IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

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

Plaintiffs seek to muddle what is a simple issue presented by this motion: should the sitting leadership of the Maryland General Assembly and two private citizens who served the State at the Governor's request be required to appear for deposition to be interrogated as to their subjective motivation concerning their legislative activity relating to Maryland's 2011 congressional redistricting plan, in a lawsuit neither raising any extraordinary claim nor requiring any evidence of subjective intent? Plaintiffs have provided no reason in their response why the longstanding precedent of the Fourth Circuit regarding the absolute nature of the testimonial legislative privilege should be set aside, identifying no case from a three-judge court compelling the testimony of legislative actors absent waiver or allegations of racial animus. In fact, plaintiffs have failed to explain how the testimony they seek would even be relevant to the claims brought in this case, or

provide any rationale for why the subjective motivations behind legislation are a pressing element of the cause of action, which does not involve allegations of racial discrimination, sex discrimination, establishment of religion, or statutes that facially burden the First Amendment. *See S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989). For these reasons, the subpoena targets' legislative privilege should not be unnecessarily invaded, and the subpoenas should be quashed.

BACKGROUND

First, while a lamentable distraction from the simple substance of this motion, plaintiffs' claims regarding the relationship of the proponents of this motion to the defendants in the action and the general conduct of party and non-party discovery by a variety of state officials, employees, and entities related to this matter must be addressed.

Despite repeated efforts of undersigned counsel to point the Plaintiffs to the statute governing the Office of the Attorney General's representation of all State officials, acting within their official capacity, including all sitting legislators, the Plaintiffs remain skeptical that this representational relationship exists and indignant over the OAG's performance of its statutorily-mandated role. To clear up any confusion on the matter, the most relevant text of § 6-106 of the State Government Article of the Maryland Code, is reproduced in full:

> **Supervision**
>
> (a) Except as otherwise provided in this section, the Attorney General has general charge of the legal business of the State.
>
> **Counsel for officers and units**

> (b) Unless a law expressly provides for a general counsel as the legal adviser and representative of the officer or unit, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government.

Md. Code Ann., State Gov't § 6-106.

So extensive is the scope of the Attorney General's handling of all the State's legal business, the General Assembly (the members of which the Plaintiffs appear to argue are not represented by the OAG in connection with this matter) saw fit to prohibit in most instances an officer or unit of the State government from employing or being represented by a legal advisor or counsel other than the Attorney General or a designee of the Attorney General. *Id.* § 6-106(c); *see also Duckworth v. Deane*, 393 Md. 524, 537–38 (2006) (holding that § 6-106 barred elected State official from intervening in lawsuit with private counsel because his asserted interest in the litigation "relate[d] entirely to the performance of his duties as a state official" even though official had described his interest as "personal").

It is therefore altogether unsurprising that the Office of the Attorney General objected when plaintiffs contacted their clients directly seeking "informal discovery" from GRAC members and other members of the General Assembly to inquire about their legislative activities as it relates to the subject matter of this lawsuit, without the benefit of the advice of counsel. Further, contrary to the plaintiffs' contention that the OAG has refused to allow plaintiffs to interview "any" state employee except under "onerous conditions" (ECF 120 at 3), the OAG insisted only that plaintiffs' counsel not contact current and former State officials and employees, represented in their official capacity as

it relates this lawsuit, ex parte. The plaintiffs have been and continue to be free to attempt to contact any of these officials through counsel and, of course, can speak to any member of the General Assembly who wishes to speak with them. The plaintiffs offer only their own aggravations to support their apparent argument that the "State" must somehow assist in these efforts to conduct "informal discovery." The plaintiffs also allege various conduct and positions purportedly of the "State" that are not attributable to the movants here.[1] In so doing, the plaintiffs overlook the vast amount of information already provided to them in this action either by the actual defendants that they named in the lawsuit, responses to various non-party document subpoenas, and responses to requests for information under the Maryland Public Information Act. Whatever leverage the plaintiffs hope to gain by wrongly alleging that the "State" has stonewalled their discovery efforts at every turn, it has nothing to do with the merits of the motion to quash—it neither illuminates nor explains why plaintiffs seek testimony wholly irrelevant to their claim.

ARGUMENT

Plaintiffs argue that, contrary to the Supreme Court's caution about the "substantial intrusion" on coordinate branches of government worked by a federal court's setting aside of state legislative privilege, and the limited "extraordinary instances" in which any abridgement of the privilege might even be possible, *Village of Arlington Heights v.*

[1] The defendants to this action have explained why, although they have sought to obtain responsive documents through party discovery and have provided thousands of pages of documents to the plaintiffs, they do not control independent state actors and entities that are unaffiliated with the State Board of Elections. *See* ECF No. 118. Further, although the OAG *represents* State entities and current and former State officials in relation to this litigation, the OAG does not *control* documents within their possession.

Metropolitan Housing Dev. Corp., 429 U.S. 252, 268, 268 n.18 (1977), a case mounting a challenge to a state's redistricting plan should automatically set aside the testimonial privilege, regardless of the particular legal claims involved.[2] Plaintiffs make this sweeping claim while ignoring that each of the three-judge district court decisions on which they rely involved some claim of racial discrimination, just as the claim in *Village of Arlington Heights* involved allegations of racial discrimination, allegations wholly absent from this case. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003) (race-based gerrymandering); *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012) (race-based gerrymandering and malapportionment); *Perez v. Perry*, 2014 WL 106927 (W.D. Tex. 2014) (race-based and partisan gerrymandering claims); *Veasey v. Perry*, 2014 WL 1340077 (S.D. Tex. 2014) (challenging Voter ID law with claims of race-based discrimination), *aff'd in part and rev'd in part*, 796 F.3d 487 (5th Cir. 2015); *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (race-based gerrymandering); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wis. 2011) (race-based and partisan gerrymandering); *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 665-68 (E.D. Va. 2014) (race-based gerrymandering);

[2] It is plaintiffs' who misapprehend the law when dismissing the application of a federal common law privilege as "no more than federal-state comity." (120 at 10). Comity is a doctrine whose exercise is rooted in the belief that our "Union of separate state governments . . . will fare best if the States and their institutions are left free to perform their separate functions in separate ways," and that federal courts must demonstrate "a proper respect for state functions." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (quoting *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 112 (1981))

and *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (race-based gerrymandering). *Compare South Carolina Education Ass'n v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989) (first amendment retaliation claim did not merit setting aside privilege, although a race discrimination claim might).[3]

While plaintiffs are correct that Fourth Circuit precedent is not binding on this three-judge court, it is more persuasive than decisions from three-judge courts based on a deliberative process privilege test originally imported and adapted to the legislative privilege context with no analysis, let alone reliance on Supreme Court authority. By contrast, the Fourth Circuit has closely tracked the Supreme Court's cautions that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and, therefore, placing decisonmakers on the stand is "usually to be avoided." *Vill. of Arlington Heights*, 429 U.S. at 268 n. 18 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).) Plaintiffs have identified only one case not involving claims of racial discrimination, *Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015). The claim at issue in *Hargett* was a § 1983 claim involving Texas's voter identification law as it applied

[3] Although the plaintiffs note that legislators testified in *Harris v.McCrory*, 159 F. Supp. 3d 600, 617 (M.D.N.C. 2016) and *Bethune-Hill* 114 F. Supp. 3d 323, they do not argue that this testimony was compelled by the courts in those cases. It appears that in *Bethune-Hill*, the testimony of Delegate S. Chris Jones was offered by the Virginia House of Delegates as the defendant-intervenors in that case. Defendant-Intervenors' Pre-Trial Disclosures, *Bethune-Hill*, 114 F. Supp. 3d 323 (ECF No. 79). Similarly, in *McCrory*, there is no indication that any of the legislators who testified were compelled to do so.

to students, and, in that case, while the test was discussed, a one-judge court ultimately determined that defendants had not opposed plaintiff's proposal to conduct *in camera* depositions, allowing for question-by-question assertion of the privilege, and ordered those depositions move forward based on that assent.[4]

I. EVEN IF THIS COURT WERE TO APPLY THE FIVE-FACTOR TEST, IT WEIGHS AGAINST COMPELLING DEPOSITION TESTIMONY ABOUT LEGISLATIVE MOTIVE AND INTENT.

Plaintiffs press the five-factor test adopted in *Bethune-Hill*, but even if this Court were to adopt the test, the factors weigh in favor of quashing the deposition subpoenas. First, as to relevance, this Court has stated that the plaintiffs "must rely on *objective* evidence" of specific intent, ECF No. 88 at 33 (emphasis added), a type of evidence that cannot be adduced through depositions of GRAC members. Plaintiffs attempt, through obfuscation, to avoid this basic and pervasive flaw in their quest for irrelevant evidence. While statements of legislators may be relevant to prove intent generally, for purposes of the limitations put on plaintiff's claim by this Court, they are not. Compelled testimony on a particular legislator's *subjective* intent "straight from the horse's mouth," could never "bear directly and *objectively*" (ECF No. 120 at 10) on the specific intent of the legislature in enacting the 2011 Congressional plan. To the extent such testimony is the best testimony about specific intent, plaintiffs must do without it because it is subjective, and not objective, evidence.

[4] The movants here would oppose any *in camera* deposition.

As the Eleventh Circuit has explained in describing the tensions between legislative privilege and a First Amendment retaliation claim:

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

In re Hubbard, 803 F.3d 1298, 1310 (11th Cir. 2015). Plaintiffs must work within the limitations of the claim they have chosen to bring (again, based on different legal theories with different modes of proof from the equal protection claims brought in cases considered by other three-judge panels). The testimony of individuals acting in a legislative capacity about "the GRAC's and legislature's intent to commit the acts comprising the constitutional violation alleged in the complaint" (120 at 12) is simply irrelevant under this Court's limitation that plaintiffs must "rely on objective evidence."

Second, there is ample other relevant evidence available to the plaintiffs in this case.[5] Plaintiffs have received through their numerous party and non-party discovery and public information act requests thousands of pages of documents, recordings of legislator statements, transcripts of public hearings of the GRAC, electronic versions of maps, election and voter data, bill files, and draft maps considered by the GRAC, made available by waiver made by Speaker Busch and President Miller specifically to aid the progress of this litigation. These documents and other tangible items, along with other material in the public record, are the objective evidence of legislative intent; it is with this material that

[5] Movants do, in fact challenge plaintiff's assessment of all five factors of the test as set forth more fully at ECF No. 119, 15-19.

plaintiffs' must prove their case.

Third, a constitutional challenge to the method by which our representative democracy is conducted is serious. However, so too are the considerations protected by the legislative privilege afforded state legislative actors by federal courts. Here, plaintiffs brought suit about one year after the first election under the plan had taken place and about sixteen months after the flurry of other constitutional challenges to the plan had been finally resolved. Moreover, the plaintiffs did not bring claims involving motives or the intent of the legislature until they filed their second amended complaint in March 2016. *Compare* ECF 1 at 3 *with* ECF 44. Therefore while serious, plaintiffs have not pressed their claims with any particular urgency.[6]

Fourth, the opponents to this motion are the House and Senate leaders of the General Assembly of Maryland and former members of the GRAC. All are non-parties to this case. Plaintiffs' assertions that non-party status weigh in favor of setting aside the privilege are contradicted by the Fourth Circuit's own statements that "because litigation's costs do not

[6] Although plaintiffs' interests in redistricting cases are no doubt important, the Supreme Court has explained that the procedural mechanisms laid out in 28 U.S.C. § 2284 are designed to provide "procedural protection" for the States "against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips v. United States*, 312 U.S. 246, 251 (1941); *see also Admiralty Jurisdiction, United States as a Party, General Federal Question Jurisdiction and Three-Judge Courts: Hearing on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 635, 791 (1972 ("1972 Hearings") (testimony of Judge Skelly Wright) (testifying on the amendments to three-judge-court statute that apportionment cases "continue[d] to need the [same] protection that three-judge district courts were originally designed to give," namely, that "no one Federal judge set aside what the Congress has done or what the State legislature has done").

fall on named parties alone," the legislative "privilege applies whether or not the legislators themselves have been sued." *WSSC*, 631 F.3d at 181. Plaintiffs need not name legislators or their staff to suits in order to cause great disruption in their legislative work, "[d]iscovery procedures can prove just as intrusive." *Id.* (quoting *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C.Cir.1988)). Such disruption is evident here, where the plaintiffs' proposed discovery schedule has allowed for a large portion of the fact discovery period to overlap with Maryland's General Assembly session.

Finally, legislative privilege's core essence is at issue here, where plaintiffs press subpoenas issued after extensive productions have already been made, where public information act requests to these same officials have already been answered, and where plaintiffs seek information beyond the scope of that needed to prove their claims. Requiring attendance at depositions and disclosure of correspondence and papers that reflect the decisionmaking process of legislators and close aides, after extensive efforts have been made to provide nonprivileged materials, will significantly burden the legislators and deter their aides and future legislators from service. Moreover, disclosure to the public of the exact factors considered in formulating and passing the 2011 redistricting plan is impossible, given that there were five members of the GRAC, their staff, the Governor and his office staff, 188 members of the General Assembly and ultimately over one million voters who were motivated to adopt the plan. Selective disclosure of the subjective motivations of particular legislators or staff members would unfairly represent the process constructed and relied upon by the General Assembly and Governor's office to be transparent, subject to public input, and ultimately in the public's best interest.

II. THE DEPOSITION TARGETS HAVE NOT WAIVED THEIR LEGISLATIVE TESTIMONIAL PRIVILEGE OVER THEIR LEGISLATIVE MOTIVE AND INTENT.

The targets of the deposition subpoenas at issue have not waived their legislative privilege. On the contrary, they have asserted it at every turn. In responses to document subpoenas, President Miller and Speaker Busch, through counsel, asserted legislative privilege over documents that went to the heart of their subjective motivations. *See* Ex. 1. They asserted their testimonial privilege by moving to quash the deposition subpoenas at issue, where the plaintiffs themselves acknowledge that they seek only to question the deponents about their subjective motivations concerning legislative activity. And they have refused to provide legislatively-privileged information in response to inquiries made in the course of party discovery. *See, e.g.*, Ex. 2. Although the plaintiffs suggest that the GRAC members must first sit for a deposition and assert legislative privilege question by question, they do not dispute that the only information they seek through these depositions concerns "legislative motive and intent" (ECF No. 120 at 3), information over which the GRAC members have already asserted the privilege in this case through this very motion. The much more reasonable and efficient course is to have this Court decide these issues before subjecting any of the subpoena targets to deposition.[7]

Moreover, because these subpoenas are not seeking documents, the cases on which the plaintiffs rely are inapposite. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d 323 at 344 ("'A

[7] If this Court finds the filing of motions to quash deposition subpoenas on each individual legislator at issue as inadequate to establish individual assertion of the legislative privilege, when no deposition topic not falling within the bounds of the legislative privilege has been proposed, affidavits can be secured to support this assertion.

conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular *document*.' Thus, the proponent of a privilege must 'demonstrate specific facts showing that the *communications* were privileged.'") (quoting *Page*, 15 F. Supp. 3d at 661) (emphases added). Because the plaintiffs seek to depose the former GRAC members only concerning their legislatively-privileged subjective motivations, nothing more is required than a motion to quash the depositions on grounds of legislative privilege.

Finally, the plaintiffs mischaracterize Senator Miller's and Ms. Hitchcock's conduct in this case to support their erroneous suggestion that these individuals have waived their legislative privilege. First, Senator Miller, in response to the plaintiffs' subpoena for documents, disclosed draft maps when he could not recall whether the maps had been shared with third parties. *See* Ex. 1. Given that the plaintiffs did not bring the current claim until nearly five years after these draft maps were created, it is easy to understand how Senator Miller may not recall which of several maps were disclosed to third parties and which were not. The maps themselves do not contain statements about Senator Miller's subjective motivations. This is a far cry from waiving his testimonial privilege as to the subjective motivations underlying his legislative activities, and the plaintiffs cite no case that supports the broad subject matter waiver that they are asking this Court to apply where the legislator has not already been deposed on those topics. When assessing whether a subject matter waiver should apply to attorney opinion work product, a privilege similar to legislative privilege in that it protects an individual's thought processes and mental impressions, the Fourth Circuit refused to adopt a subject matter waiver. *See In re Martin Marietta Corp.*, 856 F.2d 619, 626 (4th Cir. 1988) (citing the unlikelihood that "a litigant

will attempt to use a pure mental impression or legal theory as a sword and as a shield in the trial of a case so as to distort the factfinding process"). The plaintiffs' argument with respect to Jeanne Hitchcock is even more contrived, relying on nothing more than her actual *assertion* of legislative privilege as to statements she made in a legislative briefing, when those were the only statements that were the subject of the discovery request. Senator Miller and Ms. Hitchcock have been nothing but consistent in their assertion of legislative privilege in this case; neither has waived it.

III. SENATE PRESIDENT MILLER AND HOUSE SPEAKER BUSCH WERE NOT REQUIRED TO MEET AND CONFER BEFORE MOVING TO QUASH THE UNDULY BURDENSOME SUBPOENAS SERVED ON THEM.

While all of the individuals involved in this case, including the Court, are busy professionals, only two individuals will be presiding over the two houses of the Maryland General Assembly for the remainder of the discovery period. The Maryland General Assembly session is so compressed, that the General Assembly has provided that if a member of the General Assembly is counsel of record in a case, "the proceeding shall be continued from 5 days before the legislative session convenes until at least 10 days after it is adjourned." Md. Code. Ann., Cts. & Jud. Proc. Art. § 6-402(b). Plaintiffs have offered no argument or evidence to contradict the affidavits explaining Senate President Miller and Speaker Busch's unavailability during this crucial time period in Maryland government. Neither of these officials has "a handful of hours over the next few weeks" that can be given without great cost to the conduct of Maryland's public business.

As for plaintiffs' counsel's remark about compliance with Local Rule 104.7, that rule is inapplicable to this motion to quash a non-party subpoena, brought under Fed. R. Civ. Pro. 45. *See* Local Rules of the United States District Court for the District of Maryland Cross-Reference to Uniform Federal Rule Numbering System at 2 (cross-referencing Local Rule 104.7 with Fed. Rs. Civ. Pro. 33 and 34). Moreover, any such conference about the burden of scheduling a date during session would have been futile. Plaintiffs' counsel failed to contact undersigned counsel to request available dates at the commencement of discovery. As soon as these subpoenas were served on December 19, 2016, there was no longer enough time to complete motions practice related to discovery before the Maryland General Assembly Session began on January 11, 2017. As explained in the initial motion and supporting affidavits, Senate President Miller and Speaker Busch's schedules are such that they each have no availability in the remaining discovery time period, which is coincident with Maryland's General Assembly session.

CONCLUSION

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

Respectfully submitted,

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Dated: January 19, 2017

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TABLE OF EXHIBITS

Exhibit No. Title

1. Letter from Sandra Brantley to Stephen Medlock, Dec. 30, 2016

2. Defendants' Supplemental Responses to Plaintiffs' First Set of Requests for Admissions