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' OPPOSITION
TO MOTION TO QUASH THE DEPOSITION SUBPOENA OF
FORMER GOVERNOR MARTIN O'MALLEY

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INTRODUCTION

We showed in our brief opposing the State's motions to quash (Dkt. 152) that the state legislative privilege is not an absolute shield against document or deposition subpoenas in important federal constitutional cases like this one. *See* Dkt. 152, at 9-15. We also showed that, under the applicable five-factor balancing test, we are entitled to take the testimony of the members of the GRAC, former Governor O'Malley, and the state legislators who have received subpoenas in this case. *Id.* at 22-28. That is especially so, we explained, because the relevant state agencies and officials have failed to preserve relevant communications and documents despite their obligation to do so. *Id.* at 19-21; *see also* Dkt. 153 (motion for spoliation sanctions). Finally, we showed that the privilege has been waived repeatedly, including during and after the drafting of the Plan. Dkt. 152, at 29-35. For his part, Governor O'Malley not only openly discussed drafting and strategy with Maryland's congressional delegation and their consultants (*id.* at 30-31), but—as we demonstrate below—he recently gave a speech at Boston College in which he discussed his and others' intent to flip the Sixth District.

In its reply in support of their motions to quash (Dkt. 155), the State says little of substance. It does not respond directly to our point that the privilege must yield in cases like this one, and it says almost nothing about the five-factor balancing test. Instead, it asserts (without explanation) that Plaintiffs "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." *Id.* at 1. That ignores what we have now shown several times: A serious redistricting case under 28 U.S.C. § 2284 that makes a plausible claim of unconstitutional conduct in connection with the drawing of

congressional districts is exactly the kind of "exceptional" case in which the privilege must yield. The State evidently believes that no case could *ever* be sufficiently "exceptional" to warrant denying the privilege—after all, if not this case, then when? But that is not the law. The privilege is a matter of federal-state comity only, and it gives way when it would otherwise stand as a barrier to the vindication of fundamental constitutional rights of broad public importance.

ARGUMENT

1. This is an exceptional case. Despite the State's refusal to admit it, this is not a run-of-the mill lawsuit; it is a proceeding under the Three-Judge Court Act, which provides for review by a special three-judge district court and immediate appeal as of right to the Supreme Court. *See* 28 U.S.C. §§ 1253, 2284. Congress retained this unusual procedure for constitutional challenges to the apportionment of congressional districts precisely because such cases are tremendously important. *See, e.g.*, S. Rep. No. 94-204, at 9 (1975); 119 Cong. Rec. 666 (1973) (statement of Sen. Burdick).

And this case is exceptionally important even among congressional redistricting cases. In the fifty years since the Supreme Court held in *Baker v. Carr*, 369 U.S. 186 (1962), that partisan gerrymandering claims are in theory justiciable, no plaintiff has yet come forward with a workable standard for the adjudication of such claims. In their effort to overcome this intractable problem, Plaintiffs here have drawn upon the First Amendment retaliation doctrine, which was most recently identified by Justice Kennedy in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), as a potential solution. This Court has already held that Plaintiffs have stated a plausible and justiciable claim under that doctrine, and the Supreme Court (which has already rendered one decision in this case)

will ultimately weigh in again on that question. Civil lawsuits don't get more important than this; the proper functioning of a democracy hangs in the balance.

2. Similar redistricting cases often involve compelled testimony. The State asserts that, regardless of the acknowledged importance of the case, Governor O'Malley (and the other state officials) should not be compelled to testify because there is no precedent for it. That is simply wrong. As we demonstrated in the opposition brief, state officials have been compelled to testify about legislative intent in numerous redistricting cases.

To begin with, we cited a range of cases in which legislative and gubernatorial testimony was taken (Dkt. 152, at 14 & nn. 5, 6) but which the State dismisses as preclearance cases, in which testimony was offered voluntarily. *See* Dkt. 155, at 9 & n.7. The State's assertion is misleading. Although many of the States involved in the cases we cited were required to obtain preclearance under Section 4 of the Voting Rights Act separate and apart from the gerrymandering lawsuits we cited, only one of the cases we cited was *itself* a preclearance case.[1] And while the State suggests that testimony in some of the cases was nevertheless given voluntarily, it has nothing to say about *Harris v. McCrory*, 159 F. Supp. 3d 600, 617 (M.D.N.C. 2016) (three-judge district court) (testimony at trial of various state legislators), *Seamon v. Upham*, 536 F. Supp. 931, 1002 (E.D. Tex. 1982) (three-judge district court) (testimony at deposition of Texas Governor William Clements), or *Voting for America v. Andrade*, 888 F. Supp. 2d 816, 854 n.29 (S.D. Tex. 2012) (testimony at a preliminary injunction hearing of Texas Governor Mark White).

[1] Indeed, *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) was decided after the Supreme Court invalidated Section 4 in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), as the court there expressly acknowledged. *See Harris*, 159 F. Supp. 3d at 606.

In three other cases, the State admits (as it must) that legislative testimony was taken. In *Perez v. Perry*, for example, the three-judge district court held that "any sort of blanket protective order that would insulate [legislative] witnesses from testifying would be inappropriate." Order Denying Defendants' Motion for Protective Order at 2, *Perez v. Perry*, No. 11-CA-00360 (W.D. Tex. 2011), ECF No. 102. The court thus compelled the testimony of, among others, Texas Governor Rick Perry. Legislators were likewise compelled to testify in *Nashville Student Organizing Committee* v. *Hargett*, 123 F. Supp. 3d 967 (M.D. Tenn. 2015), where the court held straightforwardly that "plaintiffs may proceed with the depositions." *Id.* at 971. And legislators were similarly compelled to testify in *Bandemer v. Davis*, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986).

In response, the State says that *Perez* is distinguishable because "the deposition subpoena targets sought to use the privilege as a sword and shield" by waiving privilege as "to some matters while invoking privilege as to others." Dkt. 155, at 5. But that is no distinction at all; each of our proposed deponents (including Governor O'Malley) has waived the privilege in whole or in part—but we have no way to tell whether those disclosures tell a full and accurate story or are merely self-serving fragments of the truth. This is why, as we have said all along, the proposed deponents must be understood as having waived the privilege altogether. *See* Dkt. 152, at 30-32.

As for *Nashville Student Organizing Committee*, the State complains that the legislators there may not have made the same arguments about chilling as they have made here. Dkt. 155, at 5. That is silly. The deponents there resisted the deposition subpoenas on the same grounds there as does Governor O'Malley here; the court there rightfully rejected to privilege. The same result is warranted here. That is particularly

so for two additional reasons. First, as we explained in our opposition (at 27-28), any concern for chilling is vastly overblown, and the State offers no substantive response. And second, the court in *Nashville* found it relevant that "[t]he plaintiffs also served two subpoenas for documents on officials at the Tennessee General Assembly's Office, but the plaintiffs received no responsive records back because older emails are routinely deleted from the General Assembly's servers." 123 F. Supp. 3d at 968. The same is true in this case.

As for *Bandemer*, the State speculates that "there are indicia that testimony [was] voluntarily offered." Dkt. 155, at 9. That is wrong. In fact, the legislators' testimony (which concerned legislative intent) is consistent with having been compelled. *See Bandemer*, 603 F. Supp at 1484 (recounting testimony). That much is confirmed by *amicus* briefs filed by both houses of the California legislature, which complained about the compelled depositions and other discovery into legislative intent. Br. of Senate of State of Cal. as *Amicus Curiae* in Support of Appellants, 1985 WL 670022, at *27 n.33 (May 8, 1985); Br. of Assembly of State of Cal. as *Amicus Curiae*, 1985 WL 670005, at *2 (Mar. 4, 1985) ("the decision below appears to open the way for widespread inquiry-by discovery, deposition and trial testimony-into the intent of individual legislators"). Apart from its baseless speculation that the testimony may have been voluntary, the State gives no explanation for why testimony should have been compelled in *Bandemer* but not in this case.

3. The testimony sought is critical to Plaintiffs' case. The State continues with its bizarre insistence that the testimony we seek would "not [be] necessary to or particularly probative of [Plaintiffs'] cause of action" (Dkt. 155, at 7) and that "plaintiffs have simply failed to demonstrate a need for such testimony" (*id.* at 6). It is simple

common sense that "sworn testimony by the individuals involved in the redistricting process are not only relevant but often highly probative" in gerrymandering cases that have as an element legislative intent. *Harris*, 159 F. Supp. 3d at 610 (citing *Bush v. Vera*, 517 U.S. 952, 960-961 (1996) (examining the testimony of state officials)). *Accord, e.g.*, *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").

Judge Bredar was therefore correct to conclude that documents and other circumstantial evidence, though relevant, would "provide no meaningful substitute for the direct evidence of the mapmakers' intent." Dkt. 132, at 5. That is especially so in this case because—as we have explained—most of the relevant documents and emails have been destroyed. The Court need look no further than Governor O'Malley himself as an example: He has represented that he searched for responsive documents and communications, *and he found none*. Dkt. 153-3. There is no substitute for his testimony here.

4. The executive privilege does not apply. Governor O'Malley purports to assert executive privilege as an alternative basis for avoiding our deposition subpoena. *See* Dkt. 146, at 2. But he offers nothing more than a hollow invocation, devoid of substance and support. Regardless, the executive privilege is plainly inapplicable here. As the State has explained in its other briefs, the drafters of the Plan, including the members of the GRAC, "were engaged in legislative," not executive, "activity." Dkt. 112-1, at 7; Dkt. 119, at 8. That is so, the State has insisted, despite the "executive nature of the GRAC." *Id.* That observation is assuredly correct, and it applies just as well to Governor O'Malley, who—so far as the Plan is concerned—was no more engaged

in executive activity than were the members of the GRAC. It is "axiomatic" that "the preparation and introduction of legislation for the legislature" is a "legislative function[]." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992). "Thus although the Governor's title indicates his Executive position within the governmental framework of the State, his specific actions in this case indicate that he functioned as would a legislator," and therefore he is entitled to legislative and not executive privilege "for his actions in preparing and presenting the legislative redistricting plan to the General Assembly." *Id*.

5. Governor O'Malley waived whatever privilege he had. As with its prior discovery motions, the State's blanket assertion of privilege does not take into account the fact that the proposed deponents, including Governor O'Malley, have waived whatever privilege they may have had, both by involving non-legislative third parties in the drafting of the Plan (Dkt. 152, at 30-31) and by individually speaking in public about the reasons for the redistricting at issue in this case.[2]

Governor O'Malley is no exception. On January 24, 2017, Governor O'Malley gave a speech titled "Restoring the Integrity of Our Democracy" at Boston College School of Law. He republished his remarks the next day on Medium, a self-publishing website where "thousands of people . . . publish their ideas and perspectives" every day. *About*, Medium, perma.cc/APG6-E5S7; *see* Dkt. 131-2 (text of speech).

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[2] In response to our repeated arguments on this point, the State says that *we* have not produced adequate evidence to support our argument that the privilege has *been* waived. *See* Dkt. 155, at 11-12. But that gets the burden of proof backward. As we have repeatedly explained, it falls to *the State* to prove that the privilege has *not* been waived. *See* Dkt. 152, at 29. Time and again the OAG has had an opportunity to proffer basic evidence (a declaration, for example) showing that the privilege has not been waived, but time and again the OAG has declined. Their refusal to provide any evidence concerning the privilege speaks volumes.

In the speech, Governor O'Malley decried the practice of "gerrymander[ing] Congressional districts" as a harmful one that "drives our representative[s] apart" and "has wiped out diversity of opinions" in Congress. Dkt. 131-2, at 10. "I can speak to this," he explained, "with the credibility that comes from experience." *Id.* at 11. "As a governor, I held that redistricting pen in my own Democratic hand. *I was convinced that we should use our political power to pass a map that was more favorable for the election of Democratic candidates.*" *Id.* (emphasis added). Thus, Governor O'Malley effectively admitted to using "big data, geographic information systems, and micro-targeting of precinct by precinct voting trends" to draft a "political map" that "carved" the voices of Republican voters in northwest Maryland "into irrelevance." *Id.* at 12.

Having publicly discussed the political rationale and big-data methods behind the redistricting—and having then republished them on the Internet for consumption by a mass audience—Governor O'Malley has waived any claim he might have had to privilege regarding the redistricting process. To conclude otherwise would be like holding that a client can publish descriptions of consultations with her lawyer to the Internet, but then claim the attorney-client privilege when questioned about the consultations in litigation. That is not the law. There is therefore no basis to claim that any privilege could have survived Governor O'Malley's voluntary disclosure of the purposes of the redistricting to anyone with a computer.

CONCLUSION

The motion to quash should be denied. Governor O'Malley should be ordered to sit for, and answer questions at, deposition without regard for any assertion of legislative or executive privilege.

Dated: February 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 2017, a copy of the foregoing Opposition to Motion To Quash the Deposition Subpoena of Former Governor Martin O'Malley 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-party Martin O'Malley.

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