IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(RICHMOND DIVISION)

DAWN CURRY PAGE, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

Civil Action No. 3:13-cv-00678-REP-LO-AKD

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO QUASH SUBPOENAS TO ROBERT B. BELL, WILLIAM ROBERT JANIS, AND CHRISTOPHER MARSTON AND/OR FOR A PROTECTIVE ORDER AND OPPOSITION TO MOTION TO ENFORCE COMPLIANCE WITH SUBPOENA

Third-party Christopher Marston submits this rely brief in further support of the Motion to Quash Subpoenas to Robert B. Bell, William Robert Janis, and Christopher Marston and/or for a Protective Order (the "Motion"). Messrs. Marston, Bell, and Janis filed the Motion after receiving from Plaintiffs Gloria Personhuballah and James Farkas[1] (the "Plaintiffs") three subpoenas seeking broad discovery of the activities of the Virginia House of Delegates during the 2010 redistricting cycle. Plaintiffs sought to depose members of the Virginia House of Delegates and requested documents pertaining to both congressional and state legislative redistricting even though Plaintiffs have challenged only the congressional plan.

Since the filing of the Motion, Plaintiffs have withdrawn the subpoenas to Messrs. Bell and Janis, who were Members of the Virginia House of Delegates during the relevant time. As such, this brief will not further address the arguments on the deposition subpoenas to Messrs. Bell and Janis. What remains is the subpoena *duces tecum* to Mr. Marston. Plaintiffs have

[1] Plaintiff Dawn Curry Page has been dismissed from the case.

narrowed the scope of their document requests to Mr. Marston to documents concerning only congressional redistricting. Pls.' Opp. Br. at 15 (ECF No. 83). This is a recent concession, made just two days ago with the filing of Plaintiffs' brief in opposition to the Motion. Plaintiffs' requests were overly broad and, contrary to the claim that Mr. Marston produced a "belated" privilege log, *id.* at 6, Mr. Marston has worked diligently to meet the tight schedule imposed by the imminent trial date, and has had to exert significant time and effort to respond to Plaintiffs' requests in an orderly fashion.

Mr. Marston's efforts continue. Even with Plaintiffs' decision to limit the scope of their requests, there remain issues of privilege. Mr. Marston has asserted both legislative and attorney-client privileges at the request of the Speaker of the Virginia House of Delegates and the Virginia House Republican Caucus, who he advised in both a legal and legislative capacity during the 2010 redistricting cycle. Mr. Marston has properly asserted and is entitled to the protections afforded by these privileges.

I. MR. MARSTON IS ENTITLED TO LEGISLATIVE PRIVILEGE

Mr. Marston is entitled to assert legislative privilege. Another three-judge panel within the footprint of the United States Court of Appeals for the Fourth Circuit recently dealt with the same issue and granted the motion to quash. Attached hereto as Exhibits B and C are copies of the motion and the court's order granting the motion. Application of the privilege is warranted, and there is no basis to limit the privilege based on Plaintiffs' need or waiver.

A. The Privilege Extends to Mr. Marston

Plaintiffs concede, as they must, that legislative privilege "extend[s] to non-legislators such as staff members." Pls.' Opp. Br. at 7 (ECF No. 83). The United States Court of Appeals for the Fourth Circuit has taken the broad view that anyone "acting in a legislative capacity" may

claim the privilege. *McCray v. Md. Dep't of Transp., Md. Transit Admin.*, 741 F.3d 480, 485 (4th Cir. 2014); *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (stating that "[l]egislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity"); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty.*, 684 F.3d 462, 471 (4th Cir. 2012) (extending legislative immunity to witness at a hearing); *see also Doe v. McMillan*, 412 U.S. 306, 312 (1973). The same privilege enjoyed by a legislator extends to his or her "agent or assistant." *Gravel v. United States*, 408 U.S. 606, 616 (1972). This plainly includes Mr. Marston.

Mr. Marston was acting in a legislative capacity in connection with redistricting. He was not an "outside political consultant" and did not work for the Republican Party of Virginia. *Id.* at 2-4, 9; Decl. of Christopher Marston ¶ 6, attached hereto as Exhibit A ("Marston Decl."). In fact, Mr. Marston effectively operated as staff of the majority members of the Virginia House of Delegates. Marston Decl. ¶¶ 3-5, 7-8, 11-14. He was Executive Director of the Virginia House Republican Caucus and coordinated communication and legislative strategy for the Caucus. *Id.* at ¶¶ 3-5. He was one of four staff members to attend daily Caucus meetings during the legislative session and regularly participated in various leadership meetings. *Id.* at ¶ 5. Mr. Marston also was provided an office in the General Assembly Building, a state government email and telephone number, staff credentials, and access to the floor of the Virginia House of Delegates. *Id.* at ¶ 7. Mr. Marston has described himself as a consultant to members of the Virginia House of Delegates[2] because, due to limited appropriations for staff salaries, he is paid as an independent contractor by the House Republican Campaign Committee ("HRCC"), which

[2] The memorandum in support of the Motion does, at various times, characterize Mr. Marston as a consultant or legal counsel to the Virginia House of Delegates or Virginia General Assembly. (ECF No. 62). These references were oversimplifications made in haste and Mr. Marston is described with greater precision on the privilege log produced to Plaintiffs.

is comprised solely of members of the Virginia House Republican Caucus. *Id.* at ¶ 8, 14. This is common practice in states like the Commonwealth of Virginia that do not have majority or minority legislative staff positions. *Id.* at ¶ 8. Thus, while Mr. Marston receives his compensation from the HRCC – and accordingly is described in the privilege log as working for the HRCC – he was employed by the Virginia House Republican Caucus and worked in a legislative capacity for the Republican members of the Virginia House of Delegates. Pls.' Opp. Br. at Ex. A (ECF No. 83-1); Marston Decl. ¶ 9. This is all that is required for Mr. Marston to claim legislative privilege.

Indeed, the Fourth Circuit has made clear that application of legislative privilege is a functional analysis based on whether the person claiming the privilege acted in a legislative capacity. *Wash. Suburban Sanitary*, 631 F.3d at 181 (stating that the privilege "covers all those properly acting in a legislative capacity, not just actual officeholders"). Mr. Marston was asked by the Virginia House Republican Caucus to take the lead in assisting the Republican members of the House of Delegates with redistricting. Marston Decl. ¶ 11. Because the Republicans were (and remain) the majority party in the House of Delegates, Mr. Marston effectively was lead staff for the redistricting efforts of the Virginia House of Delegates. *Id.* at ¶ 12. In that role, Mr. Marston engaged in any number of legislative activities, including crafting redistricting legislation; coordinated gathering and analysis of data and information from which redistricting legislation was introduced; assisted members of the House of Delegates in holding hearings on redistricting; assisted in preparing statements of members about redistricting; advised members and their staff regarding strategy for passage of redistricting legislation; and regularly engaged in frank discussions with members concerning the creation, evolution, and passage of redistricting legislation. *Id.* at ¶ 13.

Mr. Marston has amply satisfied the applicable standard. Furthermore, members of the Virginia House of Delegates, including the Speaker, consider Mr. Marston to have been engaged in legislative activity on their behalf and have instructed Mr. Marston to assert legislative privilege in this proceeding. *Id.* at ¶ 15. Mr. Marston has properly done so and privilege applies.

B. Plaintiffs' Need Does Not Outweigh the Privilege

Plaintiffs' stated need does not limit application of the privilege to Mr. Marston. Legislative privilege broadly protects those acting in a legislative capacity from compulsory process, even where claims involve allegations of discriminatory intent. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 180-81; *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Simpson v. City of Hampton*, 166 F.R.D. 16, 18-19 (E.D.V.A. 1996) (finding documents sought in Voting Rights Act case protected by legislative privilege). This is seemingly inconsistent with the conventional view that evidentiary privileges are disfavored and to be construed narrowly, but whereas most privileges are born of common law, the legislative privilege is an outgrowth of protections afforded by the Speech or Debate Claus of the United State Constitution. Pls.' Opp. Br. at 4-5 (ECF No. 83) (citing cases concerning attorney-client privilege); *Tenney*, 341 U.S. at 372-73; *accord* Va. Const. art. IV, § 9.

The Speech or Debate Clause encompasses an absolute privilege against inquiries that would result in an involuntary disclosure of information about privileged legislative activities. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416, 418 (D.C. Cir. 1995). The purpose is to protect against probing that would impair the functioning and integrity of the legislative process. *Id.* at 415. This absolute protection of legislative independence applies equally to testimonial and documentary evidence and would be substantially weakened if it did not extend to preclude forced disclosure of legislative documents. *See id.* at 420. Consistent

with the broad scope of the protection, the Fourth Circuit has not adopted any test that would require balancing of the privilege against any other considerations. As such, the privilege applies to Mr. Marston and the analysis need to no further.

Even were the Court to engage in a balance of the hardships, as Plaintiffs suggest, there would be no basis to disturb the privilege. Mr. Marston does not question the gravity of Plaintiffs' claims, but even alleging a constitutional violation does not automatically entitle a plaintiff to "pull[] back the curtain on legislative proceedings" and destroy the privilege. Pls.' Opp. Br. at 11 (ECF No. 83). The vast majority of the documents being withheld on the basis of privilege are not, in fact, "highly relevant" to Plaintiffs' claims; nor has Mr. Marston conceded the relevance of the documents identified on the privilege log. *Id.* at 1, 4. The documents on the log are merely responsive to the subpoena *duces tecum*.

More importantly, in order to establish their case, Plaintiffs "need not offer direct evidence of discriminatory intent." *Committee for a Fair and Balanced Map v. Ill. State Bd. of Elecs.*, No. 11 C 5065, 2011 WL 4837508, at *3 (N.D. Ill. Oct. 12, 2011); *ACORN v. Cnty. of Nassau*, No. 05-2301, 2007 WL 2815810, at *3 (E.D.N.Y. Sept. 25, 2007). They are entitled to – and plaintiffs typically do – rely on "circumstantial factors," including but not limited to district shape, racial bloc voting, low minority voter registration, and minority retrogression. *Committee for a Fair and Balanced Map*, 2011 WL 4837508, at *3. The best evidence of what a legislature intended to do is the actual legislation that was enacted, and what statements or communications of individual members are of little to no relevance:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look into statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria,

> constitution on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the states are sufficiently high for us to eschew guesswork.

Hunter v. Underwood, 471 U.S. 22, 228 (1985); *cf. Bandemer v. Davis*, 478 U.S. 109, 129 (1986) (upholding trial court's finding of discriminatory intent and stating that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended"). Where, as here, direct evidence of discriminatory intent is not necessary or probative, Plaintiffs have not stated a need sufficient to outweigh the protection of the privilege. *See, e.g., ACORN*, 2007 WL 2815810, at *3 (recognizing "the difficulty of plaintiffs' burden of proving discriminatory intent," but finding that they had "not produced a compelling reason sufficient to overcome the legislative privilege").

C. Legislative Privilege Has Not Been Waived

There has been no waiver of the legislative privilege. First, as discussed above, consultants acting in a legislative capacity in advising legislators are within the protections of the legislative privilege. Part I.A., *supra*. Messrs. Bensen, Morgan, and Ellis all were engaged by the Virginia House Republican Caucus to help prepare the state plan for the Virginia House of Delegates and directly participated in the crafting the redistricting legislation that was introduced and enacted by the House of Delegates. As such, their presence on communications between and among members of the House of Delegates and their staff, including Mr. Marston, does not waive the privilege. *See, e.g., ACORN v. Cnty. of Nassau*, No. 05-CV-2301 (JFB) (WDW), 2009 WL 2923435, at *5-7 (E.D.N.Y. Sept. 10, 2009) (upholding extension of privilege to communications involving non-legislators performing legislative functions).

Second, the privilege for communications involving Mr. Morgan is not waived by virtue of the fact that he was retained as an expert witness by Intervenors in the above-captioned proceeding. This is not a situation of one party withholding information while also using it as a sword against the other party. Neither the Virginia House of Delegates nor any member of the House of Delegates is named as a party to this proceeding. With respect to the House of Delegates, Mr. Morgan's only role was to assist the Virginia House Republican Caucus in drawing the *state* plan for the Virginia House of Delegates, and the communications on the privilege log which involve Mr. Morgan relate to that role. Intervenors separately retained Mr. Morgan to serve as their expert witness concerning the *congressional* plan. Intervenors are not members of the Virginia House of Delegates and cannot waive the privilege on behalf of members of the House of Delegates.[3] *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179-80 (C.D. Cal. 2002).

Additionally, Mr. Morgan's work for the Virginia House Republican Caucus did not include work on the congressional plan and Plaintiffs have provided no basis upon which to believe that his expert testimony relies on any of the communications identified in the privilege log. Plaintiffs have the ability to discover any and all materials upon which Mr. Morgan relied in rendering his expert opinion. If these materials include the communications identified in the log, then Plaintiffs either already have them in their possession or could more appropriately obtain them from Mr. Morgan, who is associated with a party to the case.

[3] Even a waiver of the privilege would not result in subject matter waiver. *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179-80 (C.D. Cal. 2002) (legislator who waived legislative privilege may testify only about his own motivations and "may not testify about the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege").

II. MR. MARSTON IS ENTITLED TO ATTORNEY-CLIENT PRIVILEGE

Mr. Marston is entitled to assert attorney-client privilege on behalf of his clients. As stated in the memorandum supporting the Motion, Mr. Marston is an attorney admitted to and actively practicing before the Virginia State Bar. Marston Decl. ¶ 2. He also is a member of the bar of this Court. *Id.* Since 2009, Mr. Marston has served as legal counsel to the Speaker of the Virginia House of Delegates and the Virginia House Republican Caucus, which includes all Republican members of the Virginia House of Delegates. *Id.* at ¶¶ 3-5. He provides advice to his clients on a variety of matters, including election law, campaign finance, and redistricting. *Id.* at ¶¶ 9, 11.

With respect to redistricting, Mr. Marston has asserted the privilege as to a relatively small portion of the documents identified in the privilege log. *See* Pls.' Opp. Br. at Ex. A (ECF No. 83). Mr. Marston's clients instructed him to assert the privilege, and he has appropriately done so. Marston Decl. ¶ 10. Mr. Marston has demonstrated the existence of an attorney-client relationship and asserted the claim of privilege, which his clients have not waived. Additionally, those documents identified in the privilege log as attorney-client communications were made with Mr. Marston in his capacity as an attorney and either were made for the purpose of seeking or rendering legal advice, or reflect legal advice given to Mr. Marston's clients. *See* Pls.' Opp. Br. at Ex. A (ECF No. 83). Finally, the fact that Mr. Marston worked in two capacities – one legal and one non-legal – does not vitiate the privilege. When Mr. Marston is acting as an attorney for his clients, rendering or discussing legal advice, then his clients are entitled to assert the privilege, as they have done here.

III. CONCLUSION

Mr. Marston has worked diligently to respond to the subpoena *duces tecum* in spite of the incredible and undue burden it placed on him as a third-party to the action. To produce documents or further parse those documents on the privilege log would entail additional, significant effort. For these and the reasons set forth above, Mr. Marston respectfully requests that the Motion be granted.

Dated: April 16, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2014, a copy of the foregoing Reply Memorandum in Further Support of Motion to Quash Subpoenas to Robert B. Bell, William Robert Janis, and Christopher Marston and/or for a Protective Order was filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF system on the following counsel of record:

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(RICHMOND DIVISION)

DAWN CURRY PAGE, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

Civil Action No. 3:13-cv-00678-REP-LO-AKD

DECLARATION OF CHRISTOPHER MARSTON

Christopher Marston, for his declaration, states as follows:

1. I have personal knowledge of the facts contained herein and am competent to testify thereto.

2. I am an active member of the Virginia State Bar (VSB No. 65703). I also am a member of the bar of this Court.

3. I was Executive Director of and Counsel to the Virginia House Republican Caucus, which consists of the Republican members of the Virginia House of Delegates.

4. I served in these positions on a full-time basis between 2009 and 2011 and continue to serve as Counsel on a part-time basis.

5. In these positions, I fulfilled two roles. I was (and continue to be) legal counsel to the Speaker of the Virginia House of Delegates and the Virginia House Republican Caucus. I also worked in a legislative capacity for the Republican members of the Virginia House of Delegates, coordinating communications and legislative strategy. I was one of four staff

members to attend daily Caucus meetings during the legislative session and regularly participated in various leadership meetings.

6. During the relevant period, between 2010 and 2012, I did not work for the Republican Party of Virginia, and I was not an attorney for the Republican Party of Virginia.

7. Rather, I functioned as staff of the Virginia House of Delegates. I had an office in the General Assembly Building and was assigned a state government telephone number and email address. I also was provided with staff credentials and had access to the floor of the House of Delegates.

8. Due to limited appropriations for staff salaries, I was paid as an independent contractor by the House Republican Campaign Committee, which is comprised solely of members of the Virginia House Republican Caucus. This practice is common in states like the Commonwealth of Virginia that do not have majority or minority legislative staff positions.

9. In my capacity as Counsel to the Virginia House Republican Caucus, my clients are the Speaker of the Virginia House of Delegates and the members of the House Republican Caucus. Since 2009, I have provided legal advice concerning a variety of matters, including election law, campaign finance, and redistricting.

10. In connection with the subpoena *duces tecum* that I received in this case, my clients have instructed me to assert the attorney-client and work product privileges in the above-captioned matter.

11. In 2010, the Virginia House Republican Caucus asked me to provide legal counsel regarding redistricting, and to take the lead in assisting Republican members of the Virginia House of Delegates with redistricting.

12. At that time and since, the Republicans have been the majority party of the House of Delegates. Thus, I effectively was lead staff for the redistricting efforts of the Virginia House of Delegates, which is one of the two legislative bodies that constitute the Virginia General Assembly.

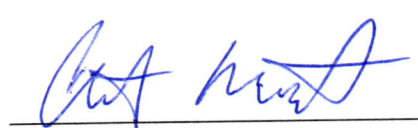
13. In this non-legal role, among other things, I participated in crafting redistricting legislation; coordinated gathering and analysis of data and information from which redistricting legislation was introduced; assisted members of the House of Delegates in holding hearings on redistricting; assisted in preparing statements of members about redistricting; advised members and their staff regarding strategy for passage of redistricting legislation; and regularly engaged in frank discussions with members concerning the creation, evolution, and passage of redistricting legislation.

14. When performing this non-legal role, I was a consultant due to the manner in which I was compensated even though I functioned as staff advising Republican members of the House of Delegates.

15. The Speaker of the Virginia House of Delegates and the Virginia House Republican Caucus have instructed me to assert the legislative privilege in the above-captioned matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2014.



Christopher Marston

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,	)	
Plaintiffs,	)	Civil Action No.
v.	)	3:11-cv-03120-PMD-HFF-MBS
THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, KEN ARD, in his capacity as Lieutenant Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, Jr., in his capacity as Speaker of the House of Representatives, JAMES H. HARRISON, in his capacity as Chairman of the House of Representatives' Judiciary Committee, ALAN D. CLEMMONS, in his capacity as Chairman of the House of Representatives' Elections Law Subcommittee, MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, CYNTHIA M. BENSCH, MARILYN BOWERS, PAMELLA B. PINSON, and THOMAS WARING, in their capacity as Commissioners of the Elections Commission,	)	
Defendants.	)	

DEFENDANT GLENN F. MCCONNELL'S MOTION TO QUASH AND FOR A LIMITED PROTECTIVE ORDER AND ACCOMPANYING MEMORANDUM OF POINTS AND AUTHORITIES

As shown below, it is well-established that state legislators and their legislative agents possess an absolute privilege against being questioned on their communications or deliberations concerning legislative activity. Plaintiffs have served a deposition notice that infringes on this privilege with respect to certain topics. Accordingly, Defendant Glenn F. McConnell moves to quash Plaintiffs' Rule 30(b)(6) Notice of Deposition of the South Carolina Senate ("Deposition Notice") (attached as Exhibit A), as to those topics, as well as for a protective order on all topics.

The topics identified in Plaintiffs' Deposition Notice either directly or potentially invade the legislative privilege. Specifically, deposition topics 5, 12, and 14, which relate to the drafting of redistricting plans, and deposition topics 7, 13, and 16, which concern communications involving legislators and/or their legislative agents, directly invade the privilege and are facially impermissible.[1] Defendant McConnell therefore respectfully moves this Court to quash Plaintiffs' Deposition Notice as to those topics. All other topics in Plaintiffs' Deposition Notice potentially involve legislative matters that are shielded for the same reasons. Thus, as to those topics, Defendant McConnell requests a protective order precluding any questions concerning deliberations and communications regarding legislative activity. (A Proposed Order is attached.)

Under clear Supreme Court and Fourth Circuit precedent, state legislators and their agents possess a privilege against being questioned on deliberations and communications regarding legislative activity. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951);

[1] Deposition topic 5 seeks information on "[t]he drafting of S. 815 as originally proposed on June 8, 2011," and topics 12 and 14 seek exactly the same information for "'staff plans' originally proposed in the Senate Redistricting Subcommittee" and the Congressional Plan "ultimately passed into law by the General Assembly," respectively. *See* Exhibit A. Deposition topic 13, meanwhile, seeks information regarding "[a]ny and all communication, whether written or verbal, between the Senate and the South Carolina House of Representatives concerning the passage of" the Congressional Plan, and deposition topics 7 and 16 seek information about "communications between the Senate" and outside groups, consultants, and experts regarding the Senate and Congressional Plans. *Id.*

EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 180-81 (4th Cir. 2011). This legislative privilege is firmly rooted in history and tradition, and is incorporated into federal law through Rule 501 of the Federal Rules of Evidence. *See, e.g.*, *Tenney*, 341 U.S. at 372; *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403 (1979); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Wash. Suburban*, 631 F.3d at 181 (citing *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996)); Fed. R. Evid. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). And in civil cases, such as this one, the legislative privilege possessed by state legislators and their staff is co-extensive with the constitutionally-rooted privilege that members of Congress enjoy pursuant to the Speech or Debate Clause. *See S. Ct. of Va.*, 446 U.S. at 733; *Wash. Suburban*, 631 F.3d at 180-81 ("In recognition of the [Speech or Debate privilege's] historical pedigree and practical importance the Supreme Court has extended it to a wide range of legislative actors . . . , and it covers all those properly acting in a legislative capacity, not just actual officeholders."); U.S. Const. art. I, § 6, cl. 1.

This robust protection is premised on the bedrock principle that "the exercise of legislative discretion should not be inhibited by judicial interference." *Bogan*, 523 U.S. at 52. Indeed, the Fourth Circuit recently observed that the "practical import" of the legislative privilege "is difficult to overstate." *Wash. Suburban*, 631 F.3d at 181. Most importantly, the privilege enables legislators and those who assist them "to focus on their public duties by removing the costs and distractions attending lawsuits." *Id.* In addition, and of particular relevance here, legislative privilege serves as bulwark against "political wars of attrition in which

[legislators'] opponents try to defeat them through litigation rather than at the ballot box." *Id.* Accordingly, the privilege protects "against compulsory evidentiary process." *See id.* (citing *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (holding that "[d]iscovery procedures can prove just as intrusive" as defending oneself against suit)); *Burtnick*, 76 F.3d at 613 ("The existence of testimonial privilege is the prevailing law in this circuit."). And the same privilege enjoyed by legislators extends to their "aides and assistants," who are "treated as one" with the legislators they serve. *Gravel v. United States*, 408 U.S. 606, 616 (1972) (internal quotation marks omitted).

Plaintiffs' Deposition Notice runs squarely up against these well-established protections because it purports to compel testimony on a number of categorically and conclusively privileged topics. In particular, all questions concerning "[t]he drafting of" the Senate Plan, Congressional Plan, and any "staff plans"—deposition topics 5, 12, and 14—and all questions concerning "communications" involving any Senator or any of his agents—deposition topics 7, 13, and 16—necessarily and solely concern legislative matters.

Indeed, any questioning on these topics would cut right to the heart of the Senate's "legislative activity." It is impossible for Plaintiffs to seek information on how the enacted plans and any staff plans were "drafted" without inquiring into the very fabric of the legislative redistricting process and thereby "interfer[ing]" with "the exercise of legislative discretion." *Bogan*, 523 U.S. at 52. Likewise, any inquiries about communications related to the proposed and enacted redistricting plans would unavoidably expose discussions among or between legislators and their staff regarding their legislative actions. Because these topics aim at core legislative activity, they are conclusively off-limits. Thus, this Court should quash Plaintiffs'

Deposition Notice as to these topics, prohibiting Plaintiffs from seeking any information on these topics in the future.

For all the same reasons, many of Plaintiffs' other deposition topics could potentially encroach on privileged material as well. As just one example, questions regarding the "legislative procedure for drawing election districts" for the Senate and Congressional Plans (deposition topics 1 and 8) could encompass information on the internal deliberative procedures in the Senate—an area of "legislative activity" clearly protected by the privilege. We do not seek to foreclose any and all inquiry into these topics, because they also encompass permissible topics such as the text of public hearings. Thus, Defendant McConnell requests a protective order precluding any questions regarding these topics that concern communications or deliberations among legislators or their agents regarding the redistricting legislative activity.

Finally, many of the topics in Plaintiffs' Deposition Notice also directly or potentially infringe on attorney-client privilege and work product privilege. For instance, deposition topics 7 and 16 seek information about "[a]ny and all communications between the Senate and . . . private consultants or experts" regarding the Senate and Congressional Plans. Exhibit A. Such questioning potentially encompasses communications between the Senate and its lawyers, which are protected by attorney-client privilege, or substantive materials prepared in anticipation of litigation, which are protected by work product privilege. Moreover, the potential for encroachment on these privileges is heightened here because the Senate's Rule 30(b)(6) witness will be Charles Terreni, the Chief Counsel to the Senate Judiciary Committee's Redistricting Subcommittee. Thus, Defendant McConnell reserves the right to assert attorney-client privilege and work product privilege in response to any deposition questioning.

* * *

For the foregoing reasons, Defendant McConnell's motion to quash and for a limited protective order should be granted.

Respectfully submitted,

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Attorneys for Defendant Glenn F. McConnell

January 23, 2012
Greenville, South Carolina

Exhibit C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

VANDROTH BACKUS, **WILLIE HARRISON BROWN**, **CHARLESANN BUTTONE**, **BOOKER MANIGAULT**, **EDWARD MCKNIGHT**, **MOSES MIMS, JR, ROOSEVELT WALLACE**, and **WILLIAM G. WILDER**, on behalf of themselves and all other similarly situated persons, Plaintiffs, **SENATOR DICK ELLIOTT** Intervener-Plaintiff, v. **THE STATE OF SOUTH CAROLINA**, **NIKKI R. HALEY**, in her capacity as Governor**, KEN ARD**, in his capacity as Lieutenant Governor**, GLENN F. MCCONNELL**, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee**, ROBERT W. HARRELL, JR**, in his capacity as Speaker of the House of Representatives, **JAMES H. HARRISON,** in his capacity as Chairman of the House of Representatives' Judiciary Committee, **ALAN D. CLEMMONS**, in his capacity as Chairman of the House of Representatives' Elections Law Subcommittee, **MARCI ANDINO**, in her capacity as Executive Director of the Election Commission, **JOHN H. HUDGENS, III**, Chairman, **NICOLE S. WHITE**, **MARILYN BOWERS**, **MARK BENSON**, and **THOMAS WARING**, in their capacity as Commissioners of the Elections Commission, Defendants.	**Case No.: 3:11-cv-03120-HFF-MBS-PMD** **Order**

For the reasons set forth in Defendant McConnell's Motion to Quash and for a Limited Protective Order and Accompanying Memorandum of Points and Authorities, this Court hereby **GRANTS** Defendants McConnell and Harrell's motions. Deposition topics 5, 12, and 14, which relate to the drafting of the redistricting plans, are quashed. Deposition topic 13, which concerns communications involving legislators and their legislative agents, is also quashed. Additionally, deposition topics 7 and 16 are quashed to the extent the questions involve communications between the Senate or the House and "private consultants or experts."

With respect to the remaining topics in Plaintiffs' Notice of Deposition, this Order prohibits Plaintiffs from inquiring into any matters protected by legislative privilege. That means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation. *See Alexander v. Holden*, 66 F3d. 62, 68 n.4 (4th Cir. 1995) ("In *Berkley*, we suggested that council members may be privileged from testifying in federal district court regarding their motives in enacting legislation . . . .") (citing *Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 n. 9 (4th Cir. 1995).

In their response, Plaintiffs argue that Defendants have waived any objection based on attorney client privilege or work product doctrine. The Court disagrees that those privileges have been waived.

Subsequent to their response, the Court received a letter from Plaintiffs' counsel explaining that Plaintiffs anticipate opposing counsel may object to some or all of the questions put to the witnesses they are deposing on February 9, 2012 by asserting attorney-client privilege or work product doctrine. Plaintiffs' request that the Court designate a member of the panel to

be available to speak via telephone to rule on any objection that may arise. The Court denies that request. This Order is sufficient guidance for the depositions. Any other disputes will be resolved by motion after the depositions.

It is SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

February 8, 2011
Charleston, SC