UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK A. FAVORS et al.,

Plaintiffs,

v.

ANDREW M. CUOMO et al.,

Defendants.

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No. 11 Civ. 5632 (RR) (GEL) (DLI)

MEMORANDUM OF LAW REGARDING PRIVILEGE ISSUES

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Senate Minority Leader John L. Sampson and Senator Martin Malavé Dilan respectfully submit this memorandum of law in response to the Senate Majority's April 27, 2012 memorandum of law regarding legislative privilege.

PRELIMINARY STATEMENT

The Senate Majority's argument that it has an "absolute privilege" that allegedly excuses it from producing any documents or any witnesses for depositions has been rejected in a well-established line of cases that the Senate Majority simply ignores. Contrary to the Senate Majority's distortion of the legislative privilege doctrine, the case law makes clear that any legislative privilege is, at best, a *qualified* privilege that yields to the need for disclosure where, as here, important federal interests are at stake. Indeed, the Senate Majority fails to acknowledge that its strained claim of an absolute privilege against disclosure has been rejected by three different federal courts in redistricting cases in the last six months alone.

The Senate Majority also insists that the intent behind the Senate plan is entirely irrelevant as a matter of law, notwithstanding that the ultimate question in this case is at least largely subjective: whether the Senate Majority engaged in the "honest and good faith effort" to draw equipopulous districts that the Equal Protection Clause requires. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The Senate Majority has not identified any pleading deficiencies in the Plaintiffs' or the Intervenors' claims – this Court already rejected the same arguments in denying the Senate Majority's motions to dismiss – and it certainly has not established that the Plaintiffs and the Intervenors are entitled to no fact discovery.

A. State Legislators Have No "Absolute Privilege" Exempting Them From Discovery in Redistricting Litigation, and Any Qualified Privilege Must Yield to the Need for Disclosure In This Case

The Senate Majority's assertion of an "absolute privilege" that allegedly exempts it from depositions and document discovery in this case is meritless. Some courts have held that there is no privilege at all; some courts have held that there is a qualified privilege that does not apply in constitutional cases; and some courts have held that there is a qualified privilege that to some degree shields disclosure even in constitutional cases. But no court has gone nearly as far as the Senate Majority asserts.

The fundamental flaw in the Senate Majority's "absolute privilege" argument is its conflation of legislative *immunity from suit*, which is absolute when applicable, and legislative *privilege against disclosure*, which courts have found to be either nonexistent or, at best, qualified. In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court sustained a claim of legislative immunity asserted by a California legislator who was sued for alleged misconduct in connection with a legislative investigation. But in *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court expressly distinguished *Tenney*, holding that state legislators' common law immunity from damages liability with respect to their official legislative acts does not translate into a blanket disclosure privilege.

In *Gillock*, the Supreme Court addressed whether the common law recognizes a privilege against disclosure in a federal criminal prosecution of a state legislator. The Court first decided that, because the federal Speech or Debate Clause does not apply to state legislators, the privilege question was one of federal common law. *See id*. at 366 & nn. 5-6 (citing Federal Rule of Evidence 501, which provides that in federal question cases, privilege issues are governed by federal common law). The Court observed that the drafting history of Rule 501 suggested that

legislative privilege "was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *Id*. at 367-68. The Court then identified the two rationales underlying the federal Speech or Debate Clause: "the need to avoid intrusion by the Executive or the Judiciary into the affairs of a coequal branch," and "the desire to protect the legislature's independence." *Id*. at 369. The Court held that the first rationale provides no support for recognizing a federal common law privilege against disclosure for state legislators because "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," and thus "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." *Id*. at 370. With respect to the second rationale, the Court held that "where important federal interests are at stake" – including but not limited to the enforcement of federal criminal laws – "comity yields," and no federal common law legislative privilege bars disclosure of otherwise relevant information. *Id*. at 373.

Applying *Gillock*, courts have repeatedly rejected the argument that the *immunity from suit* that the common law affords to state legislators in connection with their legislative acts gives rise to an *evidentiary privilege* that shields legislative decision-making from *disclosure*. *See*, *e.g*., *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (Go, M.J.) (rejecting claim of absolute privilege and holding that "the discovery and trial needs of plaintiff in enforcing her rights under federal law clearly outweigh the State Defendants' need for confidentiality"); *Fla. Ass'n of Rehab. Facilities v. State of Florida*, 164 F.R.D. 257, 261-68 (N.D. Fl. 1995) (rejecting argument that federal common law recognizes absolute privilege against state legislative disclosure, and holding that any privilege was at best qualified and could be overcome by "a showing of need" in a case where the issue turned on "the legislative process itself"); *Small v.*

Hunt, 152 F.R.D. 509, 512-13 (E.D.N.C. 1994) (holding that legislative immunity from suit does not entitle a state legislator to a legislative privilege against disclosure); *U.S. v. Irvin*, 127 F.R.D. 169, 171-74 (C.D. Ca. 1989) (finding qualified privilege overcome and ordering discovery in Voting Rights Act case); *In re Grand Jury*, 821 F.2d 946, 956-58 (3d Cir. 1987) (rejecting both an absolute and qualified privilege for state legislators); *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 298 (D.P.R. 1989) (rejecting legislative privilege because the legislature is the "part of the governmental branch that has historically been subjected to the greatest degree of public accountability").

In addition to ignoring all of these oft-cited cases, the Senate Majority also fails to acknowledge that several recent federal redistricting cases have squarely rejected its legislative privilege argument. In *Baldus v. Brennan*, 2011 WL 6122542 (E.D. Wisc. Dec. 8, 2011), in which the plaintiffs claim that Wisconsin's redistricting plan is an unlawful partisan and racial gerrymander and violates the Voting Rights Act, the Court held that "[l]egislative privilege is a qualified privilege that can be overcome by a showing of need." *Id*. at *2. The Court recognized that "[a]llowing the plaintiffs access [to documents and testimony evidencing the intent behind the redistricting plan] may have some minimal future 'chilling effect' on the Legislature," but nonetheless held that "that fact is outweighed by the highly relevant and potentially unique nature of the evidence." *Id*. Because of "the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans," the Court concluded "that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued." *Id*. In response to the Wisconsin Legislature's subsequent motion for clarification, the Court reaffirmed its rejection of the assertion of legislative privilege. *See Baldus v. Brennan*, 2011 WL 6385645 (E.D. Wisc. Dec. 20, 2011). When the Legislature

then refused to comply, the three-judge Court sanctioned the Legislature's counsel, noting that they were "flailing wildly in a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process." *Baldus v. Brennan*, __ F. Supp. 2d __, 2012 WL 10610, at *3 (E.D. Wisc. Jan. 3, 2012). In imposing sanctions, the Court emphasized that the legislative privilege it rejected was "in derogation of the truth," and that "the truth here – regardless of whether the court ultimately finds the redistricting plan unconstitutional – is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature." *Id*. at *3. "On the other hand," the Court explained, "no public good suffers by the denial of privilege in this case." *Id*.

Similarly, in *Texas v. United States*, 279 F.R.D. 24 (D.D.C. 2012) – the preclearance proceeding at issue in *Perry v. Perez*, 132 S.Ct. 843 (2011) – the Court also rejected the argument the Senate Majority makes here. Noting that "[c]ourts tend to apply the privilege narrowly because it blocks full disclosure of relevant information," 279 F.R.D. at 28, the Court disagreed that Texas was entitled to "a broad legislative privilege that would, if adopted, shield almost everything that any Texas State Legislator or his staff ever does." *Id*. at 33. The Court observed that Texas was unable to cite any "statute or case law" upholding "the privilege it claims here in federal court." *Id*.; *see also id.* at 29 (observing that "[t]here is no state legislative privilege identified in the Federal Rules of Evidence"). The Court concluded that it was premature at the discovery stage to make final decisions about trial admissibility, ordering Texas to "produce under seal all documents as to which it claims legislative privilege," subject to further motion practice regarding unsealing such documents at trial. *Id*. at 33-34; *see also Committee for a Fair and Balanced Map v. Illinois Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (holding that under *Gillock* and its progeny there is no absolute legislative

privilege against disclosure "[g]iven the federal interests at stake in redistricting cases," but recognizing a qualified privilege).

Given that *Baldus v. Brennan* and *Texas v. United States* are squarely on point and are from the current redistricting cycle, it is surprising that the Senate Majority chose not to acknowledge either decision.

This case law rejecting legislative privilege claims in redistricting cases is consistent with the very high burden that the proponent of a privilege against disclosure – here, the Senate Majority – must meet. "Testimonial exclusionary rules and privileges contravene the fundamental principle that '*the public . . . has a right to every man's evidence*.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (emphasis in original) (quoting *United States v. Bryan*, 339 U. S. 323, 339 U. S. 331 (1950)). "*As such, they must be strictly construed, and accepted* 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id*. (emphasis in original) (quoting *Elkins v. United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting)); *see also In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998) ("[W]hen evaluating a novel claim of privilege, [courts] start with the primary assumption that there is a general duty to give what testimony one is capable of giving") (quotation omitted); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (denying absolute testimonial privilege to the President of the United States); *Couch v. United States*, 409 U.S. 322 (1973) (rejecting accountant-client privilege); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (denying a testimonial privilege to reporters).

As numerous courts have recognized, it would be particularly inappropriate to exempt the Senate Majority from discovery where, as here, the basic issue is whether it made an honest and

good faith effort to minimize population deviations, tolerating population deviations only to the extent necessary to pursue legitimate redistricting goals such as compactness and maintaining the integrity of county borders. *See Baldus*, 2011 WL 6122542 at *1 (rejecting assertion of legislative privilege in claims brought "under both the Voting Rights Act and the Equal Protection Clause" because "as the plaintiffs correctly point out, proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in both types of claims. Thus, any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent."); *Committee for a Fair and Balanced Map*, 2011 WL 4837508 at *5-*7 (holding that "[g]iven the federal interests at stake in redistricting cases, this court concludes that common law legislative immunity does not entirely shield" legislators from discovery because "[v]oting rights cases . . . seek to vindicate public rights [and thus] are akin to criminal prosecutions" for purposes of applying *Gillock*); *Irvin*, 127 F.R.D. at 173-74 (declining to apply a state legislative privilege because of the "compelling" federal interest in "vigorous and searching federal enforcement" of redistricting constraints and because the "withheld information is directly relevant to the validity of the redistricting plan"); *End Ventures, LLC v. Inc. Vill. of Sag Harbor*, 2011 WL 6337708, at *3 (E.D.N.Y. Dec. 19, 2011) (holding that legislative privilege is inapplicable where "the legislative deliberations are among the central issues in the case"); *see also Doe v. Nebraska*, 788 F. Supp. 2d 975, 981-82 (D. Neb. 2011) (collecting cases "involving potential violations of constitutional rights" that "have allowed queries into legislators' motivations"). These cases correctly apply *Gillock*, which held that legislative privilege must yield to disclosure "where important federal interests are at stake." 445 U.S. at 373.

Rather than acknowledge the many cases that have rejected its privilege arguments, the Senate Majority relies on legislative *immunity* cases such as *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), and *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007). But nobody has sued Senator Skelos for damages, and as numerous cases have explained, legislators' absolute immunity from suit does not translate into a blanket privilege barring *disclosure* with respect to legislative decision-making. *See Fla. Ass'n of Rehab. Facilities*, 164 F.R.D. at 267; *Small*, 152 F.R.D. at 513; *Irvin*, 127 F.R.D. at 174. The fact that Senator Skelos may have been entitled to dismissal on legislative immunity grounds if he had decided that he did not want to participate as a defendant in this case – as opposed to waiving his absolute immunity so that he could lead the defense, as he decided to do – plainly does not entitle him to the discovery exemption he claims.[1]

Nor do Magistrate Judge Maas's privilege rulings in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), support Senator Skelos's position. Judge Maas expressly held that legislative privilege "is not absolute," *id*. at 95; that "notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions," *id*.; that "even if the legislator-defendants had asserted legislative immunity as a defense, and the Court had concluded that they were protected by its mantle, a legislator may be required to disgorge documents or provide other information in appropriate circumstances," *id*. at 100; that any legislative privilege in a redistricting case "is, at best, one which is qualified," *id*.; that because LATFOR is comprised of both legislators and non-legislators, discovery of LATFOR officials is "arguably less invasive," *id*. at 101; that legislative privilege applies primarily after a

[1] Notably, in *Rowland*, the Second Circuit denied the defendants' motion to dismiss on immunity grounds and ordered them to engage in discovery.

redistricting bill "reaches the floor of the legislature," and that LATFOR was not "acting at the earlier stages of the redistricting process solely as the surrogate of [the Senate Majority Leader] or other individual members of the Legislature," *id*.; that by delegating much of the redistricting process to LATFOR, the Legislature had "created a working group which, by statute, necessarily contained legislative 'outsiders,'" *id*.; that "the fact that LATFOR was constituted in this fashion tends to weaken any claim that the disclosure of LATFOR's deliberations and documents would cause future members of the Legislature not to engage in frank discussions of proposed legislation," *id*.; that "the legislatively-mandated structure of LATFOR makes its workings more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation – a session for which no one could seriously claim privilege," *id*.; that the defendants "have not shown that [evidence of unlawful discrimination] could be obtained through other means," and that their "argument that the discovery sought by the plaintiffs is either irrelevant or unnecessary is consequently unavailing," *id*. at 102; and that redistricting cases "raise[] serious charges about the fairness and impartiality of some of the central institutions of our state government," which "suggests that the qualified legislative or deliberative process privilege should be accorded only limited deference," *id*. Judge Maas therefore held that legislative privilege applied only to "the actual deliberations of the Legislature – or individual legislators – which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature." *Id*. at 103. Reviewing this opinion *de novo*, the District Court affirmed Judge Maas's rulings in their entirety. *See* 293 F. Supp. 2d 302, 304-05 ("Magistrate Judge Maas correctly analyzed the law pertaining to legislative privilege. He concluded that legislative privilege is 'not absolute.'").[2]

[2] In a subsequent opinion, Judge Maas reaffirmed that he had sustained the Senate

For all of these reasons, the Senate Majority's assertion of an "absolute privilege" that allegedly precludes any discovery into how and why LATFOR developed the Senate plan is baseless.

B. The Senate Majority's Merits Arguments Are Unavailing and Premature

The Senate Majority also posits a number of reasons why, in its view, the claims asserted by the Plaintiffs and the Intervenors are legally deficient as a matter of law. Because this Court denied the Senate Majority's motion to dismiss, these legal arguments are not currently before the Court, and their resolution is at best premature. We nonetheless address the Senate Majority's core merits arguments briefly.

First, the Senate Majority is incorrect that "there is no injury" where "population deviations are under 10%." Courts have consistently rejected the argument that population deviations under ten percent are immune from constitutional scrutiny. *See Cox v. Larios*, 542 U.S. 947, 949 (2004) (rejecting appellant's invitation to create a "safe harbor" for population deviations of less than ten percent); *Fairley v. Hattiesburg, Miss*., 584 F.3d 660, 675 (5th Cir. 2009) ("If a population deviance is less than 10%, it is considered minor and does not suffice, alone, to make out a prima facie case of discrimination. Although deviation below that threshold

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Majority's assertion of legislative privilege only with respect to legislative communications that took place "outside LATFOR" or "after the proposed redistricting plan reached the floor of the Legislature." 2004 WL 22109902, at *1. Judge Maas compelled the Senate Majority to produce documents relating to the increase in the size of the Senate. *Id*. at *3. But he did not compel the Senate Majority to produce documents demonstrating its "partisan" goals, concluding that "it would add nothing to the discussion of the legality of the Senate majority's final plan if, as is generally the case, the request [by a political actor for the lines to be drawn in a certain way] was couched in political rather than racial or ethnic terms." *Id*. at *2. In so holding, Judge Maas failed to appreciate, the year before *Larios v. Cox*, 300 F. Supp. 2d 1320 (2004), was decided, that whether the Legislature purposefully drew districts with significant population deviations in order to achieve partisan goals *is* relevant to the lawfulness of a redistricting plan.

does not provide a safe harbor, a plaintiff in such a case 'must prove that the redistricting process was tainted by arbitrariness or discrimination.'" (quoting *Moore v. Itawamba County*, 431 F.3d 257, 259 (5th Cir.2005) (per curiam)); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 363-65 (S.D.N.Y. 2004) (rejecting argument that plans with population deviations below ten percent are immune from scrutiny). Indeed, in the Congressional redistricting context, the Supreme Court has repeatedly held that *no* population deviations are constitutionally tolerable, even deviations smaller than the statistical margin of error in the Census, regardless of whether any plaintiff has suffered any measurable injury. *See Karcher v. Daggett*, 462 U.S. 725 (1983); *see also Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (striking down plan with a total deviation of *nineteen* people out of 646,897).

Second, it is irrelevant whether the upstate and downstate regions are under- or over-populated measured by *citizen* population because Article III, § 5-a of the New York Constitution requires the equal population rule to be implemented based on *total* population. The Senate Majority correctly observes that in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), the Supreme Court assessed population equality based on citizen population. But that is because the New York Constitution was not amended to require apportionment based on total population until 1970. *Lomenzo* focused on citizen population only because that is what the New York Constitution required at the time.

Finally, Mr. Breitbart's April 26, 2012 Declaration (Dkt. 327) (Paragraphs 71-76, 81-87) establishes that the Senate Majority is wrong in claiming that an additional majority-minority district could not have been drawn in the downstate region. This assertion by the Senate Majority in its brief, coupled with Mr. Carvin's statement to the Court during the April 20, 2012 status conference that nobody proposed an additional downstate Hispanic- or black-majority

district before the Senate plan was enacted, suggest that the Senate Majority rejected the plans proposed by the public without considering them.

C. The Senate Majority Fails to Address Its Waiver of Attorney-Client Privilege

The Senate Majority's submission focuses exclusively on legislative privilege and does not address the attorney-client privilege waiver issue that we discussed with the Court at the last status conference. As the Court is aware, Senator Skelos published and widely disseminated a January 5, 2012 memorandum from Jones Day advising him regarding how to calculate the size of the Senate this year. There is no question that publishing this memorandum waived any attorney-client privilege between Senator Skelos and Jones Day regarding the Senate size at the very least. *See*, *e.g.*, *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (holding that "the attorney-client privilege cannot at once be used as a shield and a sword" and that a defendant "may not use the privilege . . . to disclose some selected communications for self-serving purposes"); *see also County of Erie*, 546 F.3d 222 (2d Cir. 2008); *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000). Accordingly, discovery should include inquiry into any advice that the Senate Majority received from Jones Day regarding the appropriate size of the Senate in 2012.[3]

D. Proposed Next Steps

In light of the foregoing, we propose that discovery in this case proceed as follows. First, the Senate Majority should disclose the identities of all of the individuals (including without

[3] As we have previously observed, the Senate size and population deviation issues are inextricably intertwined because the Senate Majority both maximally underpopulated the upstate region and created a 63rd Senate district in order to maximize partisan advantage. The New York Court of Appeals concluded in the *Cohen* case that the addition of the 63rd district did not violate the New York Constitution. But that does not mean that the addition of the 63rd district was part of an honest and good faith effort to draw equipopulous districts, an issue that was not addressed in *Cohen*.

limitation LATFOR officials, legislators, legislative staffers, attorneys, lobbyists, and/or consultants) who participated in the design of the Senate plan, specifying the nature of the role each individual played, and identifying the individuals who played the most significant role. Second, the Senate Majority should produce all documents relating to the design of the Senate plan, including memoranda and/or email messages or other writings evidencing why the Senate size was increased, why the Senate plan has significant population deviations, what alternatives were considered, and why those alternatives were rejected. Third, the relevant LATFOR officials and any outside consultants should be deposed. Once those three steps have been completed, the parties should evaluate whether depositions of legislators, legislative staffers, and/or attorneys is warranted and, if necessary, the parties should seek the Court's assistance in resolving any such issues. In the meantime, we respectfully submit that the first three steps outlined above are modest, minimally intrusive, and plainly warranted in light of the case law and the gravity of the claims in this case.

Dated: May 4, 2012
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