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.	*	

* *

MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH NON-PARTY DEPOSITION SUBPOENAS SERVED ON DELEGATE CURTIS S. ANDERSON AND SENATOR C. ANTHONY MUSE

On January 11 and 19, 2017, Plaintiffs' counsel served subpoenas for deposition on Maryland State Delegate Curtis S. Anderson and Maryland State Senator C. Anthony Muse, respectively, two non-parties in this matter. *See* Ex. 2. Delegate Anderson and Senator Muse have legislative privilege against compulsory evidentiary process regarding any matter relevant to this litigation, and thus the subpoenas for their depositions should be quashed. Moreover, neither legislator served on the Governor's Redistricting Advisory Committee ("GRAC") in connection with the 2011 redistricting process, and neither legislator has been identified in discovery as being involved in the 2011 congressional redistricting process, other than voting for Senate Bill 1 in the case of Delegate Anderson or against Senate Bill 1in the case of Senator Muse (ECF No. 104 ¶ 37). That neither sitting legislator has any relevant testimony to provide in this case is another justification for

quashing the deposition subpoenas, which seek to compel these sitting legislators to testify during the brief three-month session of the Maryland General Assembly.[1]

BACKGROUND

The redrawing of the boundaries of congressional districts in Maryland is done by ordinary legislation, passed in the ordinary manner, although it is developed and introduced by the Governor. For this reason, the Maryland Attorney General's Office has consistently advised that the bill specifying congressional districts, like most bills, may be petitioned to referendum. 46 *Opinions of the Attorney General* 90, 90-91 (1961). In fact, the law by which the congressional boundaries were drawn in 1961 was petitioned to referendum and rejected by the voters in 1962. *See* Laws of Maryland 1963 at 2251. The 2011 map at issue here was enacted as Chapter 1 during a special session of the General Assembly in 2011. That bill was also petitioned to referendum, but this time voters approved the redistricting plan in the 2012 general election.[2]

Governor O'Malley announced the formation of the Governor's Redistricting Advisory Committee for the 2011 redistricting process on July 4, 2011. The five-member committee was created to "hold public hearings, receive public comment, and draft a recommended plan for the State's legislative and congressional redistricting." Press

[1] *See* http://mgaleg.maryland.gov/Pubs-current/current-session-dates.pdf.

[2] The Maryland State Board of Elections website publishes election results. The 2012 election results for the referred question on the congressional plan, which was Question 5, can be found at www.elections.maryland.gov/elections/2012/results/general/gen_qresults_2012_4_00_1.html. The results show that 64.1 percent voted "For" the redistricting plan and 35.9 percent voted "Against."

Release, Office of the Governor, *O'Malley Announces Members of The Governor's Redistricting Advisory Committee* (July 4, 2011) *available at* http://www.pgpost.com/1.html (last accessed January 6, 2017). Neither Delegate Anderson nor Senator Muse was a member of the GRAC. Both Delegate Anderson and Senator Muse have been served with document subpoenas in this case seeking documents relating to 2011 congressional redistricting process. Delegate Anderson responded that he had no responsive documents in his possession, custody, or control. *See* Ex. 3, letter from S. Brantley to S. Medlock. Senator Muse provided responsive documents that have nothing to do with the subject matter of this case – alleged partisan gerrymandering – and instead relate to his opposition to Senate Bill 1 based on concerns about minority vote dilution. *See* Ex. 4, email from B. Calhoun to M. Stein and attachments. Not only are Senator Muse's concerns about minority vote dilution not relevant to the Plaintiffs' claim in this case, but issues relating to alleged minority vote dilution were litigated and fully resolved in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012).

Given the broad scope of objective evidence the Plaintiffs have received in this case, including thousands of pages of non-privileged documents; 76 joint stipulations, including stipulations as to the existence of legislators' public statements, audio files of legislative proceedings, demographic and political data files; and draft maps considered by the GRAC, these deposition subpoenas should be quashed because they seek nothing more than to invade Delegate Anderson's and Senator Muse's subjective legislative motivations and intent in voting for or against the Plan or their speculation about others' legislative intent.

ARGUMENT

I. THE SUBJECTS OF THE SUBPOENAS HAVE A TESTIMONIAL PRIVILEGE PROTECTING THEM FROM COMPULSORY PROCESS AIMED AT DISCOVERING THEIR LEGISLATIVE MOTIVE AND INTENT.

Under Maryland law, as members of the General Assembly, legislators and their staff are protected from liability for or inquiry into their legislative activities by an absolute constitutional privilege contained in Maryland Declaration of Rights Article 10 and Maryland Constitution Article III, § 18. *Mandel v. O'Hara*, 320 Md. 103, 113 (1990); *Blondes v. State*, 16 Md. App. 165 (1972). This immunity applies to all acts that are legislative in nature. *Mandel*, 320 Md. at 106. "The policy is to free the officer from the necessity of submitting [the officer's] purposes, motives and beliefs to the uncertain appraisal of juries or even judges." *Id.* This immunity and the attendant legislative privilege is not qualified or conditional, but absolute. *Id.* at 107, 134.

Maryland legislators are also immune from suit arising from their legislative activities and protected from compulsion to testify about their legislative activities under federal law. *See Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951) (extending legislative immunity and legislative privilege to state legislators as an application of federal common law). In *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998), the Supreme Court highlighted the "venerable tradition" of protecting State legislators from liability for their legislative activities by application of an absolute immunity from suit. As the Court recognized, whether at the federal, state, or local level, "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* at 52.

The Fourth Circuit treats a state legislator's absolute legislative immunity from suit and legislative privilege against compulsory evidentiary process as "parallel concept[s]." *E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011) (hereinafter "*WSSC*"). This is because the legislative privilege "exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *Id.* at 181. Legislative immunity's "practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out." *Id.* at 181. *See also McCray v. Maryland Dept. of Transportation*, 741 F.3d 480, 485 (4th Cir. 2014); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 470 (4th Cir. 2012).

"Absolute immunity enables legislators to be free, not only from 'the consequences of litigation's results, *but also from the burden of defending themselves.*'" *Id.* (quoting *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967))) (emphasis added in *WSSC*). And "[b]ecause litigation's costs do not fall on named parties alone," the Fourth Circuit has explained that legislative "privilege applies whether or not the legislators themselves have been sued." *WSSC*, 631 F.3d at 181. Accordingly, in the Fourth Circuit, legislative privilege is treated as absolute, and where a party seeks "to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.* (citing *Burtnick*, 76 F.3d at 613); *see also*

Burtnick, 76 F.3d at 613 (noting that the plaintiff would have to make a prima facie ADEA case without testimony from city council members unless they waived the privilege).

Delegate Anderson and Senator Muse, as sitting members of the General Assembly who voted on Senate Bill 1, are protected from a legislative privilege from being compelled to testify about their legislative motives in voting for or against Senate Bill 1, or from speculating about others' legislative motives or intent. In a precisely analogous cause of action challenging state legislation on the theory that it was unconstitutional under the First Amendment because it was enacted to retaliate against the plaintiffs for their engagement in certain political activities, the Fourth Circuit held that it was error for a trial court to admit the testimony of sixteen current and former legislators on the topic of their motivation in enacting the statute. *South Carolina Education Ass'n v. Campbell*, 883 F.2d 1251, 1260 (4th Cir. 1989). With regard to the compelled testimony of the legislators about "the content of their speeches and the statements made by colleagues in the legislative chamber"; "their motives in supporting or opposing various legislative actions"; and their "speculat[ion] about the motives of colleagues," the Fourth Circuit stated, at 1262:

> Such an inquiry is inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers. Moreover, probing inquiries by federal courts into the motivations of legislatures by calling representatives to testify concerning their motivations and those of their colleagues will doubtlessly have a chilling effect on the legislative process.

The Supreme Court has never held that the legislative privilege should yield in a challenge to a redistricting law because of the nature of the constitutional claim. *Contrast United States v. Gillock*, 445 U.S. 360, 373 (1980) (privilege yields in criminal

prosecutions). And when discussing types of evidence that may shed light on whether an "invidious discriminatory purpose was a motiving factor" of a legislative act in the absence of objective direct and circumstantial evidence, the Court was careful to note that while there may be "some extraordinary instances" when legislators "might be called to the stand at trial to testify concerning the purpose of the official action, . . . *even then* such testimony frequently will be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (emphasis added) (discussing methods of proof of intent in equal protection zoning case). *Id.* At the same time, the Court also pointed out that it "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131, 3 L. Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided.'" 429 U.S. at 268 n.18.

Notably, this is not a case where the Plaintiffs must adduce evidence of subjective legislative motivation to prevail. Rather, the Plaintiffs seek to gather evidence of subjective intent when such evidence would be *insufficient* to prove their claim. (ECF No. 88 at 33-34.) This Court has held that plaintiffs must prove their cause of action through objective evidence of intent, not subjective evidence, thus making clear that this is not an "extraordinary instance" as contemplated in *Village of Arlington Heights*.

Moreover, it is unclear what possible relevant evidence Delegate Anderson or Senator Muse could provide, given that neither legislator was a member of the GRAC, and neither legislator has been identified through discovery in this case as having been involved in drawing the proposed map (*see* Ex. 5, Defs.' Resp. to Interrog. 6). Other than making a

handful of contemporaneous statements at the time the Plan was enacted over five years ago, these legislators were merely briefed on the Plan during a legislative session and voted for or against the Plan, *see* ECF No. 104 ¶¶ 35, 37.

Accordingly, to the extent this Court adopts and applies the five-factor test put forth by the Plaintiffs' in their motion to compel legislator testimony in this case, the test weighs strongly against compelling either State legislator to testify here. This five-factor "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." *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 338 (E.D. Va. 2015) (involving allegations of racial gerrymandering in violation of the Equal Protection Clause) (quoting *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014) (same)).

As to relevancy, as discussed neither legislator was a member of the GRAC, and neither legislator has been identified in discovery as having any involvement in drafting the plan submitted by the Governor. Thus, to the extent subjective intent of those drafting the legislation even is relevant to the Plaintiffs' claims, these two legislators would have no relevant testimony to provide. Moreover, this Court has stated that the plaintiffs "must produce *objective* evidence" of specific intent, (ECF No. 88 at 33-34 (emphasis added)), a type of evidence that cannot be adduced through two legislators who voted for or against the Plan. Second, there is ample other relevant evidence available to the Plaintiffs in this case. The 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.

This available evidence is consistent with the types of evidence the Supreme Court described in *Village of Arlington Heights*, circumstantial or direct, that a plaintiff could use to sufficiently show improper legislative motive. Examples of such evidence include the historical background of the legislation, the specific sequence of events leading up to the legislation, departures from the normal procedural process, substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Additionally, the legislative history may be highly relevant, including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 267-68. Notably, the Plaintiffs already have access to Delegate Anderson's and Senator Muse's contemporaneous public statements.

Finally, although constitutional challenge to a redistricting plan is no doubt a serious matter,[3] as the Supreme Court, the Fourth Circuit and numerous other courts have continuously emphasized, allowing litigants to subject legislators to compulsory process should only be allowed in the most extraordinary of circumstances. "Inquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391

[3] Notably, the Plaintiffs waited to bring suit until nearly one year after the first election under the plan had taken place and did not bring claims involving motives or the intent of the legislature until they filed their second amended complaint in March, 2016. *Compare* ECF No. 1 at 3 *with* ECF No. 44. Therefore while serious, the Plaintiffs have not pressed their claims with any particular urgency.

U.S. 367, 383-84 (1968). Intrusion into the inner workings of a sister branch of government should be limited, and allowing depositions of individuals engaged in legislative activity after *Bogan v. Scott-Harris* would be a break with a consistent application in the Fourth Circuit of legislative privilege as an absolute testimonial privilege. Moreover, the Plaintiffs seek to depose the non-party legislators during the brief three-month session of the Maryland General Assembly, posing an even greater intrusion into the legislature's work.

CONCLUSION

For the reasons set forth above, this Court should enter a protective order and quash the non-party deposition subpoenas served on Curt Anderson and C. Anthony Muse.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: January 23, 2017

___/s/__Jennifer L. Katz_____
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

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 Curt Anderson and C. Anthony Muse

TABLE OF EXHIBITS

Exhibit No. Title

1. Intentionally left blank

2. Deposition subpoenas served on Curt Anderson and C. Anthony Muse

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

4. Email from Brandi Calhoun, Chief of Staff to Senator Muse, to Micah Stein and attachments, Dec. 20, 2016

5. Defendants' Supplemental Responses to Plaintiffs' First Set of Interrogatories