Received 11/17/2017 8:02:07 AM Commonwealth Court of Pennsylvania

Filed 11/17/2017 8:02:00 AM Commonwealth Court of Pennsylvania
261 MD 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 261 MD 2017

LEAGUE OF WOMEN VOTERS
OF PENNSYLVANIA, *et al.*,

Petitioners,

v.

THE COMMONWEALTH
OF PENNSYLVANIA, *et al.*,

Respondents.

BRIEF OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF THE INSTITUTIONAL SPEECH OR DEBATE PRIVILEGE OF THE LEGISLATIVE BRANCH AND OTHER PRIVILEGES

Jonathan F. Bloom (No. 45542)
Karl S. Myers (No. 90307)
Kyle A. Jacobsen (No. 320802)
STRADLEY RONON
STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000

Counsel for respondent
The General Assembly of the
Commonwealth of Pennsylvania

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE QUESTIONS PRESENTED 4

III. STATEMENT OF FACTS 5

A. Petitioners challenge a legislative enactment of the General Assembly 5

B. Petitioners seek discovery into the legislative process concerning a legislative enactment 6

IV. ARGUMENT 10

A. The Speech or Debate Clause protects all activities within the legitimate legislative sphere. 10

1. Legislative privilege broadly protects the integrity of the legislative process and legislative independence. 10

2. Speech or Debate privilege protects a wide array of activities in the legitimate legislative sphere. 16

3. Individual legislators and others cannot be compelled to disclose information protected by the Speech or Debate privilege, nor can they waive this institutional privilege of the Legislative Branch. 21

B. Activities by legislators' "alter egos" (consultants, advocacy groups, constituents, and others) are squarely within the legitimate legislative sphere. 23

1. The Supreme Court's *Gravel* decision establishes that legislative functions performed by legislators' alter egos are afforded Speech or Debate protection. 24

2. The Supreme Court of Virginia held in 2016 that legislative alter egos can include outside consultants, advocacy groups, and constituents. 26

3. Cases across the nation apply Speech or Debate privilege to non-legislator communications and activities. 30

4. This Court recognized in 2007 that legislative communications with third parties are entitled to Speech or Debate protection. 36

C. Petitioners' discovery is barred by Speech or Debate privilege. 39

D. Attorney-client privilege and the attorney work-product doctrine also bar petitioners' discovery concerning Act 131 of 2011. 41

V. CONCLUSION 43

TABLE OF AUTHORITIES

CASES

Almonte v. City of Long Beach,
478 F.3d 100 (2d Cir. 2007) 32

Arizona Independent Redistricting Commission v. Fields,
75 P.3d 1088 (Ariz. App. 2003) 34, 40

Bagwell v. DOE,
103 A.3d 409 (Pa. Commw. 2014) 42

Bogan v. Scott Harris,
523 U.S. 44 (1998) 12

Brown & Williamson Tobacco Corp. v. Williams,
62 F.3d 408 (D.C. Cir. 1995) 17

Bruce v. Riddle,
631 F.2d 272 (4th Cir. 1980) 31

Cianfrani v. SERB,
426 A.2d 1260 (Pa. Commw. 1981),
aff'd, 460 A.2d 753 (Pa. 1983) 38

Coffin v. Coffin,
4 Mass. 1 (Mass. 1808) 13

Consumers Educ. & Prot. Ass'n v. Nolan,
368 A.2d 675 (Pa. 1977) 2, 10, 13

Eastland v. United States Servicemen's Fund,
421 U.S. 491 (1975) 2, 10, 14

Edwards v. Vesilind,
790 S.E.2d 469 (Va. 2016) ..... Passim

Finn v. Rendell,
990 A.2d 100 (Pa. Commw. 2010) 38

Firetree, Ltd. v. Fairchild,
920 A.2d 913 (Pa. Commw. 2007) 36-38

Gillard v. AIG Ins. Co.,
15 A.3d 44 (Pa. 2011) 42

Government of the Virgin Islands v. Lee,
775 F.2d 514 (3d Cir. 1985) 31

Gravel v. United States,
408 U.S. 606 (1972) ..... Passim

Harristown Dev't Corp. v. DGS,
580 A.2d 1174 (Pa. Commw. 1990),
rev'd on other grounds, 614 A.2d 1128 (Pa. 1992) 38

Holmes v. Farmer,
475 A.2d 976 (R.I. 1984) ..... Passim

In re Grand Jury Investigation,
587 F.2d 589 (3d Cir. 1978) 21

In re: Grand Jury (Granite Purchases),
821 F.2d 946 (3d Cir. 1987) 9

Jubelirer v. Rendell,
953 A.2d 514 (Pa. 2008) 39

Jubelirer v. Singel,
638 A.2d 352 (Pa. Commw. 1994) 38

Kennedy v. Commonwealth,
546 A.2d 733 (Pa. Commw. 1988) 38

Kilbourn v. Thompson,
103 U.S. 168 (1881) 13, 17

Lincoln Party v. General Assembly,
682 A.2d 1326 (Pa. Commw. 1996) 2, 12, 38, 39

McNaughton v. McNaughton,
72 Pa. D. & C. 4th 363 (Com. Pl. Dauphin 2005) 16, 40

McSurely v. McLellan,
553 F.2d 1277 (D.C. Cir. 1976) 31

Melvin v. Doe,
48 Pa. D. & C. 4th 566 (Com. Pl. Allegheny 2000) 18, 38

Montgomery County v. Schooley,
627 A.2d 69 (Md. App. 1993) 33

Nash Metalware Co. v. Council of City of New York,
2006 WL 3849065 (N.Y. Sup. Dec. 21, 2006) 14

National Association of Social Workers v. Harwood,
69 F.3d 622 (1st Cir. 1995) 16-17

Pentagen Techs. Int'l v. Committee on Appropriations,
20 F. Supp. 2d 41 (D.D.C. 1998) 17

Pittston Coal Group, Inc. v. Int'l Mine Workers of America,
894 F. Supp. 275 (W.D. Va. 1995) 32

R.S.S.W. v. City of Keego Harbor,
56 F. Supp. 2d 798 (E.D. Mich. 1999) 33

Rusack v. Harsha,
470 F. Supp. 285 (M.D. Pa. 1978) 15, 17

Sears v. Corbett,
49 A.3d 463 (Pa. Commw. 2012),
rev'd on other grounds, 118 A.3d 1091 (Pa. 2015) 38

Smolsky v. Pennsylvania General Assembly,
34 A.3d 316 (Pa. Commw. 2011) 38

Sweeney v. Tucker,
375 A.2d 698 (1977) 11, 14

Tenney v. Brandhove,
341 U.S. 367 (1951) 11

Traweek v. City and County of San Francisco,
659 F. Supp. 1012 (N.D. Cal. 1985),
rev'd on other grounds, 920 F.2d 589 (9th Cir. 1990) 32

United States Football League v. National Football League,
842 F.2d 1335 (2d Cir. 1988) 22

United States v. McDade,
827 F. Supp. 1153 (E.D. Pa. 1993) 14

United Transp. Union v. Springfield Terminal Railway Co.,
132 F.R.D. 4 (D. Me. 1990) 32

White v. First Am. Registry,
378 F. Supp. 2d 419 (S.D.N.Y. 2005) 6, 15

Youngblood v. DeWeese,
352 F.3d 836 (3d Cir. 2004) 17, 20

CONSTITUTIONAL PROVISIONS

PA. CONST. art. II, §15 ..... Passim

R.I. CONST., art. IV, §5 22

Va. Const., art. IV, §9 27

LEGISLATIVE ENACTMENTS

Pennsylvania Act 131 of 2011,
P.L. 598, Cl. 25, S.B. 1249 (Dec. 22, 2011) ..... Passim

OTHER AUTHORITIES

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, S. Rep. No. 896, 93rd Congress, 2nd Sess. 2 (1974) 20

LETTERS AND OTHER WRITINGS OF JAMES MADISON (PHILADELPHIA 1865) 13

THE WORKS OF JAMES WILSON (R. McCloskey ed. 1967) 13

THE WORKS OF THOMAS JEFFERSON (Ford ed. 1904) 13

The General Assembly of the Commonwealth of Pennsylvania, by and through its attorneys, Stradley Ronon Stevens and Young, LLP, hereby submits this brief to defend and safeguard the constitutionally-endowed Speech or Debate privilege of the Legislative Branch and to protect it from unconstitutional discovery.

I. INTRODUCTION

Through a series of invasive and burdensome discovery requests, petitioners attempt to bully their way into the Legislative Branch, break into the sphere of legitimate legislative activity, and gain access to materials protected by the constitutionally-enshrined Speech or Debate privilege. Petitioners indiscriminately seek documents, information, and depositions from House and Senate Leaders, legislators, legislative legal counsel and high-level legislative staffers employed by the General Assembly, and the General Assembly itself. The discovery petitioners seek is about a legislative enactment of the General Assembly.

Petitioners' requests are prohibited by the Pennsylvania Constitution. The Speech or Debate clause of our Commonwealth's governing document, which breathes life into the Separation of Powers

between the three branches of government, protects the Legislature from intrusive discovery in judicial proceedings. In Article II, Section 15 of the Constitution, the People declared:

> The members of the General Assembly[,] ... for any speech or debate in either House[,] shall not be questioned in any other place.

Our Supreme Court has proclaimed that this command must be "interpreted broadly" to protect any activity that "falls within the legitimate legislative sphere."[1] The development and passage of legislation fall squarely within the legitimate legislative sphere protected by the Speech or Debate privilege,[2] and therefore all of petitioners' discovery requests are barred.

Perhaps aware of this prohibition, petitioners appear to be trying to make an end-run around the Constitution by seeking discovery from individuals who they believe assisted the General Assembly and its legislators in developing the enactment. Petitioners seem to be

---

[1] Consumers Educ. & Prot. Ass'n v. Nolan, 368 A.2d 675, 680-81 (Pa. 1977) (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)).

[2] Lincoln Party v. General Assembly, 682 A.2d 1326, 1333 (Pa. Commw. 1996) ("It is axiomatic that passing legislation … is within the legitimate legislative activity of the Legislature. Quite frankly, the Court cannot envision a more important legislative function." (citation omitted)).

taking the position that these individuals – consultants, advocacy groups, and/or constituents, in addition to legislative legal counsel and legislative staff – can be subjected to discovery about matters within the legitimate legislative sphere. But legislative proposals do not always start on the House or Senate Floor or in a room within the Pennsylvania Capitol. The seeds of legislation often are planted elsewhere. Its development can start with a constituent encounter, a significant public event, or communications with outside interest or advocacy groups. Regardless of an enactment's source of origin, each event that occurs during the legislative process – from start to finish – serves a legislative function.

Given the reality of how legislation develops, this case really is no different than any other where discovery is improperly sought about the legislative process. And just as in those cases, the discovery that petitioners seek is prohibited, as has been long recognized by the courts. In its pivotal 1972 decision in Gravel, the United States Supreme Court found, in no uncertain terms, that the Speech or Debate privilege protects more than the legislators themselves. It extends to staff, consultants, and third parties who assist or have input into the

legislative process. That consistent body of jurisprudence continues to the present. Just last year, the Supreme Court of Virginia unanimously held that Speech or Debate privilege precluded similarly intrusive discovery in a case nearly identical to this one. This firmly-rooted jurisprudence recognizes that Speech or Debate privilege must extend to protect all aspects of the legislative process from discovery. It demands that petitioners' discovery be ordered precluded in its entirety.

II. STATEMENT OF THE QUESTIONS PRESENTED

1. Does Speech or Debate privilege preclude petitioners' discovery requests for documents, information, and testimony about the development and passage of Act 131 of 2011, an enactment by the General Assembly?

Suggested answer: Yes.

2. In addition to the protections afforded by the Speech or Debate privilege, do the attorney-client privilege and attorney work-product doctrine also protect the General Assembly's communications with its legal counsel, and materials prepared by those lawyers, in relation to Act 131?

Suggested answer: Yes.

III. STATEMENT OF FACTS

A. Petitioners challenge a legislative enactment of the General Assembly.

In this case, petitioners assert several challenges under the Pennsylvania Constitution to an enactment of the General Assembly. In particular, they ask this Court to issue an order striking down as unconstitutional Pennsylvania Act 131 of 2011, which was signed into law by the Governor on December 22, 2011. That enactment specifies the plan of congressional districts for the Commonwealth of Pennsylvania that is in effect today.

Petitioners accurately allege that the map of congressional districts was developed through a legislative process. They assert that the districts are set "by legislative action in a bill that proceeds through both chambers of the General Assembly and is signed into law by the Governor." (Pet. at ¶34.) Petitioners also specifically allege the legislative steps that took place as Senate Bill 1249 was introduced in on September 14, 2011 and then traveled through the Legislature until it became law as Act 131. (See, e.g., Pet. at ¶¶50-52, 68-69, 76.)

Act 131 of 2011 was *legislative* in its germination stage, was *legislative* as the issues were studied and considered, was *legislative* in

its formative stage, was *legislative* as it developed, was *legislative* as it was introduced in each chamber, was *legislative* as it traversed through the House and Senate (including referral to committee and each of the three considerations on each chamber's Floor, as required by Article III, Sections 2 and 4 of the Pennsylvania Constitution), was *legislative* as it was separately approved by the House and Senate, was *legislative* when the Elected Presiding Officers of the Senate and House certified the enrolled bill, and was *legislative* when it was signed into law by the Governor. All parts of that *legislative* process – from beginning to end – obviously fall within the *legislative* sphere.

B. Petitioners seek discovery into the legislative process concerning a legislative enactment.

After filing their petition for review, the petitioners sought discovery from the respondents, including the General Assembly:

First, on June 30, 2017, petitioners issued a set of document requests and a set of interrogatories to the General Assembly and the Elected Presiding Officers of the House and the Senate.[3]

[3] These discovery requests are attached as ***Exhibits A*** and ***B*** hereto.

Second, on July 20, 2017, petitioners notified the General Assembly that they intended to serve 17 subpoenas seeking the production of documents.[4] Of those, 11 were to be directed to individuals currently or formerly associated with the General Assembly, including a former Representative, 3 attorneys employed by the General Assembly serving as counsel to legislators or legislative leaders, and 7 high-level legislative staffers employed by the General Assembly. The remaining 6 subpoenas were directed to third parties. Later, on August 11, 2017, petitioners issued an 18th subpoena notice, this time seeking documents from former Governor Corbett.

Third, petitioners served a purported "corporate designee" deposition notice on the General Assembly.[5]

In their discovery requests, petitioners seek documents, information, and testimony about Act 131, starting from its earliest

---

[4] These discovery requests are attached as exhibits to the August 9, 2017 and August 28, 2017 filings made with this Court on behalf of the General Assembly.

[5] This discovery request is attached as an exhibit to September 22, 2017 filing made with this Court on behalf of the General Assembly.

development through final enactment.[6] Specifically, petitioners seek access to the following legislative materials and information about a piece of legislation:

- All documents, in all forms, referring or relating to Act 131, including proposals, analyses, memoranda, notes, and individuals' calendar entries;

- All documents and information pertaining to the development of Act 131 and the criteria and data sources used to develop that enactment;

- All communications relating to Act 131, including communications by, with, or between Senators, Representatives, committees, and legislative staffers;

- All communications with attorneys about Act 131; and

- Information about the General Assembly personnel and other individuals involved in developing Act 131, including their specific roles in the legislative process, the documents they possess, their access to relevant materials, and personal financial information about their compensation.

---

[6] Although petitioners' discovery references the "2011 Plan" instead of Act 131, the term "2011 Plan" is defined in petitioners' discovery as "the 2011 Congressional Redistricting Plan for Pennsylvania *that was signed into law in 2011*." See, e.g., ***Exhibits A*** and ***B*** hereto.

The General Assembly and its Elected Presiding Officers objected to this discovery as unconstitutional and otherwise violative of applicable privileges, including by way of filings with this Court on August 9, 2017, August 28, 2017, September 22, 2017, and September 26, 2017. The General Assembly invoked its constitutionally-endowed Speech or Debate privilege. The General Assembly also asserted its attorney-client and attorney work-product privileges, among other protections, and also objected to petitioners' "corporate designee" deposition notice as invalid.

The Court has directed the parties to file briefs addressed to questions of privilege. The Legislative Branch now files this brief to ensure that its constitutionally-enshrined privileges are respected and safeguarded by its sister branch of government.[7]

---

[7] The General Assembly acknowledges that there is ongoing redistricting litigation in federal court, where the federal court may take a different approach to discovery than the approach the General Assembly urges – and the Pennsylvania Constitution demands – in this state court action (where only state constitutional claim are asserted). See Agre v. Wolf, E.D. Pa. No. 17-4392. It must be noted, however, that any decision to permit any discovery by the federal court is not relevant or instructive here, as a Pennsylvania *federal* court might treat a Pennsylvania state legislator's assertion of legislative privilege differently than a Pennsylvania *state* court. See, e.g., In re: Grand Jury (Granite Purchases), 821 F.2d 946, 954-56 (3d Cir. 1987) (noting impact of Supremacy Clause and that Speech or Debate privilege is addressed mainly to preventing

(footnote continued on next page)

IV. ARGUMENT

A. The Speech or Debate Clause protects all activities within the legitimate legislative sphere.

1. Legislative privilege broadly protects the integrity of the legislative process and legislative independence.

The Speech or Debate Clause of the Pennsylvania Constitution, which commands that Members of the General Assembly "shall not be questioned in any other place" "for any speech or debate in either House," PA. CONST. art. II, §15, has core purposes of ensuring the Legislature's independence, giving effect to Separation of Powers principles, and creating a constitutional equilibrium or balance among the three branches of government. This constitutionally-based legislative privilege was forged to afford the General Assembly wide freedom of speech, debate, and deliberation – without fear of external intimidation, intrusion, or threats.[8] Eastland v. U.S. Servicemen's

---

(footnote continued from prior page)

intimidation of a legislature by a sister branch of government, a concern of less import when state legislators are involved in federal court proceedings).

[8] Pennsylvania's Speech or Debate Clause is coterminous with its federal counterpart. See Consumers Ed. & Protective Ass'n v. Nolan, 368 A.2d 675, 681 (Pa. 1977) ("[W]e find no basis for distinguishing the scope of the Pennsylvania

(footnote continued on next page)

Fund, 421 U.S. 491, 502 (1975); Gravel v. United States, 408 U.S. 606, 616 (1972); see Edwards v. Vesilind, 790 S.E.2d 469, 478 (Va. 2016) ("The very nature of the Clause concerns the separation of powers and the protection of legislative processes. At its essence, it prevents intrusion into the legislative process from the executive branch or from a possibly hostile judiciary."); Tenney v. Brandhove, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies…. The courts should not go beyond the narrow confines of determining that a [legislative action] may fairly be deemed within [the legislative] province.")

"The privilege protects the institution of the Legislature itself from attack by either of the other co-equal branches of government." Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984). And,

---

(footnote continued from prior page)

Speech and Debate Clause applicable to members of the General Assembly from that of the federal clause applicable to members of Congress[.]"); Sweeney v. Tucker, 375 A.2d 698, 703 (1977) (recognizing that Pennsylvania's Speech or Debate Clause is "essentially the same" as its federal counterpart, and acknowledging that Pennsylvania courts may "seek guidance from the federal cases which clarify the policies underlying the federal Speech or Debate Clause"). However, as explained in footnote 7, federal decisions as to Speech or Debate privilege assertions by state legislators are of limited or no import here.

"[a]t the same time[,] it protects the individual legislator personally from attack … by another branch of government." Id. at 985. This core constitutional privilege provides legislators with sweeping and absolute protection, including immunity from both criminal and civil liability for their legislative activities. See Bogan v. Scott Harris, 523 U.S. 44, 48-49 (1998).

This Court has held that it is "axiomatic that passing legislation … is within the legitimate legislative activity of the Legislature." Lincoln Party v. General Assembly, 682 A.2d 1326, 1333 (Pa. Commw. 1996). But Speech or Debate protection is not narrowly limited or confined to drafting legislation and debating bills on the Floor of the Senate or the House. See Holmes v. Farmer, 475 A.2d 976, 984 (R.I. 1984) ("Restrictive application of the privilege to words spoken within the walls of the State House in a formal setting would inhibit legitimate legislative activities."). Quite to the contrary: the Pennsylvania Supreme Court has declared that the "Speech or Debate Clause must be interpreted broadly in order to protect legislators from judicial interference with their legitimate legislative activities," and that any activity of a legislator – even that which is not literally speech

or debate – cannot be questioned in a judicial forum "if it falls within the 'legitimate legislative sphere.'"[9] Consumers Education and Protective Association v. Nolan, 368 A.2d 675, 680-81 (Pa. 1977). An activity falls within the "legitimate legislative sphere" if it is:

> 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

[9] One of the Framers described the importance of the Speech and Debate Clause as follows: "[T]o 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 offense." 1 THE WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967). Thomas Jefferson further explained that "representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any." 8 THE WORKS OF THOMAS JEFFERSON 322 (Ford ed. 1904). James Madison cautioned that "the reason and necessity of the privilege" should direct the application of legislative immunity by the courts. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 221 (Philadelphia 1865). The first American decision regarding the scope of Speech or Debate privilege expressed agreement with the Framers; the court explained that the privilege "ought not to be construed strictly, but liberally, that the full design of it may be answered …. [It extends to] every thing said or done by him, as a representative, in the exercise of the functions of that office." Coffin v. Coffin, 4 Mass. 1, 19 (Mass. 1808). And the early United States Supreme Court also agreed with the Framers. In its very first opinion considering the Speech or Debate Clause, the Court warned against its literal interpretation, and instead emphasized that the purpose of legislative privilege should define the bounds of its application. See Kilbourn v. Thompson, 103 U.S. 168, 203 (1881).

> other matters which the Constitution places within the jurisdiction of either House.

Eastland, 421 U.S. at 504; Gravel, 408 U.S. at 625. In determining whether Speech or Debate immunity applies, the question is whether the claim involves an inquiry "into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for these acts." Sweeney, 375 A.2d at 704.

Given the realities and complexities of the modern legislative process, and in keeping with the Supreme Court's broad application of the privilege, courts repeatedly recognize that the sphere of legitimate legislative activity extends far beyond the physical halls of the Capitol Building. See United States v. McDade, 827 F. Supp. 1153, 1163 (E.D. Pa. 1993) ("Today … most of the grinding of legislative machinery occurs outside the chambers of the houses themselves …. [I]n an effort to carry forward the Speech or Debate Clause's purpose of immunizing legislative acts … courts have extended the Clause beyond the chambers' doors."). These decisions contemplate that "[t]he legislative process, unlike the process before a Court or administrative agency, is inherently chaotic." Nash Metalware Co. v. Council of City of New York, 2006 WL 3849065, at *13 (N.Y. Sup. Dec. 21, 2006); see also

White v. First Am. Registry, 378 F. Supp. 2d 419, 424 n.26 (S.D.N.Y. 2005) ("Keen awareness of the legislative process doubtless accounted for the remark, famously attributed to Bismarck, that, '[i]f you like law and sausages you should never watch either being made.'").

An absolutely essential part of this dynamic legislative process is the development and consideration of topics of prospective legislation, which necessarily includes communications with – and assistance from – constituents, industry groups, advocacy groups, and consultants. These activities are protected: "It has long been held that investigation by a [legislator] regarding issues over which legislation may be had is legitimate legislative activity and, therefore, protected by the Speech or Debate Clause." Rusack v. Harsha, 470 F. Supp. 285, 296 (M.D. Pa. 1978) (legitimate legislative sphere encompasses all activities that allow a legislator to fulfill her or his duties "with any kind competency"). A broad construction of the Speech or Debate privilege therefore is critical to maintaining this vibrant democratic process. Safeguarded by the privilege, legislators are free to do their work and serve their constituents in the manner deemed appropriate.

To be clear, the Speech or Debate Clause not only protects against suit, but also shields the Legislature and its Members from compelled discovery in connection with the discharge of their duties. See McNaughton v. McNaughton, 72 Pa. D. & C. 4th 363, 369 (Com. Pl. Dauphin 2005) ("the Speech and Debate Clause extends beyond providing legislative immunity from suit or shielding oral testimony; it also protects documents from discovery, if the documents contain information that is the product or result of activity within the legitimate legislative sphere").

There can be no doubt, therefore, that the Speech or Debate privilege fully protects against any discovery seeking to inquire about the development of legislation.

2. Speech or Debate privilege protects a wide array of activities in the legitimate legislative sphere.

The protection afforded by the Speech or Debate Clause covers a "host of kindred activities" beyond literal speech or debate. National Association of Social Workers v. Harwood, 69 F.3d 622, 630 (1st Cir. 1995). The doctrine's "prophylaxis extends to *any* act 'generally done in a session of the House by one of its members in

relation to the business before it.'" Id. at 630 (emphasis added; quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)); Pentagen Techs. Int'l v. Committee on Appropriations, 20 F. Supp. 2d 41, 43 (D.D.C. 1998) (many activities "other than literal speech or debate can fall within that definition").

Courts thus have held that a wide range of activities – including those in the lead-up to consideration and enactment of legislation – fall squarely within Speech or Debate privilege, and hence are protected from compelled disclosure:

- Evidence with regard to a Congressional investigation. See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995).
- Legislative investigation reports. See Pentagen Techs. Int'l v. Committee on Appropriations, 20 F. Supp. 2d 41 (D.D.C. 1998).
- Information concerning events occurring during a Senate subcommittee hearing. See Gravel v. United States, 408 U.S. 606 (1972).
- Investigation by a legislator regarding issues over which legislation may be had. See Rusack v. Harsha, 470 F. Supp. 285 (M.D. Pa. 1978).
- Allocations of funds from House Leadership. See Youngblood v. DeWeese, 352 F.3d 836 (3d Cir. 2004).

- Information about a legislator's discussions of potential judicial appointees. See Melvin v. Doe, 48 Pa. D. & C. 4th 566 (Com. Pl. Allegheny 2000) (Wettick, J.).

Consistent with these cases, the Speech or Debate privilege involves many activities, discussions, communications or information within the legislative sphere. These include, among other things:

- Conduct of members of the legislature, legislative committees, or subcommittees with respect to proposed or pending legislation or other legislative activity.

- Constituent or industry group complaints, concerns, suggestions for legislative enactment, or other issues of public policy.

- Communications regarding proposed budgetary requests, including executive agency budgets, non-preferred institutions, state-related colleges and universities, and city and local agencies, and comments, edits, or analysis thereto.

- Documents or communications related to strategies to promote or oppose potential or pending legislation, constitutional amendments, administrative regulations, or internal House procedures and policies.

- Negotiations between the members of the House and Senate regarding legislation, proposed legislation, internal procedures, policies, litigation, or other matters of public policy.

- Studies, analyses, and reports of matters of public policy which may also be topics of potential legislative enactment.

- Documents, memos, talking points, and briefs prepared for use in House or Senate committee and subcommittee meetings, hearings on the House or Senate Floor in connection with proposed or pending legislation, or other legislative activity.

- Communications, notes, or minutes regarding House or Senate committee and subcommittee meetings or other meetings of legislators or their respective staffs.

- Draft speeches or talking points to read on the Floor of the House or Senate, and any comments or proposed changes thereto, including those relating to proposed or pending legislation or other legislative activities.

- Communications reflecting strategies to respond to the opposition party with regard to proposed legislation, pending legislation, or the legislative agenda.

- Communications reflecting strategies to deal with the Governor's Office or other member or staff of the Executive Branch with regard to proposed legislation, pending legislation, or the legislative agenda.

- Communications pertaining to funding requests of other branches of state government and local political subdivisions.

- Communications with television, radio, and newspaper reporters and media consultants

that reflect, constitute, or relate to legislative strategy.

- Communications between and among legislative counsel, committee counsel, staff attorneys, state administrative agencies, and city and local governmental agencies on behalf of members of the Senate, House and their respective staff with regard to proposed legislation, pending legislation, the legislative agenda or other matters within the domain of the General Assembly.

- Communications concerning the litigation of legal challenges to legislative enactments of the General Assembly, including but not limited to legislation and constitutional amendments.

See Youngblood, 352 F.3d at 841 (citing examples of activities within the legislative sphere, and hence privileged: voting for a resolution; obtaining records for a committee hearing; preparing investigative reports; addressing a congressional committee, and speaking before the legislative body in session); see also JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS, THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS, S. Rep. No. 896, 93rd Congress, 2nd Sess. 2, at 53 (1974) (explaining that Speech or Debate protections apply to "any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate

and coequal branches which includes anything a Legislator does as a representative of a constituency").

3. Individual legislators and others cannot be compelled to disclose information protected by the Speech or Debate privilege, nor can they waive this institutional privilege of the Legislative Branch.

The Speech or Debate privilege prohibits individual legislators from being questioned – either voluntarily or involuntarily, and whether parties to an action or not – where their compelled disclosure would include the Legislature's protected institutional Speech or Debate, or that of other legislators. Thus, the General Assembly has come to rely upon the Speech or Debate privilege as an institution – just as legislators have come to rely upon it as individuals. See, e.g., In re Grand Jury Investigation, 587 F.2d 589, 593 (3d Cir. 1978) (Speech or Debate immunity is of "great institutional importance to the House as a whole, [and] it is also personal to each member"). Indeed, while the Speech or Debate Clause protects individual members of the General Assembly from questioning, its purpose is not only to protect individuals from compelled disclosure, but also to protect the institution itself from interference in carrying out its constitutional role.

In United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988), the court held that a Senator was barred by the Speech or Debate Clause from voluntarily testifying about legislative activities involving other members of Congress. Id. at 1374-75. The court explained that the Senator could not waive "the testimonial privilege that members of Congress enjoy under the Speech or Debate Clause." Id. The court concluded that"[t]he underlying purpose of the Speech or Debate Clause" is to "protect the integrity of the legislative process by insuring the independence of individual legislators," and as such, this purpose "would be 'ill-served' if [even voluntary testimony] were permitted." Id. at 1375.

Similarly, in Homes v. Farmer, 475 A.2d 976 (R.I. 1984), the Rhode Island Supreme Court proclaimed that, under the Rhode Island Constitution's Speech or Debate Clause,[10] individual legislators were not permitted to voluntarily testify in court about legislative activities (in that case, concerning the formation of a redistricting plan), since the

[10] The Rhode Island constitution provides: "For any speech in debate in either house, no member shall be questioned in any other place." R.I. CONST., art. IV, §5.

privilege at stake belonged to the legislature, not the individual member. Id. at 985 (Speech or Debate privilege is designed to "protect[] the Legislature as an institution from judicial interference"). The court ruled that the lower court had improperly admitted the testimony of individual legislators about legislative activities, which had infringed upon the legislature's own Speech or Debate privilege. Id. ("none of the testimony as it related to legitimate legislative activities should have been introduced"). Id. The Court explained:

> The privilege is institutional in its protection of the legislature, ensuring the separation of powers among the co-equal branches of government. To allow an individual legislator to waive the institution's privilege would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.

Id. The court thus held that an individual legislator could not waive Speech or Debate privilege, as it also belonged to the institution itself.

B. Activities by legislators' "alter egos" (consultants, advocacy groups, constituents, and others) are squarely within the legitimate legislative sphere.

The legitimate legislative sphere also protects the activities and communications of non-legislator individuals who are engaged in

legislative functions. Stated another way, Speech or Debate privilege extends to communications by legislators and their "alter egos" at the "grass roots" level, where the seeds of legislation are planted and the legislative process is set in motion. These communications – even by or with non-legislators – are afforded the very same Speech or Debate protections as communications between two legislators, since both types of communications involve the development of legislation, and thus fall within the legitimate legislative sphere.

1. The Supreme Court's *Gravel* decision establishes that legislative functions performed by legislators' alter egos are afforded Speech or Debate protection.

Speech or Debate protection for legislators' alter egos emanates from the Supreme Court's landmark decision in Gravel v. United States, 408 U.S. 606 (1972). There, the federal government attempted to subpoena Dr. Leonard Rodberg, a resident fellow at the Institute of Policy Studies, who had assisted Senator Mike Gravel in preparing for a Senate subcommittee meeting. Dr. Rodberg had been added to Senator Gravel's staff just hours before the hearing. Id. at 609-10.

The Supreme Court held that Speech or Debate privilege prevented any testimony by Dr. Rodberg about his assistance to Senator Gravel in preparing for the legislative meeting. The Court's reasoning was rooted in the fact that the activities of Dr. Rodberg would have been protected if they had been personally performed by Senator Gravel. The Court explained that this reality made it necessary to extend Speech or Debate protection to alter egos of legislators, as they are vital to the legislative process:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; 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.

Id. at 616-17. The Court therefore held that "for the purpose of construing the [Speech or Debate] privilege *a Member and his aide are to be treated as one*." Id. at 616 (emphasis added).

In reaching its conclusion, the Gravel court emphasized that "[r]ather than giving the [Speech or Debate Clause] a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." Id. at 618. The Court thus was sure in its conclusion that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." Id. at 618. Gravel's legacy is that it established – once and for all – that the activities and communications of those assisting a legislator with legislative activities fall within the protection of the Speech or Debate clause.

2. The Supreme Court of Virginia held in 2016 that legislative alter egos can include outside consultants, advocacy groups, and constituents.

Today, courts continue to abide by the Gravel court's directive that non-legislators enjoy Speech or Debate protection when they function as the alter ego or agent of a legislator in performing a legitimate legislative activity. Most recently, the Supreme Court of our sister state of Virginia applied Gravel's teachings when it was

confronted with the precise issue now before this Court: determining the scope of Speech or Debate privilege as to non-legislators – including constituents, consultants, advocacy groups, and other third parties – in the context of a dispute over legislative redistricting.[11]

In Edwards v. Vesilind, 790 S.E.2d 469 (Va. 2016), the court applied the mandate of the U.S. Supreme Court in Gravel that the activities and communications of those assisting legislators in legislative activity fall within the protections of the Speech or Debate clause, irrespective of whether those non-legislators are outside consultants, constituents, advocacy groups, or others. The key question in Edwards, like in Gravel, was whether the individuals were functioning in a legislative capacity on behalf of and at the direction of a legislator. If so, their activities fell within the legitimate legislative sphere.

In Edwards, several individual plaintiffs filed suit, challenging Virginia's state legislative maps. They then sought to issue

---

[11] Virginia's Speech or Debate clause is similar to Pennsylvania's, providing: "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.

subpoenas to a legislative agency and several individual legislators. And just as in this case, the plaintiffs in Edwards sought documents and information about the redistricting legislation, including the development of the state legislative maps and the criteria used to create the map.

Based on Gravel, the Virginia Supreme Court held that Speech or Debate privilege applied to protect both the individual legislators and their alter egos. Id. at 480-82. This meant that the communications and activities of the legislators, their staff members, and third parties were protected, as long as those people were "functioning in a legislative capacity on behalf of and at the direction of a Member." Id. at 481. The court identified several non-exhaustive factors for determining this "function" question, including the individual's relationship with the legislator, whether the individual could be identified as serving in a policy capacity, and the source of the individual's remuneration. Id. at 482. Ultimately, these and other factors were to be assessed in totality to "evaluate function: whether the person is acting as 'one' with the legislator, and whether the individual is functioning in a legislative capacity." Id.

Importantly, the court refused to draw artificial lines between the types of individuals who could be protected by Speech or Debate privilege and those who could not. It thus proclaimed that constituents, policy consultants (including redistricting consultants), any other third parties, and even unpaid interns could be protected. Id. at 482-83. The court categorically rejected the notion that a person had to be employed or paid by the legislature in order for Speech or Debate privilege to apply. It also explained that "even a communication between two alter egos" could be subject to Speech or Debate protection. Id. at 481-82.

Edwards makes it clear that the job title or employer of an individual is not dispositive of application of Speech or Debate privilege. Rather, the ultimate question is whether the individual is functioning in a legislative capacity. While legislators, their legal counsel, and legislative staff are obviously functioning in a legislative capacity when they are working on legislation such as Act 131, the protection also applies to anyone working outside of the Capitol building who is performing a legislative function.

The Virginia Supreme Court's decision comports with and harmonizes the realities of the modern legislative process, which requires the use of experts, consultants, contractors, industry groups, advocacy groups, and other constituents – all of whom may properly serve a legislative function. As recognized in Gravel, these individuals play an important role in the legislative process, assisting legislators in making informed and difficult policy decisions. Indeed, the development of legislation with the assistance of constituents, advocacy groups, and other interested citizens is the essence of our representative democracy.

3. Cases across the nation apply Speech or Debate privilege to non-legislator communications and activities.

Gravel and Edwards represent the proverbial bookends of pertinent Speech or Debate jurisprudence on the applicability of Speech or Debate privilege to legislative alter egos. In between those cases is an unbroken line of decisions confirming that communications with constituents, contractors, experts, and advocacy groups about legislative matters – including in the redistricting setting – fall squarely within

the legitimate legislative sphere, and as such, are protected from compelled disclosure.

Such a construction of Speech or Debate privilege makes sense and comports with the privilege's underlying purpose because "[t]he acquisition of knowledge through *informal* sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege." McSurely v. McLellan, 553 F.2d 1277, 1287 (D.C. Cir. 1976) (emphasis added). "Meeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." Bruce v. Riddle, 631 F.2d 272, 280 (4th Cir. 1980); see Government of the Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985) ("fact-finding, information gathering and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation … such fact-finding justifi[ies] the protection afforded by legislative immunity.").

Based on these principles, a litany of cases hold that a legislator's meetings, discussions, and communications with industry

groups, constituents, interest groups, and others regarding issues of public concern or proposed legislation are properly within the legitimate legislative sphere and protected from compelled disclosure by legislative immunity. See United Transp. Union v. Springfield Terminal Railway Co., 132 F.R.D. 4, 6 (D. Me. 1990) (legislative immunity protected internal memoranda dealing with communications with constituents, labor organizations, and agencies; memoranda were "traditionally an integral part of the legislative process"); Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007) ("Meeting with persons outside the legislature – such as executive officers, partisans, political interest groups, or constituents – to discuss issues that bear on potential legislation, and participating in party caucuses to form a united position on matters of legislative policy, assist legislators in the discharge of their legislative duty."); Pittston Coal Group, Inc. v. Int'l Mine Workers of America, 894 F. Supp. 275, 279 n.5 (W.D. Va. 1995) (legislative immunity shielded disclosure of information regarding congressional aide's communications with the media); Traweek v. City and County of San Francisco, 659 F. Supp. 1012, 1031-32 (N.D. Cal. 1985) (legislative immunity protected actions of city councilmen in

"meeting with economically self-interested private developers and other interested parties" prior to enactment of ordinance), rev'd on other grounds, 920 F.2d 589 (9th Cir. 1990); R.S.S.W. v. City of Keego Harbor, 56 F. Supp. 2d 798, 802-803 (E.D. Mich. 1999) (legislative immunity protected city council member relating to passage of ordinance where member allegedly held informal meetings with constituents to discuss their opposition to the regulated business and strategy for a legislative response); Montgomery County v. Schooley, 627 A.2d 69, 78 (Md. App. 1993) ("It is evident from this that the legislative process, for purpose of the privilege, includes more than just proceedings at regularly scheduled meetings of a legislative body. If it includes a meeting with citizens or private interest groups, it must also include caucuses and meetings with political officials called to discuss pending or proposed legislation.").

The cases decided between the jurisprudential bookends of the 1972 decision in Gravel and the 2016 decision in Edwards include those decided in the specific circumstances of this case. Those cases are also in full accord with the above principles.

For example, 14 years ago, the Arizona courts confronted many of the same issues presented here. In Arizona Independent Redistricting Commission v. Fields, 75 P.3d 1088 (Ariz. App. 2003), the court held that the activities of the state's redistricting commission were legislative in nature, and also went further – holding that the acts of the commission's retained consultants were protected. Relying on Gravel, the court explained it could "discern no practical difference" between Dr. Rodberg's capacity in Gravel and "retaining that same consultant as an independent contractor," as the Arizona commission had done. Id. at 1097-98. The court explained that "[t]he manner of employment does not affect the consultant's function within the legislative process," as "*function trumps title*." Id. (emphasis added). The redistricting activities of the commission were "legislative" in nature, and so it was entitled to assert legislative privilege. And the acts performed by its independent consultants were also privileged, given they would have been protected if performed by the commissioners themselves.

Similarly, the Rhode Island Supreme Court held that Speech or Debate privilege applied to protect legislators and a third party

consultant from discovery concerning redistricting legislation and the development of the redistricting map. See Holmes v. Farmer, 475 A.2d 976 (R.I. 1984). In Holmes, the plaintiffs, just like the petitioners here, sought testimony by the legislators and the consultant about the process used to develop the map. The court made quick work of that attempt, holding that "[w]e need not reach very far into an interpretation of the speech in debate clause in order to find the excluded testimony in this case privileged." Id. at 984. The court explained that "the actions and motivations of the legislators and the General Assembly in proposing and passing the reapportionment plan" were "clearly within the most basic elements of legislative privilege." Id. This included not only formal meetings and discussions among legislators, but also more generally "the actions of individuals in carrying out the reapportionment process." Id. This meant "meetings [that] took place outside the State House and [that] were not formal committee meetings" were protected, as "[a]t times the Legislature's business is conducted outside the four walls at the State House." Id. ("[t]he physical setting and the informality of the meeting do not impair the privilege or dilute its objective").

4. This Court recognized in 2007 that legislative communications with third parties are entitled to Speech or Debate protection.

Pennsylvania law, in accord with the decisions issued in other jurisdictions, also recognizes that Speech or Debate protection is afforded to communications and activities by those who are neither legislators nor legislative staff, but who are assisting legislators in their legislative functions.

In Firetree, Ltd. v. Fairchild, 920 A.2d 913 (Pa. Commw. 2007), this Court held that the legitimate legislative sphere extended beyond the Capitol building in Harrisburg. There, the plaintiff filed suit over the Commonwealth's termination of a contract to sell land to the plaintiff, and claimed a legislator caused the termination of the sale. The legislator's communications included lobbying a state agency to stop the sale, speaking out against the sale, and communicating with constituents regarding the sale. The legislator invoked Speech or Debate privilege to protect these communications.

Even though the legislator's specific actions did not involve the development or passage of an enactment, this Court nevertheless held the legislator had engaged in legitimate legislative activities

entitled to Speech or Debate protection. In reaching this conclusion, the Court explained that "[l]egitimate legislative activity extends beyond Floor debate on proposed legislation, and it is not confined to conduct that actually occurs in the State Capitol building." Id. at 919-20. As to the legislator's specific activities, the Court reasoned that he was "entitled and obligated to seek input from constituents about their concerns," given that "such concerns lie at the core of proposed legislation." Id. at 921. The Court found the connection between the external communications and potential future legislation to be important, as "[n]othing is more basic to the independence and integrity of the legislature than its ability to pass legislation." Id.

Firetree thus embodies a broad expression of Speech or Debate privilege: any activity bearing a connection to legitimate legislative duties is fully protected from discovery and immunized. That decision is consistent with legions of decisions by this Court and other Pennsylvania courts (a) holding that Speech or Debate privilege protects the Legislature and legislators against both discovery and suit for their legislative activities, and (b) repeatedly admonishing that activities related to the development of legislation (like Act 131) are

fundamentally protected.[12] See Harristown Dev't Corp. v. DGS, 580 A.2d 1174, 1177 (Pa. Commw. 1990) (Speech or Debate privilege precluded challenge against Senator based on his request for information from third party in connection with a legislative measure), rev'd on other grounds, 614 A.2d 1128 (Pa. 1992); Melvin v. Doe, 48 Pa. D. & C. 4th 566 (Com. Pl. Allegheny 2000) (Wettick, J.) (deposition of Senator barred on Speech or Debate grounds where deposition would have inquired into the Senator's discussions regarding the filling of judicial vacancies).

---

[12] See also Sears v. Corbett, 49 A.3d 463, 481-82 (Pa. Commw. 2012) (Speech or Debate privilege held applicable; challenge against legislators as to constitutionality of enactment and claim seeking enactment of new legislation), rev'd on other grounds, 118 A.3d 1091 (Pa. 2015); Smolsky v. Pennsylvania General Assembly, 34 A.3d 316, 322 (Pa. Commw. 2011) (same; challenge against General Assembly as to constitutionality of legislative enactment), aff'd, 50 A.3d 1255 (Pa. 2012); Finn v. Rendell, 990 A.2d 100, 106 (Pa. Commw. 2010) (same; challenge against General Assembly seeking to compel appropriation of funds); Lincoln Party v. General Assembly, 682 A.2d 1326, 1333 (Pa. Commw. 1996) (same; claim against General Assembly seeking to delay vote on proposed constitutional amendment); Jubelirer v. Singel, 638 A.2d 352, 354 (Pa. Commw. 1994) (same; challenge against legislators regarding voting on seating of Senators); Kennedy v. Commonwealth, 546 A.2d 733 (Pa. Commw. 1988) (same; challenge against General Assembly as to constitutionality of legislative enactment); Cianfrani v. SERB, 426 A.2d 1260, 1261 (Pa. Commw. 1981) (same; contention that retired legislator's vote should be construed as assent to application of legislation to him), aff'd, 460 A.2d 753 (Pa. 1983).

C. Petitioners' discovery is barred by Speech or Debate privilege.

In light of the foregoing decisional authorities, petitioners' discovery requests unquestionably seek documents, information, and testimony protected by the Speech or Debate Clause of the Pennsylvania Constitution. The material petitioners seek concerns the development and enactment of legislation: Act 131 of 2011. The discovery seeks to discover the motives, background, development, and objectives relating to a legislative enactment. As this Court has held, it is "axiomatic that passing legislation … is within the legitimate legislative activity of the Legislature." Lincoln Party v. General Assembly, 682 A.2d 1326, 1333 (Pa. Commw. 1996). The Speech or Debate privilege fully safeguards the General Assembly, its current and former Senators, Representatives, and legislative leaders, and all internal alter egos, such as legislative staff and counsel, against petitioners' discovery.[13]

---

[13] This protection necessarily extends to any communications with former Governor Corbett. Negotiations or discussions with the Governor as to legislation pending in the General Assembly is part and parcel of the legislative process, since the Governor must sign or veto all legislation or allow it to become law. See, e.g., Jubelirer v. Rendell, 953 A.2d 514, 529 (Pa. 2008) ("The

(footnote continued on next page)

The Speech or Debate privilege also protects communications by or with or actions taken by third parties, including constituents, interest groups, advocacy groups, and consultants when acting as alter egos assisting legislators in carrying out a legislative function. With regard to alter ego and other third party participation in the legislative process, it is important to emphasize that the Speech and Debate Clause provides "protection from compelled disclosure whether by deposition, document discovery or otherwise – if the activity or the documents or information is the product or result of activity within the legitimate legislative sphere." McNaughton v. McNaughton, 72 Pa. D. & C. 4th 363, 369 (Com. Pl. Dauphin 2005). So "to the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure documentation reflecting those acts or communications." Arizona Indep. Redist. Comm'n v. Fields, 75 P.3d 1088, 1099 (Ariz. App. 2003). Here, to the extent that any third parties were assisting

---

(footnote continued from prior page)

Governor's exercise of his veto power is unique in that it is essentially a limited legislative power, particularly in the appropriations context.").

members of the General Assembly in the development of the redistricting plan ultimately enacted as Act 131, they were performing legislative functions as legislative alter egos. As such, those communications and activities are fully entitled to Speech or Debate protection.[14]

D. Attorney-client privilege and the attorney work-product doctrine also bar petitioners' discovery concerning Act 131 of 2011.

In addition to Speech or Debate privilege, petitioners' discovery, in which they seek attorney-client communications and attorney work-product (including through subpoenas directed to current and former attorneys of the General Assembly[15]), is plainly precluded.[16]

---

[14] The Speech or Debate privilege may be invoked and asserted by the General Assembly and its Members to protect against disclosure of any alter ego material. But the alter egos may not waive the privilege. Nor may one Member waive the privilege where another Member claims it, as previously discussed. See Gravel, 408 U.S. at 621-22 & n.13; Edwards, 790 S.E.2d at 481 & nn.9-10. Since the General Assembly has invoked its Speech or Debate privilege, all of petitioners' discovery is precluded.

[15] Petitioners directed subpoenas to the following, who are or were General Assembly attorneys: Drew Crompton, Anthony Aliano, and David Thomas.

[16] Petitioners also have purported to notice the deposition of a so-called "corporate designee" of the General Assembly. No such deposition is even possible. Although the Pennsylvania Constitution vests the Commonwealth's legislative powers in a General Assembly (Article II, §1), establishes the Senate and the House of Representatives as the separate bodies comprising the General Assembly (Article II, §1), provides for the qualification and election of Senators

(footnote continued on next page)

It is axiomatic that attorney-client communications are sheltered from discovery, so as to protect and foster candid communications between lawyers and their clients. See generally Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011) (describing privilege and holding it protects communications by each of the lawyer and the client regarding legal services). And the attorney work-product doctrine protects against "disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Bagwell v. DOE, 103 A.3d 409, 415 (Pa. Commw. 2014) (quoting Pa.R.Civ.P. 4003.3). Each of these protections applies here to prevent disclosure of any material or information where the General Assembly's attorneys were involved regarding Act 131 or otherwise.

(footnote continued from prior page)

and Representatives (Article II, §5), empowers each chamber of the General Assembly to establish the rules of its own proceedings (Article II, §11), protects the Legislative Branch from intrusion into the legitimate legislative sphere through the Speech or Debate clause (Article II, §15), and provides for the procedures for enacting legislation (Article III), our Constitution *does not* designate the Legislative Branch as a "government agency" and does not designate a "CEO" who can sit and answer questions at a deposition on behalf of the bicameral Legislative Branch. Petitioners' deposition notice obviously must be quashed.

V. CONCLUSION

For the foregoing reasons, the General Assembly respectfully requests that this Court give full effect to the General Assembly's Speech or Debate privilege and quash and preclude any discovery directed to the General Assembly, its legislators, legislative leaders, legislative legal counsel, legislative staff, and other legislative alter egos regarding Act 131 of 2011.

Respectfully submitted,

/s/ Karl S. Myers

Jonathan F. Bloom (No. 45542)
Karl S. Myers (No. 90307)
Kyle A. Jacobsen (No. 320802)
STRADLEY RONON
STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
(215) 564-8000

Counsel for respondent
The General Assembly of the
Commonwealth of Pennsylvania

Dated: November 17, 2017

CERTIFICATE OF COMPLIANCE

I, Karl S. Myers, certify that this brief complies with the length limitation of Pa.R.A.P. 2135 because this brief contains 8,309 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135.

/s/ Karl S. Myers
Karl S. Myers

A

David P. Gersch
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No. 261 MD 2017

PETITIONERS' FIRST SET OF INTERROGATORIES TO ALL RESPONDENTS

Pursuant to Rule 4005 of the Pennsylvania Code, Petitioners hereby serve Respondents with the following First Set of Interrogatories and request a complete written response within 30 days as required by Rule 4006. Respondents are required to answer these interrogatories separately and fully in writing, under oath, and to serve a copy of their answers on the undersigned within 30 days after service hereof. The interrogatories are continuing in nature until the date of trial, and Respondents are required to serve supplemental answers as additional information may become available to them, per Rule 4007.4. If you object to a specific interrogatory, the reasons for the objections should be stated in writing and served upon Petitioners' counsel. If objection is made to part of an interrogatory, the part shall be specified.

DEFINITIONS

1. "2011 Plan" means the 2011 Congressional Redistricting Plan for Pennsylvania that was signed into law in 2011 by the Governor of Pennsylvania any preliminary or draft plans that preceded the 2011 Congressional Redistricting Plan, and any proposal, strategies or plans to redraw Pennsylvania's congressional districts following the 2010 census.

2. "Individual Respondents" refers to Thomas W. Wolf, Michael J. Stack III, Michael C. Turzai, Joseph B. Scarnati III, Pedro A. Cortés, Jonathan M. Marks, and their predecessors in office.

3. "Entity Respondents" refers to The Commonwealth of Pennsylvania and The Pennsylvania General Assembly.

4. "Respondents" refers to the Individual Respondents and the Entity Respondents.

5. With respect to the Individual Respondents, "You" and "Your" refers to the Individual Respondents and their predecessors in office, attorneys, representatives, agents, and others acting on their behalf.

6. With respect to the Entity Respondents, "You" and "Your" refers to the Entity Respondents and all branches of government, including departments, agencies, committees, and subcommittees, as well as attorneys, representatives, agents, and others acting on behalf of the Entity Respondents.

7. "Document" is used in its broadest sense and is intended to be comprehensive and to include, without limitation, a record, in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) it is maintained, and includes originals and each and every non-identical copy of all writings of every kind, including drafts, legal pleadings, brochures, circulars, advertisements, letters, internal memoranda, minutes, notes or records of meetings, reports, comments, affidavits, statements, summaries, messages, worksheets, notes, correspondence, diaries, calendars, appointment books, registers, travel records, tables, calculations, books of account, budgets, bookkeeping or accounting records, telephone records, tables, stenographic notes, financial data, checks, receipts, financial statements, annual reports, accountants' work papers, analyses, forecasts, statistical or other projections, newspaper articles, press releases, publications, tabulations, graphs, charts, maps, public records, telegrams, books, facsimiles, agreements, opinions or reports of experts, records or transcripts of conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means and all other forms or types of written or printed matter or tangible things on which any words, phrases, or numbers are affixed, however produced or reproduced and wherever located, which are in Your possession, custody or control. The term "Document" includes electronical mail and attachments, data processing or computer printouts, tapes, documents contained on floppy disks, hard disks, computer hard drives, CDs , and DVDs, or retrieval listings, together with programs and program documentation necessary to utilize or retrieve such

information, and all other mechanical or electronic means of storing or recording information, as well as tape, film or cassette sound or visual recordings and reproduction for film impressions of any of the aforementioned writings.

8. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons, by any means or mode of conveying information including, but not limited to, telephone, television, or telegraph or electronic mail.

INTERROGATORIES

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

RESPONSE:

2. For each person identified in response to interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

RESPONSE:

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

RESPONSE:

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

RESPONSE:

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

RESPONSE:

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

RESPONSE:

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

RESPONSE:

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

RESPONSE:

Dated: June 30, 2017

By:

Mary M. McKenzie
Attorney ID No. 47434
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183
mmckenzie@pubintlaw.org

David P. Gersch*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@apks.com
* Not admitted in Pennsylvania, admitted in the District of Columbia. Pro hac vice motion to be filed.

Counsel for Petitioners

B

David P. Gersch
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No. 261 MD 2017

PETITIONERS' FIRST SET OF REQUESTS FOR PRODUCTION TO ALL RESPONDENTS

Pursuant to Rules 4009.1 and 4009.11 of the Pennsylvania Code, Petitioners hereby request that Respondents produce at the office of Public Interest Law Center, located at 1709 Benjamin Franklin Parkway, 2nd Floor, Philadelphia, PA, or at such other place as mutually agreed upon by the parties, all of the documents described in the following request for production (the "Request") that are in Respondents' possession, custody, or control, in the manner and time required by Rule 4009.12. Petitioners also request that Respondents supplement their answers under Rule 4007.4.

DEFINITIONS

1. "2011 Plan" means the 2011 Congressional Redistricting Plan for Pennsylvania that was signed into law in 2011 by the Governor of Pennsylvania any preliminary or draft plans that preceded the 2011 Congressional Redistricting Plan, and any proposal, strategies or plans to redraw Pennsylvania's congressional districts following the 2010 census.

2. "Individual Respondents" refers to Thomas W. Wolf, Michael J. Stack III, Michael C. Turzai, Joseph B. Scarnati III, Pedro A. Cortés, Jonathan M. Marks, and their predecessors in office.

3. "Entity Respondents" refers to The Commonwealth of Pennsylvania and The Pennsylvania General Assembly.

4. "Respondents" refers to the Individual Respondents and the Entity Respondents.

5. With respect to the Individual Respondents, "You" and "Your" refers to the Individual Respondents and their predecessors in office, attorneys, representatives, agents, and others acting on your behalf.

6. With respect to the Entity Respondents, "You" and "Your" refers to the Entity Respondents and all branches of government, including departments, agencies, committees, and subcommittees, as well as attorneys, representatives, members, employees, agents, and others acting on behalf of the Entity Respondents.

7. "Document" is used in its broadest sense and is intended to be comprehensive and to include, without limitation, a record, in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) it is maintained, and includes originals and each and every non-identical copy of all writings of every kind, including drafts, legal pleadings, brochures, circulars, advertisements, letters, internal memoranda, minutes, notes or records of meetings, reports, comments, affidavits, statements, summaries, messages, worksheets, notes, correspondence, diaries, calendars, appointment books, registers, travel records, tables, calculations, books of account, budgets, bookkeeping or accounting records, telephone records, tables, stenographic notes, financial data, checks, receipts, financial statements, annual reports, accountants' work papers, analyses, forecasts, statistical or other projections, newspaper articles, press releases, publications, tabulations, graphs, charts, maps, public records, telegrams, books, facsimiles, agreements, opinions or reports of experts, records or transcripts of conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means and all other forms or types of written or printed matter or tangible things on which any words, phrases, or numbers are affixed, however produced or reproduced and wherever located, which are in Your possession, custody or control. The term "Document" includes electronical mail and attachments, data processing or computer printouts, tapes, documents contained on floppy disks, hard disks, computer hard drives, CDs , and DVDs, or retrieval listings, together with programs and program documentation necessary to utilize or retrieve such

information, and all other mechanical or electronic means of storing or recording information, as well as tape, film or cassette sound or visual recordings and reproduction for film impressions of any of the aforementioned writings.

8. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons, by any means or mode of conveying information including, but not limited to, telephone, television, or telegraph or electronic mail.

9. A request seeking production of communications between you and an individual or entity includes communications between you and the individual or entity's agents, employees, consultants, or representatives.

INSTRUCTIONS

1. This Request applies to all Documents within Your possession, custody or control, Your entities, affiliates, predecessors-in-interest, successors-in-interest, and all of Your past and present attorneys, agents, representatives, accountants, consultants, or employees.

2. Any Document that responds, in whole or in part, to any portion or clause of this Request should be produced.

3. This Request calls for the separate production of any copy or copies of a Document that is no longer identical by reason of notation or modification of any kind whatsoever.

4. If there are no Documents responsive to the Request, You shall so state in writing.

5. All objections should be set forth with specificity and should include a brief statement of the grounds for the objection.

6. For each Document withheld from production on the basis of a claim of any privilege or discovery immunity, identify:

(a) the Date;
(b) the author(s);
(c) the recipient(s);
(d) the type of Document;
(e) the subject matter of the Document;
(f) the number of pages;
(g) the nature of the asserted privilege; and
(h) the basis of the claim of the privilege asserted.

7. If You know, or have reason to believe, that any Document would have been responsive to the Request herein but for its loss or destruction, provide the following:

(a) A description of the Document sufficiently particular to identify it for purposes of a court order, including, but not limited to, the type of Document, the Date, the author, the addressee or addressees, the number of pages and the subject matter;
(b) A list of all natural persons who participated in the preparation of the Document;
(c) A list of all natural persons to whom the Document was circulated or its contents communicated, or who were ever custodians of the Document;
(d) State whether each Document was destroyed pursuant to a policy regarding document retention and, if so, state the terms of that policy and identify each Document or natural person who has knowledge concerning Your response or upon which or whom You relied in whole or in part in making Your response; and
(e) If any Document was lost or destroyed other than pursuant to a policy regarding document retention, state the circumstances under which each Document was lost or destroyed and identify each Document or natural person who has knowledge of those circumstances.

8. The Request shall be read to be inclusive rather than exclusive. The connectives "and" and "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of a Request all responses that might otherwise be construed as outside its scope.

"Including" shall be construed to mean "including without limitation." The word "any" shall be construed to mean "all" and *vice versa*. The singular shall include the plural and *vice versa*.

9. This Request is continuing in nature. You should supplement Your response and produce additional Documents if You obtain or become aware of further Documents responsive to this Request.

REQUESTS

1. All documents referring or relating to the 2011 Plan, including, but not limited to:

   a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.

   b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

   c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.

   d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.

e. All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority Project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan.

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

Dated: June 30, 2017

By:

Mary M. McKenzie
Attorney ID No. 47434
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183
mmckenzie@pubintlaw.org

David P. Gersch*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@apks.com
* Not admitted in Pennsylvania, admitted in the District of Columbia. Pro hac vice motion to be filed.

Counsel for Petitioners