IN THE

Supreme Court of Virginia

RECORD NO. 160643

JOHN S. EDWARDS, *et al.*,

Appellants,

v.

RIMA FORD VESILIND, *et al*.,

Appellees.

BRIEF OF APPELLEES IN RESPONSE TO OPENING BRIEF OF APPELLANT DIVISION OF LEGISLATIVE SERVICES

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Appellees, Rima Ford Vesilind; Arelia Langhorne; Sharon Simkin; Sandra D. Bowen; Robert S. Ukrop; Vivian Dale Swanson; H.D. Fiedler; Jessica Bennett; Eric E. Amateis; Gregory Harrison; Michael Zaner; Patrick M. Condray; Sean Sullivan Kumar; and Dianne Blais (hereinafter "Redistricting Challengers"), by counsel, file their Brief of Appellees in response to the Opening Brief of Appellant Division of Legislative Services ("DLS") (brief hereinafter referred to as "DLS Brief") as follows:

PRELIMINARY STATEMENT

It is undisputed among the parties that the Speech or Debate Clause of the Virginia Constitution, like its counterpart in the U.S. Constitution, creates for legislators a privilege from compelled discovery, deposition and testimony regarding acts within the legitimate legislative sphere absent a waiver. What is disputed is how much further that privilege should be expanded through a broadened definition of what is integral to the legislative process.

The specific grant in the Virginia Constitution is as follows:

> Article IV. Legislature
>
> Section 9. Immunity of legislators
>
> Members of the General Assembly shall, in all cases except treason, felony, or breach of the

> peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place. They shall not be subject to arrest under any civil process during the sessions of the General Assembly, or during the fifteen days before the beginning or after the ending of any session.

The section is entitled "Immunity of legislators" and the language therein is focused on immunity - not privilege. This is an important distinction as the vast majority of the cases cited by DLS deal with legislators seeking immunity from a lawsuit or arrest and the consequences thereof and not with the assertion of legislative privilege by an entity to avoid producing documents in response to a subpoena. While the concepts of immunity and privilege are clearly related and are both derived from this Clause, assuming a perfect parallel would be inaccurate. Whether legislative privilege applies to DLS is the only issue currently before the Court in this Brief. No appellant - including DLS - is a named party in the underlying lawsuit and thus immunity is not a concern or a question before this Court.

The language in the Virginia Constitution is limited to "Members of the General Assembly" and no one else. Va. Const. Art. IV, §9. DLS is not a member of the General Assembly. The language is further limited to "any speech or debate in either house." *Id.* DLS

does not participate is "any speech or debate in either house." *Id.* Instead, that duty lies with our elected legislators. While the Speech or Debate clause has been expanded under *Gravel v. United States*, 408 U.S. 606 (1972) to include "aides and assistants" who are the "alter ego" of a legislator, neither the language nor purpose of that expansion should be understood to extend to an entire agency such as DLS, which is not the "alter ego" of any legislator and serves many other committees and commissions other than the legislature.

As DLS points out in its Brief, "Virginia's Constitution vests **all** 'legislative power' in 'a General Assembly, which shall consist of a Senate and House of Delegates' Art. IV, §1." DLS Brief, p. 2 (emphasis added). Though DLS may be helpful to legislators, it does not fit within the language of the Speech or Debate Clause and this Court should not conclude that it does by expanding this language beyond where existing case law has already taken it.

Courts have already extended the scope of the Speech or Debate Clause beyond its plain language but there must be limits and this appeal addresses where one of those limits should apply. The Speech or Debate Clause has not been extended to DLS and it should not be now. The trial court's decision should be affirmed.

STATEMENT OF THE CASE

The material proceedings below are limited as this is a discovery dispute. The underlying lawsuit is a compactness challenge. While it is true that the only two compactness challenges previously before this Court have "failed" (DLS Brief, p. 9 fn. 4), each was decided on the record before the Court. *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992), was the only case limited to a compactness challenge. In that case, however, the "mandatory constitutional requirements of equal representation and minority representation" were major factors in the development of the two challenged districts. That is not the case here. *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002) also addressed compactness, but many other issues were at play in that case including racial gerrymandering. Both *Jamerson* and *Wilkins* were decided on the facts before the Court and the facts of the underlying lawsuit are very different. Redistricting Challengers are confident that the facts of their compactness challenge will lead to a different result.

To support their compactness challenge, Redistricting Challengers sought documents from DLS. JA 204-212. DLS moved to quash the subpoena *duces tecum* on the grounds of legislative

privilege pursuant to the Speech or Debate Clause. JA 132-134. DLS did not file a separate brief but instead relied upon the brief filed by the Virginia Senators. JA 135-136; 304. The trial court denied DLS's motion. Since DLS mischaracterizes or truncates that ruling in its Brief, Redistricting Challengers set forth the trial court's holding as to DLS below:

> In analyzing the scope and application of the legislative privilege asserted, the Court has reviewed both state and federal law, as the "'[Virginia] and federal immunities are very similar in their wording [, and] they appear to be based upon the same historical and public policy considerations.'" *Bd. of Supervisors of Fluvanna Cnty v. Davenport & Co. LLC*, 285 Va. 580, 586 (2013) (quoting *Greenburg v. Collier*, 482 F. Supp. 200, 202 (E.D. Va. 1979)); see also *Lee v. Va. State Bd of Elections*, No. 3:15CV357, 2015 U.S. Dist. LEXIS 171682, at 11 (E.D. Va. Dec. 23, 2015). The results of that analysis make clear that the legislative privilege applies absolutely to purely internal legislative communications solely among legislators, and between legislators and their legislative staff. *North Carolina State Conf of the NAACP v. McCrory*, No. 1:13CV658, ECF No. 207, Slip Op. at 5-15, 2014 U.S. Dist. LEXIS 185130 (M.D.N.C. Nov. 20, 2014); see also *Gravel v. United States*, 408 U.S. 606 (1972). …the Court declines to extend the privilege beyond that core definition cited above, and finds that the individuals included within the legislative privilege are only the legislators and their legislative assistants and/or aids who are employed and paid by the individual legislator, a legislative committee, or the legislature as a whole.

> *Page v. Va. State Bd of Elections*, 15 F. Supp. 3d 657, 664 (E.D. Va. 2014). …
>
> As to the Division of Legislative Services ("DLS"), it is a legislative agency that serves legislators individually and collectively, but it is not a legislator, a legislative committee, or the legislature as a whole, and it is not a paid employee of any of the above. Therefore, DLS does not fall within the scope of this Court's definition of the legislative privilege and cannot invoke the privilege. Consequently, DLS shall answer the discovery propounded herein. Certainly, this includes all communications between DLS and legislators or their paid aids or staff, as well as documents or communications among DLS staff or between DLS staff and others. If DLS was involved in the Attorney General's Office Legislative preclearance process with the DOJ, then that issue would have to presented and argued to the Court, but there was no such evidence or argument put before the Court in the two hours of oral argument on January 7, 2016.

JA 320-321; 324-325. DLS did not comply with the trial court's order and instead asked the trial court to either certify an interlocutory appeal or hold it in contempt to create an appealable ruling. JA 334-357. After finding that the requirements for an interlocutory appeal were not met, the trial court held DLS in contempt and this appeal followed as set forth in DLS's Brief. JA 587-592.

STATEMENT OF FACTS

DLS's "Statement of Facts" section (DLS Brief, pp. 2-8) contains six pages of argument that it failed to present to the trial court. This is highlighted by the fact that there is only one citation to the Joint Appendix in that entire section. Thus, this section is in violation of Rule 5:27(b) of the Rules of the Supreme Court of Virginia and should be disregarded ("A statement of the case containing material proceedings below and the facts, with references to the appendix.").

Redistricting Challengers filed the underlying lawsuit against the Virginia State Board of Elections, the Virginia Department of Elections, and their respective officials for declaratory judgment and other equitable relief, seeking a judgment that the State House of Delegates and Senate districting plans, and specifically House of Delegates districts 13, 22, 48, 72, and 88, and Senate districts 19, 21, 28, 29, 30, and 37 violate the Constitution of the Commonwealth of Virginia. JA 5. Notably, no appellant here is a named defendant in the lawsuit. Redistricting Challengers filed the lawsuit under Article II, § 6 of the Virginia Constitution alleging that 1) when the General Assembly drew the 2011 House and Senate district plans, it did not

make a good-faith effort to draw compact districts and instead subordinated the constitutional requirement of compactness to other non-constitutional political and policy concerns; and 2) numerous districts in the adopted plans are not in fact compact, as required by the Virginia Constitution. JA 6.

Redistricting Challengers further alleged that Article II, §6 of the Virginia Constitution dictates three and only three requirements that the legislature must follow when drawing legislative districts after each decennial census. Districts must be 1) contiguous; 2) compact; and 3) as nearly equal in population as is practical. JA 5. These three requirements--in addition to the federal "one person, one vote" and Voting Rights Act (VRA) requirements--must occupy a special status with unique authority over the legislature. While the legislature may consider other rational public policy considerations, the mandates of the United States and Virginia Constitutions can never be subordinated to those considerations. JA 6.

Redistricting Challengers allege that the legislature subordinated the constitutional requirement of compactness to political considerations which resulted in districts that violate the Virginia Constitution. JA 2-42. In order to further support their case,

Redistricting Challengers issued discovery including a subpoena *duces tecum* to DLS and to others, which brings the parties before this Court as set forth above.

STANDARD OF REVIEW

Redistricting Challengers agree with DLS that this appeal presents a question of law to be reviewed *de novo*. *See e.g., Davenport*, 285 Va. at 585-586.

SUMMARY OF ARGUMENT

The very discrete question on appeal here is: does the legislative privilege derived from the Speech or Debate Clause extend to DLS? The answer is no. DLS ignores the majority of the trial court's holding and instead claims that the trial court denied privilege solely "because DLS is not any legislator's 'paid employee'." DLS Brief, p. 1. That was only part of the equation that included a denial of privilege because DLS is an agency that does not fall within the scope of the Speech or Debate Clause which is limited by its own terms to "Members of the General Assembly." Va. Const. Art. IV, §9. Since the Supreme Court's ruling in *Gravel v. United States*, 408 U.S. 606 (1972), it has been clear that the privilege also applies to the

personal aides and assistants of the legislators who operate as the alter egos of individual legislators.

Redistricting Challengers acknowledge and respect the legislative privilege but extending it to an entire agency that serves numerous commissions and committees in addition to the legislature (see, e.g., DLS Brief, pp. 5-6) is a bridge too far.

There is only one assignment of error sent forth by DLS in this case. DLS Brief, p.14.

ARGUMENT

I. APPLICABLE LAW

In parallel language to Article I, § 6 of the U.S. Constitution, the Virginia Constitution declares that: "Members of the General Assembly . . . for any speech or debate in either house shall not be questioned in any other place." Compare Va. Const. Art. IV, § 9, with U.S. Const. Art. I, § 6. Because of the near identical language of the two provisions, and the dearth of independent jurisprudence in the Commonwealth on the issue, federal case law is persuasive in determining the scope and application of the clause. *Davenport & Co. LLC*, 285 Va. at 586, 742 S.E.2d at 61. *See also Greenburg v. Collier*, 482 F. Supp. 200, 202 (E.D. Va. 1979) ("The [Virginia] and federal

immunities are very similar in their wording. Further, they appear to be based upon the same historical and public policy considerations.")

Moreover, "the analysis is substantially similar to that under the federal common law, wherein privilege for state legislators ultimately relates back to the Speech or Debate clause of the Federal Constitution." *Lee v. Va. St. Bd. of Elections*, 2015 U.S. Dist. Lexis 171682 *11-12 fn7 (E.D. Va. Dec. 23, 2015). DLS goes to great lengths to undermine cases cited by the trial court's opinion as relying on the common law privilege rather than the constitutional privilege derived from the Speech or Debate Clause. DLS Brief, pp. 37-41. While some of these cases do engage in a balancing test after deciding that a particular action is within the legislative sphere, such a balancing analysis was never argued to the trial court below nor was it adopted by the trial court in its decision.

Thus, cases such as *Page v. Va. State Bd of Elections*, 15 F. Supp. 3d 657, 664 (E.D. Va. 2014); *Bethune-Hill v. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015); and *North Carolina State Conf. of NAACP v. McCroy*, 2014 U.S. Dist. LEXIS 185130, *22 (M.D.N.C. Nov. 20, 2014) apply with equal force as any other would from those courts. If reliance on these cases was inherently useless

by virtue of applying a common law privilege - as DLS suggests - then DLS's reliance on cases such as *Davenport,* which also applies a common law privilege, would also be suspect. DLS Brief, p.14-15, 40. *See Davenport*, 285 Va. at 588 (Applying a common law legislative privilege to local legislators and holding that they "are protected under common law legislative immunity to the same extent as legislators protected under Constitutional legislative immunity.").

DLS has the burden of establishing the applicability of the legislative privilege by a preponderance of the evidence. *In re Grand Jury Inve*stigation, 587 F.2d 589, 597 (3d Cir. 1978); *United States v. Menendez*, 132 F. Supp. 3d 610, 621 (D. N.J. 2015). As set forth in *Bethune-Hill*, 114 F. Supp. 3d at 344:

> '[a] party asserting privilege has the burden of demonstrating its applicability.' *N.L.R.B. v. Interbake Foods, LLC,* 637 F.3d 492, 501 (4th Cir. 2011). 'A conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular document.' *Page I*, 15 F. Supp. 3d at 661. Thus, the proponent of a privilege must 'demonstrate specific facts showing that the communications were privileged.' *RLI Ins. Co. v. Conseco, Inc*., 477 F. Supp. 2d 741, 751 (E.D. Va. 2007). Because '[t]he privilege is a personal one and may be waived or asserted by each individual legislator,' *Schaefer*, 144 F.R.D. at 298, the 'legislator or an aide has the burden of proving the preliminary facts of the privilege.' Legislative Privilege, 26A Fed. Prac. & Proc. Evid. § 5675 (1st ed.).

DLS did not carry its burden in the trial court and cannot do so here.

II. THE PURPOSE AND SCOPE OF THE LEGISLATIVE PRIVILEGE

It is undisputed that the legislative privilege derived from the Speech or Debate Clause applies to legislators absolutely, if not waived. *Eastland v. U.S Servicemen's Fund*, 421 U.S. 491, 503 (1975). The Clause codifies the separation-of-powers prohibition against "judicial inquiry into the motives of legislative bodies elected by the people." *Davenport*, 285 Va. at 587, 742 S.E.2d at 62 (*quoting Ames v. Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 205 (1990)). DLS is not "elected by the people." *Id.*

While the Clause itself is read to include much more than just speech or debate on the floor of the legislature itself, the scope of that privilege is not to be read too broadly. "[T]he privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process." *U.S. v. Brewster*, 408 U.S. 501, 525 (1972). *See also Gravel*, 408 U.S. at 625 ("Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the

deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation."). The mandate of *Gravel* is to determine what is an "integral part" of the legislative process performed by a legislator or his/her "alter ego" and draw the line that stops the Speech or Debate clause at that point. This is exactly what the trial court did.

The legislative privilege, like all other privileges, is an exception to the general rule that the scope of discovery should be liberally construed in order to uncover the truth*. Hickman v. Taylor*, 329 U.S. 495, 512 (1947). *See also Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 660 (E.D. Va. 2014) ("Testimonial and evidentiary privileges exist against the backdrop of the general principle that all reasonable and reliable measures should be employed to ascertain the truth of a disputed matter."). As such, like all privileges, it is "not lightly created nor expansively construed, for [it is] in derogation of the search for truth." *United States v. Nixon*, 418 US 683, 710 (1974).

Expansion of the Clause's reach should not be granted lightly. *See Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979) ("Claims under the Clause going beyond what is needed to protect legislative

independence are to be closely scrutinized."). The legislative privilege "is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy." *In re Grand Jury Investigation*, 587 F.2d at 597.

As the Tenth Circuit stated in *Bastien v. Campbell*, 390 F.3d 1301, 1306-1307 (10th Cir. 2004):

> To say that 'Speech or Debate in either House' is to be construed broadly is not, however, to say that it should be cast free from its mooring. In particular, it should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of any activity that could assist in the performance of their official duties.

Yet that is exactly what DLS is seeking here but in an even broader fashion as it wants absolute protection from discovery "arising out of any activity that could assist [a legislator] in the performance of their official duties." *Id.*

The U.S. Supreme Court has warned against such over-extensions of the privilege:

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. **Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to '"relate'" to the legislative process**.

Brewster, 408 U.S. at 516 (emphasis added). Those words ring true today when DLS attempts to "relate" all of its activities "to the legislative process" in order to shield them from production. *Id.*

III. TO WHOM THE LEGISLATIVE PRIVILEGE APPLIES

A straightforward reading of the Speech or Debate Clause would lead one to believe that the clause applies only to the "Members of the General Assembly." Until the Supreme Court's opinion in *Gravel v. United States* in 1972, it appears that the privilege was applied in such absolute fashion. See *Tenny v. Brandhove*, 341 U.S. 367, 378 (1951) (noting that the privilege deserves less respect when asserted by an "official acting on behalf of the legislature.").

In *Gravel*, the U.S. Supreme Court's jurisprudence evolved, noting that "it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform

their legislative tasks without the help of aides and assistants." *Gravel*, 408 U.S. at 617. As a result, these "aides and assistants" must be treated as the legislators' "alter egos" and therefore have the same privileges as legislators under the Speech or Debate Clause. *Id.* Redistricting Challengers are unaware of any case in which the privilege has ever been extended to an entire agency, like DLS.

IV. THE ROLE OF DLS

DLS spends several pages discussing all of the statutes pertaining to DLS but excludes Virginia Code § 30-28.17 which states:

> All the books, documents and other materials, and the guides to materials **shall be at all times accessible to** the Governor and members of the General Assembly, state and municipal officers, boards and commissions, and **the general public**, for reference purposes. (Emphasis added).

This contradicts DLS's argument that "none of DLS's files are subject to the Freedom of Information Act's *compulsory* disclosure requirement, and Virginia Code § 30-28.18(B) dictates merely that some legislative documents are subject to its *discretionary* disclosure option." DLS Brief, p.5. Indeed, a vast amount of information is available right on DLS's website at http://dls.virginia.gov/ including public access to interactive electronic maps. Moreover, Virginia Code

§ 30-264(B) does not state that DLS "maintains the General Assembly's 'computer-assisted mapping and redistricting system'", DLS Brief p. 6., but rather that DLS "shall maintain the current election district and precinct boundaries of each county and city as a part of the General Assembly's computer-assisted mapping and redistricting system." Virginia Code § 30-264(B). Thus, DLS's role here is administrative in nature rather than an "integral part of the deliberative and communicative processes." *Gravel,* 408 U.S. at 525.

DLS concedes that it provides administrative services for numerous commissions and committees and does not just serve the General Assembly. DLS Brief, pp. 5-6. What is critical here is that DLS is seeking a blanket inclusion over its entire agency under the Speech or Debate Clause. DLS is a collective group of technical advisors that provided no evidence of their role to the trial court. As conceded by DLS - it "has no independent authority to draft or pass redistricting legislation." DLS Brief, p. 11. As such, it should not be protected under the Speech or Debate Clause.

In recognizing that aides and assistants of an individual legislator may act as the alter ego of that legislator, the U.S. Supreme Court in *Gravel* extended legislative privilege in a very limited fashion

and out of what the U.S. Supreme Court saw as a necessity in modern times. Furhter, legislative privilege remains an individual right. *United States v. Helstoki*, 442 U.S. 477, 493 (1979). And any right that an aide enjoys must derive from an individual member. *Gravel,* 408 U.S. at 618. DLS is no individual legislator's alter ego; it is a legislative agency that serves legislators (and numerous other committees and commissions) collectively.

While a legislator controls the privilege for his specific aide he cannot control the privilege for an entire agency that serves the legislature as a whole. A blanket privilege assertion by DLS does not work - the privilege is "invocable only by the Senator or by the aide on the Senator's behalf." *Gravel*, 408 U.S. at 622.

A number of courts have specifically noted that collective advisors who provide assistance--often of a technical nature--have less connection to the deliberative process and so they also have less reason for the privilege. *See e.g. Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012); *Fla. Ass'n of Rehab. Facilities v. State of Fla. Dep't of Health & Rehab. Servs*., 164 F.R.D. 257, 267 (N.D. Fla.

1995). DLS consists of collective advisors providing administrative and technical assistance to numerous committees and commissions.

Moreover, in *Lee v. Va. St. Bd. of Elections*, 2015 U.S. Dist. Lexis 171682 *25 (E.D.Va., Dec. 23, 2015), the Eastern District of Virginia recently held that "any communications the Nonparty Legislators or the Legislative Employees made with Third Parties--**such as state agencies**, constituents, lobbyists, and other third parties--are not protected by legislative privilege." (Emphasis added). Thus, under *Lee*, communications with DLS - a state agency - "are not protected by legislative privilege." *Id.*

Further underlining this independence from any one legislator, DLS is accounted for on their own line of the state budget, separate from the lines that provide funds for Senate and House members to pay their personal staff in accordance with Va. Code § 30-19.4; 19.20. To the contrary, DLS argues that whether DLS is within the scope of privilege or not should be determined on a functional basis, but the source and authorization of DLS's funding is informative to what its intended function is. If the function of DLS and individual legislators' aides were intended to be treated identically one would expect them to be funded in the same fashion.

The determination of who is covered by the privilege in this area is a straightforward question. As the *Page* court points out, Va. Code § 30-19.20 outlines the authorization and procedures for employing and compensating staff covered by the privilege and states:

> The House of Delegates and the Senate and the clerks thereof are authorized to employ such personnel as may be deemed necessary for the efficient operation of the General Assembly as prescribed by the rules or resolutions of the respective houses. The House of Delegates and the Senate shall by resolution or resolutions set the compensation of the personnel employed by each house, and the personnel shall be paid from the contingent fund of each house, respectively.

Page, 15 F. Supp.3d at 663. *See also* Va. Code § 30-19.4 (specifying the procedure for appropriating the funds to compensate staff members).

Thus, "[a]s a matter of simple logic," an individual not paid from that fund has not been deemed "necessary for the efficient operation of the General Assembly," and is not considered staff nor covered by the privilege. *Page*, 15 F. Supp.3d at 663-664. *See also Bethune-Hill*, 114 F. Supp. 3d at 343 ("Unless an individual or organization was retained by the House itself pursuant to this provision [Va. Code § 30-19.4], any communications or documents with or from such

person may not be withheld."). Such a decision respects the absolute status of the legislative privilege and "provides a sensible and defensible bulwark" against abuse of the privilege. *Page*, 15 F. Supp.3d at 664.

V. THE LEGISLATIVE PRIVILEGE DOES NOT APPLY TO DLS

DLS urges the Court to go far beyond *Gravel*, in an attempt to sweep within the protection of the privilege an entire agency. In support, DLS repeatedly cites *Doe v. McMillan*, 412 U.S. 306 (1973) ("*Doe*") and manipulates the language therein to claim that the holding extended the federal Speech or Debate clause to "institutional functionaries." DLS Brief, pp. 1, 17-19. This is inaccurate. DLS opens its Brief by citing to *Doe,* 412 U.S. at 312, for the following proposition: "[t]he protections of the federal Speech or Debate Clause have long been held to reach 'institutional or individual legislative functionaries' who perform core legislative tasks on legislators' behalf." DLS Brief, p. 1.

DLS then attributes the following misleading quote to *Doe*: "It is 'plain' that the Speech or Debate Clause covers, not only legislators, but also 'institutional or individual legislative functionaries.'" DLS Brief, p. 17 (citing *Doe*, 412 U.S. at 312). DLS repeats this

misleading citation on page 19 of their Brief when it says "*Doe* also clarified that privilege encompasses 'institutional' legislative functionaries." DLS Brief, p. 19 (citing *Doe*, 412 U.S. at 312).

However, the actual quoted words from *Doe* are as follows:

> Without belaboring the matter further, it 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 that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing *Speech or Debate Clause* protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and **institutional or individual legislative functionaries.** (Emphasis added).

Thus, *Doe* never held that the Speech or Debate clause extends to "institutional functionaries." DLS Brief, pp. 1, 17-19. *Doe* did not address the role of an entire agency nor did it even address the question of legislative privilege but instead was an immunity case in an action brought directly against, among others, legislators.

As noted above, *Doe* does not address whether a particular entity is covered by legislative privilege but instead deals with whether the republication of a particular document can serve as the

foundation for a suit for invasion of privacy. *Doe* does not even suggest - much less hold - that a blanket extension of legislative privilege to DLS would be appropriate, as DLS urges here.

The U.S. Supreme Court in *Doe* considered only "whether the act of [public distribution], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' . . . ." 412 U.S. at 314 (*quoting Gravel*, 408 U.S. at 625). "In answering this question in the negative, the Court determined only that such distribution was not necessarily privileged, and not that it was *per se* unprivileged." *Doe v. McMillan*, 566 F.2d 713, 717 (D.C. Cir. 1977). Thus, the holding on remand was similarly not helpful to DLS in that the D.C. Circuit found--based on "the facts of the present case" including the "limited distribution" "in accordance with standing orders for all congressional reports"--that the "distribution did not exceed the 'legitimate legislative needs of Congress" and was therefore within the privilege. *Id.* at 718. How DLS can stretch this narrow ruling regarding the printing and distribution of official congressional reports to try to encompass an entire agency within the privilege is a puzzle.

DLS supports their argument that those outside the legislature are also protected with another misleading quote, this time from *U.S. v. Johnson*, 383 U.S. 169 (1966). DLS states that *Johnson* "held that 'the Speech or Debate Clause clearly proscribes' judicial inquiry into speech-writing efforts by a Congressman, 'his administrative assistant,' and 'outsiders representing [a] loan company.'" DLS Brief, pp. 20-21. Instead, *Johnson* states that:

> The language of the *Speech or Debate Clause* clearly proscribes **at least some of the evidence** taken during trial. Extensive questioning went on concerning how much of the speech was written by Johnson himself, how much by his administrative assistant, and how much by outsiders representing the loan company. *Johnson,* 383 U.S. at 173 (emphasis added).

Rather than making a blanket statement against inquiry into the activities of a swath of individuals other than just the Congressman, including "outsiders representing [a] loan company," the U.S. Supreme Court held that at least some of the "extensive questioning" was impermissible as a basis for prosecution. Such a sweeping reading of *Johnson* is particularly uncalled for in light of *Brewster's* reminder of the narrowness of *Johnson's* holding:

> It is important to note the very narrow scope of the Court's holding in *Johnson*:

> 'We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the *Speech or Debate Clause*. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.'

Brewster, 408 U.S. at 517 (quoting *Johnson,* 383 U.S. at 184-185).

In short, *Johnson* does not expand the privilege outside the legislature as DLS implies. *Johnson* simply prohibits criminal prosecution of a legislator based on extensive inquiry into a speech given on the floor of the House.

DLS goes on to cite several cases on pages 21-22 of its Brief, purportedly in support of its argument, but all of these cases address an individual or individuals and not an entire agency. There is no question that there is a split of authority in the country regarding the reach of the Speech or Debate Clause but no case has taken it as far as DLS seeks here. Unlike a legislator, DLS does not utter speeches, take part in debates or vote. *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006). Instead, DLS provides collective administrative assistance that does not qualify as so critical as to make the entire agency the "alter ego" of any one particular legislator to whom the privilege belongs. *Gravel*, 408 U.S.

at 616-617. *See also Bastien*, 390 F.3d at 1306-1307 (the Clause does not protect legislators for "any activity that could assist in the performance of their official duties.").

In fact, Redistricting Challengers question how DLS can even raise the privilege when they concede that the privilege belongs to each individual member:

> The privilege belongs to 'each individual member,' and it retains full force 'even against the declared will of the' General Assembly, because the Members do 'not hold this privilege at the pleasure of the [General Assembly], but derive[] it from the will of the people, expressed in the constitution.' *Coffin v. Coffin,* 4 Mass. 1, 27 (1808); *see also Gravel*, 408 U.S. at 622 & n. 13 (invocation and waiver is the individual right of the Member); *Miller v. Transamerican Press, Inc.,* 709 F.2d 524, 530 (9th Cir. 1983) (same).

DLS Brief, p. 28. This highlights the issue of an entire agency claiming the protection of the Speech or Debate Clause.

The additional immunity and criminal prosecution cases cited by DLS, such as *U.S. v. Helstoski*, 442 U.S. 477 (1979), and DLS's argument regarding prosecutions generally, DLS Brief, p. 36, are not instructive to the narrow issue before this Court. Here, the Court must consider whether further expansion of the privilege is necessary to protect legislative independence and the deliberative process or

whether such an expansion would only serve to unnecessarily undermine the legislature's accountability to the citizens of the Commonwealth.

Here a "constitutional guarantee" is at stake. The Virginia Constitution guarantees that districts be compact. Va. Const., Art. II, §6. As alleged in this case, the legislature subordinated the constitutional requirement of compactness to political considerations which resulted in districts that violate the Virginia Constitution. Thus, the federal redistricting cases emphasizing the *sui generis* nature of redistricting are very relevant here not because a balancing test should be employed regarding an act within the scope of the privilege, but because the scope should not be expanded beyond its current reach.

In redistricting, legislators are presented with a classic conflict of interests; their self-interest in reelection inevitably conflicts with their duty to draw districts in compliance with Constitutional demands. *See, e.g., Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (Judges Murnaghan and Motz concurring and recognizing that redistricting "is not a routine exercise of [legislative] power" as "it directly involves the self-interest of the

legislators themselves" and as a result calls for a "more flexible approach . . . in shaping the scope of discovery.").

Moreover, to extend the privilege beyond the personal aides and assistants as DLS suggests would fly in the face of the reasoning of *Gravel*. The personal staff of a legislator is to be considered the alter ego of that legislator, which the courts have concluded justifies expanding the plain language of the Speech or Debate Clause's limitation to "Members." Individuals and entities outside that structure may be helpful to the legislator but they are not the alter ego of the legislator. *Lee*, 2015 U.S. Dist. Lexis 171682 at *25 ("any communications the Nonparty Legislators or the Legislative Employees made with Third Parties--such as state agencies…--are not protected by legislative privilege"). *See also ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058 *19 (E.D.N.Y. Sept. 25, 2007) (noting that "conversations between legislators and knowledgeable outsiders...are discoverable"); *North Carolina State Conf. of NAACP v. McCroy*, 2014 U.S. Dist. LEXIS 185130, *22 (M.D.N.C. Nov. 20, 2014) ("communications between legislators and third parties, such communications are not ordinarily the type of legislative acts that the privilege is designed to protect").

DLS's reliance on *Barr v. Matteo,* 360 U.S. 564 (1958) is also misplaced. In *Barr* a plurality of the U.S. Supreme Court held that a federal executive officer was absolutely immune from a common law tort suit based upon conduct otherwise within the official's authority. The U.S. Supreme Court held that "we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.* at 572-573. *Gravel* relied on this statement when extending legislative privilege "not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618.

Following both of those opinions, however, courts restricted the holding in *Barr* and the U.S. Supreme Court subsequently held, in *Butz v. Economou,* 438 U.S. 478 (1978), that high ranking federal executive officers, like their state counterparts, are only entitled to qualified immunity. Thus, the subsequent restriction of *Barr* actually supports the position of Redistricting Challengers - not DLS - that the legislative privilege should not be expanded any further.

In fact, it would be dangerous to expand the privilege as far as DLS suggests - to any entity or person whose conduct could have

been performed by a legislator. In a fair election (i.e., one that is not all but determined by gerrymandering), constituents elect a legislator. They do not elect an entity or a person that a legislator choses to perform some of his or her duties. The ability of a legislator to selectively choose entities or people to perform certain duties to protect them under the broad legislative privilege umbrella that DLS suggests is a slippery slope and one that would further erode the fundamental right at stake in the underlying case. In addition, such an expansion undermines rather than promotes the check and balance history of the Speech or Debate Clause which "was designed to preserve legislative independence not supremacy . . . ." *Brewster*, 408 U.S. at 508.

CONCLUSION

Redistricting Challengers acknowledge both the existence and the limitations of the legislative privilege. DLS's proposed expansion of the privilege to cover the entire agency conflicts with the history and purpose of the Speech or Debate Clause, as well as precedents of the United States Supreme Court, the Eastern District of Virginia, and other courts across the country. There is no basis to include DLS within the legislative privilege.

Accordingly, the Court should affirm the trial court's ruling.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing Brief complies with Va. Sup. Ct. R. 5:26. I further certify that on this 22nd day of June, 2016, a copy of the foregoing Brief was served on the following counsel of record via email:

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