

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND**

CHRISTOPHER DOYLE, LPC, LCPC,)	
individually and on behalf of his clients,)	
)	
Plaintiff,)	Civil Action No. 1:19-cv-00190-DKC
)	
v.)	INJUNCTIVE RELIEF SOUGHT
)	
LAWRENCE J. HOGAN, JR., Governor of)	
the State of Maryland, in his official capacity,)	
and BRIAN E. FROSH, Attorney General of)	
the State of Maryland, in his official capacity,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MOTION TO COMPEL AND MEMORANDUM OF LAW IN SUPPORT
AND REQUEST FOR EXPEDITED CONSIDERATION**

Plaintiff Christopher Doyle, LPC, LCPC, pursuant to Fed. R. Civ. P. 37, moves the Court for an order compelling Defendants to provide a Rule 30(b)(6) deposition witness properly prepared and able to answer Plaintiff’s deposition questions concerning Defendants’ positions, interpretation, understanding, application, and enforcement of SB 1078. Plaintiff also moves the Court for an order compelling Defendants to produce a properly prepared Rule 30(b)(6) designee to answer Plaintiffs’ deposition questions concerning Defendants’ consideration of less speech-restrictive alternatives to SB 1028, efforts to address Maryland’s purported interests enacting SB 1028 prior to its enactment, and reasons for rejecting other available alternatives to SB 1028, if any, or in the alternative, to prohibit Defendants from subsequently introducing undisclosed evidence concerning its legal burden to consider and attempt less speech-restrictive alternatives prior to enacting SB 1028. Because the discovery sought by Plaintiff is in connection with Plaintiffs’ pending Motion for Preliminary Injunction (Doc. 2) and imminent hearing thereon,

Plaintiff respectfully requests the Court's expedited consideration of this motion. In support thereof, Plaintiff shows the Court as follows:

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL

“On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.” Fed. R. Civ. P. 37(a)(1). When presented with a motion to compel, “[t]he party resisting discovery bears the burden of showing why it should not be granted.” *Mainstreet Collection, Inc. v. Kirkland's, Inc.*, 270 F.R.D. 238, 241 (E.D.N.C. 2010) (emphasis added). For purposes of the instant motion, Defendants “must make a particularized showing of why discovery should be denied, and conclusory or generalized statements fail to satisfy this burden.” *Id.*

Defendants have an unquestionable duty to provide a Rule 30(b)(6) designee who is prepared to provide Defendants' answers and positions concerning the application, interpretation, understanding, and enforcement of SB 1028. Defendants' failure to satisfy this obligation constitutes a complete failure to provide an answer to such questions, and must be deemed a failure to respond. Moreover, Defendant cannot assert legislative privilege to prevent discovery of Defendants' consideration of less speech-restrictive alternatives to SB 1028, and then subsequently introduce evidence of such consideration in support of their defenses at trial.¹ Indeed, Defendants are prohibited as a matter of black letter law from using the legislative privilege as both a sword and a shield. Thus, this Court should grant Plaintiff's motion to compel, or in the alternative, should

¹ Plaintiff does not proffer, or even speculate, that Maryland actually did consider alternatives to SB 1028 that would have been less restrictive of speech. Because any such consideration is critically relevant to Defendants' defenses, however, Plaintiff is entitled to discovery on the subject.

prohibit Defendants from subsequently introducing evidence of any matter regarding which Defendants asserted the legislative privilege.

I. DEFENDANTS SHOULD BE COMPELLED TO PROVIDE A PREPARED RULE 30(b)(6) WITNESS TO ANSWER QUESTIONS ABOUT DEFENDANTS' UNDERSTANDING, INTERPRETATION, APPLICATION, AND ENFORCEMENT OF SB 1028.

A. Defendants' Have an Unquestionable Duty to Prepare a Rule 30(b)(6) Witness to Provide Defendants' Official and Binding Positions.

Rule 30(b)(6) requires a governmental defendant to “designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf,” and “[t]he persons designated **must testify about information known or reasonably available to the organization.**” Fed. R. Civ. P. 30(b)(6) (emphasis added). As this Court has said, “Rule 30(b)(6) imposes **affirmative obligations** upon corporations and their designated deponents” and “requires affirmative action on the part of the corporation to educate its designee on issues outside of that particular individual’s personal knowledge.” *First Data Merchant Servs. Corp. v. SecurityMetrics, Inc.*, No. RDB-12-2568, 2014 WL 6871581, *13 (D. Md. Dec. 3, 2014) (emphasis added). This means that Defendants are “obligated to produce one or more witnesses who were **thoroughly educated about the noticed deposition topics** with respect to any and all facts known to [Defendants or their] counsel.” *Int’l Ass’n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487 (D. Md. 2005) (emphasis added) (quoting *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172 (D.D.C. 2003)). Indeed, Defendants have “**the duty to present and prepare a Rule 30(b)(6) designee** [that] goes beyond matters personally known to that designee,” and must “prepare the designees so that they may give knowledgeable and binding answers for the corporation.” *First Mariner Bank v. Resolution Law Grp., P.C.*, No. MJG-12-1133, 2014 WL 1652550, *14 (D. Md. Apr. 22, 2014) (emphasis added) (quoting *United States*

v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.1996)). This duty, ““therefore, implicitly requires such persons to review all matters known or reasonably available to [the defendant] in preparation for the Rule 30(b)(6) deposition,”” which ““is necessary to make the deposition a meaningful one and to prevent the “sandbagging” of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial.”” *Id.*

Put simply, while it is technically not possible to depose the State of Maryland or the Executive Branch of the State, Defendants are ““**expected to create a witness or witnesses with responsive knowledge**”” of the corporate body as a whole, “and in doing so must make a good faith effort to ‘find out the relevant facts—to collect information, review documents, and interview employees with personal knowledge.’” *Cornyn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238 (D. Md. 2010) (bold emphasis added) (quoting *Wilson v. Lakner*, 228 F.R.D. 524, 528–29 (D. Md. 2005); *see also Wilson*, 228 F.R.D. at 528 (D. Md. 2005) (holding organization “is expected to create a witness or witnesses with personal knowledge”); *First Data*, 2014 WL 6871581, at *13 (same); *Scott Hutchinson Enters., Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 55 (S.D.W.V. 2016) (stating corporation expected to create witness to answer noticed topics and questions on behalf of corporation). Defendants have utterly failed to comply with this obligation and refused to fulfill their duty to create a knowledgeable witness.

B. Defendants’ Duty to Prepare a Rule 30(b)(6) Designee Extends to Defendants’ Positions on Their Understanding, Interpretation, Application, and Enforcement of SB 1028.

As this Court has made clear, a Rule 30(b)(6) designee “must not only testify about facts within the corporation’s knowledge, but also **its subjective beliefs and opinions** [and] **must provide its interpretation of documents and events.**” *Paul Revere Life Ins. Co. v. Jafari*, 206 F.R.D. 126, 127 (D. Md. 2002) (emphasis added)); *see also Burnett v. Ford Motor Co.*, No. 3:13-cv-14207, 2015 WL 4137847, *10 (S.D.W.V. July 8, 2015) (“[T]he testimony of a corporate

designee is useful to explain and clarify the policy and procedures, **to provide the corporation's interpretation** of the document, and to **confirm how the policy was applied . . .**” (emphasis added)); *Beattie v. Skyline Corp.*, No. 3:12-cv-02528, 2014 WL 5039678, *4 (S.D.W.V. Oct. 8, 2014) (“The purpose of a Rule 30(b)(6) deposition is obtain a corporation’s knowledge and memory of the facts, **its interpretation** of key documents, and its opinions and positions” (emphasis added)).

Under Rule 30(b)(6), government designees also are required to provide the government’s answers on its interpretation, enforcement, or application of a challenged law. *See, e.g., Hoyer v. City of Oakland*, 653 F.3d 835, 850 (9th Cir. 2011) (noting government’s designation of official “most knowledgeable of [government’s] ‘policies, procedure, and interpretations relating to enforcement’” of challenged law restricting plaintiff’s speech); *id.* at 850 n.12 (explaining proper to ask designated official questions “in an attempt to ascertain the [government’s] enforcement policy. In a sense, questions about a general policy are, by their very nature, always hypothetical: a policy provides what officers should do under certain hypothetical circumstances. We would be setting an impossibly high bar for plaintiffs if we were to require them to establish a municipality’s policy and then to exclude as inadmissible a responsible police official’s testimony as to what the municipality’s policy is.”); *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 32 (2d Cir. 2015) (noting government’s production of designee on “matters related to the drafting, passage, and enforcement” of challenged law); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 411 (N.D. Ala. 2017) (denying government official’s motion for protective order requiring him to submit to Rule 30(b)(6) deposition “regarding proper interpretation” of challenged law); *Billups v. City of Charleston*, No. 2:16-cv-00265-DCN, 2017 WL 4238233, *4 (D.S.C. Sept. 25, 2017) (noting government 30(b)(6) deponents were questioned concerning government’s understanding

of meaning of certain terms in challenged law and how certain provisions apply in certain contexts).

C. Defendants' Rule 30(b)(6) Designee Admitted That Defendants Did Not Even Attempt to Comply with Their Duty to Create a Witness with Defendants' Collective Knowledge.

In response to multiple questions seeking information concerning the Rule 30(b)(6) designee's efforts and preparation to provide Defendants' collective knowledge, the designee admitted not complying with the requirements of Rule 30(b)(6). First, the designee admitted that the only individuals the designee spoke to in preparation for the Rule 30(b)(6) deposition were Defendants' lawyers:

Q: [W]ith whom did you speak to prepare for your testimony today?

A: My lawyers.

Q: Anyone else?

A: **Not to my recollection.**

Q: . . . [D]id you speak to anyone in the governor or the attorney general's office to prepare for your testimony today?

A: No, sir.

. . . .

Q: Apart from the lawyers that are in the room with us today, did you speak to any other representative from the attorney general's office

A: No sir.

. . . .

Q: Was anyone else present in those discussions besides your lawyers?

A: Yes.

Q: Who else was there?

A: I don't remember the young lady's name.

[Defendants' Counsel] MS. ELLIS: A law clerk from our office was there.

. . . .

Q: So apart from that one other person, the law clerk identified by your lawyer, was anyone else present in those meetings?

A: No, sir.²

(Tr. Dep. Kimberly Christine Lang (hereinafter referred to as "Lang Dep."), copy attached hereto as Exhibit A, at 23:12–26:1 (emphasis added).)

The designee admitted to spending a **grand total of two hours**, over a two-day period, preparing for the Rule 30(b)(6) deposition:

Q: And about how long did you spend speaking with your lawyers about your testimony today? . . .

A: I would say a **total of one to two hours**.

Q: And over what period of time?

A: Two separate days, as I recall.

(Lang Dep. at 24:11–24:16 (emphasis added).)

It is beyond cavil that Defendants' slapdash two-hour preparation session utterly fails to comply with Defendants' affirmative duty "to educate its designee on issues outside of that particular individual's personal knowledge." *First Data*, 2014 WL 6871581, at *13. Indeed, devoting a grand total of two hours to prepare a Rule 30(b)(6) designee is a slap in the face to this Court's requirement that Defendants make "a good faith effort to find out the relevant facts—to

² Though not rehabilitative, the witness later amended her testimony: "I asked a singular general question of one of our investigators, asking what the process of an investigation may typically be." (Lang Dep. at 165:6–8.)

collect information, review documents, and interview employees with personal knowledge.” *Cornyn Grp.*, 265 F.R.D. at 238. Defendants must be required to properly prepare a witness to provide Defendants’ collective knowledge, opinions, and positions on SB 1028; Defendants’ two-hour chat does not suffice.

D. The Constant Chorus of “I Don’t Know” from Defendants’ Rule 30(b)(6) Designee Demonstrates Defendants’ Utter Failure to Comply with Their Indisputable Duty to Provide a Prepared Rule 30(b)(6) Designee.

Defendants’ Rule 30(b)(6) designee was also woefully unprepared to answer basic questions concerning Defendants’ understanding, interpretation, application, and enforcement of SB 1028.³ In fact, the Rule 30(b)(6) designee’s responses to all such questions can be summed up in one simple phrase: “I don’t know.” As this Court has held numerous times, “I don’t know” is not an acceptable response for a corporation’s designee and represents a failure to comply with the affirmative duty to prepare a witness. *See, e.g., Int’l Ass’n of Machinists*, 390 F. Supp. 2d at 488 (holding corporation failed to comply with its obligations when designee’s responses amounted to a constant refrain of “I don’t knows”—“fourteen by the court’s count”); *First Mariner*, 2014 WL 1652550 at *14 (holding defendant’s failure to produce witness who could provide more than “I don’t know” responses was breach of duty to comply with requirement of preparing witness).

Much like the corporate designee witnesses in *Int’l Ass’n of Machinists* and *First Mariner*, the responses of Defendants’ designee can be summed up as “I don’t know.” Defendants’ Such woeful lack of compliance with Rule 30(b)(6) and this Court’s requirements is illustrated by the following examples:

³ *See* Matters for Examination no. 10, Plaintiffs’ Notice of Taking Deposition of State of Maryland (hereinafter “Not. Dep.”), copy attached hereto as Exhibit B, at 4.

Plaintiff inquired of the Rule 30(b)(6) designee whether she was prepared to answer questions relating to the specific understanding, application, and enforcement of the terms of SB

1028. Defendants' designee could not provide any answer:

Q: So before we move on, just so the record is clear, I've asked the same hypothetical a number of times about the 10-year-old. Do you recall that I've asked that?

A. I do.

Q. **And you have been unable to answer specifically whether that hypothetical would implicate a violation of SB 1028.** Would it be fair to conclude that you would provide a similar answer to other hypotheticals asking whether particular conduct would be deemed a violation of SB 1028?

A: **That's accurate.**

(Lang Dep. at 173:13–174:3 (emphasis added).)

Plaintiff inquired of the Rule 30(b)(6) designee whether certain practices would constitute a violation of SB 1028. **Defendants' designee could not provide any answer:**

Q: [I]f the minor requests it, requests help to change sexual orientation or gender identity and the practitioner responds by doing what the client asks, is that conversion therapy under SB 1028?

MS. ELLIS: Objection.

A: I believe that would be a matter for the board to consider if that's unprofessional conduct.

Q: So you're not able to tell me?

A: I'm not.

. . . .

Q: And I'm asking you based on what you see on the page, is that a correct interpretation of what's here, that when the minor requests assistance to change or reduce or eliminate same-sex attractions and a practitioner responds by doing what the client asks, is that conversion therapy?

MS. ELLIS: Objection

A: And my answer is going to continue to be the same, that is legislative intent, that is judicial review. I cannot render an opinion on that.

Q: And so again just for the sake of completeness, is your answer the same if I asked about a minor who presented to a practitioner requesting help to change gender expressions and that practitioner responds by doing what the client asks, would that be conversion therapy under SB 1028?

MS. ELLIS: Objection

A: And my response would be the same.

Q: That you are unable to tell me?

A: Correct.

(Lang Dep. at 181:13–183:20.)

Plaintiff inquired as to the official understanding and positions of the official capacity Defendants, Governor Hogan and Attorney General Frosh, about the evidence upon which the legislature purportedly relied upon when enacting SB 1028. **Defendants' designee was unable to provide any answer and specifically lacked any knowledge of the topic:**

Q: So do you know whether the governor has reached any conclusion about any statement or information in the exhibit marked as 17 since the enactment of SB 1028?

MS. ELLIS: Objection, irrelevant.

A: **I'm not aware.**

Q: And same question for the attorney general of the state of Maryland?

A: **I'm not aware.**

(Land Dep. at 187:14–188:1 (emphasis added).)

Plaintiffs inquired as to Defendants' position on whether the counseling prohibited by SB 1028 was actually harmful and whether any evidence was offered in support of any assertion of purported harm. **Defendants' designee did not have the knowledge to answer:**

Q: So you don't recall any discussion about the inability to conclude how likely it is that harm will occur from SOCE?

A: I don't.

Q: And isn't it also true that the state of Maryland cannot conclude how likely it is that harm will occur from SOCE or conversion therapy?

MS. ELLIS: Objection.

A: I can't render an opinion on that.

Q: Just to clarify for the record then, are you saying that you don't know if the state of Maryland can conclude how likely it is that harm will occur from SOCE?

MS. ELLIS: Objection.

A: Correct.

(Lang Dep. at 202:5–202:19.)

These foregoing excerpts are a mere sampling of the numerous incomplete, evasive, and unresponsive answers that Defendants' designee gave during the course of her Rule 30(b)(6) deposition. The transcript is littered with "I don't know," "I'm not aware," and "go ask someone else" answers. Such a failure to provide a thoroughly prepared witness is a dereliction of duty and amounts to no response from Defendants at all.

E. Defendants' Failure to Provide a Properly Prepared 30(b)(6) Designee Is a Dereliction of Duty and Must Be Treated as a Failure to Provide Any Answers at All.

"Defendants **must** answer all [discovery requests] completely and not evasively." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, MJG-06-2662, 2012 WL 13012439, *3 (D. Md. Feb. 8, 2012) (emphasis added). A failure to fulfill this obligation is tantamount to a failure to provide any

answer whatsoever. *See, e.g.*, Fed. R. Civ. P. 37(a)(4) (“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”); *Johnson v. Diversified Consultants, Inc.*, 2016 WL 1464549, *1 (D. Md. April 13, 2016) (same); *Steele v. Mobley*, 5:14-CT-3298-F, 2016 WL 7655696, *1 (E.D.N.C. Mar. 31, 2016) (same); *Waterkeeper Alliance, Inc. v. Alan & Kristin Hudson Farm*, 2011 WL 13217389, *2 n.3 (D. Md. June 1, 2011) (“[E]vasive and incomplete responses . . . are deemed to be a failure to answer at all.”). Indeed, if the Rule 30(b)(6) designee “is not knowledgeable about relevant facts . . . then the appearance is, for all practical purposes, no appearance at all.” *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.3d 196, 197 (5th Cir. 1993). Defendants’ failure to provide adequate and thorough responses concerning Defendants’ collective knowledge of all facts is an abuse of discovery, and Defendants failure must be treated as a complete failure to abide by the requirements of Rule 30(b)(6).

At the beginning of the deposition Defendants’ counsel (improperly) imposed the limitation that the deposition would be of the “executive branch.” (Lang. Dep. at 8:13–9:1.) The witness, however, confirmed that the professional boards directly responsible for enforcement of SB 1028 is part of the executive branch, and there was no barrier to the witness’s consulting any member of such board to prepare for her testimony. (Lang Dep. at 163:8–164:10.)

The subject matters on which Defendants refused or were unprepared and unable to give deposition testimony are critical to this Court’s determination of Plaintiff’s preliminary injunction motion. For example, a key issue in Plaintiff’s facial and pre-enforcement **as applied** First Amendment challenge is whether SB 1028 prohibits sexual orientation or gender identity change counseling even when initiated, sought and requested by the minor client, or only when change is

the pre-determined goal of the counselor. Defendants have improperly prevented this inquiry to which Plaintiff is clearly entitled.

Similarly, when deciding Plaintiff's claims of vagueness, overbreadth, and overreach of SB 1028, this Court must be aware of whether certain conversations or speech that Plaintiff wishes to say to minor clients who seek his counseling are banned by the statute. SB 1028 does not define or specify any specific conversations or speech that would be banned as "conversion therapy," and thus there is no way to determine its reach without Defendants' testimony. Once again, Defendants' deposition designee as to interpretation, application, and enforcement was unprepared and unable to answer a single question about how the statute is to be applied to speech in numerous instances of speech in which Plaintiff Doyle wishes to engage.

F. Defendants Must Be Required to Produce an Appropriately Prepared Rule 30(b)(6) Designee to Provide Answers to Plaintiffs' Inquiries Concerning Defendants' Understanding, Interpretation, Application, and Enforcement of SB 1078.

Where, as here, a designee "is not responsive to a notice of deposition—claiming no or limited knowledge—the responding party may be subject to sanctions." *Wilson*, 228 F.R.D. at 529–30. "If unanswered information is significant enough, the 30(b)(6) deposition may have to be reconvened, possibly with a new witness" *Id.* at 530; *see also Resolution Trust Corp.*, 985 F.3d at 197 (same); *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989) (requiring non-responsive defendant to "re-designate its witnesses and mandate their preparation for re-deposition at the corporation's expense"). This Court should require Defendants to produce an appropriately prepared and responsive designee, to require the witness(es) to provide answers as to Defendants' understanding, interpretation, application, and enforcement of SB 1028, and to pay the expenses of the re-convened deposition.

II. DEFENDANTS MUST, AS A MATTER OF SETTLED LAW, BE PROHIBITED FROM USING THE LEGISLATIVE PRIVILEGE AS BOTH A SWORD AND A SHIELD.

A. It Is Settled Law That Defendants Cannot Use the Legislative Privilege as Both a Sword and a Shield.

It is axiomatic that “[a] party **may not use a privilege as a shield during discovery and then hammer it into a sword for use at trial.**” *United States v. Duke Energy Corp.*, 208 F.R.D. 553, 558 (M.D.N.C. 2002) (emphasis added). This Court, too, has long precluded a defendant from hiding behind the shield of privilege during discovery and then ambushing the plaintiff with the sword of the undisclosed information at trial. *See, e.g., United Bank v. Buckingham*, 301 F. Supp. 3d 547, 558 (D. Md. 2018) (recognizing party cannot “use the privilege as a sword and shield”); *Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc.*, 764 F. Supp. 2d 736, 739 (D. Md. 2011) (same); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) (“[T]he court is not unmindful of the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.”).

B. Defendants’ Rule 30(b)(6) Designee Improperly Used the Assertion of Legislative Privilege to Refuse to Answer Plaintiff’s Legitimate and Discoverable Inquiries.

Defendants’ Rule 30(b)(6) designee asserted legislative privilege as a basis for refusing to answer Plaintiff’s questions **thirty-three times** in her deposition. (Lang Dep. at 55:9–61:9 (eleven times), 68:1–69:1 (four times), 92:13–93:9 (two times), 105:15–110:13 (eight times), 185:9–187:3 (five times), 190:5–194:3 (three times)). In each of these instances, Defendants’ Rule 30(b)(6) designee was instructed not to answer. (*Id.*). Many of these assertions were made in response to legitimate inquiries into Defendants’ enactment of SB 1028. (Not. Dep. at 3–4, Matters for Examination nos. 1–9.)

In federal litigation, state legislative privilege is “a creature of federal common law” and is **qualified**, not absolute. *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553 (D. Md. 2017) (granting plaintiffs’ motion to compel Maryland legislators to testify and produce documents in discovery), *aff’d*, 241 F. Supp. 3d 566 (D. Md. 2017). “Thus, unlike lawsuits seeking to hold individual legislators liable, ‘where [as here] the State faces liability, the legislative privilege becomes qualified when it stands as a barrier to the vindication of important federal interests and insulates against effective redress of public rights.’” *Id.*; *see also United States v. Craig*, 537 F.2d 957, 958 (7th Cir. 1976) (holding no federal legislative privilege available to state legislator who is not targeted for individual civil liability). Where legislative intent is an element of a First Amendment claim against a state, “‘judicial inquiry . . . is specifically contemplated as part of the resolution of the core issue.’” *Benisek*, 263 F. Supp. 3d at 553.

Maryland’s legislative intent in enacting SB 1028 is a seminal issue in this case. As Plaintiff demonstrates in his Motion for Preliminary Injunction (Doc. 2), Defendants are required to show that Maryland “seriously undertook to address the problem with less intrusive tools readily available to it,” *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014), and show “either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason.” *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2015). (Mot. Prelim. Inj., Doc. 2, at 28–29.) Indeed, binding precedent dictates that “the burden to prove narrow tailoring requires [the government] to **prove that it actually tried other methods to address the problem**” and that it “seriously undertook” other methods to address a problem prior to restricting speech. *Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015) (bold emphasis added).

As the foregoing authority makes clear, Defendants have a constitutionally mandated burden to produce evidence concerning the “problem” Maryland intended to solve by SB 1028, Maryland’s interest in solving it, and less speech-restrictive alternatives that Maryland considered prior to enacting a blanket ban on speech (poorly) defined as “conversion therapy.” Despite that unquestionable burden, however, when presented with inquiries concerning these very issues, Defendants’ Rule 30(b)(6) designee—legally tasked with giving Defendants’ official positions on these matters—raised a legislative privilege shield, asserting such questions should not be answered.

For example, Plaintiff inquired as to whether Defendants considered any alternatives that would have been less restrictive on protected speech. **Defendants’ designee asserted legislative privilege and refused to answer:**

Q: Is there anything in the public legislative record of SB 1028 or the House counterpart that indicates the legislature considered banning only a residential or summer camp style version of what’s called conversion therapy?

MS. ELLIS: Objection. Legislative privilege.
Instruct the witness not to answer.

(Lang Dep. at 92:13–92:19.)

Plaintiff inquired as to any considerations that went into the rejection of certain amendments to SB 1028, which included alternatives that were less speech restrictive. **Defendants’ designee asserted legislative privilege and refused to answer eight times.** (Lang Dep. at 105:15–110:13.)

Plaintiff inquired as to Defendants’ bases for the assertion that SB 1028 was necessary to prevent harm to minors and the support (if any) for such an assertion. **Defendants’ designee asserted legislative privilege and refused to answer:**

Q: In connection with the enactment of SB 1028, did the legislature reach any conclusions as to the level of risk of – let’s just start with the first outcome here – confusion resulting from conversion therapy as defined in the bill?

MS. ELLIS: Objection. . . . [T]he question you’ve asked calls for information covered by the legislative privilege and I instruct the witness not to answer.

. . . .

Q: In connection with passing SB 1028 did the legislature undertake to determine what level of risk of these various bad outcomes is involved with counseling in general that does not involve conversion therapy as defined in the bill?

MS. ELLIS: Objection. It’s covered by the legislative privilege and I instruct the witness not to answer.

(Lang Dep. at 192:12–194:3.)

C. Defendants Must Either Be Required to Provide a Properly Prepared Rule 30(b)(6) Designee or Be Prohibited from Introducing Any Evidence of Subjects on Which They Asserted Legislative Privilege.

As demonstrated above, Defendants’ legislative record of the enactment of SB 1028 is a proper subject for a governmental Rule 30(b)(6) designee. Moreover, and vitally important in the First Amendment context, Plaintiff’s inquiries into whether Defendants considered any alternative to SB 1028 that might have been less restrictive of Plaintiff’s speech is a seminal question. Therefore, Defendants must be required to provide a properly prepared Rule 30(b)(6) designee to testify regarding Maryland’s enactment of SB 1028. Alternatively, Defendants must be precluded from subsequently offering any previously undisclosed or shielded evidence to meet their burden of proving that SB 1028 is narrowly tailored, so as not to allow Defendants to hide behind the legislative privilege shield, and then hammer it into a sword for use against Plaintiff. **Defendants must either answer the questions, or forever hold their peace.** Plaintiff’s Motion to Compel should be granted.

CONCLUSION

Because Defendants' failed to properly prepare their Rule 30(b)(6) designee, failed to provide answers to appropriate and proper inquiries concerning Defendants' understanding, interpretation, application, and enforcement of SB 1028, and erected a legislative privilege shield to prevent legitimate inquiries concerning Defendants' constitutional burdens in the enactment of a speech restriction, the Court should grant Plaintiff's motion and require Defendants to produce a properly prepared Rule 30(b)(6) designee at a reconvened deposition, require Defendants' designee to provide appropriate and binding answers to Plaintiff's inquiries, and require Defendants to bear the costs of the reconvened deposition. As to Defendants' legislative privilege assertions, the Court should require Defendants' Rule 30(b)(6) designee to answer questions concerning Defendants' constitutional burdens in enacting SB 1028, or in the alternative, preclude Defendants from introducing any evidence concerning the enactment of SB 1028. Finally, given the imminent preliminary injunction hearing, Plaintiff respectfully requests the Court's expedited consideration of this motion.

/s/ John R. Garza
(signed by Roger K. Gannam
with permission of John R. Garza)
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CERTIFICATION OF GOOD FAITH CONFERRAL

Pursuant to Fed. R. Civ. P. 37(a)(1), the undersigned Plaintiff's counsel hereby certifies that Plaintiff has, in good faith, conferred with Defendants in an attempt to reach agreement on the disputed matters. Despite such good faith efforts, Plaintiff has been unable to obtain the requested discovery without court action.

/s/ John R. Garza
(signed by Roger K. Gannam
with permission of John R. Garza)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been filed this April 11, 2019, through the Court's ECF system, which will send a notice of electronic filing to all parties and counsel of record, including the following:

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