

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VESILIND, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF
ELECTIONS, *et al.*,

Defendants.

Case No. CL15003886-00

REPLY IN FURTHER SUPPORT OF MOTION TO QUASH

Defendant-Intervenors, the House of Delegates and the Honorable Speaker of the House of Delegates, William J. Howell, (the “Defendant-Intervenors”), and Robert H. Brink, Kathy J. Byron, Mark L. Cole, S. Chris Jones, Robert G. Marshall, James P. Massie III, Christopher Marston and John Morgan, and the Division of Legislative Services (together the “Legislative Non-Parties”), through counsel, hereby submit this reply in further support of their Motion to Quash. On December 17, 2015, Plaintiffs filed their Memorandum in Opposition to Motions to Quash (“Opposition Brief”). Defendant-Intervenors and the Legislative Non-Parties submit for the Court’s consideration the following points in reply to the Opposition Brief. In addition, Defendant-Intervenors and the Legislative Non-Parties refer to the reply brief filed by Senator John S. Edwards, Senator Ralph K. Smith, Senator Richard H. Stuart, Senator Richard L. Saslaw, Senator Charles J. Colgan, Senator David W. Marsden, Senator George L. Barker, and Ms. Susan Schaar, Clerk of the Virginia Senate (“Senate’s Reply Brief”), and the reply brief filed by the Office of the Attorney General, for further support.

I. Legislators Do Not Waive Legislative Privilege Over Protected Communications By Discussing Legislation.

Plaintiffs argue that legislative privilege is waived for any privileged communication when a legislator discusses with a third-party any subject matter contained in that communication.¹ No case supports Plaintiffs' position. Indeed, using Plaintiffs' overly broad formulation, the waiver would swallow the protection: legislators, as public representatives, communicate with the public on a regular basis about the subject matter of legislation. Plaintiffs would have this public communication act as a waiver of legislative privilege over any protected communication about legislation. Tellingly, Plaintiffs cite to just one case – *Commonwealth of Virginia v. Edwards*² – to support such a broad subject matter waiver and it is a case about attorney-client privilege where the client understood that the communication at issue would be revealed to others, and it was revealed:

When a client communicates information to his attorney *with the understanding that the information will be revealed to others, the disclosure to others effectively waives the privilege* “not only to the transmitted data but also as to the details underlying that information.” In other words, “The client’s offer of his own or the attorney’s testimony as to a part of any communication to the attorney is *a waiver as to the whole of that communication*, on the analogy of the principle of completeness.”

Commonwealth of Virginia v. Edwards, 235 Va. 499, 510 (Va. 1988) (emphasis added). Here, movants are not seeking to protect communications that were “revealed” to those outside the scope of legislative privilege. Moreover, *Edwards* only establishes that purposeful disclosure of an attorney-client communication acts as a waiver “as to the whole of *that* communication.” *Id.* *Edwards* does not hold, as Plaintiffs advocate, that disclosure of one communication acts as a

¹ Opp. Br. 14.

² Plaintiffs cite other cases that support the general proposition that a privilege can be waived by purposeful disclosure, and cases that analyze legislative privilege under the wrong legal framework. Opp. Br. 14-15. As noted in the Senate’s Reply Brief and elsewhere, the Speech and Debate Clause of the Virginia Constitution is the source of legislative privilege in this case, not federal common law.

broad subject matter waiver of privilege for all related communications. Notably, in the example provided by Plaintiffs, Delegate Jones testified in the federal matter about the 2011 redistricting process from his own recollection, not from any privileged communication. Plaintiffs have shown no authority that such testimony would act as a broad subject matter waiver of Delegate Jones' legislative privilege as to protected communications he made during the redistricting process. Indeed, case law suggests the opposite:

The court is aware of no authority to suggest that simply speaking to the press may constitute such a renunciation. To the contrary, the Fourth Circuit has indicated that meetings with constituents and interest groups are ordinary legislative business and fall within the scope of the immunity. By the same token, public statements about legislative matters would appear to be an ordinary function of representative government and therefore a matter covered by legislators' testimonial privilege.

A Helping Hand, LLC v. Baltimore Cnty., Md., 295 F. Supp. 2d 585, 591 (D. Md. 2003) (citing *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980)).

II. Defendant-Intervenors Have Not Waived Legislative Privilege By Intervening In This Case.

Plaintiffs argue that Defendant-Intervenors “waived broadly” the legislative privilege by intervening as defendants in this case.³ But Defendant-Intervenors – the House of Delegates as a body, and the Speaker of the House – cannot waive a privilege they do not hold. In this respect, it is unclear what materials Plaintiffs refer to when they argue that the House of Delegates has “broadly waived” legislative privilege. Moreover, the cases Plaintiffs cite in support of their argument are inapplicable here. Plaintiffs rely on the *Davenport* opinion which, as a preliminary matter, made clear that “[l]egislative immunity can be waived *only* by an explicit and unequivocal renunciation of the protection.” *Bd. of Supervisors of Fluvanna Cnty. v. Davenport & Co. LLC*, 285 Va. 580, 589-90 (Va. 2013) (emphasis added). Second, the *Davenport* Court

³ Opp. Br. 15.

held that a prerequisite to finding waiver was that the party seeking the protection of legislative immunity failed to assert the legislative privilege in a timely fashion. *Id.* Not so here:

Defendant-Intervenors asserted legislative privilege at the first opportunity, when served with discovery requests in this matter. Next, Plaintiffs rely on federal case law which addresses the waiver of legislative immunity as to statutory attorneys' fees,⁴ not at issue here, or which analyzed legislative privilege under federal case law, inapplicable here where the Speech and Debate Clause of the Virginia Constitution will guide the Court's analysis.⁵

Overall, Plaintiffs have failed to show why Defendant-Intervenors' intervention acts as a waiver of legislative privilege in this matter.

III. Communications including the DLS and consultants working to support legislators' legislative function fall within the scope of legislative privilege.

The Senate's Reply Brief addresses the Opposition Brief's arguments regarding legislative privilege as it applies to communications including the Division of Legislative Services and consultants. Defendant-Intervenors and Legislative Non-Parties adopt and incorporate by reference the Senate's Reply Brief on those points.

In summary, for these reasons and those detailed in the Motion to Quash, the Senate's Reply Brief, and the Senate's Motion to Quash, Defendant-Intervenors and the Legislative Non-Parties ask this Court to quash the Subpoenas served upon the Defendant-Intervenors and the Legislative Non-Parties.

⁴ See, e.g., Opp. Br. 16 (citing *May v. Cooperman*, 578 F.Supp. 1308 (D.N.J. 1984)).

⁵ See, e.g., Opp. Br. 16 (citing *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001)).

Dated: December 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 31st day of December, 2015, copies of the foregoing were sent via e-mail to the following:

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