IN THE MATTER OF THE 2022	*	**IN THE**
LEGISLATIVE DISTRICTING OF	*	**COURT OF APPEALS**
THE STATE OF MARYLAND	*	**OF MARYLAND**
	*	**Misc. Nos. 21, 24, 25, 26, and 27**
	*	**September Term, 2021**

AMENDED ORDER OF SPECIAL MAGISTRATE REGARDING DISCOVERY

BACKGROUND

WHEREAS, on January 27, 2022, the General Assembly of Maryland enacted Senate Joint Resolution 22, which constitutes the Legislative Redistricting Plan of 2022. Article III, Section 5 of the Maryland Constitution confers on the Court of Appeals of Maryland original jurisdiction, upon petition by any registered voter, to review that Legislative Redistricting Plan and to grant appropriate relief if it finds that the redistricting of the State is not consistent with requirements of the Constitution of the United States or the Constitution of Maryland.

WHEREAS, on January 28, 2022, on motion of the Attorney General of Maryland, the Court entered an Order that promulgated certain procedures to govern all actions brought under Article III, Section 5 that challenge the validity of the Plan. Among other things, that Order required persons desiring to challenge the Plan to file a petition on or before February 10, 2022 and appointed the undersigned as a Special Magistrate to resolve

certain scheduling issues, take testimony and receive other evidence, and make a Report to the Court.

On or before the February 10 deadline set by the Court, four petitions were filed:

- Misc. No. 24, by David Whitney,
- Misc. No. 25, by Mark N. Fisher; Nicholaus R. Kipke; and Kathryn Szeliga,
- Misc. No. 26, by Brenda Thiam; Wayne Hartman; and Patricia Shoemaker, and
- Misc. No. 27 by Seth Wilson.

Mr. Whitney and Mr. Wilson are self-represented. The petitioners in Misc. Nos. 25 and 26 are represented by attorneys.

WHEREAS, Mr. Whitney's petition did not identify by number which district he was challenging but described a district that he said began in Anne Arundel County, extended east for more than four miles across the open Chesapeake Bay, and included land on the Eastern Shore. The petitioners in Misc. No. 25 are challenging eleven General Assembly districts, which they identified. The petitioners in Misc. No. 26 are challenging three General Assembly districts, which they identified; and the petitioner in Misc. No.27 is challenging one General Assembly district that he identified.

WHEREAS, On February 15, 2022, the Attorney General filed timely motions to dismiss all four of those petitions. With respect to Mr. Whitney's petition (Misc. No. 24),

the Attorney General noted that there was no General Assembly district that crossed the Bay in the manner Mr. Whitney alleged, that it appeared he was describing a Congressional district, and that the Court did not have original jurisdiction over complaints regarding Congressional districts.

WHEREAS, at a virtual scheduling conference held on February 17, 2022, the Special Magistrate inquired of Mr. Whitney what district he was challenging, and he responded that it was a General Assembly district. Still unaware that there was such a district that crossed the Bay as he described, the Special Magistrate asked that he amend his petition to identify it. He responded the next day by filing a completely new petition, which he continued to label Misc. No. 24, but which identified seven General Assembly districts, none of which crossed the Chesapeake Bay but did cross rivers (different rivers) on the Western Shore of the Bay.

WHEREAS, the Attorney General responded on February 22, 2022 with a "renewed" motion to dismiss Mr. Wilson's amended petition. The Attorney General argued that this was an entirely new petition that had no relationship whatever with the one filed on February 9, 2022, that it therefore could not relate back to the earlier petition, and that it therefore was untimely under the Court of Appeals scheduling Order of January 28, 2022, which required petitions to be filed by February 10, 2022. That issue has not yet been resolved.

DISCOVERY

On February 18, 2022, following the virtual scheduling conference on February 17, 2022, at which all of the petitioners participated, either remotely in person or through counsel, the Special Magistrate issued a general scheduling order directing that a good faith exchange of discovery occur on Friday, March 11, 2022 unless the Special Magistrate was informed by March 8 of an inability to achieve that objective. Such notice, jointly on behalf of the petitioners in Misc. No 25 and the Attorney General's Office was received by the Special Magistrate on March 5, whereupon a remote meeting occurred on March 8, 2022. Without objection, the petitioners in Misc. No. 26 participated in that meeting as well and joined in the arguments made by their colleagues in Misc. No. 25. Neither of the other two petitioners (Mr. Whitney in Misc. No. 24 and Mr. Wilson in Misc. No. 27) filed any timely discovery requests, and the time for doing so has now passed. They did not participate in the March 8 meeting.

The principal – indeed really the sole – dispute was whether certain information desired by the petitioners in Misc. Nos. 25 and 26 was protected by legislative privilege. Some discovery had been provided by the State informally, and there appeared to be a cooperative attitude on both sides, up to the point of a legal dispute over privilege. That dispute centered on the requests by those petitioners for what they characterize as "the following focused and limited discovery" from the State:

(1) who was responsible for the actual drawing or construction of the specific legislative district Petitioners have challenged;

(2) if a computer program was used, what criteria was the program instructed to use to draw the legislative districts Petitioners have challenged;

(3) who provided instructions to the actual map drawer(s) regarding what factors or other criteria were to be used in drawing the legislative districts Petitioners have challenged; and

(4) what specific instructions were given to the map drawer(s) regarding the various legislative districts Petitioners have challenged.

See Strider L. Dickson *Memorandum Concerning Applicability of Legislative Privilege to Petitioners Discovery Requests*, at 2, 3.

Petitioners' View

In support of those requests, petitioners in Misc. Nos. 25 and 26 note that Article III, Section 4 of the Maryland Constitution requires that each General Assembly district consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. They aver that those requirements are mandatory because they protect important interests, that the contiguity and compactness requirements are of particular importance because they are intended to prevent political gerrymandering, and that they may not be subordinated to justifications not mandated by the Federal or Maryland Constitutions. *Id.*at 1.

Those petitioners add that the State is in sole possession of the information requested and that petitioners cannot obtain it from any other source. They suggest that their requests

may not require testimony from any member of the General Assembly if no member was "involved in the hands-on drawing of the legislative districts." *Id.* at 3.

As legal support for their position, petitioners note that the purpose of the privilege is "to protect the legislative function and to allow it to be performed independently and without fear of outside interference" (citing *Montgomery County v. Schooley*, 97 Md. App. 107, 116 1993)), but urge that "it is not absolute" (citing *Floyd v. Baltimore City Council*, 241 Md. App. 199, 213 (2010)). They rely principally on *Benisek v. Lamone,* 241 F. Supp.3d 566, 575 (D. Md. 2017), a Congressional districting case, in which the court applied a five-factor test to determine whether the legislative privilege applicable in Federal court applied: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the State, as opposed to individual legislators in the litigation; and (5) the extent to which discovery would impede legislative action.

The State's View

The ultimate State law sources of the legislative privilege, according to the State, are Article 10 of the Maryland Declaration of Rights ("The freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature") and Article III, § 18 of the Maryland Constitution ("No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate.").

Those provisions, the State asserts, provide "absolute immunity" to Maryland legislators and members of their staff. In *Schooley, supra,* cited by petitioners, although

not for this purpose, the Court, latching on to *Gravel v. United States*, 408 U.S. 606 (*reh. denied*, 409 U.S. 902 (1972), concluded that "a legislator, even if not a party to the action and thus not subject to any direct consequence of it, cannot be compelled to explain, other than before the legislative body of which he is a member, either his legislative conduct or 'the events that occurred' in a legislative session." That provision necessarily assumes that there may be information critical to a protestant's case that is simply unavailable to the party who needs it. That is the very nature of a privilege.

As to the privilege itself, the *Schooley* Court construed language from *Gravel* as indicating that "a legislator, even if not a party to the action and thus not subject to any direct consequence of it, cannot be compelled to explain, other than before the legislative body of which he [or she] is a member, either his [or her] legislative conduct or 'the events that occurred' in a legislative session." *Schooley*, at 117. Citing language from *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292 (D. Md.1992), the *Schooley* Court added that a legislator, acting within the sphere of legitimate legislative activity, may not be required to testify regarding those actions. *Id,* at 118. Citing *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980), *Schooley* also held that "for purposes of the privilege, [the legislative process] includes more than just proceedings at regularly scheduled meetings of a legislative body" but includes as well "a meeting with citizens or private interest groups" and, if it includes that "must also include caucuses and meetings with political officials called to discuss pending or proposed legislation." *Id.* at 123.

The State challenges petitioners' reliance on *Benisek*, which was an attack in Federal Court on the redrawing, in 2011, of one **Congressional** district. The attack was based on Federal law, the allegation being that the redrawing of that district deprived petitioners of their rights under Article I, sections 2 and 4 of the U.S. Constitution and the First Amendment to that Constitution. To prove those allegations, the plaintiffs sought to depose four members of the Governor's redistricting advisory committee regarding their intent and motivation in drawing the district as they did and the data they used to achieve their objective.

The targets of the subpoenas produced some documents but denied others on the ground of legislative privilege. Acting under 28 U.S.C. § 2284(b)(3), a three-judge panel of Federal judges affirmed rulings by one of the panel members that rejected that claim. Applying Federal law, the court concluded that, although the legislative privilege was "robust," it did not absolutely protect state legislative officials from discovery into communications made in their legislative capacity. Citing only Federal cases, the court applied a five-part test to resolve the competing interests: (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the State; and (5) the extent to which the discovery would impede legislative action.

The major problem with reliance on *Benisek* is that the judgment in that case was vacated by the United States Supreme Court, which remanded the case to the U.S. District Court with instructions to "dismiss for lack of jurisdiction." *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

One of the least debatable statements made regarding the legislative privilege in Maryland came from Professor Lynn McLain in her book on Maryland Evidence, where, in § 513.1, she commented that "[t]he case law regarding legislative privilege is both scarce and somewhat arcane." The scarcity, if not also the arcaneness, is compounded by the varying contexts in which the issue has arisen – what kind and extent of information is being sought and from whom it is being sought, whether there is a substantial Federal interest in the outcome, whether the investigation is criminal in nature, whether there are significant racial issues, and who the targets are of the investigation or inquiry.

The function of a privilege is a protective one – to at least limit, if not avoid, the duty that otherwise would exist to disclose information subject to the privilege. As noted above, the privilege stems from the general proposition that legislators and their staff and consultants cannot be compelled to explain their legislative conduct or events that occurred in a legislative session, other than before the legislative body. For these reasons, the discovery requests proposed by petitioners are **DENIED**.

/s/ Alan M. Wilner
Alan M. Wilner
Special Magistrate

Filed: March 11, 2022

/s/ Suzanne C. Johnson
Suzanne C. Johnson
Clerk
Court of Appeals of Maryland