Responses and Replies

1:13-cv-01312-WDQ Hake et al v. Carroll County, Maryland

U.S. District Court

District of Maryland

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REPLY to Response to Motion re [55] MOTION to Compel *Production of Documents* filed by American Humanist Association, Lauren Graybill, Bruce A. Hake, Cornelius M. Ridgely, Judy Smith. (Miller, Monica)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Bruce A. Hake, et al. *Plaintiffs,* v. Carroll County, Maryland, by its Board of County Commissioners, et al. *Defendants*.	Case No. 1:13-cv-01312-WDQ

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS

I. INTRODUCTION[1]

The questions presented are: (1) Whether Defendants' boilerplate objections to every request constitute a waiver; and (2) Whether Defendants' failure to oppose the Motion to Compel constitutes an assent to the Motion. Defendants attempt to unduly complicate the issues by reasserting their entire legislative immunity argument, which has already been briefed by both parties *ad nauseam*, and by raising a number of issues that have no bearing on the present motion. While Defendants have willfully ignored the local rules and refused to turn over a single document, Plaintiffs have consistently followed the rules and acted in good faith to coordinate with Defendants on resolving the discovery disputes.

II. DEFENDANTS' FAILURE TO OPPOSE PLAINTIFFS' MOTION IS A WAIVER.

Because Defendants failed to timely respond to Plaintiffs' Motion to Compel, they effectively assented to the Motion. *See Pisani v. Balt. City Police Dep't*, 2014 U.S. Dist. LEXIS 15068 (D. Md. Feb. 6, 2014) ("Plaintiff Bryan M. Pisani did not file a response to the Motion to Compel and the time for doing so has passed. See Loc. R. 105.2. I find that a hearing is not necessary. See Loc. R. 105.6. For the reasons stated herein, the Motion to Compel is GRANTED IN PART"); *Anderson v. Obama*, 2010 WL 3000765, at *2 (D. Md. 2010) ("Defendants, having failed to oppose the Motion to Amend within 14 days, should be deemed to have waived any opposition to same."). Defendants do not deny that they violated L.R. 104 by failing to respond to Plaintiffs' Motion. Instead, they make the baffling argument that it was Plaintiffs' responsibility to inform them of *their deadlines* under the local rules. What is more troubling is the fact that, despite not having such an obligation, Plaintiffs (repeatedly) *did* inform Defendants of their duty to respond to Plaintiffs' Motion, yet Defendants still failed to respond.

Specifically, on June 23, 2014, Plaintiffs served Defendants with their Motion, accompanied by the following courtesy email: "Defense Counsel, Please see the attached motion to compel and memorandum of law in support of the motion. ***As you know, the local rules require the motion and memorandum to be served on the parties without filing on ECF***. If we are unable to resolve the matter,

[1] Plaintiffs refer to and incorporate by reference their Motion to Compel Memorandum along with their Cross-Motion for Summary Judgment Memorandum ("P. MSJ") and Reply Memorandum in support of the same ("P. Reply MSJ") as if fully stated herein. Defendants' belated "Opposition" Brief is referred to herein as "D.Br."

I will be filing the attached with the Court. If you would like to confer about this before serving ***your responsive papers***, please let me know." (Dkt. 55 ¶3).

Plaintiffs' email tracked the language of the local rules. L.R. 104.8.b "encourages" (but does not require) an informal conference around the time the motion is served and then provides: "counsel must hold the conference required by L.R. 104.7 *after serving upon one another all of the documents* relating to the motion to compel." (emphasis added). L.R. 104.8.a states that the parties shall "not serve them through the Court's electronic filing system[.]" Finally, L.R. 104.8.c.i provides that "If counsel fail to resolve their differences during their conference, the party seeking to compel discovery shall file the certificate required by L.R. 104.7 [on ECF], and shall append thereto a copy of the motion and memoranda **previously served by the parties** under L.R. 104.8.a."

Two days after Plaintiffs served their Motion on Defendants in accordance with the above rules, Defendants sent an email in response, seeking to discuss discovery that day. Plaintiffs' counsel (Ms. Miller) promptly replied, explaining she was available for a "quick call around 3:00 pm" but was unable to have an extended discussion. (Dkt.55¶4). Significantly, Plaintiffs' counsel again informed Defendants of the rules, explaining: "The **local rules require** us to meet and confer ***after all the briefs are filed (i.e. after you respond and we reply)*** so if today doesn't work out, ***we can plan to talk then***, if not sooner." (*Id.*). She added: "Also, I will be available via email while I am out in California so we can also try and resolve the disputes that way as well." (*Id.*). Defendants' counsel responded: "OK thanks. Let me know when you are back from California and we will try to schedule a call then." (*Id.*).

Accordingly, the parties agreed to hold the discovery conference *after all the briefs were filed* (i.e. the mandatory 104.7 conference). They did not agree to confer prior to the conclusion of the briefing. But even assuming, *arguendo*, the parties agreed to confer at an earlier date, that would not excuse Defendants from filing a response. The briefing schedule in L.R. 104.8.a is precise and unambiguous: "[the moving] party shall serve a motion to compel within thirty (30) days . . . The opposing party **shall serve a memorandum** in opposition to the motion within fourteen (14) days [.]"

Pursuant to L.R. 104.8.a, Defendants were required to respond to Plaintiffs' Motion by July 7,

2014. Defendants failed to serve any response. On July 15, counsel for both parties agreed to have a phone conference in accordance with L.R. 104.7 on July 16. On July 16, at 3:00 p.m., Ms. Miller contacted Defense counsel to hold the conference. Since no one picked up, she left a voice message. About an hour later, Ms. Miller called a second time at which point counsel for both parties discussed the discovery disputes. During the conference, Defendants steadfastly maintained that legislative immunity shielded them from discovery and Plaintiffs disagreed. After agreeing there was nothing left to discuss, Plaintiffs filed their Motion with the Court in accordance with the local rules.

There is no question Plaintiffs fully complied with the local rules. Defendants, on the other hand, either chose not to read the local rules or willfully refused to follow them. Defendants' negligence is simply inexcusable, especially in light of the fact that Plaintiffs courteously informed them on numerous occasions of their obligation to file a response. Defendants nevertheless urge the Court to excuse their negligence by accusing Plaintiffs of not acting in good faith. This is untrue, as Plaintiffs complied with all the rules and have been met with nothing but noncooperation and obstruction in their efforts to obtain basic discovery from Defendants. Compare this case to *Mezu v. Morgan State Univ*., 269 F.R.D. 565, 585 (D. Md. 2010), which Defendants cite for the proposition: "denying motion to compel where there was no certificate of good faith nor other indication that movant conferred or attempted to confer with opposing counsel[.]" Plaintiffs here *did file* the certificate and did hold the conference with opposing counsel. *Madison v. Hartford Cnty*., 268 F.R.D. 563, 564 (D. Md. 2010) is similarly inapposite. In that case, unlike here, the plaintiffs' certificate did not "contain any of the details required by Local Rule 104.7." *Id*. Moreover, "Plaintiffs' counsel only claim[ed] to have 'attempted to contact' Defense counsel." *Id.* Here, Plaintiffs actually held the 104.7 conference prior to filing the Motion.

Indeed, Plaintiffs have consistently acted in good faith and indeed, went above and beyond their obligations under the local rules. In their initial communication, Plaintiffs: 1) informed Defendants of their obligation to file a response, and 2) offered to confer with Defendants about the discovery disputes prior to the briefing deadline. Defendants did not respond until two days later. Although Plaintiffs' counsel was busy that day, she made herself available for an informal call. She further offered to discuss

the disputes via email during her vacation. Defendants declined the offer, agreeing to hold the 104.7 conference after the briefing and upon her return.[2] The day before Ms. Miller returned to D.C. and a week after Defendants' brief was due (the period in which Plaintiffs would be drafting their Reply to the Motion), Defendants contacted Ms. Miller about the Motion. She replied: "Hi David. I am about to take off to DC. We need to have a conference before we file. I will try giving your office a call tomorrow to have the conference. If you think this can be resolved without a call, let me know by the end of the day." (D.Br. 11). Counsel for both parties then agreed to hold the conference the following day (July 16). Ms. Miller contacted Defendants' office twice that day to hold the conference. In fact, since Defendants did not oppose the Motion, it is arguable that the duty to confer under the local rules was not even triggered. Since the rule is ambiguous about whether there's a duty to confer even if no opposition is served, Plaintiffs offered to do so in good faith and arguably went beyond what was required.

Defendants' statement that "[t]he Court should not reward Plaintiffs' attempt at unfair advantage and surprise" (D.Br. 10) is, as Defendants like to put it, "astonishing." Defense counsel has an obligation to read the local rules. They cannot claim they were "surprised" by their obligation to file a response. In addition to the fact that the requirement is clearly spelled out in the rules, Plaintiffs expressly informed Defendants that "the local rules require the motion and memorandum to be served on the parties without filing on ECF." (Dkt. 55 ¶3). Plaintiffs also informed them: "The local rules require us to meet and confer after all the briefs are filed (i.e. after you respond and we reply)[.]" (*Id.* at ¶4). "[I]t is a reckless lawyer who fails to familiarize himself with 'the applicable procedural rules before filing and trying a case.'" *Whichard v. Specialty Restaurants Corp*., 220 F.R.D. 439, 442 (D. Md. 2004) (citation omitted). The "rules of procedure are not to be considered as mere guides or Heloise's helpful hints to the practice of law, but rather precise rubrics that are to be read and followed." *Id*.

[2] Defense counsel makes much of Plaintiffs' counsel's trip to California yet ignores the fact that she offered to resolve the issues via email on her trip. Given the fact that Defendants have been adamant about legislative immunity and refused to produce any documents, Plaintiffs reasonably believed the conference would be brief and could be concluded via email. While Defendants criticize Plaintiffs' counsel for taking a "vacation of such extended length" (two and a half weeks) (D.Br. 9), it bears emphasis that Ms. Miller worked extensively during this time drafting Plaintiffs' Reply MSJ. Attempting to shift the blame to Plaintiffs is unprofessional at best.

As for Defendants' last-ditch effort to be excused from their recklessness, Defendants ask the Court "[a]t minimum" to "construe the MSJ Reply filed on June 26" as "responsive to the Motion to Compel." (D.Br.10). Defendants reason: "Plaintiffs were fully advised of Defendants' understanding of these matters. Yet at no point did they respond or clarify that they regarded the responsive deadline as approaching in **eleven days**." (*Id*). It goes without saying that Plaintiffs had no duty whatsoever to inform Defendants' counsel – a team of bright attorneys with years of litigation experience – that they had a responsive deadline approaching in ***eleven days***. The local rules are easily accessible online and the "motion to compel" section is clearly set forth under its own special heading.

More importantly, Defendants' "MSJ Reply" cannot possibly be construed as a response to the Motion to Compel. For one thing, their brief only mentions the legislative immunity objection to discovery (and tangentially so); it makes no mention of their other justifications including "undue burden" and "overbroad" among others.[3] Likewise, the "Reply MSJ" does not in any way respond to the arguments in Plaintiffs' Motion, including the fact that their boilerplate objections constitute a waiver. Consequently, the Court should strike Defendants' belated response and grant Plaintiffs' Motion. *See Pisani*, 2014 U.S. Dist. LEXIS 15068 ; *Anderson*, 2010 WL 3000765, at *2.[4]

III. DEFENDANTS VIOLATED LOCAL RULE 105.2.C

Defendants' total disregard for the local rules is evident in how they proceeded to file for summary judgment while disregarding the local rule (105.2.c) governing that procedure. Thus, it is ironic that they would call attention to their ignorance of the local rules by raising the summary judgment issue again in their brief opposing the Motion to Compel, especially since the argument is futile. That is, even assuming, *arguendo*, Defendants complied with 105.2.c (which they did not), that would not excuse them from discovery. However, Defendants indeed violated the rule when they filed for summary judgment without so much as notifying Plaintiffs' counsel, let alone reaching an *agreement*

[3] Defendants did not assert legislative immunity in three requests (*See* #14, #21, #24). The Reply MSJ does not seek to justify why Defendants did not produce documents pursuant to these three requests.

[4] Of course, if the Court accepts Defendants' strange plea to treat the "Reply MSJ" as the response to Plaintiffs' Motion, the Court must strike Defendants' second memorandum (at issue here) as duplicative.

with them as to which party would file the initial motion. Failure "to adhere to this Local Rule" warrants "striking a party's []motion for summary judgment." *Carter v. VNA, Inc*., 2013 U.S. Dist. LEXIS 107017, *20 (D. Md. July 30, 2013). *See also McReady v. O'Malley*, 804 F.Supp.2d 427, 438 n.5 (D. Md. 2011) (striking motion); *Mezu*, 269 F.R.D. at 585 (same).

There is nothing ambiguous about L.R. 105.2.c: "if both parties intend to file summary judgment motions, counsel are to agree among themselves which party is to file the initial motion." The Court's scheduling order mandates compliance with this rule. (Dkt. 38). Plaintiffs intended to file for summary judgment, as did Defendants. Thus, 105.2.c was triggered regardless of Defendants' claim of ignorance as to Plaintiffs' intentions. (*See* D.Br. 5). The discovery and status report deadline is August 25, 2014. In the status report, the parties are to state "[w]hether any party intends to file" for summary judgment. (*Id.*). Because Defendants chose to move for summary judgment long before the status report deadline, they had a duty to contact Plaintiffs to inquire into their plans for summary judgment.

In *Zeneca Inc. v. Shalala*, 1999 U.S. Dist. LEXIS 12327, *3 n.4 (D. Md. Aug. 11, 1999), the Court stressed that the "Local Rules clearly require that where there are cross motions for summary judgment, [the] party . . . should have filed a single memorandum [.]" In that case, the plaintiff sought to "excuse its violation of the Local Rules **by claiming ignorance of Defendants' intention to file summary Judgment motions**." *Id.* The Court ruled, as is relevant here: "**If there was uncertainty, the simple resolution would have resulted from a telephone call.**" *Id.* The Court concluded, "[f]ar from being 'illogical' or 'draconian'" the "briefing scheme embodied in the Local Rules promotes the most efficient resolution of cross motions for summary judgment." *Id.*

Contrary to Defendants' assertion, *Y.B. v. Bd. of Educ. of Prince George's County*, 895 F. Supp. 2d 689, 701 (D. Md. 2012) actually supports Plaintiffs' position. There, this Court recognized that L.R. 105.2.c "works in tandem with the court's standard scheduling order . . . [A] scheduling order, entered when a case is at issue, directs the parties to **submit a status report** at the close of discovery, including whether any party intends to file a dispositive motion." *Id.* Armed "with that information, the parties can then propose a schedule for the filing of cross motions." *Id.* Likewise, in *Carter*, the Court issued a

scheduling order with provisions nearly identical to those in the case *sub judice*. 2013 U.S. Dist. LEXIS 107017, at *20-23. In the status report, only the defendant notified the Court of its intent to file for summary judgment. After the defendant filed, the plaintiff responded with both a cross-motion and an opposition. Because the plaintiff did not notify the defendant or court of her intent to file for summary judgment as required by 105.2.c, the court struck her cross-motion. *Id.*

There is nothing "Janus-like" about Plaintiffs' argument for discovery. Plaintiffs would have preferred to file for summary judgment after discovery but they interpreted the local rules and scheduling order as requiring a combined response. *See Gross v. SES Americom, Inc*., 225 F.R.D. 169, 170 (D. Md. 2004) (105.2.c requires "filing a single memorandum in support of their cross-motion for summary judgment and in opposition"); *Nat'l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 346 (D. Md. 2003) ("because Plaintiff chose to ignore this Court's local rules regarding the coordination of the filing of cross-motions, see L.R. 105.2.c, Plaintiff repeats some of the same language in both its motions and its oppositions."). Recent cases continue to reiterate this aspect of the rule, *Y.B.* not withstanding. *See Toure-Davis v. Davis*, 2014 U.S. Dist. LEXIS 42522, *5-6 n.3 (D. Md. Mar. 28, 2014).

Plaintiffs have consistently maintained that the facts are sufficient for the Court to rule in their favor on summary judgment. However, because the *Galloway* decision has yet to be interpreted by the lower courts, Plaintiffs believe it is important for the Court to have all the facts available to it before rendering its ruling. As Plaintiffs' counsel declared (Dkt. 52):

> When Plaintiffs wrote that discovery was not "necessary" to prove that Defendants' current prayer practice is unconstitutional, they meant that they could easily demonstrate that *at least* one or more of the above factors are present in this case. However, since the *Marsh-Galloway* inquiry is "fact-sensitive," further discovery on any of these factors will be relevant to Plaintiffs' claims.

Summary "judgment in the face of requests for additional discovery is appropriate only where such discovery would be 'fruitless' with respect to the proof of a viable claim." *Jones v. Blanas*, 393 F.3d 918, 930 (9th Cir. 2004). In this case, further discovery would not be "fruitless."

The Court in *Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983), as in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823-25 (2014), "weighed **all of the factors** that comprised the [legislative

prayer] practice." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1281-82 (11th Cir. 2008). *See Galloway*, 134 S. Ct. at 1823-25 (looking to a variety of factors). The Court emphasized that "[t]he inquiry remains a fact-sensitive one[.]" *Id. See also id.* at 1838 (Breyer, J., dissenting) ("we all recognize, this is a 'fact-sensitive' case."). *Marsh* "indeed, requires an inquiry into the prayer opportunity as a whole." *Id.* at 1824. Significantly, the Court held that one factor in this analysis is whether the legislative prayer practice "betray[s] an impermissible government purpose." *Id. Galloway* thus requires an assessment into the County's purpose for its prayer practice (i.e. motive and intent), as well as its motive for selecting the Commissioners as the prayer-givers.[5] The Fourth Circuit has held that ruling on a motion for summary judgment before discovery is completed is "particularly inappropriate" where, as here, a "case involves complex factual questions about intent and motive." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 247 (4th Cir. 2002).[6]

IV. DEFENDANTS' BOILERPLATE OBJECTIONS CONSTITUTE A WAIVER.

As discussed above, Defendants' failure to timely respond to Plaintiffs' Motion renders further analysis unnecessary. But even if Defendants' opposition was timely, they still must furnish the requested documents because their boilerplate objections to each request waived any valid objections they might have had. Defendants hardly address this in their belated response. Par for the course, Defendants instead dedicated over half their brief reasserting their baseless legislative immunity argument that courts have repeatedly rejected in legislative prayer cases. In fact, Defendants seemingly admit their responses were boilerplate, merely averring: "No particularized discussion for each item is necessary; such things are self-evidently irrelevant." (D.Br. 48).

However, "[u]nder Rule 34, failure to make particularized objections to document requests constitutes a waiver of those objections." *Sabol v. Brooks*, 469 F. Supp. 2d 324, 328 (D. Md. 2006)

[5] *See also Snyder v. Murray City Corp*., 159 F.3d 1227, 1234 (10th Cir. 1998) ("*Marsh* "indicated that the particular motive that is 'impermissible' in this context is a motive in selecting the prayer-giver either to 'proselytize' a particular faith or to 'disparage' another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body."); *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012) ("a legislature may not select invocational speakers based on impermissible motives or sectarian preferences.").

[6] In addition to the above, the Court could deny both parties' motions for summary judgment in which case Plaintiffs would likely need more time for discovery to prove whatever material facts the Court deems disputed.

(citations omitted). The rules mandate that "[a]ll objections to document production requests must be stated with particularity and specificity; objections may not be 'boilerplate.'" *D.J.'s Diamond Imps., LLC v. Brown*, 2013 U.S. Dist. LEXIS 46730, at *20 (D. Md. 2013). The failure to do so waives the objections. This rule is firmly established in this jurisdiction.[7] Put "simply, objections that recite 'the familiar litany that . . . a document production request is 'overly broad, burdensome, [vague, ambiguous, and/or] irrelevant'—like those made by Defendant[s] in this case—are plainly deficient." *Webb*, 2012 U.S. Dist. LEXIS 104953, at *5-7. Such "objections clearly disregard the requirement . . . that objections to document production requests must be specific, non-boilerplate, and **supported by particularized facts and that failure to do so waives the objections**." *Id.* Indeed, the "very act of making such boilerplate objections is prima facie evidence of a Rule 26(g) violation." *Mancia*, 253 F.R.D. at 359.

This Court has frequently held that a litigant's boilerplate objection constitutes a waiver, and has thus required such litigants to produce documents that may actually be privileged or unduly burdensome to produce.[8] For example, in *D.J.'s Diamond*, the plaintiff's request sought "[a]ll Silverman Consultants, LLC's federal [and state] tax returns, including all schedules, attachments and worksheets, for the years

[7] *See id.*; *First Mariner Bank v. Resolution Law Group, P.C.*, 2014 U.S. Dist. LEXIS 55379, at *47-48 (D. Md. 2014); *Sher v. Barclays Capital Inc.*, 2013 U.S. Dist. LEXIS 122342, at *7-8 (D. Md. 2013); *Romanyk Consulting Corp. v. EBA Ernest Bland Assocs., P.C.*, 2013 U.S. Dist. LEXIS 89485, at *14-15 (D. Md. 2013); *In re Trs. of the Heating*, 2013 U.S. Dist. LEXIS 34122, at *5-6 n.2 (D. Md. 2013); *Webb v. Green Tree Servicing LLC*, 2012 U.S. Dist. LEXIS 104953, at *5 (D. Md. July 27, 2012) ("objections to document production requests must be specific, non-boilerplate, and supported by particularized facts and that **failure to do so waives the objections**."); *Fisher v. Fisher*, 2012 U.S. Dist. LEXIS 78445, at *15-16 (D. Md. 2012); *Lynn v. Monarch Recovery Mgmt.*, 285 F.R.D. 350, 360 (D. Md. 2012); *Allstate Ins. Co. v. Warns*, 2012 U.S. Dist. LEXIS 163860, at *4 (D. Md. 2012); *Adams v. Sharfstein, Civil Case*, 2012 U.S. Dist. LEXIS 100366, at *4 (D. Md. July 19, 2012); *Anderson v. Reliance Std. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 117058, at *6-8 (D. Md. 2011); *Mezu*, 269 F.R.D. at 573-74; *Desrosiers v. MAG Indus. Automation Sys., LLC*, 675 F. Supp. 2d 598, 601 (D. Md. 2009); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008); *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005) (holding that "objections to document production requests must be stated with particularity in a timely answer, and that a failure to do so may constitute a waiver of grounds not properly raised, **including privilege or work product immunity**"); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000).

[8] *See Adams*, 2012 U.S. Dist. LEXIS 100366, at *4 (granting motion to compel because plaintiff's boilerplate objections asserting vagueness, burdensomeness, and privilege were not particularized); *Webb*, 2012 U.S. Dist. LEXIS 104953, at *5-7; *Anderson*, 2011 U.S. Dist. LEXIS 117058, at *6-8; *Mezu*, 269 F.R.D. at 573-74; *Sabol*, 469 F. Supp. 2d at 328-29 ("Synergy did not particularize its objections to these [document] requests, and instead used the boilerplate objections that this Court repeatedly has warned against, thereby waiving its objections."); *Mancia*, 253 F.R.D. at 364 ("the boilerplate objection . . . waived any legitimate objection Defendant Argo may have had") (citations omitted).

2008 through 2011." 2013 U.S. Dist. LEXIS 46730, at *21. The defendant responded: "Objection. This request is overly broad and irrelevant for purposes of the remaining limited claim in this litigation." *Id.* at *21-22. This Court granted the motion to compel, ruling that the defendant's "**boilerplate objection amounts to a waiver of any legitimate objection it may have had to these requests**." *Id. See also Allstate*, 2012 U.S. Dist. LEXIS 163860, at *4-5 (boilerplate objections based on privilege and undue burden were waived). As in these cases, none of Defendants' "privilege, relevance, overbreadth, vagueness, and burdensomeness objections are particularized." *Adams*, 2012 U.S. Dist. LEXIS 100366, at *15. Thus, Defendants must "provide the requested discovery[.]" *Mancia*, 253 F.R.D. at 363-64.

A. Defendants' "overbroad" and "unduly burdensome" objections are waived and unfounded.

Noticeably absent from Defendants' brief is any justification for their "overbroad" and "unduly burdensome" boilerplate responses. Yet they invoked these objections in every request. Defendants' letter (Dkt. 53-1) does not make said responses any less boilerplate. It simply repeats Defendants' unspecified objections on legislative immunity, attorney-client privilege and *Monell* grounds. (*Id*).

As discussed in Plaintiffs' previous brief, the "party claiming that a discovery request is unduly burdensome must allege specific facts that indicate the nature and extent of the burden, usually by affidavits or other reliable evidence." *Tucker v. Ohtsu Tire & Rubber Co*., 191 F.R.D. 495, 498 (D. Md. 2000) (citations omitted). A "conclusory assertion of burden and expense is not enough." *Id. See Marens*, 196 F.R.D. at 39; *Thompson*, 219 F.R.D. at 99 ("A properly particularized showing of burden . . . **identifies evidentiary facts**"). Indeed, the rules "impose 'an **affirmative duty** on the objecting party to particularize facts, not conclusory statements[.]'" *Romanyk*, 2013 U.S. Dist. LEXIS 89485, at *14. They "must allege **specific facts** that indicate the nature and extent of the burden, **usually by affidavits or other reliable evidence[.]"** *Id*. Defendants utterly failed to do this, thus waiving the objections.

Moreover, none of Plaintiffs' requests are overbroad or unduly burdensome. They all seek relevant evidence related to Defendants' legislative prayer practice. The information is also relevant to the scope of injunctive relief and to Defendants' objections regarding *Monell* liability and immunity. *See Carter v. Baltimore County*, 39 Fed. Appx. 930, 934 (4th Cir. 2002) ("it is possible that discovery will

provide Carter with the evidence necessary to support his claim against the county based on the county's policy with regard to verifying the identity of those taken into custody. *See Monell*"); *McGee v. Pomerleau*, 1989 U.S. App. LEXIS 22076, *1-2 (4th Cir. 1989) ("we remanded so McGee could conduct sufficient discovery to determine whether he could maintain an action against Baltimore officials under *Monell*"); *Treadwell v. Prince George's County*, 2013 U.S. Dist. LEXIS 170854, *8-9 (D. Md. 2013) ("it is plausible that Plaintiff will uncover sufficient evidence to sustain a *Monell* claim against the County with the benefit of discovery."). Similar requests – and indeed, far more onerous and costly ones – have been held not unduly burdensome or overbroad.[9] At a minimum, the information is relevant for impeachment and is therefore discoverable. *See Capital One Bank N.A. v. Hess Kennedy Chtd*., 2008 U.S. Dist. LEXIS 76385, at *5-8 (E.D. Va. Sept. 29, 2008).

Even if a request is unduly burdensome or overbroad, Defendants bear the burden of "providing suggested alternatives" to lessen "the burden[.]" *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005).[10] They cannot simply refuse to turn over *all* records on such grounds.

[9] *See, e.g.*, *Lillibridge v. Nautilus Ins. Co*., 2013 WL 1896825, at *14 (U.S.D. May 3, 2013) (granting motion to compel production of "any and all documents relating to regulatory actions, including but not limited to suspension or revocation proceedings, Market Conduct Examinations, Cease and Desist Orders, Consent Orders, Reports of Examinations, Corrective Orders or Corrective Action Plans relating to Defendant's property claims from January 1, 2001, to present"); *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 WL 3923092, at *4, *12 (D. Colo. Oct. 1, 2010) (granting a motion to compel *inter alia*, "all documents relating to any communication between [Stratus] and any person or entity that relates, refers, or pertains to the Cabrera Reports" and "all documents that were reviewed, considered, or relied upon by [Stratus] in performing any work relating to the Cabrera Reports"); *Beyer v. Medico Ins. Grp*., 266 F.R.D. 333, 336-37 (D.S.D. 2009) (discovery request was not unduly burdensome, even though insurer would have to scan images to make them text-searchable or search manually for **5,040 documents**); *Moss v. BCBS of Kansas, Inc*., 241 F.R.D. 683 (D. Kan. 2007) (review of **1,800 personnel** files was not in and of itself overly broad and unduly burdensome); *Harner v. Greyhound Lines, Inc.*, 2003 WL 147774, at *2 (E.D. Pa. Jan. 10, 2003) (discovery request for "[a]ll documents relating to communications, meetings and or conversations between Greyhound and persons with disabilities, government entities, organizations representing persons with disabilities or any other entity or person concerning the person concerning the transportation of person with disabilities" was valid so long as request was limited to the preceding five years); *Payless Shoesource Worldwide, Inc. v. Target Corp*., 2007 WL 1959194, at *11 (D. Kan. June 29, 2007) (finding that discovery requests for "all documents relating to Target's market share in shoe sales [and] financial data or other financial information for Target's footwear products and accessories" were not unduly burdensome); *United States v. Pel-Star Energy, Inc*., 670 F.2d 1032, 1033-34 (Temp. Emer. Ct. App. 1982) (subpoena for "all documents or records . . . relating to Pel-Star Energy, Inc.'s purchases, sales, exchanges, and acquisitions and dispositions of crude oil during the period from June 1, 1979 through January 27, 1981" was not unduly burdensome); *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489, 499 (D. Kan. 2001) (discovery request was not unduly burdensome, even though it would have required the city to produce "every personnel file and every file relating to complaints handled by the Internal Affairs Unit of the Olathe Police Department").

[10] For instance in *In re Coventry Healthcare, Inc. v. This Document Relates*, 290 F.R.D. 471, 475 (D. Md. 2013), the

See Moss, 241 F.R.D. at 690. As such, Defendants' objections are grossly deficient and waived.

B. Defendants' attorney-client privilege and work-product objections are waived.

Defendants' objections based on attorney-client privilege and work-product are asserted in a conclusory, boilerplate manner and lack the specificity required by the applicable rules. (Requests #13-15, 18-20, 22-23). At no point did they provide any explanation as to why such privilege is applicable or produce any non-privileged material. Consequently, these objections are waived.

In their belated brief, Defendants' only justification for their attorney-client privilege objections is that "the wording [in Plaintiffs' requests] is broad enough to include written communications between Defendants and their legal counsel." (D.Br.46). If that were the case, however, Defendants still had an obligation to turn over any non-privileged items and then produce a log of the items withheld. Their only response for failing to particularize and produce a privilege log is: "legislative immunity shields Defendants from the burden of litigation for immunized matters[.]" (D.Br.48). Yet legislative immunity, even if applicable, would not excuse Defendants from particularizing *attorney-client* privilege objections.

Setting aside the fact that legislative-immunity is inapplicable here, *infra*, objections "based on attorney-client privilege or the work product doctrine must be particularized, Fed. R. Civ. P. 26(b)(5) . . . The Court may deem the failure to do so to be a waiver of the privilege or work product protection." *Anderson*, 2011 U.S. Dist. LEXIS 117058, at *6-8. *See D.J.'s Diamond*, 2013 U.S. Dist. LEXIS 46730, at *7 n.3; *Fisher*, 2012 U.S. Dist. LEXIS 78445, at *16-17 n.6 ("the objection must be particularized . . . and it must be accompanied by the information required by this Court's Discovery Guidelines . . . Failure to do so may result in waiver"); *Mezu*, 269 F.R.D. at 577; *Victor Stanley, Inc. v. Creative Pipe, Inc*., 250 F.R.D. 251, 267 (D. Md. 2008).

Rule 26(b)(5)(a)(2)(5) provides in part: "the party must: . . . (ii) **describe the nature of the**

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defendants claimed "that they applied Plaintiffs' proposed search terms to the ESI . . . and 'hit' approximately **200,000** documents." They argued "that it will cost approximately **$388,000 to process**, host, and review the data for responsiveness and privilege." *Id.* The defendants, however, had "not suggested any alternative measures[.]" *Id.* Because the Court found that there were alternative measures such as a clawback provision, the Court ruled that "[d]efendants have not shown that producing the requested ESI will be unduly burdensome." *Id.* at 476. *See also Romanyk*, 2013 U.S. Dist. LEXIS 89485, at *15.

documents, communications, or tangible things not produced or disclosed—and do so in a manner that, . . . will enable other parties to assess the claim." The "party asserting privilege has the burden of demonstrating its applicability." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011). The required level of "specificity can be accomplished by providing a privilege log that 'identifies each document withheld, information regarding the nature of the privilege/protection claimed, the name of the person making/receiving the communication, the date and place of the communication, and the document's general subject matter.'" *Richardson*, 270 F.R.D. at 228 (quoting *Victor*, 250 F.R.D. at 264). A litigant "cannot withhold documents after it is served with discovery requests based merely on its own decision that a privilege exists, and the failure to provide a privilege log can result in a waiver[.]" *Buonauro v. City of Berwyn*, 2011 WL 116870, at *2 (N.D. Ill. Jan. 10, 2011).

Defendants failed to provide any justifications, let alone a privilege log identifying each document withheld. *See Marens*, 196 F.R.D. at 38 ("[T]he responding party must then do more than rely on a privilege log that gives two word justifications for the assertion of the privilege."). Thus, their objections are waived. *See Anderson*, 2011 U.S. Dist. LEXIS 117058, at *6-8 (failure to particularize resulted in waiver of privilege); *Adams*, 2012 U.S. Dist. LEXIS 100366, at *16-18 (same).

Defendants misunderstand attorney-client privilege in claiming that "[i]t would be a bizarre waste of time. . . to give any additional detail as to why an email between the Board and its lawyers regarding legislative prayers mentioning 'Jesus' would be covered by attorney-client privilege." (D.Br. 47). Yet that is what the rules require. *NLRB*, 637 F.3d 492 at 501-02. Contrary to Defendants' claim, "the attorney-client privilege does not apply simply because documents were sent to an attorney[.]" *Id.* Indeed, the "attorney-client privilege is to be strictly construed[.]" *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986). Because Defendants "did not provide specific objections supported by particularized facts, [they] waived [any] improperly-raised objections[.]"*Mezu*, 269 F.R.D. at 573-74.

V. DEFENDANTS ARE NOT ENTITLED TO LEGISLATIVE IMMUNITY OR PRIVILEGE

A. Legislative Immunity

Defendants cannot rely upon legislative immunity to shield them from discovery. *See Young v.*

City & County of Honolulu, 2007 U.S. Dist. LEXIS 75168, *4-5 (D. Haw. Oct. 9, 2007) ("the legislative immunity doctrine does not shield the City's documents from discovery . . . Even to the extent that Plaintiffs request documents from individuals who would be immune, legislative immunity does not protect their documents from discovery."); *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R. 1989). It is well settled that "the government official seeking immunity bears the burden of showing that an exemption from personal liability is justified." *Kamplain v. Curry County Bd. of Comm'rs*, 159 F.3d 1248, 1251 (10th Cir. 1998) (citing *Forrester v. White*, 484 U.S. 219, 224 (1988); *England v. Rockefeller*, 739 F.2d 140, 142-43 (4th Cir. 1984)).[11] Additionally, the Supreme Court and federal courts have repeatedly held that scope of legislative immunity is narrow.[12]

Defendants have failed to meet their burden. Putting aside the fact that the objection is misplaced, as legislative immunity is not a bar to *discovery*, each Commissioner is sued only in his or her official capacity and prayers are not deemed legislative acts. *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 916 (W.D. Va. 2012) ("There are two reasons why common law legislative immunity has no application to this case. First, such immunity only extends to Board members sued in their individual capacities, and does not shield the County and the Board, as entities, from constitutional review of their actions. Second, legislative immunity only applies to activities integral to the legislative process and does not embrace non-legislative acts such as opening prayers."). Whatever the rule is in other jurisdictions, the Fourth Circuit has made abundantly clear that legislative immunity is inapplicable in official-capacity suits, such as the case *sub judice. Berkley v. Common Council*, 63 F.3d 295, 300 (4th

[11] *See also Burns v. Reed*, 500 U.S. 478, 486 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) ("The burden of justifying absolute immunity rests on the official asserting the claim."); *Guindon v. Twp. of Dundeee*, 488 Fed. Appx. 27, 33 (6th Cir. 2012) ("The burden is on Defendants to establish the existence of absolute legislative immunity."); *Weingarten Realty Investors v. Silvia*, 376 Fed. Appx. 408, 410 (5th Cir. 2010) (same); *Canary v. Osborn*, 211 F.3d 324, 328 (6th Cir. 2000); *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985); *Christian v. Cecil County*, 817 F. Supp. 1279, 1287 (D. Md. 1993) ("a local legislator bears the burden of proving that his or her actions were 'in the sphere of legitimate legislative activity.'").

[12] *See United States v. Brewster*, 408 U.S. 501, 528 (1972); *Fowler-Nash v. Democratic Caucus of the Pa. House of Representatives*, 469 F.3d 328, 331 (3d Cir. 2006) ("[a]s to what actions were protected by legislative immunity, the Court t[a]k[es] a narrow view"); *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 30 (1st Cir. 1996); *Hansen v. Bennett*, 948 F.2d 397, 402 (7th Cir. 1991) ("The Supreme Court has construed the legislative capacity narrowly"); *Bonadeo v. Lujan*, 2009 U.S. Dist. LEXIS 45671, *24 (D.N.M. Apr. 30, 2009) ("the scope of legislative immunity is narrowly construed").

Cir. 1995) ("Our holding today that a municipality does not enjoy immunity with respect to the acts of its legislative body . . . should come as no surprise."). The "holding in *Berkley* is amply supported by Supreme Court precedent." *Pittsylvania*, 842 F. Supp. 2d at 917 (collecting cases). Accordingly, "legislative immunity . . . cannot be invoked by the city or the legislative body." *Hobart v. City of Stafford*, 2010 U.S. Dist. LEXIS 89441, *8 (S.D. Tex. Aug. 26, 2010).[13]

While the absence of any individual-capacity claims forecloses the need for further analysis, not a single court has held that legislative immunity applies to legislative prayer. In fact, numerous courts have reached the opposite conclusion. These courts have unanimously ruled that prayer is not a "legislative activity." *See Chambers v. Marsh*, 675 F.2d 228, 232 (8th Cir. 1982) ("the deliberative process of the legislature will not be impaired to any degree by judicial resolution of the claim brought by [plaintiff]."); *Kurtz v. Baker*, 630 F. Supp. 850, 856 (D.D.C. 1986), *rev'd on other grounds*, 829 F.2d 1133 (D.C. Cir. 1987) (rejecting legislative immunity to prayer practices of Congress because "legislative prayer does not provide meaningful input into . . . legislative decision making."); *Doe v. Franklin County*, 2013 U.S. Dist. LEXIS 80033, *13-14 (E.D. Mo. June 7, 2013) ("in contrast to situations like that in *Johnson*, the speech in this case — the specific content of the prayer — did not pertain to deliberating or passing any law. Therefore, legislative immunity does not attach."); *Pittsylvania*, 842 F. Supp. 2d at 916-18 (prayers are "beyond the scope of legislative immunity."). Even *Galloway* recognized that prayers were separate from "policymaking[.]" 134 S. Ct. at 1827.

Moreover, the Fourth Circuit ruled on the merits of two cases involving prayers by *legislators* and in neither case did it deem legislative immunity a bar to its review. The Supreme Court has repeatedly held that "'[w]hile we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, **neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases**." *E. Enters.*

[13] *See also Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613 (8th Cir. 1980); *Young*, 2007 U.S. Dist. LEXIS 75168, *5 ("The municipality as a whole, however, is not immune; the immunity is personal to the individual legislators."); *Parvati Corp v. City of Oak Forest*, 2010 U.S. Dist. LEXIS 115807, *5-6 (N.D. Ill. Nov. 1, 2010).

v. Apfel, 524 U.S. 498, 522 (1998) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)). *See also Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000) (same). Plaintiffs are not alone in interpreting *Marsh* and the Fourth Circuit cases as foreclosing legislative immunity in legislative prayer cases. *See Pittsylvania*, 842 F. Supp. 2d at 921 (in "*Joyner*, *Turner*, *Simpson*, and *Wynne*, the Fourth Circuit recently decided four legislative prayer cases . . . and neither legislative immunity nor privilege precluded the court from reaching the merits.").

And even if a Court is not bound by a prior exercise of *sub silentio* jurisdiction, that doctrine has no applicability here because the "legislative prayer case of *Marsh v. Chambers*" in the Supreme Court did, "in fact, involve consideration of the intersection of legislative immunity and legislative prayer." *Id.* at 918-19. The Eighth Circuit expressly rejected the argument that the prayer practice could not be challenged, stating: "[t]he prayer practice, as the district court found, bears no substantive relation to the process of enacting legislation." *Marsh*, 675 F.2d at 232. The legislative officials sought review of the holding that legislative immunity did not apply. *Marsh*, 463 U.S. at 786 n.4. In its ensuing decision, the Court left undisturbed the Eighth Circuit's decision rejecting legislative immunity. *See id*. at 785-86. As such, *Marsh* "supports the proposition that legislative immunity does not bar an Establishment Clause challenge to legislative prayer." *Pittsylvania*, 842 F. Supp. 2d at 918-19.

That *Marsh* involved prayer by non-legislative government officials (chaplains) rather than legislators is irrelevant because under the "functional test" for determining whether legislative immunity applies, the "identity of the actor" is irrelevant. *Forrester*, 484 U.S. at 229. *See also McCray v. Md. DOT*, 741 F.3d 480, 485 (4th Cir. 2014) ("The determination of legislative immunity is based on the function being fulfilled—not the title of the actor claiming immunity."). Instead of focusing on the identity of the speaker, the functional test looks to the nature of the action, because "[l]egislative immunity only attaches to legislative actions." *Alexander v. Holden*, 66 F.3d 62, 65 (4th Cir. 1995). Local "government bodies often undertake actions in different capacities[.]" *Id.* If a "legislator (or his surrogate) undertakes actions that are only 'casually or incidentally related to legislative affairs,'" or "which fall outside the 'legitimate legislative sphere,'" no "immunity inheres." *National Ass'n of Social Workers v. Harwood*,

69 F.3d 622, 630 (1st Cir. 1995) (citations omitted). A court within the Fourth Circuit explained: "To be sure, *Marsh* and *Kurtz* involved prayers by legislative chaplains, rather than individual legislators. Regardless, these cases squarely reject the argument that opening prayers are activities integral to lawmaking and subject to legislative immunity." *Pittsylvania*, 842 F. Supp. 2d at 919-20.

The critical aspect of the Fourth Circuit's ruling in *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011), a case which Defendants rely heavily upon, is as follows: "if the EEOC or private plaintiffs sought to compel information from legislative actors *about their legislative activities*, they would not need to comply." *See also McCray*, 741 F.3d at 485. Here, as in *WSSC*, neither legislative immunity nor privilege applies because prayer is not a "legislative activity," *supra.*[14]

Finally, Defendants' immunity objections lack the specificity required by the rules, *supra*, and are therefore waived. *Cf. Elat v. Ngoubene*, 2013 U.S. Dist. LEXIS 116275, at *10 (D. Md. 2013) ("A party asserting privilege during written discovery should provide a **privilege log** that identifies each document withheld, information regarding the nature of the privilege/protection claimed, the name of the person making/receiving the communication, the date and place of the communication, and the document's general subject matter."). In applying Fourth Circuit precedent to the issue of whether legislative privilege applied to certain documents, the court in *Page v. Va. State Bd. of Elections*, 2014 U.S. Dist. LEXIS 63957, *6-7 (E.D. Va. May 8, 2014) made clear that "the proponent of a privilege must 'demonstrate specific facts showing that the communications were privileged.'" (citation omitted).

Whether legislative immunity can be waived or not is irrelevant at this point because legislative prayers are not encompassed by legislative immunity, *supra*. That said, numerous courts have concluded that legislative immunity is an affirmative defense that can be waived. *See Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 945 F.2d 760, 762 (4th Cir. 1991) ("Defendants raised several affirmative defenses including absolute legislative immunity . . . we upheld the district

[14] In addition, the actual documents Plaintiffs seek are wholly unrelated to legislation, such as emails and correspondences made outside of the legislative meetings. For instance, communication "by a legislator to his or her constituents is not legislative activity for purposes of legislative immunity." *Hansen v. Bennett*, 948 F.2d 397, 403 n.13 (7th Cir. 1991) (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979)).

court's holding that absolute legislative immunity was not available to defendants."); *Fraternal Order of Police v. City of Hobart*, 864 F.2d 551, 554 (7th Cir. 1988) ("The council members failed to invoke their absolute legislative immunity in the district court, and have therefore waived it in this court.") (internal citation omitted); *Powell v. Ridge*, 247 F.3d 520, 531 (3d Cir. 2001) (Roth, J., concurring) ("legislative immunity may be waived"); *Perez v. Perry*, 2014 U.S. Dist. LEXIS 1838, at *16 (W.D. Tex. Jan. 8, 2014) ("The legislative privilege is a personal one and may be waived or asserted by each individual legislator."); *Allison v. Bd. of Educ*., 2011 U.S. Dist. LEXIS 63860, *5 (N.D. Ill. June 7, 2011); *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 112 (D. Mass. 2010) ("Legislative immunity is an affirmative defense, and the Defendants have the burden of establishing that their actions were legislative, rather than administrative or executive.").[15]

B. Legislative Privilege

Defendants did not object to a single document request on legislative *privilege* grounds, and thus, any such objection is waived. *See United States v. El Paso Co*., 682 F.2d 530, 539 (5th Cir. 1982) ("[t]he **privilege must be specifically asserted with respect to particular documents**"); *Perez*, 2014 U.S. Dist. LEXIS 94276, *14 ("With respect to the questions for which he did not assert legislative privilege, such a legislative privilege objection is considered waived."). There is no question that legislative *privilege* can be waived. *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) ("This privilege may be waived by the Board members."); *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) ("We, likewise, refuse to address the testimonial privilege, because the Brunswick commissioners in this case clearly waived any such privilege. Holden, Jones, and Shaw testified extensively as to their motives in depositions with their attorney present, without objection."); *Schaefer*, 144 F.R.D. at 298 (legislative privilege "is a personal one and may be waived or asserted by each individual legislator").[16] However,

[15] *See also United States v. Helstoski*, 442 U.S. 477, 490-91 (1979) (assuming without deciding that legislative immunity under the Speech or Debate Clause can be waived); *Almonte v. City of Long Beach*, 2005 U.S. Dist. LEXIS 46320 (E.D.N.Y. July 27, 2005) (legislative immunity was waived); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1278 (S.D. Fla. 2002); *Jim Sowell Constr. Co. v. City of Coppell*, 82 F. Supp. 2d 616, 617 (N.D. Tex. 1998).

[16] *See also Virgin Islands*, 775 F.2d at 520 n.7 (legislator waived testimonial privilege); *Baldus v. Members of the Wis. Gov't Accountability Bd*., 2011 U.S. Dist. LEXIS 142338, *7-8 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services"); *Trombetta v. Bd. of*

Defendants would not be entitled to the privilege even if they asserted it because none of Plaintiffs' requests seek information on "legislative" acts. *See Pittsylvania*, 842 F. Supp. 2d at 920 ("legislative testimonial privilege has no application to this case").

Legislative privilege is not absolute and it belongs to the individual government official, not the municipality; it typically does not shield the government from disclosing documents in discovery. *See id.* at 920 ("there is no absolute 'evidentiary privilege for state legislators for their legislative acts.'"); *Page*, 2014 WL 1873267, at *6-7 ("[T]he argument that legislative privilege is an impenetrable shield that completely insulates any disclosure of documents is not tenable.") (citation omitted); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n.20 (D. Md. 1992) ("Legislative immunity . . . does not, however, extend to certain types of documentation. The defendants will be required to produce any documents prepared by the Committee during the course of its deliberations which are requested by the plaintiffs") (citations omitted); *Corporacion Insular*, 709 F. Supp. at 297 (certain legislative documents were discoverable); *see also A Helping Hand LLC v. Baltimore County, Md.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003) (noting that plaintiff was free to serve deposition notices on each legislator "and to require each of those persons to assert the privilege on his own behalf").[17] "[C]onfidentiality does not lie at the root of the concerns motivating a privilege for all legislative speech or debate." *In re Grand Jury*, 821 F.2d 946, 958 (3d Cir. 1987). *See also Powell*, 247 F.3d at 524.

It bears further emphasis that Plaintiffs have only sought *documentation*; they have not sought testimony from the Commissioners. *See WSSC*, 631 F.3d at 182. And the documents Plaintiffs seek, such as emails from constituents and between the Commissioners, are not covered by such privilege. *Hansen*, 948 F.2d at 403 n.13; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elecs.*, 2011 U.S. Dist. LEXIS 117656, *10 (N.D. Ill. Oct. 12, 2011) (privilege did not apply to "[c]ommunications

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Educ., 2004 U.S. Dist. LEXIS 6916, *13-14 (N.D. Ill. Apr. 22, 2004) ("such a privilege is waivable and is waived if the purported legislator testifies . . .on supposedly privileged matters").

[17] *See also Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95-96 (S.D.N.Y. 2003) ("notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions."); *Hobart*, 2010 U.S. Dist. LEXIS 89441 ("the testimony of Council members is reasonably calculated to lead to the discovery of admissible evidence"); *Stone's Auto Mart, Inc. v. City of St. Paul, Minn.*, 721 F. Supp. 206, 211 (D. Minn. 1989) ("The motivation of the council members is precisely what is at issue and, therefore, is discoverable.").

between [state legislators] and outsiders to the legislative process . . . includ[ing] lobbyists").

VI. PLAINTIFFS SEEK RELEVANT, DISCOVERABLE INFORMATION AND DEFENDANTS' *MONELL* OBJECTIONS ARE UNFOUNDED.

Under FED. R. CIV. P. 26(b)(1), "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *See Watson v. Lowcountry Red Cross*, 974 F.2d 482, 485 (4th Cir. 1992). The Fourth Circuit has "interpreted the quoted language liberally as a requirement merely that information sought be **germane to the subject matter of the action**." *King v. McCown*, 1987 U.S. App. LEXIS 18799, at *3-4 (4th Cir. 1987). As this Court has repeatedly stated, "[t]he scope of relevancy under the discovery rules is broad, such that relevancy **encompasses any matter that bears or may bear on any issue that is or may be in the case**." *Romanyk*, 2013 U.S. Dist. LEXIS 89485, at *9-10. Hence, "a request for discovery should be allowed 'unless it is clear that the information sought **can have no possible bearing'** on the claim or defense of a party." *Cardenas v. Dorel Juv. Group, Inc*., 232 F.R.D. 377, 382 (D. Kan. 2005).

Defendants objected in a boilerplate manner to Requests #6-18, 20, 23-25, asserting that "this request is not relevant to establishing any material fact justiciable under 42 U.S.C. § 1983 under *Monell*." Defendants objected to #19 and #21 on boilerplate "irrelevancy" grounds as well. However, the "burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted." *Capital One*, 2008 U.S. Dist. LEXIS 76385, at *4-5. Specifically, Defendants bear "the burden of establishing that the information is not relevant." *Kidwiler v. Progressive Paloverde Ins. Co*., 192 F.R.D. 193, 199 (N.D.W. Va. 2000). Defendants failed to meet this burden. It "is never enough for a party resisting discovery to simply proclaim irrelevance, but must 'explain precisely why its objections are proper.'" *First Mariner Bank*, 2014 U.S. Dist. LEXIS 55379, at *47-48 (citation omitted).

Far from justifying their boilerplate objections, Defendants simply assert, "[n]o particularized discussion for each item is necessary; such things are self-evidently irrelevant." (D.Br.47). And:

> Emails and Facebook messages concerning prayer, *see id.* ¶ 17, are irrelevant to the constitutionality of the County's practice. Documents regarding sectarian prayers, *see id.* ¶ 18, is irrelevant since sectarian content is irrelevant to constitutionality under *Town of Greece*. Or Plaintiffs' requests for documents of any other prayers ever offered in a County building aside

> from the legislative prayers offered during the Board meetings, *see id.* ¶ 19, are—again—completely irrelevant . . .

Besides the fact that Defendants' objections lack any specificity and are thus waived, Plaintiffs' requests do seek relevant information. In #17, for instance, Plaintiffs seek written communications sent to Defendants relating to "prayer delivered at Board Meetings." The Court in *Galloway* clearly ruled: "The analysis would be different if town board members directed the public to participate in the prayers." 134 S. Ct. at 1826. The Court explained that the audience "for these invocations is not, indeed, the public but lawmakers themselves . . . [T]he prayer exercise [i]s 'an internal act' directed at the [] Legislature's 'own members,'" rather "than an effort to promote religious observance among the public." *Id.* at 1825. The court in *Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.7 (4th Cir. 2004) similarly held that a legislative prayer practice is unconstitutional when the government encourages others, who are not legislators, to participate. In so ruling, the court looked to the actions of certain council members and constituents and found it relevant that "Council member urged the Town's citizens to get involved in the prayer controversy" and that "**the Town's citizenry and church leaders obviously felt that they had enough personal investment in the Council's 'Christian prayer' to organize petitions and draft resolutions in support of it**." *Id.*

Likewise, documents relating to the "delivery of sectarian prayers at Board Meetings" (#18) are relevant under *Galloway*. In *Galloway*, the Court reiterated a legislative prayer practice is unconstitutional if it is "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" 134 S. Ct. at 1823; *id.* at 1821-22 (same). In "determining what it means to 'advance' one religion or faith over others, the touchstone of the analysis should be whether the government has placed its imprimatur, deliberately or by implication, on any one faith or religion." *Joyner v. Forsyth County*, 653 F.3d 341, 362 (4th Cir. 2011) (Niemeyer, J., dissenting).[18] In *Galloway*, the Court stressed that: "Greece neither reviewed the prayers in advance of the meetings **nor provided guidance as to their tone or content**." 134 S. Ct. at 1816. The Court reiterated: "**Our Government** is prohibited from

[18] *See also Rubin v. City of Lancaster*, 710 F.3d 1087, 1095-96 (9th Cir. 2013) (adopting *Joyner's* dissent in articulating the same test).

prescribing prayers to be recited in our public institutions[.]" *Id.* at 1822. Finally, the Court held that a legislative prayer practice is unconstitutional if it "betray[s] an impermissible government purpose." *Id.* at 1824. Request #18 seeks information related to the *government's* purpose in prescribing Christian prayers and the degree to which it "**provided guidance as to their tone or content**."

Request #19 seeks relevant information on the extent to which Defendants are using their position as Commissioners to exalt their personal religious views in government affairs. The evidence already shows that Frazier used her official position to try and hold prayer meetings for all County staff, which at least one other Commissioner admitted was inappropriate. (Dkt. 51-3 ¶123). And at a minimum, it serves to undermine Defendants' claim that the sole purpose of their prayers is to "solemnize" meetings. *See Romanyk*, 2013 U.S. Dist. LEXIS 89485, at *10-12 ("even if it does not directly relate to the claims and defenses, this information is still discoverable").

In addition to irrelevancy, Defendants also claim *Monell* bars discovery of the County's legislative prayer practice. The crux of Defendants argument is that: "No Commissioner is ever delegated authority by the Board to offer prayers." (D. Reply MSJ at 7). Yet the fact that Defendants have a policy and practice of allowing Commissioners to deliver invocations on a rotating basis is undisputed. (Dkt. 53-3). The fact that *Monell* liability has attached to prayer practices involving *private citizens*, including in *Galloway*, alone defeats Defendants' argument. Courts have agreed that the prayers in those cases are "less clearly attributable to the government" than prayers by the legislators themselves. *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008). *See also Pittsylvania*, 842 F. Supp. 2d at 914 n.4. Moreover, there are four cases directly addressing legislator-led prayer practices, three of which held the practice unconstitutional; *Monell* liability attached to each case. *See, e.g.*, *Wynne*, 376 F.3d at 294; *Turner*, 534 F.3d 352; *Mullin v. Sussex County*, 861 F. Supp. 2d 411 (D. Del. 2012); *Pittsylvania*, 842 F. Supp. 2d 927. For example, in *Wynne*, the Fourth Circuit held that a "practice of members of Town Council" delivering invocations violated the Establishment Clause. 376 F.3d at 294. In so ruling, the court relied extensively on the actions and statements of particular council members.[19]

[19] *See id.* at 295 (observing that "Council Member Barbara Hilton posted a message on the Town's website addressing

Defendants claim *Monell* shields them from disclosing a wide array of relevant documents: (a) Communications (emails, letters) by members of the public to Defendants regarding legislative prayer (Requests #6, 9, 10, 17); (b) Communications by Commissioners regarding legislative prayer (#7-10); (c) Communications between Frazier and Michelle Jefferson (#11); (d) Communications between Rothschild and Bruce Holstein (#12); (e) Communications sent by or received by Commissioners concerning any of the Plaintiffs (#13-14, 23); (f) Documents concerning the prayer delivered by Frazier on March 27, 2014 (#15-16); (g) Documents relating to prayers by Frazier in Carroll County government buildings (#20); (h) Documents relating to support of prayer at Board Meetings. (#25)

Monell does not bar discovery of the above documents. Again, there is no requirement that the information sought "directly relate to the claims and defenses." The Supreme Court has stated: "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." *Oppenheimer Fund, Inc. v. Sander*s, 437 U.S. 340, 351 (1978). Regardless, these requests directly relate to the claims and defenses. Emails to and from Commissioners and constituents tend to show that the practice is unconstitutionally directed to the public. Such communications may further reveal the County's improper motive for delivering such prayers and for selecting the Commissioners as the prayer-givers. The fact that Plaintiffs already discovered emails of a similar nature in their public records request makes it likely that such communications continued.

Defendants' argument that statements made by Commissioners outside of meetings cannot be considered is completely without merit. The Supreme Court has said that in reviewing Establishment Clause cases, courts can "infer [an improper] purpose from . . . public comments" of the legislators and their supporters. *McCreary County v. ACLU*, 545 U.S. 844, 862-63 (2005) (citations omitted). In this case, as in *McCreary*, the Court can consider all "openly available data" that supports "a commonsense conclusion that a[n] [improper] religious objective permeated the government's action." *Id*.[20] Indeed, the

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Wynne's 'request of alternative prayer,'"); *id.* (quoting a statement by Councilman Broom in a meeting); *id.* at 296 n.2 (noting that "Council Member Henry Stevenson told Wynne that things 'would stay the same.'"); *id.* at 301 n.7 (finding it relevant that a particular "Council member urged the Town's citizens to get involved in the prayer controversy").

[20] *See also Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (relying on detailed public comments of a senator in concluding that statute violated Establishment Clause); *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 800-01

Fourth Circuit in *Wynne* relied extensively on public comments made by the council members in finding the town's prayer practice unconstitutional. 376 F.3d at 301 n.7. Other cases in this district fully support the notion that statements by local legislators are relevant and discoverable evidence. *See Reaching Hearts Int'l, Inc. v. Prince George's County*, 584 F. Supp. 2d 766, 782 (D. Md. 2008) ("The statements that Prince George's County Council members **made to the press** also support the inference that religion-based public sentiment was opposed to RHI's application."); *Helping Hand*, 295 F. Supp. 2d at 591 (a council member's media statements "may be evidence of the Council's intentions"); *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 782 (D. Md. 2001) ("discriminatory animus" may have motivated a city council's action where one member of the council "successfully spearheaded an effort to build community opposition"). "[I]t defies logic, human nature, and case law to suggest that these statements . . . are irrelevant to the Court's inquiry." *Reaching Hearts*, 584 F. Supp. 2d at 783.

Finally, Requests 11 and 12 are relevant for impeachment. Defendants claimed the Commissioners had no role in two overtly proselyting and disparaging prayers that were delivered by citizens at their meetings. "[E]vidence obtained solely for the purpose of impeachment is discoverable within the federal discovery rules." *Capital One*, 2008 U.S. Dist. LEXIS 76385, at *5-8.

Although Defendants' objections to discovery have been waived, *supra*, Plaintiffs wish to respond to Defendants' accusation that Plaintiffs have changed their argument "no less than three times" since *Galloway*. (D. Br. 26-28). Since *Galloway*, Plaintiffs have consistently maintained the following: (1) the *Marsh-Galloway* analysis is "fact-sensitive"; (2) the fact-sensitive analysis looks to a variety of factors to determine whether a legislative prayer practice is unconstitutional; (3) some of these factors *can be* dispositive of an unconstitutional practice[21]; and (4) prayers delivered by legislators rather than

(10th Cir. 2009) (looking to public statements by county board members and concluding that monument was unconstitutional based largely on "[n]umerous quotes from these commissioners."); *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *23-24 (C.D. Cal. 2014) (same); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, *13-14 (M.D. Fla. 2007) (looking to the "comments of the citizens of and an official in the City").

[21] Plaintiffs correctly pointed out that the first factor, whether legislative prayer "exploited to proselytize or advance any one, or to disparage any other, faith or belief," is dispositive of a practice's unconstitutionality. (P. Reply MSJ at 3). Courts have also held that an invocation selection process can be determinative of a prayer practice's unconstitutionality, even if the content of the prayers are constitutional. (*Id.* at 15).

clergy or private citizens are more likely to be unconstitutional.

CONCLUSION

In view of the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Compel and require Defendants produce the document sought in Plaintiffs' discovery request, regardless of privilege, burden or other asserted objections that have been waived.

Respectfully submitted,
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