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' RESPONSE BRIEF
URGING AFFIRMANCE OF THE COURT'S JANUARY 31
AND FEBRUARY 3 DISCOVERY ORDERS

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INTRODUCTION

Plaintiffs allege that the State of Maryland—through the Democratic-controlled Governor's Redistricting Advisory Committee (GRAC), Democratic-controlled General Assembly, and then-Democratic-controlled governor's office—retaliated against Republicans living in the former Sixth District by reason of their political association and voting histories. State officials gerrymandered the district with convoluted lines that moved tens of thousands of Democratic voters into and tens of thousands of Republican voters out of the district, all with the specific intent of preventing Republicans there from electing their candidate of choice, trammeling their representational rights.

The seriousness of these allegations cannot be overstated. The State's conduct in drafting and adopting the 2011 redistricting plan (the Plan) not only violates the First Amendment's protection of citizens against official retaliation, but it undermines the proper functioning of our democracy. The effects are real—every bit as much on the streets of the former Sixth District as in the halls of Congress. As each of the plaintiffs have explained in their depositions, the State's cartographic gamesmanship has left Republicans throughout the old Sixth District confused and disempowered. And perhaps more importantly, the gerrymander achieved its goal of flipping control of the Sixth District: Although its citizens had safely elected a Republican representative in each election during the two decades preceding the 2011 redistricting, a Democrat has won every election since. That is not a coincidence.

Not wanting to answer for their unconstitutional conduct, the state officials responsible for the Plan now ask the full Court to shield them—categorically and absolutely—from lawful subpoenas commanding them to appear for depositions and produce documents. Judge Bredar correctly rejected their assertion of legislative privilege in this case. Dkts. 132, 133. The full Court should do the same.

First, courts have uniformly held that the privilege (a creature of federal common law only) necessarily yields in cases like this one, involving important federal constitutional rights, where the state legislators do not themselves face personal liability. The State's counterarguments are unpersuasive: There are no separation-of-powers concerns implicated here, we seek evidence far broader than simple statements about personal motives, and the evidence collected so far indicates that the State has failed to preserve documents and to conduct adequate document searches, making it essential that we take the testimony of the witnesses involved in drafting the Plan.

Second, the five-factor balancing test applicable in cases like this tips strongly in favor of disclosure. Among other things, the documents and testimony sought go to the heart of Plaintiffs' claims, and the state officials played an essential role in the very serious constitutional violations alleged in the complaint. The State's argument that compelling depositions will chill legislative conduct is nothing more than a bogeyman, as may courts have held.

Finally, the privilege (such as it is) has been waived several times over. Not only did the GRAC use third-party consultants and other non-legislators to draft the map (destroying the privilege altogether), but each of the subpoena recipients here has made public statements or disclosed documents that waive the privilege with respect to legislative intent. State officials must not be allowed to selectively disclose evidence, giving Plaintiffs and the Court only self-serving fragments of the truth.

For these reasons, the full Court should deny the motions to quash. And respectfully, it should do so with as prompt an order as possible and a separate opinion to follow. Depositions have finally been scheduled to take place between February 17 and March 3, and every additional day of delay makes is less and less likely that Plaintiffs will be able to obtain an injunction in time to affect the 2018 primaries.

BACKGROUND

A. Non-legislators' involvement in the drafting of the Plan

Non-legislators were intimately involved in drafting the Plan. In the 2010 redistricting cycle, the Democratic National Redistricting Trust retained NCEC Services, Inc.—a Democratic consulting firm—to assist legislators in Democrat-controlled states with drafting new congressional maps. In Maryland, NCEC's President Mark Gersh and chief map-maker Eric Hawkins worked directly with democratic members of Maryland's U.S. House delegation to draft a new congressional map and then funneled information about this map to the GRAC through Senate President Mike Miller's staffers, Jake Weissman and Patrick Murray. See, for example:

- Ex. A (referring to Murray as "Mike Miller's guy" and suggesting that he should be sent a thank you note based on the outcome of the congressional redistricting process);
- Ex. B (Congressman Hoyer's chief of staff proposing a September 2011 meeting between Mark Gersh, Martin O'Malley, Speaker Busch, and Senate President Miller);
- Ex. C (emails exchanged between staffers to Congressmen Hoyer and Sarbanes, Eric Hawkins, and Jake Weissman).

In an apparent effort to shield these documents from disclosure through FOIA requests of Maryland Public Information Act requests, these staffers discussed redistricting using their personal email accounts. *See* Ex. D (email between Brian Romick, chief of staff to Steny Hoyer, and Patrick Murray, chief of staff to Senate President Miller sent via Gmail).

To ensure that the final map proposed by the GRAC was acceptable to Maryland's U.S. House delegation, Governor O'Malley and members of his staff held in-person meetings with each Democratic member of Maryland's Congressional delegation in September 2011. *See* Ex. E. Governor O'Malley continued to communicate directly

with Democratic members of Maryland's U.S. House delegation after these meetings. For example, on October 14, 2011, Governor O'Malley and Congressman Sarbanes exchanged emails concerning "trading" precincts with Congresswoman Donna Edwards. Ex. F.

The chiefs of staff for Hoyer and Sarbanes also received a briefing on the GRAC's map before it was announced to the public. During this presentation, even these senior congressional aides could not bring themselves to believe the justifications that the GRAC members were offering for the Plan. Jason Gleason, the chief of staff to Congressman Sarbanes, wrote in an email sent during the briefing: "This is painful to watch." Ex. G. He added: "I'm not sure that I buy the themes they are selling. Hopefully they have some better ones for the public face of it." *Id.*

B. The subpoenas and the State's responses

In its opinion denying the State's motion to dismiss, the Court held that a plaintiff bringing a political gerrymandering claim under the First Amendment must "allege 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." *Shapiro v. McManus*, --- F. Supp. 3d ---, 2016 WL 4445320, at *10 (D. Md. 2016) (emphasis omitted). Demonstrating the necessary intent requires a plaintiff to "rely on objective evidence to prove that, in redrawing a district's boundaries, the legislature and its mapmakers were motivated by a specific intent to burden the supporters of a particular political party." *Id.* at *11.

To that end, we served Senate President Mike Miller, House Speaker Michael Busch, GRAC Chair Jeanne Hitchcock, Richard Stewart, Delegate Curt Anderson, Senator C. Anthony Muse, and former Senator Robert Garagiola with deposition subpoenas; and

the same individuals and Senator Richard Madaleno with document subpoenas.

With respect to the deposition subpoenas, we have explained from the start that we "intend to question [the witnesses] regarding (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." Dkt. 111-1, at 7. The State responded by stating that it would "move to quash subpoenas" because "the individuals you seek to depose cannot be compelled to testify in this matter" on the basis of state legislative privilege. Ex. H at 1. *See also* Ex. I at 1 (correspondence stating that counsel intended "to seek protective orders quashing those subpoenas on grounds of legislative privilege").

As for the document requests, we served third-party document subpoenas seeking (among other things):

- "All external communications relating to the planning or drafting of Maryland's 2011 congressional redistricting plan with . . . (a) the Governor; (b) Maryland House Redistricting Committee; (c) Maryland Senate Redistricting Committee; (d) Any current or former member of the Maryland General Assembly, including their staff or agents; (e) Any current or former member of the United States Congress, including their staff or agents; (f) Any current or former officer, member of leadership, or staff member of the Democratic National Committee, including their staff or agents; (g) Any current or former officer, member of leadership, or staff member of the Democratic Congressional Campaign Committee, including their staff or agents; or (h) Any current or former officer, member of leadership, or staff member of the Maryland Democratic Party." *See* Exs. J, K, L, and M, at Req. 1.

- "All external Communications between or among You and third parties (including consultants, experts, constituents, and members of the press) related in any way to Maryland's 2011 congressional redistricting process, its goals, or its results during the Relevant Time Period." *See id.*, Req. 2.

- "All interim or draft maps or reports related to Maryland's 2011 congressional redistricting plan, whether electronic or in hard copy, provided to You by any third party or by You to any third party during the Relevant Time Period." *See id.*, Req. 3.

By letter dated December 19, 2016, the OAG stated that Hitchcock "was [not] able to locate any electronic or hard copy documents responsive to the subpoena." *See* Ex. N. Among what was surely a voluminous exchange of documents and communications concerning the 2011 redistricting, Hitchcock—the chair of the GRAC—*found not one single responsive communication or other document.*

Attached to the same letter, the OAG produced eleven pages of emails (and later six email attachments) and stated that Stewart was withholding one document on the basis of attorney-client privilege. *See* Ex. O. Again, among all the emails, letters, and other documents shared in the course of drafting the Plan, *Stewart found just eleven pages of emails.* Neither Hitchcock nor Stewart invoked the state legislative privilege as a basis for refusing to produce documents.

Senator Miller, Speaker Busch, and Senator Madaleno responded differently. *See* Ex. P. While they produced a limited number of documents—collectively, fewer than 150 pages in all—they asserted legislative privilege as a basis for withholding 36 responsive documents. *See* Exs. Q-S. In addition to serving three privilege logs, the State explained that "Plaintiffs seek, through the subpoenas, to invade individual General Assembly members' deliberations over the drafting of legislation by seeking documents compiled by legislators, or their close aides at their direction, to produce the legislation." Ex. P at 1. "Accordingly, legislative privilege applies because the members' activities and contribution to any draft maps, reports, or other materials that resulted in Senate Bill l are legislative in nature." *Id.*

Two weeks after we served the first subpoenas, the State still had not filed a motion. Unwilling to let the State delay any longer, Plaintiffs served and filed motions to compel on December 29, 2016 and January 3, 2017. *See* Dkts. 110, 111, 125-1. Six days later the State moved to quash (Dkts. 112, 114, 118), later adding to the list of

motions their requests to quash the deposition subpoenas for Delegate Anderson, Senator Muse, and former Senator Garagiola (Dkts. 126, 127). Senator Garagiola later waived his legislative privilege and was deposed on February 3, 2017.

C. The orders denying the motions to quash and granting Plaintiffs' first motion to compel, and the State's subsequent conduct

Acting on his authority under 28 U.S.C. § 2284(b)(3), Judge Bredar denied the motions to quash and granted Plaintiffs' first motion to compel in orders entered on January 31, 2017 and February 3, 2017. *See* Dks. 133, 134. "After considering all of the parties' arguments," Judge Bredar explained, "the Court concludes the legislative privilege claimed by the Non-Parties must yield to the discovery requests of Plaintiffs." Dkt. 132, at 3. At bottom, Judge Bredar "[could] not endorse" the State's efforts "to bar essential discovery of evidence that lies at the heart of this case." *Id*. at 4. And "[a]lthough the Non-Parties' compliance with the subpoenas served upon them may involve some inconvenience," he concluded, "such inconvenience [is] minor in comparison to the weight of the litigation, which seeks to vindicate fundamental constitutional rights." *Id*. at 7. He accordingly denied both motions to quash and granted the first of Plaintiffs' motion to compel.

For one week after entry of Judge Bredar's discovery orders, the State continued to withhold documents and to assert that it would not make witnesses available for deposition on the basis of legislative privilege.[1] The State took this position without

[1] The State implies in its motion (at 1 n.1) that Plaintiffs acquiesced in its refusal to produce documents and make witnesses available despite Judge Bredar's orders. That is highly misleading. In fact, we consistently expressed our concern with the State's delay in complying with what we viewed as valid discovery orders. We agreed to continue the date for Speaker Busch's deposition (a date that Speaker Busch had never actually agreed to honor) only *because* the State had refused to produce documents necessary for our preparation and *because* counsel for the State informed us that Speaker Busch would refuse to answer any questions at the deposition if we insisted on holding it.

moving for an immediate stay of the Court's orders and without otherwise requesting that Judge Bredar make the orders contingent on approval by the full three-judge Court. Instead, the State simply declared, unilaterally, that it would not comply with Judge Bredar's rulings until the full three-judge panel has exercised its discretion to review them.

Again unwilling to let the State delay any longer, Plaintiffs moved on February 8, 2017 for full-Court approval of Judge Bredar's orders. Dkt. 135. The next day, Judge Bredar filed a show-cause order (Dkt. 138), in response to which the State immediately produced six CDs of documents and filed a motion for a stay and full-Court review. Dkt. 139. The Court withdrew the show-cause order, entered a stay, and granted full-Court review. Dkt. 140. We now ask the full Court to affirm Judge Bredar's orders.

ARGUMENT

This is not the first time that Maryland state officials have made an absolute assertion of state legislative privilege—nor, if the full Court denies the State's motions to quash, would it be the first time the Court had rejected it. In *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), members of the GRAC (including Senator Miller) asserted legislative privilege as a blanket basis to avoid producing documents and answering questions concerning the legislature's motives for drawing the 1991 map. Denying them the privilege, this Court—sitting then, as now, as a court of three judges—held that, in the special context of redistricting, federal common law does *not* "prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." *Id.* at 304. On the contrary, "judicial inquiry into legislative motive is appropriate where 'the very nature of the constitutional question requires an inquiry into legislative purpose.'" *Id.* (quoting *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259

(4th Cir.1989), in turn quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)). That is the case here. The Court has held that Plaintiffs' claims—which turn fundamentally on questions of legislative motive and purpose—are justiciable and that their allegations are plausible. *Shapiro*, 2016 WL 4445320, at *1.

The Court accordingly should reject the assertion of state legislative privilege here. Three-judge district court in redistricting cases have uniformly held that the privilege (a creature of federal common law only) yields in cases involving important federal constitutional rights, where the state legislators do not themselves face personal liability. Despite the State's contrary suggestions, there are no separation-of-powers concerns implicated here, and we seek evidence far broader than simple statements about personal motives. Beyond that, the State has failed to preserve documents and to conduct adequate searches for documents, in violation of its discovery obligations and Maryland public records laws. There is also no basis for granting the privilege under the five-factor balancing test applicable in cases like this. The evidence sought concerns the core of Plaintiffs' claims, and the state officials played an essential role in the serious constitutional violations alleged. Finally, any privilege has been waived. The GRAC used non-legislative consultants to draft the map , destroying the privilege altogether; and each of the subpoena recipients has made public statements or disclosed documents that waive the privilege with respect to legislative intent. The motions to quash must therefore be denied.

I. ABSOLUTE STATE LEGISLATIVE PRIVILEGE IS UNAVAILABLE IN THIS CASE

The state officials purport to assert the legislative privilege on a blanket basis, as a ground for quashing the subpoenas altogether. Their position is meritless. To the extent the privilege applies at all (it does not), it is a qualified one that must be

evaluated under the settled five-factor balancing test.

A. Absolute state legislative privilege is unavailable in redistricting cases involving the vindication of important federal rights

1. "Testimonial and evidentiary privileges" like the state legislative privilege "exist 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 v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 660 (E.D. Va. 2014) (three-judge district court rejecting blanket assertion of legislative privilege). "Privileges are therefore strictly construed" and will be deemed to apply "only where the public good associated with the exclusion of relevant evidence overrides the general principle in favor of admission." *Id.*; *accord Perez v. Perry*, 2014 WL 106927, at *1 (W.D. Tex. 2014) (three-judge district court rejecting blanket assertion of privilege and requiring testimony in particular) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

The "public good" associated with the state legislative privilege is well understood: "Because 'legislators bear significant responsibility for many of our toughest decisions,'" the privilege "'provides legislators with the breathing room necessary to make these choices in the public's interest' without fear of undue judicial interference or personal liability." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 332-333 (E.D. Va. 2015) (three-judge district court blanket assertion of privilege) (citation omitted).

"State legislative immunity differs, however, from federal legislative immunity in its source of authority, purposes, and degree of protection." *Bethune-Hill*, 114 F. Supp. 3d at 333. Unlike the federal privilege, which is grounded in the Constitution's separation of powers, the state legislative privilege is a creature of "federal common law" only. *Id.* "[F]ederal interference in the state legislative process is [therefore] 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))—particularly "in 'those areas where . . . the Supremacy Clause dictates that federal [law prevails] over competing state exercises of power.'" *Bethune-Hill*, 114 F. Supp. 3d at 333 (quoting *Gillock*, 445 U.S. at 370). In other words, the state legislative privilege—a product only of federal common law only—necessarily "yields" when a plaintiff "seeks evidence to vindicate important *public* rights [that are themselves] guaranteed by [the Federal Constitution]." *Id*. at 336.

In addition, the manner in which the state legislative privilege applies in federal litigation "depends upon the nature [not only] of the claim [but also of] the defendant." *Bethune-Hill*, 114 F. Supp. 3d at 335. When the person asserting privilege is not himself 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). "[T]here is," in other words, "little to no threat to the 'public good' of legislative independence when a legislator is not threatened with individual liability." *Bethune-Hill*, 114 F. Supp. 3d at 335.

It follows that the state legislative privilege is strongest in "civil action[s] brought by . . . private plaintiff[s] to vindicate *private* rights" against individual lawmakers, where "'the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process.'" *Bethune-Hill*, 114 F. Supp. 3d at 333-335 (quoting *Owen*, 445 U.S. at 655). But the privilege is at its nadir in cases like this one, where individual lawmakers 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." *Id.*

at 334. Simply put, in federal constitutional redistricting cases, "[t]he argument that 'legislative privilege is an impenetrable shield that completely insulates any disclosure of documents' is not tenable." *Id.* at 336 (quoting *Page*, 15 F. Supp. 3d at 665, 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))).

2. Unsurprisingly, therefore, there is a "litany of recent federal decisions in which, in cases involving federal constitutional challenges premised on the right to vote, federal courts have found that the [state legislative] privilege did 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 rejecting blanket privilege); *Favors v. Cuomo*, 285 F.R.D. 187, 214 (E.D.N.Y. 2012) (same); *Perez*, 2014 WL 106927, at *1 (same); *Bethune-Hill*, 114 F. Supp. 3d at 337 (same); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wis. 2011) (same); *Page*, 15 F. Supp. 3d at 666 (same); *Veasey v. Perry*, 2014 WL 1340077, at *1 (S.D. Tex. 2014), *aff'd in part and rev'd in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015)).[2]

These courts compelled both document production and testimony. In *Perez*, for

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[2] *See also Marylanders for Fair Representation*, 144 F.R.D. at 292; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 48375083, at *6 (N.D. Ill. 2011) (three-judge district court rejecting the state officials' assertion that "legislative immunity absolutely shields non-party state lawmakers from providing evidence"). To the extent the court in *Committee for a Fair and Balanced Map* partially upheld the legislative privilege, it did so only because the plaintiffs there had the benefit of a robust "totality of the circumstances test" that reduced the need for direct testimonial evidence. *Id.* at *3. That test—custom tailored to racial discrimination—is inapplicable to the First Amendment framework adopted by the Court in this case. The same goes for *Hall v. Louisiana*, 2014 WL 1652791, at *10 (M.D. La. 2014), which expressly adopted the reasoning in *Committee for a Fair and Balanced Map*.

example, the three-judge court rejected Governor Rick Perry's and other Texas officials' request for "a blanket protective order" as "unwarranted," holding that "depositions should proceed" and that the "deponents must appear and testify." 2014 WL 106927, at *1.[3] The court in *Nashville Student Organizing Committee* likewise refused to quash the plaintiffs' deposition subpoenas and ordered the legislators to sit for depositions. 123 F. Supp. 3d at 971. The court in *Baldus* held that the "legislative privilege does not protect any documents or other items that were used by the Legislature in developing the redistricting plan" and similarly denied the motions to quash both document and deposition subpoenas. 2011 WL 6122542, at *1-3. And in *Rodriguez*, the court compelled production of all documents and information "concerning the operations of LATFOR," an analogue to the GRAC. 280 F. Supp. 2d at 102-103.

In a similar rejection of a blanket assertion of legislative privilege, the court in *Bethune-Hill* heard the testimony of legislators (*e.g.*, July 8, 2015 Transcript of Bench Trial at 262:17, *Bethune-Hill,* 114 F. Supp. 3d 323 (Dkt. 100))[4] and ordered production of nearly all documents, including "[a]ll documents or communications produced by committee, technical, or professional staff for the House . . . that reflect opinions,

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[3] Because the legislative privilege may apply in a "qualified" manner (*see* Part II, *infra*), the *Perez* Court adopted a procedure for question-by-question assertion of privilege at the depositions: If deponents "invoke the privilege in response to particular questions, . . . the deponent must then answer the question, and . . . those portions of the deposition would be sealed and submitted for *in camera* review, along with a motion to compel, if the party taking the deposition wished to use the testimony in this case." 2014 WL 106927, at *1. The court *Nashville Student Organizing Committee* took the same approach. 123 F. Supp. 3d at 971. *Cf. Veasey*, 2014 WL 1340077, at *3-4 (similar approach with respect to documents).

[4] The State asserts that there is no indication that the testimony in *Bethune-Hill* was compelled. Motion 8, n.3. But that ignores the obvious: The testimony was taken after the court had broadly rejected legislative privilege with respect to documents, and there was no indication that the court would rule differently with respect to testimony; it is therefore likely that the testimony followed as a consequence of that prior ruling.

recommendations, or advice," and "[a]ll documents or communications produced by legislators or their immediate aides before the redistricting legislation was enacted . . . to the extent any such document pertains to, or 'reveals an awareness' of: racial considerations employed in the districting process, sorting of voters according to race, or the impact of redistricting upon the ability of minority voters to elect a candidate of choice." 114 F. Supp. 3d at 343-345.

The State is thus wrong to insinuate that it would be unusual to compel the testimony of legislators and other government officials in an important redistricting case like this one. In fact, the *opposite* is true. Although meritorious gerrymandering cases before three-judge courts are relatively rare, when they do come along, three-judge district courts *routinely* require the testimony of legislators, as the court did in *Davis v. Bandemer* itself. *See* 478 U.S. 109, 116 n.5 (1986) (discussing "the deposition testimony of the Speaker of the House" and "Senator Bosma").[5] They likewise routinely compel the testimony of governors and other high executive officials.[6]

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[5] *See also, e.g.*, *Ala. Legislative Black Caucus v. State*, 989 F. Supp. 2d 1227, 1259-1265 (M.D. Ala. 2013) (three-judge district court) (testimony of six sitting state lawmakers); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1336 (N.D. Ga.) (three-judge district court) (testimony of "Speaker of the House Murphy" and "Senator Johnson" among others); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (three-judge district court) (testimony of numerous sitting state lawmakers). *See also Whitford v. Gill*, 2016 WL 6837229, at *12-13 (W.D. Wisc. 2016) (three-judge district court) (testimony of aids to the senate president and house speaker).

[6] *See, e.g.*, *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 937-938 (E.D. Ark. 2012) (three-judge district court) (testimony of Arkansas Governor Mike Beebe, Attorney General Dustin McDaniel, and Secretary of State Mark Martin); *Jeffers v. Clinton*, 740 F. Supp. 585, 590-591 (E.D. Ark. 1990) (three-judge district court) (considering "the live testimony of Attorney General Clark and Governor White, [and] the deposition of Secretary of State Paul Riviere," noting that "[b]oth Governor White and Attorney General Clark explicitly denied any intention to discriminate"); *Seamon v. Upham*, 536 F. Supp. 931, 1002 (E.D. Tex. 1982) (three-judge district court) (testimony of Texas Governor William Clements). *See also Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816, 854 n.29 (S.D. Tex. 2012) (testimony of Texas Governor Mark White).

Lest there by any doubt, 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).

This Court should follow these other courts and deny the motions to quash and grant the motions to compel. The state legislative privilege, "a judicially crafted evidentiary privilege based on federal common law," cannot be asserted in a blanket fashion here; it does not "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. As Judge Bredar explained in his order denying the motions to quash and granting the motion to compel, "the Court cannot endorse the Non-Parties' claim of that privilege to bar essential discovery of evidence that lies at the heart of this case." Dkt. 132, at 4. The full Court should hold the same.

B. The State's counterarguments are not persuasive

In response to all of this, the State appears to abandon its blanket assertion of privilege with respect to documents. It now asserts that state officials "have disclosed all of their documents 'containing objective facts' upon which the GRAC relied in drawing the 2011 map" (Motion 5; citation omitted) and are withholding only those documents that contain "opinions and advice" (*id.* at 2). As far as we can tell, the

dispute over documents now concerns just 14 emails. *See* Dkt. 139-3 (privilege logs).

Yet at the same time, the State continues to assert absolute, blanket privilege with respect to depositions, insisting that the state officials here cannot be compelled to testify on *any* topic—even non-privileged topics like document preservation and matters as to which they admittedly have waived privilege, now including the "objective facts upon which the GRAC relied in drawing the 2011 map" (Motion 5; internal quotation marks omitted).

In an effort to reconcile its inconsistent positions concerning documents and depositions, the State says *first* that requiring testimony would represent "a 'substantial intrusion' on a coordinate branch of government'" (Motion 3; citation omitted); *second*, that testimony should not be compelled because Plaintiffs "seek the testimony of sitting legislators *solely* to question them about the legislative motive and intent in creating or debating legislation" (*id.* at 4-5 (emphasis added)); and *finally* that testimony should not be compelled because state officials have already produced a "fairly extensive documentary record" (*id.* at 10; *accord id.* at 5). None of these responses has merit.

1. Separation-of-powers concerns are not implicated here

The State is simply wrong that, in a federal lawsuit involving federal constitutional rights, an assertion of *state* legislative privilege implicates separation-of-powers concerns. Motion 3, 5. Throughout the parties' briefing on legislative privilege, the State has persisted in describing the Maryland General Assembly as a "sister branch of government" (Dkt. 126-1, at 10), asserting that the privilege thus concerns the "separation of powers" between "coordinate branches of government" (Dkt. 124, at 4). *See also* Dkt. 114-1, at 9; Dkt. 119, at 11. But as we have explained no fewer than four times (*see* Dkts. 111-1, at 13; 120, at 10; 111-1, at 16; 128, at 3)—and as the Supremacy

Clause makes clear—a *federal* court and a *state* legislature are not, in fact, "coordinate" or "sister" branches of government. Thus, when it comes to federal lawsuits involving important federal rights, "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." *Gillock*, 445 U.S. at 370.

This distinction goes to the heart of the parties' disagreement here. Not only are separation-of-powers concerns simply not present, but it should go without saying that state officials cannot invoke a federal common-law privilege predicated on federal-state comity to avoid federal judicial scrutiny of official state conduct that violates the Federal Constitution. The Supreme Court has said as much: "where important federal interests are at stake . . . comity yields." *Gillock*, 445 U.S. at 373. The State fails to grapple with these fundamental limitations on the privilege, despite that we have cited and discussed *Gillock* in every brief that we have filed.[7]

2. The State mischaracterizes the topics we intend to cover at the depositions

The State next asks the Court to quash the deposition subpoenas because (the State says) we seek to depose legislators "*solely* . . . about the legislative motive and intent." Motion 4-5 (emphasis added). That is doubly mistaken.

To begin with, the State has given no reason to conclude that the deponents should be entitled to avoid direct questions about motive and intent. For all of the

[7] The Fourth Circuit's decision in *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), cited on page 5 of the State's motion, does not change matters, both because Fourth Circuit law does not bind this Court (*see* Dkt. 124 at 6 (State admitting that "plaintiffs are correct that Fourth Circuit precedent is not binding on this three-judge court")), and because *Gillock* governs either way. Besides that, *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 constitutional public-rights claims at issue here. We made this observation in our prior briefing (*e.g.*, Dkt. 120, at 4 n.2), but the State ignores our arguments.

reasons that we have just given—and additionally because each of the state officials has waived the privilege repeatedly (*see* Part III, *infra*)—they should not.

Setting that aside, we have never said that the questions we intend "solely" to pose the state officials are direct questions about motive and intent. On the contrary, we explained in our first motion to compel (the first of a dozen briefs filed on this issue) that we "intend to question [the witnesses] regarding (*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*." Dkt. 111-1, at 5-6 (emphasis added). Thus in our reply brief in support of our second motion to compel, we characterized the State's own description of our intended topics:

> 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." [State's Opp. to 1/3 Motion to Compel 3 (Dkt. 119)] (quoting [1/3 Motion to Compel 12 (Dkt. 111)]). . . .
>
> 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.

Dkt. 123, at 1-2. The State's mischaracterization of our position in its latest brief is strange and inexplicable.

The scope of our proposed topics matters because, as the three-judge court in *Perez* explained, to the extent that it applies at all, the state legislative privilege must be asserted on a question-by-question basis at depositions; it is not, standing alone, a ground for quashing deposition subpoenas wholesale in important federal redistricting cases. 2014 WL 106927, at *1. *See supra*, p. 12, n. 4 (describing procedure).

For the reasons we have given above and the additional reasons we give below (including spoliation and waiver), the state officials should be required to testify without being permitted to assert legislative privilege of any kind. But even if they were entitled to assert the privilege on a question-by-question basis with respect to direct inquiry into "legislative motive and intent" (Motion 4-5), that would be no basis for quashing the deposition subpoenas; rather, the "depositions should proceed" and the privilege would have to be invoked, if at all, "in response to certain questions." *Perez*, 2014 WL 106927, at *1. *Accord Nashville Student Organizing Comm.*, 123 F. Supp. 3d at 971-972 (holding that "[t]he plaintiffs may proceed with the depositions" and adopting a similar question-by-question procedure).

3. The State's pervasive spoliation of documents and failure to conduct adequate document searches makes the denial of the absolute testimonial privilege especially appropriate

Finally, the State takes the remarkable position that the deposition subpoenas should be quashed because it has already provided Plaintiffs with an "extensive documentary record" (Motion 5, 10) and Plaintiffs "have not and do not complain about a lack of objective evidence" (*id.* at 11). Nothing could be further from the truth.

1. From the outset of discovery, we have expressed our concern that the State has not preserved documents. *See, e.g.*, Ex. T at 3-6; Ex. U. The basis for our initial suspicion speaks for itself: Jeanne Hitchcock—the former chair of the GRAC—did not assert legislative privilege with respect to documents. Instead, she asserted that she had searched her records and that *she has no responsive documents*. Thus, the person at the heart of the 2011 redistricting process could not produce a single email or other document concerning the redistricting. Similarly, Richard Steward—another member of the GRAC—asserted that he, too, had searched his records and that he had found just *eleven pages of emails*.

Tipped off to the likelihood that documents have been destroyed, we began asking questions about preservation notices, preservation practices, and the fate of what we had expected to be tens or hundreds of thousands of pages of communications among scores of individuals. The OAG has, on several occasions, simply refused to answer our questions. *See* Exs. V, W. Here, nevertheless, is what we have learned:

- Untold emails and documents have been destroyed. We know this because several key players at the heart of the redistricting have produced *zero* or very few documents. And productions from third parties have uncovered responsive email chains that should have, but were not, produced by those individuals.

- Despite acknowledging that it anticipated redistricting litigation as early as April 22, 2011, neither the OAG nor any of its many clients issued a litigation hold notice for *over six months* after that point; as a result, there was no litigation hold of any kind in place during the entire period that the GRAC was deliberating (July 4, 2011 through October 4, 2011).

- When the OAG finally issued a litigation hold notice on October 31, 2011, it failed to send the litigation hold notice to several key players, including Governor O'Malley, the State Board of Elections, Maryland Senate Majority Leader Robert Garagiola, and Jake Weissman, a central character in the redistricting story and Senate President Miller's deputy chief of staff.

- Even those who *were* told to preserve documents failed to do so. Multiple key players in the 2011 congressional redistricting process claim that they have no documents at all concerning the Plan or redistricting in general, including Jeanne Hitchcock (the chair of the GRAC), Jeremy Baker (chief of staff to Maryland House Speaker Busch), Kristin Jones Bryce (former chief of staff to Speaker Busch), and Victoria Gruber (chief of staff to Senate President Miller).

- Despite being named as a defendant in multiple redistricting cases, the State Board of Elections itself never issue a litigation hold notice regarding any case related to the 2011 congressional redistricting process. As a consequence, numerous employees (but no one know exactly who) deleted their *entire* email accounts as part of an email system upgrade in 2013. The State Board of Elections' failure to preserve relevant documents violated Maryland law and the Board's own internal record retention policy.

Accordingly—and contemporaneously with this opposition brief—Plaintiffs are filing a separate motion for a sanction order requiring all current and former state officials to comply fully with our deposition subpoenas.

Against this backdrop, the State's eagerness to fall back on documents as a reason for avoiding depositions is understandable: Because none of the relevant documents have been preserved, it means that Plaintiffs would get nothing of substance at all.[8] The Court should not countenance this kind of shell game. In a case much like this one, the Court in *Nashville Student Organizing Committee* compelled the depositions of legislators in part because "plaintiffs received no responsive records back because older emails are routinely deleted from the General Assembly's servers." 123 F. Supp. 3d at 968. The same result is warranted here.

For its part, the State has never denied that the GRAC members' and legislators' testimony would be substantially more probative of specific intent than would generic data that the GRAC will not confirm that it actually considered.[9] As the court said in *Bethune Hill*, "the availability of alternate evidence does not render the evidence sought here irrelevant by any measure." 114 F. Supp. 3d at 341. Nowhere could that be more true than in this case, where the State has failed to meet its document-preservation obligations.[10]

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[8] The great majority of the (relatively few) documents that the State has produced 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. Shortly after the Court entered a show-cause order, Plaintiffs received a hasty email message from the Office of the Attorney General conveying additional documents that previously had been withheld. *See* Ex. X. The documents are marginally relevant at best. They relate to the logistics of the General Assembly's special legislative sessions concerning congressional redistricting, constituent responses, and updates from counsel regarding the progress of redistricting litigation.

[9] The State will confirm only that the data it has provided was "available" to the GRAC. Motion 10. For purposes of proving specific intent, data that the GRAC *could* have considered is obviously not the same thing as data that it affirmatively *did* consider.

[10] In its most recent brief, the State has wisely backed away from its assertion that the Plan's "legislative history" is meaningful evidence of legislative intent. *See, e.g.*, Dkt. 119, at 16-17. As we have explained (*e.g.*, Dkt. 123, at 5), the floor statements are not of themselves probative of the intent question—in large part because SB 1 was rushed

II. THE FIVE-FACTOR BALANCING TEST TIPS DECISIVELY IN FAVOR OF DENYING THE QUALIFIED PRIVILEGE

Recognizing that the state legislative privilege cannot be invoked in the absolute and blanket fashion asserted by the proposed deponents here, "[m]ost courts that have conducted [a] qualified privilege analysis in the redistricting context." *Bethune-Hill*, 114 F. Supp. 3d at 337. This analysis, taking the form of "a five-factor balancing 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." *Id.* at 337-338 (quoting *Page*, 15 F. Supp. 3d at 666). And, again, because the party asserting a privilege "has the burden of demonstrating its applicability" (*NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011)), the State bears the burden of satisfying the balancing test. As Judge Bredar concluded, the facts here do not overcome the presumption of disclosure of the testimony and evidence that Plaintiffs seek.

1. The evidence sought is highly relevant to Plaintiffs' claims. Plaintiffs allege that the State redrew the boundaries of the Sixth District with the specific intent of retaliating against Plaintiffs and other Republicans by reason of their political affiliations or voting histories. In approving our theory of constitutional injury at the Rule 12(b)(6) stage, the Court held that Plaintiffs must show that the legislature "specifically intended to burden the representational rights of certain citizens" by reason of their political affiliations and voting histories. *Shapiro*, 2016 WL 4445320, at *11. Thus, the evidence sought goes to the very heart of this case. *See Page*, 15 F. Supp.

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through both chambers of the General Assembly in a record-breaking 72 hours. What is more, 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 has never once denied that this accurately describes this case.

3d at 666 (noting that in redistricting cases, "[t]he subjective decision-making process of the legislature is at the core of the" claim); *Baldus*, 2011 WL 6122542, at *1 ("proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in" redistricting cases).

This is not a case where "the government's decision-making process [may be] swept up unnecessarily into the public domain" as part of a dispute only tangentially related to legislative motive. *Bethune-Hill*, 114 F. Supp. 3d at 339 (alterations omitted) (quoting *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8). Nor is this a case where compulsory process is sought in aid of an action seeking damages against an individual state official or agency. *See EEOC*, 631 F.3d at 177-178. Rather, this is a case "where the decisionmaking process *is* the case." *Bethune-Hill*, 114 F. Supp. 3d at 339. (internal quotation marks omitted; emphasis added). As in similar redistricting suits, "what motivated the [General Assembly] . . . is at the heart of this litigation" and "evidence bearing on what justifies [its actions] is [therefore] highly relevant." *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014), *aff'd* 136 S. Ct. 1301 (2016). The State hardly could contend otherwise.

2. No other testimony or evidence would be as probative of unlawful motive as the GRAC members' deposition testimony. Although Plaintiffs will rely on various types of evidence (including the voter data, election returns, public statements made by legislators, demographic evidence, and expert testimony), there is no question that the testimony and documentary evidence sought here is critical to Plaintiffs' case. As Judge Bredar rightly concluded: "Although those [other] materials may be probative in part on the issue of specific intent, they provide no meaningful substitute for the direct evidence of the mapmakers' intent." Dkt. 132, at 5.

Given that officials and legislators are typically careful to keep intimations of discriminatory motive out of public view (*see Smith*, 682 F.2d at 1064), it is vital that Plaintiffs be allowed to question these officials regarding the redistricting process and their intentions, regardless of whether circumstantial evidence may also be available. After all, "[i]n the event that plaintiffs' claims have merit, and that the commissioners were motivated by an impermissible purpose, the commissioners would likely have kept out of the public record evidence making that purpose apparent." *Harris*, 993 F. Supp. 2d at 1070-1071.

Thus, as other courts have held, the second balancing factor favors testimony and disclosure even when other circumstantial evidence of motive may be available in the public record. *See Favors*, 285 F.R.D. at 219 (noting that although plaintiffs had access to "substantial" public information, including "maps, analyses, data, and memoranda," "such evidence may provide only part of the story" and the second factor thus "militate[d] in favor of disclosure"). These courts have recognized that redistricting plaintiffs "need not confine their proof to circumstantial evidence" because "[t]he real proof is what was in the contemporaneous record in the redistricting process." *Bethune-Hill*, 114 F. Supp. 3d at 341 (internal quotation marks omitted). *Accord*, *e.g.*, *Veasey*, 2014 WL 1340077, at *3. Just so here.

Without citation, the State rejoins that "the non-parties have disclosed documents relating to how the GRAC developed the Plan." Motion 9. But it is unclear what documents the State is referring to; again, it has never confirmed what data the GRAC actually used, and it has not to our knowledge produced any documents disclosing how it used it. Regardless, Judge Bredar was right that such documents would "provide no meaningful substitute for the direct evidence of the mapmakers' intent." Dkt. 132, at 5.

3. The federal constitutional issues in this litigation are of the utmost seriousness. There can be no doubt that the seriousness of the federal constitutional issues at stake in this case demands disclosure. The kind of politically-motivated retaliation alleged in the complaint is cause for great concern. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns*, 427 U.S. 347, 356 (1976), and government actions that punish members of a particular political group are accordingly "inimical to the process which undergirds our system of government and at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 357 (internal quotation marks omitted).

More broadly, the right to vote "is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562. Any attempt to deprive a citizen of the right to "an equally effective voice in the election of members of his state legislature" is illegal. *Id.* at 565.

The State thus concedes that the third factor weighs in favor of denying the motions to quash. Motion 12. As Judge Bredard concluded, " the seriousness of both the litigation and the issues involved . . . favors the Plaintiffs." Dkt. 132, at 5.

4. The GRAC members and other members of the General Assembly played a direct, central, and essential role in the constitutional violations here. Officials on the GRAC and in the General Assembly and governor's office were directly responsible for drafting and approving the Plan. Dkt. 104 ¶¶ 22-28, 33-34.

In these circumstances, where the legislature's subjective "decision-making [is] at the core of the plaintiffs' claims," "the legislature's direct role in the litigation sup-

ports overcoming the privilege" and disclosing evidence going to the legislature's intent in approving the plan. *See Bethune-Hill*, 114 F. Supp. 3d at 341 (quoting *Favors*, 285 F.R.D. at 220); *see also, e.g.*, *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8 (explaining that because "the legislators' role in the allegedly unlawful conduct is direct," and the legislators' actions were the very actions "under scrutiny," this factor favored disclosure). The State admits as much, but asserts that "this factor does not favor disclosure" in light of the "burdens of litigation" of the witnesses. Motion 12. That is a non sequitur. The fourth factor thus weighs decisively in favor of denying the motions to quash.

5. Compelling disclosure of the evidence sought will not conflict with the purposes of the privilege. The final factor, which looks to the "purposes of the privilege," likewise favors granting the motion. As Judge Bredar observed, "[t]he absence of the threat of personal monetary liability reduces significantly, and perhaps even eliminates, the justification for state legislative immunity." Dkt. 132, at 7 (citing *Owen v. City of Independence*, 445 U.S. 622, 655-56 (1980)).

This factor is the only one as to which the State really puts up a fight. *See* Motion 12-14. It asserts that compelling compliance with the subpoenas here would "constrain[] legislators' modes of future action" and chill "earnest discussion within government walls." *Id.* at 12 (internal quotation marks omitted). It also says that the "burden" of compliance would be "a significant deterrent to legislators," so much so that it would risk cancelling the "prestige and pecuniary rewards" of public service. *Id.* at 13 (internal quotation marks omitted).

Those are phantom concerns. To begin with, the State's primary case—*Bogan v. Scott-Harris*, 523 U.S. 44 (1998)—involved a lawsuit against a legislator himself, defending against claims for monetary damages for private injuries; the case thus con-

cerned, not the evidentiary privilege, but legislators' "absolute immunity from *suit*." Motion 3 (emphasis added). The concerns implicated by private suits against legislators for money damages are quite different from the concerns that might arise from deposition subpoenas in a case like this—the officials here face the inconvenience of an afternoon's worth of testimony, not personal financial liability after a full trial; and the lawsuit seeks injunctive relief to protect constitutional rights, not a private award of damages for personal injury.

Undeterred, the State asserts that "the same considerations" that explain the Supreme Court's approach in *Bogan* "apply equally to compelled testimony of non-parties" (*id.* at 13)—but it offers no explanation for why that is so. Instead, it offers an unadorned citation to *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 857 (D.C. Cir. 1988), which addressed "congressional immunity under the Constitution's Speech or Debate Clause" (*id.* at 857). The State once again appears to be confusing that Maryland General Assembly with the federal Congress.

In recognition that the concerns animating the legislative *immunity* doctrine are distinct from those that animate the evidentiary *privilege*, some courts addressing the fifth factor have spoken of a lesser "anti-distraction" purpose for the privilege, which "guard[s] legislators from the burdens of compulsory process." *Bethune-Hill*, 114 F. Supp. 3d at 341. But any concern about "distraction" here is minimal. All of the subpoena recipients have already searched for documents. And again, having to appear for deposition—the inconvenience of a single afternoon—is not an unreasonable burden, particularly when weighed alongside the importance of this lawsuit and the rights and principles that Plaintiffs seek to vindicate.

Nor (as other courts have held) would sitting for a deposition impede legislative deliberations. "[T]he occasional instance in which disclosure may be ordered in a civil

context will [not] add measurably to the inhibitions already attending legislative deliberations." *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989). And even if there were "some minimal impact on the exercise of his legislative function," such impact would easily be offset by the "impair[ment of] the legitimate interest of the Federal Government" to see federal constitutional rights vindicated. *Gillock*, 445 U.S. at 373; *see also Baldus*, 2011 WL 6122542, at *2 (whatever "minimal" chilling effect the subpoenas may entail is "outweighed by the highly relevant and potentially unique nature of the evidence").

Resorting to scare tactics, the State says, finally, that refusing to quash the subpoenas here would mean that the "legislative privilege [has been] stripped from legislators in a broad-based way." Motion 14. This echos of the State's argument, made in its earlier briefing, that denying the privilege here "would render the privilege meaningless in the context of redistricting [lawsuits]," which are "quite common." Dkt. 114-1, at 8-9; Dkt. 119, at 9-10. Not so. Plaintiffs in redistricting cases, as in all federal lawsuits, must 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). Thus while three-judge district courts routinely deny legislative privilege in meritorious redistricting cases, such cases are on the whole quite rare. And there is no basis whatever to think that denying the privilege in this case would "strip" legislators of the privilege more broadly in any other kinds of cases.

In sum, the State has not met its burden to show that of the five-factor balancing test supports the assertion of privilege here. On the contrary, "[i]n this context, . . . the balance of interests calls for the legislative privilege to yield." *Bethune-Hill*, 114 F. Supp. 3d at 343. Judge Bredar's decisions denying the motions to quash and granting the motions to compel accordingly should be affirmed in full.

III. THE PRIVILEGE HAS BEEN WAIVED MANY TIMES OVER

All that we have said so far provides ample reason for the Court to deny the State's motions to quash. But there are yet further factual grounds, every bit as compelling as our legal arguments, for denying the motions: The GRAC and individual officials have all waived the privilege many times over.

Every individual asserting any evidentiary 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. 2016)). It is insufficient, in other words, to offer up "[a] conclusory assertion of privilege" without more. *Page*, 15 F. Supp. 3d at 661. *Accord Bethune-Hill*, 114 F. Supp. 3d at 342-45 ("one does not prove entitlement to legislative (or, indeed, any) privilege simply by asserting it").

In addition, "[i]t is well settled that the legislative privilege . . . may be waived." *Favors*, 285 F.R.D. at 211 (quoting *Schaefer*, 144 F.R.D. at 298). A "waiver of the privilege need not be 'explicit and unequivocal,' and may occur either in the course of the litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Id.* at 211-212 (internal citations omitted; citing *Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. 209*, 2004 WL 868265, at *5 (N.D. Ill. 2004)). It thus follows that among the facts that "must be proved" are that the privilege has been preserved and not waived. *Id.*

In every brief we have filed concerning legislative privilege, we have both raised the State's burden of proof and demonstrated that the privilege has been waived. Remarkably, though, the State does not offer a single word of argument or piece of evidence demonstrating that the privilege has been preserved in this case by a single one of the subpoena recipients. That is because it cannot.

A. Broad-based disclosures to third-party consultants and members of the Maryland congressional delegation have destroyed the privilege altogether, for all state officials

We begin with the broadest ground for finding waiver: the GRAC's and Governor's use of third-party consultants to analyze demographic data and draw maps (including the Plan itself), and their consultation with the members of Maryland's congressional delegation, who are not state legislators.

Courts broadly agree that "communications between state legislators and outsiders to the legislative process including lobbyists, members of Congress," and "experts and/or consultants retained or utilized by legislators to assist in the redistricting process" are not protected by legislative privilege. *Page*, 15 F. Supp. 3d at 662-663 (brackets and ellipses omitted) (quoting *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10). More generally, "the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10.

Recently-uncovered evidence shows that Senate President Miller and his staff and Governor O'Malley and his staff—on behalf of the GRAC as a whole—worked in close consultation and coordination about the Plan and the GRAC's gerrymandering strategy with Maryland's U.S. House delegation and third-party consultants hired by the Democratic National Redistricting Trust to draft Maryland's new congressional map. Ex. C. *See generally supra* at 3-4. The fruits of this close coordination with non-legislators was passed on to the GRAC for its consideration. This evidence is proof-positive that Miller and O'Malley have completely destroyed the legislative privilege surrounding the drafting of the Plan.

As other courts have held in circumstances like these, the GRAC and Governor have collectively "waived [their] legislative privilege to the extent that [they] relied on

such outside experts for consulting services" and conferred on the substance and purpose of the legislation with members of Congress. *Baldus*, 2011 WL 6122542, at *2 (citing *Comm. for a Fair & Balanced Map*). It would be "disingenuous for the Legislature to argue that [its documents and data are] subject to privilege in a Court proceeding determining the constitutionality of the Legislature's actions, when the Legislature clearly did not concern itself with maintaining that privilege when it hired outside consultants to help develop its plans." *Id*.

The Court here should hold the same: The GRAC and Governor outsourced their legislative work to third-party consultants, who weighed in on the GRAC's strategy, the map drafting, and the data analysis. And they conferred on the details, purpose, and shape of the Plan with Maryland's congressional delegation, who are not state legislators. For its part, the State has not come forward with an iota of evidence to overcome our repeated assertion that the privilege has been waived.

Because the privilege has been destroyed entirely, and because the State offers no evidence suggesting otherwise (it cannot), each of the subpoena recipients in this case should be compelled to testify at a minimum on the subject matter that they disclosed to an discussed with the consultants and members of Congress, including what roles that these third parties had in the drafting and editing the Plan, what data they used, what advice they gave, what drafts they produced, and what motives they harbored.

B. Each of the subpoenaed officials has waived the privilege personally on the subject of legislative intent

The legislative privilege is further waived "if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters." *Favors*, 285 F.R.D. at 212 (quoting *Trombetta*, 2004 WL 868265, at *5). 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 cases). Were it otherwise, witnesses (like those here) could manipulate the fact-finding process by selectively disclosing documents and communications in ways that fall short of the whole truth. To ensure the entire story is told, and not just fragments of it, the doctrine of "subject matter waiver . . . ensure[s] that fair context is provided," which is critical to the fact-finding process. *Bethune-Hill*, 114 F. Supp. 3d at 345 n.8.

Applying this framework to the facts here provides another ground for denying the motions to compel.

1. Although they purport to assert the legislative privilege on an "absolute" basis to avoid having to respond to compulsory process *at all*, each of the third-party subpoena recipients here has answered 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, all of the subpoena recipients have waived any absolute privilege they might have had to resist such process (assuming that they had it to begin with, which they did not).

2. Each subpoena recipients except Speaker Busch and Mr. Stewart has also personally waived the privilege with respect to legislative deliberations.

a. Senate President Miller. In response to our discovery requests, Senate President Miller produced four draft maps considered by the GRAC, as to which he expressly waived any legislative privilege. *See* Dkt. 119 at 4-5. The disclosure of these maps must be taken as a waiver of *all* of the interim maps and data that the GRAC considered. How else are Plaintiffs or the Court to know whether or not the disclosed

maps are the full set of options considered by the GRAC or instead were provided selectively to paint a defense-favorable picture? Construing the disclosure of the four maps as a waiver of the privilege on the entire subject is therefore essential to "ensur[ing] that fair context is provided." *Bethune-Hill*, 114 F. Supp. 3d at 345 n.8. Thus, Senator Miller has waived privilege with respect to *all* of the alternative maps and data considered by the GRAC.

b. Jeanne Hitchcock. A similar rationale applies with respect to selective disclosures by GRAG Chair Hitchcock. In our requests for admission, we asked Hitchcock to admit certain facts about a briefing that she and the other members of the GRAC gave to the General Assembly in early October 2011. In response, Hitchcock asserted that particular topics were *not* discussed during the briefing. *See* Dkt. No. 120-16 Supp. Resp. 10. She therefore has waived privilege with respect to all statements made and documents shared during all of the GRAC's briefings on the proposed Plan to the General Assembly. Without a broader subject matter waiver, Plaintiffs and the Court would be denied a full and fair context for evaluating what, in fact, took place at the briefing.

c. Delegate Anderson. On October 3, 2011, Delegate Curt Anderson described the same briefing as to which Hitchcock made a selective disclosure in an interview with an Associated Press reporter. In his recollection: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Ex. Y at Supp. Interrog. Resp. 7. *See also* Joint Stips. ¶ 46 & Ex. 13 (Dkt. 104). Furthermore, in a recorded interview on October 17, 2011, Delegate Anderson stated, "What we're doing is we are trying to get more, in terms of—currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to

seven and one, with the additional Congressional district coming out of Montgomery County and going into western Maryland that would give the Democrats more." *Id.* at ¶ 47 (internal quotation marks omitted).

These revelations regarding the contents of Hitchcock's presentation—and more generally regarding the purpose, motives, and specific intent of the GRAC and Democrat-controlled General Assembly—are broad waivers of Delegate Anderson's legislative privilege on the topic of specific intent.

d. Senator Muse. On October 18, 2011, on the floor of the Maryland Senate, Senator Muse stated:

> [L]et's just be frank. As it stands, the plan dilutes minorities, minority power and parcels out minority populations—voters—to other very different communities *in order to strengthen the chances of a Democrat being elected.* * * *
>
> *Yes, the party walks away with maybe seven seats*, but what do our minority populations walks [sic] away with? * * *
>
> I cannot support this map. It may well like up to the letter of the law, but surely not the spirit of the law nor the spirit of the democratic process. I think minorities lose with this map. *Yes, the party gains. But honestly I believe the people, not the party, are the losers*.

Ex. Y, Supp. Interrog. Resp. 7 (emphasis added). Senator Muse also spoke to the press regarding the 2011 Congressional Plan:

> You look at the way these districts are drawn, *they're absolutely drawn with one thing in mind*. Now is it right or wrong? You be the judge of that—*but it's certainly drawn so that you can minimize the voice of the Republicans*.

12/29 Motion at 31 (emphasis added).

Again, Senator Muse's public statements concerning the purpose, motives, and specific intent of the GRAC and General Assembly is a waiver of his legislative privilege. We are therefore entitled to depose him regarding the factual bases for his statements and the broader contexts of those statements.

e. Senator Madaleno. Senator Madaleno also has waived privilege on the subject of his and the General Assembly's specific intent, which is "supposedly [a] privileged matter[]." *Favors*, 285 F.R.D. at 212 (internal quotation marks omitted). *See* Dkt. 104 ¶¶ 40, 63-65. In particular, Senator Madaleno explained in a recorded presentation to constituents:

- "What you see going on elsewhere is clearly in other states that are Republican controlled they are drawing maps to try to take out Democrats, so I think there is pressure on saying look, if they are playing that game elsewhere, then in states like Maryland where democrats control we've got to do the opposite." Dkt 104 ¶¶ 40(a) (internal quotation marks omitted).

- "This is a conflict between, what you could say, the heart and the mind of the Democratic party. . . . The head is telling you, 'Look, western Maryland, a new district focused toward western Maryland is one that you could actually pick up easier…' Do you reach out and help your good old friend Frank Kratovil, or do you go for where, in fact, you probably have a better chance at a pick up?" *Id.* ¶ 40(b) (internal quotation marks omitted).

- "I think trying to achieve both makes it a little more difficult for everyone trying to draw the maps. But you're dealing with—one of the things that's interesting is—you're dealing with people like a Mike Miller or some of the staff of the legislature who have done this several cycles, so it's not like they are a bunch of people experimenting for the first time on how to do this." *Id.* ¶ 40(d) (internal quotation marks omitted).

Senator Madaleno's statements to third-party constituents and members of the press concerning the purpose of the redistricting map constitute a waiver of any legislative privilege as to that subject matter.

CONCLUSION

The full Court should uphold Judge Bredar's January 31 and February 3 discovery orders and deny the State's motions to quash. Moreover, it should do so as expeditiously as possible with an order and a separate opinion to follow.

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Respectfully submitted,

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