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
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INTRODUCTION

Virginia's Constitution, through the Speech or Debate Clause, confers upon the members of the General Assembly a broad and absolute constitutional right to speak freely while attending to their legislative duties. The Speech or Debate Clause protects legislators from an overzealous executive, judiciary, or a private litigant who would attempt to use a legislator's speech against the legislator in civil or criminal proceedings. Although exceptions may exist in cases of felony, treason or breach of peace, nothing in the Constitution specifies that this privilege yields in cases related to redistricting or election law.

Nearly five years after their alleged injuries occurred, the Vesilind Plaintiffs/Appellees filed suit alleging that several House and Senate districts included in Virginia's 2011 redistricting violate Virginia's constitutional compactness requirements. Appellees seek documents and communications from Senator John S. Edwards, Senator Ralph K. Smith, Senator Richard L. Saslaw, Senator Charles J. Colgan, Senator David W. Marsden, and Senator George L. Barker (collectively 'Virginia Senators') concerning the drafting, amending, and deliberating over redistricting legislation that was ultimately approved in 2011. Appellants'

communications and deliberations are protected under the Virginia Constitution's Speech or Debate Clause.

Both the Vesilind Appellees and the circuit court treat the Speech or Debate Clause protections as an evidentiary privilege that courts interpret narrowly. The circuit court held that the broad and absolute Speech or Debate Clause protects only communications between legislators and among legislators and legislative staff, while communications between legislators and consultants and others are not protected because communications with a third party are not internal to the legislature. The circuit court concluded that only those legislators and legislative staff that are paid by the legislature are protected by the Speech or Debate Clause.

Similarly, the circuit court held that communications between legislators and the Division of Legislative Services ('DLS') are not protected because DLS is not the legislature, a legislative committee, or a legislator or a paid employee of either. Despite its holding as to DLS, the circuit court held that communications among legislators and legislative staff with officials at the Office of Attorney General regarding preclearance of the redistricting plan pursuant to the federal Voting Rights Act are protected.

The circuit court's 'paid for by' test is inconsistent with U.S. Supreme Court and U.S. Court of Appeals for the Fourth Circuit precedent, both of

which have consistently held that the application of the Speech or Debate Clause turns not on the identity of the actor, or the bank account from which the actor is paid, but on whether the act itself is protected by the Speech or Debate Clause. The Speech or Debate Clause therefore protects legislative communications with consultants, constituents, and legislative agencies.

Determined to vigorously protect their constitutional rights—rights that benefit the people of the Commonwealth—the Virginia Senators *requested* that the circuit court cite them for contempt to generate an appealable order. To guarantee that legislators can speak freely without fear of recrimination from an aggressive executive branch official or a private litigant who disagrees with a legislator's actions, this Court must construe Virginia's Speech or Debate Clause broadly and absolutely.

ASSIGNMENTS OF ERROR

1. The circuit court erred as a matter of law when it found the Virginia Senators in contempt of court because the court's underlying opinion and order held that the Speech or Debate Clause in Virginia's Constitution does not protect communications between the Virginia Senators and their staff with consultants when those communications are within the legislative sphere. This was error because U.S. Supreme Court precedent concerning the substantially similar federal Speech or Debate Clause emphasizes function over form and, when within the legislative sphere, protects the communications and actions of non-legislators. *See, e.g., Gravel v. United States*, 408 U.S. 606, 618 (1972); *Doe v. McMillan*, 412 U.S. 306, 312 (1973). (App. 54, 276, 331, 341, 344-45, 590).

2. The circuit court erred as a matter of law when it found the Virginia Senators in contempt of court because the court's underlying opinion and order held that the Speech or Debate Clause in Virginia's Constitution does not protect communications between the Virginia Senators and their staff with third parties such as constituents and interest groups when those communications are within the legislative sphere. This was error because, in addition to the reasons stated in Assignment of Error 1 above, a Virginia circuit court has held that communications with constituents are absolutely privileged so as to encourage citizens to communicate with the legislature about pending legislation. *See Mills v. Shelton*, 66 Va. Cir. 415 (Va. Cir. Ct. 1998) (Bedford County). Furthermore, Fourth Circuit precedent has explicitly held that the federal Speech or Debate Clause protects communications between local legislators and interest groups. *See Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980). (App. 55, 272, 331, 342-44, 590).

3. The circuit court erred as a matter of law when it found the Virginia Senators in contempt of court because the court's underlying opinion and order held that the Speech or Debate Clause in Virginia's Constitution does not protect communications between the Virginia Senators and their staff with the DLS when those communications are within the legislative sphere. This was error because the DLS is statutorily authorized to assist legislators in fulfilling their legislative duties. In addition to the reasons stated in Assignment of Error 1 above, the circuit court's ruling conflicts with holdings that the substantially similar federal speech or debate clause protects communications and actions of officials at the Government Accountability Office and the Congressional Research Service. *See Chapman v. Space Qualified Systems Corp*., 647 F. Supp. 551 (N.D. Fla. 1986); *Webster v. Sun Co*., 731 F.2d 1 (D.C. Cir. 1984). (App. 280, 331, 346-48, 590).

STATEMENT OF THE CASE

Virginia's Constitution vests the Virginia General Assembly with the authority to draft and enact the federal congressional districts, the House of

Delegate districts, and the Senate Districts. *See* Va. Const. art. II, § 6. This sovereign function is repeated every ten years to ensure that the various districts comply with both federal and Virginia requirements. *See id*.

Appellees claim that the map is not compact in violation of the compactness requirements of Va. Const. art. II, § 6. Appellees seek the communications of the Virginia Senators concerning their crafting, drafting, and deliberating over this sovereign function of redistricting. (App. 88-90).

The Speech or Debate Clause under Virginia's Constitution, which is substantially similar to the federal Speech or Debate Clause, protects communications that are fairly within the General Assembly's jurisdiction. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951); *Gravel*, 408 U.S. at 625; *Bd. of Supervisors v. Davenport & Co. LLC*, 285 Va. 580, 586, 742 S.E.2d 59, 61 (Va. 2013). Therefore, the Speech or Debate Clause protects communications between legislators and their staff with consultants, constituents, interest groups, and DLS. *See, e.g., Gravel*, 408 U.S. at 618; *Doe*, 412 U.S. at 312; *McSurely v. McClellan*, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (*en banc*).

The circuit court therefore erred when it cited the Virginia Senators for contempt because they refused to disclose their communications concerning the crafting, drafting, amending, and deliberating over

redistricting legislation in accordance with the circuit court's January 29, 2016 opinion. This Court should vacate the contempt citation and reverse the circuit court's order denying the Virginia Senators' Motion to Quash.

STATEMENT OF THE FACTS AND MATERIAL PROCEEDINGS BELOW

A. Complaint.

Four and a half years after the House and Senate redistricting maps were approved in 2011, fourteen Plaintiffs—Appellees here—claimed that several districts in those maps "palpabl[y]" violated Virginia's constitutional compactness requirement. (App. 2-4, 18). Naming the Virginia State Board of Elections and the Virginia Department of Elections as defendants, the September 14, 2015 Complaint alleges that Senate Districts 19, 21, 28, 29, 30, 37, and House of Delegates Districts 13, 22, 48, 72, and 88, violate Virginia's constitutional compactness requirements located at Va. Const. art. II, § 6. (App. 4-5, 17). Despite this Court's insistence that to prove a violation of Virginia's constitutional compactness requirements a party need only analyze the map from a spatial perspective, (App. 409 n.2), the Appellees allege that the Virginia General Assembly did not engage in a good-faith effort to create compact districts. (App. 17). Appellees further allege that legislators completely ignored Virginia's compactness requirement. (App. 18). The basis of these claims appears to be that the

General Assembly declined to adopt maps drafted by college students who won the Virginia College and University Redistricting Competition and were, according to Appellees, more compact than the challenged map. (App. 8).

B. Plaintiffs Issue Subpoenas For Legislative Communications.

Less than two months after the Complaint was filed, Appellees issued subpoenas duces tecum to Senator John S. Edwards, Senator Ralph K. Smith, Senator Richard L. Saslaw, Senator Charles J. Colgan, Senator David W. Marsden, and Senator George L. Barker. (App. 61, 67, 75, 83, 91, 107, 116). The subpoenas sought documents and communications in relation to the challenged districts and the districts that border the challenged districts concerning the following topics:

1. The compactness, total population, contiguity, total number of splits, communities of interest, the core retention of the districts, and any other factors used in drafting the districts. (Requests 1-5, 8-9);
2. The Senators' partisan considerations that affected the districts' shape or composition. (Request 6);
3. The districts' impact on incumbent legislators including communications concerning how changes in the redistricting map

impact incumbents as well as all materials used to determine the incumbents' residences. (Requests 7 and 15);

4. The Senators' development and prioritization of the criteria used to draft and modify the districts. (Request 10-11);
5. The establishment and implementation of the 2001 redistricting criteria. (Request 12);
6. All documents and communications with the Virginia Attorney General's Office concerning preclearance under Section 5 of the Voting Rights Act. (Request 13);[1]
7. All documents and communications received from the public concerning the compactness of the 2011 redistricting map. (Request 14);
8. All map files of all plans proposed, considered, or adopted during the 2011 redistricting. (Request 16); and
9. Any official or unofficial meeting of the General Assembly. (Request 17).

[1] The circuit court held that the Speech or Debate Clause protects communications between legislators and legislative staff with officials at the Office of Attorney General concerning preclearance pursuant to Section 5 of the Voting Rights Act. (App. 320-21). The Virginia Senators do not challenge this holding.

See, e.g., (App. 88-90).[2] The subpoena explicitly requested documents and communications from the Virginia Senators and those consultants acting on behalf of the Virginia Senators. *See, e.g.,* (App. 85).

C. <u>The Virginia Senators File Their Motion To Quash.</u>

To preserve their rights guaranteed under the Virginia Constitution's Speech or Debate Clause, the Virginia Senators filed a Motion to Quash on November 18, 2015. (App. 43, 46).[3] The Virginia Senators contended that Plaintiffs' subpoenas, on their face, sought documents and communications concerning drafting, investigating, and deliberating legislation. (App. 46, 48). Permitting disclosure would prevent legislators from speaking freely and violate separation of powers principles. (App. 50). To protect these interests, the Speech or Debate Clause is both broad and absolute. (App. 48-49).

In response, Appellees claimed that the Speech or Debate Clause's constitutional protections are actually a narrow evidentiary privilege, similar to the attorney-client privilege or the attorney work-product doctrine. (App.

[2] The subpoenas issued to each of the Virginia Senators request the same documents and communications. (App. 64-66, 72-74, 80-82, 88-90, 96-98, 104-06, 112-14, 121-23).

[3] Senator Richard Stuart also joined the Virginia Senators in their Motion to Quash. (App. 43, 99). Instead of joining this appeal, he chose to comply with the circuit court's order. (App. 588). Senator Stuart is therefore not a party to this appeal.

252-53). Based upon this premise, Appellees argued that discussions with third-parties such as consultants, constituents, and government agencies are not protected. (App. 256, 258-60).

Appellees also contend that the Speech or Debate Clause should be interpreted narrowly in the particular context of a redistricting challenge. (App. 255-56). According to Appellees, because redistricting challenges are *sui generis*, courts should apply a highly restricted and narrowed interpretation of the Constitution's Speech or Debate Clause guarantee that serves to heavily qualify the legislative privilege. (App. 255-56).

Appellees further contend that the Eastern District of Virginia's outlier decision in *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014) is persuasive and should be followed. According to Appellees, the Virginia Constitution's Speech or Debate Clause, as interpreted in *Page*, applies only to communications with a consultant when the consultant is paid from General Assembly funds pursuant to Va. Code § 30-19.20. (App. 258). For the same reasons, Appellees contend that the Speech or Debate Clause does not protect communications among Virginia Senators and their staff with the DLS. (App. 259). Appellees also contended that the Speech or Debate Clause could not cover communications between legislators and DLS or consultants because they are not legislators,

legislative staff, or legislative committees and therefore could not qualify as a legislator's alter ego. (App. 259).

In reply, the Virginia Senators explained that the legislative privilege includes communications with consultants because the critical issue is whether the communication in question is protected rather than who the actors were in the communication. (App. 277). Similarly, the Virginia Senators maintain that communications between DLS and legislators are covered because these communications were an inherent part of the drafting, investigating, and deliberating process in crafting legislation. (App. 281-83). Finally, the Virginia Senators argued that Appellees' "alter ego" argument is inconsistent with Supreme Court precedent that extends the privilege to consultants and investigators without regard to how either is paid. (App. 276-79). The Virginia Senators maintained that the Speech or Debate Clause extends to all those acting in a legislative capacity. (App. 277).

In response to Appellees' claims that redistricting cases should be treated as exceptional, the Virginia Senators noted that the Speech or Debate Clause includes only three exceptions—felony, treason, and breach of peace—none of which are at issue in this case. (App. 275). Finally, Appellees rely on a U.S. District Court case in which the plaintiffs there

alleged that the state legislature violated certain federal rights. (App. 275). The federal court determined in that matter that a state legislator's federal common law privilege should yield for the purpose of upholding federal rights. (App. 275-76). That decision is inapposite, however, because here Appellees have brought a redistricting challenge in state court alleging state constitutional violations. Federal rights are not at issue in this case. (App. 276).

D. The Circuit Court Construed Virginia's Speech Or Debate Clause Too Narrowly.

The Circuit Court interpreted Virginia's Speech or Debate Clause narrowly. The Circuit Court also limited the Clause's protections to those paid from a certain state budget rather than by reference to the function those persons served. (App. 320).

The circuit court disregarded precedent from several courts holding that the applicability of the Speech or Debate Clause turns on whether the act at issue is legislative in nature, rather than whether the actor involved is a legislator. *See, e.g., McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 485 (4th Cir. 2014); (App 277). The circuit court agreed that the Speech or Debate Clause served as an absolute bar to discovery, but only with respect to a narrow subset of legislative communications, namely communications that are purely internal among legislators and legislative

staff, (App. 320) (citing *N.C. State Conf. of the NAACP v. McCrory*, No. 13-658, 2014 U.S. Dist. LEXIS 185130 (M.D.N.C. Nov. 20, 2014)), and specifically to legislators and legislative aides who are "employed and paid by the individual legislator, a legislative committee, or the legislature as a whole." (App. 320) (citing *Page*, 15 F. Supp. 3d at 664).

Under this formulation, the Speech or Debate Clause's broad and absolute protections do not protect communications between legislators and legislative aides with *anyone* not paid from a legislative budget line and are subject to disclosure because those communications "would not be internal to the legislature[.]" (App. 322-23). Additionally, the Circuit Court held that communications with the DLS do not fall within the legislative 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." (App. 324). Consequently, the circuit court ordered the Virginia Senators and their staff to disclose all of their communications with DLS—an agency the circuit court noted serves both legislators individually and the legislature as a whole. (App. 324-25).

The circuit court did, however, find that communications between legislators and the Virginia Office of the Attorney General, an executive branch agency, that concerned preclearance pursuant to Section 5 of the

Voting Rights Act were protected under the Speech or Debate Clause. (App. 320-21). On February 16, the Court issued an order commanding production of documents consistent with its opinion. (App. 328-29).

E. The Virginia Senators Attempt To Appeal The Decision Directly To This Court Through Virginia's Interlocutory Appeal Statute.

Prior to and after the January 7, 2016, oral argument on the Virginia Senators' Motion to Quash, counsel to the Virginia Senators asked Appellees' counsel if they would consent to an interlocutory appeal pursuant to Va. Code § 8.01-670.1. On both occasions, Appellees refused. *See* (App. Opp'n. to Appellees Mot. for Special Session at 3) (*filed* on May 11, 2016).

On March 4, 2016, the Virginia Senators filed a Motion to Certify an Interlocutory Appeal to this Court. (App. 334-35). The Virginia Senators contended that the issue presented on appeal was a (i) question of law, (ii) where substantial grounds for difference of opinion existed, (iii) and there is no mandatory authority on the precise question before the appellate court, (iv) a ruling from the Supreme Court of Virginia would be dispositive of Appellants' Motion to Quash, and (v) all parties and circuit court agree that it is in everyone's best interest to appeal the issue now. (App. 334).

Appellees opposed on three grounds. First, Appellees claimed that although there was no mandatory authority on the precise question, there

was no substantial grounds for difference of opinion as to the proper scope of the Speech or Debate Clause because other courts had come to different conclusions. (App. 383). Second, Appellees also contended that the requirement that the appeal be dispositive of a material aspect of the proceeding currently pending before the court limited application of the statute to only those appeals where the circuit court's ruling foreclosed certain types of relief or resolved a final issue in a case. (App. 383). Third, Appellees also refused to agree that it was in their best interest to appeal at that time. (App. 385).

Despite demonstrating that it was in Appellees' interest to appeal then, (App. 409-11), and that the dispositive aspect requirement applied to Appellant's Motion to Quash, (App. 403-08), the Circuit Court denied Appellants' motion because, at the very least, not all the parties consented to the appeal. (App. 587).

F. In The Alternative, The Virginia Senators Requested That The Circuit Court Hold Them In Contempt.

In the alternative, if the circuit court denied the request to certify an interlocutory appeal, the Virginia Senators requested that the circuit court cite them for contempt so as to generate an appealable order consistent with *HCA Health Services of Virginia, Inc. v. Levin*, 260 Va. 215, 219-220, 530 S.E.2d 417, 419 (Va. 2000). (App. 335, 355-56). The circuit court

granted this request and found the Virginia Senators in contempt of court, fining each senator $100 per day until the contempt is purged. (App. 588).

On April 20, 2016, Appellants filed their Notice of Appeal with the Court of Appeals of Virginia. (App. 593). Six days later, Appellees filed a joint-motion with this Court asking that the Court assume jurisdiction of the appeal pursuant to Va. Code § 17.1-409. (App. 604). The following day, April 27, 2016, this Court granted the joint motion and assumed jurisdiction of the case. (App. 643).

STANDARD OF REVIEW

Because this case presents a clear question of law concerning the interpretation of the Speech or Debate Clause contained in Virginia's Constitution, this Court reviews the circuit court's ruling *de novo*. *See, e.g., Montgomery Cty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011); *see also Davenport & Co. LLC*, 285 Va. at 585-86, 742 S.E.2d at 61.

ARGUMENT

The circuit court held that the Speech or Debate Clause privilege is narrow and applies only to the internal communications between and among legislators and their staff paid for from legislative funds. This ruling is inconsistent with the history and purposes of legislative privilege, as well

as with the only other circuit court decision to address the scope of Virginia's Speech or Debate clause. *See generally Mills*, 66 Va. Cir. at 415.

A. The History And Purpose Of The Speech Or Debate Clause Demonstrates That Courts Interpret It Broadly And Absolutely.

The Virginia Constitution provides in relevant part:

> Members of the General Assembly shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place.

Va. Const. art. IV, § 9. Virginia's Speech or Debate Clause is based upon the same historical basis and has the same purposes as the federal Speech or Debate Clause. *See Davenport & Co.*, 285 Va. at 586, 742 S.E.2d at 61.

a. The History Of The Speech Or Debate Clause.

The U.S. Constitution's Speech or Debate Clause incorporates concepts and protections that far pre-date the U.S. Constitution. *See Barr v. Matteo*, 360 U.S. 564, 579 (1959) (Warren, C.J., dissenting) (noting that legislative privilege dates back to 1399). In 1787, the provision reflected the "[p]olitical principles already firmly established in the States." *Tenney*, 341 U.S. at 373. Unsurprisingly, the federal Speech or Debate Clause was adopted without debate or opposition. *See U.S. v. Johnson*, 383 U.S. 169, 177 (1966).

As the States ratified their own Constitutions, they meticulously preserved the principle so that legislators could perform their official duties without fear of criminal or civil liability. *See Tenney*, 341 U.S. at 375. Today, approximately 43 states have Speech or Debate Clause privileges enshrined in their state constitutions. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 224-25 (2003). Approximately 23 of those States, including Virginia, have Speech or Debate Clause provisions that substantially mirror the U.S. Constitution's Speech or Debate Clause. *See id*. at 236.[4]

b. <u>The Purpose Of The Speech Or Debate Clause.</u>

The "central role" of the Speech or Debate Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Eastland*, 421 U.S. at 502 (internal quotation marks and citations omitted). The Speech or Debate Clause gives the legislative branch latitude to speak freely. *See Gravel*, 408 U.S. at 616; *see Tenney*, 341 U.S. at 373; *Davenport & Co. LLC*, 285 Va. at 588, 742

[4] These twenty-three states are: Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wyoming. *See* Steven F. Huefner, *The Neglected Value Of The Legislative Privilege In State Legislatures*, 45 Wm. & Mary L. Rev. 221, 236 n.49 (2003).

S.E.2d at 63 (stating that the common law Speech or Debate Clause protections were "adopted to safeguard the performance of legislative duties from fear of outside interference.") (citing and quoting *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731-32 (1980) (internal quotation marks omitted)); *Covel v. Town of Vienna*, 78 Va. Cir. 190, 200 (Va. Cir. Ct. 2009) (Fairfax County). Accordingly, the Clause reinforces the separation of powers principle. *See Eastland*, 421 U.S. at 502; *id*. at 511 (noting that judicial interference frustrated judicial inquiry for five years during which time the legislators were required to divert time, focus, and energy to consult with counsel); *see also Davenport*, 285 Va. at 587, 742 S.E.2d at 62 ("The principles of separation of powers generally preclude judicial inquiry into the motives of legislative bodies elected by the people.") (internal quotation marks omitted). The separation of powers principle protects individual liberty. *See NLRB v. Canning*, 134 S. Ct. 2550, 2559 (2014).

To preserve the independence of legislators from outside interference, the Speech or Debate Clause also protects legislators from private litigants because lawsuits for declaratory or injunctive relief, or damages, similarly distract legislators and divert their time and energy to the litigation and away from their legislative duties. *See Eastland*, 421 U.S.

at 503 ("The applicability of the [federal Speech or Debate] Clause to private civil actions is supported by the absoluteness of the terms 'shall not be questioned,' and the sweep of the terms 'in any other Place.'"); *see also EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (stating that the practical import of legislative privilege is difficult to overstate because it provides legislators 'breathing room' to discharge their duties without fear of distraction from the judiciary or other litigants who wish to defeat the legislators in litigation rather than the ballot box).

The Speech or Debate Clause's protections are available regardless of whether a legislator is a named party to a lawsuit, and protects legislators from discovery procedures because the burdens of litigation are not limited to named parties alone. *See WSSC II*, 631 F.3d at 181; *see Davenport*, 285 Va. at 588-89, 742 S.E.2d at 63; *Covel*, 78 Va. Cir. at 200.

The Speech or Debate Clause provides these protections not for the private indulgence of legislators, but for the public good. *See Tenney*, 341 U.S. at 377. The application of the privilege is not at the mercy of the pleader. *See id*. Even a "claim of any unworthy purpose does not destroy the privilege." *See id*.

c. The Speech Or Debate Clause's Scope Is Broad.

As early as 1808, courts in the United States read the Speech or Debate Clause broadly to effectuate its purposes. *See Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (Mass. 1808) (stating that Massachusetts' Speech or Debate Clause—which is substantially similar to the federal and Virginia's Clause—must be construed liberally to effectuate its purpose). The Supreme Court continues to read the Speech or Debate Clause broadly. *See Eastland*, 421 U.S. at 501; *Johnson*, 383 U.S. at 180 ("*Kilbourn* and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes.").

The Speech or Debate Clause covers actions including "delivering an opinion, uttering a speech, or haranguing in debate...to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office." *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881) (quoting *Coffin*, 4 Mass. at 27); *Davenport*, 285 Va. at 589, 742 S.E.2d at 63 (cataloguing a similar non-exhaustive list of legislative acts).

The Clause does not, however, protect the cajoling or exhorting of executive branch officials in the administration of a statute. *See Gravel*, 408 U.S. at 625. Similarly, the making of government agency appointments,

providing assistance obtaining government contracts, and preparing constituent newsletters, are also not protected. *See Brewster*, 408 U.S. at 512.

The privilege applies to communications that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings." *Gravel*, 408 U.S. at 625. In determining whether communications satisfy this standard, "courts should not go beyond the narrow confines of determining that a committee's inquiry may *fairly* be deemed within its province." *Tenney*, 341 U.S. at 378 (emphasis added); *McSurely*, 553 F.2d at 1295.

d. <u>Once The Court Determines The Requested Documents And Communications Are Within The Legislature's Province, The Privilege Is Absolute.</u>

The United States Supreme Court ruled that "Once it is determined that Members are acting within the legitimate legislative sphere the Speech or Debate Clause is an absolute bar to interference." *See Eastland*, 421 U.S. at 503; *see also Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) ("Absolute immunity enables legislators to be free, not only from the 'consequences of litigation's results, but also from the burden of defending themselves.'"); *WSSC II*, 631 F.3d at 181; *Davenport*, 285 Va. at 588, 742 S.E.2d at 63 (recognizing that the federal and common law Speech or

Debate Clause provide absolute protection to legislators) (citing *Bogan*, 523 U.S. at 52); *Covel*, 78 Va. Cir. at 200.

Virginia courts, including this Court, have indicated that the legislative privilege applies absolutely. *See Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 590, 118 S.E.2d 668, 669 (Va. 1961) ("Cases in which absolute privilege apply are not numerous and they may be divided into three classes, namely: *Proceedings of legislative bodies*; judicial proceedings; and communications by military and naval officers.") (emphasis added); *see also Mills*, 66 Va. Cir. at 416-17.

B. <u>The Circuit Court Erred.</u>

The circuit court erred in holding that Virginia's Speech or Debate Clause covered only internal communications between legislators and among legislators and legislative staff who are employed and paid for by the legislature, a legislator, or legislative committee. (App. 320) (citing *Page*, 15 F. Supp. 3d at 664). As explained below, the Clause also protects communications among legislators, legislative staff, consultants, constituents, and the DLS, to the extent those communications are a part of the legislative process. Nothing in the text of the Constitution limits or suggests that courts should look to payment from specific appropriations to determine the application of the Clause. The circuit court's improper

narrowing of the Speech or Debate Clause stems from its treatment of the legislative privilege as a narrow rule of evidence rather than as a broad and absolute constitutional right. (App. 322) (relying on an attorney-client privilege case).

I. AOE 1: THE CIRCUIT COURT ERRED IN HOLDING THAT VIRGINIA'S SPEECH OR DEBATE CLAUSE DOES NOT PROTECT COMMUNICATIONS BETWEEN LEGISLATORS AND CONSULTANTS.

The circuit court held that the Speech or Debate Clause does not protect communications between legislators and their staff with consultants because those communications are not internal to the legislature. Consequently, the circuit court treated communications with consultants as communications with third parties. (App. 320, 322-23). For the reasons explained *infra*, the circuit court erred.

The U.S. Supreme Court has determined that the federal Speech or Debate Clause protects communications between legislators and consultants. *Gravel*, 408 U.S. 606, 608-609, 616, 622; *Doe*, 412 U.S. at 312. Federal district courts have found that communications between legislators and retained redistricting consultants are covered because these consultants assist legislators in their legislative duties. *See, e.g., Favors v. Cuomo*, 285 F.R.D. 187, 213 (E.D.N.Y. 2012).

Extending Speech or Debate Clause protection to communications between legislators and retained consultants permits the legislator to freely communicate with those assisting in the legislative process. If these communications are not covered, the legislative function could be seriously impaired. Legislators are forced to either exclude their retained experts from legislative conversations about the very issues the consultants were retained to address and risk disclosure in subsequent litigation, or forego the consultants' expertise. *See ACORN v. County of Nassau,* No. 05-CV-2301, 2009 U.S. Dist. LEXIS 82405 at *24 (E.D.N.Y. Sept. 10, 2009). This is particularly true for part-time legislatures facing budgetary constraints that require legislators to retain consultants rather than paid staff to provide legislators with the expertise needed to legislate wisely. *See Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 140, 75 P.3d 1088, 1098 (Ariz. Ct. App. 2003); *see also Covel*, 78 Va. Cir. at 202 (recognizing that due to the part-time service of Virginia's legislators, the legislators must secure additional employment while also remaining focused on the continuing needs of their constituents); *Eastland*, 421 U.S. at 504-05 ("Where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.") (internal quotation marks omitted).

A. The U.S. Supreme Court Interprets The Federal Speech Or Debate Clause To Protect Communications With Consultants Without Inquiring Into How Those Consultants Are Paid.

In *Gravel*, the aide in question, Dr. Leonard Rodberg, was employed as a resident fellow at the Institute of Policy Studies. *Gravel*, 408 U.S. at 608. He received a subpoena from the government after Senator Gravel, a United States Senator from Alaska, placed the Pentagon Papers on the public record and arranged for Beacon Press to publish the documents. *See id*. at 609-10. Senator Gravel hired Dr. Rodberg the very same day Senator Gravel published the papers. *See id*. at 609.

This places in context the *Gravel* Court's comments that a legislative aide is covered where the aide serves as an alter ego. *See id*. at 616-17. The Supreme Court's point was not that the individual served so closely with the Senator that the aide became the Senator's alter ego, *see, e.g.,* (App. 257); the Supreme Court's point was that Speech or Debate Clause covered acts of non-legislators "[i]nsofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *See Gravel*, 408 U.S. at 618; *see also Walker v. Jones,* 733 F.2d 923, 929 (D.C. Cir. 1984) (Ginsburg R.B., J.) ("The key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor.") (*cert. denied Jones v. Walker,* 469 U.S. 1036 (1984)); *McCray v. Md. Dep't of*

Transp., 741 F.3d 480, 485 (4th Cir. 2014) ("The determination of legislative immunity is based on the function being fulfilled—not the title of the actor claiming immunity.").

As a result, the U.S. Supreme Court granted a broad protective order to Dr. Rodberg that prohibited the Government from asking him any questions concerning communications regarding Senator Gravel's conduct related to the meeting, motives for his conduct, the conduct of his aides at the meeting, and communications between aides and Senator Gravel concerning the meeting. *See id*. at 616, 618, 628-29.

In *Doe v. McMillan*, the U.S. Supreme Court held that an independent consultant and an investigator for a subcommittee of the U.S. House Committee on the District of Columbia were protected from questions concerning their involvement in the preparation and dissemination of a committee report. *See Doe*, 412 U.S. at 309, 312; *see also Doe v. McMillan*, 459 F.2d 1304, 1328 (D.C. Cir. 1972) (Wright, J., dissenting) (noting that Appellee, Little, served as an independent consultant to the Committee and that Appellee Martin was a D.C. police officer on loan to the U.S. Capitol Police who allegedly assisted the Committee by transmitting records to the Committee). Importantly, neither the U.S. Court of Appeals for the D.C. Circuit nor the U.S. Supreme Court made a determination as to

whether the independent consultant or the investigator "was an 'employee' of the House within the meaning of the official immunity doctrine." *See Doe*, 459 F.2d at 1328 (Wright, J., dissenting). Also, importantly, neither Congress nor the Committee paid the investigator. The investigator was a D.C. police officer on loan to the U.S. Capitol Police. *See id*.

Questions of employment were irrelevant to the U.S. Supreme Court because both the consultant and D.C. police officer *functioned* as aides to the House Committee, meaning that their actions and communications were entitled to protection under the federal Speech or Debate Clause. *Doe*, 412 U.S at 312.

B. Two State Appellate Courts Have Held That Their State Constitutional Speech Or Debate Clauses Protect Communications With Redistricting Consultants.

In Rhode Island, much like the matter before this Court, plaintiffs challenged Rhode Island's redistricting map claiming that—among other things—it violated Rhode Island's constitutional compactness requirements. *See Holmes v. Farmer,* 475 A.2d 976, 978 (R.I. 1984); *see* (App. 3). Similar to the Vesilind Plaintiffs, the Rhode Island plaintiffs sought to question the Reapportionment Commission consultant about the redistricting process. *See id*. at 983; (App. 88-90). Specifically, the plaintiffs inquired into whether "a targeting specialist addressed the political reasons

for particular district lines" (*compare with* App. 89 (requesting documents and communications concerning the Virginia Senators' partisan considerations when drafting the map)) and whether +/- 2.5 percent population deviation target was used (*compare with* App. 88, demanding communications concerning population deviation in map). Plaintiffs contended that their inquiries were not within the legitimate legislative sphere. The court disagreed. *See id*.

Rhode Island's Speech or Debate Clause is substantially similar to the federal Clause and Virginia's Clause. *Compare* R.I. Const. art. IV, § 5, *with* U.S. Const. art. I, § 6, and Va. Const. art. IV, § 9; *see Holmes*, 475 A.2d at 980-81. The Rhode Island Supreme Court ruled that what plaintiffs sought were the very actions and motivations of the legislators in their deliberations regarding the eventual passing of a reapportionment plan. *See id*. at 984. This inquiry required the court to delve into the actions and motivations of legislators concerning pending legislation. *See id*. This falls clearly within the privilege. *Id*. Further, the fact that some of the reapportionment meetings were not formal meetings or meetings conducted within the confines of the capitol did not foreclose application of the privilege. *See id*. Nor did plaintiffs' contention that the legislature had an

unworthy purpose in adopting the redistricting plan to maintain population deviations of +/-2.5% foreclose application of the privilege. *See id*.

Similarly, in Arizona, plaintiffs there filed a motion to compel the Arizona Independent Redistricting Commission to produce documents disseminated between the Commission and its consultants and expert witnesses. *See Fields*, 206 Ariz. at 134, 75 P.3d at 1092. The plaintiffs filed a complaint alleging that the map violated Arizona's constitutional requirement that legislative districts be competitive. *See id*. at 135, 1093. Plaintiffs sought documents from the Commission's consultant National Demographics Corporation ('NDC'). *See id*. Plaintiffs contended that the NDC was not covered under the legislative privilege because the NDC was not a direct participant in the legislative process. *See id*. at 139, 1097.

The Arizona Court of Appeals explained that in *Gravel*, the federal Speech or Debate Clause protected Dr. Rodberg from inquiry not because of his job title, but because of his function. *See id*. The Arizona Court of Appeals disagreed that the legislative privilege "[c]an never extend to protect the legislative acts of a retained consultant." *See id*. The Arizona Court of Appeals concluded that there was no practical difference between placing an individual temporarily on staff, like Dr. Rodberg, or retaining the same person as a consultant. Simply put, how a person is employed does

not determine the person's function within the legislative process. *See id*. at 139-40, 1097-98.

Further, the court concluded the legislative privilege must apply to independent contractors because of budgetary constraints. *See id*. Legislators must be able to freely communicate with these experts without fear of judicial oversight. *See id*. (citing *Gravel*, 408 U.S. at 618); *see also ACORN*, No. 05-CV-2301, 2009 U.S. Dist. LEXIS 82405 at *24.

C. The Circuit Court Erred In Not Applying Virginia's Speech Or Debate Clause To Communications Among Legislators, Legislative Aides, And Consultants Who Functioned As Aides To The Legislators.

To protect and fully effectuate the purposes of the legislative privilege, this Court must reverse the Circuit Court and grant the Motion to Quash.

First, Virginia's Constitution vests the General Assembly with the authority to draw both Senate and House districts. *See* Va. Const. art. II, § 6. Drafting and amending General Assembly district maps is a task constitutionally committed to the legislature. *See id*; *see also Gravel*, 408 U.S. at 625 (stating that the Speech or Debate Clause protects those communications and deliberations concerning pending legislation as well as those acts that the "Constitution places within the jurisdiction of either House."). Communicating and deliberating about federal and state

redistricting requirements during the consideration stage of the redistricting legislation constitutes an integral part of the legislative process. *See Gravel*, 408 U.S. at 625. Therefore, the Speech or Debate Clause protects those communications. *See id*. This Court should not inquire further into whether the communications sought are within the legitimate legislative sphere. *See Tenney*, 341 U.S. at 378; *McSurely*, 553 F.2d at 1295.

Second, the subpoenas issued to Senator John S. Edwards, Senator Ralph K. Smith, Senator Richard L. Saslaw, Senator Charles J. Colgan, Senator David W. Marsden, and Senator George L. Barker seek documents and communications concerning the compactness (Request 1-2), how drafts and amendments of districts impact the population of districts (Request 3), the contiguity of districts (Request 4), the number of split precincts, counties, and subdivisions, including communications about drafts and amendments of districts that impact each of those items (Request 5), the partisan considerations the legislators used (Request 6), the impact of the shape or composition of the challenged district (Request 7), the core retention of districts, including communications about how drafts and amendments to those districts impact core retention (Request 8), all factors used by legislators in drafting the map, including communities of interest (Request 9), the development and prioritization of the criteria the

Senators used in drafting districts (Request 10), the creation, *consideration*, or adoption of criteria, including how the legislators prioritized that criteria for the 2011 and 2001 redistricting (Request 11-12), all communications from the public, even those not submitted through the DLS website (Request 14), all communications concerning map files, including maps used to determine an incumbent's residence (Request 15), all map files, *proposed, considered*, and adopted during the 2011 round of redistricting (Request 16), and all transcripts, videos, and tapes of official and unofficial meetings of the Virginia General Assembly (Request 17). (App. 88-90).

These requests cut to the heart of what the Speech or Debate Clause protects, namely, those communications that are part of the crafting, drafting, amending, and deliberating about the redistricting legislative process, matters the Virginia Constitution vests within the General Assembly. *See Gravel*, 408 U.S. at 625. The subpoena should be quashed. *See Holmes*, 475 A.2d at 984; *Fields*, 206 Ariz. at 140, 75 P.3d at 1098.

Third, communications between legislators and retained consultants are protected. The U.S. Supreme Court has found that the federal Speech or Debate Clause protects communications between legislators and consultants. *See Doe*, 412 U.S. at 312; *Favors*, 285 F.R.D. at 213. Application of the privilege does not depend upon how the consultant is

paid. *See Doe*, 412 U.S. at 312; *Doe,* 459 F.2d at 1328 (Wright, J., dissenting). Consultants and experts who participate in the deliberative and communicative process about redistricting—communications that would be protected if performed by a legislator—are unquestionably within the sphere of legislative activity. *See Gravel*, 408 U.S. at 618; *Doe*, 412 U.S. at 312; *see also McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) ("[A] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."). Communications with these consultants and experts must be protected under legislative privilege.

D. The Circuit Court Erred In Grafting A 'Paid For By The Legislature' Limitation On The Constitution's Speech Or Debate Clause.

The circuit court ruled that the application of the Speech or Debate Clause was dependent on who was paying the person in question. (App. 331, 335). In support, the circuit court cited *Page*, 15 F. Supp. 3d at 664. However, Judge Payne does not cite any case for his 'paid for by' test. Instead, Judge Payne imposes the 'paid for by' test as a limitation to prevent excessive use of the Speech or Debate Clause protection. *See Page*, 15 F. Supp. 3d at 664.

The 'paid for by' test is an extra-textual requirement imposed on the Speech or Debate Clause that already includes its own longstanding limiting principles. *See, e.g., Brewster*, 408 U.S. at 512-14. The Speech or Debate Clause protects only those communications that are an integral part of the deliberative and communicative process within the legislative sphere. *See Gravel*, 408 U.S. at 624-25.

Furthermore, U.S. Supreme Court precedent and Fourth Circuit precedent do not support Judge Payne's 'paid for by' test. *See Doe*, 412 U.S. at 312; *Johnson*, 383 U.S. at 173-74 n.5; *Bruce*, 631 F.2d at 280 (holding that local legislators were immune from allegations of federal civil rights violations, including communications between local legislators and local interest group). This Court should not endorse the circuit court's 'paid for by' test and graft a sweeping limitation onto the broad and absolute privilege afforded by Virginia's Constitution.

Appellees next claim that only consultants who are paid for by the legislature can be covered because only those persons can be considered the 'alter ego' of legislators. *See* (App. 257). But *Gravel*'s comments regarding 'alter ego' referred to a think-tank consultant whom Senator Gravel hired the same day as the events in question occurred. *See Gravel*, 408 U.S. at 609. Because the U.S. Supreme Court lends weight to function

over title, the U.S. Supreme Court is unconcerned with from what budget line item or account an individual is receiving funds. What matters is the function the person serves. *See Doe*, 412 U.S. at 312; *Doe*, 459 F.2d at 1328 (Wright, J., dissenting); *Bogan v. Scott-Harris,* 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *Walker*, 733 F.2d at 929 ("The key consideration, Supreme Court decisions teach, is the act presented for examination, not the actor."); *McCray*, 741 F.3d at 485; *see also WSSC II*, 631 F.3d at 181 (ruling that legislative privilege "covers all those properly acting in a legislative capacity, not just actual officeholders."); *Jewish War Veterans of the United States of Am., Inc., v. Gates,* 506 F. Supp. 2d 30, 59 (D.D.C. 2007) ("[T]he Speech or Debate Clause's application turns on the activity at issue, *not the identity of the party* with which the Member comes in contact.") (emphasis added).

Gravel's use of the term 'alter ego', therefore refers to those persons whose actions would be protected if the legislator had done the same act. *See Gravel*, 408 U.S. at 618; *WSSC II*, 631 F.3d at 181 (noting that the Speech or Debate Clause "[c]overs all those properly acting in a legislative capacity, not just actual officeholders."); *Chapman*, 647 F. Supp. at 553-54 ("Rather, my inquiry is limited to whether Rod Worth's activities would be

protected by the Speech or Debate Clause had they been performed by a legislator personally.").

Appellees also claim that the U.S. District Court for the Eastern District of Virginia has decided the issue of whether the Speech or Debate Clause protects communications with consultants with "remarkable consistency." (App. 623). For this proposition of remarkable consistency, Plaintiffs cite three decisions rendered between May of 2014 and December of 2015: *Page v. Va. State Board of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014), *Bethune-Hill v. Va. State Board of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015), and *Lee v. Va. State Board of Elections*, 2015 U.S. Dist. LEXIS 171682 (E.D. Va. 2015). Judge Payne authored two of these three decisions, *Page and Bethune-Hill.* Plaintiffs also fail to mention that these decisions depart from *Simpson v. City of Hampton*, 166 F.R.D. 16 (E.D. Va. 1996), that held that the Speech or Debate Clause protected legislative materials from discovery in a redistricting case alleging violations under the federal Voting Rights Act. *See id*. at 19.

Finally, Plaintiffs fail to account for the critical differences between the federal common law legislative privilege applied in federal court when state legislators face subpoenas seeking documents in cases alleging violations of federal rights, and the legislative privilege in Virginia Constitution's

Speech or Debate Clause that protects state legislators, in state court concerning allegations of violations of state rights.

E. The 'Paid For By The Legislature' Test Would Severely Impair The Virginia Senators' Ability To Legislate Appropriately.

Va. Code § 30-19.4 provides only limited funds. For fiscal year 2017, each Senator is appropriated $45,900 for legislative assistants. *See* H.B. 30, §(5)(d)(1) 2016 Gen. Assemb., Reg. Sess. (Va. 2016). This Section also appropriates $10,200 annually for legislative assistant support costs and for constituent services offices in the legislator's home district. *See id*. (d)(2).

Consequently, the Virginia Senators have sufficient funds to hire one and at most two legislative aides and maybe one administrative assistant. For legislation that is drafted, amended, and passed decennially, it is not financially prudent to hire a full-time staff redistricting expert. Instead, the General Assembly Members utilize redistricting experts on a contract or volunteer basis. *See Fields*, 206 Ariz. at 140, 75 P.3d at 1098; *see also Eastland*, 421 U.S. at 504-05.

The circuit court's ruling undermines the Virginia Senators' ability to fully inform themselves when crafting redistricting legislation. The circuit court's ruling poses a dilemma for the Virginia Senators. The Senators can communicate with redistricting experts and risk that future plaintiffs,

dissatisfied with the final redistricting map, will haul a senator into court and demand their communications, an outcome the Speech or Debate Clause seeks to prevent. *See, e.g., WSSC II*, 631 F.3d at 181. Or, the Senators can forgo the expertise of a redistricting consultant and legislate as best they can, another result the Speech or Debate Clause seeks to prevent. *Fields*, 206 Ariz. at 140, 75 P.3d at 1098; *see ACORN,* No. 05-CV-2301 2009 U.S. Dist. LEXIS 82405 at *24. Either outcome severely undermines Virginia's legislative process, thereby inhibiting legislators from seeking to fully inform themselves.

F. Even If This Court Did Apply A 'Paid For By The Legislature' Limitation, The Speech Or Debate Clause Would Still Protect Communications With Consultants.

Even if this Court were to adopt a 'paid for by' test, communications with redistricting experts are still protected because the legislators are still communicating with redistricting experts as part of their fact-finding, investigative, and deliberative process which is protected under the Speech or Debate Clause. *See e.g., McSurely,* 553 F.2d at 1287 ("The acquisition of knowledge through informal sources 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"); *see id*. at 1303 n.3 (Wilkey, J., dissenting) ("The majority states

the principle, which we endorse, that investigative activity is so essential to the legislative process that it is ordinarily absolutely privileged, provided, of course, that the basic conditions of authorization and pertinency are established."); *Gov't of the V.I. v. Lee,* 775 F.2d 514, 521 (3d Cir. 1985) (finding that informal fact-finding is protected under the Speech or Debate Clause); *Jewish War Veterans*, 506 F. Supp. 2d at 59.

The U.S. Supreme Court has already held that the Speech or Debate Clause protects communications between a senator and his co-conspirators who were both bank employees. *Johnson*, 383 U.S. at 173-74 n.5; *Brewster*, 408 U.S. at 512. Surely Virginia's Speech or Debate Clause protects fact-finding and investigating communications with redistricting consultants concerning the crafting, drafting, amending, and deliberating over redistricting legislation.

For the foregoing reasons, the circuit court erred when it found the Virginia Senators in contempt because the court's underlying opinion erred when it held that the Speech or Debate Clause did not protect communications between legislators and their staff with consultants concerning redistricting legislation.

II. AOE 2: THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE SPEECH OR DEBATE CLAUSE DOES NOT PROTECT COMMUNICATIONS BETWEEN LEGISLATORS AND THEIR STAFFS WITH CONSTITUENTS & INTEREST GROUPS.

The circuit court also erred in holding that the Speech or Debate Clause's protections only extend to internal communications between legislators and legislative staff. (App. 320). The circuit court's holding necessarily excludes fact-finding and investigative communications with constituents and others, including lawyers. Such communications are within the legislative sphere and, for the reasons stated *infra*, are protected under the Speech or Debate Clause.

A. The Speech Or Debate Clause Protects Communications Among Legislators, Legislative Staff, And Constituents.

The circuit court also erred in not finding that Virginia's Speech or Debate Clause protected legislative communications with constituents and interest groups who the court considered third-parties and not internal to the legislature. (App. 320, 322-23). Virginia courts previously recognized that legislative communications with constituents are absolutely protected. *See Mills*, 66 Va. Cir. at 416-17.

In *Mills*, the circuit court reviewed a demurrer in a defamation case. The defendant, the then mayor of Bedford, wrote a letter to the Senate Courts of Justice Committee urging the Committee to support the reelection

of a judge to the Juvenile and Domestic Relations Court. *See id*. at 415. The plaintiff opposed the reelection and a newspaper quoted the defendant's letter which contained a description that Mr. Mills had a vendetta against the judge in question. *See id*. at 415-16. The Court held that the letter was absolutely privileged. *See id*. at 417.

Citing *Story v. Norfolk-Portsmouth Newspapers, Inc.,* 202 Va. 588, 590, 118 S.E.2d 668 (Va. 1961), the circuit court explained that the Supreme Court of Virginia held that communications concerning the proceedings of a legislative body are absolutely privileged because "Citizens should be allowed to communicate freely their concerns to legislative bodies concerning matters pending before the legislature." *See id*. at 416 (citing *Story*, 202 Va. at 590, 118 S.E.2d at 669). Disclosure of the letter would discourage citizens from communicating with the legislature. *See id*. at 417. Thus, the court upheld as absolutely privileged a letter from a citizen to the Senate Courts of Justice Committee concerning a judicial candidate the Committee was evaluating.[5]

[5] There is currently pending in the Circuit Court for the City of Richmond a lawsuit that charges the Arlington Members of the Virginia General Assembly with conspiracy to injure another in a trade or business. *See Broadstone Security v. Doe*, No. 16001861-00 (Va. Cir. Ct., April 18, 2016) (Richmond City) (Compl. ¶ 42). This case raises issues of legislative immunity and legislative privilege.

The Bedford County Circuit Court is not alone in protecting legislative communications with constituents. *See Miller v. Transamerican Press, Inc*., 709 F.2d 524, 530-31 (9th Cir. 1983) (holding that constituent communications urging legislator to initiate or support legislation are protected under the Speech or Debate Clause because disclosure might chill both the speech of constituents as well as the legislator, who may curtail speech to protect constituent sources); *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) ("[D]ocuments or other material that comes into the hands of congressmen may be reached either in a direct suit or a subpoena only if the circumstances by which they come can be thought to fall outside 'legislative acts' or the legitimate legislative sphere.").

While it is true that not *all* communications with constituents are protected under the Speech or Debate Clause, such as constituent newsletters, *see Hutchinson v. Proxmire,* 443 U.S. 111, 133 (1979), the Speech or Debate Clause does protect communications that inform legislators about facts pertaining to legislation or legislative proceedings.

B. The Speech Or Debate Clause Protects Communications Among Legislators, Legislative Aides, And Interest Groups.

Various courts throughout the United States have concluded that the Speech or Debate Clause privilege also protects communications among legislators, legislative aides and advocacy organizations even where those communications are politically motivated. *See Bruce*, 631 F.2d at 280 ("Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider"); *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (noting that communications with partisan groups, political caucuses, political interest groups, and constituents to discuss legislation and potential legislation, and to form coalitions are routine and part of the legislative process).

In *Bruce*, the plaintiff brought a 42 U.S.C. § 1983 action claiming that a local South Carolina county council violated the plaintiff's civil rights because a zoning ordinance devalued the plaintiff's property. *Bruce*, 631 F.2d at 273-74. Plaintiff claimed that the county council acted outside its legislative capacity when council members met with private persons. *See id*. at 279. The Fourth Circuit rejected this argument because meetings with

interest groups are how legislators receive information "possibly bearing on legislation." *See id*. at 280. Even if the meeting was politically motivated, the court still would have upheld a finding of legislative immunity. *See id*.

C. Conclusion.

Courts within both the Commonwealth of Virginia and the federal Fourth Circuit hold that the Speech or Debate Clause is both broad and absolute, and protects communications that are within the sphere of legitimate legislative activity. This includes communications between legislators and interest groups or constituents. This confirms the plain language of Virginia's Constitution that legislators cannot be questioned in any other place concerning their Speech or Debate. *See* Va. Const. art. IV, § 9.

As noted *supra*, the subpoena requests documents and communications from the Virginia Senators concerning redistricting legislation, topics that cut to the heart of what the Speech or Debate Clause protects. The circuit court therefore erred when it found the Virginia Senators in contempt because the court ruled that communications with third parties are not protected. (App. 320, 322-23). This Court should vacate the contempt citations, reverse the circuit court, and quash the subpoenas.

III. AOE 3: THE CIRCUIT COURT ERRED WHEN IT RULED THAT THE SPEECH OR DEBATE CLAUSE DID NOT PROTECT COMMUNICATIONS BETWEEN LEGISLATORS AND THEIR STAFF WITH THE DIVISION LEGISLATIVE SERVICES.[6]

Despite recognizing that the DLS is a "legislative agency that serves legislators individually and collectively," the Circuit Court held that communications between legislators and the DLS are not protected under Virginia's Speech or Debate Clause because DLS is not a legislator, legislative committee, or the legislature as a whole, and it is not a paid employee of any of the foregoing. (App. 324). The circuit court did, however, hold that the Speech or Debate Clause protects communications concerning preclearance under Section 5 of the Voting Rights Act with the Office of the Attorney General. (App. 320-21).

Like DLS, the Office of the Attorney General is not a legislator, legislative committee, or the legislature as a whole, and it is not a paid employee of any of the foregoing. However, the circuit court correctly applied a functional standard in this instance and recognized that "its role in advising and advocating changes to the district map brings the Attorney General under the umbrella of the legislative privilege." (App. 321). For the reasons discussed *infra*, this Court should similarly hold that the

[6] The Virginia Senators hereby adopt and incorporate the separate brief filed in this case by DLS.

Speech or Debate Clause protects communications between legislators and their staff with DLS concerning redistricting legislation.

A. The Substantially Similar Federal Speech Or Debate Clause Protects Communications With The GAO And CRS.

Federal courts have extended the federal Speech or Debate Clause to protect communications between congressional officials and the Congressional Research Service and the Government Accountability Office. As to the GAO, the U.S. District Court for the Northern District of Florida ruled that the Speech or Debate Clause covered a GAO investigator's communications with the House Committee on Government Operations concerning an investigation that the Committee's chairman initiated. *See Chapman*, 647 F. Supp. at 552-54. The court quashed the subpoena because under *Gravel*, the investigator's activity would have been protected had the same act been performed by a congressman. *See id*. at 553-54.

Similarly, the U.S. Court of Appeals for the D.C. Circuit held that the common law privilege "for communications preliminary to a legislative proceeding" applied to communications with the Congressional Research Service, an agency that "is an arm of Congress that collects and analyzes information for potential legislation." *See Webster*, 731 F.2d at 2 and n.2. There, the court ruled that CRS was within the umbrella of this absolute

privilege and declined to find whether the privilege applied. *See id*. at 5-7. However, the court remanded to the district court to determine whether the defendant's memorandum—which contained the allegedly defamatory content—was sent to the CRS simply to inform them about a subject properly within their jurisdiction. *Id*. at 3, 7.

B. This Court Should Hold That Virginia's Speech Or Debate Clause Protects Communications Between The Virginia Senators And DLS.

As noted *supra*, the subpoenas seek documents and communications about the crafting, drafting, amending, and deliberating about redistricting legislation. This cuts to the heart of what the Speech or Debate Clause protects.

DLS, as the circuit court noted, "[s]erves legislators individually and collectively." (App. 324). Like the CRS, the DLS is statutorily authorized to assist legislators in successfully completing their legislative obligations. *See, e.g.*, Va. Code § 30-28.16(A-B) (outlining duties of the Division that include acting at the behest of individual Members of the General Assembly to, among other things, advise on the legal effect of proposed legislation including the constitutionality of proposed legislation, compile statistics about the impact of the Commonwealth's statutes, and conduct research at the behest of Members). Furthermore, the Director of DLS serves at the

pleasure of the House and Senate Committees on Rules and is subject to their oversight. Va. Code §§ 30-28.12, 30-28.16(C).

Just as the federal Speech or Debate Clause protects communications with congressional members and officials at the CRS and GAO, so too should this Court hold that the Speech or Debate Clause protects communications between the Virginia Senators and the DLS regarding the crafting, drafting, amending, and deliberating over redistricting legislation. This Court should vacate the circuit court's finding of the Virginia Senators in contempt and reverse the circuit court's holding that the Speech or Debate Clause does not protect communications with the DLS. (App. 324).

CONCLUSION

Virginia's Speech or Debate Clause confers a constitutional right that is both broad and absolute. Appellees seek documents and communications concerning the crafting, drafting, amending, and deliberating over redistricting legislation. Appellees' document requests go straight to the very heart of what the Speech or Debate Clause protects, namely, the ability of legislators to be free from outside interference and to therefore give legislators the breathing room to speak freely about the business pending before the legislature.

To fulfill the purposes of this broad and absolute privilege, this Court should vacate the circuit court's finding the Virginia Senators in contempt. This Court should also reverse the circuit court's opinion and February 16, 2016 order and quash the subpoenas issued to the Virginia Senators.

Respectfully submitted on this 27th day of May, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Va. Sup. Ct. R. 5:26 and is 50 pages long exclusive of the cover page, the Table of Contents, Table of Authorities, the Certificate of Compliance and the Certificate of Service.

By: *Shawn Toomey Sheehy*

Shawn Toomey Sheehy (VSB 82630)

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, that rule 5:26 has been complied with, and a PDF copy of the foregoing was emailed to the following counsel:

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ATTACHMENTS OF UNREPORTED CASES

ACORN (THE NEW YORK ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW), NEW YORK ACORN HOUSING COMPANY, INC., VIC DEVITA, AND NATALIE GUERRIDO, Plaintiffs, VERSUS COUNTY OF NASSAU, INCORPORATED VILLAGE OF GARDEN CITY, AND GARDEN CITY BOARD OF TRUSTEES, Defendants.

No 05-CV-2301 (JFB) (WDW)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 82405

September 10, 2009, Decided
September 10, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by *ACORN v. County of Nassau, 2010 U.S. Dist. LEXIS 59368 (E.D.N.Y., June 15, 2010)*

PRIOR HISTORY: *ACORN v. County of Nassau, 2007 U.S. Dist. LEXIS 71058 (E.D.N.Y., Sept. 25, 2007)*

COUNSEL: [*1] For Plaintiffs: Frederick K. Brewington, Esq., Law Offices of Frederick K. Brewington, Hempstead, New York; Paul B. Sweeney, Kim F. Bridges, Cynthia Dorsainvil Sleet, Jenny Rubin Robertson, Stanley Joseph Brown, Toby William Smith, Sabrina Helene Cochet, Esqs., Hogan & Hartson LLP, New York, New York; Peter Joseph Dennin, Esq., Simpson, Thacher & Bartlett LLP, New York, New York; Joseph D. Rich, Esq., Lawyers' Committee for Civil Rights, Washington, D.C.

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JUDGES: JOSEPH F. BIANCO, United States District Judge.

OPINION BY: JOSEPH F. BIANCO

OPINION

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiffs The New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Francine McCrary, and Vic DeVita (collectively, "plaintiffs"), [1] brought this civil rights action against defendants the County of Nassau, the Incorporated Village [*2] of Garden City, and the Garden City Board of Trustees (collectively, "defendants"), alleging that defendants have engaged in a long-standing pattern and practice of preventing African-American and other minority persons from residing in predominantly white communities. Specifically, plaintiffs allege that defendants have

engaged in exclusionary zoning procedures that prevented the development of affordable multi-family housing opportunities on a 25-acre parcel of County-owned property in Garden City, New York, in violation of the Fair Housing Act ("the FHA"), *42 U.S.C. § 3601, et seq.*, the Civil Rights Act of 1866, *42 U.S.C. §§ 1981*, *1982*, and *1983*, the Civil Rights Act of 1964, *42 U.S.C. § 2000d, et seq.*, and the *Equal Protection Clause of the Fourteenth Amendment*. On March 10, 2006, the County and the Garden City defendants moved separately to dismiss the action, for lack of standing and failure to state a claim. By Memorandum and Order dated July 21, 2006, this Court denied both motions in their entirety. *See ACORN v. County of Nassau, No. 05 Civ. 2301 (JFB) (WDW), 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732 (E.D.N.Y. July 21, 2006)*. Familiarity with that underlying decision is presumed.

1 The original complaint, [*3] filed on May 12, 2005, included individual plaintiffs Daphne Andrews, Vernon Ghullkie and Natalie Guerrido, as well. (Docket Entry No. 1.) The Amended Complaint, filed November 30, 2005, dropped Daphne Andrews as an individual plaintiff and added Lisbett Hunter as an individual plaintiff. (Docket Entry No. 24.) By Stipulation and Order dated October 24, 2006, Guerrido dismissed all claims against the defendants. (Docket Entry No. 51.) By Stipulation and Order filed May 22, 2008, Ghullkie and Hunter dismissed all claims against the defendants. (Docket Entry No. 114.)

Pending before the Court is plaintiffs' motion, pursuant to *Rule 72(a) of the Federal Rules of Civil Procedure*, to "set aside or modify a portion" of the September 25, 2007 discovery order of Magistrate Judge William D. Wall (hereinafter, "the Order") which granted in part and denied in part plaintiffs' motion to compel testimony withheld by the Garden City defendants on the grounds of legislative privilege. Specifically, Magistrate Judge Wall held: (1) legislative privilege is available to protect inquiry into the actual deliberation and motivations of legislators of the Garden City Board of Trustees in this case; (2) the [*4] privilege extends to both documents and testimony reflecting such deliberations and motivations; (3) the privilege extends to the Village Administrator and the Superintendent of the Village's Building Department, to the extent that they were communicating with the Village Board or performing acts in furtherance of their legislative duties (and their presence during conversations does not act as a waiver of the privilege); and (4) the privilege extends to a consulting firm retained by Garden City as a land use/zoning specialist, but did not apply to communications or documents produced or shared with the firm's personnel prior to the issuance of the firm's report to the Village Board (*i.e.*, May 14, 2003). Defendants have submitted 22 documents for *in camera* review that they assert are subject to the privilege.

For the reasons set forth below, this Court finds no error in the thorough and well-reasoned Order issued by Magistrate Judge Wall and, therefore, plaintiffs' motion is denied. This Court requests that Magistrate Judge Wall review the documents *in camera* within the framework set forth in his Order, with the additional instruction that any documents illustrating that racial considerations [*5] were part of the legislative deliberations in the zoning decision at issue in this case must be produced because, with respect to any such documents (if they exist), the seriousness of the litigation and the issues involved, including the critical national interest in civil rights enforcement, outweigh the other factors favoring the application of the qualified legislative privilege.

I. Background

A. The September 25, 2007 Order

On January 3, 2007, plaintiffs moved, pursuant to *Federal Rule of Civil Procedure 37(a)*, to compel both documentary and testimonial evidence from the Garden City defendants withheld on the grounds of legislative privilege. (*See* Docket Entry No. 58.) Specifically, plaintiffs sought evidence regarding communications between the Garden City Board of Trustees, Garden City employees and the outside consulting firm of Buckhurst Fish & Jacquemart, Inc. ("BFJ") as it related to the re-zoning of the Social Services site. (*See id*. at 1.) Plaintiffs argued that the legislative privilege, as asserted by the Garden City defendants prior to and during the scheduled deposition of BFJ representative Frank Fish, is inapplicable because the public's interest in obtaining the requested [*6] information outweighs any governmental interest in protecting the confidentiality of the legislative process. (*See id*. at 2-3.) Plaintiff further asserted that, even if the privilege was properly invoked, it was waived by the Board of Trustees' inclusion of non-legislative personnel in its deliberative communications. (*See id*. at 3.) The Garden City defendants argued that the balancing test weighs in favor of the privilege and that it was not

waived by the presence of non-Board employees and BFJ, as the former served as legislative aides and the latter acted as legislative consultants. (*See* Docket Entry No. 60.)

By Order dated September 25, 2007, Magistrate Judge Wall granted in part and denied in part plaintiffs' motion to compel discovery materials withheld by the Garden City defendants on the assertion of legislative privilege related to the Board, as well as Garden City Building Superintendent Filippon, Garden City Administrator Schoelle, and personnel from BFJ. (*See* Docket Entry No. 87, hereinafter the "Order.") Recognizing that the legislative privilege is a qualified one, Magistrate Judge Wall identified the five factors courts consider when weighing the assertion of legislative [*7] privilege, specifically:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (quoting *In re Franklin Nat'l Bank Secs. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979))*. Magistrate Judge Wall determined that "the most significant factors to be considered" in the instant case were the availability of other evidence and the seriousness of the litigation. (Order at 5.) [2] As to the former, Magistrate Wall determined that it did not weigh in favor of piercing the privilege because plaintiffs could access "the materials and information available [to the Board] at the time a decision was made," and indeed, had already obtained "[s]ubstantial documentary evidence." (*Id*. at 6.) Regarding the latter, Magistrate Wall noted that, although the matter involves alleged race-based discrimination and the alleged violation of plaintiffs' civil rights, plaintiffs [*8] had failed to identify any case where "the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations." (*Id*.) Furthermore, Magistrate Judge Wall stated that "plaintiffs cannot point to any independent evidence of a discriminatory motive that would convince the court that this is an 'extraordinary instance' in which such inquiry should be allowed." (*Id*.) In short, Magistrate Judge Wall concluded that "[a]lthough the court recognizes the difficulty of plaintiffs' burden of proving discriminatory intent, they have not produced a compelling reason sufficient to overcome the legislative privilege." (*Id*.)

> 2 The Order also noted that the Supreme Court addressed the tension between plaintiffs' need for evidence and a legislator's need to act free of worry about inquiry into deliberations, stating: "[I]n 'some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, *although even then such testimony frequently will be barred by privilege*.'" (Order at 5 (quoting *Vill. of Arlington Heights v. Metro. Hous.Dev Corp.., 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)* (emphasis [*9] added by Order).)

Magistrate Judge Wall next addressed plaintiffs' argument that Garden City employees and BFJ were not entitled to invoke the privilege, as they are not legislators. Noting that the employees at issue both provide reports and recommendations to the Board members related to the passage of legislation and that those Board members are particularly reliant on such assistance because they perform their official duties on a volunteer, part-time basis, Magistrate Judge Wall determined that the employees were entitled to invoke the privilege as "legislative staff members." (*See id*. at 9 ("[The employees] are determined to be legislative staff members and as such, may assert legislative privilege as to their acts performed in furtherance of their legislative duties.").) Regarding BFJ, Magistrate Judge Wall determined that they, too, could invoke the privilege, because in their work on the Social Services re-zoning project, they acted as legislative consultants. However, "[c]ommunications prior to the issuance of the report [we]re more like conversations between legislators and knowledgeable outsiders and [we]re therefore discoverable." (*Id*. at 11.) Magistrate Judge Wall set [*10] that temporal marker as May 14, 2003, the date on which BFJ submitted its first report to the Board. (*See* Docket Entry No. 96.) However, Magistrate Judge Wall stated that "if necessary, [he would] make a determination regarding production of post-report documents on a case by case basis after *in camera* review." (Order, at 11.) The 22 documents at issue have been submitted to Magistrate Judge Wall for review

pending the outcome of this appeal of his Order.

B. Procedural History

On October 10, 2007, plaintiffs appealed the Order of Magistrate Judge Wall granting in part and denying in part their motion to compel certain documents from the Garden City defendants. On October 19, 2007, the Garden City defendants opposed plaintiffs' appeal. On October 26, 2007, plaintiffs submitted their reply. Oral argument was heard on August 21, 2009. This matter is fully submitted.

II. STANDARD OF REVIEW

Rule 72(a) states that a district court shall only set aside a discovery order of a magistrate judge when it has been shown that the magistrate's order is "clearly erroneous or contrary to law." *See also 28 U.S.C. § 636(b)(1)(A)*. Indeed, it is well-settled that "[a] magistrate judge's resolution of discovery [*11] disputes deserves substantial deference." *Weiss v. La Suisse, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001)*; *see also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 124 F.R.D. 75, 77 (S.D.N.Y. 1989)* ("[I]n resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused.") (quotations omitted).

III. DISCUSSION

The Court has carefully reviewed the parties' submissions related to plaintiffs' appeal, as well as the September 25, 2007 Order, and finds no grounds to disturb that ruling, as set forth in more detail below.

A. The Magistrate Judge's Order Properly Applied the Qualified Legislative Privilege to Documents Evincing Legislative Intent

Plaintiffs first object to the Order on the grounds that it improperly extended the legislative privilege beyond subjects addressed in deposition testimony to documentary evidence. Specifically, they argue that the "seriousness of the litigation," *i.e.*, the civil rights implicated, outweighs any qualified legislative privilege as to documentary evidence. As set forth below, and for the reasons outlined in the Magistrate Judge's Order, the Court concludes that Magistrate Judge Wall did not err in ruling [*12] that the legislative privilege would apply not only to testimony into the actual deliberation and motivations of legislators of the Garden City Board of Trustees in this case, but also to documents reflecting the same.

In their objections, plaintiffs rely heavily upon the ruling in *Manzi v. DiCarlo, 982 F. Supp. 125, 129 (E.D.N.Y. 1997)*, wherein the magistrate judge permitted plaintiff to examine documents pertaining to the funds allocated to legislator defendants for staff members, despite defendants' assertion of legislative privilege. However, that case is inapposite to the instant matter, as the allocation of funds was deemed to be "within the discretion of the Senate Majority leader and not related to the passage of legislation." *Id*. The court thus determined that, because defendants' "claim of confidentiality appear[ed] to be based, in large part, on the State's interest in preserving the secrecy of an allocation process that has historically been separate from general Senate proceedings and protected from disclosure" and not on the legislative process, the legislative privilege was not implicated. *Id*. The court further ruled that, even if it was related to the legislative process, [*13] plaintiff's interest in enforcing her federal rights would outweigh that privilege because it was "not apparent how removal of the confidential designation would disrupt the legislative process." *Id. at 130*. Finally, before ordering the production of the documents, the court in *Manzi* first conducted an *in camera* review of the documentary evidence.

In the instant case, unlike in *Manzi,* the documents that Magistrate Judge Wall found would be precluded directly implicate the legislative process -- namely, the Village Board's communications with its consultant on a zoning issue, including any documents that would reflect the deliberations and motivations of the Village Board. For such core documents, the seriousness of the litigation, by itself, is insufficient to overcome the other compelling factors (outlined by Magistrate Judge Wall) that support application of the legislative privilege in this particular case. Thus, the *Manzi* decision provides limited guidance to the issues presented by the instant matter and Magistrate Judge Wall correctly distinguished it.

Plaintiffs further rely upon the ruling in *Rodriguez v. Pataki, 02-CV-618 (RMB) (FM), 02 Civ. 3239 (RMB) (FM), 2003 U.S. Dist. LEXIS 15934, 2003 WL 22109902, at *2-3 (S.D.N.Y. Sept. 10, 2003)* [*14] (Maas, M.J.), *aff'd*, *293 F. Supp. 2d 313 (S.D.N.Y. 2003)*, in which the magistrate judge ordered the production of a single document (out of numerous documents) withheld on the

grounds of legislative privilege because it revealed that defendant legislators impermissibly considered race as a factor in legislative redistricting. Plaintiffs argue that because race-based discrimination is also alleged in the instant action, the circumstances herein require the same outcome. However, the court in *Rodriguez* made that determination after it conducted an *in camera* review. *See Rodriguez, 2003 U.S. Dist. LEXIS 15934, 2003 WL 22109902, at *2*. The Court agrees with plaintiffs (and, in fact, defendants conceded this point at oral argument) that, if any of the withheld documents reveal that racial considerations played any role in the legislative deliberations regarding the re-zoning of the Social Services site, then the factors regarding legislative privilege would warrant production of those documents, as in *Rodriguez*. Moreover, the Court also agrees with plaintiffs that, even where the legislative privilege bars questioning or production of documents revealing a legislator's deliberations, it does not also prohibit inquiries [*15] into documents and information available to the legislators at the time the decision was made. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.20, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*. Any objection to Magistrate Judge Wall's Order on that basis is ill-founded because Magistrate Judge Wall made clear that documents can only be withheld if they reflect a legislator's deliberation or motivation with respect to the zoning decision. [3]

> 3 Plaintiffs also argue that the legislative redistricting case of *Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292 (D. Md. 1992)* requires production of the withheld documents, because the three-judge district court panel in that case stated that defendants would be required to "produce any documents prepared by [the Governor's] Committee during the course of its deliberations which [we]re requested by plaintiffs, subject . . . to the assertion of any other privilege . . . ." *Id. at 302 n.20*. In doing so, the panel determined that the legislative privilege was not applicable to any documents generated prior to a bill's first introduction to the floor of the legislature. This determination implicates two issues -- one, whether documents [*16] reflecting legislative intent can be somehow distinguished from deposition testimony regarding the same, and two, at what point in the legislative process those documents reflect non-discoverable deliberative processes. As to the first issue, the Court sees no reason why documents evincing legislative intent should be more discoverable than deposition testimony reflecting the same, as both implicate the same interests. Regarding the second issue, as the *Rodriguez* court noted in distinguishing its own decision to extend the privilege to certain documents generated by an outside committee prior to the official introduction of a piece of legislation: "the [*Schaefer*] court acknowledged that any changes that may have been made to a proposed redistricting plan once it reaches the floor of the legislature, and the rationale therefore, fall squarely within the legislative or deliberative process privilege. Nevertheless, actions which are legislative do not begin only when a bill reaches the floor of the legislature. As every high school student knows, the process of drafting legislation is also an important part of how a bill becomes law." *Rodriguez, 280 F. Supp. 2d at 101* (internal citations [*17] and quotation marks omitted). The Court finds the *Rodriguez* analysis to be persuasive in this regard and determines, as discussed in further detail *infra*, that the fact-finding and analysis preceding the first draft of a bill can, depending on the circumstances, trigger the privilege before that draft is ultimately introduced. *See, e.g., Kay v. City of Racho Palos Verdes, No. CV 02-03922 MMM RZ, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *11 (C.D. Cal. Oct. 10, 2003)* ("Requiring testimony about communications that reflect objective facts related to legislation subjects legislators to the same burden and inconvenience as requiring them to testify about subjective motivations -- 'the why questions.' Creating an 'objective facts' exception to the legislative process privilege thus undermines its central purpose.").

In sum, the Court concludes that Magistrate Judge Wall did not err in concluding that the qualified legislative privilege applied to testimony and documents reflecting a legislator's deliberations or motivations relating to the Board's zoning decision. Thus, Magistrate Judge Wall shall review the 22 documents to determine whether the documents reflect a legislator's deliberation or motivation relating [*18] to the zoning decision. Any such documents can be withheld under the legislative privilege, unless any of the withheld documents reveal that racial considerations played any role in the

legislative deliberations regarding the zoning decision, in which case such documents must be produced. This framework will ensure that the factors relating to the qualified legislative privilege are properly balanced, including the "seriousness of the litigation and the issues involved" and "the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."

B. The Magistrate's Order Properly Extended the Qualified Legislative Privilege to Non-Legislators Performing Legislative Functions

Plaintiffs also seek reversal of Magistrate Judge Wall's determination that the legislative privilege applies to two non-legislative Garden City employees -- the Superintendent of the Village's Building Department (Michael Filippon) and the Garden City Village Administrator (Robert Schoelle) -- and BFJ, which was the private consulting firm hired by Garden City in connection with the zoning issues. Specifically, plaintiffs assert that Schoelle and Filippon do not [*19] qualify as "legislative staff members" simply because they provided recommendations to legislators regarding the re-zoning of the Social Services site, and that BFJ does not qualify as a legislative committee because it simply served as an outside consultant with expertise in technical zoning matters. As set forth below, the Court concludes that Magistrate Judge Wall did not err in his rulings regarding the application of the legislative privilege to communications between the Village Board and the aforementioned parties.

As noted in the Order, it is well-settled that "[w]here a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator." (Order at 8 (citing *United States v. Gravel, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)*.) Because the legislative members in the instant action perform their duties on a part-time volunteer basis and therefore rely upon Schoelle and Filippon for assistance in carrying out their legislative functions, Magistrate Judge Wall concluded that these two Village employees properly qualify as legislative aides and are entitled [*20] to assert the privilege insofar as it relates to acts "performed in furtherance of their legislative duties." (*Id*. at 9.) Plaintiffs argue that these individuals may not assert the privilege because they do not claim to be "personal staff member[s] for any particular Garden City legislator." [4] In doing so, plaintiffs stress form over substance, as the appropriate inquiry does not focus on the technical titles of the individuals at issue, but rather the nature of the functions that they performed. *See, e.g., Johnson v. Metro. Gov. of Nashville and Davidson County, Nos. 3:07-0979, 3:08-0031, 2009 U.S. Dist. LEXIS 56538, 2009 WL 1952780, at *4 (M.D. Tenn. July 2, 2009)* ("When evaluating whether there is a claim for legislative immunity, courts are to evaluate the 'function' performed by the individual claiming the privilege, that is, whether the function performed was 'legislative' or 'administrative,' not whether the entity in which the individual was operating was necessarily solely a legislative body.") (citing *Bogan v. Scott-Harris, 523 U.S. 44, 54-55, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998)*). Here, Schoelle and Fillippon have submitted sworn statements regarding the nature of their duties as Garden City employees, which include providing assistance [*21] to the Board members in performing their legislative functions. *Cf. Almonte v. City of Long Beach, No. 04-CV-4192 (JS) (JO), 2005 U.S. Dist. LEXIS 46320, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005)* (in denying extension of privilege to city manager, noted that "defendants make no effort to show that [the city manager], in the words of *Bogan*, 'performs legislative functions' or took any 'actions [that] were legislative because they were integral steps in the legislative process.'"). Accordingly, these individuals may properly assert privilege related to those duties. [5]

4 Plaintiffs argue that the decision in *Fla. Ass'n of Rehab. Fac., Inc. v. State of Fla. Dep't of Health and Rehab. Servs., 164 F.R.D. 257, 267 (N.D. Fla. 1995)* supports their argument in this regard, as the court in that case restricted the legislative privilege "to communications between an elected legislative member and his or her personal staff members involving opinions, recommendations or advice about legislative decisions." *Id. at 267*. However, that court stated that the purpose of extending such a privilege to such individuals was to "protect the confidentiality of communications with the office-holder involving the discharge of his or [*22] her office." *Id*. The affidavits submitted by Schoelle and Filippon indicate that their duties as Village employees involve these very types of communications. (*See, e.g*., Docket Entry No. 69, Ex. 1, Schoelle Aff. PP 2-3 (duties include

making reports to Board for "considering and reviewing potential new legislation"); Ex. 2, Filippon Aff. P 2 ("The Superintendent of a Village Building Department is required to, among other things, make 'recommendations . . . for adoption of new laws.'") (quoting County of Nassau Civil Service job description).) Moreover, the *Florida Association* court refused to extend the privilege to the outside committee at issue because that committee was, by specific statute, excluded from the legislative branch. There is no such clear delineation here. Accordingly, the court's reasoning in the aforementioned case does not require a different outcome in the instant action.

5 Of course, to the extent that these individuals may possess other relevant information that was not acquired pursuant to their legislative functions for the Board, but rather was obtained pursuant to their other job responsibilities for the Village, such information would not be protected by [*23] the legislative privilege.

Finally, plaintiffs argue that the privilege should not extend to BFJ because it functioned, at all times relevant to this litigation, solely as a "knowledgeable outsider" and, therefore, its testimony would not intrude into the legislature's prerogatives. As all parties concede, "fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity." *Government of Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985)*. The parties disagree as to the extent that BFJ provided these services. [6] Magistrate Judge Wall determined that BFJ's activities prior to the presentation of its first report to the Board were more akin to "conversations between legislators and knowledgeable outsiders" (as in *Rodriguez, 280 F. Supp. 2d at 101*) and were, therefore, discoverable. However, Magistrate Judge Wall further concluded that "[t]aking the presentation of a report upon which legislation was based as the necessary starting [*24] point of the Board's deliberations," all communications thereafter that reflected any legislative intent were privileged. (Order at 11.) The Court concurs in this analysis. As stated *supra*, "actions which are legislative do not begin only when a bill reaches the floor of the legislature," *Rodriguez, 280 F. Supp. 2d at 101*, and the Garden City defendants have established that communications between the Board members and BFJ that followed the submission of the first report should be protected to the extent that such communications reflected legislative deliberations or motivations (with the exception of communications reflecting racial considerations). Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege. To hold otherwise under the particular circumstances of this case would impair the legislative function by requiring them to exclude their own retained experts from the critical legislative conversations about the precise issues the experts were hired to address. *See generally Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007)* [*25] ("Meeting with persons outside the legislature -- such as executive officers, partisans, political interest groups, or constituents -- to discuss issues that bear on potential legislation, and participating in party caucuses to form a united position on matters of legislative policy, assist legislators in the discharge of their legislative duty. These activities are also a routine and legitimate part of the modern-day legislative process."). Accordingly, those communications are covered by the qualified legislative privilege and subject to the balancing test outlined above, which this Court finds weighs in favor of protection for the reasons outlined by Magistrate Judge Wall.

6 Specifically, plaintiffs argue, that because the outside committee in *Rodriguez* had "greater legislative ties than BFJ," (Order at 10), and the magistrate judge in that case ordered the production of certain documents created by that committee, BFJ, by extension, should produce all of its documents. The Court finds this argument unpersuasive. Although the court in *Rodriguez* found that certain information regarding the operation of a task force with four legislators and two non-legislators was not subject to legislative [*26] privilege, the court also denied the motion to compel information to the extent it sought information concerning "the actual deliberations of the Legislature -- or individual legislators -- which took place outside [the Task Force], or after the proposed redistricting plan reached the floor of the Legislature." *280 F. Supp. 2d at 103*. Therefore, neither the facts nor the result in *Rodriguez* suggest that no legislative privilege

> should attach at all to the Board's communications with BFJ, and Magistrate Judge Wall did not err in establishing a temporal marker (combined with *in camera* review) to distinguish documents that did not implicate legislative processes from those that did.

In sum, having considered plaintiffs' objections, Magistrate Judge Wall did not err in concluding that (1) the legislative privilege extends to the Village Administrator and the Superintendent of the Village's Building Department, to the extent they were communicating with the Village Board or performing acts in furtherance of their legislative duties (and their presence during conversations does not act as a waiver of the privilege), and (2) the privilege extends to the consulting firm retained by Garden City [*27] as a land use/zoning specialist, but does not apply to communications or documents produced or shared with the firm's personnel prior to the issuance of the firm's report to the Village Board (*i.e.*, May 14, 2003).

IV. CONCLUSION

The Court recognizes that the allegations in the instant matter, of race-based housing discrimination, are serious indeed, and that the legislative privilege is a qualified one. However, it is plain to the Court from its review of Magistrate Judge Wall's Order, as well as relevant case law, that the Order struck the appropriate balance between the competing interests implicated and, therefore, is not "clearly erroneous" or "contrary to law." Moreover, if Magistrate Judge Wall's *in camera* inspection reveals evidence of racial considerations in the decision-making process, they shall be produced. This framework will ensure that the balance is maintained, and that the privilege is not asserted at the expense of inviolable civil rights.

Accordingly, for the reasons set forth above, plaintiffs' motion seeking to set aside the September 25, 2007 discovery order of Magistrate Judge Wall is denied. Magistrate Judge Wall can now expeditiously review *in camera* the twenty-two [*28] documents submitted by the Garden City defendants. The documents will be reviewed within the framework set forth in the September 25, 2007 Order, with the additional instruction that any documents illustrating that racial considerations were part of the legislative deliberations must also be produced.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: September 10, 2009

Central Islip, New York

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

Broadstone Security, LLC,
trading as NOVA Armory, Plaintiff

v.

1. John Doe, Jane Doe,
and other person or persons unknown, to be identified and added by an appropriate motion if, as, and when their identity and location information be discovered; and the following:
2. Ryan Albert (3174 20th St, Arlington, VA 22201; 703-243-0353)
3. Susan Anthony *
4. Laura Bannach (229 N Barton St., Arlington, VA 22201; 703-527-1297)
5. Bonnie Beckett *
6. Lauri Berlied *
7. Jay Boucher (2001 N Adams St., Arlington, VA 22201; 703-527-3070)
8. Laura Browning *
9. Sacha Cohen *
10. Saidouna Zouiten Dagata *
11. Lynn Davignon *
12. Mary Dodson *
13. Christian Dorsey *
14. Beth Dowd *
15. Wendy Dunn *
16. Sammy Dweck *
17. Barbara A. Favola *
18. Beth Fine *
19. Angela Gentile *
20. Jackie Gentile-Azbill *

At Law

No. CL 16001861-00

Civil Division

SERVICE OF PROCESS IS NOT REQUESTED AT THIS TIME. These defendants will asked to waive service pursuant to Va. Code § 8.01-286.1 and Va. Sup. Ct. Rule 3:4.

RECEIVED AND FILED
CIRCUIT COURT
APR 18 2016
EDWARD F. JEWETT, CLERK
BY_____D.C.

21. Danielle LaLone Gerber *

22. Anne Davis Gillet *

23. Geoff Gregory *

24. Nathan Guerrero (4020 Washington Blvd., Arlington, VA 22201; 703-524-4354)

25. Susan Hildebrandt (410 N Kenmore St., Arlington, VA 2220; 703-522-6105)

26. Cragg Hines *

27. Nara Hojvat-Gallin (2921 2nd St., Arlington, VA 22201; 703-807-2059)

28. Patrick Alan Hope, 512 N Park Dr., Arlington, VA 22203

29. Janet Denison Howell (11338 Woodbrook Ln., Reston, VA 20194; 703-709-8283)

30. Michael Hughes (2100 S Monroe St., Arlington, VA 22204; 703-979-2040)

31. Emily Hughes aka Emily Hughes Ilich *

32. Chris Jones (1020 N Quincy St., Arlington, VA 22201; 571-970-0334)

33. Bill Jonscher *

34. Barbara Kanninen *

35. Elle Kasey (1505 Crystal Dr., Arlington, VA 22202; 571-970-3119

36. Nancy Kellner (550 14th Rd; Arlington, VA 22202; 703-892-4869)

37. Mark H. Levine (805 Rivergate Pl., Alexandria, VA 22314; 703-549-1001)

38. Alfonso H. Lopez *

39. Hoda Moustafa (3225 N Pershing Dr., Arlington, VA 22201; 703-807-1017)

40. Kathleen Frizzell Murray *

41. Patricia Overend *

42. Medha Parikh (1401 N Taft St., Arlington, VA 22201; 571-312-5562)

43. Linda Peebles *

44. Tenley D Peterson *

45. Michael Rafky (415 N Fillmore St., Arlington, VA 22201; 703-243-0323)

46. Susan Robinson *

47. Caroline Rogus (714 N Irving St., Arlington, VA 22201; 703-528-4873)

48. Natalie Roy (Roy, Natalie; 34 N Highland St., Arlington, VA 22201; 703-524-4119)

49. Jennifer Sable (1276 N Wayne St; Arlington, VA 22201; 703-527-1397)

50. Dana Sapatoru (3120 2nd Rd., Arlington, VA 22201; 703-527-3120)

51. Schuetz, Aaron

52. Micaela Schweitzer-Bluhm *

53. Sheela Shah *

54. Palak Shah *

55. Sheri Shepherd-Pratt *

56. Soumya Silver *

57. Jason Silverman (416 N Cleveland St., Arlington, VA 22201; 703-888-2969)

58. Gordon Simonett *

59. Karen Taylor Soiles (4923 14th St., Arlington, VA 22205; 703-465-0397)

60. Richard Cyril Sullivan, Jr. *

61. Jen Swedish *

62. Jeanne Williams (720 N Irving St., Arlington, VA 22201; 703-243-4979)

63. Julia Young *

64. Bess Zelle *

Defendants (* location information unavailable at the time of filing but will be supplied as discovered.)

Complaint

Comes now the Plaintiff, Broadstone Security, LLC, trading as NOVA Armory, by counsel, and moves this Court for entry of an order of judgment against each of the defendants, and all of them, jointly and severally, as prayed herein:

1. The unnamed defendants, and those against whom Plaintiff proceeds under pseudonyms will be added by appropriate motions to correct the style of the case as the information about their identity and location become available.

2. Plaintiff Broadstone Security, LLC, is, and was at all times material hereto, a limited liability company chartered in the Commonwealth of Virginia, and has properly registered the fictitious trade name, "NOVA Armory" in connection with its business located at Suite "2B", 2300 Pershing Drive, Arlington, Virginia 22201-1428.

3. The exhibit comprises a letter which was transmitted to Plaintiff's landlord and others; that exhibit is a true and correct copy of the substance of the said letter.

4. The exhibit purports to have been executed and transmitted from offices of the undersigned officials located in the City of Richmond.

5. These officials are all named as defendants, as the execution and transmission of that letter comprised tortious acts, underlying, among other tortious acts, the cause of action pled herein, and thus venue is appropriate in this Court.

6. As one or more of the tortious acts comprising the cause of action complained of herein occurred within the City of Richmond, venue is appropriate in this Court.

7. Inasmuch as some of the defendants (Patrick A. Hope, Barbara A. Favola, Alfonso H. Lopez, Janet D. Howell, Richard C. Sullivan, Jr., Adam Ebbin, and Mark H. Levine) are officers of the Commonwealth, sued in their official capacity as well as personally, have their principal offices within the City of Richmond, venue is appropriate in this Court.

8. Defendants in this action communicated among themselves for the purpose of destroying Plaintiff's business. The legislators named as defendants signed the letter, attached as an exhibit, in furtherance of that malicious purpose and for no good reason. The Defendants used social media to communicate and to post messages to each other and to the public of a defamatory nature intended to smear Plaintiff and destroy its business. Their intentional, willful, and malicious acts in their conspiracy to injure Plaintiff's business and reputation caused a great deal of difficulty with the result that Plaintiff's staff members were required to expend time in merely attempting to survive the crisis; in meetings with the landlord, with logistical problems, with dealing with harassing telephone calls and electronic mail, and in heightened security concerns. Death threats were made by mail to a sixteen year-old girl, herself Plaintiff's employee and the daughter of Plaintiff's business manager. Their personal telephones were made the instruments of attack, and private home addresses made public through newspaper distribution. Plaintiff's employees grew fearful and apprehensive due to the violent and vitriolic nature of the defendants' threats and rhetoric. As one of the defendants recently stated:

"...The opposition is united and overwhelming. The voice of the community is clear. We are against it; it is an assault on our character and values; we will fight it until it goes away."

9. The defendants' conduct has caused actual damages in the form of both special and general damages, estimated as nearly as possible to comprise the following:

   a. $69,041.14 in lost revenue;
   b. $1,000,000.00 or such amount as may be proved at trial representing the present value of the diminution of the future income stream over time;
   c. $5,000.00 physical and personal protection expenses;
   d. $24,300.00 in lost opportunity costs due to the inability to attend to other profitable activities;
   e. $100.00 Phone number change due to harassment and stalking behavior by the defendants;
   f. $3,000.00 time lost related to employee having to effect phone number change and related costs; and
   g. $1,000,000.00 in general damages by reason of the injury done to the business' good will and reputation.

10. The object of the conspiracy was an attempt to interfere in the economic relations of the Plaintiff such that the Plaintiff's landlord would breach its lease agreement with the Plaintiff and otherwise bring social, political, and economic pressure to bear upon Plaintiff and Plaintiff's business in order to unlawfully force Plaintiff's business to shut down.

11. The object of the conspiracy was to put Plaintiff out of business at the Arlington County location by the use of unlawful means.

12. Each of these defendants was, or had been, in communication with other defendants named and unnamed, with regard to the object of the conspiracy.

13. At least one overt act was taken by at least one member of the conspiracy in furtherance of the object of the conspiracy, including the issuance, execution, and transmission of the letter attached as an exhibit.

14. Each of the defendants, named and unnamed, was acting in the capacity as an agent for each of the others in the course their pursuit of the object of their conspiracy to destroy Plaintiff's business, and each is liable for the acts committed by each of the others by reason of that agency, whether or not any of them approved or even knew about the acts committed.

15. The defendants have characterized themselves as "protesters", though nothing they have done in connection with their attemp to destroy Plaintiff's business was done in the attempt to petition the government for redress of grievances. Instead, they have merely been disruptors, attempting to destroy Plaintiff's business and reputation, stalking the store with signs, parking cars covered with documents referring to horrible deaths, attempting to coërce and intimidate tenants of the same facility, etc.

16. Each of the defendants that signed the letter attached as an exhibit (Patrick A. Hope, Barbara A. Favola, Alfonso H. Lopez, Janet D. Howell, Richard C. Sullivan, Jr., Adam Ebbin, and Mark H. Levine) is an elected public official.

17. The letter is on official stationery and issued under the seal of the Commonwealth of Virginia.

18. Issuance, execution, and transmission of the letter were official acts made by the defendant signatories thereto, made under color of their respective offices.

19. Each of the signatories thereto is a legislative officer with no authority to act in an official capacity to interfere in the relationship between the Plaintiff and its landlord or other members of the local business community. Since the lease

agreement had already been executed at the time the offensive letter had been received, no legislative act could have "impaired the obligation" of that contract.

20. Issuance, execution, and transmission of that letter constituted an attempt to interfere with ongoing economic relations between the Plaintiff and its landlord by threats and intimidation, and constituted an abuse of official authority.

21. The letter was defamatory in that it asserted that the Plaintiff had opened its business in order to conduct criminal activities, namely conveyance of firearms to persons ineligible to be in possession thereof and to facilitate violent crime.

22. The signatories to the letter were and had been in communication with other members of the conspiracy, and the issuance and transmission of the letter were acts taken in furtherance of the objects and purposes thereof.

23. The transmission of the letter attached as the Exhibit was an affirmatively wrongful act.

24. The exact language sued upon is contained in the Exhibit, which is incorporated herein as though fully set forth *in haec verba*.

25. In particular, the letter refers to a statement of fact, in that it recites that its purpose is to inform the landlord of "we want to make you are aware [sic] of the potentially unintended consequences a firearms retailer **will have** in this particular location.", incorporating the previous recitations including the suggestion that the Plaintiff is responsible for Virginia's having a reputation for being a "gun-running capital", and participation in "illegal and nefarious" activities including support for a market in illegal drugs (emphasis added). The language used is the language of fact; it does not suggest what "might happen" or what "could happen".

26. The statements were made specifically to render the reputation of Plaintiff's business as odious, infamous, or subject to disgrace, shame, scorn, or contempt by insinuating that all the businesses to whom the letter was published will become tainted by the presence thereof.

27. The statements regarding the character and purposes of Plaintiff's business are, and were, false.

28. Defendants knew at the time they made the statements that they were false, mischaracterizations, and misrepresentations of fact.

29. Defendants wrote the letter for the specific purpose of defaming Plaintiff in its business, and to cause the landlord not to enter into a lease agreement by which Plaintiff is located in Arlington County.

30. The attempt to intentionally interfere with the economic relations of both the Plaintiff and the landlord constitute tortious misconduct, and therefore an unlawful purpose.

31. Taken as a whole, the statement made by that letter, including fair inferences, implications, and insinuations, was designed to, and did, injure Plaintiff in its reputation, goodwill in the community, trade, and business.

32. As early as March 4, 2016, the defendants were warned that their actions were unlawful and that legal action would be taken against them if they continued. Notwithstanding specific identification of the cause of action the defendants were generating, by the use of the phrase, "tortious interference", and emboldened by their recent success in having destroyed two other similar businesses, this criminal gang, having actual knowledge that their actions were unlawful, persisted in their malicious attempt to destroy Plaintiff's business and reputation. News stories by WJAL reporter Jeff Goldberg and ARLNow.com

reported on statements made on Plaintiff's behalf that what the disruptors were attempting to accomplish was unlawful.

33. Some of these defendants continued to make defamatory remarks against the Plaintiff and the Plaintiff's business by means of Facebook and Twitter to further publish outlandish statements under color of authority through the use of their official titles despite actual notice that their actions in that regard were tortious and unlawful. Other members of the conspiracy used these media to publish false assertions of fact regarding Plaintiff and Plaintiff's business. These remarks were published throughout the United States. For example:

> **"... gunslinger Denny better watch his every move, and stop being so slinky and unaccountable. If he crosses any legal/moral lines whatsoever, we'll be on him. You betcha! His track record on keeping his arms out of the hands of criminals sucks big time..."**

34. Defendant Mark H. Levine, in particular, stated in a "Facebook" post on March 4, 2016:

> **NoVA Armory, we don't want you selling your weapons of mass destruction near schools in Arlington! We shouldn't have to wait until people are shot dead with your military-grade semiauto-matic weaponry to protest this store. Thousands of your neigh-bors want you gone.**
>
> **Last weekend, a Woodbridge man who was arrested for pulling a gun on someone in a parking lot murdered his wife and a police officer and shot two others. How did he get his guns? Are you ready to pay for all the funerals of all the people that your guns murder? And provide reimbursement for all wrongful deaths you cause? If not, then please, we beg you, leave Arlington.**
>
> **You are not welcome here. Arlingtonians will do their best to show you how unwelcome you are. We have options. Perhaps we boycott the entire strip mall? And force people to cross an angry**

picket line? If business declines at the other stores, maybe the mall owner will change its mind. What do you think?

35. And, on Twitter, the same defendant stated,

"All someone has to do is be from Virginia, buy a bunch of guns, and sell them to DC gangs, no questions asked.";

and

"Cop-killer bullet' is a nickname for armor-piercing bullets... it's very easy to sell an AK-47 to a DC gang member from Arlington if the Armory opens here...".

36. Defendant Mark H. Levine's comments add substance to the perception that what the upper-middle and professional class suburban Virginia neighborhood is worried about is the presence of "undesirables" taking the Metro subway into their lovely Lyon Park neighborhood from the other side of the Anacostia River, buying guns and dealing drugs. These comments, among others, reveal an unfortunate prejudice against the residents of the District of Columbia and Prince George's County, Maryland.

37. The assertion that most of the people from North of the Potomac, or more particularly Plaintiff are, or would be, engaged in the kind of criminal enterprise is a false statement of fact, designed and intended to injure Plaintiff and Plaintiff's business and reputation through racist calumny and is defamatory *per se*.

Count 1: Conspiracy to Injure Another in his Trade or Business

38. Each and every one of the foregoing paragraphs is included by reference as though fully set forth herein.

39. The tortious acts of public officials acting beyond the scope of their duties as such and without authority, by making libelous statements on official letterhead under the Seal of the Commonwealth of Virginia, acting under color of authority to do so, for the purpose of intentionally, knowingly, willfully, and maliciously injuring Plaintiff in its business and its business reputation constitutes malfeasance in office.

40. At common law, malfeasance in office is both a tort and a criminal offense punishable as a felony and is an independently wrongful act.

41. That malfeasance in office was perpetrated as an abuse of authority in an attempt to coërce, intimidate, and procure the participation, coöperation, agreement or other assistance of Plaintiff's landlord and all others to whom it was published, for the purpose of intentionally, knowingly, willfully, and maliciously injuring Plaintiff in its business and its business reputation.

42. The intentionally tortious attempt to interfere with Plaintiff's economic relations with its landlord was done knowingly, willfully, and maliciously, with actual notice that it was an unlawful and tortious act, and was done for the specific purpose of injuring Plaintiff in its business and its business reputation.

43. The libelous publications made by the defendants were made intentionally, knowingly, willfully, and maliciously, for the specific purpose of injuring Plaintiff in its business and its business reputation. Defamation *per se* is in itself tortious and wrongful.

44. Among other civil rights, the right to enter into contracts is one protected by law under the Constitution of the United States; violation of that civil right under color of state authority is an independently tortious act, committed by some of the defendants in furtherance of the conspiracy as a whole, maliciously,

willfully, and intentionally, for the specific purpose of injuring Plaintiff in its trade, business, and reputation.

45. Each of the defendants, named and unnamed, was in communication at some point with at least one of the other defendants, named or unnamed, with regard to the purpose of destroying Plaintiff's reputation and business, or to destroy Plaintiff's business by the destruction of Plaintiff's reputation in the trade, forming a loosely organized network of persons engaged in the same unlawful enterprise which communicated, among other ways, via email listservs under the auspices of the Lyon Park Citizens' Association and a group set up for the purpose known as Act4LyonPark.org.

46. Act4LyonPark.org is not a corporate entity chartered in Virginia, and has been set up anonymously through a web-server in Toronto, Canada.

47. The defendants communicated for that purpose with the specific intention of doing Plaintiff, Plaintiff's business, and Plaintiff's standing in the relevant community injury; and that intention was willful and malicious in itself and carried to the degree it has been, by willful and malicious acts.

48. Defendants willfully and maliciously conspired to coërce the Plaintiff's landlord into acts violative of the lease agreement already in effect, in an attempt to destroy Plaintiff's business. Intentional interference with business expectancy and with contract is, in itself a tortious or wrongful act, and the attempt to do so is thus also tortious.

49. Defendants willfully and maliciously conspired to, and did, procure the participation, agreement, coöperation, and other assistance of persons engaged in public journalism, in an attempt to destroy Plaintiff's business reputation by

republishing the defamatory comments made among the defendants and published to others through private means.

50. One of the defendants, Hoda Moustafa, is quoted as having said, on behalf of the gang of defendants, in a Washingtonian Magazine ("Washingtonian.com", March 17, 2016) article regarding the goals and purposes of the conspiracy,

> **"We have other plans, this is not a short-term opposition. This is a long-term battle, and we're not giving up."**

Wherefore, Plaintiff Broadstone Security, LLC, trading as NOVA Armory moves this Court for entry of an order of judgment against each of the defendants, and all of them, jointly and severally, in the amount of $2,101,441.14, and further that such amount be trebled and that Plaintiff be awarded its costs and attorneys' fees and interest at the judgment rate on the total thereof from the date of judgment until finally paid.

AND A TRIAL BY JURY IS DEMANDED.

Respectfully Submitted,
Broadstone Security, LLC, trading as NOVA Armory,
Plaintiff, by counsel

Daniel L. Hawes, VSB N°. 30076
Counsel for the Plaintiff

Virginia Legal Defense
Post Office Box 100
Broad Run, VA 20137-0100
Voice: (540) 347-2430; Fax: (540)347-9772

Commonwealth of Virginia

GENERAL ASSEMBLY

RICHMOND

March 2, 2016

Ms. Katya Varley
KV Realty
2300 N. Pershing Drive
Arlington, VA 22201

Dear Ms. Varley:

It has come to our attention through various media reports that a company named "NOVA Armory" has submitted an application to operate a firearms retail store in your shopping center located at 2300 N. Pershing Drive. On behalf of the neighborhood and the broader Arlington community, we strongly urge you to reconsider your decision to grant a lease to NOVA Armory.

What concerns us the most is the nature of the business of NOVA Armory: the selling of dangerous firearms. As you may know, the Commonwealth of Virginia has the weakest gun safety protection laws in the tri-state region. In the 1990's, Virginia was known as the "gunrunning Capital of the East Coast" with one in three guns in Washington, DC and one in four guns in New York City with traceable origins determined to be bought in Virginia. The culprit was a law allowing for the unlimited purchase of guns, repealed in 1993 but later overturned in 2012.

NOVA Armory is already marketing aggressively to residents of surrounding states, including much of the East Coast. Given its proximity to Route 50 with easy access to Interstate 95, this location could be the site for potentially nefarious and illegal activities such as enabling individuals to successfully obtain fraudulent Virginia drivers licenses to purchase firearms, illegally paying Virginia residents to buy guns, creating a "black market" to sell firearms for cash or drugs, or become a magnet for robbery as was recently the case in a firearms store in McLean, Virginia.

Just as importantly, we are deeply concerned about the impact this particular tenant will have on the rest of your tenants' viability and the character of the surrounding neighborhood. Specifically, small businesses rely on customers living in the neighborhoods to frequent their establishment and we believe certain businesses in your center will be negatively impacted. It is also troubling that the NOVA Firearms store would be located in such close proximity to a child care center. Moreover, property values may also be negatively impacted due to prospective homeowner uncertainty in locating so close to a firearms retail store.
In conclusion, while the Commonwealth of Virginia has no legal recourse to prevent a firearms retailer from locating in the Lyon Park neighborhood, we want to make you are

aware of the potentially unintended consequences a firearms retailer will have in this particular location. The selling of firearms, while legal, does not reflect the Arlington community's values. Therefore, we strongly encourage you to reconsider your decision to grant a lease to NOVA Armory.

Sincerely yours,

Delegate Patrick Hope

Senator Barbara Favola

Delegate Alfonso Lopez

Senator Janet Howell

Delegate Richard Sullivan

Senator Adam Ebbin

Delegate Mark Levine

cc: Abdulhossien and Homadokht Niakan
Medhi Hashemimejad, Arlington Development & Consulting Group, Inc.
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