VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

RIMA FORD VESILIND, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	**Case No. CL15003886-00**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS TO QUASH

Plaintiffs, 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, Linda Cushing, Sean Sullivan Kumar, and Dianne Blais (hereinafter "Plaintiffs"), by and through the undersigned counsel, submit this Opposition to the Motions to Quash filed in this matter.

INTRODUCTION

On November 2, 2015, Plaintiffs issued subpoenas *duces tecum* to the Clerk of the Virginia Senate and seven individual Senators.[1] Collectively they have responded by motioning this Court to quash the subpoenas because some of the requested documents are protected by legislative privilege. Objections of a similar nature have been filed by other subpoenaed non-

[1] These senators are: Senator John S. Edwards, Senator Ralph K. Smith, Senator Richard H. Stuart, Senator Richard L. Saslaw, Senator Charles J. Colgan, Senator David W. Marsden, and Senator George L. Barker.

parties as well as the Defendant-Intervenors.[2] Because of the similar nature of the privilege issues involved, all parties have agreed that for the sake of judicial economy the issues should be heard together. As such, these non-parties and the Defendant-Intervenors joined the Motion to Quash. Thus, the issue before the Court is to what extent the Defendant-Intervenors and non-parties alike (herein referred to as the "Respondents") are required to comply with the requests for documents made of them.

SUMMARY OF THE ISSUES

It is undisputed among the parties that the Speech and 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. Having been invoked by the Respondents, it undoubtedly protects from compelled production some documents and communications that would otherwise be discoverable in this case. Where the parties disagree is the scope of the privilege, who is covered by it, and if that privilege has been waived in certain instances.[3]

As the Respondents note, the scope of the privilege is not unlimited. Rather, it applies only to "purely legislative activities." *United States v. Brewster*, 408 U.S. 501, 512 (1972). While this includes a much wider scope of activities than simply "speech and debate" on the floor of the House or Senate chamber, it is not the blank check Respondents imply. Courts have outlined the scope in general terms as well as provided specific examples of activities that are

[2] Defendant-Intervenors and this second set of non-parties are all represented by Baker Hostetler. Defendant-Intervenors are the House of Delegates and the Speaker of the House of Delegates, the Honorable William J. Howell. Baker Hostetler also states that they represent non-parties Delegate Robert H. Brink, Delegate Kathy J. Byron, Delegate Mark L. Cole, Delegate S. Chris Jones, Delegate Robert G. Marshall, Delegate James P. Massie III, Christopher Marston, John Morgan, and the Division of Legislative Services for purposes of these objections.

[3] Defendant-Intervenors and non-parties represented by Baker Hostetler acknowledge as much in their response stating that, in some cases, privilege may have been waived and agreeing to production of documents where they believe no privilege exists or where it has been waived.

proper and even official acts of a legislator, but are nonetheless outside the "legitimate legislative sphere." *Id.*

The second area of substantial disagreement between the parties is who is covered by legislative privilege. Of course the privilege applies to legislators. Further, 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. Beyond these individuals, Respondents attempt to sweep in "private citizens," "experts, and consultants," as well as the Virginia Attorney General, political parties, and innumerable other individuals and entities, regardless of whether these non-legislators possess any legitimate connection to the privilege and the purposes that underlie it. Respondents' Memorandum at 4, 10.

Finally, Plaintiffs point the Court's attention to the waiver of privilege which has occurred in connection to many of the requested documents. Such forms of waiver include: the breaking of privilege by sharing documents or having communications with parties outside the privilege; testifying voluntarily about the subject matter at trial and in depositions for *Bethune-Hill v. Virginia St. Bd. of Elections*, 2015 U.S. Dist. LEXIS 144511 (E.D. Va. 2015); and, as to the Defendant-Intervenors, by intervening into this case.

In light of the above and with due respect for the important role of the legislative privilege, the Plaintiffs acknowledge that those requests for documents which are properly within the legislative sphere, and to which the privilege has not been waived, do not create an obligation of production for the Respondents (although it may require a privilege log). Therefore, the subpoenas should not be quashed. Instead the Court should provide guidance as to what categories of documents and communications fall within the scope of the privilege, and which

are outside that scope or where the privilege has been waived so that discovery may appropriately proceed.

ARGUMENT

I. THE PURPOSE AND SCOPE OF LEGISLATIVE PRIVILEGE

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. *Bd. of Supervisors of Fluvanna County. v. Davenport & Co. LLC,* 285 Va. 580, 586 (Va. 2013).

It is undisputed that the legislative privilege derived from the Speech and Debate Clause applies to legislators absolutely, if not waived. *Eastland v. U.S Servicemen's Fund*, 421 U.S. 491, 503 (1975). While the clause itself is read to include much more than just speech and debate on the floor of the legislature itself, the scope of that privilege is not to be read too broadly. *See 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 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). As the U.S. Supreme Court summarized in *Eastland*:

> The question to be resolved is whether the actions of the petitioners fall within the sphere of legitimate legislative activity. If they do, the petitioners shall not be questioned in any other Place about those activities, since the prohibitions of the Speech or Debate Clause are absolute. *Eastland,* 421 U.S. at 501 (internal quotations omitted).

Thus the challenge of the Court is to define the "sphere of legitimate legislative activity." *Id.*

As the Virginia Supreme Court has recognized, some activities are clearly within the legislative sphere. "Legislative actions include, but are not limited to, 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." *Davenport,* 285 Va. at 589 (internal quotations omitted).

On the other hand, "the mere fact that a legislator or a legislative aide performs an act in his official capacity does not automatically confer protection under the Speech or Debate Clause." *Nat'l Ass'n of Social Workers v. Harwood*, 69 F. 3d 622, 630 (1st Cir. 1995) (citing *Gravel*, 408 U.S. at 625). Moreover, "[i]n no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process." *Brewster*, 408 U.S. at 515-516.

In *Brewster,* the U.S. Supreme Court listed a number of such examples of activities that are **not** "legislative" for purposes of legislative privilege, stating:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. *Id.*, 408 U.S. at 512

Numerous other cases and courts have added to this list. *See, e.g., U.S. v. Helstoski*, 442 U.S. 477, 489 (1979) ("Promises by a Member to perform an act in the future are not legislative acts."); *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) ("[T]he transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process."); *Gravel v. U.S.*, 408 U.S. 606, 625 (1972) ("[T]hey may cajole, and exhort with respect to the administration of a federal statute -- but such conduct, though generally done, is not protected legislative activity."). *See also Crymes v. DeKalb Cnty.*, 923 F.2d 1482, 1485 (11th Cir. 1991) ("[A] legislative act involves policy-making rather than mere administrative application of existing policies.").

The Court in *Brewster* also notes that the distinguishing element of many of these non-legislative activities is that they are political in nature:

> They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature, rather than legislative. . . . But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. *Brewster*, 408 U.S. at 512.

See also National Association of Social Workers v. Harwood, 69 F. 3d 622, 630 (1995) ("So, too, activities that are more political than legislative in nature do not come within the legislative sphere, and, hence, do not implicate the Speech or Debate Clause."). In the case at hand, there may be many documents that are related to the legislative process but nonetheless are better categorized as political rather that legislative.

Ensuring that legislative privilege is not expanded beyond the "purely legislative sphere" is particularly important in redistricting cases where the protections the founders envisioned to guard against the abuse of this privilege are at great risk to be undermined. The inherent risk that legislative privilege will be abused in order to hide improper activity rather than protect legislative independence has long been justified by the idea that "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenny v. Brandhove*, 341 U.S. 367, 378 (1951).

Unfortunately, redistricting cases are of the kind where the risk of such abuse is particularly high and the power of the vote is limited in its ability to combat such risks. 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) (Judge 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, if legislators fall prey to this conflict of interest, the voters may find themselves powerless to oust legislators in the face of districts designed with computer precision to ensure the reelection of the map-drawers themselves. For this reason, the Court should be

particularly careful not to expand the scope of the legislative privilege beyond the purely legislative sphere.

II. TO WHOM THE LEGISLATIVE PRIVILEGE APPLIES

A straightforward reading of the Speech and 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 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 and Debate Clause. *Id.*

Respondents urge the court to go beyond *Gravel*, in an attempt to sweep within the protection of the privilege: consultants, experts, and other individuals and entities not hired as official staff of the legislators. In support, Respondents cite *Doe v. McMillan*, 412 U.S. 306 (1973), and quote *McCray v. Md. Dep't of Transp., Md. Transit Admin.,* 741 F.3d 480, 485 (4th Cir. 2014) for the proposition that this privilege applies to "all those acting in the legislative capacity." The same argument was presented to a three-judge panel in Eastern District of Virginia in another recent Virginia redistricting case, *Page v. Virginia State Board of Elections,* 15 F. Supp.3d 657, 661-664 (E.D. Va. 2014). There, it was firmly rejected.[4] *Id.* As the three-judge panel in *Page* pointed out, the "consultant" who found shelter under the Speech and

[4] In *Page* this argument was made to protect the documents of political consultant Christopher Marston, who is one of the parties objecting to a similar subpoena by the present Motion.

Debate Clause in *McMillan* "was directly retained and compensated by a legislative committee . . . mak[ing] him more like a legislative aide than a consultant who receives payment from a partisan political group." *Page*, 15 F. Supp.3d at 662 n.2. Moreover, the *Page* court concluded that *McMillan* does not "announce, or even suggest the blanket extension of legislative privilege or immunity to legislative consultants." *Id.* at 661-662.

McCray "is perhaps even less helpful" to Respondent's cause. *Id.* at 662. There, the parties claiming privilege were "government agency officials who gave counsel to executive officials tasked with carrying out legislative budget cuts" and the application of privilege was overturned on appeal as the actions in question "predated any legislative action." *Id.* As a result, the *Page* court concluded that not only was the individual in *McCray* differently situated, but also that *McCray*'s comments regarding privilege were no more than dicta. *Id.*

Moreover, to extend the privilege beyond the personal aides and assistants as Respondents suggest 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. Individuals and entities outside that structure may be helpful to the legislator but they are not the alter ego of the legislator. Rather, they are "knowledgeable outsiders, such as lobbyists . . . for which no one could reasonably claim privilege." *Rodriguez v. Pataki,* 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003). *See also Comm. for Fair and Balanced Map v. Ill. St. Bd. of Elections, 2011 U.S. Dist. LEXIS 117656* at *34-35 (N.D. Ill. 2011) ("Communications between Non-Parties and outsiders to the legislative process, however, do not [invoke legislative privilege]. This includes lobbyists, members of Congress and the Democratic Congressional Campaign Committee ("DCCC"). Although these groups may have a heightened interest in the outcome of the redistricting process, they could not

vote for or against the Redistricting Act, nor did they work for someone who could. As such, the legislative privilege does not apply.").

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 compensating employees 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 executive privilege. *Page*, 15 F. Supp.3d at 663-664. *See also Bethune-Hill v. Virginia St. Bd. of Elections,* 2015 U.S. Dist. LEXIS 68054 at *41 (E.D. Va. 2015) ("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.")(emphasis added). 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.

Respondents also claim a privileged relationship with the Department of Legislative Services (DLS). *Gravel* does not go so far. In recognizing that aides and assistants of an individual legislator may act as the alter ego of that legislator, the Court extended legislative

privilege in a very limited fashion and out of what the Court saw as a necessity in modern times. 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 collectively. For instance, 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 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*, 280 F.Supp.2d at 101; *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). 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. As a result the nature of this relationship between Virginia legislators and DLS staff, communications with such staff "at best deserve weak deference." *Favors,* 285 F.R.D. at 212. Even if this deference is given to communications between legislators (or their aides) and DLS staff, there can be no deliberative process justification for withholding documents or communications merely among DLS staff or between DLS staff and outsiders.

Respondents also invoke legislative privilege over documents and communications with the "Virginia Attorney General's Office, concerning obtaining preclearance under §5 of the Voting Rights Act." *See* Plaintiffs' Request No. 13. First, preclearance is only sought after the

Governor signs the plan into law. As a result, most of this communicating and sharing of documents would have occurred after the legislative process concluded. Like any other communication occurring after the Governor has signed the bill into law, such communications occur after the legislative process has ended and thus are firmly outside the scope of the legislative privilege. Second, as the court recognized in *Bethune-Hill*, the Attorney General "provides legal advice to the executive branch and its constituents" not to the legislature. *Bethune-Hill*, 2015 U.S. Dist. LEXIS 68054 at *53. Nor does the Attorney General have any relevant legislative role. Thus, the Attorney General's Office is clearly outside the scope of the privilege.

Also outside the scope of the privilege are communications with the public. "Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process." *Hutchinson,* 443 U.S. at 133. Attempting to argue to the contrary, Respondents cite a Virginia Circuit Court case which has never been relied upon in another published opinion since its own publication, *Mills v. Shelton*, 66 Va. Cir. 415, 416-417 (Va. Cir. Ct. 1998), for the proposition that a letter from a private citizen is absolutely privileged. Respondents' Memorandum at 10. *Mills* is completely inapposite.

In *Mills* the court was confronted with the question as to whether a private citizen was immune from an action for defamation for speech in a letter sent to a legislative committee, which later was republished by a newspaper. In that case the private citizen was under attack in the courts and he was subject to both possible liability and the burden of defending himself. He asserted immunity. Thus, *Mills* deals with an immunity defense in an intentional tort case, not

legislative privilege. The policy behind providing immunity as it was applied in *Mills* is not affected here as there would be no chilling effect on citizens "communicating with their elected representatives on matters pending before a legislative body." *Mills*, 66 Va. Cir. at 417. The present case does not involve any claims against a private citizen. As such, no citizen has asserted immunity (or more properly here, privilege) and there is no burden upon them. Instead, the legislature seeks to prevent the disclosure of such communications and the disclosure of legislator responses. These communications fall outside the legislative sphere and should be considered part of the communicating and informing role of the legislature not subject to the privilege. *See Hutchinson,* 443 U.S. at 132-133.

III. WAIVER OF LEGISLATIVE PRIVILEGE

Finally, some responsive documents to which privilege otherwise properly applies must be produced as a result of a waiver. The burden of proof regarding such waivers is on the proponent of the privilege. *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 280 Va. 113, 122-123 (Va. 2010) ("The proponent of the privilege has the burden to establish that the attorney-client relationship existed, that the communication under consideration is privileged, and that the privilege was not waived."). Moreover, a "conclusory assertion of privilege is insufficient to establish a privilege's applicability." *Page*, 15 F. Supp. 3d at 661 (quoting *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 751 (E.D. Va. 2007).). The party asserting privilege must "demonstrate specific facts" to establish the privilege. *Id.*

Documents to which Plaintiffs believe privilege has been waived include 1) those that have been shared with individuals or entities which do not enjoy legislative privilege, thereby breaking privilege, 2) documents of which there is a subject matter waiver as a result of

testimony in the *Bethune-Hill* proceedings, and 3) documents and communications requested of the Defendant-Intervenors who have waived privilege by virtue of their intervention.

Legislative privilege is like all other evidentiary privileges in that it may be broken by sharing or communicating protected subject matter with individuals or entities that could not independently invoke the privilege. *Commonwealth of Virginia v. Edwards*, 235 Va. 499, 510 (Va. 1988) ("[T]he disclosure to others effectively waives the privilege "not only to the transmitted data but also as to the details underlying that information.") (Internal citations omitted); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 142338, *7 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on outside [redistricting] experts for consulting services"); *Comm. for a Fair & Balanced Map v. Ill. St. Bd. Of Elections*, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill. 2011) at *10 ("Even if properly asserted, the legislative privilege nevertheless can be waived if "the parties holding the privilege share their communications with an outsider."); *ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058 at *13 (E.D.N.Y 2007) ("As with many testimonial privileges, the legislative privilege may be waived as to communications made in the presence of third parties."); *Almonte v. The City of Long Beach,* 2005 U.S. Dist. LEXIS 46320, at *11 (E.D.N.Y. 2005) ("it would be an affectation of research to cite the many cases supporting the general proposition that a privilege [including specifically legislative privilege] can be waived when the parties holding the privilege share their communications with an outsider.").

It is clear from the record in *Bethune-Hill* that communications breaking the privilege regarding the 2011 House redistricting plan occurred, at the very least between outside consultant Christopher Marston and legislators. *See Bethune-Hill v. Virginia St. Bd. of Elections,* 2015 U.S. Dist. LEXIS 68054 (E.D. Va. 2015). These documents should be produced.

It seems very likely there are also documents to which privilege has been waived by virtue of sharing with other similarly situated parties on both the House and Senate side. All documents that have been shared with parties outside the privilege and responsive communications with parties outside the privilege should be produced.

Waiver of legislative privilege also occurs like waiver of other testimonial privileges when a party testifies to a particular subject matter. *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (Individuals "clearly waived any such [legislative] privilege" by "testify[ing] extensively as to their motives in depositions with their attorney present, without objection."); *Trombetta v. Bd. Of Educ., Proviso Tp. High Schl.Dist.* 209, 2004 U.S. Dist. LEXIS 6916, at *13 (N.D. Ill. 2004) ("[S]uch a privilege is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters.").

We know of at least one such relevant waiver as Delegate Chris Jones testified extensively about his work drafting and obtaining passage of the redistricting plans for the House of Delegates at the heart of this litigation. As a result, privilege has been waived and the documents and communications of Delegate Jones relevant to his redistricting efforts should be produced. In addition, privilege claims over any responsive documents and communications of any other person who has testified, either in court or deposition, have been waived for those subject matters testified to. Such documents should also be produced.

Finally, privilege has also been waived broadly by the Defendant-Intervenors, the House of Delegates and the Speaker of the House of Delegates, William J. Howell, by virtue of their intervention in the case. While there is very little law on the application of legislative privilege in Virginia, this is one area where the Virginia Supreme Court spoke clearly. In *Davenport* the court held that privilege had been waived by the Board of Supervisors of Fluvanna County by

virtue of "stepping outside the function for which their immunity was designed" and initiating the litigation in that case. *Davenport*, 285 Va. at 590. For support, the court cited *May v. Cooperman*, 578 F.Supp. 1308, 1317 (D.N.J. 1984), stating that "[i]n May, New Jersey legislators interjected themselves into a lawsuit as defendants when they were not originally named as such. By choosing to participate in the proceeding, the legislators waived the protection of legislative immunity." *Davenport*, 285 Va. at 590 (internal citations omitted).

The present case is situated in precisely the same fashion as *May*. Though suit was filed against the Virginia State Board of Elections, Department of Elections, and the officers of the respective agencies, the House and Speaker interjected themselves into the case. Simultaneous with filing their motion to intervene, Intervenors also filed an answer denying critical alleged facts such as whether the compactness requirement of the Virginia Constitution was subordinated to policy considerations and whether a good-faith effort was made to draw compact districts. Answer of Defendant-Intervenors ¶¶ 24-25. Intervenors also support their denials by including an exhibit consisting of a committee resolution regarding redistricting criteria. Answer of Defendant-Intervenors ¶¶ 31-32, 34, 40-42, 64-65. In light of this, documents and communications that may have been otherwise privileged must be deemed discoverable as a result of this additional waiver.

Perhaps this principle was articulated most clearly by the Third Circuit in *Powell v. Ridge*, 247 F.3d 520, 525 (3rd Cir. 2001):

> Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order. As we noted at the outset, and as the Legislative

> Leaders conceded at oral argument, the privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist.

Under these circumstances the House and Speaker have clearly waived any privilege and should be required to produce all responsive documents regardless of whether privilege would otherwise apply.

IV. THE REQUEST IS NOT UNDULY BROAD OR OVERLY BURDENSOME

Respondents' final objection is to the "overly broad and unduly burdensome" nature of the requests. In support of this objection Respondents complain of the "seventeen separate requests," the time frame "going back to 2001," and reference the huge number of documents returned when searching legislators' emails in an unrelated case. Respondents' Memorandum at 12. First, Plaintiffs aver that the number of requests is not necessarily indicative of the total size of the request, as several closely honed requests may be more efficient and lead to a smaller return than one or two all-encompassing requests. Second, Plaintiffs are not requesting every document for close to 15 years as Respondents imply. Plaintiffs request a wider swath of documents from the 2010-2011 timeframe when the redistricting process occurred and for one particular set of documents from the 2001 time period which is particularly relevant to the case. In any case, seventeen document requests are surely a relatively small number in the modern litigation context.

Finally, the Plaintiffs are happy to work with Respondents to craft search terms likely to retrieve the relevant and responsive documents and avoid unnecessary burdens. Plaintiffs have already begun this process with the Defendant-Intervenors as well as the Legislative Non-Parties on the House side (represented by the same counsel as the Defendant-Intervenors). With guidance from the Court regarding the scope of legislative privilege in this case, Plaintiffs are

confident that they can work with the all Respondents to ensure productive and manageable discovery.

CONCLUSION

Plaintiffs acknowledge both the existence and the limitations of legislative privilege. The privilege having been asserted, Plaintiffs accept that Respondents may have a right to withhold certain documents. Rather than simply quashing subpoenas that request both privileged and nonprivileged documents, the Court should provide guidance for the parties on what categories of documents are privileged and may be withheld, and which are nonprivileged or where there has been a waiver of privilege and must be produced.

Finally, Plaintiffs respectfully request that the Court take notice of those categories of documents and subject matters of documents that are being withheld on the ground of privilege, as "privilege cannot be used as both a shield and a sword." *Nationwide Mutual Ins. Co. v. Fleming*, 605 Pa. 468, 471 (Pa. 2010). It would be fundamentally unjust to allow Respondents to "invoke the privilege as to themselves yet allow others to use the same information against plaintiffs at trial." *Committee for a Fair and Balanced Map*, 2011 U.S. Dist. LEXIS 117656 at *35-36 (N.D. Ill. 2011). And, of course, this would apply to Respondents use of such previously withheld information as well.

For instance, it does not serve the orderly process by which this litigation should proceed to allow someone like Delegate Jones--as the chief architect of the House plan--to invoke the privilege now and then testify in a deposition or at trial in a manner that waives the privilege. If done at deposition it will create a circumstance where documents must then be produced and the deposition reconvened. If done at trial, the prejudice to Plaintiffs would be immeasurable. Therefore, positions should be required now. For example, if anyone from the House or Senate

plans to testify regarding the subject matter of redistricting criteria employed when the 2011 Redistricting Plan was created or their application to a challenged district, the documents related to that subject matter will then lose their privilege. If such documents or communications will be relied on, then they should be disclosed now rather than later.

Wherefore, Plaintiffs respectfully request that the Court deny the Motions to Quash and apportion relief as requested above.

Dated December 17, 2015

Respectfully submitted,

RIMA FORD VESILIND, et al,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2015, a copy of the foregoing Opposition was filed and served on the following counsel of record by mail with a courtesy copy sent by email:

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