IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO QUASH THE DEPOSITIONS OF DELEGATE CURTIS S. ANDERSON AND SENATOR C. ANTHONY MUSE (DKT. 126) AND FORMER SENATOR ROBERT GARAGIOLA (DKT. 127)

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INTRODUCTION

One thing is by now clear: the State will resist every effort that Plaintiffs make to obtain discovery on the question of legislative intent. Its now-evident strategy is to burden Plaintiffs and the Court with the same cookie-cutter brief, errantly asserting legislative privilege, in response to every single deposition subpoena that it receives.

To avoid yet further duplicative motions practice, we have not filed redundant cross-motions to compel. Instead, we summarize our arguments in this consolidated opposition concerning the inapplicability of the state legislative privilege; we also offer additional reasons to deny the privilege with respect to Delegate Anderson, Senator Muse, and former Senator Garagiola, in particular.

Unlike the State, which has shown little willingness to participate meaningfully in discovery, we have produced every piece of discovery that has been requested of us. We have provided the State with detailed interrogatory answers, produced over 3,000 pages of documents, and made each of the Plaintiffs available for a deposition. In this opposition and in our other discovery motion papers, we merely ask that the State show the same respect and cooperate equally in the discovery process.

REASONS FOR DENYING THE MOTIONS

A. The State's cut-and-paste motions fail for the same reasons that its prior discovery motions fail

We have explained, at length, the reason that the State's position concerning state legislative privilege is mistaken. *See* 1/16 Pls.' Opp. to Motion to Quash 3-12 (Dkt. No. 120) ("1/16 Opp."); 12/29 Motion to Compel 13-28 (Dkt. 125-1) ("12/29 Motion"); 1/3 Motion to Compel 10-23 (Dkt. 111-1) ("1/3 Motion"); Reply ISO 1/3 Motion 1-7 (Dkt. 123) ("1/3 Reply"). So as not to burden the Court with verbatim re-argument of our

positions, we incorporate our prior arguments by reference and briefly summarize the key bullet points below:

- State legislative privilege is unavailable in federal cases like this one, where individual state lawmakers face no threat of personal liability, the request for relief is injunctive only, and the privilege "stands as a barrier to the vindication of important federal interest and insulates against effective redress of public rights." *See* 12/29 Motion 13-18; 1/3 Motion 10-15; 1/16 Opp. 3. *See also Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 334 (E.D. Va. 2015) (three-judge district court). Throughout its repetitive, cut-and-paste motions practice, the State has yet to respond meaningfully to this fundamental point.

- State law on legislative privilege is inapplicable in cases in federal court turning on federal law. We pointed this out in our January 16 opposition to the State's last motion to quash (1/16 Opp. 4), but the State ignores our argument, continuing to cite state-law authorities.

- The State's cases are all inapposite. We persuasively distinguished *Bogan*, *Kensington Volunteer Fire Department*, *WSSC*, *McCray*, and *Mitchell* in our last opposition brief (1/16 Opp. 6-8), but the State goes on citing those same cases without even acknowledging, much less responding to, our arguments.

- The State has not met its burden under the five-factor balancing test from *Bethune-Hill*. As we have shown, the testimony of subpoena targets (concerning not only their personal motivations, but also what they were told by the GRAC, what data and facts they know the GRAC considered, and what data and facts they themselves considered) will be highly relevant; there is no more probative evidence of specific intent; the federal constitutional issues in this litigation are serious and important;

state officials played a direct, central, and essential role in the constitutional violations here, and the proposed deponents had front-row seats; and compelling disclosure of the evidence sought will not conflict with the purposes of the privilege. *See* 12/29 Motion 18-25; 1/3 Motion 16-22; 1/3 Reply 1-5.

- We explained in the 12/29 Motion (at 15-16) and in the 1/16 Opposition (at 10) that the State is simply wrong to describe the General Assembly as a "sister branch of government." As the Supreme Court has said, "federal interference in the state legislative process *is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch*" (*United States v. Gillock*, 445 U.S. 360, 370 (1980) (emphasis added))—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). Thus not only is the separation-of-powers argument simply unavailable to the State, but it should go without saying that state officials cannot invoke mere federal-state comity to avoid federal judicial scrutiny of official state conduct that violates the Federal Constitution. Once again, the State persists making obviously wrong arguments, verbatim, as though our responsive arguments did not exist.

- The assertion of the privilege is once more wholly unsupported by the facts or evidence. As was true of the 1/9 Motion to Quash and the opposition to the 1/3 Motion to Compel, the State has failed to offer one shred of actual evidence to meet its "burden of proving the preliminary facts of the privilege." *Bethune-Hill*, 144 F. Supp. 3d at 344. We laid out in detail the facts that the State must prove the establish entitlement to the privilege (*e.g.*, 12/29 Motion 25-27), but the State has refused every opportunity to offer evidence meeting its burden—including here.

With these points and principles in mind, we turn now to the particular shortcomings of the State's motions with respect to Delegate Anderson, Senator Muse, and former Senator Garagiola.

B. Delegate Anderson, Senator Muse, and former Senator Garagiola have each waived whatever privilege they may have had

As with its prior discovery motions, the State's blanket assertion of privilege does not take into account the facts that Delegate Anderson, Senator Muse, and former Senator Garagiola have each waived the legislative privilege, in two ways.

First, each has answered our compulsory document subpoenas. *See* Ex. A, B, C. Having done so—not as a courtesy but evidently in the belief that they were *required* to do so—these members of the General Assembly cannot now assert that they enjoy "absolute immunity" (Motions to Quash 4-5) from answering compulsory process in this federal lawsuit. To the extent they ever had an absolute privilege, they have clearly waived it. *See* 1/3 Reply 5.

Second, when legislators share information otherwise protected by the state legislative privilege with third-parties, they necessarily waive the privilege with respect not only to those particular communications, but with respect to all matters that are the subject of those communications. *See, e.g.*, 1/3 Reply 6 (a "voluntary disclosure" of a privileged fact "not only waives the privilege as to the specific information revealed, but also waives the privilege as to the subject matter of the disclosure" as a whole) (quoting *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998)). Otherwise, litigants could manipulate the fact-finding process by selectively disclosing fragments of evidence in ways that paint less than the full truth. Thus, when a witness discloses anything on a privileged subject, he must disclose everything; "subject matter waiver"

of this sort "ensure[s] that fair context is provided." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 345 n.8 (E.D. Va. 2015).

What is more, "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 v. Cuomo*, 285 F.R.D. 187, 211-212 (E.D.N.Y. 2012) (citation omitted) (citing *Trombetta v. Bd. of Educ.*, 2004 WL 868265, at *5 (N.D. Ill. 2004)). *See generally* 12/29 Motion 28-29.

Against this backdrop, there is ample evidence of waiver with respect to Delegate Anderson, Senator Muse, and former Senator Garagiola.

Delegate Anderson. On October 3, 2011, Delegate Curt Anderson described a briefing given by the GRAC chair, Jeanne Hitchcock, about the proposed Sixth District: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Ex. D (Plaintiffs' Supplemental Interrogatory Responses) at Supp. Interrog. Resp. 7. *See also* Joint Stips. ¶ 46 & Ex. 13 (Dkt. 104). Furthermore, in an October 17, 2011 interview, Delegate Anderson stated, "What we're doing is we are trying to get more, in terms of—currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming out of Montgomery County and going into Western Maryland that would give the Democrats more." *Id.*

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

privilege on the topic of specific intent. Accordingly, we are entitled to question him on those matters, without which "fair context [would not be] provided." *Bethune-Hill*, 114 F. Supp. 3d at 345 n.8.

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

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

Ex. A at Supp. Interrog. Resp. 7. *See also* Joint Stips. ¶ 42 & Ex. 11 (emphasis added).

Senator Muse also spoke to the press regarding the 2011 Congressional Plan:

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

Ex. N at 4, 12/29 Motion at 31 (emphasis added).

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

Former Senator Garagiola. In response to our document subpoena, former Senator Garagiola produced an email revealing his own knowledge of the GRAC's

specific intent to crack the Sixth District. On October 4, 2011, prior to the GRAC making its 2011 Congressional Plan public, former Senator Garagiola wrote:

> The map will be public today. There still may be minor changes before the General Assembly convenes in less than two weeks. The 6th District would comprise about 40% of Montgomery County, including northern and western parts. It would include southern Frederick and the City of Frederick. The rest of Frederick would be in Van Hollen's district. All of Washington, Allegheny, and Garrett would remain in the 6th. The Dem performance would be 53%. All good news.

Ex. E. We are entitled to ask former Senator Garagiola questions regarding this statement, including the source of this non-public information, how he learned that "[t]he Dem performance would be 53%," and why this non-public information was shared with former Delegate Garagiola before it was made public.

CONCLUSION

The motions to quash should be denied, and the motions to compel should be granted. Delegate Anderson, Senator Muse, and former Senator Garagiola—along with Defendants and all of the other third-party subpoena targets—should be ordered to produce responsive documents and to sit for, and answer questions at, deposition without regard for any assertion of legislative privilege.

Dated: January 27, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2017, a copy of the foregoing Consolidated Opposition was filed in the United States District Court for the District of Maryland, electronically served upon all counsel of record through the Court's CM/ECF system, and served via electronic mail upon counsel for non-parties Curtis S. Anderson, C. Anthony Muse, and Robert Garagiola.

/s/ *Stephen M. Medlock*

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