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.	*	

* *

REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR PROTECTIVE ORDER FROM NON-PARTY DEPOSITION SUBPOENAS SERVED ON CURTIS S. ANDERSON, C. ANTHONY MUSE, AND ROBERT GARAGIOLA

INTRODUCTION

As part of their apparent strategy to cast the State of Maryland as a monolithic obstacle to discovery in this case while ignoring the legal structure of state government and important public purposes that appropriately motivate limits on discovery, the Plaintiffs confuse the "State" with the actual movants here – one former and two current state legislators who have been subpoenaed to testify about their legislative activities related to congressional redistricting. These three legislators are not involved in any concerted effort on behalf of the "State" to deny the Plaintiffs access to proper discovery in this case. Indeed, within pages of bemoaning the "State's" unwillingness to cooperate in discovery in this case, the Plaintiffs acknowledge that the subpoena targets responded to their document subpoenas. In reality, the movants have done no more than assert a legislative privilege that protects them from being compelled to testify about their

legislative activities. The Plaintiffs' erroneous depiction of the subpoena targets' assertion of their rights and privileges as part of the "State's" alleged obstruction in this case should not distract from the lack of any reasoned justification for denying the protective orders that are the subjects of these motions.

Similarly, the Plaintiffs' applauding of their own compliance with formal discovery, which is their obligation under the federal rules of evidence as parties to this case, has nothing to do with the relief sought in this motion.[1] And, although the Plaintiffs appear to believe it beneficial to their case to blink reality, they cannot legitimately deny that the Defendants in this action have provided the Plaintiffs with thousands of pages of documents and other discovery, and that various non-parties have provided documents responsive to the numerous subpoenas issued in this case. The Plaintiffs' strategic decision to expend considerable resources seeking privileged material from legislators about their and others' subjective motives and intent, despite this Court's clear holding that subjective evidence of intent is not only unnecessary but insufficient to prove their claim, should not be used as a cudgel to deny these three movants of their legislative testimonial privilege.

[1] Nor does the Plaintiffs' purported restraint from filing unnecessary motions to compel the testimony of these witnesses. The movants, having been subpoenaed to testify, were required to seek relief from this Court. *See* Fed. R. Civ. P. 45. The Plaintiffs, having subpoenaed the movants to testify, were under no such obligation.

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

As described more fully in their opening memoranda, the legislative privilege protects the movants from giving compelled testimony in this case. *See South Carolina Education Ass'n v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989) (first amendment retaliation claim did not merit setting aside legislative testimonial privilege); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *3, *11 (N.D. Ill. Oct. 12, 2011) (quashing discovery requests that "suggest[ed] an attempt by plaintiffs to gain insight to the thought processes of these individuals, if not now, then perhaps later through depositions"); *Hall v. Louisiana*, No. CIV.A. 12-657-BAJ, 2014 WL 1652791, at *12 (M.D. La. Apr. 23, 2014) (quashing deposition subpoenas served on legislators because they sought only privileged information and because they were unduly burdensome because sought during the legislative session).

Even applying the five-factor test advocated by the Plaintiffs, the balance weighs against compelling the testimony here.[2] Neither the subjective intent of these legislators nor their speculation as to others' motivations is relevant here. Although the Plaintiffs seek to question these legislators about the legislative activities of others, such as the internal deliberations of the GRAC, the subpoena targets "cannot . . . waive the privilege

[2] Consistent with the Plaintiffs' approach in their response to the two motions, the movants incorporate by reference arguments made by other non-party legislators who have asserted legislative privilege against compelled testimony in this case. ECF Nos. 114, 119, 124.

on behalf of another legislator." *Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012); *see also A Helping Hand, LLC v. Baltimore Cty., Md.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003) (explaining that only an individual legislator may assert or waive the privilege on his behalf). Indeed, the Plaintiffs have sought to compel the individual GRAC members to testify about their subjective intent or to produce documents that go to the heart of subjective intent, and each GRAC member has asserted legislative privilege as grounds for a protective order. Thus, deposing the movants about topics specific to the GRAC members' legislative activities would either be improper if the subpoenas are quashed, or unnecessary if the GRAC members are compelled to testify. Finally, the Plaintiffs are simply wrong that questioning individual legislators about their or others' subjective motives or considerations to support a claim brought five years after the fact is the most probative evidence in this case. This Court has already concluded it is not. *See* ECF No. 88 at 32-34.

II. THE SUBPOENA TARGETS HAVE NOT WAIVED THEIR LEGISLATIVE TESTIMONIAL PRIVILEGE.

The Plaintiffs argue for application of a subject matter waiver of legislative privilege that would eviscerate the privilege, relying on sitting legislators' contemporaneous comments to the press, their colleagues, or third-parties about a piece of legislation. In the case of Senator Muse, the Plaintiffs use his statements made during a debate on the floor of the Senate and to the press about a piece of legislation he opposed as grounds for waiving the privilege. In the case of Delegate Anderson, the Plaintiffs argue that his comments to the press about what he thought a piece of legislation was

meant to or might accomplish constitutes a waiver of the privilege. And in the case of former Senator Garagiola, the plaintiffs point to an email he sent providing only factual information about a soon-to-be proposed piece of legislation and his assessment of those facts as "good news."[3] Notably, none of the legislators revealed any internal deliberations. Indeed, none of them was a member of the GRAC or involved in drawing or developing the proposed Congressional plan. None of these legislators waived their privilege against giving compelled testimony by engaging in these routine communications.

Moreover, applying the waiver as the Plaintiffs advocate would gut the privilege. Anytime a sitting legislator engaged in a debate on the floor of his or her legislative body about his support for or opposition to a piece of legislation, commented to the press about what he thought a piece of legislation sought to accomplish, or merely provided factual information about upcoming legislation, that legislator would waive his or her privilege against compelled testimony. Such an interpretation would create a significant, perverse disincentive for sitting legislators to speak candidly to the press, their constituents, or on the floor of their legislative bodies. Moreover, given the frequency with which legislation is challenged in the courts, adopting such a broad application of waiver would cause substantial disruption to legislators' legislative duties, which is precisely the harm that the privilege is designed to prevent. *See E.E.O.C. v. Washington Suburban Sanitary*

[3] Although the Plaintiffs wish to question him about the source of that information and why it was shared with him, Senator Garagiola did not disclose that information to a third-party, and, thus, he may not be compelled to provide that information through testimony in this case.

Comm'n, 631 F.3d 174, 181 (4th Cir. 2011) ("*WSSC*") (explaining that "[l]egislative privilege against compulsory evidentiary process" enables legislators to be free from the burdens of defending themselves regardless of whether the legislator has been sued).

The Plaintiffs cite no case that supports such a broad application of the waiver to legislative privilege. *Hawkins v. Stables*, 148 F.3d 379 (4th Cir. 1998) involved the waiver that applies when a client discloses attorney-client privileged information, and the Fourth Circuit explained that subject matter waiver applies because "[s]uch a disclosure vitiates the confidentiality that constitutes the essence of the attorney-client privilege." *Id.* at 384 n.3. Here, talking to the press or on the floor of a legislative body or sharing factual information about legislation does not vitiate the essence of the legislative privilege, which exists to protect "the exercise of legislative discretion" from being "inhibited by judicial interference" and to safeguard and promote republican values. *WSSC*, 631 F.3d at 181. Much more analogous is the attorney work product privilege that protects the uninhibited work of an attorney and, thus, the adversary process, that the Fourth Circuit has held is not susceptible to subject matter waiver. *In re Martin Marietta Corp.*, 856 F.2d 619, 626 (4th Cir. 1988).

In *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012), the court acknowledged that legislative privilege "casts a wide net" and rejected a broad subject matter waiver argument. *See id.* at 213 (holding that the dissemination of certain emails, claimed to be privileged, did not "waive[] the privilege as to other documents and communications" relating to the same subject matter). And in *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015), the Court was merely noting that if

"individual legislators choose to introduce additional evidence of other motivations to dispel the notion that racial considerations predominated," they could do so by "waiv[ing] their privilege with respect to other documents and communications with the understanding that some degree of subject matter waiver may apply to ensure that fair context is provided." *Id.* at 345 n.8. Here, of course, the individual legislators who are the subject of this motion have not sought to "introduce additional evidence of other motivations" and thus have not opted to "waive their privilege" in any respect as it pertains to the Plaintiffs' claims in this case. Rather, it is the *Plaintiffs* who wish to use these legislators' statements, made contemporary to their consideration of the legislation and not in the course of this litigation, to support the *Plaintiffs'* claims. Whatever relevance these lawmakers' statements may have to the Plaintiffs' claims in this case, they should not also be wielded as a sword to pierce legislative privilege. *Cf. In re Martin Marietta*, 856 F.2d at 626 (rejecting application of subject matter waiver to attorney opinion work product, in part, because of the unlikelihood that the privileged material would be used by the holder of the privilege "as a sword and as a shield in the trial of a case so as to distort the factfinding process").

CONCLUSION

For the reasons set forth above, this Court should enter the protective orders sought by Delegate Curtis S. Anderson, Senator C. Anthony Muse, and former Senator Robert Garagiola.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

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___/s/__Sarah W. Rice_____
JENNIFER L. KATZ (Bar No. 28973)
SARAH W. RICE (Bar No. 29113)
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (tel.); (410) 576-6955 (fax)
jkatz@oag.state.md.us
srice@oag.state.md.us

KATHRYN M. ROWE (Bar No. 09853)
Assistant Attorney General
104 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401
(410) 946-5600 (tel.); (410) 946-5601 (fax)
krowe@oag.state.md.us

Attorneys for Curtis S. Anderson, C. Anthony Muse, and Robert Garagiola