IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL NON-PARTIES JEANNE D. HITCHCOCK, THOMAS V. "MIKE" MILLER JR., MICHAEL E. BUSCH, AND RICHARD STEWART TO TESTIFY AT DEPOSITION, AND TO COMPEL NON-PARTIES THOMAS V. "MIKE" MILLER JR., MICHAEL E. BUSCH, AND RICHARD S. MADALENO JR. TO PRODUCE DOCUMENTS

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INTRODUCTION

Plaintiffs allege that the State of Maryland—through the Democrat-controlled Governor's Redistricting Advisory Committee (GRAC), the Democrat-controlled General Assembly, and the then-Democrat-controlled governor's office—retaliated against Republicans living in the former Sixth Congressional District by reason of their political associations and voting histories. These state agencies and officials gerrymandered the Sixth District by moving into the district tens of thousands of Democratic voters and out of the district tens of thousands of Republican voters, all with the specific intent and purpose of changing the outcome of future congressional elections in the Sixth District under the 2011 redistricting plan (the Plan).

In its opinion denying the State's motion to dismiss, the Court described what Plaintiffs must prove to establish their claim. They must:

- prove that the State used "data reflecting citizen's voting history . . . for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed";
- "produce objective evidence, either direct or circumstantial, that the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated"; and
- show that "the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have 'an equally effective voice in the election' of a representative."

Shapiro v. McManus, ---F. Supp. 3d---, 2016 WL 4445320, at *10-11 (D. Md. 2016) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). To that end, we served four members of the GRAC—Jeanne Hitchcok, Maryland State Senator Thomas Miller, Maryland House of Delegates Speaker Michael Busch, and Mr. Richard Stewart—with

deposition subpoenas; and the same individuals and Senator Richard Madaleno, Jr., with document subpoenas.

In response to these subpoenas, the Maryland Office of Attorney General (OAG) has asserted that no past or present lawmaker may be required to appear for deposition, much less to answer any of our questions on the merits. Indeed, in the OAG's view, no current or former state official involved in the drafting of the Plan can be compelled in this federal civil rights lawsuit to answer *any* question or produce *any* document concerning legislative intent or the legislative process *at all*.

These assertions of legislative privilege lack all merit.

First, the case law is clear that state officials cannot duck their federal constitutional obligations by hiding behind claims of state legislative privilege. That conclusion is especially apparent in federal lawsuits of broad public importance like this one, particularly given that the subpoena targets are not themselves named as defendants and therefore face no threat of personal liability. Courts frequently face claims of privilege in circumstances like these, and relying on a settled balancing test, nearly always reject them. The Court should do so here.

Second, even supposing that the privilege were available to the former members of the GRAC and Senator Madaleno in this lawsuit, these individuals have asserted the privilege conclusorily, without offering a single statement of fact or article of evidence to support their objections. Yet they carry the burden of proving that the privilege applies. That have failed entirely to meet that burden.

Third, the legislative privilege is unavailable to the extent that it has been waived. As relevant here, Senator Madaleno openly waived any legislative privilege he might have had with respect to legislative intent when he gave a public speech on

exactly that topic. He accordingly cannot withhold responsive documents concerning legislative intent on that basis.

For these reasons and all of those laid out more fully below, the Court should enter an order compelling Ms. Hitchcock, Senator Miller, Speaker Busch, and Mr. Stewart to testify at a deposition and answer questions concerning legislative intent without regard for assertion of legislative privilege; and compelling Senator Miller, Speaker Busch, and Senator Madaleno to produce responsive documents, again without regard for any assertion of legislative privilege.

BACKGROUND

A. The key roles in drawing the lines of the Sixth District

The GRAC members played a key role in drafting and enacting the Plan. The committee comprised two sitting legislators (Speaker Busch and Senator Miller) and three individuals appointed by Governor O'Malley. *See* ECF No. 104 ¶¶ 18-21. One of the appointees, Jeanne Hitchcock, was a close advisor to Governor O'Malley. *See id.* ¶ 19. At the time that she was appointed, Hitchcock served as Governor O'Malley's Appointments Secretary. *Id.* She had previously served as Deputy Mayor of Baltimore when Governor O'Malley was the Mayor of Baltimore. *Id.* Hitchcock served as the chair of the GRAC. ECF No. 96 ¶ 43.

The GRAC members received a steady stream of information from Maryland state agencies, high-level staffers, and members of the General Assembly. The GRAC also relied for its work on staffers from the governor's office, Department of Legislative Services (DLS), Department of Planning (DOP), and the General Assembly. The following staffers assisted the GRAC and had access to the proposed 2011 congressional map before it was released to the public:

- Patrick Murray, a legislative aide to Senator Miller;
- Yaakov Weissman, a legislative aide to Senator Miller;
- Jeremy Baker, a legislative aide to Speaker Busch;
- Joseph Bryce, an aide to Governor O'Malley;
- John McDonough, the Maryland Secretary of State;
- Michelle Davis, a DLS Senior Policy Analyst; and
- Karl Aro, the former DLS Executive Director.

Ex. A at Interrog. Resp. 1.

DOP, the governor's office, the GRAC, and staffers working for Speaker Busch and Senator Miller worked closely with one another on the drafting of the Plan. On July 5, 2011, a day after the GRAC was formed by Governor O'Malley, Hitchcock emailed meeting materials to GRAC members, an aide to Governor O'Malley, and Richard Hall, the Secretary of DOP. Ex. B at 2. The same day, Hitchcock mailed a GRAC meeting agenda to GRAC members, an aide to Governor O'Malley, and Secretary Hall. *Id.* at 3. Similarly, on July 7, 2011, John Bryce, an aide to Governor O'Malley sent a proposed schedule for public meetings regarding the 2011 congressional map to members of the GRAC. The recipients of this email included:

- John Favazza, a Chief of Staff to Speaker Busch;
- Kristin Jones, a Chief of Staff to Speaker Busch;
- Victoria Gruber, a staffer to Senator Miller;
- Patrick Murray, a legislative aide to Senator Miller;
- Alexandra Hughes, a staffer to Speaker Busch;
- Jeremy Baker, a senior advisor to Speaker Busch;

- Nancy Earnest, an assistant to Speaker Busch;
- Joy Walker, an assistant to Senator Miller; and
- John McDonough, Governor O'Malley's Secretary of State.

Id. at 4. A week later, Bryce sent an updated schedule to members of the GRAC, the same staffers to Speaker Busch and Senator Miller, and the following individuals:

- Richard Hall, the DOP Secretary;
- Raquel Guillory, the Director of Communications for Governor O'Malley;
- Karl Aro, the DOP Executive Director;
- Matt Gallagher, the governor's chief of staff;
- Rick Abbruzzese, the governor's Director of Public Affairs; and
- John McDonough, the Maryland Secretary of State.

Id. at 5. The map generated through this process of staff and information exchange is the very map that Plaintiffs now seek to enjoin Defendants from enforcing.

B. Senator Madaleno's speech concerning legislative intent

Shortly before the Plan was enacted, Senator Madaleno gave a recorded speech in which he addressed the specific intent behind that Plan's drafting. *See* Joint Stips. (ECF No. 104) ¶¶ 40, 63-65 & Exs. 7-9 (available online at http://www.marylandjuice.com/2011/09/2012-redistricting-sen-rich-madaleno.html). He said, specifically:

- "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." Joint Stips. (ECF No. 104) ¶¶ 40(a).
- "This is a conflict between, what you could say, the heart and the mind of the Democratic party. The heart is 'Frank Kratovil had that seat [the 1st District] before, Frank Kratovil won before, he made hard votes on behalf of Barack

> Obama, we should find a way to reward our friend Frank Kratovil.' 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).

- "If you go with a competitive western Maryland district, the way that works is clearly that district comes further into Montgomery county, substantially into Montgomery county." *Id.* ¶ 40(c).

- "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).

The parties have stipulated to the authenticity of the videos depicting Senator Madaleno's speech. *See* Joint Stips. (ECF No. 104), at 1 & ¶¶ 63-65.

C. Plaintiffs' document and deposition subpoenas and the GRAC members' responses

As the Court has explained, 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*, 2016 WL 4445320, at *10 (emphasis omitted). Demonstrating the required 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. Plaintiffs here must show, in other words, that "the legislature specifically intended to burden the representational rights" of Republican voters in the former Sixth District "because of how they had voted in the past and the political party with which they had affiliated." *Id.*

To meet this burden, Plaintiffs served deposition subpoenas on the four Democrat-appointed members of the GRAC: Ms. Hitchcock, Senator Miller, Speaker Busch, and Mr. Stewart. *See* Exs. G-J. We also served document subpoenas on the same four individuals as well as Senator Richard Madaleno, Jr. *See* Exs. C-F.

1. With respect to the deposition subpoenas, Plaintiffs intend to question these four members of the GRAC 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.

In an email dated December 16, 2016, counsel for Defendants (the same counsel in the Office of the Attorney General who represent Defendants in this case) stated that their intent was to "move to quash subpoenas served on members of the GRAC" because "the individuals you seek to depose cannot be compelled to testify in this matter" on the basis of state legislative privilege. Ex. L at 1.

On December 20 and 21, Plaintiffs met and conferred with counsel for the proposed deponents (and Defendants) to discuss, among other things, the deposition subpoenas served on the GRAC members. During that conference, and in subsequent correspondence, counsel for the proposed deponents again asserted that the members of the GRAC will refuse to sit for depositions on the basis of a blanket assertion of state legislative privilege, and that the their counsel intended "to seek protective orders quashing those subpoenas on the grounds of legislative privilege." Ex. M at 1.

At the same time, the OAG has obstructed our efforts to speak informally with any current legislators, asserting that all sitting legislators are represented by the OAG in connection with this matter and that they therefore cannot be contacted

despite Plaintiffs' First Amendment right to petition their lawmakers for redress of their grievances. *See* Md. Rule of Prof. Conduct 4.2(c). Most recently, counsel for Defendants have stated that they will seek a protective order from this Court if we make any attempt to contact sitting legislators on an ex parte basis and informed us that they will not consent to our interview of such legislators unless several lawyers from the OAG are present and the OAG lawyers are permitted to invoke the legislative privilege on absent parties' behalves. In addition, the OAG has refused to agree to allow these interviews go forward unless Plaintiffs are limited to five interviews and the interviews are not transcribed. *See* Ex. R at 1-2.

2. 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. C, D, E, and F 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* Exs. C, D, E, and F at 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 part during the Relevant Time period." *See* Exs. C, D, E, and F at Req. 3.

The four democratic members of the GRAC responded to our requests for documents in different ways.

By letter dated December 19, 2016, counsel for Hitchcock stated that "she was unable to locate any electronic or hard copy documents responsive to the subpoena." *See* Ex. K. 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.***

In the same letter, counsel for Stewart 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. *Id*. 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. N. While they produced a limited number of documents—collectively, fewer than 150 pages in all—they asserted legislative privilege as a basis for withholding 30 responsive documents. *See* Exs. O-Q. In addition to serving three privilege logs, counsel for the legislators explained in her cover letter 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. N 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*.

Plaintiffs now move to compel.

ARGUMENT

A court "may hold in contempt a person who, having been served, fails without adequate excuse to obey [a] subpoena or order related to it." Fed. R. Civ. P. 45(g). Likewise, when an individual refuses to produce documents in response to a subpoena "the serving party move the court . . . for an order compelling production or inspection." Fed. R. Civ. P. 45(d)(2)(B)(i). In this case, the subpoenas served on the GRAC members and Senator Madaleno are valid, enforceable, and properly served, complying in all respects with the requirements of Rule 45. Yet the subpoena targets' privilege objections are not an "adequate excuse" for avoiding the subpoenas. Courts routinely deny claims of state legislative privilege in federal constitutional cases like this one, challenging redistricting practices. Little wonder why: The purpose of the privilege is not served in the context of federal lawsuits to vindicate important constitutional rights where the relief requested is injunctive and those asserting the privilege are not named defendants. Courts have thus consistently recognized that state officials cannot hide behind state legislative privilege to avoid federal judicial scrutiny into unconstitutional legislative motive. This Court should hold the same.

I. THE STATE LEGISLATIVE PRIVILEGE PROVIDES NO BASIS FOR REFUSING TO SIT FOR DEPOSITIONS OR PRODUCE DOCUMENTS IN THIS CASE

In response to every *subpoena ad testificandum* that we have served, the OAG has made sweeping assertions of state legislative privilege that, if upheld, would effectively insulate GRAC members and other state officials from having to answer *at all* the very serious federal constitutional claims alleged in the complaint. It has also asserted privilege with respect to more than one quarter of the (suspiciously few)

responsive documents it has found in the possession of the Democratic members of the GRAC and Senator Madaleno.

This is not the first time that Maryland state officials have asserted privilege in such a way—nor, if the Court grants our motion to compel, would it be the first time this 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 of the lines of 1991 map. Denying their assertion of privilege, this Court—sitting then, as now, as a panel of three judges—explained that in the special context of redistricting, the doctrine of legislative privilege 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 on questions of legislative motive and purpose—are justiciable and that their allegations are plausible. *Shapiro*, 2016 WL 4445320, at *1.

The Court should reject the assertion of privilege here, for two reasons.

First, the state legislative privilege—a creature of federal common law—necessarily yields in cases involving important federal constitutional rights, where the state legislators do not themselves face personal liability. That is particularly apparent under the five-factor balancing test that applies in qualified-privilege cases like this

one: Among other things, the evidence sought goes to the heart of Plaintiffs' claims, and state officials played an essential role in the very serious constitutional violations alleged in the complaint.

Second, the GRAC members have not properly supported their assertion of the state legislative privilege, even to the extent that it might apply. With respect to both documents and testimony, the members of the GRAC bear the burden of proving the availability of the privilege. Yet they have not offered any assertion of fact, much less article of evidence, supporting their claim of privilege.

Beyond that, Senator Madaleno has plainly waived the privilege (such as it is) with respect to the matter of legislative intent.

In sum, "[t]he promise having been made" to hear Plaintiffs' complaint, the Court should not tolerate the State's effort "to bar virtually all discovery of relevant facts" in the name of an inapplicable and unsupported privilege. *Schaefer*, 144 F.R.D. at 305.

A. State legislative privilege cannot be invoked on a blanket basis in cases like this one

As an initial matter, the proposed deponents' attempt to assert the legislative privilege on a blanket basis and as ground for avoiding sitting for depositions altogether lacks any legal support. To the extent the privilege applies at all, it is a qualified one that must be asserted question-by-question.

"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). "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, e.g.*, *Perez v. Perry*, 2014 WL 106927, at *1 (W.D. Tex. 2014) (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; 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 federal law." *Id.* at 336.

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 Independence*, 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 privilege is at its apex in the context of "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 *Gillock*, 445 U.S. at 372 *Owen*, 445 U.S. at 655). In such cases, "the legislative privilege prevents compelled testimony or documentary disclosure in support of such claims." *Id*. at 335.

But the state legislative 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." *Bethune-Hill*, 114 F. Supp. 3d 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, 552 (D. Md. 2009), *aff'd* 631 F.3d 174 (4th Cir. 2011))).

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); *Favors v. Cuomo*, 285 F.R.D. 187, 214 (E.D.N.Y. 2012) (three-judge district court); *Perez,* 2014 WL 106927, at *1; *Veasey v. Perry*, 2014 WL 1340077, at *1 (S.D. Tex. 2014), *aff'd in part and rev'd in part,* 796 F.3d 487 (5th Cir. 2015); *Bethune-Hill*, 114 F. Supp. 3d at 337; *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wis. 2011); *Page,* 15 F. Supp. 3d at 666).[1]

This Court should follow these other courts and hold that the state legislative privilege, "a judicially crafted evidentiary privilege based on federal common law," 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.

[1] The OAG argued at the December 21-22 conference and in our letter exchanges that *Mitchell v. Glendenning*, No. WMN-02-602 (D. Md. June 4, 2002) (ECF No. 11), supports a contrary conclusion. But unpublished opinions are not persuasive authority where (as here) "they are against the clear weight of current published authority." *Chase v. Peay*, 286 F. Supp. 2d 523, 528 n.8 (D. Md. 2003). Regardless, the court in *Mitchell* upheld the assertion of privilege because the plaintiff's claim there did not require proof of legislative motive. *Mitchell*, slip op. at 6. That is not the case here. *See Shapiro*, 2016 WL 4445320, at *11. And once again, "[t]he doctrine of legislative immunity" does not "prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." *Schaeffer*, 144 F.R.D. at 304.

B. The five-factor balancing test clearly favors disclosure

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. In particular, they "have employed a five-factor balancing test imported from deliberative process privilege case law." *Id*. This five-factor test, which applies in a qualified manner to individual topics and documents, 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 337-38 (quoting *Page*, 15 F. Supp. 3d at 666). And, again, the party asserting privilege "has the burden of demonstrating its applicability" (*NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011)) and thus the burden of satisfying the balancing test.

Here, the facts do not come close to overcoming the presumption of disclosure of the testimony and evidence that Plaintiffs seek: the evidence and testimony sought is highly relevant; no other evidence would be as probative of unlawful motive as the evidence sought; the federal constitutional issues in this litigation are of the utmost seriousness; the members of the GRAC played a direct, central, and essential role in the constitutional violations here; and compelling disclosure of the evidence and testimony sought will not conflict with the purposes of the privilege. The motion to compel accordingly should be granted.

1. The evidence sought is highly relevant to Plaintiffs' claims. Plaintiffs allege that the State redrew the boundaries of the Sixth District for the specific purpose 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 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; *see also Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (noting that this First Amendment theory requires proof that "an apportionment has the *purpose* and effect of burdening a group of voters' representational rights") (emphasis added).

Thus, testimonial and documentary evidence regarding the intent and motive of the GRAC members and legislators who drafted and approved the Plan goes to the very heart of this case. *Cf. Page*, 15 F. Supp. 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 v. Brennan*, 2011 WL 6122542, at *1 (E.D. Wis. 2011) ("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 (N.D. Ill. 2011)). 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 v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 177-78 (4th Cir. 2011). 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. Arizona 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 used to draw the 2011 district map, 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. It goes without saying that 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*, 682 F.2d at 1064.

Given that officials and legislators are typically careful to keep intimations of discriminatory motive out of public view (*see Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982)), it is vital that Plaintiffs be allowed to question these officials regarding their intentions and review all of their responsive communications and other documents—regardless of whether circumstantial evidence going to the issue of motive is also 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 1070-71.

Several courts accordingly have held in redistricting cases that the second balancing factor favors testimony and disclosure even when there already some evidence of motive in the public record. *See Favors v. Cuomo*, 285 F.R.D. 187, 219

(E.D.N.Y. 2012) (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.

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. Plaintiffs and other Republicans in the Sixth District had been able to elect a candidate of their choice to the House of Representatives for two decades, until Democrats on the GRAC and in the General Assembly chose to redraw the district's boundaries with an eye to Plaintiffs' and other Marylanders' voting histories and party affiliations, and with the express purpose of ensuring that they would no longer be able to elect their chosen candidates.

That kind of politically motivated retaliation is cause for great concern. The right to vote, the Supreme Court has held time and again, "is a fundamental matter in a free and democratic society." *Reynolds*, 377 U.S. at 561. "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 561-562. 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.

Government actions singling out individuals or groups and imposing burdens on them because of conduct protected by the First Amendment are equally illegal. "[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).

Discriminatory political gerrymandering implicates both of these fundamental constitutional concerns. By depriving members of the disadvantaged group of the opportunity to elect candidates of their choice, such gerrymandering strips away their "foundational right [to] meaningful representation" in government. *Bethune-Hill*, 114 F. Supp. 3d at 341. And by subjecting voters to differential burdens based on their political affiliation, it erodes the principles of freedom of thought and belief that form the essence of the First Amendment. Plaintiffs' allegations of political gerrymandering here are thus "undoubtedly serious," which means that this third factor "weighs heavily in favor of disclosure." *Id.*

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. ECF No. 104 at ¶¶ 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 supports 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).

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. Some courts applying this fifth factor have spoken of an anti-"distraction" purpose for the privilege that "guards legislators from the burdens of compulsory process." *Bethune-Hill*, 114 F. Supp. 3d at 341. Any such concern about "distraction" here is minimal. Having to appear for a deposition—the imposition of a single day at most—is not a serious burden for the GRAC members or legislators, many of whom have separate jobs as it is. Nor is there any evidence that searching for and producing documents is a serious burden—indeed, Senator Miller, Speaker Busch, and Senator Madaleno have already done so and produced privilege logs. *See* Exs. O-Q. No conceivable additional burden could be imposed by production of the documents, instead.

Similarly, any concern here about legislative independence is minor at best. Numerous courts have recognized that where legislators are not themselves defendants, the threat to legislative independence is minimal or nonexistent. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 342 ("[T]he threat to [the legislative-independence] interest is substantially lowered when individual legislators are not subject to liability."); *see also Owen*, 445 U.S. at 656 (noting that the threat is "significantly reduced, if not eliminated, . . . when the threat of personal liability is removed");

Gillock, 445 U.S. at 372 (suggesting that legislative independence is only implicated in a "civil action brought by a private plaintiff to vindicate private rights").

Nor would sitting for a deposition impede legislative deliberations, as other courts have consistently held. In fact, "the 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," it 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 ("Allowing the plaintiffs access to these items may have some minimal future 'chilling effect' on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence."). "For better or worse, lawsuits concerning constitutional matters such as equal protection, the First Amendment, and substantive due process all require judicial inquiry of the legislator's motive." *Carver v. Foerster*, 102 F.3d 96, 104 (3d Cir. 1996). In such cases, "the balance of interests calls for the legislative privilege to yield." *Bethune-Hill*, 114 F. Supp. 3d at 343.

In sum, *none* of the factors relied on by courts in assessing legislative-privilege claims supports recognizing the privilege here. On the contrary, each factor makes clear that the privilege does not apply. "In this context, . . . the balance of interests calls for the legislative privilege to yield." *Bethune-Hill*, 114 F. Supp. 3d at 343. Because the GRAC members have made no effort at all to carry their burden to prove otherwise, this Court should order the GRAC members to sit for their depositions and produce responsive documents.

II. EVEN IF THE PRIVILEGE WERE AVAILABLE HERE, THE ASSERTION OF PRIVILEGE IS WHOLLY UNSUPPORTED BY FACTS OR EVIDENCE

Even if there were a basis in the abstract for asserting legislative privilege here (there is not), the subpoena targets have failed to support the privilege properly.

Once again, any individual asserting the privilege "has the burden of proving the preliminary facts of the privilege." *Bethune-Hill*, 114 F. Supp. 3d at 344 (quoting *Legislative Privilege*, 26A Fed. Prac. & Proc. Evid. § 5675 (1st ed.)). That means that it is insufficient to offer up "[a] conclusory assertion of privilege" without more. *Page*, 15 F. Supp. 3d at 661. On the contrary, "the proponent of a privilege must 'demonstrate specific facts showing that the [documents or deposition answers] were privileged.'" *Bethune-Hill*, 114 F. Supp. 3d at 344 (quoting *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 751 (E.D. Va. 2007)). That is an unavoidable requirement, given both that the privilege "may be waived" (*Schaefer*, 144 F.R.D. at 298), and that it applies only to the "integral steps" of the legislative process, not to post-enactment issues, documents, or communications (*Bethune-Hill*, 114 F. Supp. 3d at 342-45). Against this background, "one does not prove entitlement to legislative (or, indeed, any) privilege simply by asserting it." *Id*. Quite the contrary, the privilege "must be proved." *Id*. Yet the subpoena targets have done none of this. They have instead offered only naked assertions of privilege, lacking factual development.

In no respect is that more apparent than with the OAG's conclusory assertion of privilege concerning the deposition subpoenas. But even with respect to the document subpoenas, the three privilege logs served by Senator Miller, Speaker Busch, and Senator Madaleno are notably deficient.

Federal Rule of Civil Procedure 45(e)(2)(A) states expressly that "[a] person withholding subpoenaed information under a claim that it is privileged . . . must . . .

describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged, will enable the parties to assess the claim." Courts take this obligation seriously. "When a party relies on a privilege log to assert [a] privilege[], the log must 'as to each document set forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed.'" *Kelly v. United States*, 281 F.R.D. 270, 277 (E.D.N.C. 2012) (citing *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501-502 (4th Cir. 2011)).

In this case, that means establishing facts sufficient to show, at a bare minimum, that (1) the withheld documents and communications concern legislative purpose and intent; (2) the subject matter of the documents and communications concern "integral steps" of the legislative process; (3) the withheld documents and communications concern matters as to which the privilege has not been waived; and (4) the relevant individual has actually asserted the privilege. *See generally Bethune-Hill*, 114 F. Supp. 3d at 342-45; *Favors*, 285 F.R.D. at 211-212; *Schaefer*, 144 F.R.D. at 298; *Perez*, 2014 WL 106927, at *2.

Crucially, "the production of an inadequate privilege log may constitute waiver of any asserted privileges." *Mezu v. Morgan State U.*, 269 F.R.D. 565, 577 (D. Md. 2010) (quoting *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 2715164, at *4 (N.D.W. Va. 2006), and citing *Ruran v. Beth El Temple of W. Hartford, Inc.*, 226 F.R.D. 165, 168-169 (D. Conn. 2005), and *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 20-21 (D.D.C. 2004)).

Here, the privilege logs for Senator Miller, Speaker Busch, and Senator Madaleno have "failed to perfect [their] privilege claim," *Mezu*, 269 F.R.D. at 577 (citing *Ruran*, 226 F.R.D. at 168-69), with respect to each withheld document. In most

cases, the individuals sending or receiving the communications or documents are unidentified; individuals other than the subpoena targets are identified ambiguously as "staff," "delegates," or not identified at all. *See* Ex. O at Doc. Nos. 1-11; Ex. P at Doc. Nos. 1-9; Ex. Q at Doc. Nos. 2-4, 10. As a consequence, it is impossible to evaluate potential waivers of the privilege by those other parties. What is more, only general dates are given in several cases (*e.g.*, "2011" or "October 2011"), making it impossible to evaluate whether the communications or documents were in fact integral to the legislative process. *See* Ex. O at Doc. Nos. 1-2, 11; Ex. Q at Doc. No. 10. And at other times still, the privilege logs assert ambiguously that the withheld documents "*may* have been used" by the subpoena target in legislative deliberations. *See* Ex. O at Doc. No. 10; Ex. Q at Doc. No. 10. That of course opens the possibility that they were *not*.

Most fundamentally, neither the privilege logs nor the letter that accompanied them establishes that the lawmakers themselves actually asserted the legislative privilege. That is no mere technicality. "It is well settled that the legislative privilege 'is a personal one and may be waived or asserted by each individual legislator.'" *Favors*, 285 F.R.D. at 211 (quoting *Schaefer*, 144 F.R.D. at 298). "It follows, then, that [a third party] cannot assert or waive the privilege on behalf of [a] legislator" who holds the privilege. *Id.* (citing *A Helping Hand, LLC v. Baltimore Cnty., Md.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003)). Yet that is precisely what the OAG purports to do here: it asserts the privilege for the former members of the GRAC and Senator Madaleno on their behalves. That, it may not do—it must instead show that *they* have each individually asserted the privilege.

Because the claims of privilege (such as they are) are not supported by the necessary facts or evidence, the third-party subpoena targets have "failed to perfect

privilege claim." *Mezu*, 269 F.R.D. at 577 (citing *Ruran*, 226 F.R.D. at 168-169). As to the deposition subpoenas, the proposed deponents offer nothing at all; as for the document subpoenas, the subpoena targets offer only "terse" assertions of privilege that "[do] not constitute a particularized justification for asserting privilege" and are therefore "insufficient to establish any privilege." *Id*. They have therefore violated Fed. R. Civ. P. 45(e)(2)(A) and failed to carry their burden of proving applicability of the privilege. The motion to compel should be granted for that reason alone.

III. SENATOR MADALENO HAS WAIVED THE PRIVILEGE, TO THE EXTENT HE CAN ASSERT IT AT ALL

There is yet an additional reason to reject Senator Madaleno's assertion of privilege with respect to the requested documents: He cannot get around his express waiver. Plainly put, the legislative privilege "is 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). Crucially, "the 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." *Favors*, 285 F.R.D. at 211-12 (internal citations omitted; citing *Trombetta v. Bd. of Educ., Proviso Twp. High Sch. Dist. 209*, 2004 WL 868265, at *5 (N.D. Ill. 2004)). Thus, "[t]o the extent . . . that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications." *Perez*, 2014 WL 106927, at *2.

As relevant here, Senator Madaleno made statements to the press regarding "supposedly privileged matters" (*Favors*, 285 F.R.D. at 212 (internal quotation marks

omitted)), including the purpose of and intent behind the Plan. *See supra* at 5-6; *see also* Joint Stips. (ECF No. 104) ¶¶ 40, 63-65 & Exs. 7-9. 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. *See, e.g.*, *Favors*, 285 F.R.D. at 212; *Trombetta*, 2004 WL 868265, at *5. Responsive documents concerning legislative purpose and intent in the possession of Senator Madaleno are therefore discoverable. Senator Madaleno should not be allowed to describe the legislature's intent for his own purposes in public speeches on the one hand, while avoiding discovery of evidence impeaching or corroborating those statements, on the other.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel should be granted. The Court should enter an order compelling Ms. Hitchcock, Senator Miller, Speaker Busch, and Mr. Stewart to testify at a deposition without resting on an assertion of legislative privilege. And it should order Senator Miller, Speaker Busch, and Senator Madaleno to produce all responsive documents regardless of any invocation of legislative privilege.

Dated: January 3, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rules 104.7 and 104.8, I hereby certify that on December 20 and 21, 2016 counsel for Jeanne Hitchcock, Thomas Miller, Michael Busch, and Richard Stewart (Jennifer Katz and Sarah Rice) and counsel for Plaintiffs (Michael Kimberly, Stephen Medlock, Brantley Webb, and Micah Stein) met and conferred via telephone regarding the subpoenas *ad testificandum* served on Ms. Hitchcock, Senator Miller, Speaker Busch, and Mr. Stewart.

I further certify that on January 3, 2017, counsel for Plaintiffs (Stephen Medlock) met and conferred via telephone with counsel for Senator Miller, Speaker Busch, and Senator Madaleno (Sandra Brantley) concerning their responses to the document subpoenas.

The sole issue requiring resolution by the Court in this motion is the assertion of legislative privilege.

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