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 PROTECTIVE ORDER AND TO QUASH NON-PARTY DEPOSITION SUBPOENA SERVED ON FORMER GOVERNOR MARTIN O'MALLEY AND FOR STAY

Former Governor Martin O'Malley, through counsel, submits this reply in support of his motion for protective order and to quash the non-party deposition subpoena served on him. Governor O'Malley incorporates by reference the non-parties' Reply In Support of Motion for Review by Three-Judge Court and for Stay (ECF No. 155).[1]

[1] In their response, plaintiffs assert that the non-parties did not address a number of cases which plaintiffs assert evidence instances where legislators were compelled to testify. (ECF 158, 3.) Each of these cases was addressed in the non-parties' reply (ECF No. 155 at 9). All of the cases discussed were from states which, at the time, were required to participate in the Department of Justice preclearance process for Voting Rights Act compliance. The preclearance process put the burden of proof of motive on the state, and therefore legislator testimony was common and generally required *at the administrative level*. In addition, plaintiffs continue to assert that there is evidence that the testimony in *Davis v. Bandemer* that was compelled. (ECF 158, 4.) There is no such evidence; the states' amici cited to in plaintiffs' response merely refer to the possible negative consequences of the exact wide-ranging and common setting aside of state legislative testimonial privilege by the federal government that may occur in this case, but does not refer to any actual compelled testimony in *Bandemer.* There is no indication in any of

ARGUMENT

I. ANY WAIVER EFFECTED BY GOVERNOR O'MALLEY'S JANUARY 24, 2017 STATEMENT IS LIMITED TO THE CONTENT OF THE STATEMENT.

The plaintiffs contend that Governor O'Malley waived his legislative privilege by speaking publicly about his role in the redistricting process. But plaintiffs have identified no legal support for their assertion that waiver with respect to 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 or those acting in a legislative capacity from ever speaking publicly 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 legislators' testimonial privilege." *A Helping Hand, LLC v. Baltimore Cty., Md.*, 295 F. Supp. 2d 585, 591 (D. Md. 2003).

Moreover, any waiver worked by former Governor O'Malley's January 24, 2017 speech is limited to the statements themselves. Former Governor O'Malley's public statement did not recollect any conversations or other specific events that took place during the redistricting process. Instead, it was limited to self-reflection and a statement of his own mental impressions. Plaintiffs' claim that "Governor O'Malley effectively admitted to using 'big data, geographic information systems, and microtargeting of precinct by

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those cases that the legislator testimony was compelled, and plaintiffs have produced no additional evidence of compulsion.

precinct voting trends' to draft a 'political map'" (ECF 158, 9) misconstrues the statement. When Governor O'Malley spoke of "big data, geographic information systems, and microtargeting of precinct by precinct voting trends" he was not speaking about the same "personal experience" he had earlier referenced, and instead was discussing "our country as a whole." (ECF 131-2, 12-13.) Former Governor O'Malley's statement waived legislative privilege only as to its exact content, and it cannot work a waiver regarding subject matter it does not address.

II. GOVERNOR O'MALLEY SEEKS A PROTECTIVE ORDER ADDRESSED TO REDISTRICTING AND OTHER TOPICS NOT ASSOCIATED WITH SB1 BASED ON EXECUTIVE PRIVILEGE.

The plaintiffs and Governor O'Malley are not in disagreement that legislative privilege is the appropriate framework for assessing Governor O'Malley's legislative activity in developing and passing the 2011 congressional plan, or SB1. However, there are related topics that could be raised at deposition, including, but not limited to, pre-decisional deliberations with close aides about whom to appoint to the GRAC or whom to assign to staff the GRAC or pre-decisional deliberations with close aides about other redistricting topics post-passage of the plan. It is also reasonably foreseeable that deposition questions could implicate topics unrelated to redistricting all together, but for which Governor O'Malley retains executive privilege. Because these topics are not directly related to the passage of the map, they would not be part of the legislative activity in which Governor O'Malley was engaged but would instead be related to actions Governor O'Malley took as the executive of Maryland. In addition, the balancing test as applied to the executive privilege weighs more heavily in favor of the application of the privilege

because the executive privilege axiomatically will apply only to ancillary matters and not directly to the passage or enactment of SB1. For these reasons, in the event his deposition is ordered to go forward, Governor O'Malley continues to seek a protective order that would protect him from deposition on topics covered by executive privilege.

CONCLUSION

For these reasons, Governor O'Malley seeks an order quashing his deposition, or, in the alternative, a protective order protecting him from deposition on topics covered by executive privilege.

Respectfully submitted,

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