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.	*	

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REPLY IN SUPPORT OF MOTION FOR
REVIEW OF THREE-JUDGE COURT

Soaring rhetoric aside, plaintiffs do not offer any "extraordinary circumstances" that would justify setting aside the testimonial legislative privilege of the seven nonparty movants. Throughout their opposition motion, plaintiffs have stretched both the facts and the law, but have been unable to adequately explain why the circumstances of this case constitute "exceptional circumstances" sufficient to set aside the longstanding federal common law absolute testimonial privilege afforded to state and local legislators. The considerations undergirding legislative privilege are important ones and plaintiffs have been provided with ample alternative sources of proof in this case. The January 31 and February 3 orders should therefore be vacated.

BACKGROUND

Plaintiffs' recounting of the document production in this case is disingenuous. As an initial matter, plaintiffs omit to mention that their document requests came more than five years after enactment of the plan. Before the instant suit was filed, (1) the same

defendants that have been sued in this case prevailed in previous litigation involving racial and political gerrymandering claims, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012); (2) the map was ratified by Maryland voters after it was petitioned to referendum (ECF No. 104 ¶ 39); and (3) one year had passed since the first election held under the plan. Moreover, for the majority of the life of this suit, the pleadings expressly disclaimed legislative intent as an element of the cause of action at issue. *See* ECF Nos. 1 ¶ 2, 11 ¶ 2. Before the plaintiffs amended their complaint to encompass a cause of action that required more factual support than the contours of the 2011 congressional redistricting map itself, the executive administration that had propounded the map faced term limits; a general election took place; and the Maryland executive switched parties.

All of these events have, unsurprisingly, contributed to confusion about where documents related to the 2011 congressional plan are located. Notably, the bulk of the documents were collected and preserved by the Department of Planning and have been produced (in multiple formats and in response to multiple channels of request) to the plaintiffs. Each of the movants still in possession of documents also produced documents in response to the document subpoenas. In supplement, additional documents in the custody of Senate President Miller evidencing the map drafts considered by the GRAC and their underlying data files were produced in response to the January 31, 2017 order. Senate President Miller and Speaker Busch have also searched for and produced (or withheld according to a privilege log) all responsive documents in their offices. Ex. 4.

Jeanne Hitchcock is now a private citizen and serves as the Special Advisor to the Vice President for Local Government, Community and Corporate Affairs for Johns Hopkins University. "Office of the Vice President," http://web.jhu.edu/administration/gca/vice_president/ (last accessed February 21, 2017). Richard Stewart always was a private citizen, and, having saved emails pertaining to redistricting in a folder in his private email account, was able to produce them to plaintiffs. It would have been strange indeed for either of these private citizens to retain material related to their state service after that service had concluded. All of the GRAC papers related to redistricting had been collected and stored at the Department of Planning, and had already been produced to plaintiffs in this litigation, including copies of the briefing books given to Ms. Hitchcock and Mr. Stewart. *See* ECF No. 104 ¶ 24.

Moreover, plaintiffs' claim that the "Democratic National Redistricting Trust retained NCEC Services, Inc.—a Democratic consulting firm—to assist legislators in Democrat-control-led states with drafting new congressional maps" (ECF No. 152 at 3) is completely unsupported. Insofar as the claim is true, plaintiffs have produced no evidence that such a statement applied to the Maryland legislature. All of the emails plaintiffs reference involve congressional strategy discussions among congressional staff (Exhibit B, G), discuss meetings with no indication of the topic (Exhibit B, F), include one-way offers of help (Exhibit A, D), or are technical conversations taking place after Senate Bill 1 was introduced about minor discrepancies between the GRAC's final map and the bill

language.[1] (Exhibit C.) Even the e-mail from Congressman Sarbanes to former Governor O'Malley is a one-way request. (Exhibit F.)

That the Maryland Congressional delegation lobbied some of the nonparties should come as no surprise. Maryland legislators, party organizations, neighborhood associations and private citizens all did so as well. *E.g.*, ECF 104 ¶ 23; Ex. 2. Moreover, the GRAC members publicly stated that they took multiple Congressional requests into account when drafting the map. ECF Nos. 104-6, 104 ¶ 50. None of these concerns bears directly on plaintiffs' asserted cause of action, which is focused solely on an intent to retaliate against registered Republican voters in the 6th District.[2]

ARGUMENT

I. FEDERAL COMMON LAW LEGISLATIVE PRIVILEGE PROTECTS IMPORTANT FEDERAL INTERESTS AND SHOULD ONLY BE SET ASIDE IN "EXTRAORDINARY CIRCUMSTANCES."

While plaintiffs seek to minimize the important concerns animating the application of legislative privilege, they have failed to identify a single other court order (published or unpublished) compelling legislators to testify at deposition without ability to assert legislative privilege as to subjective intent and motivation. Furthermore, plaintiffs have

[1] Plaintiffs misleadingly do not include an email that indicates that the September 2011 proposed meeting between Mark Gersh, Speaker Busch, and Senate President Miller may not have taken place. Ex. 1.

[2] Plaintiffs' suggestion that the movants sought review by the three-judge court and produced documents only in response to Judge Bredar's show-cause order is wrong, given that the instant motion was filed and documents and the amended privilege logs were produced approximately one hour after the show-cause order was entered. Movants continue to be perplexed by the plaintiffs' insistence that they were engaged in dilatory tactics. Movants timely exercised their statutory rights to seek review by the three-judge court within 10 days, the shortest time period for any review provided by the federal rules.

not addressed why the unique procedural posture of *Perez v. Perry*,[3] where the deposition subpoena targets sought to use the privilege as a sword and shield to testify to some matters while invoking privilege as to others, does not render the case entirely inapposite here, where movants have fully asserted their legislative privilege against compelled testimony. Similarly, plaintiffs have given no explanation why *Nashville Student Organizing Committee v. Hargett*, 123 F. Supp. 3d 967 (M.D. Tenn. 2015) should hold any persuasive weight when the deposition subpoena targets had not even argued that the depositions would have a chilling effect and failed to object to the deposition protocol that the plaintiffs in that case proposed and the court ultimately adopted. *Id.* at 970, 971 n.7.

Plaintiffs' bald statement that there are no separation of powers concerns at issue here casts aside an important function of federal common law—to maintain and respect coordinate branches of government, including the states that form our federal government. Moreover, it casts aside the substantial federal interest in protecting a federalist delegation of power to the states to conduct redistricting. U.S. Const. art. I, § 4, cl. 1. While interference of a federal court in a state legislature is not "on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch," *Gillock*, 445 U.S. at 370, nevertheless, a federal court's inquiries can "represent a substantial intrusion into the workings of other branches of government" and are therefore "usually to be avoided." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n. 18 (1977). "States retain substantial sovereign powers under our constitutional

[3] The unpublished order in *Perez v. Perry*, No. SA-11-CV-360-OLG, Dkt. No. 102 (W.D. Tex. Aug. 1, 2011) is Exhibit 4 to the movants' motion. ECF No. 139-4.

scheme." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The Supremacy clause does not require courts to ignore the practical effect of a federal courts' intrusion on state governmental functions and it does not require a casting aside of the legislative privilege in its entirety when federal common law has recognized a state testimonial legislative privilege concurrent with legislative immunity since the Nineteenth Century. *Bogan v. Scott-Harris*, 523 U.S. 44, 51-52 (1998) (discussing history of application of state and local legislative immunity and testimonial privilege).

Drawing the line at an absolute testimonial privilege makes historic and practical sense. *E.g.*, *E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). But even if a balancing test is applied, the balance is against compelling the testimony of the nonparties. In addition to all of the reasons set forth in movants' memorandum supporting the motion for review, incorporated herein, plaintiffs have simply failed to demonstrate a need for such testimony. Plaintiffs, despite protestations to the contrary, have never identified testimony they seek other than the heart of a legislative actor's privilege—the motivations and intent of the legislator in developing and advocating for passage of a certain piece of legislation. While plaintiffs identify a second formulation of their request, which includes the phrase "the data that they used and how they used it, and the vote dilution that resulted from the Plan as enacted" (ECF No. 152 at 18), plaintiffs have not explained how the movants could provide testimony on these topics that would not be cumulative to the documents already disclosed or would not reveal their subjective motivations and intent in formulating the plan. The movants are not experts or technicians. *How* data was used and whatever the plaintiffs mean by "vote dilution" can only be

explored at deposition through the intent and motivations of the movants. Moreover, any claim by plaintiffs that deposition testimony is required because "[t]he real proof is what was in the contemporaneous record in the redistricting process" (ECF No. 152 at 24 (quoting *Bethune-Hill*)) must be rejected. Deposing the nonparty movants adds nothing to "the contemporaneous record in the redistricting process" and can only yield recollections, marred by the passage of over five years and many political battles, of the nonparty movant's own experience of the 2011 congressional redistricting process.[4] To the extent the limited subjective evidence such testimony might yield is relevant to the objective evidence of specific intent, the plaintiffs must produce to prevail in this cause of action, it is not necessary to or particularly probative of that cause of action.

So, too, the court should reject plaintiffs' completely unsupported allegations of spoliation. Plaintiffs have been provided with thousands of documents in this case, including 5.7 GB of map and data files and relevant emails from the State Board of Elections. (Ex. 3; ECF 134-2.) In return, plaintiffs have made unsupported claims that "untold emails and documents" have been destroyed in this case, without a single citation to record evidence, or any acknowledgement that there was no pending cause of action related to the 2011 congressional redistricting plan from July 2012, when *Fletcher v. Lamone* was affirmed by the Supreme Court, to November 2013, when the Plaintiffs filed this action. Even at that time, the complaint and the first amended complaint relied entirely

[4] Notably, *Bethune-Hill*, on which the plaintiffs rely involved the disclosure of contemporaneously-drafted documents, not after-the-fact deposition testimony. *Bethune-Hill v. Virginia State Bd. of Elecs.*, 114 F. Supp. 3d 323, 341-43 (E.D. Va. 2015).

on the shape of the congressional districts, most notably their "narrow ribbons and orifices" (ECF Nos. 1, 11 ¶ 2), and expressly disclaimed that the Plaintiffs' claims relied on any legislative motive or intent (*id.*). Not until March 2016 did the Plaintiffs amend their pleadings to include any claims involving legislative motive.[5]

As discussed above, between July 2012 and March 2016, there was a change in executive administration, including a relocation of documents to State Archives and the departure of knowledgeable staff. In any event, emails relevant to redistricting have been provided here and plaintiffs have provided no indication that, even when e-mail systems were converted, relevant documents that were required to be preserved were not. Thus, *Hargett*, the case where legislators were found to have assented to deposition *in camera*, is no more applicable on the issue of document availability because there the plaintiffs were able to access only a small number of documents from two legislators, 123 F. Supp. 3d at 968, whereas here the plaintiffs have been provided with thousands of pages of documents making up the contemporaneous record of the redistricting process and "containing objective facts" relied upon by the GRAC. *See Comm. for a Fair and Balanced Map*, No. 11 C. 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011).[6]

[5] Although one case challenging the language of the referendum on Senate Bill 1 was filed in August 2012, the allegations of that complaint were limited to challenging the precise language of the referendum, not the substance of the plan. *See* Ex. 5.

[6] Moreover, plaintiffs are simply wrong to assert that the October 31, 2011 litigation hold notice was not set to Governor O'Malley (it was sent to his legal counsel and senior staff) or to Jake Weissman, an aide to Senate President Miller (the hold notice was sent to Mr. Weissman within a day or two of first being distributed and was provided to plaintiffs on February 9, 2017, Ex. 3). With regard to the State Board of Elections, that entity had no role in congressional redistricting other than to provide data to the Department of Planning via email before the GRAC members even were appointed; those emails were

II. LEGISLATOR TESTIMONY HAS NOT BEEN COMPELLED BY OTHER COURTS.

Plaintiffs once again overreach in their claims that other courts have compelled testimony in cases related to voting rights. While plaintiffs have identified numerous instances where legislators *have testified* in redistricting cases, they have failed to identify a single case where legislators were *compelled* to testify. As one court has noted, "states seeking judicial preclearance [under the Voting Rights Act] routinely offer the testimony of legislators, and courts routinely admit it." *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012).[7] Such testimony is common because legislative intent is an element in the preclearance process on which the state has the burden and the Department of Justice has made it a policy to seek out the views of legislators. *Id.* Moreover, where plaintiffs have identified instances of legislative testimony, there are indicia that testimony is voluntarily offered as a substantive defense of the plan or voluntarily in support of plaintiffs' opposition to the plan. *E.g.*, *Bandemer v. Davis*, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) (explaining that deposition testimony offered that majority legislators considered "community of interest" as a factor in mapmaking); *Ala.*

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preserved and the emails and attachments have been produced to plaintiffs. *See* ECF No. 134-2.

[7] Cases cited by plaintiffs as redistricting cases reflecting testimony of legislators where the state plans were required to receive preclearance under the Voting Rights Act, a process whereby states must prove the plan lacked discriminatory intent, include *Harris v. McCrory*, 159 F. Supp. 3d 600, 617 (M.D.N.C. 2016); *Ala. Legislative Black Caucus v. State*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (Georgia failed to demonstrate that its plan lacked discriminatory intent and therefore was not entitled to implement plan); *Seamon v. Upham* 536, F. Supp. 931 (E.D. Tex. 1982); *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816 (S.D. Tex. 2012).

Legislative Black Caucus v. State, 989 F. Supp. 2d 1227, 1259-56 (M.D. Ala. 2013), *vacated and remanded* 135 S. Ct. 1257 (2015) (testimony of six *minority* sitting state lawmakers testifying on behalf of the *plaintiffs*); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1336 (N.D. Ga. 2004) (testimony of staffer (not Speaker) and *minority* lawmaker); *Jeffers v. Clinton*, 740 F. Supp. 585, 589-591 (E.D. Ark. 1990) (former Governor, who testified, cast dissenting vote in questioned action). Where legislators seek to testify in support of a plan or against it, they are of course subject to deposition. *Fla. v. U.S.*, 886 F. Supp. 2d at 1302. However, that is not the case here, where the nonparty legislators and legislative actors have asserted their legislative privilege against compelled testimony in this matter.

Plaintiffs' continued reliance on evidence of legislator testimony, without any indication that the testimony was compelled, should be rejected. For example, plaintiffs continue to assert that legislator testimony in *Bethune-Hill* was involuntary (ECF No. 152 at 13) despite evidence from the docket to the contrary. 114 F. Supp. 3d at 330 (explaining, before compelling the production of documents, that the state legislator expected to testify as a fact witness for the defendant-intervenors); Defendant-Intervenors' Pre-Trial Disclosures, *Bethune-Hill*, 114 F. Supp. 3d 323 (ECF No. 79); *see also* Motion and Order, *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012) (ECF Nos. 30, 33) (Governor and Attorney General each waived legislative and testimonial privileges to sit for deposition); *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990)[8] (Dkt. 53, 54) (Governor Clinton not deposed after motion to quash was filed); *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d

[8] Docket history for this case is available on ECF although the underlying documents were not available at the time of this filing.

816, 826 (S.D. Tex. 2012) (former Governor Mark White testified in support of plaintiffs as quasi-expert).[9] The mere fact that legislative testimony has been provided in several redistricting or reapportionment cases is not probative of whether that testimony can or should be compelled. Where courts have actually been faced with the question of whether depositions should be ordered, they have uniformly stopped short of ordering legislators to testify without the option of invoking legislative privilege.

Here, because the movants have not sought to use legislative privilege as a sword and a shield, but rather have asserted legislative privilege to protect against giving any compelled testimony in this case, this Court should quash the deposition subpoenas served on them.

III. THE PLAINTIFFS HAVE IDENTIFIED NO EVIDENCE OF THE MOVANTS' WAIVER OF LEGISLATIVE PRIVILEGE.

In making a broad assertion of subject matter waiver of the legislative privilege, plaintiffs, for a third time, overreach. There is no new evidence of nonparties' coordination with outside consultants. The only evidence plaintiffs have produced in support of this contention proves nothing more than the well-known fact that members of the Congressional delegation developed their own draft maps, just like the Maryland GOP and Maryland Legislative Black Caucus did, and sought to lobby the GRAC and Governor O'Malley to adopt their preferences. Exhibit C, the only evidence of contact between a

[9] Plaintiffs also cite to *Whitford v. Gill*, 2016 WL 6837229 at *12, 13 (November 21, 2016). Adam Foltz and Tad Ottman, the aides and consultants who testified in *Whitford*, were the subpoena subjects ordered deposed in the earlier case of *Baldus v. Brennan*, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011), discussed in movants' opening memorandum of support and below.

staffer at the General Assembly (Jake Weissmann) and Congressional staffers, takes place on October 17 and 18, *after* the GRAC's final map was made public and Senate Bill 1 had already been introduced on the floor of the General Assembly. The subject matter of the conversation is a question about "a couple of census blocks with no people in it." Mr. Weissmann is not even sure where the error stemmed from, the map, the precinct list from Senate Bill 1, or some spreadsheet generated by the consultant with whom Mr. Romick was conversing. The GRAC map had been publicly available since October 4, 2011, and the Maryland House and Senate were engaging in a process of technical amendment in the days surrounding the email. (ECF 104, ¶¶32-34.) This email is not evidence of "close consultation and coordination" with third-party consultants (ECF No. 152 at 30) and cannot possibly work a waiver of legislative privilege, where there is no indication that any outside person or consultant was hired by the General Assembly or the GRAC or that any outside person or consultant was made privy to legislative actors' actual decisionmaking processes.

Accordingly, this case is entirely distinguishable from *Baldus v. Brennan,* 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011), where the court relied in part on waiver to compel depositions of a legislative aide and a consultant hired by the Wisconsin legislature because the legislature had "hired outside consultants to help develop its plans" for redistricting. *Id.* at *2; *but see Favors v. Cuomo,* 285 F.R.D. 187, 213 (E.D.N.Y. 2012) ("Retained consultants who aid legislators in the performance of their legislative duties fall within the scope of the qualified legislative privilege, and any confidential communications involving such consultants and experts are subject to the qualified privilege balancing test."). The other cases relied on by the plaintiffs also are inapposite because they involved documents

that had been generated by or shared with third-parties. *See, e.g.*, *Comm. For a Fair and Balanced Map*, 2011 WL 4837508, at *10 ("[T]o the extent that Non-Parties relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege *as to these documents*.") (emphasis added); *Favors*, 285 F.R.D. at 212 ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals *documents* related to internal deliberations.") (emphasis added). Here, the movants are not withholding any documents or communications shared with third-parties, and are withholding only communications with their aides or legislative colleagues.

Plaintiffs are therefore left to stand on the nonparties' voluntary disclosure of documents in the course of this litigation[10] and the nonparties' public statements as the bases for alleged waiver. But plaintiffs have identified no legal support for their assertion that waiver with respect to one document or in a non-testimonial statement could waive legislative privilege against compelled testimony. *See Arizona v. Arpaio*, 314 F.R.D. 664, 671 n. 5 (D. Ariz. 2016) (no persuasive authority that subject matter waiver applies to legislative privilege). Such a rule would be nonsensical, as it would discourage legislators from ever speaking to the press or constituents about final rationales and bases for legislative action. "[P]ublic statements about legislative matters would appear to be an ordinary function of representative government and therefore a matter covered by

[10] Senator Miller has already provided all draft maps considered by the GRAC and did not make selective disclosure of the draft maps. All underlying data has also been produced to plaintiffs. Exs. 3; 4.

legislators' testimonial privilege." *A Helping Hand, LLC v. Baltimore Cty., Md.*, 295 F. Supp. 2d 585, 591 (D. Md. 2003).

In *Bethune-Hill*, the only case plaintiffs cite for support of this proposition, the court noted that "some degree" of subject matter waiver *might* be appropriate if legislators chose to offer additional evidence, undisclosed at the time of that decision, to support defenses. 114 F. Supp. 3d at 345 n.8. In addition to being only prospective guidance to the defendants in that case, the scenario described in *Bethune-Hill* is not presented here. Here, nonparties have produced all documents other than those specifically discussing legislative motives and intent with fellow legislators or close aides. Contrary to the plaintiffs' assertions, Senate President Miller has produced all draft maps and underlying data. Ex. 4, 4 (Entry 10). The nonparties are affirmatively seeking *not* to testify in this case, and the nonparties have not testified on any relevant subject matter in any other case,[11] and therefore there is no rule of completeness that would apply.

For all of these reasons, this Court should reject the plaintiffs' assertion that the movants should be compelled to testify about their subjective motivations or intent, or any other subject matter, on grounds that they have waived their legislative privilege.

[11] Senate President Miller submitted an affidavit on a limited topic in *Fletcher v. Lamone*, 11-cv-3220-RWT (ECF No. 48-3), that is unrelated to any matter under consideration here.

CONCLUSION

For the reasons set forth above, this Court should quash the non-party deposition subpoenas served on Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, Richard Stewart, C. Anthony Muse, and Curtis S. Anderson. In addition, this Court should deny the Plaintiffs' Motion to Compel documents as to the limited communications withheld by President Miller, Speaker Busch, and Senator Richard S. Madaleno.

Respectfully submitted,

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Dated: February 21, 2017

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TABLE OF EXHIBITS

Exhibit No. Title

1. Emails exchanged between B. Romick and MG2590@aol.com

2. List of Plans Submitted to the GRAC from Third Parties and Letter to Speaker Busch from Mays Chapel resident

3. February 9, 2017 email from K. Rowe to S. Medlock

4. Privilege logs of Senate President Thomas v. Mike Miller, Jr., Maryland House of Delegates Speaker Michael E. Busch, and Senator Richard S. Madaleno

5. Complaint filed in *Parrott v. McDonough*