IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

COMMITTEE FOR A FAIR AND BALANCED MAP, et al. *Plaintiffs*, vs. ILLINOIS STATE BOARD OF ELECTIONS, et al. *Defendants.*	)	Case No. 1:11-cv-05065 Circuit Judge John D. Tinder District Judge Joan H. Lefkow District Judge Robert L. Miller, Jr.

THIRD-PARTY RESPONDENTS'
OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

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Introduction

In their Motion to Compel Enforcement of Third-Party Subpoenas, Plaintiffs do not—and cannot—deny the applicability of legislative immunity to the subpoenas at issue. That is, they do not deny that the information they seek about the passage of Public Act 97-14 falls clearly within "'the sphere of legitimate legislative activity.'" *Bagley v. Blagojevich*, 646 F.3d 378, 391 (7th Cir. 2011) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). They do not deny that the testimonial and documentary privilege applies to legislative staff and consultants as much as it does to legislators themselves. *See Gravel v. United States*, 408 U.S. 606, 615, 618 (1972); *Bagley*, 646 F.3d at 396-97. Nor do they deny that the privilege applies to document production as well as oral testimony at deposition or trial. *See Bagley*, 646 F.3d at 396-97; *Brown &Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418, 420 (D.C. Cir. 1995).[1]

Instead, Plaintiffs principally argue that the privilege, while clearly applicable, is *qualified* rather than absolute. For this proposition, they rely on three sources: (i) case law emanating from a U.S. Supreme Court decision holding that legislative immunity is qualified only in the context of a *criminal investigation*, which is plainly distinguishable from the instant civil action; (ii) *dicta* from another Supreme Court decision that did not involve consideration of legislative privilege; and (iii) case law interpreting a different privilege—the deliberative-process privilege. Plaintiffs cannot cite a *single* case from the Supreme Court or Seventh Circuit for the proposition that the legislative privilege is merely "qualified" in a federal civil lawsuit.[2]

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[1] Because Respondents herein are also Movants on the contemporaneously filed Motion to Quash and for Protective Order, for ease of discussion we will refer to the parties as the "Plaintiffs" and as the "General Assembly."

[2] At footnote 1 of their Motion to Compel, Plaintiffs state that "counsel for Respondents have agreed to consent to the jurisdiction of this Court for purposes of determining the enforceability of the Subpoenas against all Respondents, whether they reside in this District or in the Central District of Illinois[.]" Contrary to that statement, counsel for the Respondents made no such representations. Rather, counsel for Respondents explained that the entities subpoenaed in the Northern District (*i.e.*, the Office of the Speaker of the House and the Office of the Senate

Argument

I. The Legislative Privilege Is Absolute In A Federal Civil Action.

Once it is determined that legislative immunity applies—as Plaintiffs concede here—it is an "absolute bar to interference" from the judiciary. *Bagley*, 646 F.3d at 396 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502-03 (1975)). *Accord Brown & Williamson*, 62 F.3d at 418-19; *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 529 (9th Cir. 1983). It involves no balancing of harms or consideration of the interests at stake in the civil lawsuit. *Eastland*, 421 U.S. at 509; *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 634 (1st Cir. 1995).

A. The Supreme Court and Seventh Circuit Decisions Relied Upon By The General Assembly Are Not "Outlier" Cases But Binding Precedent.

Plaintiffs casually dismiss the 2011 Seventh Circuit decision in *Bagley* and relevant Supreme Court precedent as "outlier cases." (Pl. Mot. at ¶ 6, n. 6). They relegate to a footnote (Pl. Mot. at ¶ 9, n. 7) their discussion of *Bagley*, where the court, on legislative immunity grounds, blocked the depositions of the Illinois Governor and his aide regarding his legislative act of issuing a line-item veto. 646 F.3d at 396-97. They do not cite *Gravel v. United States*, where the Supreme Court found it "incontrovertible" and had "no doubt" that both a legislator and his aide had a privilege against testifying as to actions taken within the legislative sphere. 408 U.S. at 615, 616. Nor do they cite *Dombrowski v. Eastland*, 387 U.S. 82 (1967) or *Eastland v. U. S. Servicemen's Fund,* 421 U.S. 491 (1975), relied upon by the court in *Bagley*, both of which noted that legislators "'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Dombrowski*, 387 U.S. at 85, *quoted*

President) possess the documents addressed by the Plaintiffs' subpoenas and if the Court granted Plaintiffs' motion, counsel for Respondents would collect responsive emails possessed by employees on personal email accounts, including for Respondents residing in the Central District.

in Eastland, 421 U.S. at 503. Far from "outlier cases," these Supreme Court decisions compel a finding of absolute legislative privilege in this matter.

Beyond the Supreme Court precedent, the decision in *Bagley* is consistent with case law in the Seventh Circuit dating back to a 1976 *en banc* decision of that court. *U.S. v. Craig*, 537 F.2d 957, 958 (7th Cir. 1976) (*en banc*). In upholding the panel's decision for the reasons stated in Judge Tone's concurring opinion, the Seventh Circuit's *en banc* opinion held that "the protection afforded state legislators under the federal law for acts done in their legislative roles is based on the common-law doctrine of official immunity, *the privilege is commensurate with the immunity*, and since the immunity does not extend to criminal liability neither should the privilege." *Id.* at 958 (emphasis added). Thus, since 1976, the Seventh Circuit has held that to the extent legislative immunity provides immunity from liability, there exists a *commensurate* evidentiary privilege. *Accord Schultz v. Stranczek*, 1991 WL 328518 at *1 (7th Cir. 1991) ("one of the functions of absolute [legislative] immunity is protecting the claimant from discovery"). As long as, and insofar as immunity from liability attaches, so does the nondisclosure privilege. At no point has the Seventh Circuit or Supreme Court found this framework erroneous or characterized the evidentiary privilege as qualified in a federal civil action.

Bagley is entirely consistent with these principles. After finding that the issuance of a veto was immune from civil liability because it took place "'in the sphere of legitimate legislative activity,'" the court "[saw] no reason" why immunity should not also serve as an evidentiary privilege barring depositions of the Governor and his aide. 646 F.3d at 397.

The same result obtains here. Clearly, state legislators would enjoy absolute immunity from *liability* if they were sued over their legislative acts in the course of passing P.A. 97-14. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of*

Illinois, Inc., 729 F.2d 1128, 1131 (7th Cir. 1984); *see Scott v. Taylor*, 405 F.3d 1251, 1255-56 (11th Cir. 2005) (legislators absolutely immune from suit in their official capacity for prospective relief in redistricting case). Thus, consistent with *Craig* and *Bagley*, it follows that the commensurate absolute privilege of nondisclosure likewise applies to bar discovery into the General Assembly's drafting, negotiating, and passage of that redistricting law. *Accord Miller*, 709 F.2d at 529-30; *Brown & Williamson*, 62 F.3d at 418-21; *Equal Employment Opportunity Comm'n v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).[3]

B. Plaintiffs' Reliance (i) On Cases Interpreting Legislative Immunity In Criminal Actions, (ii) On the *Arlington Heights* Decision, And (iii) On Case Law Interpreting The Deliberate-Process Privilege Are Misplaced.

1. The Decisions of *Gillock* and *In re Grand Jury* Are Inapposite Because They Concerned Legislative Immunity In Criminal Matters.

Lacking any Supreme Court or Seventh Circuit case law to support their contention that legislative immunity in a civil lawsuit is qualified, not absolute, Plaintiffs rely heavily on *U.S. v. Gillock*, 445 U.S. 360 (1980), *In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987), and the small group of cases that relied on them. These cases are obviously distinguishable.[4]

In the case of *In re Grand Jury*, the Third Circuit rejected Pennsylvania lawmakers' claim of absolute legislative privilege from complying with a federal grand jury subpoena—a

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[3] As further evidence that the General Assembly's position is not the minority view, as Plaintiffs claim, state courts in at least 16 states as well as the U.S. District Court for the District of Columbia have interpreted their respective "speech or debate" clauses as affording an absolute evidentiary privilege against compelled testimony or disclosure of legislative acts. And at least eight states have held the privilege to be absolute in the third-party context. (A list of these decisions is attached hereto as Exhibit A).

[4] Case law cited by Plaintiffs relying on *In re Grand Jury* or *Gillock* include *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (relying on *In re Grand Jury*, but finding that *Gillock* "plainly does not control the present civil discovery question"); *Fla. Ass'n of Rehab Facs. v. Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 262-67 (N.D. Fla. 1995) (relying on *Gillock*, *In re Grand Jury*, and *Irvin*); *Manzi v. DiCarlo*, 982 F.Supp. 125 (E.D.N.Y. 1997); *Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 636-41 (S.D. Cal. 2001) (relying on *Irvin* as well as *In re Grand Jury*); *Rodriguez v. Pataki*, 280 F.Supp.2d 89 (S.D.N.Y. 2003) (relying on *Irvin*, *Florida Ass'n of Rehabilitation Facilities*, and *In re Grand Jury*); *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710 *11-22 (C.D. Cal. 2003) (relying on *Irvin*, *Florida Ass'n of Rehabilitation*, *In re Grand Jury*, *Gillock*, and *Newport Pacific*).

decidedly unsurprising result given that the Supreme Court had already found, seven years earlier in *Gillock*, that federal common-law legislative immunity did not supply legislators with an evidentiary privilege in federal *criminal* cases. 821 F.2d at 956-958; *Gillock*, 445 U.S. at 373.

It is from this seed that Plaintiffs' case law emerged. The fatal flaw with these cases, however, is that their vitality depends entirely on the Third Circuit's decision and, in turn, on *Gillock*. In *Gillock*, the Supreme Court reasoned that no absolute privilege existed primarily because the enforcement of federal *criminal* statutes presented an important federal interest to which the principle of protecting state legislators from interference must yield. 445 U.S. at 372-73. Notably, the Court reiterated that its legislative immunity decisions firmly protect the independence of state legislators as a common-law privilege in federal *civil* actions. *Id.* at 373.

Following *Gillock*, the Seventh Circuit left no doubt that legislative immunity continued to apply to *civil* actions. In *Thillens*, 729 F.2d 1128, the court specifically recognized the *Gillock* holding (which, as the court implicitly recognized, mirrored the Seventh Circuit's *en banc Craig* decision) and held that state legislators still enjoyed absolute immunity in *civil* actions for their legislative acts. *Id.* at 1131. Since *Thillens*, the Seventh Circuit has repeatedly limited the *Gillock* holding to the criminal arena. *See In re Witness*, 288 F.3d 289, 295 (7th Cir. 2002); *U.S. v. Wilson*, 960 F.2d 48, 50 (7th Cir. 1992); *U.S. v. Davies*, 768 F.2d 893, 898 (7th Cir. 1985).

2. The *Arlington Heights* Decision Does Not Alter The Absolute Nature Of Legislative Privilege; If Anything, It Recognizes It.

Plaintiffs' reliance on the decision in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), and cases relying on this decision, is misplaced. (Pl. Mot. at ¶¶ 9-11, 18). Most importantly, *Arlington Heights* did not involve a claim of legislative immunity or any other privilege. Rather, in *Arlington Heights*, a case involving a challenge to a village zoning board decision, the Court merely held that plaintiffs must prove, as an element of

their claim, that discriminatory intent or purpose was a motivating factor in the decision. *Id.* at 265. The court proceeded in *dicta* to list examples of evidence that might reveal such an intent or purpose, including the following example relied upon by Plaintiffs (Pl. Mot. at ¶ 9, n.6): "[i]n some extraordinary instances the members [of the decision-making body] might be called to stand at trial and testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id.* at 268.

This reference to "extraordinary instances" in this context is unremarkable. The Court was quick to add that even in such extraordinary instances, "such testimony frequently will be barred by privilege." *Id.* For this proposition, the court cited *Tenney*, the leading Supreme Court decision recognizing absolute immunity for state legislators, *United States v. Nixon*, 418 U.S. 683, 705 (1975), a case recognizing a *qualified* executive privilege for the President, and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), a case recognizing a *qualified* testimonial privilege for administrative decisionmakers. *Id.* at 268 and n.18. The Court in *Arlington Heights* was not referring only to legislative bodies; it was also discussing executive bodies, such as the one involved in the very controversy before it, a zoning board. Thus, when the Court wrote that such testimony would "frequently" be barred by privilege, the most logical reading of that statement would be that such testimony would *always* be barred under absolute legislative immunity and would usually, but not necessarily always, be barred under the qualified immunity executive officers enjoy.

Thus, the Court's reference to "extraordinary instances" does not assist Plaintiffs. If anything, the Court's mention of the attendant privileges that would frequently apply shows that the Court contemplated absolute immunity for legislators. *See Buonauro v. City of Berwyn*, 08 C 6687, 2011 WL 116870 at *6 (N.D. Ill. Jan. 10, 2011) (noting that *Arlington Heights* did not give

plaintiffs the right to inquire into legislators' motives but, in fact, "'has done very nearly the opposite'") (quoting *Dyas v. City of Fairhope,* No. 08-0232-WS, 2009 WL 3151879, at *9 (S.D. Ala. Sept. 24, 2009)). One court in the redistricting context made this same observation. *See Cano v. Davis*, 193 F.Supp.2d 1177, 1180 (C.D. Cal. 2002).

At a minimum, it would require a gymnastic leap to believe that legislative immunity, which has been held by the Supreme Court and Seventh Circuit to be absolute in the civil arena—both before and after *Arlington Heights*—was somehow converted into a "qualified" privilege by virtue of *dicta* from a decision that did not even concern that immunity.[5]

3. Case Law Interpreting The Deliberative-Process Privilege Does Not Assist Plaintiffs' Objection To Legislative Immunity.

Plaintiffs also rely on cases discussing the deliberative-process privilege to support their argument that the legislative privilege is qualified. (Pl. Mot. at ¶¶ 13-15 (citing *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989); *United States v. Bd. of Educ. of City of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985)); *Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001)).) This tactic is ironic given that elsewhere, Plaintiffs argue that the deliberative-process privilege does not even *apply* to legislators. (Pl. Mot. at ¶ 22.) Regardless, Plaintiffs' reasoning here is circular. The deliberative-process privilege, by design, involves a balancing test weighing several factors, so it is only natural that cases discussing that

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[5] Plaintiffs also seek refuge from language in *Arlington Heights* noting that plaintiffs "were allowed . . . to question [village] Board members fully about materials and information made available to them at the time of decision." *Id.* at 270 n. 20. (*See* Pl. Mot. at ¶ 18.) But the Court nowhere concluded that plaintiffs were "allowed" to do so because the defendants lacked an evidentiary privilege, as opposed to providing a voluntary disclosure. *Id.* at 270. Nor can it support Plaintiffs' position that they are somehow entitled to "materials and information available to Respondents at the time a decision was made." (Pl. Mot. at ¶ 18.) Those "materials and information" would constitute virtually every single document called for in the subpoenas. That exception would swallow the rule and render an absolute privilege anything but. And it would do so based on a court case that did not even involve legislative immunity as a litigated issue.

privilege would discuss issues such as the importance of the issues presented in the litigation. It would be a curious result, indeed, if legislative immunity were found to be qualified simply because a separate and distinct privilege is qualified.

In particular, Plaintiffs misread *Irvin*, citing it as a legislative privilege case (Pl. Mot. at ¶ 13) when it plainly concerned the extension of the deliberative-process privilege enjoyed by executive officials to state legislators. *See* 127 F.R.D. at 174.

The purpose of the deliberative-process privilege is to promote frank discussions of government decisions. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). While the legislative privilege shares this purpose, it is also intended to prevent interference in the legislative process and protect legislators and their aides from having to defend themselves. *Gillock*, 445 U.S. at 1191; *Dembroski*, 387 U.S. at 84-85. The non-interference rationale is why, unlike the deliberative-process privilege, the legislative privilege is "an absolute bar to interference." *Bagley*, 646 F.3d at 396 (quoting *Eastland*, 421 U.S. at 502-03); *see Buonaro*, 2011 WL 2110133 at **2-3 (considering deliberative-process privilege and legislative privilege separately and finding that legislative privilege, but not deliberative-process privilege, precluded production of City Council documents).

C. The Importance Of The Section 1983 Claims And The Voting Rights Act Do Not Overcome Absolute Legislative Immunity.

Plaintiffs argue that absolute legislative immunity should fall due to the important federal interests in their Section 1983 and Voting Rights Act claims. (Pl. Mot. at ¶ 13.) However, "common-law principles of legislative and judicial immunity were incorporated in our judicial system and [ ] they should not be abrograted absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). This is especially true with legislative immunity, which "enjoys a unique historical position." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning*

Agency, 440 U.S. 391, 403 n.24 (1979). Legislative immunity "has its roots in the parliamentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders." *Id.* at 403.

Plaintiffs' argument concerning their Section 1983 claims fail under *Tenney*, where the Supreme Court held that Congress did not abrogate legislative immunity in Section 1983 actions. 341 U.S. at 376 (Congress did not intend "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National governments here"). Plaintiffs' remaining claim is the Voting Rights Act; they have cited no "clear legislative intent" in that Act to abrogate this immunity. *Pulliam*, 466 U.S. at 529.

Indeed, if anything, it seems abundantly clear that Congress knew full well that absolute legislative privilege would apply to claims under the Voting Rights Act. *See* S. Rep. No. 417 (1983), *reprinted in* 1982 U.S.C.C.A.N. 177, 214-15. As reflected in the U.S. Senate's report detailing the 1982 amendments to the Voting Rights Act, one of the reasons "intent" was eliminated as the exclusive test to establish a Section 2 violation was the drafters' recognition that legislative privilege might block evidence of "the motives involved in the legislative process." *Id.* Plaintiffs have not demonstrated any hint, much less "clear legislative intent," that Congress intended to abrogate absolute legislative immunity for Voting Rights Act claims.

D. Plaintiffs' "Waiver" Argument Misstates The Law.

In a final attempt to avoid the force of absolute legislative privilege, Plaintiffs state that the General Assembly's communications with non-legislative actors constitute a partial waiver of the privilege. Their position runs against the overwhelming weight of authority. Courts have long recognized that information gathering and legislative fact-finding fall within the legislative sphere and are entitled to legislative immunity. *See Almonte v. City of Long Beach*, 478 F.3d

100, 107 (2nd Cir. 2007) (legislative immunity covers all aspects of the legislative process, including meetings with persons outside the legislature to discuss issues that bear on potential legislation); *Miller*, 709 F.2d at 530 ("Obtaining information pertinent to potential legislation is one of the 'things generally done in a session of the House' … concerning matters within the 'legitimate legislative sphere.'"); *Williams v. Johnson*, 597 F.Supp.2d 107, 114 (D.D.C. 2009) ("[W]hether conducted formally or informally, the acquiring of information is an activity that is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that legislators are able to discharge their duties properly.").

Such information gathering invariably includes communications regarding legislation with parties outside of the legislature. Documents exchanged in these communications are protected from discovery. *Brown v. Williamson*, 62 F.3d at 417 ("Once the documents were received by Congress for legislative use—at least so long as congressmen were not involved in the alleged theft—an absolute constitutional bar of privilege drops like a steel curtain to prevent [a litigant] from seeking discovery."); *Benford v. American Broadcasting Companies, Inc.*, 102 F.R.D. 208, 210 (D. Md. 1984) (holding that information received in execution of legislative functions, including information gathering, is privileged from discovery).

Under Plaintiffs' view, the only way legislators could preserve their absolute privilege would be to lock the doors to the capitol building, turn off their phones and email, and work in complete isolation from the outside world. To say the least, such a narrow view of this historical privilege would be inconsistent with representative government.[6]

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[6] Furthermore, waiver of the legislative privilege "can be found only after explicit and unequivocal renunciations of the protection." *2BD Associates Ltd. Partnership v. County Com'rs for Queen Anne's County*, 896 F.Supp. 528, 535 (D. Md. 1995) (quoting *United States v. Helstoski*, 442 U.S. 477, 491 (1979)); *see also Brown & Williamson*, 62 F.3d at 408, n. 11; A *Helping Hand, LLC v. Baltimore County, Md.*, 295 F.Supp.2d 585, 591 (D. Md. 2003). Plaintiffs nowhere suggest that General Assembly Members or staff have made such a renunciation.

The few cases cited by Plaintiffs not only are unpersuasive; it is highly questionable that they are even good law. Plaintiffs cite *Almonte v. City of Long Beach*, 2005 WL 1971014 at * 3 (E.D.N.Y. Aug. 16, 2005), for the proposition that "consultations with [a] political operative were not part of the legislative process and thus not privileged." (Pl. Mot. at ¶ 19.) But on appeal, the Second Circuit ruled directly to the contrary:

> We hold that legislative immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote. *** Meeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation … assist legislators in the discharge of their legislative duty. These activities are also a routine and legitimate part of the modern-day legislative process.

Almonte, 478 F.3d at 107. While the magistrate's interlocutory *Almonte* decision cited by Plaintiffs was not directly reversed by the Second Circuit, it is fair to say that the Second Circuit clearly disagreed with the lower court's view of legislative immunity. In fact, given that every case cited by Plaintiffs for their waiver argument come from a New York district court, it is dubious that any of them are viable in light of the Second Circuit *Almonte* decision.[7]

This is not to say that Plaintiffs cannot seek discovery from third parties with whom legislators or their staff conferred. They simply cannot depose or compel documents from the legislative actors directly. *See Cano*, 193 F.Supp.2d at 1179 (denying protective order regarding deposition of non-legislator about discussions with legislators and their staffs) (citing *Gravel*, 408 U.S. at 629, n. 18). In fact, this raises a point made by the General Assembly previously (G.A. Mem. at pp. 11-12), that Plaintiffs have other avenues to pursue much of the information they seek because they can subpoena these third parties.

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[7] Plaintiffs' citation to *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 101 (S.D.N.Y. 2003), relies strictly on dicta which is not supported by explanation or case law. The court in *ACORN v. County of Nasssau*, 2007 WL 2815810 at ** 5-6 (E.D.N.Y. 2007), relied on that same dicta from *Rodriguez*.

Be that as it may, it would eviscerate the historical, absolute immunity enjoyed by legislators if the routine task of communicating with third parties were construed as a waiver of that privilege by those legislative actors. That should not be the law and it is not the law.

E. The Fact That General Assembly Members And Staff Are Not Named Defendants Is Irrelevant.

Plaintiffs make a passing reference, without elaboration, to the fact that the discovery at issue here is "third party" discovery, in which only a "qualified" privilege exists. (Pl. Mot. at ¶ 9). To the extent that they suggest that this long-held, fundamental, and absolute privilege somehow morphs into a "qualified" privilege simply because Members of the General Assembly are not named defendants, their argument fails. Several Circuit Courts have firmly rejected the drawing of "so artificial a line." *See MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (subpoena to non-party subcommittee and staff protected by absolute legislative privilege). "'A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.'" *E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (non-party legislator absolutely privileged from complying with subpoena) (quoting *MINPECO*, 844 F.2d at 859). Even where the legislative investigation has already ended, and even where the legislators and staff are no longer part of the legislature, the courts have steadfastly refused to permit a breach in the absolute nature of the privilege. *Miller*, 709 F.2d at 528 (subpoena to non-party former congressman protected by absolute legislative privilege, even though he could not possibly be distracted from his legislative duties: "Any questioning about legislative acts, even [of a former legislator], would 'interfere' by having a chilling effect on Congressional freedom of speech.").

As the D.C. Circuit noted, if absolute legislative privilege were qualified, then "each time a subpoena is served on a committee, an initial judicial inquiry would be required to calibrate the degree to which its enforcement would burden the committee's work. Such a consequence would be absurd." *MINPECO*, 844 F.2d at 859-60. What is equally "absurd" is any suggestion by Plaintiffs that there is a meaningful difference to the Members and staff of the General Assembly between a request for documents served by third-party subpoena, as opposed to a production request on a named party; or how a deposition compelled by subpoena is any less intrusive on an individual than one compelled by notice to a party. If the privilege can be converted from absolute to qualified by the choice of who is sued, then a privilege deeply rooted in the country's history can be thwarted by strategic gamesmanship.

II. Independent of the Absolute Legislative Privilege, the Deliberate Process Privilege Operates to Bar the Subpoenas.

Even under the qualified deliberate process privilege, the balance of interests, for and against disclosure, would favor assertion of the privilege. The chilling effect that disclosure would have on the legislative process clearly outweighs the factors favoring disclosure. *ACORN*, 2007 WL 2815810 at *2. As Plaintiffs recognize, among the factors that the deliberative process privilege requires to be considered in arriving at such a determination are: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Id.*; *Rodriguez*, 280 F.Supp.2d at 100-101.

The most significant factors to be considered are the availability of other evidence and the seriousness of the litigation. *ACORN*, 2007 WL 2815810 at *3. Here, it is quite evident that Plaintiffs have been and/or will be able to obtain much of the evidence they seek through

alternative means. The General Assembly has already provided substantial, publicly-disclosed evidence that is pertinent to the litigation, including approximately 2500 pages of transcripts from the Illinois Senate and House redistricting committee hearings, audio recordings of both the House and Senate floor debate regarding SB 1178, the text of SB 1178 and all associated roll call votes, all hearing witness statements and witness slips received by the Senate and House redistricting committees, and all shape files used to create the Congressional maps (disclosed to Plaintiffs in response to their FOIA request). Beyond the publicly-disclosed materials already provided to Plaintiffs by the General Assembly, Plaintiffs have subpoenaed the DCCC (the entity which Plaintiffs have described in other filings as having drafted the map passed by the General Assembly)[8] and have begun to subpoena individual members of Congress.

And while the claims brought under Section 1983 and the Voting Rights Act are certainly serious, it was noted previously that Congress was aware of the legislative privilege but did not intend to remove its force in claims brought under either the Voting Rights Act or Section 1983. Despite the importance of those claims, Congress intended to foreclose inquiry into legislators' motives. *See ACORN*, 2007 WL 2815810 at * 3 ("neither plaintiffs' submissions nor the court's own research has identified a single case in which the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations").[9]

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[8] *See* Plaintiffs' Motion to Compel DCCC at ¶¶ 14-15.

[9] Contrary to Plaintiffs' claim (Pl. Mot. at ¶ 23), the General Assembly properly asserted the deliberative process privilege, even though their objection was not on a document-by-document basis. In *Tuite v. Henry*, the court reasoned that under Rule 45(d)(2), a district court must ensure that an objecting party has a reasonable time to fully evaluate subpoenaed documents and a requesting party has reasonable time to contest that claim. 98 F.3d. 1411, 1416-17 (D.C. Cir. 1996). The Northern District of Illinois adopted this reasonableness standard in *Minnesota Sch. Boards Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 630 (N.D. Ill. 1999).

III. The General Assembly Properly Asserted And Preserved The Attorney-Client And Work Product Privileges.

Plaintiffs argue in cursory fashion that the General Assembly failed to assert the attorney-client and work-product privileges because it has not purportedly "gone to the trouble to analyze particular documents." That is not true. General Assembly staff has diverted time and resources from their legislative obligations to preliminarily review the documents potentially responsive to Plaintiffs' subpoena, at least to recognize they number the tens of thousands. The subpoenas seek a broad range of documents that include within their scope privileged attorney-client communications between attorneys employed by the Senate President and House Speaker and legislators and/or legislative aides involved in the congressional redistricting process.[10]

As with the deliberative-process privilege, the General Assembly properly and timely asserted these privileges, and, if the legislative privilege is denied, would seek sufficient time to provide the Court with a privilege log detailing the privileged documents pursuant to Rule 45(d)(2). *Tuite*, 98 F.3d. at 1416-17; *Minnesota Sch. Boards*, 183 F.R.D. at 630; *Metzger v. American Fidelity Assurance Co.*, No. CIV-05-1387-M, 2007 WL 895141 2-4 (W.D. Okla. 2007) (rejecting claim that legislators waived legislative privilege by failing to submit a privilege log because "even if no privilege log has been provided, the nature of the documents sought is clear from the text of Plaintiff's request").

WHEREFORE, Third-Party Respondents respectfully request that Plaintiffs' Motion to Compel be denied for the reasons stated herein.

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[10] Indeed, Plaintiffs were brazen enough to specifically target their subpoenas at two attorneys employed by the Senate President. Similarly, many of the documents requested fall under the attorney-work product doctrine because the documents were prepared in anticipation of, and as an outgrowth of, claims litigated against Illinois redistricting plans for the past four decades.

Respectfully submitted,
By: /s/ Richard J. Prendergast, Esq.
One of the Attorneys for Third Party Respondents

Senate President John J. Cullerton, House Speaker Michael J. Madigan, Senator Kwame Raoul, Representative Barbara Flynn Currie, and the subpoenaed General Assembly staff members.

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EXHIBIT A

I. State Court and United States District Court for the District of Columbia decisions interpreting their respective "speech or debate" clauses as affording an absolute evidentiary privilege against compelled testimony or disclosure of legislative acts.

- *Arizona Independent Redistricting Commission v. Fields*, 75 P.3d 1088, 1095 (Ariz. App. Div. 1, 2003)
- *State v. Neufeld*, 926 P.2d 1325, 1332 (Kan. 1996)
- *Copsey v. Baer*, 593 So.2d 685, 686-687 (La. App. 1st Cir. 1991)
- *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736, 750 (N.H. 2005)
- *Novak v. City of High Point*, 582 S.E.2d 726 at *6 (N.C. App. 2003)
- *Brock v. Thompson*, 948 P.2d 279, 287 (Okla. 1997)
- *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984)
- *Humane Society of NY v. City of New York*, 729 N.Y.S.2d 360, 363 (Sup. Ct. N.Y. 2001)
- *Campaign for Fiscal Equality v. State*, 687 N.Y.S.2d 227, 230-232 (N.Y. Sup. 1999)
- *In re Perry*, 60 S.W.3d 857, 859-860 (Tex. 2001)
- *Kerttula v. Abood*, 686 P.2d 1197, 1204-1205 (Alaska 1984)
- *Montgomery County v. Schooley*, 627 A.2d 69, 75 (Md. App. 1993)
- *Blume v. County of Ramsey*, No. C9-88-2861, 1988 WL 114606 at *2 (Minn. Tax. Ct.)
- *State v. Township of Lyndhurst*, 650 A.2d 840, 844 (N.J. Super. Ch. 1994)
- *Melvin v. Does*, No. GD99-10264, 2000 WL 33252882 at *574 (Pa. Comm. Pl.)
- *Covel v. Town of Vienna*, No. CH-2003-184618, 2009 WL 7326376 at *6-7 (Va. Cir. Ct.)
- *Greenburg v. Collier*, 482 F.Supp. 200, 202-203 (E.D. Va. 1979)
- *State v. Beno*, 341 N.W.2d 668, 678 (Wis. 1984)
- *Williams v. Johnson*, 597 F.Supp.2d 107 (D.D.C. 2009)
- *Chang v. United States*, 512 F.Supp.2d 62 (D.D.C. 2007)

- *City of King City v. Community Bank of Central California*, 131 Cal.App.4th 913, 931, n. 12 (Cal. App. 4th Dist. 2005)

II. State Court and United States District Court for the District of Columbia decisions that have held the legislative privilege to be absolute in the third party context.

- *Humane Society of NY v. City of New York*, 729 N.Y.S.2d 360, 363 (Sup. Ct. N.Y. 2001)
- *Campaign for Fiscal Equality v. State*, 687 N.Y.S.2d 227, 230-232 (N.Y. Sup. 1999)
- *In re Perry*, 60 S.W.3d 857, 859-860 (Tex. 2001)
- *Kerttula v. Abood*, 686 P.2d 1197, 1204-1205 (Alaska 1984)
- *Montgomery County v. Schooley*, 627 A.2d 69, 75 (Md. App. 1993)
- *Blume v. County of Ramsey*, No. C9-88-2861, 1988 WL 114606 at *2 (Minn. Tax. Ct.)
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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

COMMITTEE FOR A FAIR AND BALANCED MAP, et al. *Plaintiffs*, vs. ILLINOIS STATE BOARD OF ELECTIONS, et al. *Defendants.*	Case No. 1:11-cv-05065 Circuit Judge John D. Tinder District Judge Joan H. Lefkow District Judge Robert L. Miller, Jr.

NOTICE OF FILING

TO: SERVICE LIST

PLEASE TAKE NOTICE that on **Tuesday, September 27, 2011**, I caused to be filed with the Clerk of the Northern District of Illinois, Eastern Division, **Third-Party Respondents' Opposition to Plaintiffs' Motion to Compel**, a copy of which is attached and served upon you.

By: /s/ Richard J. Prendergast
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CERTIFICATE OF SERVICE

Richard J. Prendergast, an attorney, certifies that he caused a copy of the **Notice** and **Third-Party Respondents' Opposition to Plaintiffs' Motion to Compel** to be served upon the following Service List via electronic means, this 27th day of September, 2011.

/s/ Richard J. Prendergast

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