IN THE
Supreme Court of Virginia

RECORD NO. 160643

JOHN S. EDWARDS, *et al.*,

Appellants,

v.

RIMA FORD VESILIND, *et al*.,

Appellees.

OPENING BRIEF OF APPELLANT DIVISION OF LEGISLATIVE SERVICES

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Preliminary Statement

The 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. *Doe v. McMillan*, 412 U.S. 306, 312 (1973). The decision below afforded Virginia's Speech or Debate Clause a much narrower reach. The Court should correct that error.

The Division of Legislative Services ("DLS") assists Virginia General Assembly Members and committees in exercising their legislative duties, including drafting bills and resolutions. Yet the Circuit Court categorically excluded DLS's files from legislative privilege and ordered it to produce legislative work product—gathered and produced by or at the direction of General Assembly Members and committees—to plaintiffs challenging the Commonwealth's redistricting plans (the "Redistricting Challengers"). The Circuit Court conceded that DLS is a legislative agency and fulfills core legislative functions. It denied privilege, however, because DLS is not any legislator's "paid employee."

That holding threatens the capability of both DLS and the General Assembly to fulfill their constitutional and statutory mandates. It exposes General Assembly Members, DLS employees, and the employees of other legislative agencies to potential lawsuits, depositions, document

subpoenas, and even criminal charges for drafting legislation—the most fundamental of legislative acts. Indeed, DLS provides indispensable services, such as assistance with redistricting mapping software, that cannot be supplied through 140 "paid employee[s]" of each individual General Assembly Member. For good reason, the General Assembly centralized such resources in an "institutional" functionary: most Members have only one legislative assistant.

The Circuit Court's ruling invades the internal affairs of the legislative branch and, if it stands, would render the Speech or Debate Clause impotent in the face of "[t]he complexities and magnitude of governmental activity" that "must of necessity" involve "a delegation and redelegation of authority as to many functions." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *Barr v. Matteo*, 360 U.S. 564, 573 (1959)). The Court should reverse the decision below and remand with instructions that the Circuit Court quash the Redistricting Challengers' subpoena to DLS.

Statement of the Case

I. Statement of Facts

Virginia's Constitution vests all "legislative power" in "a General Assembly, which shall consist of a Senate and House of Delegates." Art. IV, § 1. The General Assembly is composed of 140 Members: 100

Delegates and 40 Senators. Senators and Delegates are part-time officials, earning an annual salary of approximately $18,000, plus some expense reimbursement. Members' salary has not increased since 1988.

Virginia law creates an infrastructure to facilitate the General Assembly's work, codified in part at Title 30 of the Virginia Code. Title 30 establishes legislative commissions and committees, run by General Assembly Members and often other officials. *See, e.g.*, Va. Code § 30-34.1 (establishing the Legislative Support Commission, composed of various appointed and ex officio legislators and bureaucrats); Va. Code §§ 30-56, 30-57 (establishing Joint Legislative Audit and Review Commission composed of appointed and ex officio legislators and bureaucrats and operated by an appointed director); Va. Code §§ 30-73.1, 30-73.2 (establishing Joint Commission on Administrative Rules composed of appointed legislators); Va. Code §§ 30-218, 30-219 (establishing Commission on Unemployment Compensation consisting of appointed legislators); Va. Code §§ 30-257, 30-258 (establishing Virginia Housing Commission, composed of appointed legislators and "three nonlegislative citizen members appointed by the Governor").

DLS is the first "legislative agency" constituted in Title 30. *See* Va. Code § 30-28.12(A), (B). DLS performs an assortment of tasks, including

"[c]arry[ing] out research and obtain[ing] and analyz[ing] information for members of the General Assembly and its committees," "[d]raft[ing] or aid[ing] in drafting legislative bills or resolutions and amendments thereto," and "[m]ak[ing] researches and examinations as to any subject of proposed legislation." Va. Code § 30-28.16. DLS also maintains a reference library, keeps legislative records, and prepares an annual report on certain actions of state-government agencies. *Id.*

The Director of DLS, who must be an experienced attorney, serves "at the pleasure of the Committees on Rules of the House of Delegates and the Senate" and is subject to the oversight of those Committees. Va. Code §§ 30-28.12, 30-28.16(C). The Director is authorized to employ "necessary assistants, draftsmen and clerks, who shall be selected solely on the grounds of fitness for the performance of the duties assigned to them." Va. Code § 30-28.13.

Requests "for the drafting of bills or resolutions" may be made "in person, in writing, or by voice transmission" and "shall contain a general statement respecting the policies and purposes that the requester desires incorporated in and accomplished by the bill." Va. Code § 30-28.18(A). With narrow exceptions, "[n]either the Director nor any employee of the Division shall reveal to any person outside of the Division . . . the contents

or nature of any request or statements except with the consent of the person signing such request." *Id.*

Legislative drafting requests and related materials are maintained by DLS "as permanent records," but remain the "property" of the individual requester. Va. Code § 30-28.18(B). After passage of a bill into law, however, Title 30 renders drafting requests related to that bill and accompanying documents "public property." Va. Code § 30-28.18(B). That provision operates in tandem with Virginia's Freedom of Information Act, which exempts *all* "[w]orking papers and correspondence of" DLS. Va. Code § 2.2-3705.7(2). The Freedom of Information Act allows disclosure in the "discretion" of DLS's custodian of records, "except where disclosure is prohibited by law." Va. Code § 2.2-3705.7(2). Thus, 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 also fulfills staffing roles for various legislative bodies. Title 30 lists DLS alongside or in place of internal staff to provide legislative and legal services for numerous legislative commissions and committees. *See, e.g.*, Va. Code § 30-223 (authorizing the Commission on Unemployment Compensation to hire "administrative support staff" and requiring the

"Division of Legislative Services [to] provide legal, research, policy analysis and other services as requested by the Commission"); Va. Code § 30-73.4 (requiring DLS to provide "[s]taff assistance" to the Joint Commission on Administrative Rules); Va. Code § 30-87 ("The Division of Legislative Services shall provide staff support to [the Joint Commission on Technology and Science]"); Va. Code § 30-155(B)(3) ("Staff assistance shall be provided to the [Administrative Law Advisory Committee] by the Division of Legislative Services"); Va. Code § 30-275(E) ("The Division of Legislative Services shall provide legal, research, policy analysis, and other services as requested by the [Manufacturing Development Commission]").

Among these, DLS serves "as staff to the Joint Reapportionment Committee," Va. Code § 30-264(A), which is responsible for "the orderly redistricting of congressional, state legislative, and local election districts," Va. Code § 30-263(C). By federal and state constitutional edict, redistricting must be completed after each decennial census, to render legislative districts as nearly as equal in population as is practicable. *See* Va. Const. Art. II, § 6; *Reynolds v. Sims*, 377 U.S. 533, 577, 583–84 (1964).

As part of its staffing responsibilities for the Joint Reapportionment Committee, DLS maintains the General Assembly's "computer-assisted mapping and redistricting system." Va. Code § 30-264(B). This technology

is essential to "facilitate statewide redistricting efforts following each decennial census." Main Webpage of Commonwealth of Virginia Division of Legislative Services, http://dls.virginia.gov/. Legislative maps have not been drawn by hand for decades, and General Assembly Members would have no means of meaningfully contributing to the redistricting process without geographic information system software, which provides demographic and geographic information down to the census-block level. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 961–63 (1996).

Accordingly, DLS makes its mapping system and support services available to all General Assembly Members. Members can visit DLS and work with staff on software displaying proposed redistricting legislation. The software allows legislators to test possible changes to redistricting maps and to make proposals to the General Assembly. A legislator can, for instance, test what consequences follow from splitting or un-splitting a precinct on surrounding districts, such as the effect on total population and percentage minority population.[1] *See* Joint Appendix ("JA") 307–11. DLS personnel assist in the process. This work is memorialized in

[1] A redistricting plan is like a Rubik's Cube. Because of the equal-population requirement, every alteration to a district impacts surrounding districts and, potentially, the entire plan. Thus, a legislator cannot propose a boundary change without also proposing changes to respond to the ripple effects of that change on countless other aspects of the plan.

communications between Members and DLS staff and on software files maintained by DLS.

DLS also maintains a redistricting webpage on the General Assembly's behalf. Through that website, it collects public comments and questions related to the redistricting process.

Aside from DLS, Title 30 authorizes the General Assembly to employ support personnel, including for individual Members. Va. Code §§ 30-19.4; 30-19.20. DLS is funded from the same appropriation that funds the General Assembly and its support staff, and DLS's budget and very existence depend on the grace of the General Assembly. An Act for Appropriations, 2014 Acts of Assembly, Special Session 1, Chapter 3, Item 1(B)(10)(D).[2] Under the most recently enacted General Assembly Budget, each Delegate was allocated $40,000 and each Senator $45,000 per calendar year for the compensation of legislative assistants. *Id.* Item 1(B)(5)(c)(1). Individual Members typically employ a single legislative assistant and do not employee staff members with discipline- or issue-specific expertise, such as redistricting experts.[3]

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[2] Available at http://lis.virginia.gov/142/bud/budsum/hb5010chap.pdf.

[3] Consultants paid by partisan caucuses provide redistricting services to some Members on a partisan basis. DLS is non-partisan and serves all Members who choose to use its services.

II. The Material Proceedings Below

The Redistricting Challengers filed a civil lawsuit in Richmond Circuit Court in September 2015, alleging that their respective Senate and House voting districts (the "Challenged Districts") do not comply with the Virginia Constitution's provision requiring compact legislative districts. JA5–6; JA17–18; *see* Va. Const. Art. II, § 6.[4] The Challenged Districts were enacted as part of Virginia House and Senate redistricting plans passed by the General Assembly in April 2011 and signed by the Governor into law. JA9. The complaint seeks a declaration that the Challenged Districts violate the Virginia Constitution and an injunction forbidding the State Board of Elections and its officers from giving effect to the Challenged Districts' boundaries.[5] JA18.

This litigation is sponsored by OneVirginia2021, a non-profit organization that advocates for non-partisan redistricting. *See, e.g.*, Jeff Shapiro, *New Front Opens in Legal Fight Over Gerrymandering*, Richmond

[4] No compactness challenge has succeeded in this Court. Two have failed. *See Jamerson v. Womack*, 244 Va. 506, 517, 423 S.E.2d 180, 186 (1992); *Wilkins v. West*, 264 Va. 447, 463, 571 S.E.2d 100, 109 (2002).

[5] The Virginia House of Delegates and House Speaker William J. Howell intervened to defend the Challenged Districts in the House plan, but they are not parties to this appeal.

Times-Dispatch, June 9, 2015.[6] The central premise of the suit is that the Challenged Districts are the product of "blatant partisanship" and that "political criteria were given far greater consideration than the Constitution's compactness mandate." JA10.[7]

In November, the Redistricting Challengers served document requests on the Defendants and Defendants-Intervenors and subpoenas on multiple non-parties, including various Virginia legislators, two consultants, and DLS. *See* JA61–131, JA140–248.

The subpoena served on DLS seeks virtually all "documents" and "communications" related to the drafting, deliberation, and passage of the Challenged Districts and the 2011 plan as a whole in the possession, custody, or control of DLS or its agents, employees, or attorneys. JA209–12. The term "communications" is defined to include any "tangible record without limitation." JA206. The subject-matter scope includes most elements of redistricting, including "the use of compactness as a criteria," "the population of the challenged districts," the "contiguity of the challenged

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[6] Available at http://www.richmond.com/news/virginia/government-politics/jeff-schapiro/article_784cffac-a447-53c0-afba-e97ecb83aa5d.html.

[7] *But see Wilkins*, 264 Va. at 465–66, 571 S.E.2d at 110–11 (holding that "[r]emoving 'highly Democratic'. . . precincts from" district of Republican Delegate to make "that district a 'safer' Republican district" reflected "the traditional redistricting considerations of incumbency" and therefore *weighed in favor* of the district's constitutionality).

districts," "splits in political subdivisions (cities and counties) and voter tabulation districts," "partisan considerations," "the shape or composition of the challenged districts," "core retention," "communities of interest," "any other criteria or factors taken into consideration," "prioritization of criteria," and "implementation of criteria." JA209–11. The subpoena also seeks the "electronic map files of redistricting plans proposed, considered, or adopted," transcripts of "any official or unofficial meeting" whether "open to the public or not," and all files for previous redistricting plans. JA211–12.

The subpoena defines "General Assembly" as "the Virginia House of Delegates and the Senate of Virginia, including the Virginia [Division] of Legislative Services," along with "all current and former members, staff, and employees." JA206–07. The subpoena defines "2011 Virginia Redistricting" to mean "any activity related to the efforts to prepare for, create, evaluate, or adopt redistricting plans for the Virginia General Assembly in 2010 or 2011." JA207.

All materials that are potentially responsive to the subpoena are in DLS's possession by virtue of the services to Members and the Reapportionment Committee described above. DLS has no independent authority to draft or pass redistricting legislation. All redistricting-related

information DLS gathered or created was in the service of the General Assembly, its members, and its committees.[8]

DLS, the Virginia House, and multiple legislators served objections. JA223–248. Several Senators moved to quash, JA43–44, and DLS joined their motions, JA132–38. In their opposition papers, the Redistricting Challengers admitted that the Speech or Debate Clause "undoubtedly protects from compelled production some documents and communications that would otherwise be discoverable in this case." JA250. The Redistricting Challengers urged, however, that "the subpoenas should not be quashed" on this basis and asked the Circuit Court instead to "provide guidance as to what categories of documents and communications fall within the scope of privilege, and which are outside that scope or where the privilege has been waived so that discovery may appropriately proceed." JA251–52.

The Circuit Court held a hearing, *see* JA420–520, and, on January 29, 2016, issued a letter opinion and order, JA315–333. In relevant part, the Circuit Court categorically denied the reach of legislative privilege to materials in DLS's possession. JA324–25. The Circuit Court acknowledged

[8] The one relevant exception concerns DLS's assistance to the Virginia Attorney General in preparing Virginia's preclearance submission under Section 5 of the federal Voting Rights Act. *See* JA312–14. As discussed below at note 12, information related to that role is not part of this appeal.

that DLS "is a legislative agency that services legislators individually and collectively." JA324. It denied privilege, however, because the agency "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." JA324–25. The Court ordered production of "all communications between DLS and legislators or their paid aids or staff . . . ." JA325.

The Redistricting Challengers declined to consent to certification of these issues for interlocutory appeal, JA557–59, even while conceding that the Circuit Court's decision raises issues of first impression under the Virginia Constitution, JA382–81. The Circuit Court held that consent is required under the governing statute and therefore denied the motion of DLS and Senators to certify an interlocutory appeal. JA559.

The Circuit Court held DLS and other parties in contempt. JA581–83. On April 19, 2016, DLS filed a timely notice of appeal to the Virginia Court of Appeals. JA593–94; *see* Va. Code § 19.2-318. DLS also joined a motion to certify the case for review in this Court. JA604–08; *see* Va. Code § 17.1-409. The Court granted that motion on April 27, 2016, finding that "the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require a prompt decision in this Court." JA643.

Assignment of Error

The Circuit Court erred in holding that legislative work product and other materials concerning core legislative acts held in the custody of DLS, including communications between Virginia legislators and their staff, on the one hand, and DLS and its staff, on the other, are categorically excluded from the protections afforded in Virginia's Speech or Debate Clause.[9]

In making that holding, the Circuit Court decided a constitutional question that is purely legal, and review in this Court is *de novo*. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011).

Argument

Virginia's Speech or Debate Clause provides that Virginia legislators "shall not be questioned in any other place," besides the General Assembly, about their legislative acts. Va. Const. Art. IV, § 9. The Clause codifies the separation-of-powers prohibition against "'judicial inquiry into the motives of legislative bodies elected by the people.'" *Bd. of Supervisors of Fluvanna Cnty. v. Davenport & Co. LLC*, 285 Va. 580, 587, 742 S.E.2d

[9] **Rulings:** JA320–21; JA324–25; JA326; JA328–29; **Objections preserved:** JA53–57; JA135–36; JA236–48; JA270–83; JA286–87; JA331; JA333; JA473–777; JA499–504.

59, 62 (2013) (quoting *Ames v. Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990)).

This provision "is derived from the Speech or Debate Clause of the United States Constitution."[10] *Davenport & Co.*, 285 Va. at 587, 742 S.E.2d 62. The "central role" of that federal analogue is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quotation marks omitted). It shields legislators from "questions" and "prosecution," *Gravel v. United States*, 408 U.S. 606, 616 (1972), related to "things generally done in a session of [Congress] by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

The U.S. Supreme Court has stressed "the absoluteness of the phrase 'shall not be questioned,' and the sweep of the term 'in any other Place.'" *Eastland*, 421 U.S. at 503. Similarly worded state constitutional provisions have been afforded similar breadth and rigidity. *See, e.g.*, *Ex parte Marsh*, 145 So. 3d 744, 749 (Ala. 2013); *Lucchesi v. State*, 807 P.2d

[10] The provision is borrowed nearly verbatim from the English Bill of Rights, which provides that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2; *Johnson*, 383 U.S. at 754.

1185, 1189 (Colo. Ct. App. 1990); *Holmes v. Farmer*, 475 A.2d 976, 980–85 (R.I. 1984).

The federal Speech or Debate Clause also supplies the "corollary" legislative "privilege to use materials in [the legislature's] possession without judicial interference." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995). The privilege "operates to insulate materials held by Congress from claims based on actions or occurrences other than Congress' present use." *Id.* "The bar on compelled disclosure is absolute." *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 660 (D.C. Cir. 2007).

The Redistricting Challengers concede that (1) the safeguards of the Virginia and federal Speech or Debate Clauses are co-extensive, JA250, JA252, and (2) the Virginia Speech or Debate Clause includes a testimonial privilege covering both compelled testimony and document production, JA478–79. But they contend, and the Circuit Court agreed, that legislative materials in DLS's possession, custody, or control categorically fall beyond Speech or Debate protection.

That is erroneous. Analogous federal authority extends—and the policies of the Speech or Debate Clause necessitate extending—privilege to actions undertaken at the direction of General Assembly Members if the

Member would be privileged for undertaking those actions personally. That test is met where a functionary—*any* functionary—carries out core legislative duties on a Member's behalf.

The Redistricting Challengers' subpoena invades that precise sphere of activity, seeking "[a]ll documents" related to the General Assembly's effort to "prepare for, create, evaluate, or adopt redistricting plans." Drafting legislation is the most fundamental of legislative acts, and because virtually all responsive materials are privileged, the subpoena should be quashed.

Neither the policies nor the constitutional experience expressed in the Speech or Debate Clause justify differentiating DLS from personal legislative assistants. That distinction would erase Speech or Debate privilege from a broad swath of legislative activity consolidated in agencies with proficiencies that the Assembly Members' legislative aides cannot furnish. And it would chill communication between DLS and General Assembly Members. The Redistricting Challengers' arguments in favor of those results contort the Speech or Debate Clause and should be rejected.

I. The Speech or Debate Clause Applies to DLS, an Institutional Functionary of the General Assembly

It is "plain" that the Speech or Debate Clause covers, not only legislators, but also "institutional or individual legislative functionaries." *Doe v. McMillan*, 412 U.S. 306, 312 (1973). That is because "a cramped

construction" of the Clause would not account for "[t]he complexities and magnitude of governmental activity," which requires "of necessity . . . a delegation and redelegation of authority as to many functions." *Gravel*, 408 U.S. at 617 (quoting *Barr v. Matteo*, 360 U.S. 564, 572–73 (1959)). "[I]t is literally impossible" for Members of the General Assembly "to perform their legislative tasks without the help of aides and assistants." *Id.* at 616–17. "[T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos," or else the "central role of the Speech or Debate Clause" will "inevitably be diminished and frustrated." *Id.* at 617. Thus, actions taken at the direction of legislators are privileged if they "would have been legislative acts, and therefore privileged, if performed by [a legislator] personally." *Id.* at 616–17.

DLS is an "institutional" functionary of the General Assembly. Its personnel draft bills and resolutions at the direction of Members of the General Assembly and provide them with research assistance. Va. Code § 30-28.16. DLS provides "legal, research, policy analysis, and other services" to legislative committees and commissions. Va. Code § 30-275(E); *see also* Va. Code. § 30-223; Va. Code § 30-73.4; Va. Code § 30-87; Va. Code § 30-155(3). DLS serves as "staff" to the Joint Reapportionment Commission. Va. Code § 30-264(A). The Redistricting

Challengers' subpoena grants all of this by defining "Virginia General Assembly" to include DLS. And the Circuit Court found that DLS "is a legislative agency that serves legislators individually and collectively." JA10–11.

The principles enunciated in *Gravel*, *Doe*, and their progeny support application of privilege. *Doe* found it "plain" that privilege covered Congressional "Committee staff," including a consultant and an investigator. 412 U.S. at 312; *see also Rangel v. Boehner*, 785 F.3d 19, 24–25 (D.C. Cir. 2015) (rejecting the argument that committee staff are "not entitled to congressional immunity" because "this argument runs headlong into *Gravel*"); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 858–61 (D.C. Cir. 1988) (finding that statements "elicited by staff in the course of a subcommittee investigation" were privileged).

Doe also clarified that privilege encompasses "institutional" legislative functionaries. 412 U.S. at 312. Accordingly, the Court remanded the case for adjudication of whether document dissemination by the Public Printer and Superintendent of Public Documents was sufficiently legislative in character to be privileged. 412 U.S. at 324–25. The issue on remand was *not* whether the Public Printer and Superintendent were personal staff of individual Congressmen or committees—they obviously were not. Remand

was rather required because the record at that stage provided "little basis for judging whether" the Public Printer and Superintendent's actions furthered "the legitimate legislative needs of Congress." 412 U.S. at 324–25. On remand, both the district court and the D.C. Circuit found that the actions were legislative and, thus, privileged. *Doe v. McMillan*, 566 F.2d 713, 714, 716–18 (D.C. Cir. 1977).

Gravel imparted an identical view through its reliance on *Barr v. Matteo*, 360 U.S. 564 (1959), which extended executive privilege to the Acting Director of Rent Stabilization. *See* 408 U.S. at 617. *Barr* declined to restrict privilege "to executive officers of cabinet rank" because the privilege is "an expression of a policy designed to aid in the effective functioning of government," not "a badge or emolument of exalted office." 360 U.S. at 572–73. The functions exercised do not "become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id. Gravel* quoted this reasoning in delineating the scope of legislative privilege. 408 U.S. at 617–18.

Indeed, there is no requirement that an assistant be employed in the legislative branch or even in government to qualify. *United States v. 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." 383 U.S. 169, 173–77 (1966) (emphasis added); *cf. Sup. Ct. of Va. v. Consumers Union of the United States*, 446 U.S. 719, 733–34 (1980) (finding this Court protected by common-law legislative privilege when engaged in rulemaking).

Following *Doe* and *Gravel*, courts have found privilege to reach an unincorporated membership association charged with determining which reporters may access the Press Galleries of Congress, *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1342 (D.C. Cir. 1975), *Schreibman v. Holmes*, No.1:96-cv-01287, 1997 WL 527341, at *3–4 (D.D.C. Aug. 18, 1997) *aff'd*, 203 F.3d 53 (D.C. Cir. 1999), an investigator employed by the General Accounting Office, *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 553 (N.D. Fla. 1986), an employee of an independent state department of education who assisted state legislators "in determining the state's allocation of funds to public schools," *Campaign for Fiscal Equity v. State*, 179 Misc. 2d 907, 910 N.Y.S.2d 227, 230 (Sup. Ct.), *sum. aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (N.Y. Sup. Ct. App. Div. 1999), and independent contractors retained by a state redistricting commission, *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 140, 75 P.3d 1088, 1098 (Ct. App. 2003).

These cases reject as "far too restrictive" a test that would turn on whether an actor is "different from or similar to a congressional aide"; the correct inquiry is whether the actor's "activities would be protected by the Speech and Debate Clause had they been performed by a legislator personally." *Chapman*, 647 F. Supp. at 554; *see also Consumers Union of U.S.*, 515 F.2d at 1348 ("In [*Doe*], it is indicated that immunity would be extended . . . to the Public Printer and Superintendent of Documents had they been engaged in legislative functions."); *Fields*, 206 Ariz. at 139, 75 P.3d at 1097 ("The Court's holding in *Gravel* turned on the function fulfilled by [the temporary aide in that case] rather than his job title. Thus, we are not persuaded . . . that the legislative privilege can never extend to protect the legislative acts of a retained consultant.") (citation omitted); *Campaign for Fiscal Equity*, 179 Misc. 2d at 687 N.Y.S.2d at 231 ("[i]t is the nature of the work in question performed by a state employee—not the employee's title—that determines whether the Speech or Debate Clause obtains").

DLS's roles in providing staffing services to the Joint Reapportionment Committee, drafting bills and resolutions at the direction of Members, and providing research services to Members in the process of drafting legislation fall squarely within the protections of Virginia's Speech or Debate Clause.

II. The Redistricting Challengers' Subpoena Invades the Legislative Process

A. Information Responsive to the Subpoena Is Legislative

This appeal concerns DLS's legislative activities. "The legislative process at the least includes 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." *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 10-11 (D.C. Cir. 2006) (footnotes and quotation marks omitted).

The Redistricting Challengers' subpoena targets the heart of the legislative process. Its focus is the "2011 Virginia Redistricting," which includes "the efforts to prepare for, create, evaluate, or adopt redistricting plans." JA207. Requests 1 through 12 all demand documents related to drafting considerations and criteria, such as district compactness, contiguity, splits in subdivisions and voter tabulation districts, partisan advantage, core retention, communities of interest, and the prioritization of these and other criteria. JA208–11. Likewise, request 16 seeks all draft, proposed, and adopted plans. JA211. Redistricting plans are legislation. In

zeroing in on work product germane to drafting and passing it, these requests barge headlong into the Speech or Debate Clause privilege.

Request 14 calls for documents and communications received from the public related to the redistricting plans and any responses to those communications. JA211. But "documents or other material that come[] into the hands of" the General Assembly need be produced only "if the circumstances by which they come can be thought to fall outside 'legislative acts' or the legitimate legislative sphere." *Brown & Williamson*, 62 F.3d at 421. The materials requested were obtained, created, or held in tandem with legislative deliberation and information-gathering concerning the General Assembly's core legislative task of redistricting. They clearly fall within the "legitimate legislative sphere." *See id.*; *see also McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) ("The acquisition of knowledge . . . is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.") (quotation marks omitted); *United States v. Dowdy*, 479 F.2d 213, 223–24 (4th Cir. 1973) (holding that meeting with United States Attorney and executive branch agencies "would be protected legislative acts under *Gravel*" if they were undertaken "as preparation for a subcommittee"); *United States v. Biaggi*, 853 F.2d 89, 103

(2d Cir. 1988) ("[L]egislative factfinding activity conducted by [Congressman] during his Florida trips [is] protected.").

The same principle bars request 15, which targets information used to identify incumbent and candidate residencies, JA211, and request 18, which seeks all files for past redistricting plans, JA212. That information was obtained or produced as part of the deliberative process, and the General Assembly is privileged "to use [these] materials in its possession without judicial interference." *Brown & Williamson*, 62 F.3d at 416.

Request 17 seeks transcripts, tapes, and videos of "any official or unofficial meetings" of the General Assembly or its members, "whether open to the public or not," including floor session and committee and subcommittee meetings. As "is obvious from the text of the Speech or Debate Clause," speeches and conferences of the General Assembly concerning legislation are privileged.[11] *Johnson*, 383 U.S. at 180; *see also*

[11] The Redistricting Challengers advanced below a confused theory of privilege waiver, modeled on attorney-client privilege, by which actions conducted in the presence of non-Members are non-privileged. That is not how the Speech or Debate Clause operates. *See Brown & Williamson*, 62 F.3d at 411–12, 415–23 (finding that privilege protection applied to documents that were originally stolen from tobacco company and provided to Congressman by employee of tobacco company or another third party); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 862 (D.C. Cir. 1988) (applying privilege to communications between Congress and the executive agencies because they concerned "legislative responsibilities"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530

United States v. Brewster, 408 U.S. 501, 526 (1972) (privilege protects inquiry into how any legislator "spoke, how he debated, how he voted, or anything he did in the chamber or in committee").[12]

B. The Subpeona Should Be Quashed Notwithstanding the Slight Possibility That Some Non-Legislative Materials May Be Responsive

While the Redistricting Challengers' dragnet may conceivably exhume documents in DLS's possession that were not created, obtained, or held for core legislative purposes, the Court should nevertheless instruct the Circuit Court to quash the subpoena. It was "issued in pursuit of an impermissible object, namely, an inquiry into the manner in which" the General Assembly "conducted its constitutionally protected legislative responsibilities." *MINPECO*, 844 F.2d at 862. That is self-evident from the subpoena itself.

(9th Cir. 1983) (applying privilege to prevent disclosure of source information). To the extent the General Assembly has made materials public through the DLS website, the Redistricting Challengers may utilize them without recourse to judicial process. Otherwise, the Speech or Debate Clause "insulate[s] materials held by [the General Assembly]." *Brown & Williamson*, 62 F.3d at 416.

[12] Request 13 seeks communications between DLS and the Virginia Attorney General's Office regarding preclearance under Section 5 of the Voting Rights Act. While DLS pressed below for legislative-privilege protection for such materials, the Circuit Court held that this information will be subject to the attorney-client privilege if the elements of that privilege are established. JA325. DLS therefore does not press this issue on appeal.

In such instances, the mere chance that a broad search through files that "*might* contain documents relating" to redistricting that "were not received or produced in the course of" legislative process does not justify the subpoena. *Id.* (emphasis added). "For a court to authorize such open-ended discovery in the face of a claim of privilege and in the absence of any information to suggest the likely existence of nonprivileged information would appear inconsistent with the comity that should exist among the separate branches of the [Virginia] government." *Id.* at 863; *see also United States v. Dowdy*, 479 F.2d 213, 226 (4th Cir. 1973) (the Speech or Debate Clause "forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact"); *cf. Rayburn House Office Building*, 497 F.3d at 661 (finding that search warrant seeking "only non-privileged materials" did not justify search through legislative materials in the process); *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015) (declining to require privilege log where scope of documents sought and privilege were virtually co-extensive).

To be sure, one provision of Virginia Code Title 30 purports to render some Member drafting requests to DLS and accompanying documents "public property" after enactment of the related bill. Va. Code § 30-28.18(B). But that provision must be construed not to waive privilege in

order to avoid constitutional doubt. "[A]n argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause . . . ." *United States v. Helstoski*, 442 U.S. 477, 492–93 (1979). 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). Thus, courts have "rejected the contention that the Speech or Debate Clause [is] subject to statutory modification." *Cotton v. Banks*, 310 Mich. App. 104, 115, 872 N.W.2d 1, 8 (Mich. Ct. App. 2015) (discussing *Wilkins v. Gagliardi*, 219 Mich. App. 260, 271, 556 N.W.2d 171, 178 (Mich. Ct. App. 1996)).

To the extent that a statutory provision can be construed not to waive Speech or Debate Clause protection, it should be so limited. *See Helstoski*, 442 U.S. at 492–93 (construing statute not to effectuate waiver to avoid constitutional doubt); *Dowdy*, 479 F.2d at 225–26 (same); *Cotton*, 310 Mich. App. at 116, 872 N.W.2d at 8 (same); *In re Arnold*, 2007-2342 (La.

App. 1 Cir. 5/23/08), 991 So. 2d 531, 544 (same); *State v. Twp. of Lyndhurst*, 278 N.J. Super. 192, 200, 650 A.2d 840, 844 (N.J. Sup. Ct. Ch. Div. 1994) (same). And there is a viable limiting construction here: Virginia Code § 30-28.18(B) can reasonably be read to allow disclosure of legislative working papers, but not to subject them to compulsory production under judicial process. Public disclosure of legislative files not otherwise "prohibited by law" is a matter of "*discretion*," Va. Code § 2.2-3705.7 (emphasis added), and Virginia Code § 30-28.18(B) merely removes the pertinent legal bar on such *discretionary* disclosure; the provision says nothing of *compulsory* process by *judicial* mandate. Rendering the provision to implicate discretionary disclosure would therefore harmonize the statute and the Speech and Debate Clause, which prohibits "*judicial* interference" with legislative materials.[13] *Brown & Williamson*, 62 F.3d at 416 (emphasis added).

If the Court determines that this provision is not susceptible to a limiting construction, the Court should invalidate it. *See Helstoski*, 442 U.S. at 492–93; *Coffin*, 4 Mass. at 27. Alternatively, if the Court decides, notwithstanding the primacy of Constitution over statute, that Virginia Code

[13] Documents publicly disclosed in this manner are also inadmissible in judicial proceedings. *See Helstoski*, 442 U.S. at 487–88 ("evidence of a legislative act of a Member may not be introduced" in a court proceeding).

§ 30-28.18(B) does defeat privilege, it should remand with instructions that DLS produce only the materials subject to waiver under that provision. Production of specific documents would, in that instance, be conditional on the passage of the specific bill in connection with which those documents were created, obtained, or held.

III. The Circuit Court's Decision Distorts the Speech or Debate Clause

In rejecting privilege, the Circuit Court applied a "cramped construction" of the Virginia Speech or Debate Clause. *Gravel*, 408 U.S. at 618. Even after finding that DLS "is a legislative agency that serves legislators individually and collectively," it categorically denied privilege because DLS "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." JA324–25. But neither are congressional consultants, *Doe*, 412 U.S. at 312, the Public Printer and Superintendent of Documents, *id.* at 324–25, the Executive Committee of the Periodical Correspondents' Association, *Consumers Union of U.S., Inc.*, 515 F.2d at 1350, the General Accounting Office, *Chapman*, 647 F. Supp. at 553, state departments of education, *Campaign for Fiscal Equity*, 179 Misc. 2d at 687, N.Y.S.2d at 231, or independent redistricting contractors, *Fields*, 206 Ariz. at 139, 75 P.3d at 1097.

In straying from the conclusions reached in federal and state Speech or Debate case law, the Circuit Court (and the Redistricting Challengers):

(A) Ignored the foundational principles of the Speech or Debate Clause and overrode the General Assembly's lawful and reasonable "delegation and redelegation of authority as to many functions," *Gravel*, 408 U.S. at 617–18 (quoting *Barr*, 360 U.S. at 572–73);

(B) Dismissed 300 years of constitutional wisdom by blessing judicial process, including civil and criminal actions, targeting the core legislative function of drafting legislation;

(C) Relied on inapplicable case law applying common-law *qualified* privilege involving a "flexible approach" in balancing privilege against judicial interests, *N.C. State Conf. of the NAACP v. McCrory*, 1:13-cv-658, ECF No. 207, Slip Op. at 5–15 (M.D.N.C. Nov. 20, 2014) (cited at JA320); and

(D) Misconstrued the import of Virginia Code provisions authorizing General Assembly Members to hire personal legislative assistants, which have no relevance whatever to the Speech or Debate Clause.

A. The Circuit Court's Decision Jettisons the Policies Embodied in the Speech or Debate Clause

The Speech or Debate Clause is "an expression of a policy designed to aid in the effective functioning of government." *Gravel*, 408 U.S. at 617

(quotation marks omitted). "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Brewster*, 408 U.S. at 507. The Clause is therefore to "be read broadly to effectuate its purposes." *Johnson*, 383 U.S. at 180. Restricting the privilege to "paid employee[s]" of "a legislator, a legislative committee, or the legislature as a whole," JA324, thwarts the effective functioning of government and is inconsistent with a broad, functional construction.

"The complexities and magnitude of governmental activity" demand "delegation and redelegation of authority as to many functions." *Gravel*, 408 U.S. at 617–18 (quoting *Barr*, 360 U.S. at 572–73). Delegation to an *institution* instead of a "paid employee" is often the best allocation of limited state resources. That is true, for instance, as to legislative deliberation over complex issues, necessitating specialized expertise or aptitude.

The redistricting process is a prime example. The General Assembly is comprised of 140 part-time Members. Just as "it is literally impossible" for them "to perform their legislative tasks without the help of aides and assistants," *id.* at 616–17, it is impossible to hire 140 redistricting experts and purchase 140 computer systems and 140 software licenses once every

ten years for each Member. Yet this expertise and technology is indispensable: Members cannot perform even the most basic act of proposing one amendment to one boundary of one district without software, the knowledge of redistricting principles, and, by consequence, an assistant capable of using the software and providing advice.

Thus, the General Assembly established the Joint Reapportionment Committee, Va. Code § 30-263, centralized the legislative, legal, and technological expertise with DLS to aid that Committee, Va. Code § 30-264, and made that expertise available to all Members on an individual basis as well.[14] The General Assembly did not render "these functions [any] less important"—or any less *legislative*—by delegating to DLS, rather than individual aides and assistants. *Gravel*, 408 U.S. at 617 (quoting *Barr*, 360 U.S. at 572–73).

B. The Circuit Court's Decision Threatens a Panoply of Legal Actions Aimed at Core Legislative Activities, Contrary to 300 Years of Constitutional Experience

The consequences of the Circuit Court's decision are difficult to overstate. The first is the burden of responding to third-party subpoenas, which "can prove just as intrusive" as being sued directly. *Brown &*

[14] Although Members may receive support from redistricting experts paid by the respective political parties, the Circuit Court categorically excluded such experts from the scope of the privilege. JA322–23.

Williamson, 62 F.3d at 418 (quotation marks omitted). This appeal concerns document production. But this or other cases can, under the Circuit Court's reasoning, just as easily involve subpoenas to testify in depositions or at trial. *See, e.g.*, *Miller*, 709 F.2d at 526, 531 (allowing deposition questioning to proceed to the extent privilege did not apply). Subpoenas may be directed at both DLS personnel and General Assembly Members for their work with DLS personnel, diverting scarce legislative resources to document production and litigation.

The next consequence is the threat of civil liability, including suits for damages. The testimonial privilege is no "weaker than . . . immunity from suit"; "if anything," that would be "backwards" because the Speech or Debate Clause "says nothing specifically about lawsuits; what it does say is that members of Congress 'shall not be *questioned* in any other place' about legislative actions." *Brown & Williamson*, 62 F.3d at 418 (emphasis in original); *see also id.* at 421 ("A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen."). If DLS personnel and General Assembly Members can be subpoenaed for drafting legislation, they can be sued for it.

The third consequence is potential criminal prosecution, the possibility of which rises or falls under the same functional test governing

document production. *See Eastland*, 421 U.S. at 503 (finding no basis to distinguish between civil and criminal actions in construing the reach of the Speech or Debate Clause).

Virginia's Speech or Debate Clause was meant to foreclose all of this—and for good reason. The Clause, like its federal counterpart and its counterpart in the English Bill of Rights, "was the culmination of a long struggle for parliamentary supremacy," including "a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators." *Johnson*, 383 U.S. at 178. The "privilege has been recognized as an important protection" of legislative independence "[s]ince the Glorious Revolution in Britain, and throughout United States history." *Id.* It protects against both executive and judicial interference with the legislative process. *Id.*; *see also Eastland*, 421 U.S. at 501–03 (describing the historical roots of legislative privilege).

The Circuit Court's decision places the legislative process—the very drafting of legislation—squarely within the crosshairs of judicial process. It does so for the purpose of scrutinizing the *political* views and motives of Members. *See* JA10–11. And it accomplishes this by allowing the Redistricting Challengers and OneVirginia2021 to rummage through

General Assembly Member drafts, instructions, policy discussions, and other work product virtually at will and, presumably, to enter these materials in evidence at trial. All of that—and more—follows, according to the Circuit Court, simply from a Member's availing himself or herself of DLS's services.

There is no reason for privilege to disintegrate under those circumstances. Compelled discovery "clearly tends to disrupt the legislative process" by bringing judicial process to bear on private exchanges concerning legislative activity, *Rayburn*, 497 F.3d at 661, whether those exchanges are with institutional or individual staff members. Civil litigation entails "delay and disrupt[ion]" and the intrusion of "judicial power" into the legislative process, *Eastland*, 421 U.S. at 503, whether institutional or individual aides are defendants. And criminal prosecution subjects the legislative branch to "intimidation" by co-equal branches of government, *Johnson*, 383 U.S. at 181, whether Members' institutional or personal staff committed the predicate acts. Whether nominally aimed at DLS or a Member's personal assistant, these forms of judicial process ultimately aim at the *Member*. And that is what the Speech or Debate Clause rightly forbids.

C. Federal Common-Law Privilege Principles Do Not Supply the Appropriate Rules of Decision

The Circuit Court and Redistricting Challengers justified their departure from the policies of the Speech or Debate Clause and the case law interpreting its federal analogue by reference to a separate line of federal cases providing a mere *qualified* privilege to state legislators in federal litigation. *See* JA258–59; JA320–21. These cases are irrelevant.

In federal-question cases, "federal common law"—not the U.S. Speech or Debate Clause or any state constitution—governs the testimonial privilege protecting state legislators. *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980). "[T]he principles animating immunity for state legislators under common law . . . are distinguishable from those principles underlying the constitutional immunity afforded federal legislators." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015). Federal common law turns on federalist "principles of comity"; the Speech or Debate Clause codifies "the separation of powers principle." *Id.* (quotation marks omitted). The common law yields "when federal statutory law comes into conflict with" it; constitutional provisions do not. *Id.* And "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," but it does not subject

Congress to the judiciary. *Gillock*, 445 U.S. at 370; *see also Sup. Ct. of Va.*, 446 U.S. at 733.

Because the underlying policies are fundamentally distinct, federal common-law decisions and those interpreting the Speech or Debate Clause can and do reach different results. *Compare, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 344–45 (ordering production of legislative materials from Virginia Delegates concerning "racial considerations employed in the districting process") *with Miller*, 709 F.2d at 529 ("Once the legislative-act test is met, the privilege is absolute."). That is especially true of federal redistricting cases because some district courts have proffered the supposed "sui generis" nature of redistricting as a justification for balancing the common-law legislative privilege against an asserted federal interest in curbing legislators' "self-interest." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (Murnaghan & Motz, JJ., concurring).[15]

[15] The validity of this line of cases, even in federal court, is doubtful. Federal courts have no freestanding interest in regulating the "self-interest" of state legislators. Quite the opposite, "the sensitive nature of redistricting . . . requires courts to exercise extraordinary caution in adjudicating" redistricting cases. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Interference from the federal judiciary is justified only to vindicate federal civil-rights statutes or constitutional guarantees—which are the same interests implicated in numerous cases where even qualified privilege has barred discovery in whole. *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir.

The Redistricting Challengers and the Circuit Court rationalized curbing the scope of Virginia's Speech or Debate Clause by adopting the reasoning and holdings of such decisions. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003) (finding discovery into materials of task force that included non-legislators to be "arguably less invasive of the Legislature's prerogatives" under a "balance" of interests); *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (finding that "privilege must be limited to communications between an elected legislative member and his or her personal staff members," and not extend to "technical employees of a standing committee," because "[t]he privilege would not be as extensive as that provided for Congress by the Speech or Debate Clause"); *Favors v. Cuomo*, 285 F.R.D. 187, 210–12 (E.D.N.Y. 2012) ("[C]ommunications with technical employees who provide information to legislators collectively, but who do not advise a particular legislator as his or her personal staff, at best deserve weak deference in the balancing of competing interests.") (quotation marks omitted); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 66–61 (E.D. Va. 2014) (conducting the entire analysis under the

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1996) (Civil Rights Act of 1964); *see also Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 18 (E.D. Va. 1996) (following *Burtnick* to deny discovery in Voting Rights Act redistricting case).

premise that "[t]estimonial and evidentiary privileges exist against the backdrop of" a presumption in favor of disclosure and "are therefore strictly construed"); *N.C. State Conf. of the NAACP v. McCrory*, 1:13-cv-658, ECF No. 207, Slip Op. at 5–15 (M.D.N.C. Nov. 20, 2014) (conducting analysis under the premise that "legislative privilege is not absolute, but rather requires a flexible approach") (quotation marks omitted). Accordingly, the Redistricting Challengers asked the Circuit Court to tailor the reach of the Speech or Debate Clause in light of "the sui generis nature of the redistricting process." JA478.

This case concerns Virginia's Speech or Debate Clause as applied in Virginia court to Virginia General Assembly Members. The compatible rules of decision are stated in federal Speech or Debate Clause decisions, not federal common-law decisions, because (1) separation-of-powers principles, rather than comity and federalism, predicate Virginia's Speech or Debate Clause, *Davenport & Co.*, 285 Va. at 587, 742 S.E.2d at 62; (2) Virginia's Speech or Debate Clause does not yield to Virginia statutes or other constitutional provisions and is therefore not akin to federal evidentiary common law; and (3) the Supremacy Clause does not govern the relationship between the General Assembly and Virginia's judiciary. The Circuit Court's reliance on cases invoking "balancing"—and the result it

produced—have no place in construing Virginia's Speech or Debate Clause.[16]

D. The Circuit Court's Ruling Incorrectly Focused on the Source of DLS's Funding—Which It Misapprehended—Where the Proper Focus Is DLS's Function

In concluding that only acts of "legislative assistants and/or aids who are employed and paid by the individual legislator, a legislative committee, or the legislature as a whole" can be privileged, the Circuit Court cited *Page v. Virginia State Board of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014), *see* JA320–21; *see also* JA258–59 (Redistricting Challengers advancing a similar argument), which adopted qualified common-law privilege, *id.* at 660–68, and is therefore inapplicable. The reliance on *Page* is flawed for two additional reasons.

First, applying *Page* here would allow statutory funding mechanisms to cabin the scope of a constitutional privilege in contravention of the individualized constitutional right of each General Assembly Member. *Coffin*, 4 Mass. at 27; *see also Gravel*, 408 U.S. at 622 & n.13; *Miller*, 709 F.2d at 530; *supra* Section II.B. *Page* concluded that, because Virginia

[16] In addition, this Court's precedents defeat any notion that heightened judicial intrusion is warranted in the redistricting process. *See Wilkins v. West*, 264 Va. 447, 481–82, 571 S.E.2d 100, 120 (2002) (quoting *Jamerson v. Womack*, 244 Va. 506, 510, 423 S.E.2d 180, 182 (1992) ("'[R]eapportionment is, in a sense, political, and necessarily wide discretion is given to the legislative body.'") (quotation marks omitted).

Code §§ 30-19.4 and 30-19.20 authorize the General Assembly to hire legislative staff, "a decision not to pay an individual" under those provisions "is tantamount to an acknowledgment that the individual in question is not 'necessary to the efficient operation of the General Assembly . . . .'" 15 F. Supp. 3d at 663–64; *see also* JA258.

But utilizing one statute over another in *funding* activities has no bearing on legislative privilege, which is defined on a functional basis. *See, e.g.*, *Miller*, 709 F.2d at 529 ("Once the legislative-act test is met, the privilege is absolute."). For that reason, *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.15 (1979), rejected the notion that statutory funding provisions alter "the scope of the Speech or Debate Clause."[17] In *Hutchinson*, a Senator was sued for statements in newsletters and press releases, and the district court cited a statute, 39 U.S.C. § 3210, that authorized those communications to be made at Congress's expense, in concluding that the

[17] Notably, the plaintiff in *Hutchinson* had long since conceded that "the investigative actions by defendants in gathering information on public spending from *administrative agencies* is not actionable under the Speech or Debate Clause since the investigation was within the legislative sphere." *Hutchinson v. Proxmire*, 579 F.2d 1027, 1031–32 (7th Cir. 1978) (emphasis added). This concession—which was obvious even in 1978 as to executive agencies—is precisely what the Redistricting Challengers refuse to make here.

communications were legislative. *Hutchinson v. Proxmire*, 431 F. Supp. 1311, 1324 (W.D. Wis. 1977).

The Supreme Court dispensed with the facile argument in a footnote: "Congress, by granting franking privileges, stationery allowances, and facilities to record speeches and statements for radio broadcast cannot expand the scope of the Speech or Debate Clause to render immune all that emanates via such helpful facilities." 443 U.S. at 133 n.15. For the same reason, channeling funding through Virginia Code §§ 30-19.4 and 30-19.20 does not expand privilege, and channeling funding through other provisions does not diminish it. Privilege turns on the function of the party acting under a Member's directives.[18]

Second, *Page* did not address DLS's enabling statutes or the appropriations for its activities. *Page* rather considered a partisan consultant "who was employed by a partisan political committee" and was not paid by *any* provision of Virginia law. 15 F. Supp. 3d at 662. *Page* therefore has nothing to say of the sundry provisions directing Members and Committees to work through DLS, which is statutorily required to supply "[s]taff assistance" needs, Va. Code § 30-73.4; *see also* Va. Code.

[18] As discussed in Part II.B, *supra*, privilege can only be waived by individual Members, not by the General Assembly as a whole, whether by statute, rule, or conduct.

§ 30-223; Va. Code § 30-73.4; Va. Code § 30-87; Va. Code § 30-155(3); Va. Code § 30-275(E); Va. Code § 30-264(A), and is funded from the same appropriation as the General Assembly and legislative staff.

And the reasoning of *Page* is far afield where such provisions exist: *Page* applied the *expressio unius* interpretive canon, 15 F. Supp. 3d at 663, which interprets "specific terms" to exclude "*omitted*" terms, *Com. ex rel. Va. Dep't of Corr. v. Brown*, 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000) (emphasis added), in concluding that provisions for staffing excluded partisan consultants from privilege. The canon, however, does not defeat *other explicit* terms and so does not apply here. *Page* does not support the Circuit Court and Redistricting Challengers' random selection of *one* statutory provision to set the parameters of Speech or Debate protection at the exclusion of all others.

Conclusion

The Court should reverse the decision below and remand with instructions to quash the Redistricting Challengers' subpoena to DLS. If the Court disagrees with DLS's legal positions and affirms the Circuit Court, it should nevertheless waive the contempt fine in light of DLS's good-faith effort to raise issues of "imperative public importance" for review in Virginia's highest tribunal. JA643.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 27th day of May, 2016, that Rule 5:26 has been complied with this same day, and 10 copies of the foregoing brief were hand delivered to the Clerk's Office of the Supreme Court of Virginia, an electronic copy was filed with same through VACES, and a copy served on opposing counsel via e-mail.

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