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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER OF THE FULL COURT APPROVING OR OTHERWISE DIRECTING COMPLIANCE WITH THE COURT'S JANUARY 31, 2017 AND FEBRUARY 3, 2017 DISCOVERY ORDERS

Michael B. Kimberly, Bar No. 19086
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Micah D. Stein, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

INTRODUCTION

Judge Bredar, acting on his authority under 28 U.S.C. § 2284(b)(3), entered two orders for the Court on January 31, 2017, and February 3, 2017, correctly rejecting the State's assertion of state legislative privilege in this case and compelling compliance with Plaintiffs' third-party subpoenas. Dkts. 132, 133. The State has refused to comply. It has *continued* to assert third-party legislative privilege in its responses to our discovery requests, *continued* to refuse to produce documents identified in its earlier privilege logs, and *continued* to assert that no state official need yet sit for deposition, all in flat violation of the Court's orders.

The State did not move for an immediate stay of the Court's January 31, 2017, and February 3, 2017 orders, did not request that Judge Bredar make the orders contingent on approval by the full three-judge Court, and did not (despite Plaintiffs' suggestion) ask for initial consideration of its motions by the full Court. Instead, the State has simply declared, unilaterally, that it will not comply with the Court's rulings until the full three-judge panel has exercised its discretion to review them—relief that, one week on, it still has not sought.

Plaintiffs cannot stand idly by while the discovery clock continues to count down. Fact discovery was initially scheduled to close on February 10, but the State's repeated assertion of privilege has necessitated an extension of that deadline. Although the parties have now reached an agreement to extend the discovery schedule by three weeks, to and including March 3, 2017 (*see* Ex. B), even the extended schedule leaves limited time to prepare for and take *seven* depositions, the first of which is scheduled to take place in just nine days, on February 17. And it is no answer to say that Plaintiffs can seek a further extension of the discovery schedule if one later becomes necessary.

As we have explained from the start, time is of the essence in this case. Should Plaintiffs ultimately prevail, final judgment must be entered by early summer, in time for the Governor and General Assembly to negotiate and enact a new map in time for the 2018 primary election cycle. And that is to say nothing of the likelihood that the losing party will appeal to the Supreme Court. The State should not permitted to delay progress in a case of this importance and urgency by simply choosing not to comply with discovery orders duly issued by Judge Bredar.

In our view, the issues presented by the State's assertion of legislative privilege are sufficiently clear that the full Court's review is unnecessary. We therefore request the full Court enter a summary order declining further review of the January 31, 2017, and February 3, 2017 orders and directing immediate compliance. If the Court disagrees and exercises its discretion to review the orders on their merits, we ask that the full Court to summarily approve Judge Bredar's orders for all of the reasons laid out fully in our briefing on the motions. *See* Dkts. 111, 120, 123, 125-1, 125-3, 128, 131.

BACKGROUND

Plaintiffs allege that the State of Maryland—through the 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 all congressional elections in the Sixth District under the 2011 redistricting plan (the Plan).

1. In its opinion denying the State's motion to dismiss (Dkt. 88), the Court held that to prove their claims, Plaintiffs must (among other things) "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." *Shapiro v. McManus*, --- F. Supp. 3d ---, 2016 WL 4445320, at *11 (D. Md. 2016).

To meet this burden, Plaintiffs served a combination of document and deposition subpoenas on former GRAC chair Jeanne Hitchcock; Maryland Senate President Thomas "Mike" Miller, Jr.; Maryland House Speaker Michael Busch; former GRAC member Richard Stewart; Senator Richard Madaleno, Jr.; Senator C. Anthony Muse; Delegate Kurt Anderson; and former Senator and Democratic candidate for Congress from the Sixth District, Robert Garagiola. We similarly propounded requests for documents, interrogatories, and requests for admissions on the named Defendants, seeking documents and information concerning the drafting of the Plan.

2. In response to every last subpoena and discovery request, the Office of the Attorney General filed motions and served objections asserting that current and former state officials are absolutely and categorically immune from having to answer compulsory process in this case pursuant to the state legislative privilege doctrine. *See* Dkts. 111-3 thru 111-21; Dkt. 114; Dkt. 126. At the same time, Plaintiffs filed motions to compel the third parties to produce documents and appear at deposition (Dkt. 111) and to compel the defendants to answer our discovery requests (Dkt. 125). The parties' positions are fully developed in their briefing on the two motions to quash and the two motions to compel, which comprise 1,162 pages of argument and exhibits.

In summary: We argued that state officials cannot duck their federal constitutional obligations by hiding behind claims of state legislative privilege—a creature of federal common law only. That rule, which is affirmed consistently in the case law, has special force in federal lawsuits of broad public importance seeking injunctive relief under the Federal Constitution, in which no state official faces a threat of personal liability. We explained that courts often face claims of state legislative privilege in cases like this one, and relying on a settled balancing test, they virtually always reject them. We explained further that the balancing test applied by other courts in cases like this tips decisively in favor of denial of the privilege. Finally, we demonstrated at length that the State had failed to meet its evidentiary burden to prove the facts necessary to support assertion of the privilege (despite numerous opportunities), and separately that each of the subpoena targets had waived privilege in myriad ways since enactment of the 2011 redistricting plan.

The State disagreed. It took the position that all of the state officials in this case are categorically immune from having to answer compulsory process. In support of that dubious assertion, it cited state-law authorities that have no application to this federal lawsuit; and inapposite federal-law authorities involving assertions of the legislative privilege by state officials defending themselves in private lawsuits seeking awards of damages. Beyond that, the State asserted (puzzlingly) that testimony from individual legislators and the members of the GRAC would be "irrelevant" to our claims because such testimony would provide only "subjective" evidence concerning "subjective" intent, and not objective evidence concerning specific intent. The State never produced an iota of evidence to support the officials' assertion of privilege and generally declined to respond to the arguments and authorities that we cited.

3. Acting on his authority under 28 U.S.C. § 2284(b)(3), Judge Bredar rejected the State's arguments, entering an order for the Court denying the motions to quash and granting the first motion to compel. *See* Dkts. 132-133.[1] "After considering all of the parties' arguments," Judge Bredar explained, "the Court concludes the legislative privilege claimed by the Non-Parties must yield to the discovery requests of Plaintiffs." Dkt. 132, at 3. Judge Bredar gave "no weight to the Non-Parties' contention that the Court's earlier opinion purportedly prohibited Plaintiffs from using 'subjective evidence,'" which he described as "a distortion of what the opinion actually said." *Id*. at 4. At bottom, Judge Bredar "[could] not endorse" the State's efforts "to bar essential discovery of evidence that lies at the heart of this case." *Id*. And "[a]lthough the Non-Parties' compliance with the subpoenas served upon them may involve some inconvenience," he concluded, "such inconvenience [is] minor in comparison to the weight of the litigation, which seeks to vindicate fundamental constitutional rights." *Id*. at 7. He accordingly denied both motions to quash and granted the first of Plaintiffs' motion to compel. Plaintiffs' second motion to compel (Dkt. 125) remains pending.

4. Notwithstanding the Court's order, both Defendants and the third-party subpoena targets have continued (through common counsel in the OAG) to assert legislative privilege as a basis for refusing to produce documents, answer requests for admissions, and appear at depositions. For example, Defendants have continued to refuse to answer our Requests for Admission 24-25, asserting that they lack sufficient knowledge "in part because of continued assertion of legislative privilege in response to

[1] An order issued with respect to Jeanne Hitchcock, Senator Miller, Speaker Busch, Richard Stewart, and Senator Madaleno on January 31, 2017. Dkt. 132. A second order issued with respect to Senator Muse, Delegate Anderson, and former Senator Garagiola on February 3, 2017. Dkt. 133.

inquiry regarding these matters by Senate President Miller and House of Delegates Speaker Busch." *See* Ex. A at 6. In the parties' February 7, 2017, meet-and-confer concerning Defendants' most recent (post-order) discovery responses, counsel for the State explained further that they also will not produce documents in response to our third-party document subpoenas on the continued basis of legislative privilege. Counsel explained they were continuing to assert legislative privilege and will not yet comply with the Court's discovery orders because they had not yet had an opportunity to seek and obtain a decision concerning their legislative privilege arguments from the full Court. They also informed us that they will not make any further state officials available for deposition before such a ruling.[2]

REASONS FOR GRANTING THE MOTION

Section 2284(b), Title 28, provides that, in actions covered by Section 2284(a), "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure" other than orders granting or denying injunctions or entering judgment on the merits. That is just what Judge Bredar did when he denied the State's motions to quash and granted the first of Plaintiffs' motions to compel: He entered valid, standing orders *of the Court*, requiring compliance with our third-party deposition and document subpoenas. As we noted at the outset, the State did not move for a stay of the discovery orders and did not request that Judge Bredar make the orders contingent on approval by the full three-judge court.

The State has instead taken the untenable position that it need not comply with the Court's January 31, 2017, and February 3, 2017 orders until it first seeks and

[2] We deposed former Senator Robert Garagiola on February 3, 2017, after he agreed to waive all claims to legislative privilege.

obtains full-Court review on a schedule of its own choosing. There is nothing in either the text of the statute or common sense to support that position. To be sure, Section 2284(b) provides that "[a]ny action of a single judge *may* be reviewed by the full court at any time before final judgment." 28 U.S.C. § 2284(b)(3) (emphasis added). But that language is merely permissive, not obligatory; it does not entitle the State as of right to further review of any single-judge orders. And the statutory language assuredly does not say that single-judge orders are unenforceable or without effect until the full three-judge court enters a subsequent order on review.

The State's refusal to comply with the Court's discovery orders are, meanwhile, prejudicing Plaintiffs. We served the first of our deposition subpoenas on December 19, 2016, more than seven weeks ago. Yet it was only late yesterday—three days from the original close of discovery—that the State provided us with acceptable dates for these depositions. *See* Ex. C. Meanwhile, although the parties have agreed to a three-week extension of the discovery deadline (Ex. B)[3] to permit Plaintiffs to take the depositions compelled by the January 31, 2017, and February 3, 2017 orders, the clock continues to tick. The first of the depositions (for Senator Muse) is scheduled for February 17, 2017—just nine days from today. Richard Stewart's depositions, meanwhile, is scheduled for February 21. And counsel for Plaintiffs need time to review as-of-yet withheld documents in order to prepare adequately for those depositions.

Against this backdrop, Plaintiffs respectfully request that the full Court enter an expedited order declining review and directing the State to comply with the January 31, 2017, and February 3, 2017 discovery orders or otherwise approving the orders on

[3] With Defendants' consent, Plaintiffs intend to file a joint stipulation to an extension of the discovery deadline by close of business tomorrow. *See* Ex. D.

their merits. Because the issues were already subject to more than 1,100 pages of briefing and exhibits, and because Judge Bredar's careful opinion is consistent with settled law (the State could not cite a single redistricting case in which the legislative privilege was upheld), we do not believe that full-Court review is necessary. If the full Court nevertheless exercises its discretion to review the January 31, 2017, and February 3, 2017 discovery orders, Plaintiffs respectfully refer the Court to their prior briefs (Dkts. 111, 120, 123, 125-1, 125-3, 128, 131), which fully develop their arguments on the matter.

CONCLUSION

The full Court should enter an order (1) declining to review, and directing the State to comply with, the Court's January 31, 2017, and February 3, 2017 discovery orders or (2) otherwise approving the orders on their merits.

Dated: February 8, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Micah D. Stein, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)