IN THE

Supreme Court of Virginia

RECORD NO. 160643

JOHN S. EDWARDS, *et al.*,

Appellants,

v.

RIMA FORD VESILIND, *et al*.,

Appellees.

BRIEF OF APPELLEES IN RESPONSE TO OPENING BRIEF OF APPELLANT JOHN S. EDWARDS, *et al.*

Nicholas H. Mueller, Esquire (VSB #84250)
Wyatt B. Durrette, Jr., Esquire (VSB #04719)
Christine A. Williams, Esquire (VSB #47074)
Debbie G. Seidel, Esquire (VSB #23124)
J. Buckley Warden IV, Esquire (VSB #79183)
DurretteCrump PLC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
cwilliams@durrettecrump.com
wdurrette@durrettecrump.com
nmueller@durrettecrump.com

Counsel for Appellees

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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Appellees, Rima Ford Vesilind; Arelia Langhorne; Sharon Simkin; Sandra D. Bowen; Robert S. Ukrop; Vivian Dale Swanson; H.D. Fiedler; Jessica Bennett; Eric E. Amateis; Gregory Harrison; Michael Zaner; Patrick M. Condray; Sean Sullivan Kumar; and Dianne Blais (hereinafter "Redistricting Challengers"), by counsel, file their Brief of Appellees in response to the Opening Brief of Appellants, Senators John S. Edwards; Ralph K. Smith; Richard L. Saslaw; Charles J. Colgan; David W. Marsden; and George L. Barker (hereinafter "Virginia Senators") as follows:

Introduction

The Speech or Debate Clause of the Virginia Constitution grants to members of the General Assembly certain privileges and immunities in both the criminal and civil contexts. Virginia Senators seek to expand the scope of this legislative privilege "beyond [the] core definition" to include communications between legislators and 1) outside political consultants, 2) constituents and interest groups, and 3) the Division of Legislative Services ("DLS"). JA 320. Such an expansion of the legislative privilege is unwarranted as it fails to serve the underlying purpose of the Speech or Debate Clause, conflicts with existing case law, erects an obstacle to truth-seeking in civil litigation and creates an unjustified barrier to citizens of the

Commonwealth seeking genuine and accountable representation in the legislature.

Statement of the Case

For years individuals and organizations—including those with which the Redistricting Challengers are affiliated—petitioned the General Assembly to reform the way they draw legislative districts. They urged the General Assembly to abandon the partisanship and incumbency protection which is achieved at the expense of voters, local communities, and other values far more important than creating the most favorable electoral map for the party in power. After years of the General Assembly ignoring these calls for reform, Redistricting Challengers filed suit in September, 2015 challenging eleven House of Delegates and Virginia Senate districts as violations of the Virginia Constitution. These districts, the Redistricting Challengers allege, do not meet the requirements of the Compactness Clause, a provision of the Virginia Constitution put in place explicitly to deter—in Professor A.E. Dick Howard's words—"the more obvious forms of gerrymandering." Va. Const. Art. II, § 6. *See also* JA 6-7.

In support of their claims, Redistricting Challengers issued subpoenas *duces tecum* to a number of Virginia legislators, including the Virginia Senators, as well as their outside political consultants, and DLS.

These subpoenas triggered motions to quash which were briefed, argued and upon which a detailed order was entered. In his opinion, Judge Marchant agreed that many of the requested documents fall within the scope of the privilege, and that the privilege having been asserted, these documents were not required to be produced. However, the trial court "declin[ed] to extend the privilege beyond [its] core definition" to include the categories of communications with third parties that are the subject of this appeal. JA 320.

The Virginia Senators refused to comply with the trial court's order. Instead they requested that they be held in contempt, creating the predicate for this appeal. The three assignments of error the Virginia Senators submit all ask this Court to extend the legislative privilege beyond its current scope to allow them to conceal documents and communications with individuals outside the legislature that may be highly relevant in this case of great public importance. The trial court's order was thoroughly grounded in the history and purpose of the Speech or Debate Clause and United States Supreme Court precedent and thus the trial court did not err when it held the Virginia Senators in contempt.

Statement of Facts

In September of 2015, Redistricting Challengers filed a complaint in the Richmond City Circuit Court seeking a declaratory judgement that eleven House of Delegates and Senate districts violate the Compactness Clause of the Virginia Constitution and an injunction against the use of these districts in future elections. JA 1-42. Redistricting Challengers alleged that the General Assembly did not make a good-faith effort to draw compact districts, that the constitutional requirement of compactness was subordinated to other non-constitutionally compelled criteria, and that the districts are not in fact compact. *Id*.

To gather further support for these claims, Redistricting Challengers issued several subpoenas *duces tecum* to various parties including DLS and the six Senators jointly bringing this appeal. Under this Court's precedents, bringing a compactness claim involves an evaluation of the various criteria that the legislature considered in the drafting of the redistricting plan.[1] For that reason, Redistricting Challengers requested documents and communications concerning compactness and various other potential criteria as well as electronic map files of the enacted, as well as other considered, redistricting plans. JA 61-123.

[1] *See Jamerson v. Womack*, 244 Va. 506 (1992); *Wilkins v. West*, 264 Va. 447 (2002).

In November of 2015, the Virginia Senators filed a motion to quash which was joined by DLS and various other parties asserting legislative privilege. JA 43-45. Redistricting Challengers responded acknowledging that—having been asserted—the privilege entitled some parties, including the Senators, to refuse to produce certain categories of documents and communications. JA 250. On the other hand, Redistricting Challengers argued that—based on the history and purpose of the Speech or Debate Clause, its application in highly persuasive United States Supreme Court cases, and recent federal court cases in Virginia and elsewhere—the application of the privilege has articulable bounds which should not be expanded.[2] JA 252-261. Specifically, Redistricting Challengers argued that communications with individuals or organizations outside the legislature

[2] The Virginia Senators attempt to undermine Redistricting Challengers' use of case law by claiming that many of these cases apply the common law privilege which is subject to a balancing test rather than the absolute constitutionally established privilege. Their criticism misses the mark though, as Redistricting Challengers cite to the portions of the cases discussing the purpose, history and application of the privilege in its constitutional form. Redistricting Challengers never discuss or attempt to apply such a balancing test. The Virginia Senators' point is further undermined by their use of similar cases applying the common law when they believe the language is advantageous to them. *See* Virginia Senators' Brief in *passim (citing Board of Supervisors v. Davenport & Co*., 285 Va. 580 (2013)); Virginia Senators' Brief at 4, 35, 44 (citing *Bruce v. Riddle*, 631 Va. 272 (4th Cir. 1980)); Virginia Senators' Brief at 19, 20, 23, 25 (citing *Covel v. Town of Vienna*, 78 Va. Cir. 190 (Fairfax County Mar. 14, 2009)).

such as third-party political consultants, lobbyists, and constituents fall outside the established boundaries of the privilege. JA 256-258.

Redistricting Challengers also argued that the employees of DLS, in their role as collective and technical advisors to the legislators, do not fall within the U.S. Supreme Court's expanded articulation of the privilege which included aides to legislators acting as the "alter ego" of the legislator. JA 258-59. Finally, the Redistricting Challengers also noted that redistricting cases are unique and not a routine exercise of legislative power. JA 255-256. Instead they represent a challenge to an unavoidable conflict of interest wherein legislators often find the public's interest and compliance with constitutional mandates in conflict with ensuring their own reelection and the success of their political party. As a result, Redistricting Challengers urged that it was a particularly inappropriate time to expand the scope of the legislative privilege. JA 255-56.

Having reviewed the briefs and heard extensive argument, the trial court properly interpreted the existing scope of the legislative privilege and refrained from further expanding it. Following the lead of federal courts in Virginia in *Page v. State Bd. of Elections*, 15 F. Supp.3d 657 (E.D. Va. 2014) and *Lee v. State Bd. of Elections*, 2015 U.S. Dist. LEXIS 171682 (E.D. Va. Dec. 23, 2015) as well as United States Supreme Court

precedent in *Gravel v. United States,* 408 U.S. 606 (1972) and *United States v. Brewster*, 408 U.S. 501 (1972), the trial court held that "purely internal legislative communications" were absolutely protected but that the legislative privilege does not extend to communications with individuals outside the legislature. JA 320-23. Additionally, the court distinguished DLS from the kind of legislative aides that have been covered by the privilege in the past and refused to extend the privilege to them as well. *Id.*

Disagreeing with the scope of the privilege as determined by the trial court, the Virginia Senators sought to have this discovery issue certified to this Court for interlocutory appeal. JA 334-357. Both before and after the opinion was handed down the Virginia Senators approached Redistricting Challengers regarding consent to certify the case for interlocutory appeal. In both instances Redistricting Challengers did not consent, stating that such a discovery order does not resolve a "material aspect of the proceeding" as required by the interlocutory appeal statute and thus is inappropriate for review at this stage of the case. Va. Code 8.01-670-1. Absent consent, there was no reason for the trial court to rule on whether the other criteria for certification were met, and it denied certification. JA 587. The Virginia Senators did not assign error to this ruling.

In the face of the denial of certification for interlocutory appeal, the Virginia Senators remained determined to appeal the case immediately and asked the trial court to hold them in contempt in order to generate an appealable order. JA 335, 355-56. The trial court held them in contempt and fined each Senator and DLS $100 per day until the contempt is purged. JA 587-592.

On April 20, 2016, the Virginia Senators filed a notice of appeal with the Court of Appeals. JA 593. On April 27, 2016, this Court certified the case for appeal and on June 1, 2016, this Court set the case for a hearing in a special session on July 19, 2016. JA 643; Supreme Court of Virginia Order June 1, 2016.

Standard of Review

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

Argument

The Virginia Senators erroneously characterize the trial court's opinion which is actually in lockstep with current jurisprudence. The trial court agreed with the Virginia Senators and Redistricting Challengers that the privilege is absolute where it applies and followed U.S. Supreme Court

precedent in interpreting the Speech or Debate Clause "broadly to effectuate its purposes." *United States v Johnson,* 383 U.S. 169, 180 (1965). The Virginia Senators asked the trial court to go further and hide under the cloak of privilege nearly everything tangentially related to the process of legislating. Such a request conflicts with the history and purpose of the Clause, relevant case law, and the reasoned opinion of the trial court.

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

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

The Virginia Senators did not carry their burden in the trial court and cannot do so here. This Court should affirm the trial court's opinion and refuse to further extend an already broad privilege.

I. History and Purpose of the Speech or Debate Clause

The language and history of the Speech or Debate Clauses in both the Federal and Virginia constitutions are virtually identical and thus the history and interpretation of the federal analogue is highly informative in the interpretation of the Virginia Clause. *See Davenport*, 285 Va. at 586. This history has been detailed at length in many United States Supreme Court cases including *Brewster* and *Tenney v. Brandhove*, 341 U.S. 367 (1951).

The Speech or Debate Clause "is a product of the English experience," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975), which was marked by a centuries-long struggle for parliamentary supremacy in the face of a "catalogue of abuses at the hands of the Executive." *Brewster,* 408 U.S. at 515-516. The Clause was informed by the experience with King Henry VIII's persecution of Sir Thomas More in the 16th century; King Charles I's prosecution of Sir John Elliot for seditious speeches in Parliament in the 17th century; as well as the imprisonment of Members of Parliament in the 18th century "owing to the subservience of some royal judges." *See Tenney,* 341 U.S. at 372;

Brewster, 408 U.S. at 516. As a result, the Speech or Debate Clause found its way into the English Bill of Rights in 1689 stating: "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." *See Johnson*, 383 U.S. at 177-178 (citing 1 W. & M., Sess. 2, c. 2.).

With this history in mind, James Wilson—U.S. Constitution signatory and member of the Committee of Detail which was responsible for this provision—explained that:

> [i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence. *Tenney,* 341 U.S. at 373 (quoting II Works of James Wilson (Andrews ed. 1896) 38).

But the Speech or Debate Clause in the U.S. Constitution cannot solely be understood by the English experience. "[I]t must be interpreted in light of the American experience and in the context of the American constitutional scheme." *Brewster,* 408 U.S. at 508. In addition to the fears of executive overreach inherited from the English tradition, our founding fathers also had a healthy fear of legislative overreach. *See, e.g.,* Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in The Papers of Thomas Jefferson Vol. 1, Ch. 14, Doc. 49 (Julian P. Boyd ed., Princeton

University Press) (1950) ("The tyranny of the legislatures is the most formidable dread at present, and will be for long years."); The Federalist No. 48 (James Madison) (The “legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex “); The Federalist No. 73 (Alexander Hamilton) (“The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render [the executive] as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.").

As a result, unlike in the English system, our system “was designed to preserve legislative independence not supremacy . . . [to] insure independence of the legislature without altering the historic balance of the three co-equal branches of Government.” *Brewster,* 408 U.S. at 508. American history has shown our system to be a relatively successful venture balancing the powers of three co-equal branches of government. Neither the horrors of English history nor the fears of our founders have come to fruition. As the Court summarized in *Brewster*:

> The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. *Brewster,* 408 U.S. at 523.

Therefore, the purpose of the Speech or Debate Clause—and the legislative immunity and privilege that derive from it—should not be considered in isolation but rather as part of that system of checks and balances. Nor should the judiciary shrink from its role in defining the Clause by allowing the legislature to expand its reach. *See Tenney,* 341 U.S. at 376 ("Legislatures may not of course acquire power by an unwarranted extension of privilege"). In the end, the scope of the immunity and privilege must be wide enough to protect legislative independence, but not so wide as to unnecessarily prevent judicial review of the laws the legislature passes. The further expansion of the legislative privilege sought in this appeal would undermine that system of checks and balances and give legislators too much power.

II. Scope of the Legislative Privilege

In *Johnson,* the U.S. Supreme Court penned the phrase that the Virginia Senators rely on so extensively: "the legislative privilege will be

read broadly to effectuate its purposes." *Johnson,* 383 U.S. at 180.[3] Even a passing glance at the language of the Speech or Debate Clause—in light of its current application—shows this to be abundantly true. The Speech or Debate Clause for the Virginia Constitution states that:

> Members of the General Assembly . . . for any speech or debate in either house shall not be questioned in any other place. Va. Const., Art. IV, § 9.

By its plain language the Clause is fairly narrow, protecting only "*speech or debate*" by "*Members of the General Assembly*" that takes place "*in either house.*" *Id.* (emphasis added). Yet the "who", and the "what", and the "where" have all been expanded. Despite the language of the Clause, legislative immunity and privilege derived from it are certainly not applied literally or even narrowly. The Clause is read much more broadly to effectuate its purpose of insuring legislative independence within the scheme of checks and balances.

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[3] It should be noted that while the Virginia Senators rely heavily on *Johnson* for their vision of an ever-expanding legislative privilege, the U.S. Supreme Court in *Brewster*, 408 U.S. at 517, noted the narrowness of *Johnson's* holding:

> It is important to note the very narrow scope of the Court's holding in *Johnson*:
> 'We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the *Speech or Debate Clause*. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.' *Id.* (quoting *Johnson,* 383 U.S. at 184-185).

The Court in *Johnson* itself recognizes this in describing *Kilbourn v. Thompson*—the first U.S. Supreme Court case addressing the Clause and the one that *Johnson* cites for the premise of reading the Clause "broadly to effectuate its purpose." *Johnson,* 383 U.S. at 179-180 (discussing *Kilbourn v Thompson*, 103 U.S. 168 (1881)). In *Kilbourn*, the Speaker and several members of the House of Representatives were defendants in a suit alleging false imprisonment resulting from an order to arrest the petitioner for contempt of Congress. Though the order was unlawful and was certainly not literally "speech or debate in either house" the Clause was read broadly to provide immunity from the suit. *Id*. The *Johnson* Court elaborates, noting that "it is apparent from the history of the Clause that the privilege was not born primarily of a desire to avoid private suits . . . but rather to prevent the intimidation by the executive and accountability before a hostile judiciary." *Id.* at 180-181. Nonetheless, the Court refrained from adopting a "narrow view of the constitutional provision to limit it to words spoken in debate." *Kilbourn,* 103 U.S. at 204.

This Court has also recognized that the privilege is read broadly to not just include speech and debate but also to include other legislative actions such as:

> proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing material at Committee hearings. *Davenport,* 285 Va. at 589 (internal quotations omitted).

Moreover, the holding of *Johnson* itself is a broad application of the literal language of the Speech or Debate Clause. In *Johnson*, the U.S. Supreme Court held that a legislator was immune from a prosecution which necessitated extensive inquiry not into a legislator's actions, but into the legislator's motives for performing the relevant legislative act. *Johnson,* 383 U.S. at 184-185.

The U.S. Supreme Court has also read the language of the Clause broadly to cover not just Members themselves, as the literal language would indicate, but also—recognizing that "it is literally impossible, in view of the complexities of the modern legislative process" to perform the job of legislating without assistance—to "aides and assistants" of legislators who act as legislators' "alter egos." *Gravel,* 408 U.S. at 616-617.

These are but a few examples of how courts have undoubtedly read the privilege "broadly to effectuate its purposes." *Johnson,* 383 U.S. at 180. Redistricting Challengers do not dispute that this is the state of the federal precedent, nor do Redistricting Challengers argue for a different outcome in Virginia. But the Virginia Senators now urge this Court to read the privilege

even more broadly to include not merely legislative acts but nearly *all* acts related to legislating as well, sweeping even outsiders to the legislature-such as political consultants-into the protection of the privilege. The U.S. Supreme Court has repeatedly stated that such an expansion is unwarranted as it leaves behind the core of the privilege:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an *integral* part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. *Gravel,* 408 U.S. at 525 (emphasis added)

Activities merely related to, but not essential to, the deliberative process do not substantially affect legislative independence and thus their inclusion expands the Clause more broadly than is necessary to effectuate its purpose. *Brewster,* 408 U.S. at 515 ("In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process.").

The Virginia Senators also seem to argue that the Clause protects them entirely from the burdens of litigation. Virginia Senators' Brief at 20. To be sure, the courts have read the Clause broadly by reading into the legislative immunity a grant of testimonial and evidentiary privilege not merely in criminal cases but also in civil cases. *Gravel,* 408 U.S. at 615-

616. But this privilege is not without boundaries and the Virginia Senators misstate those boundaries.

The Virginia Senators cite and paraphrase *EEOC v. Washington Suburban Sanitary Commission,* 631 F.3d 174, 181 (4th Cir. 2011) ("WSSC"), for the premise that, in the Virginia Senators' words, "the practical import of legislative privilege is difficult to overstate because it provides legislators 'breathing room' to discharge their duties without fear of distraction… ."[4] Virginia Senators Brief at 20. But in the Virginia Senators' paraphrasing of the case, they change a critical word, swapping "privilege" in place of "immunity." *See WSSC,* 631 F.3d at 181. In so doing they imply that the "fear of distraction" provides a free pass of sorts from any responsibility to respond to discovery requests. Such is clearly not the case. While the Clause may provide a complete immunity from suit in a case predicated on a legislative act—such as when California State Senator Jack B. Tenney was held immune for prosecution for allegedly

[4]Rubbing salt in the wound, the Virginia Senators include in their paraphrase the concern that legislative privilege is necessary to protect from "litigants who wish to defeat the legislators in litigation rather than the ballot box." *Id.* Yet, that is the whole point of Redistricting Challengers' underlying claim—the concern that legislators have eliminated any real choice in elections through unconstitutional gerrymandering. How can a legislator be defeated in "the ballot box" when they have gerrymandered his or her district to ensure re-election? In this case, the Virginia Senators are attempting to use the privilege to protect themselves *from* the ballot box.

libelous statements read into the committee records in *Tenney v. Brandhove,* 341 U.S. 367—when the Clause provides privilege from discovery, it only provides privilege to those documents properly within the "legitimate legislative sphere." *Eastland,* 421 U.S. at 501.

Even in the *WSSC* case cited by the Virginia Senators, the Fourth Circuit notes the "proper bounds" of legislative acts covered by the privilege, stating that among other characteristics, protected acts "generally bear the outward marks of public decisionmaking[sic], including the observance of *formal legislative procedures*." *WSSC,* 631 F.3d at 184 (emphasis added). Thus, the question to be resolved is not if some modest distraction may be created by requiring a legislator to disclose documents in litigation; "[t]he question to be resolved is whether the actions of the petitioners fall within the sphere of legitimate legislative activity."[5] *Eastland,* 421 U.S. at 501 (internal quotations omitted).

Moreover, the privilege is also not extended to just anyone who interacts with the legislator on the topic of legislation but, as the language of the Clause implies, it protects those internal to the legislature. The

[5] To the degree that potential distraction from legislative duties does merit consideration, it should be noted that Virginia has a part time legislature and that in this case discovery requests have worked around the legislative session so as not to create a burden while the General Assembly was in session. Such distraction is also appropriately guarded against during session by Va. Code §§ 30-4, 30-5, 30-6.

privilege protects the legislator and his “aides and assistants” as their work is not merely helpful or convenient but:

> is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary -- will inevitably be diminished and frustrated. *Gravel,* 408 U.S. at 616-617 (internal citations omitted)

This is the scope of the privilege under existing law. The Virginia Senators’ extension of this holding to include third-party consultants, constituents, or DLS as a legislator’s “alter ego” stretches *Gravel* beyond its breaking point.

Expansion of the Clause’s reach should not be granted lightly. *See Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979) ("Claims under the Clause going beyond what is needed to protect legislative independence are to be closely scrutinized."). *See also United States v. Nixon*, 418 US 683, 710 (1974) (noting that privileges are “not lightly created nor expansively construed, for they are in derogation of the search for truth.”).

The expansion the Virginia Senators propose presents a threat to other democratic values and jeopardizes the responsiveness of legislators to the public. Moreover, extending legislative privilege to these third parties does not support the purpose behind the Speech or Debate Clause but

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

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

Yet that is exactly what the Virginia Senators are seeking here in an even broader fashion, as they want absolute protection from even *discovery* "arising out of any activity that could assist in the performance of their official duties." *Id.*

The Virginia Senators argue that this expansion is essential. The Virginia Senators assert that because they have appropriated only limited funds to provide staff for legislators, outside political consultants hired by partisans must be considered to act in an official legislative capacity and thus engage in legislative acts just as the legislator does. But the U.S. Supreme Court has warned against such over-extensions of the privilege:

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

> **legislative process**. *Brewster,* 408 U.S. at 516 (emphasis added).

Those words ring true today as the Virginia Senators attempt to "relate" all their activities "to the legislative process" in order to shield them from production. *Id. See also Gravel,* 408 U.S. at 624-625 ("But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."); *National Ass'n of Social Workers v. Harwood*, 69 F. 3d 622, 630 (1st Cir. 1995) ("So, too, activities that are more political than legislative in nature do not come within the legislative sphere, and, hence, do not implicate the Speech or Debate Clause.").

This Court—like the trial court below—should follow the broad reading in prior cases to effectuate the Clause's purposes but reject further extensions of the privilege. As the U.S. Supreme Court made clear, the proper balance has been struck. "So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process." *Brewster,* 408 U.S.

at 525.[6] Further expansion would serve only to invite such excesses and corruption. The trial court should be affirmed.

III. Assignments of Error

A. AOE 1: Whether the Trial Court Erred in Holding that Virginia's Speech or Debate Clause does not Protect Communications between Legislators and Consultants

The Virginia Senators begin their argument by misstating that the U.S. Supreme Court has determined that communications with consultants are privileged citing to *Gravel* as well as *Doe v. McMillan*, 412 U.S. 306, 312 (1973). Neither of these cases established this principle, and the citation to *Gravel* is particularly egregious. As discussed above, *Gravel* extended the privilege to the "aides and assistants" of legislators. There, the U.S. Supreme Court addressed the applicability of the privilege to Dr. Leonard S. Rodberg, "a member of Senator Gravel's personal staff." *Gravel,* 408 U.S. at 613. In fact, the word "consultant" appears nowhere in the case; nor does the U.S. Supreme Court imply application beyond "aides

[6] Several of the leading cases extending the clause and setting limits involved immunity from suit for a legislator, a far more necessary protection for free and robust conduct of the people's business. Shielding from discovery third-party documents that bear on the underlying lawsuit is not necessary to maintain a check and balance but instead serves to allow a legislator to insulate parties outside the legislature and to avoid accountability at the ballot box for their political rather than legislative acts. To extend the protection beyond its current boundaries in that context is unwarranted.

and assistants." In fact, the U.S. Supreme Court specifically explains that it would be "literally impossible" to function without these aides thus to fail to extend the privilege would significantly undermine the fulfillment of the purpose of the Speech or Debate Clause. *See Id.* at 625 (noting that the courts have extended the privilege "only when necessary to prevent indirect impairment of such deliberations.").

On the other hand, the inclusion of outside political consultants is a mere convenience at best. The legislature is empowered to appropriate funds in accordance with Va. Const. Art. IV, §§ 11, 14 and specifically is empowered to use those funds to hire staff under Va. Code Ann. § 30-19.20. This provision states that the "[t]he House of Delegates and the Senate and the clerks thereof are authorized to employ such personnel as may be *deemed necessary* for the efficient operation of the General Assembly." *Id*. (emphasis added). Thus, it follows "[a]s a matter of simple logic," that political consultants hired outside this structure are not "necessary for the efficient operation of the General Assembly." *Page* , 15 F. Supp.3d at 663-664.

The Virginia Senators' reference to *Doe* is no more persuasive. The same argument was presented to the Eastern District of Virginia in another recent redistricting case, *Page*, 15 F. Supp.3d 657. There, it was firmly

rejected. *Id*. at 661-664. As the court in *Page* pointed out, the "consultant" who found shelter under the Speech or Debate Clause in *Doe* "was directly retained and compensated by a legislative committee . . . mak[ing] him more like a legislative aide than a consultant who receives payment from a partisan political group." *Page*, 15 F. Supp.3d at 662 n.2. Moreover, the *Page* court concluded that *Doe* does not "announce, or even suggest the blanket extension of legislative privilege or immunity to legislative consultants." *Id*. at 661-662. In fact, *Doe* repeats *Brewster's* concerns of the consequences that "could flow from too sweeping safeguards" and *Brewster's* reminder that "the shield does not extend beyond what is necessary to preserve the integrity of the legislative process." *Doe*, 412 U.S. at 387, n.9 (citing *Brewster*, 408 U.S. at 516-517).

Further, while the scope of legislative immunity and the associated privilege are the same in many respects, cases like *Doe* clearly demonstrate the issues resulting from over simplifying the relationship of the two. *Doe* resolved a question of whether a committee report that was already publicly distributed could form the basis for a civil claim against legislators or individuals such as the printer of the report, for invasions of privacy. The mere fact that the legislators remained immune from a suit predicated on these documents reflecting legislative acts says nothing

about whether they would have been discoverable and could be used as evidence in a case filed against a state agency rather than the legislators themselves.

The Virginia Senators also cite two additional redistricting cases—*Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 75 P.3d 1088 (Ariz. Ct. App. 2003) and *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984)—to support this claim that consultants fall within the protection of the Clause. Neither of these cases offers a clear basis for comparison. In *Fields,* the Court of Appeals of Arizona held that several individuals fell within the scope, including some who were nominally "consultants." *Id.*, 206 Ariz. at 134, 75 P.3d at 1092. The individuals referred to as "consultants" in *Fields* were very different from those in the present case. Arizona's Constitution creates an Independent Redistricting Commission ("IRC") and assigns to it the redistricting task. *Id.* (citing Ariz. Const. Art. IV, Pt. 2, § 1(19). Under this constitutional provision, the IRC is authorized to "hire staff and consultants for the purposes of this section, including legal representation." *Id.* The IRC retained consultants from the National Demographics Corporation—a neutral organization—to serve as the lead consultant to the IRC in the redistricting process. *Id.*

No such constitutional provision allowing for the hiring of "consultants" exists in the present case. Much like the "consultant" described above in *Doe*, the "consultants" in *Fields* were employed directly by the state to be the aides of the Commissioners as envisioned by the Arizona Constitution, a far cry from the outside partisan hires at issue in the present case which do not even serve all legislators but just those in their party. In *Fields,* there appears little, if any, legal significance to the choice of the titles "staff" and "consultants" when considering the application of the privilege. In the present case, however, the legal distinction is obvious.

In the second case, *Holmes*, the Supreme Court of Rhode Island does not go into any detail on the role or status of the "consultant in question" but later refers to him as part of the group of "legislative aides and commission staff members" that the court found to be within the privilege, citing *Gravel*. *Holmes*, 475 A.2d at 984. It is difficult to make an "apples-to-apples" comparison based on the language of the case.

Even assuming there is an "apples-to-apples" comparison with *Holmes*, such a ruling conflicts with the interpretation of *Gravel* in many other courts. Individuals and entities outside the structure of the legislature—such as the political consultants hired by a party or caucus and accountable to select legislators on a partisan basis—may be helpful to the

legislator but they are not the "alter ego" as described in *Gravel*—they are by definition "independent contractors"—of the legislator. As many courts have agreed, such individuals are third parties, "knowledgeable outsiders, such as lobbyists . . . for which no one could reasonably claim privilege." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003). *See also Comm. for Fair and Balanced Map v. Ill. St. Bd. of Elections*, 2011 U.S. Dist. LEXIS 117656 at *34-35 (N.D. Ill. 2011) ("Communications between Non-Parties and outsiders to the legislative process, however, do not [invoke legislative privilege]. This includes lobbyists, members of Congress and the Democratic Congressional Campaign Committee ("DCCC"). Although these groups may have a heightened interest in the outcome of the redistricting process, they could not vote for or against the Redistricting Act, nor did they work for someone who could. As such, the legislative privilege does not apply."); *ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058 (E.D.N.Y. Sept. 25, 2007) *19 (noting that "conversations between legislators and knowledgeable outsiders . . . are discoverable."); *North Carolina State Conf. of NAACP v. McCroy*, 2014 U.S. Dist. LEXIS 185130, *22 (M.D.N.C. Nov. 20, 2014) ("communications between legislators and third parties, such communications are not ordinarily the type of legislative acts that the privilege is designed to protect.").

Beyond these numerous decisions by courts throughout the country, federal courts in Virginia have consistently reinforced this understanding of the privilege.[7] In both of the other Virginia redistricting cases this cycle--*Page* and *Bethune-Hill*--the courts have come to such a conclusion, resolving in identical circumstances that the General Assembly through statute has defined who is an official aide and who is committee staff and thus who is covered by the privilege. As the court in *Page* stated:

> [w]hen state statute specifically provides a structure for the retention of aides and assistants by individual legislators and standing committees, and even provides a mechanism for the retention of at-large legislative assistants where "necessary to the efficient operation of the General Assembly," a legislative consultant and independent contractor paid by a political group, the House Republican Campaign Committee, has no grounds to claim that he is so critical to the performance of the legislature that he should be treated as a legislative alter ego and extended the benefit of legislative privilege. *Page,* 15 F. Supp.3d at 664.

See also Bethune-Hill, 114 F. Supp. 3d at 343 ("Unless an individual or organization was retained by the House itself pursuant to this provision any

[7] The Virginia Senators dispute this assertion oddly claiming that these decisions depart from *Simpson v. City of Hampton*, 166 F.R.D. 16 (E.D. Va. 1996). *Simpson* is clearly not on point. *Simpson* extends the privilege, via the common law, to local legislators and quashes discovery of their "personal notes and files." No party here disputes that "personal notes and files" of a legislator are protected (unless they have been shared with a third-party or the privilege has otherwise been waived). *Simpson* does not address issues relating to communications with those outside the legislature.

communications or documents with or from such person may not be withheld.”).

Most recently, this same question came before another Eastern District of Virginia Judge in *Lee v. State Bd. of Elections,* 2015 U.S. Dist. LEXIS 171682. There the court, despite explicitly disclaiming that any balancing test was appropriate in the case, held that “any communications the Nonparty Legislators or the Legislative Employees made with Third Parties--such as state agencies, constituents, lobbyists, and other third parties--are not protected by legislative privilege.” *Id*. at *25.

Legislative acts done by members of the General Assembly are protected from disclosure by the legislative privilege, as are acts done by their aides or assistants. The General Assembly has the authority to ensure that official staff is sufficient in number and expertise to enable members to do their job passing legislation including redistricting legislation. Broadening the scope of the privilege to include outside political consultants as the Virginia Senators request does nothing to protect legislative independence nor to ensure the robustness of the deliberative process. Instead, it serves only to cloak in secrecy the partisan manipulation of the redistricting process in violation of the Constitution of Virginia. As a result, the Court should uphold the relevant part of the order of the trial court compelling

disclosure of these documents and the order continuing to hold the Senators in contempt until such disclosures are completed.

B. AOE 2: Whether the Trial Court Erred in Holding that Virginia's Speech or Debate Clause does not Protect Communications between Legislators and Constituents, and Interest Groups

The Virginia Senators argue that the Speech or Debate Clause should be read broadly to create an evidentiary privilege for communications with constituents and outside interest groups. In support of this argument, the Virginia Senators cite a Virginia circuit court case resolving a libel claim. *Mills v. Shelton*, 66 Va. Cir. 415 (Bedford County, Apr. 3, 1998). In *Mills*, a candidate for a judgeship alleged that the Mayor of Bedford had defamed him by virtue of a letter sent to the Senate Courts of Justice Committee, which was later republished in the *Roanoke Times*. In a three page opinion, without any analysis or even mention of the Speech or Debate Clause, nor any explanation of what privilege was being applied, the court held that defendant was absolutely privileged from such a libel claim based on this letter. *Id.* In support, the circuit court cited public policy and noted that it was important not to "discourage citizens from communicating with their elected representatives on matters pending before a legislative body." *Id*. at 417.

While encouraging citizens to interact with their representatives is certainly an admirable policy, it is not the purpose of the Clause. The circumstances of *Mills* do not implicate the independence of the legislature from the hostility of other branches, nor do they in any way implicate the deliberative process. Though the Clause should be read broadly to effectuate *its* purposes, that does not justify an overly broad reading in order to effectuate other purposes no matter how noble they may be.[8]

Even still, immunity from libel for a letter sent to the legislature is a far cry from privilege from the mere disclosure of communications with a legislator (or a legislator's responses to those communications). A constituent's potential liability could cause them to be guarded in their statements; that an email to a legislator could be revealed in a lawsuit (potentially even subject to a protective order) poses little to no threat of chilling the constituent's speech and does not even implicate a legislator's speech—which is at the heart of the Clause.[9]

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[8] It may be an interesting public policy debate as to whether a constituent's letter to a legislator should be shielded from defamation laws, but it has absolutely nothing to do with the issue before this Court.

[9]As Justice Scalia has argued, to require that views are made public actually fosters democratic society: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Doe v. Reed,* 561 U.S. 186, 228 (2010) (J. Scalia concurring).

Moreover, there is little reason to believe that constituents or interest groups had any expectation of privacy. Certainly no evidence was produced to support such a claim. A review of the official and campaign websites of the four senators still in office (as well as the still active campaign site of former Senator Ralph K. Smith) reveals no assurance or even implication that communications will be kept confidential.[10] Further, many communications from individuals and interest groups have already been made public as they were submitted as evidence by the Attorney General of Virginia while seeking preclearance from the U.S. Department of Justice under section five of the Voting Rights Act.[11]

In light of this, there seems no reason that constituents or interest groups would believe such communications were any more immune from discovery proceedings than any other communications they may have. Without such an expectation, there is no possible chill to communications

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[10] *See*: http://apps.senate.virginia.gov/Senator/memberpage.php?id=S71; =S45; =S80; =S32; http://www.senatorbarker.com/contact; http://www.johnedwardsva.com/contact.aspx; http://marsdenforsenate.com/contact/; http://www.dicksaslaw.com/node/70; http://www.ralphsmithsenate.com/Ralph_Smith_Senate/Contact_Info.html.

[11] Attachments 15 and 16 to the Attorney General of Virginia's submission to the U.S. Department of Justice seeking preclearance of these plans consisted of 206 pages of communications from and responses to constituents and interest groups. *See* summary of submission at: http://redistricting.dls.virginia.gov/2010/Data/Ref/DOJSubmission2011/submission_summaryH&S.pdf.

with legislators. The only ones served by such an extension of privilege are the legislators who do not want to be caught saying one thing in public and another behind closed doors.

Even more clear is that communications by legislators to their constituents or the public at large are not part of their legislative function. "Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process." *Hutchinson*, 443 U.S. at 133. *See also Brewster,* 408 U.S. at 512 (listing "'news letters' to constituents, news releases, and speeches delivered outside the Congress" as among the "legitimate errands" that "have come to be expected by constituents" but that "are political in nature rather than legislative.").

The Virginia Senators have cited to *Bruce v. Riddle,* 631 F.2d 272, 280 (4th Cir. 1980) for the premise that meetings with interest groups "are part and parcel of the modern legislative procedures" and *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) for the premise that such meetings "are routine" and thus should be protected. But that they have become an ordinary proceeding or that those proceedings are helpful does not in itself cloak such meetings or communications in the privilege.

As another court held in declining to follow *Bruce*, not only is *Bruce's* holding "inconsistent with the express language of *Brewster*" but it is impractical to draw lines between when a legislator is sharing information with the public (including interest groups) and when the public is "informing" the legislator, "invariably elements of both exist in every meeting." *Mirshak v. Joyce*, 652 F. Supp. 359, 365-366 (N.D. Ill. 1987). Similarly, it is impractical to draw a line between a "newsletter"—which even the Virginia Senators acknowledge is outside the scope of the privilege, Virginia Senators Brief at 43, and a letter responding to a constituent question regarding legislation. What if an identical letter was sent to many constituents who posed similar questions? Is that a "newsletter" or a privileged communication? Such determinations are unreasonable, unnecessary, and clearly not what the U.S. Supreme Court had in mind in *Brewster* when listing 'news letters' among the many legitimate activities legislators perform which are nonetheless outside the scope of the Clause. *Brewster,* 408 U.S. at 512.

The Virginia Senators also argue that both these communications with constituents/interest groups and communications with consultants should be protected because information gathering is important to the legislative process. But while the U.S. Supreme Court has acknowledged

that official activities like committee hearings—which serve an informing purpose—are protected legislative acts, the U.S. Supreme Court has not extended the privilege to individual members' communications that may happen to be informative.

The Virginia Senators' citation to *McSurely v. McClellan,* 553 F.2d 1277 (D.C. Cir. 1976), does not establish the contrary. *See* Virginia Senators Brief at 39 (quoting *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").. The information gathering that was held privileged in *McSurely* was not a letter from a constituent, or a discussion with an interest group; it was an official subcommittee investigator looking into documents that would later be subpoenaed and the center of a committee hearing. Important to the *McSurely* court in determining that this investigation fell within the privilege was that the "requirement of congressional authorization of the inquiry by the particular subcommittee involved was clearly met in this case."[12] *McSurely* 553 F. 2d at 1287. A quote taken out of context

[12] Even properly understood, this expansive reading of the privilege for information gathering purposes may be questionable in light of *Gravel* and *Dombroski v. Eastland*, 387 U.S. 82 (1967). *See Gravel,* 408 at 620-621

regarding an official committee investigation under particular circumstances does not provide shelter to every discussion with every outside party on a subject related to legislation.

Such an expansion would go well beyond the intended scope of the Speech or Debate Clause and make privileged nearly any communication that is even remotely related to legislation rather than merely those *integral* to the deliberative process. As the Tenth Circuit has noted:

> To extend protection to informal information gathering--either personally by a member of Congress or by congressional aides--would be the equivalent of extending Speech or Debate Clause immunity to debates before local radio stations or Rotary Clubs. *Bastien,* 390 F.3d at 1316.

The communications the Virginia Senators seek to cloak in privilege via this assignment of error are common and may often be useful but the Speech or Debate Clause was intended to achieve specific purposes; the mere convenience of not having to disclose communications not integral to the legislative process are not among them. *Gravel*, 408 U.S. at 625 ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."). This Court should affirm and uphold the trial court's decision compelling disclosure of

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(noting that in *Dombroski* "committee counsel was gathering information for a hearing" but "[n]o threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.").

these documents and continuing to hold the Virginia Senators in contempt until such disclosures are completed.

C. AOE 3: Whether the Trial Court Erred in Holding that Virginia's Speech or Debate Clause does not Protect Communications between Legislators and the Division of Legislative Services

Redistricting Challengers hereby adopt and incorporate the arguments filed in the separate brief responding to DLS.

The language in the Virginia Constitution is limited to "Members of the General Assembly" and no one else. Va. Const. Art. IV, §9. DLS is not a member of the General Assembly. The language is further limited to "any speech or debate in either house." *Id.* DLS does not participate is "any speech or debate in either house." *Id.* That duty lies with our elected legislators. While the Speech or Debate Clause has been extended under *Gravel* to include "aides and assistants", neither the language nor purpose of that extension should be understood to extend to an entire agency such as DLS, which is not the "alter ego" of any legislator and also serves many committees and commissions other than the legislature.

Virginia's Constitution vests **all** "legislative power" in "a General Assembly, which shall consist of a Senate and House of Delegates" Art. IV, §1. Virginia's Constitution vests none of the legislative power in DLS. Though DLS may be helpful to legislators, it does not fit within the language

of the Speech or Debate Clause or U.S. Supreme Court precedent interpreting it and this Court should not conclude that it does by expanding this language beyond where existing case law has already taken it.

As a result, this Court should affirm the trial court's ruling compelling disclosure of these documents and the order continuing to hold the Virginia Senators in contempt until such disclosures are completed.

Conclusion

It is uncontroverted that the Speech or Debate Clause must be read broadly to effectuate its purposes. A comparison of the very narrow protection of the Clause's literal language and its modern interpretation makes it abundantly clear that the Clause has been read broadly. Now, absent any American history of the kind of egregious abuses and attacks on the legislature by a power hungry executive or a corrupt judiciary that inspired this robust privilege, the Virginia Senators seek to extend the shield of the Clause to new lengths, not to effectuate its purpose of legislative independence but to prevent the disclosure of the Virginia Senators' communications with outsiders to the legislative process. In doing so, they risk undermining the ideal of transparent government, which is necessary to foster the informed and unfettered debate on which our system relies.

It could well be argued that the scope of the privilege should shrink to reflect the modern history of a reduced threat to legislative independence, and to serve the goals of government accountability enshrined in our system of checks and balances, but that is not the holding of the trial court or even the argument put forward by this brief. Instead, Redistricting Challengers urge the Court to maintain the "sensible and defensible bulwark against excessive use of the legislative privilege" outlined in the trial court's order, "prevent[ing] legislators from enveloping lobbyists and outside experts in a cloak of invisibility, while permitting state legislatures the freedom to make their own decisions about what staff members are sufficiently important to be formally retained by the state government and thus be eligible for the privilege." *Page,* 15 F. Supp.3d at 664.

The threats posed by the facts of this case are not threats to legislative independence or the deliberative process; they are threats to the citizens of the Commonwealth who are trying to freely choose their legislators. For the reasons stated above, Redistricting Challengers ask the Court to affirm the trial court, uphold its reasoned opinion, and continue to hold the Virginia Senators in contempt until they disclose all required documents.

Respectfully submitted,

Nicholas M. Mueller

Nicholas H. Mueller, Esquire (VSB #84250)
Wyatt B. Durrette, Jr., Esquire (VSB #04719)
Christine A. Williams, Esquire (VSB #47074)
Debbie G. Seidel, Esquire (VSB #23124)
J. Buckley Warden IV, Esquire (VSB #79183)
DurretteCrump PLC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
cwilliams@durrettecrump.com
wdurrette@durrettecrump.com
nmueller@durrettecrump.com
Counsel for Appellees

CERTIFICATE

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

Jason Torchinsky (VSB# 47481)
Shawn Toomey Sheehy (VSB# 82630)
J. Michael Bayes (VSB #48076)
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
jtorchinsky@hvjt.law
ssheehy@hvjt.law
jmbayes@hvjt.law
Counsel for Appellants/Virginia Senators

Katherine L. McKnight (VSB # 81482)
E. Mark Braden (pro hac vice)
Richard Raile (VSB #84340)
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W., Suite 1100
Washington, D.C. 20036
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com
Counsel for Appellants/DLS

Nicholas M. Mueller