VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

Rima Ford Vesilind, et al.,	)	
	)	Case No: CL15003886-00
Plaintiffs,	)	
	)	
v.	)	
	)	
Virginia State Board of Elections, et al.	)	
	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM ISSUED TO NON-PARTY LEGISLATIVE RESPONDENTS

INTRODUCTION

Wrongly premised on the legislative privilege developed through federal common law and applicable only to state legislators in federal court facing federal claims, and not on the absolute privilege explicitly codified in Virginia's Constitution, the Plaintiffs urge this Court to adopt a narrow and qualified version of the legislative privilege and, for the first time, apply it in the Commonwealth's courts. The Supreme Court has consistently interpreted the protections enshrined in the federal version of the Speech or Debate Clause broadly to effectuate its purposes and has explicitly rejected a qualified privilege.

On the eve of a new legislative session, this Court should recognize that Virginia's Speech or Debate Clause was enacted to guarantee that the time, resources, and attention of legislators is focused on legislative duties and not distracted and consumed by a private litigant's subpoenas. This Court should uphold that interest and quash Plaintiffs' subpoenas.

ARGUMENT

I. THE CONSTITUTION OF VIRGINIA EXPLICITLY AND ABSOLUTELY PROVIDES FOR THE LEGISLATIVE PRIVILEGE AND ITS PROTECTIONS ARE BROAD.

A. Legislative Privilege Is Constitutionally Commanded And Therefore Courts Interpret It Broadly To Effectuate Its Purposes.

Legislative Privilege is based on the explicit and absolute commands of the Virginia *Constitution*. *See* Va. Const. art. IV, § 9; *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (noting that the Speech or Debate Clause is the source of legislative immunity and privilege); *see also United States v. Gillock,* 445 U.S. 360, 366-367 (1980) (declining to use Fed. R. Evid. 501 to expand to state legislators the constitutional protections contained in the federal Speech or Debate Clause protecting federal legislators in a federal criminal case in federal court). Justice Story in his Commentaries on the Constitution noted that the Speech or Debate Clause was so vital that without it all other privileges would be unimportant or ineffectual. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (U.S. 1881) (quoting Justice Story's Commentaries on the Constitution). So important was this privilege, Justice Story noted, that every State in the Union enshrined it in their own state constitutions. *Id*.

The constitutional source of the Legislative Privilege is what distinguishes it from the common-law privileges. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562 (1989) (Attorney-Client privilege); *Hickman v. Taylor*, 329 U.S. 495, 512-14 (1947) (Attorney Work-Product); *Association for Women in Science v. Califano*, 566 F.2d 339, 343-44 (D.C. Cir. 1977) (Government Privileges, including Executive Privilege); Fed. R. Evid. 501. Understandably, because the Federal Rules of Civil Procedure and the Virginia Supreme Court Rules provide for liberal discovery, Fed. R. Civ. P. 26(b)(1), Va. Super. Ct. R. 4:1(b)(1), the common-law

privileges must be strictly construed. *See* (Pls.' Oppn. Br. at 4-5) (citing *Hickman v. Taylor* and *United States v. Nixon*).[1]

But, because the legislative privilege—like the Fifth Amendment privilege against self-incrimination—is constitutionally commanded, courts interpret the Speech or Debate Clause broadly to effectuate its purposes. *See Covel v. Town of Vienna,* 78 Va. Cir. 190, 200 (Va. Cir. Ct. 2009) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975)); *cf. Quinn v. United States*, 349 U.S. 155, 162 (1955) ("Coequally with our other constitutional guarantees, the Self-Incrimination Clause "must be accorded liberal construction in favor of the right it was intended to secure." Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial."). Even in the federal criminal law context, the Speech or Debate Clause is interpreted broadly even to prevent a federal prosecutor from questioning a federal legislator concerning a conspiracy charge to make a speech on the floor of the House of Representatives in exchange for money. *See United States v. Johnson*, 383 U.S. 169, 170, 181 (1966). Therefore, this Court should reject Plaintiffs attempt to dilute the constitutional protections of Virginia legislators into a common-law exception to the Virginia Supreme Court Rules permitting liberal discovery. (Pls.' Oppn. Br. at 4-5).

[1] Plaintiffs also rely on *Page v. State Board of Elections*, 15 F. Supp. 3d 657, 660 (E.D. Va. 2014). But the passage Plaintiffs quote relies on a case involving common law spousal privilege (*Trammel v. United States*, 445 U.S. 40, 47-50 (1980)) and a case involving a failed attempt to expand the protections announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in a defamation case. *Herbert v. Lando*, 441 U.S. 153, 169-170 (1979). Plaintiffs reliance on *Page*'s statement is therefore inapposite because this case involves the absolute and explicit commands of the Virginia Constitution prohibiting the questioning of Virginia legislators for any speech or debate in any other place. *See* Va. Const. art. IV, § 9.

B. The Legislative Privilege Protects Those Acts That Are An Integral Part Of The Deliberative And Communicative Process.

"Without exception, our cases have read the Speech or Debate Clause *broadly* to effectuate its purposes." *Eastland*, 421 U.S. at 501 (emphasis added). Because legislative privilege is interpreted broadly, it covers more than "delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing material at Committee hearings" as well as the motivations of and discussions between legislators concerning their votes on legislation. *See Bd. of Supervisors v. Davenport & Co. LLC*, 285 Va. 580, 589 (Va. 2013) (noting that its list of legislative actions is not exhaustive). The privilege protects "[e]very other act resulting from the nature, and in the execution, of the office." *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951); *Kilbourn*, 103 U.S. at 204 (interpreting the Speech or Debate Clause broadly to include those "[t]hings generally done in a session of the House by one of its members in relation to the business before it."). The privilege protects the full scope of acts and communications of legislators and their aides, experts, and consultants, that are an integral part of the deliberative and communicative process within the legislature's jurisdiction. *Gravel v. United States*, 408 U.S. 606, 616, 625 (1972). The privilege protects mental impressions, recommendations, and advice, s*ee In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987), as well as legislative investigations and the gathering of factual information. *See Eastland*, 421 U.S. at 504-05. Courts have recognized that even meetings between legislators and interests groups are protectable under the privilege. *See Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980) (holding that in lawsuit brought by landowner against county council members alleging bad faith in rezoning ordinance because council members met with political interest groups, legislative immunity applied and was not broken due to meetings

because "Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider...." and is therefore part of the legislative process); The legislative privilege even protects the personal notes and files of legislators. *Simpson v. City of Hampton*, 166 F.R.D. 16, 19 (E.D. Va. 1996).

The Supreme Court's limitations on the Speech or Debate Clause are perfunctory. The Supreme Court in *Brewster*—a case that Plaintiffs cite—states unremarkably that the Speech or Debate Clause is limited to those acts which are clearly a part of the legislative process and does not include scheduling appointments with other government agencies, cajoling government agencies to administer a statute, providing assistance with securing government contracts and drafting communications with constituents. (Pls.' Oppn. Br. at 5-6, and 12). These examples are clearly not within the legislative sphere because these activities are neither legislative in that they are not deliberating, debating, or investigating *pending* legislation, e.g., cajoling government to properly administer an enacted statute, nor do these examples consist of intra-legislative communications, e.g., drafting and disseminating constituent newsletters.

But, the General Assembly's deliberating, debating, and investigating throughout the redistricting process is clearly part of the legislative process because the redistricting process is constitutionally vested in the General Assembly. *See* U.S. Const. art. I, § 4 (vesting state legislatures with the power to draw districts for congressional members); Va. Const. art. II, § 6 (vesting General Assembly with authority to draw districts for Virginia House and Senate Members). Therefore its communications are privileged.

As was stated in the Non-Party Legislators' opening brief at 5-6, The Speech or Debate Clause also extends to those actions brought by private citizens because even those lawsuits

could disrupt the legislature and divert precious time, energy, attention and resources from legislative task to address litigation concerns. *See Covel*, 78 Va. Cir. at 200 (citing *Eastland*, 421 U.S. at 502-03). The important interest in preventing diversion of legislators time and energy is especially important in Virginia where "[m]any legislators work only on a part-time basis and are required to secure other employment to supplement any income they earn as legislators." *Covel*, 78 Va. Cir. at 202. This Court should be particularly mindful at this time because the General Assembly is returning to session on January 13, 2016 when they will have sixty days to conduct all legislative business. Va. Const. art. IV, § 6 (stating that the General Assembly convenes on the second Wednesday in January and, in even numbered years, is to meet for no more than 60 days). Thus, whether the information sought is in the form of documents or in the form of oral testimony is immaterial because both infringe on the Speech or Debate Clause's purpose of preventing a diversion of attention and resources. *See Brown & Williamson Tobacco Corp. v. Williams,* 62 F.3d 408, 421 (D.C. Cir. 1995)*; see also United States v. Rayburn House Office Bldg.,* 497 F.3d 654, 660 (D.C. Cir. 2007) (rejecting the argument that legislative privilege only applies when the legislator or legislative staff is personally questioned and noting that the privilege applies to documentary evidence as well).

Therefore, because of the mandatory nature of the Speech or Debate Clause's command—"shall not be questioned"— once it is determined that the legislator was acting in a legislative capacity, the privilege is absolute. *Eastland*, 421 U.S. at 503; *WSSC II*, 631 F.3d at 181 ("Consequently, if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply."). Even when the legislator does not face liability, compliance with discovery procedures can prove just as burdensome. *WSSC II,* 631 F.3d at 181; *Eastland*, 421 U.S. at 511 n.16 ("Where we are

presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part. The speech or debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to "grind to a halt.").

C. The Scope Of Legislative Privilege Is Not Reduced Because The Plaintiffs Brought A Redistricting Challenge.

As noted *supra*, the Virginia's Speech or Debate Clause is explicit and absolute in prohibiting the questioning of legislators in any other place for any speech or debate. Va. Const. art. IV, § 9. The U.S. Supreme Court has interpreted the federal Speech or Debate Clause broadly, without exception, to effectuate its purposes. *Covel*, 78 Va. Cir. at 200 (citing *Eastland*, 421 U.S. at 501. The only limitation to the Commonwealth's constitutional provision is that it does not apply to cases of Treason, Felonies, or Breaches of Peace. Va. Const. art. IV, § 9

The Plaintiffs, however, want this Court to reduce the scope of the privilege and hope this Court will add to the list of three exceptions to the Speech or Debate Clause's applicability: a redistricting case. (Pls.' Oppn. Br. at 7). But redistricting cases are not treason, breach of peace, or felonies. Therefore the absolute and explicit constitutional command of Virginia's Speech or Debate Clause applies with full force in this redistricting case just as much as it would apply to any other case that is not a treason, felony, or breach of peace.

For their assertion that the scope of legislative privilege should be narrowly construed and subject to balancing because this is a redistricting case, the Plaintiffs rely on one federal district court case involving federal constitutional and federal statutory challenges to Maryland's redistricting map. (Pls.' Oppn. Br. at 7); *see Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 294 and n.4 (D. Md. 1992). But that case is inapposite because the

court there analyzed legislative privilege as applied to state legislators in federal court under federal common-law and not the broader Speech or Debate Clause contained in the Commonwealth's Constitution. *Id*. at 302 n.20; 304 n.22. Here, this Court must apply the explicit and absolute protections of the analogous Virginia Speech or Debate Clause, a provision that does not contemplate any balancing. *See Eastland*, 421 U.S. at 511 n.16 ("Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, *balancing plays no part*.") (emphasis added); *see also See Lee v. Va. State Bd. of Elections*, No. 15-357, 2015 U.S. Dist. LEXIS 171682 at *22-23 n.9 (E.D. Va. Dec. 23, 2015) (rejecting a qualified balancing approach to legislative privilege as applied to state legislators in federal court and holding that the privilege applied absolutely to communications between legislators, between legislators and legislative staff and between legislative staff and ordering production of communications released to third parties). Furthermore, no Virginia court has applied a balancing test when weighing the legislative privilege explicitly codified in Va. Const. art. IV, § 9.

D. Because The Privilege Is Interpreted Broadly To Effectuate Its Purposes, The Privilege Covers Consultants And Experts Who Provide Assistance To The Legislator At The Legislator's Direction.

Understanding the complexities of the modern day legislative affairs, the Supreme Court has extended the legislative privilege to the legislator's "[a]ides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel v. United States*, 408 U.S. 606, 618 (1972). Since *Gravel*, the Supreme Court has recognized that the privilege can be extended to legislative consultants. *Doe v. McMillan*, 412 U.S. 306, 312 (1973) ("[I]t is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff,

from the consultant, or from the investigator, for introducing material at Committee hearings....") (emphasis added). As the Fourth Circuit ruled the key to the determining whether legislative privilege applies is whether the "[f]unction being fulfilled—not the title of the actor claiming immunity..." qualifies as legislative. *McCray v. Md. Dep't of Transp., Md. Transit Admin*., 741 F.3d 480, 485 (4th Cir. 2014); *Forrester v. White*, 484 U.S. 219, 223-24 (1987) (determining whether immunity applied using a functional approach), *see also Chapman v. Space Qualified Systems Corp*., 647 F. Supp. 551, 553 (N.D. Fla. 1986) ("[I]f the acts of a legislator would be privileged if performed by him personally, then they must also be privileged if performed by someone at his direction.") (citing *Gravel*, 408 U.S. at 616). Although Plaintiffs take too narrow a view, even the Plaintiffs concede that consultants to the Virginia General Assembly are covered under Legislative Privilege if they are paid from the General Assembly's funds. (Pls.' Oppn. Br. at 8-9) (citing *See Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 661-662 n.2 (E.D. Va. 2014)).[2]

Plaintiffs view is too narrow, however, because it ignores the Fourth Circuit's ruling in *McCray* that the relevant question asked must be what function is being fulfilled, not which budget is getting tapped to pay for assistance. *See McCray*, 741 F.3d at 485; *see also WSSC II*, 631 F.3d at 181 (ruling that legislative privilege "covers all those properly acting in a legislative capacity, not just actual officeholders."). In determining "[w]hether an individual's activities are protected by the Speech or Debate Clause, a court need inquire only whether the activity would

[2] Plaintiffs seem to reverse themselves and take the position that the legislative privilege can only apply to legislators and their staff. (Pls.' Oppn. Br. at 9). As demonstrated *supra*, the privilege applies to consultants and investigators. *See, e.g., Doe v. McMillan*, 412 U.S. 306, 312 (1973). Even in *Page*, the court there would have found that the legislative privilege extended to a consultant if that consultant were paid for by the General Assembly, a legislative committee, or by the legislator personally. *See Page*, 15 F. Supp. 3d at 664. The privilege is not limited to legislators and their staff.

be protected had it been that of a senator or a representative." *Chapman*, 647 F. Supp. at 553 (citing *Gravel*, 408 U.S. at 617-18). Thus, there is no need to determine how a consultant is getting paid. *See id*. at 553-554 (noting that the relevant inquiry did not turn on whether an investigator at the Government Accountability Office is analogous to a chief counsel of a subcommittee). The relevant inquiry is simply whether the individual in question was acting at the direction of the legislator and had the legislator done the act in question personally would legislative privilege protect the activity. *Id* (citing *Gravel*, 408 U.S. at 617-618 (holding that courts must view acts of aids to the legislators as protected under legislative privilege if those acts would be protected if legislator had done the same act himself); *see also Favors v. Cuomo*, 285 F.R.D. 187, 213 (E.D.N.Y. 2012) (holding that communications between New York legislators and a retained redistricting expert at Duke University were protected under legislative privilege because these consultants and experts aid legislators in their legislative duties).

The Plaintiffs attempt to limit the importance of the Fourth Circuit's opinion in *McCray* claiming its reasoning on legislative privilege is dicta. (Pls.' Oppn. Br. at 9). *First*, *McCray*'s favorable comments about extending legislative privilege to government agency officials was necessary to the decision because the court had to determine the boundaries of legislative privilege to determine whether the agency official's actions predated any legislative action. The Fourth Circuit's comments extending legislative privilege to those agency officials were necessary to determine whether the lawsuit had implicated legislative immunity. *McCray*, 741 F.3d at 487. The favorable comments then are not dicta.

Second, if the favorable comments extending legislative privilege were dicta, then the comments in *WSSC II* were also dicta for that court came to the same conclusion that the activities at issue there had not yet implicated legislative immunity and permitted the subpoena at

issue to be enforced against the Commission. *See WSSC II*, 631 F.3d at 183. The Fourth Circuit, however, has not treated *WSSC II*'s favorable comments analyzing legislative privilege as dicta. *See, e.g., Kensington Volunteer Fire Dep't, Inc. v. Montgomery County,* 684 F.3d 462, 470-471 (4th Cir. 2012). This Court should likewise not consider *McCray*'s analysis as dicta.

Finally, the Plaintiffs mistakenly interpret the procedures for hiring and compensating staff of the General Assembly as the *sole* procedure for determining who receives the protections of the legislative privilege. (Pls.' Oppn. Br. at 10) (citing Va. Code. § 30-19.20). Plaintiffs do not adduce any legislative history to suggest that this procedure is the sole mechanism by which consultants and experts could avail themselves of the legislative privilege's protections. Nor does the language of the statute suggest that it limits the application of legislative privilege. The language of the statute itself does not even speak of consultants or independent contractors, but only of personnel. It seems hard to believe that it enacting this statute the legislature was narrowing the application of its privilege and it did so in silence. *See Tenney*, 341 U.S. at 376 (rejecting the argument that by enacting the precursor to 42 U.S.C. § 1983 Congress intended to abrogate state legislative privilege without mentioning the privilege anywhere in the statute or in the legislative history).

Consultants and experts who act at the direction of a legislator or a legislative body and inform those legislators and legislative bodies of facts that the pending legislation will affect or change is within the sphere of legislative activity. *See McGrain v. Daugherty*, 273 U.S. 135, 175, (1927) ("[A] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."). Communications with these consultants and experts must be protected under legislative privilege.

E. Since Congressional Agencies Are Covered Under The Federal Speech Or Debate Clause, The Department Of Legislative Services Is Covered Under Virginia's Speech Or Debate Clause.

The Supreme Court has consistently read the Speech or Debate Clause broadly to effectuate its purposes, which includes the separation of powers principle guaranteeing that the legislature is a separate and independent branch of government. *See, e.g., United States v. Brewster*, 408 U.S. 501, 508-09 (1972); *Eastland*, 421 U.S. at 502 ("The purpose of the [Speech or Debate] Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."); *Davenport*, 285 Va. at 587.

Plaintiffs insist that the legislative privilege cannot be extended to the Department of Legislative Services ('DLS') for the peculiar reason that DLS serves the General Assembly as a whole and not any specific legislator. (Pls.' Oppn. Br. at 10-11). But Plaintiffs view is contrary to Supreme Court precedent. *See Doe*, 412 U.S. at 312 (holding that legislative privilege applied to a consultant and investigator of an entire subcommittee and not any individual legislator).

Furthermore, Plaintiffs make a category error because the cases Plaintiffs cite analyze legislative privilege under federal common law, not the federal or a state's Speech or Debate Clause. The cases Plaintiffs cite for the proposition that legislative agencies are not covered under legislative privilege are inapposite. Plaintiffs cite federal court cases from Florida[3] and

[3] *Fla. Ass'n. of Rehab. Facilities v. State of Fla. Dep't of Health & Rehab Servs.,* 164 F.R.D. 257, 261-62 (N.D. Fla. 1995) (lawsuit brought in federal court by non-profit corporations under a provision of the Medicaid Act and plaintiffs issued subpoenas to various Florida state legislators. The court viewed the assertion of legislative privilege as the assertion of a new common law privilege and thus its authority to craft a new privilege was ***narrow***); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 92-93 (S.D.N.Y. 2003) (redistricting challenge under federal law in federal court where court acknowledged that it analyzed legislative privilege claims by state legislators under federal common law and thus claims of privilege are construed ***narrowly***); *Favors v. Cuomo*, 285 F.R.D. 187, 208 (E.D.N.Y. 2012) (redistricting challenge under federal law in federal court

New York that involved federal law challenges brought in federal court against state actors. As noted in Non-Party Legislators opening brief at 8 and *supra* at 7, this is a dispositive difference because in those cases, the federal courts applied a *qualified* legislative privilege under federal common law, not the absolute and explicit privilege codified in Virginia's Speech or Debate Clause. *See* Non-Party Legislators Op. Br. at 8. Plaintiffs' cases are therefore inapposite.

The better comparison are those federal court cases that held the Speech or Debate Clause privilege applied to agency employees providing assistance to Congress. Federal courts have extended the legislative privilege to both the Congressional Research Service and the Government Accountability Office. In *Chapman v. Space Qualified Systems Corp*, the defendant allegedly made statements concerning the plaintiff, an Air Force officer, that the plaintiff used threats and extortion when dealing with the defendant, a defense contractor. *Chapman*, 647 F. Supp. at 552. The Chairman of the House Committee on Government Operations received word of these allegations and ordered that the Government Accountability Office ('GAO') investigate the Air Force officer. *Id*. The plaintiff Air Force officer sued the defense contractor and issued a subpoena duces tecum to the GAO investigator. *Id*. The investigator filed a motion to quash. *Id*.

The U.S. District Court for the Northern District of Florida granted the motion to quash. The court there began its analysis noting that the Supreme Court had interpreted the Speech or Debate Clause broadly. *See id.* The court first determined that the investigator's actions as a GAO investigator were within the sphere of legitimate legislation activity. *Id*. at 553 (citing *Doe*, 412 U.S. at 312-13). This is so because the power of Congress to investigate and obtain facts unquestionably falls within the legislative function. *Id*. at 553.

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against state legislators and the court there explicitly stated it was not bound by New York's Speech or Debate Clause and analyzed state legislators' claim of privilege federal common law and construed it ***narrowly***).

Then the court analyzed whether the legislative privilege should extend to the GAO investigator. The court, relying on *Gravel*, took a pragmatic approach and considered the complexities of the current legislative process. *Id*. at 553. The court extended legislative privilege to the GAO investigator because had a legislator performed the very same function as the investigator, the privilege would have unquestionably applied. *Id*. The court further reasoned that the result should not be any different because the investigator was acting at the behest of Congress. *Id*. The court concluded saying "I am constrained to view the Speech or Debate Clause as an absolute bar to judicial inquiry into the activities of [the GAO investigator] in that I have determined that his conduct falls within the legitimate legislative sphere." *Id*. at 554.

Additionally, the U.S. Court of Appeals for the D.C. Circuit extended the common law privilege "[f]or communications preliminary to a legislative proceeding" to the Congressional Research Service. *Webster v. Sun Co*., 731 F.2d 1 (D.C. Cir. 1984). The Congressional Research Service "[i]s an arm of Congress that collects and analyzes information for potential legislation." *Id*. at 3 n. 2. CRS does this either at the behest of Congress or on its own. *Id*. In a libel and disparagement of product case, plaintiffs, inventors, sued a corporation for allegedly defamatory comments about the invention and the lawyer promoting it. *Id.* at 2-3. The allegedly defamatory comments were contained in a memorandum prepared by an employee of the defendant corporation and sent to executives at the corporation. *Id*. at 3. An executive then sent the memorandum to an acquaintance at CRS. The district court granted summary judgment in favor of the defendants because the memorandum sent to CRS was absolutely privileged. *Id*. at 3-4. The plaintiffs appealed.

The U.S. Court of Appeals for the D.C. Circuit first acknowledged the "common-law principle" that grants of absolute immunity are interpreted narrowly. *Id*. at 4. But the court still

viewed CRS as within the umbrella of the privilege. *Id*. at 5-6. Although the court declined to determine whether the common-law privilege applied in this instance, it remanded to the district court to determine whether the "[d]isputed memorandum would have been sent to the CRS but for Mr. Anderson's intent to inform the CRS on a subject properly within its jurisdiction." *Id*. at 7. Thus if Mr. Anderson's intent was to inform the CRS about the invention, then the privilege would apply.

If the communications and actions of the GAO and the CRS are protected, both investigative arms of Congress that act either on its own or at the behest of Congress as a whole, then communications between the Non-Party Legislators and the DLS are protected.

F. Communications Between The General Assembly And The Attorney General's Office Concerning Preclearance Are Privileged.

During this past redistricting cycle, Virginia was required to obtain the permission of Department of Justice *before* its redistricting map could go into effect. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2618 (2013). Thus Plaintiffs are wrong to assert that preclearance occurs after the redistricting plan is enacted. (Pls.' Oppn. Br. at 11-12). As the lawyer presenting the final map to the Department of Justice for approval, *See* Va. Code § 2.2-513 (vesting in the Attorney General the authority to represent the Commonwealth of Virginia in all matters with the United States), the Attorney General's participation in crafting and advocating changes to the redistricting map is within the sphere of legitimate legislative activity, especially since the redistricting map cannot be implemented until the Department of Justice gives Virginia permission to do so. *Shelby County*, 133 S. Ct. at 2624. Thus despite the fact that the Attorney General is part of the executive branch of Virginia's government, communications between the Non-Party Legislators and the Attorney General are still covered because the Attorney General's role in advising and advocating changes to the map to obtain preclearance, is part of the

legislative process. *See, e.g., Supreme Court of Virginia v. Consumers Union of United States,* 446 U.S. 719 (1980) (applying legislative privilege to Virginia's Supreme Court and its members who enacted Virginia's disciplinary rules governing lawyers); *Bogan v. Scott-Harris,* 523 U.S. 44, 47 (1998) (applying legislative privilege to a mayor who advocated for the passage of a city ordinance) *McCray*, 741 F.3d at 485-86 (holding that legislative privilege applies to executive agency officials who advised others in the executive branch about budget cuts).[4]

Furthermore, courts, in addition to *McCray* have extended legislative privilege to executive branch officials when their actions are within the sphere of legitimate legislative activity. *See Baraka v. McGreevey,* 481 F.3d 187, 195-202 (3d Cir. 2007) (cited favorably by *McCray*, 741 F.3d at 485). The plaintiff there brought a claim against various officials, including the Governor of New Jersey for violations under 42 U.S.C. § 1983 claiming that his position as poet laureate of New Jersey was eliminated for unconstitutional reasons. *See Baraka*, 481 F.3d at 193. The district court granted the defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), holding, *inter alia*, that legislative immunity barred plaintiff's claims against the Governor. *Id*. at 194-95. The U.S. Court of Appeals for the Third Circuit upheld that ruling.

The court noted that the deliberating, passing, drafting, and debating legislation are all an integral part of the legislative process. *Id*. at 196. Thus, "when a governor and a governor's appointee advocate bills to the legislature, they act in a legislative capacity." *Id*; *see also Bogan* 523 U.S. at 47 (holding that a mayor and city councilman acted in legislative capacity when they advocated the passage of a city ordinance). The proper analysis is whether the act in question is substantively and procedurally legislative. *Baraka*, 481 F.3d at 198. The act is substantively

[4] Thus Plaintiffs are wrong to assert that the Office of Attorney General is not covered under legislative privilege because he is part of the executive branch. (Pls.' Oppn. Br. at 12). The relevant inquiry is whether the Attorney General's conduct is within the sphere of legitimate legislative activity.

legislative if it involves policy-making decisions of a general scope or line-drawing. Furthermore, the act is procedurally legislative if the act is passed by legislative procedures. *Id*.

Communications between the Non-Party Legislators and the Attorney General's Office concerning preclearance are part of the legislative process. The Non-Party Legislators are literally drawing lines that could impact whether the map is precleared. The Attorney General's Office in these communications advises and urges the legislature to avoid drawing lines that could cause the Department of Justice to deny preclearance, thus preventing implementation of the redistricting map; and the Attorney General advises and advocates the General Assembly to draw lines that would increase the chances of preclearance. The Attorney General's participation is substantively legislative and is covered under legislative privilege. *See Bogan*, 523 U.S. at 47; *McCray*, 741 F.3d at 485-86. It is also procedurally legislative as in the end the General Assembly votes to pass the redistricting map. Given the harsh consequences of failure to preclear, the General Assembly must consult with the Attorney General during the drafting process. *Shelby County*, 133 S. Ct. at 2624 (noting that some states wait years and expends funds to implement an otherwise validly enacted law).

Given the Attorney General's role in advising and advocating for a map that will preclear, the Attorney General plays a legislative role in the line-drawing of the map. The legislative privilege should apply to these communications between the Non-Party Legislators and the Attorney General.

G. Requiring A Privilege Log Is Contrary To The Purposes Of The Legislative Privilege Because It Would Require Legislators, On The Eve Of Session, To Search, Compile, And Send To Counsel For Review The Very Documents Claimed As Privileged.

The Plaintiffs do not demand the Non-Party Legislators produce a privilege log, but they blithely suggest that one might be needed. (Pls.' Oppn. Br. at 3). Demanding a privilege log is contrary to one of the very purposes of the legislative privilege.

One of the purposes of the legislative privilege is to prevent an aggressive Executive or private litigant from diverting the time, energy, and attention of legislators away from their legislative duties demanded by the public to fulfill their litigation obligations imposed by private litigants. *See Covel*, 78 Va. Cir. at 200 (quoting and citing *Eastland*, 421 U.S. at 503); *see also WSSC II*, 631 F.3d at 181 (holding that legislative privilege "[a]llows [legislators] to focus on their public duties by removing the costs and distractions attending lawsuits . . . [and] shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box."). This purpose is especially acute in Virginia because the General Assembly is a part-time legislature requiring legislators to secure additional employment. *See Covel*, 78 Va. Cir. at 202. The purpose of the Speech or Debate Clause is especially important now because the legislature will return to session on January 13, 2016 and will have two months to complete its duties. Va. Const. art. IV § 6.

A privilege log requires the searching of all sources, e.g., personal email, work email, legislative email, campaign email, legislative computer, work computer, personal computer, campaign computer, etc., to pull potentially relevant material; compiling all of those documents; having counsel review those documents; and making yourself available to counsel to answer questions of counsel in preparation of the log. Then the legislator would have to review log

entries to ensure that the descriptions are accurate but not too descriptive lest the privilege be waived.

The legislative privilege protects against the diversion of attention and focus towards litigation responsibilities and away from the legislative responsibilities. Requiring a privilege log destroys that interest. The Non-Party Legislators should not be required to produce a privilege log.

A privilege log is also unnecessary to determining what is covered under legislative privilege. Recently, the U.S. District Court for the Eastern District of Virginia was able to rule on the parameters of legislative privilege without the need of a privilege log. *See Lee v. Va. State Bd. of Elections*, No. 15-357, 2015 U.S. Dist. LEXIS 171682 (E.D. Va. Dec. 23, 2015) (Dkt. No. 114). More fundamentally, once the privilege is asserted over communications within the legitimate legislative sphere, here the redistricting process, nothing more is required. *See WSSC II*, 631 F.3d at 181 ("Consequently, if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, *they would not need to comply*.") (emphasis added).[5]

II. THE SUBPOENAS ARE UNDULY BURDENSOME

Plaintiffs limit their response to an unsupported assertion that 17 document requests are "surely a relatively small number in the modern context." (Pls.' Oppn. Br. at 17). This self-serving assertion provides little comfort to legislators who on January 13 will return to the legislature facing the prospect of having to conduct searches for documents on various computers and email addresses. The evidence submitted in the opening brief concerning the

[5] The Intervenor-Defendants are responding to Plaintiffs' waiver claims. The Non-Party Legislative Respondents adopt and incorporate by reference the Intervenor-Defendants arguments concerning waiver.

volume of documents returned in the *Lee v. State Board of Elections* case is relevant. Some of those legislators sat on the relevant committee responsible for reviewing election related legislation. The fact that those legislators ran searches on just their official email accounts and returned more than 100,000 potentially relevant documents with an estimated cost of review exceeding $800,000 is staggering. *See* Op. Br. at 13.

Here, the Senators subpoenaed constitute nearly twenty percent of the State Senate, and require looking back at records back at least two prior legislative sessions. Here, there are 17 independent document requests, as opposed to the nine in *Lee v. State Board of Elections*. The number of documents that Plaintiffs' subpoena demands is going to be substantially larger. This Court should quash the subpoena as unduly burdensome.

CONCLUSION

For the reasons stated herein and in their opening brief, the Non-Party Legislative Respondents ask this Court to quash Plaintiffs' subpoenas.

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I hereby certify that on December 31, 2015, I sent the foregoing via electronic mail and Federal Express overnight to the following:

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