IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs,	)	
v.	)	No. 1: CV 01-2439
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al Defendants.	)	Judge Rambo, Judge Yohn, Judge Nygaard

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER

Plaintiffs respectfully submit this memorandum of law in opposition to Defendants' motion to quash the subpoena or for protective order against the subpoena *duces tecum* issued to the Custodian of Records of the Carnegie Mellon University.

BACKGROUND

On February 8, 2002, Plaintiffs' counsel, Robert B. Hoffman, issued a subpoena *duces tecum* to the Custodian of Records at Carnegie Mellon University ("CMU"). The purpose of the subpoena was to obtain further evidence supporting the fact, as had been reported in the press and testified to at the Commonwealth Court hearing, that CMU had performed

highly sophisticated census analysis that underlies the meanderings of the Congressional boundaries established by Act 1. The subpoena sought:

> 1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

The subpoena did not seek the results of the contract analysis. Plaintiffs believed that the information that the subpoena would likely produce, when coupled with the map's obvious partisan effects, would support their claim that Act 1 is an unconstitutional partisan gerrymander.

There is no dispute that copies of the subpoena were served on counsel for all parties by first class mail postmarked February 8, 2002 (although one counsel asserts delayed receipt, presumably based on mail delivery errors). At Defendants' counsel's subsequent request, plaintiffs' counsel faxed and mailed an additional copy to Defendants' counsel on February 15. As Mr. Hoffman and CMU's counsel had agreed, and as Defendants' Memorandum describes, there was no need for a deposition. *See* Def. Memorandum at 2-3. On February 19, 2002, Defendants filed a motion to quash the subpoena or for a protective order.

ARGUMENT

The common law immunity that Defendants seek to invoke in the present action in no way provides the protection for which they seek to use it. The immunity at issue here is *not* coextensive with the Speech or Debate Clause of the United States Constitution, and it does *not* provide state legislators with the same protections that Article I, section 6 provides to the Members of the United States Congress. The purpose of the Speech or Debate Clause itself is "not to forestall judicial review of legislative action" but rather to protect legislators from "being called into court to defend their actions," *Powell v. McCormick*, 395 U.S. 486, 505 (1969). It does not purport to shield federal legislators from the many "errands" that they engage in related to their jobs that are wholly legitimate but "political in nature rather than legislative." *United States v. Brewster*, 408 U.S. 501, 512 (1972).

The common law privilege that Defendants assert here protects even less – and does not justify quashing a duly issued subpoena to a third party for the clearly relevant information sought here. Defendants attempt to use a doctrine intended to keep legislators from being hauled into court, *see Powell*, 395 U.S. at 505, to keep secret the motivation underlying the uniquely public enterprise of redistricting, all in the context not of the presentation of documentary evidence or testimony at trial but of discovery.

In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court made clear that the federal common law legislative immunity that is to

be applied here, *see* Fed. R. Evid. 501, offers state legislators *less* protection than the Speech and Debate Clause. The reasoning of that case, although decided in a criminal context, is equally applicable here.[1] The Court began there by recognizing that certain materials sought from or regarding the defendant's behavior would be barred if the federal Speech and Debate Clause applied. *Id.* at 366-67. However, the Court looked to the rationales supporting the Speech and Debate Clause and found them much less applicable to state legislators. *See id.* at 369-73. Accordingly, the Court found "no basis" for a "judicially created limitation that handicaps proof of the relevant facts." *Id.* at 374. In reaching that conclusion, the Court pointed to two rationales underlying the Speech or Debate Clause. The first was the need to avoid intrusion by the Judiciary or Executive into the affairs of the coequal Legislature. Needless to say, that rationale "gives no support" to the privilege's application to state legislators. *Id.* at 370. The second rationale related to a legislature's need for independence. This concern, although important, yields when "important federal interests are at stake." *Id.* at 373. Accordingly, the Court ruled that the common law privilege did not apply.

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1 The precise question whether the common law privilege protects state legislators and their staff from discovery requests or subpoenas in a civil suit in which the legislators are at no risk of personal liability has not been resolved in this Circuit. Defendants, in their Memorandum, urge this Court to reason that, because the Supreme Court has found that the common law privilege gives legislators immunity from *personal liability* in civil suits, the privilege must give legislators absolute freedom from all discovery in any civil suit. Defendants' many citations to case discussing immunity from liability, as well as their citations to cases involving federal legislators, are therefore inapplicable. Plaintiffs, in contrast, point the Court to the Supreme Court and Third Circuit holdings that with respect to information seeking, the privilege is qualified and requires courts to balance the interests at stake. These cases offer a better analogy than cases involving personal liability, which is in no way at issue here.

Applying *Gillock*, the Third Circuit has made clear that use of the common law privilege depends on the precise interests at stake. *See In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("[A]ny such privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides."). The privilege applies "only to the very limited extent that the public good in confidentiality transcends the value of utilizing all rational means for ascertaining truth." *Id.* (internal quotations omitted). Accordingly, the Third Circuit has "reject[ed]" the assumption "that a privilege protects all state legislative documents which may somehow reveal the 'thought processes' of state legislators." *Id.* at 959.

Applied to this case, the principles of *Gillock* and *In re Grand Jury* make clear that the common law privilege does not support Defendants' Motion to Quash the CMU subpoena. Neither of the rationales supporting the Speech or Debate privilege support the application of a common law privilege to this context. With respect to the first rationale supporting the privilege, a case involving state legislators as in *Gillock* and here, raises no threat to the Separation of Powers. With respect to the second rationale, Defendants have asserted no specific reason for confidentiality that would overcome the need for the materials sought.[2] Important federal interests are clearly at stake. *See, e.g., U.S. Term Limits v. Thornton*, 514 U.S. 779, 783

2 Defendants suggest that the fact that the contract sought is available from other sources, including from the leader of the House Republican Caucus, justifies limiting discovery. *See* Def. Memorandum at 9 n.2. Although this offers no basis for refusing to enforce the subpoena, Plaintiffs would be willing to withdraw their request for that specific document upon receipt of the contract from Defendant Matthew J. Ryan, the leader of the House Republican Caucus.

(1995) (expressing a national interest in having each state maintain uniform qualification requirements for congressional representatives). To the extent that the subpoena seeks factual material, the privilege offers no protection. *See In re Grand Jury*, 821 F.2d at 959. To the extent that the information sought in the subpoena would reveal thought processes, the privilege is overcome by the obvious import of the materials sought to Plaintiffs' case, a factor that the Third Circuit has explicitly recognized. *See id.* at 959 ("[T]he party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case."). *Davis v. Bandemer*, 478 U.S. 109 (1986), requires that Plaintiffs raising a political gerrymandering claim demonstrate intentional discrimination by the legislature. *See id.* at 127; *see also United States v. Irvin*, 127 F.R.D. 169 (C.D.Cal. 1989) (ruling that the special nature of redistricting suits required that the deliberative process privilege yield to requests for information about nonpublic meetings of the redistricting body). With the subpoena to CMU, Plaintiffs are seeking evidence that is clearly relevant to an element of their claim in a manner least threatening to the legislature's deliberative process: communications with an outside, independent organization.[3] By seeking information from this outside, independent organization, Plaintiffs have chosen the least disruptive path for

3 Further, and consistent with *In re Grand Jury*, Plaintiffs would not object to *in camera* inspection of the relevant documents. *In re Grand Jury*, 821 F.2d at 959.

proving an element of their claim. Quashing or narrowing their subpoena further would be unwarranted.[4]

CONCLUSION

For the foregoing reasons, Defendants' Motion to Quash Subpoena or For Protective Order should be denied.

Respectfully submitted,

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4 One of defendants' arguments against the subpoena is that the Contract is publicly available. Plaintiffs do not understand how that makes a subpoena for the document somehow invalid. Plaintiffs also suspect that obtaining the contract from defendants is unlikely to be as easy as advertised.

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THE COMMONWEALTH OF PENNSYLVANIA, et al Defendants.	:	Judge Yohn

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

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