No. _____

In The
Supreme Court of the United States

JOSEPH B. SCARNATI, III
IN HIS CAPACITY AS PENNSYLVANIA
SENATE PRESIDENT PRO TEMPORE,

Appellant,

v.

LOUIS AGRE, *ET AL.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

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QUESTIONS PRESENTED

1. Did the lower court err in holding that the "speech or debate" privilege is a qualified privilege when considered in connection with civil redistricting litigation, and that state legislators must disclose information regarding the crafting and drafting of redistricting legislation in discovery in such litigation?

2. If the "speech or debate" privilege is qualified when considered in connection with civil redistricting litigation, to what extent should that qualified privilege protect against the questioning of state legislators, and the disclosure of documents possessed by state legislators during discovery in such litigation?

PARTIES TO THE PROCEEDING

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, Rayman Solomon, John Gallagher, Ani Diakatos, Joseph Zebrowitz, Shawndra Holmberg, Cindy Harmon, Heather Turnage, Leigh Ann Congdon, Reagan Hauer, Jason Magidson, Joe Landis, James Davis, Ed Gragert, Ginny Mazzei, Dana Kellerman, Brian Burychka, Marina Kats, Douglas Graham, Jean Shenk, Kristin Polston, Tara Stephenson, and Barbara Shah were named plaintiffs in the District Court action below (the "*Agre* case"). Thomas W. Wolf, in his official capacity as Governor of Pennsylvania; Robert Torres, in his official capacity as Secretary of State of Pennsylvania; and Jonathan Marks, in his official capacity as Commissioner of the Pennsylvania Bureau of Elections, were named defendants in the *Agre* case. Michael C. Turzai, in his official capacity as Speaker in the Pennsylvania House of Representatives, was an intervenor defendant below (all aforementioned parties are collectively, "Appellees").

Appellant Joseph B. Scarnati, III, in his official capacity as President pro tempore of the Pennsylvania Senate ("Appellant"), also intervened as a defendant in the *Agre* case.

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INTRODUCTION

For 70 years, this Court has repeatedly held, without exception that, in civil litigation, the federal speech or debate privilege, arising under the U.S. Constitution's Speech or Debate Clause, is absolute and protects state legislators from being forced to disclose any non-public aspect of the crafting and drafting of legislation.[1] The purpose of the speech or debate privilege is simple and important: It ensures "that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Va. v. Consumers Union of United States*, 446 U.S. 719, 731 (1980). The privilege has the "fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel v. United States*, 408 U.S. 606, 618 (1972).

In recent years, a few lower courts, including the three-judge panel below (the "Panel"), have held that the speech or debate privilege is qualified in the civil redistricting context. Then, purporting to balance the purpose of the privilege against the interests of plaintiffs in obtaining evidence of legislative intent in crafting the redistricting legislation, these courts have held that the former must yield almost entirely to the latter. This result, however, is unsupported by this Court's precedent, the clear purpose of the privilege, and important principles of comity and federalism.

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[1] The privilege is also known as the "legislative privilege."

The courts that have found the speech or debate privilege to be qualified in the civil redistricting context rely almost exclusively on *dicta* from *United States v. Gillock*, 445 U.S. 360 (1980), in which this Court held that where a state legislator is accused of *criminal* activity, the speech or debate privilege may be qualified to protect the interests of the people. But, as this Court has made clear in subsequent decisions, *Gillock*'s limited exception to the speech or debate privilege only applies in the criminal context. See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) ("It is well established that federal, state and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."). And this limitation makes sense given the heightened interests applicable in the criminal context.

The absolute immunity afforded by the speech or debate privilege in civil litigation is particularly important in the redistricting context, where the Framers deliberately delegated the duty of redistricting to political bodies – *i.e.*, state legislatures.[2] Indeed, because the redistricting function is so unavoidably, and, in fact, intentionally political, opportunities for backbiting and retaliation by political rivals and the other branches of government are and will continue to be manifest absent application of an absolute privilege.

The handling of this case below affords a prime example. Appellees challenged Pennsylvania's 2011 congressional districting map (the "2011 Plan") under

[2] U.S. Const. art. I, § 4 (the "Elections Clause").

various provisions of the U.S. Constitution. Appellant and Speaker Turzai were successful in defeating Appellees' challenge, but during the course of the litigation, they were required to produce, over a speech or debate privilege objection, hundreds of documents containing non-public data that may have been considered by Appellant and Speaker Turzai in drafting and enacting the 2011 Plan. Upon receipt of the documents, Appellees immediately transferred them to the petitioners in *League of Women Voters v. Commonwealth*, No. 261 MD 2017 (Pa. Commw. Ct. 2017), a concurrent case then pending before the Pennsylvania state courts, in which those petitioners were challenging the 2011 Plan under the Pennsylvania Constitution (the "*LOWV* case").

Notably, the Commonwealth Court of Pennsylvania, the court tasked with the responsibility of holding a trial and issuing findings of fact and proposed conclusions of law in the *LOWV* case, had previously held that the very same documents were absolutely privileged under the Pennsylvania Constitution's corollary to the U.S. Constitution's Speech or Debate Clause, and barred discovery of such documents and information. In light of the *Agre* Panel's ruling, however, the petitioners in the *LOWV* case argued that the Commonwealth Court should revisit and reverse its decision and find that the disclosed documents were "public" and, thus, no longer privileged.[3] Faced with the

[3] The petitioners also argued the documents were public because they were published in the Philadelphia Inquirer. At oral argument, the petitioners' counsel reluctantly admitted that it

question of whether the Panel's ruling and Appellees' disclosure of the documents could vitiate the Pennsylvania Constitution's speech or debate privilege, the Commonwealth Court was forced to strike a balance: It would admit the disclosed documents into evidence at trial to the extent such documents were admitted at trial in the *Agre* case. Further, it would allow the petitioners' experts to rely upon the information contained in the disclosed documents, so long as such information was relied upon by experts in the *Agre* case. All other disclosed documents would not be admitted; however, they would be submitted by the Commonwealth Court to the Pennsylvania Supreme Court, the court with plenary jurisdiction over the matter, so that the documents could be considered by the Pennsylvania Supreme Court.

At the close of trial, the Commonwealth Court ruled, based partially on the disclosed documents, that the 2011 Plan was drafted with partisan intent, but did not, as a matter of law, violate the Pennsylvania Constitution. The Pennsylvania Supreme Court subsequently accepted the Commonwealth Court's findings of fact but rejected its legal conclusion. Based in part on the privileged documents, including documents that were never introduced into evidence in the *Agre* case (and that the Commonwealth Court found

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was the petitioners' counsel who released the documents to the press.

inadmissible), the Pennsylvania Supreme Court found the 2011 Plan unconstitutional.[4]

The Panel's decision below flies in the face of the long-established speech or debate privilege, which is meant to protect legislators from judicial interference. Indeed, if the judiciary can, in a single stroke, eviscerate the speech or debate privilege, then the delicate balance of power among co-equal branches of government that the speech or debate clause has protected for hundreds of years is significantly disrupted.

Further, if the speech or debate privilege is eliminated entirely in civil redistricting litigation, it necessarily raises comity and federalism concerns, as it almost certainly diminishes the value of corollary state law privileges, as it did in the *LOWV* case.

For these reasons, and the additional reasons set forth below, the erosion of the speech or debate privilege must be stopped and reversed. Accordingly, the Court should overturn the Panel's orders concerning the application of the speech or debate privilege.

[4] Appellant will be filing a writ of certiorari in the *LOWV* case with respect to the Pennsylvania Supreme Court's decision, and has sought two stays from this Court relating to that decision and subsequent enactment of a remedial plan. The new plan enacted by the Pennsylvania Supreme Court in the *LOWV* case was also challenged as unconstitutional by other state and federal legislators in the Middle District of Pennsylvania. That challenge was dismissed on standing grounds.

OPINIONS BELOW

The Order dated November 9, 2017 determining that the speech or debate privilege is a qualified privilege that may be pierced, J.S.App. 336-338 (ECF No. 76), the Orders dated November 22, 2017 and November 28, 2017 denying the motions for protective order based on the speech or debate privilege, J.S.App. 339-341, 342-345 (ECF Nos. 114 and 142), and the rulings reflected in the Oral Argument Transcripts of December 4, 2017, Vol. I at 85:18-24 (ECF No. 195), and December 4, 2017, Vol. II at 105:21-25 and 106:1-12 (ECF No. 195-1), are attached at Appendix A.[5]

JURISDICTION

The court below had jurisdiction under 28 U.S.C. § 2284 and issued its judgment on January 10, 2018. Notice of appeal was timely filed. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Speech or Debate Clause of the U.S. Constitution, art. I, § 6, cl. 1, and federal common law regarding the speech or debate privilege.

[5] Appellant is no longer appealing the October 25, 2017 order (ECF No. 47), previously included on the Notice of Appeal. Further, Speaker Turzai is no longer participating in this appeal.

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art. I, § 6, cl. 1.

STATEMENT

A. Concurrent Redistricting Litigations In Pennsylvania State And Federal Court

In the case below, Appellees challenged the 2011 Plan, alleging that it violated the First Amendment, the Equal Protection Clause, and the Elections Clause of the U.S. Constitution. See ECF No. 1. Pursuant to 28 U.S.C. § 2284, District Court Judge Michael M. Baylson, and Third Circuit Judges Patty Shwartz and Chief Judge D. Brooks Smith, were empaneled to hear the case. On October 24, 2017, Appellant and Speaker Turzai filed a Motion to Intervene, which the Panel granted the next day.

The *Agre* case was the second litigation filed in 2017 challenging the 2011 Plan as a partisan gerrymander; the first action, the *LOWV* case, advanced claims under the Pennsylvania Constitution. Both cases proceeded concurrently on expedited schedules, with full fact and expert discovery, depositions, and

discovery disputes all performed and adjudicated in a matter of weeks, followed by back-to-back trials in early December 2017.[6]

B. Discovery In The *Agre* Case

Appellees propounded substantial written discovery requests on Appellant and Speaker Turzai, seeking, among other things, non-public information considered, discussed or utilized by members of Pennsylvania's General Assembly and their staff in drafting and enacting the 2011 Plan. Appellant and Speaker Turzai objected to certain portions of the discovery because, *inter alia*, the information sought was shielded from disclosure by the federal speech or debate privilege. Appellees moved to compel production of the information sought. See ECF No. 51.

On November 9, 2017, the Panel ruled that the speech or debate privilege "is a qualified privilege that may be pierced and which at a minimum does not shield . . . facts and data considered in connection with redistricting." J.S.App. 336. The Panel ordered

[6] In the *LOWV* case, the Pennsylvania Supreme Court granted the petitioners' application for emergency relief, assumed plenary jurisdiction, and remanded the matter with instructions to the Pennsylvania Commonwealth Court, one of Pennsylvania's intermediate appellate courts, "to conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided," and to submit findings of fact and conclusions of law by no later than December 31, 2017. *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017, 2017 Pa. LEXIS 2888 (Pa. Nov. 9, 2017).

Appellant and Speaker Turzai to produce certain facts and data considered during the creation of the 2011 Plan. J.S.App. 337. In the same order, the Panel required Appellant and Speaker Turzai to submit a privilege log identifying any objections to producing the remaining documents sought. J.S.App. 337-338.

Also, on November 9, 2017, Appellees served Notices of Deposition on both Appellant and Speaker Turzai. On November 17, 2017, Speaker Turzai moved for a protective order preventing Appellees from seeking to elicit testimony about non-public information considered by the General Assembly in drafting the 2011 Plan because, *inter alia*, such information was shielded from disclosure under the speech or debate privilege. See ECF No. 87.

On November 22, 2017, the Panel denied Speaker Turzai's motion for protective order. J.S.App. 339-341.[7] Providing almost no analysis, the Panel concluded that, "[u]pon consideration of the important issues in this case . . . the Court sees no reason to protect any of this information from discovery in this case." J.S.App. 340 (citing *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)).

On or around November 24, 2017, Appellant and Speaker Turzai submitted their privilege logs to Appellees in accordance with the court's November 9, 2017 order. In their privilege logs, Speaker Turzai and

[7] Appellant sought similar relief on November 22, 2017, but withdrew his motion after the Panel denied Speaker Turzai's motion. See ECF Nos. 111 and 117.

Appellant identified *hundreds* of documents shielded from disclosure by application of the federal speech or debate privilege, including non-public data files describing the political composition of Pennsylvania's Congressional districts. On November 28, 2017 – only four days (two business days) after Speaker Turzai's privilege log was submitted – the Panel overruled his objections in their entirety. J.S.App. 342-345. In support of its decision, the Panel cited a five-part fact-based test previously used by other courts to determine whether the privilege applied to particular documents, but failed to provide any analysis explaining why the documents in Speaker Turzai's privilege log should be disclosed under the five-factor test, nor did the Panel engage in an *in camera* review of the documents at issue. J.S.App. 344 (citing *Benisek v. Lamone*, 241 F.Supp. 3d 566, 575-76 (D. Md. 2017)). The Panel required the wholesale production of every document requested.

In compliance with the Panel's order, Appellant and Speaker Turzai were required to produce hundreds of privileged documents, including, among other things, all non-public data and information that they may have considered in drafting and enacting the 2011 Plan. They were also required to sit for deposition, as were two members of their legislative staff. Additionally, the Panel further allowed Appellees' expert witness to testify about her unsupported assumptions regarding whether certain portions of the data produced were utilized when drafting the 2011 Plan. See ECF No. 195-1 (108:15-19, 116:1-7).

C. Discovery In The *LOWV* Case

Like Appellees in the *Agre* case, the petitioners in the *LOWV* case sought from Appellant and Speaker Turzai substantial discovery of non-public information related to the intent of the General Assembly in creating and enacting the 2011 Plan. Appellant and Speaker Turzai objected to disclosure of such materials because the information sought was shielded from disclosure by Pennsylvania's speech or debate privilege, Pennsylvania's corollary to the federal privilege.

On November 22, 2017, the Commonwealth Court upheld Appellant and Speaker Turzai's objections. *League of Women Voters v. Commonwealth*, No. 261 M.D. 2017, 2017 Pa. Commw. LEXIS 1097 (Pa. Commw. Ct. Nov. 22, 2017). In its memorandum opinion supporting its order, the Commonwealth Court emphasized that the Pennsylvania Speech or Debate Clause "must be construed broadly in order to protect legislators from *judicial interference* with their legitimate legislative activities," and that the "immunity of the legislators must be absolute as to their actions within the legitimate legislative sphere." *Id.* at *2 (emphasis in original) (citations and quotations omitted).

In short, the rulings of the Commonwealth Court and the *Agre* Panel were contradictory. While the *Agre* Panel held that discovery of non-public data regarding Appellant and Speaker Turzai's intent was not privileged under the federal speech or debate privilege, the Commonwealth Court held that the same data was

privileged under the Pennsylvania's speech or debate privilege.

D. The Impact Of The Inconsistent Rulings

On December 3, 2017, Appellant and Speaker Turzai moved the Panel for an order requiring that all non-public information utilized in creating and enacting the 2011 Plan produced in the *Agre* case be destroyed at the conclusion of that case, so that it could not be disseminated or else utilized in the *LOWV* case. See ECF Nos. 171-1 and 174-1. The *Agre* Panel addressed the motion from the bench. Circuit Judge Shwartz explained that the Panel would be "respectful of our colleagues in the State Court who have come to a different conclusion [on privilege] applying different law." See ECF No. 198-1 (8:19-9:3) ("The Panel is not insensitive to the fact that there is a trial starting next week [in the *LOWV* case] where this Court applying federal law found the privilege not applicable.").

Based on this logic, the Panel held that, "[d]iscovery that was produced [in the *Agre* case] that did not result in evidence produced in the trial *be used only for the purposes of this litigation and if in case that something comes up during proceedings that may* occur after this trial and that they not be disclosed beyond the order we had already entered." *Id.* (7:6-10) (emphasis added). The Court then held that the discovery that was not used at the *Agre* trial could be shared only with "counsel [in the *Agre* case], their agents (such as paralegals and other assistants), their clients, and

their experts until trial begins." *Id.* (7:11-17). Thus, the Panel sought to strike a balance: any of the discovery regarding Appellant and Speaker Turzai's intent in crafting and enacting the 2011 Plan that was utilized at the *Agre* trial was "public," but the remaining discovery was not "public."

Immediately after the Panel announced its ruling, counsel for Appellees indicated that the materials produced, "are cats that are long out of the bag. They were not covered by the original order. So, we can't go back. There's no way that we can now institute some sort of a confidentiality agreement." *Id.* (9:22-10:5). In other words, Appellees had already disclosed the documents subject to the Panel's Order.

Indeed, petitioners in the *LOWV* case had by that time submitted a disclosure for their lead expert, Dr. Jowei Chen. J.S.App. 349-354. Dr. Chen's disclosure made clear that his expert opinions were based on data files that were produced, but not used at trial, in the *Agre* case. J.S.App. 349. Clearly, as Appellees' counsel admitted, the documents that were subject to the *Agre* Panel's ruling had been disclosed to the petitioners in the *LOWV* case.

E. The Impact Of The Disclosed Privileged Data On The *LOWV* Case

On December 10, 2017, Appellant and Speaker Turzai filed two motions *in limine* in the *LOWV* case. The motions sought (i) to exclude the petitioners' introduction of evidence related to privileged documents

produced in the *Agre* case but previously held to be privileged in the *LOWV* case; and (ii) to prevent the petitioners' expert, Jowei Chen, from relying on those same documents in support of his expert opinions sought to be offered at trial in the *LOWV* case. J.S.App. 355-376. In support of the motions, Appellant and Speaker Turzai argued that the Commonwealth Court should not condone the introduction of evidence that it had already found to be absolutely privileged merely because those documents were produced to Appellees in the *Agre* case. J.S.App. 360-361. The petitioners filed their own motion *in limine* seeking to use any and all privileged materials they obtained from Appellees. J.S.App. 377-393. Petitioners argued that they "lawfully and properly obtained these materials," and that the documents were now in the public domain. J.S. App. 381.

During oral argument on the motions *in limine*, the petitioners argued that the documents obtained from Appellees should be admitted into evidence or otherwise available for use at the upcoming trial (including the documents that the *Agre* Panel deemed non-public) because they were published in the Philadelphia Inquirer and were therefore now public. When questioned by the court, the petitioners' counsel admitted that it was actually petitioners' counsel that disclosed the documents to the Inquirer.

> MS. THEODORE: . . . . . Much of this [privileged] evidence is now on the Web site of The Philadelphia Inquirer and –

> THE COURT: How did they get it? If you know, you have to answer my question.
>
> MS. THEODORE: I can – I'm happy to answer your question, Your Honor. So some – some of that, you know, was from, of course, the fact that it was in – used in the *Agre* litigation. *But – it wasn't me personally, but, yes, our team absolutely spoke with The Philadelphia Inquirer, and we had every right to do so*.

J.S.App. 395-396 (*LOWV* Trial Tr. December 11, 2017 a.m., 80:3-81:2) (emphasis added).[8]

After argument, the Commonwealth Court had no choice but to strike a balance: it would allow use at trial of "any documents of record" from the *Agre* case. J.S.App. 404. To the extent that a document "appear[ed] on the docket in the Federal litigation and is, therefore, public, that document c[ould] be used in [the *LOWV* case], assuming it [could] be admitted in terms of authenticity and relevance and all those other objections." J.S.App. 404. The Commonwealth Court also ruled that experts in the *LOWV* case could rely on privileged documents and information produced in the *Agre* case to the extent that such material was relied on by Appellees' experts in the *Agre* case. J.S.App. 405.

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[8] The data files themselves were published in the Philadelphia Inquirer. See Johnathan Lai, *Inside the gerrymandering data top Pa. Republicans fought to keep private*, Philly.com (Dec. 8, 2017, 7:14 AM), http://www.philly.com/philly/news/politics/pa-republicans-gerrymandering-data-trial-mike-turzai-20171208.html.

Thus, a substantial amount of otherwise privileged documents would be considered by the court in *LOWV*.

At trial, the petitioners sought to introduce the non-public data files they obtained from Appellees. Consistent with its prior order, the Commonwealth Court indicated that it would not consider these files, but it would nevertheless share them with the Pennsylvania Supreme Court.

Following trial, the Commonwealth Court issued its proposed findings of fact and conclusions of law. Among other things, the court found that the 2011 Plan was created, at least in part, based on partisan intent. Notwithstanding this finding, the Commonwealth Court recommended that the Pennsylvania Supreme Court find that the 2011 Plan did not violate the Pennsylvania Constitution.[9]

The Pennsylvania Supreme Court thereafter adopted the Commonwealth's findings of fact, including the finding that the 2011 Plan was drafted, at least in part, with partisan intent. *League of Women Voters v. Commonwealth*, No. 159 MM 2017, 2018 Pa. LEXIS 771, *106, n.62 (Pa. 2018). In support of this finding, the court relied on testimony concerning the data files – the files the Commonwealth Court had previously found to be privileged and therefore immune from disclosure. *Id.* at *17-*19. In other words, the materials produced in the *Agre* case were ultimately considered

[9] Judge Brobson's Recommended Findings of Fact & Conclusions of Law can be found at the following weblink: http://www.pacourts.us/assets/files/setting-5887/file-6683.pdf?cb=9beb2d.

by, and relied upon by, the Pennsylvania Supreme Court to strike down the 2011 Plan.

F. The Final Ruling By The Panel Below

After a four-day trial, the *Agre* Panel ruled 2-1 that Appellees' Elections Clause claim failed. J.S.App. 5-6, n.6. Appellees' other claims were dismissed prior to trial. J.S.App. 91, n.3. On January 18, 2018, Appellees filed a notice of appeal with respect to the merits of the Panel's decision. See ECF No. 214.

ARGUMENT

A. The Speech Or Debate Privilege Broadly Shields All Information About The Legislative Process From Disclosure, And Should Not Be Curtailed In The Civil Redistricting Context

The Panel below found that the speech or debate privilege can be qualified – and virtually eliminated – in the civil redistricting context. That finding was an unwarranted curtailment of the speech or debate privilege, contrary to precedent, and should be reversed.

1. The Speech Or Debate Privilege Is Well-Established And Broadly Applied

The federal speech or debate privilege is rooted in the English struggles to form a Parliamentary system in the 16th and 17th centuries. *Tenney v. Brandhove*,

341 U.S. 367, 372 (1951). "In 1689, the [English] Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.'" *Id*. (quoting 1 Wm. & Mary, Sess. 2, c. II). "Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372. Indeed, "[t]he Framers viewed the speech or debate privilege as fundamental to the system of checks and balances." *Gillock*, 445 U.S. at 369-70 (citing 8 THE WORKS OF THOMAS JEFFERSON 322 (Ford. ed. 1904) and 1 THE WORKS OF JAMES WILSON 421 (R. McCloskey ed. 1967)).

The federal speech or debate privilege is derived from the Speech or Debate Clause in the U.S. Constitution. The Constitution guarantees that members of Congress "shall not be questioned . . . in any other place" for their speech or debate. U.S. Const. art. I, § 6, cl. 1. At its core, the Clause is based primarily on two interrelated rationales: "first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." *Gillock*, 445 U.S. at 369 (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975)).

When applied, the speech or debate privilege provides broad protections to legislators to ensure "that

the legislative function may be performed independently without fear of outside interference." *Supreme Court of Va.*, 446 U.S. at 731. Thus, the privilege protects those acts that are "an integral part of the deliberative and communicative processes by which [legislators] participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation . . . which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. Among other things, the speech or debate privilege protects all fact-gathering that is performed as part of the legislative sphere. *Eastland*, 421 U.S. at 505.

To properly function as an actual bar to interference with legislative function, the speech or debate privilege also insulates legislators from disclosure in civil litigation because such disclosure can be every bit as intrusive as a lawsuit. See, e.g., *Minpeco, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) ("A party is no more entitled to compel congressional testimony – or production of documents – than it is to sue congressmen."); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

Although the Speech or Debate Clause applies expressly only to federal legislators, this Court has held, as a matter of common law, that federal courts must apply the Clause – and the privilege which derives therefrom – with equal force to state and local legislators in civil cases. *Tenney*, 341 U.S. at 377-79*;* see also

Supreme Court of Va., 446 U.S. at 733; *Larsen v. Senate of the Commonwealth*, 152 F.3d 240, 249 (3d Cir. 1998) ("[T]he Supreme Court has recognized that *in civil cases*, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause.") (emphasis added).

Read collectively, the aforementioned precedent establishes that the speech or debate privilege is absolute and must be applied broadly to protect state legislators and their aides from disclosing in civil litigation any information that was "an integral part of the deliberative and communicative processes" in crafting, drafting and/or considering legislation, including any information about fact finding during the legislative process. *Gravel*, 408 U.S. at 625; see also *Supreme Court of Va.*, 446 U.S. at 733; *Minpeco, S.A.*, 844 F.2d at 859; *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 521-22 (3d Cir. 1985).

2. The Orders Below Are Contrary To This Court's Established Precedent

Rather than applying the privilege in accordance with this precedent, the Panel below held, providing virtually no analysis, that the speech or debate privilege is qualified – and virtually non-existent – when applied to state legislatures in civil redistricting cases. The Panel's ruling was one of a handful of lower court decisions issued in recent years that have held that, in

challenges to districting maps, the speech or debate privilege can be qualified – or eliminated.

The basis for these decisions can be traced back to an overbroad reading of this Court's ruling in *Gillock*. See 445 U.S. 360. In *Gillock*, the defendant/appellant was a member of the Tennessee state legislature indicted on federal charges in the Western District of Tennessee for, *inter alia*, allegedly accepting bribes. *Id*. at 362. He moved to suppress evidence concerning his motivations for conducting legislative acts, claiming that such evidence would necessarily reveal information about the legislative process and therefore vitiate the speech or debate privilege. *Id*. at 362-63. Recognizing this Court's longstanding application of the speech or debate privilege to state legislators and applying principles of comity, the District Court granted the motion, and the Circuit Court affirmed the District Court's ruling. *Id*. at 363.

This Court overturned the Circuit Court's decision, and in doing so, identified a *limited* exception to previous holdings that state legislators are afforded the same protections as members of Congress under the Speech or Debate Clause. *Id.* at 373. Specifically, the Court found that while the speech or debate privilege protects members of Congress from disclosure of such information in criminal cases, the same protection is not available to state legislators. *Id*. The Court distinguished *Tenney* (a case applying the federal speech or debate privilege to state legislators) by noting that *Tenney* was a "*civil action* brought by a private plaintiff to vindicate private rights." *Id*. (emphasis

added). Thus, the holding in *Gillock* was a narrow one: that in the criminal law context *only*, a state legislator's speech or debate privilege is qualified. *Id*.

Only a few months after *Gillock* was decided, the Court reiterated that, notwithstanding its decision in *Gillock*, an absolute speech or debate privilege still applied to state legislators in civil cases. See *Supreme Court of Va.*, 446 U.S. at 725-26. The Court's majority in *Supreme Court of Va*. made clear that "Congress did not intend [28 U.S.C.] § 1983 [the procedural mechanism pursuant to which the *Agre* case was brought below] to abrogate the common-law immunity of state legislators." *Id*. at 732. The Court also distinguished *Gillock*, noting that although "the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators *in criminal actions* . . . [the Court] generally ha[s] equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Id*. at 733 (emphasis added).

Later, in *Bogan v. Scott-Harris*, this Court unanimously held (again) that the speech or debate privilege is absolute for state legislators in civil cases. 523 U.S. at 46-49 ("It is well established that federal, state and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."). The Court recognized that the privilege has a "venerable tradition" and that state and regional "legislators [are] entitled to *absolute immunity* from suit at common law and that Congress did not intend the general language of § 1983 'to impinge on a tradition so well grounded in

history and reason.'" *Id*. at 49 (citing *Tenney*, 341 U.S. at 376). In so holding, the Court recognized that, "it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." *Bogan*, 523 U.S. at 54 (internal citations omitted).

Since the *Gillock* decision, several courts have correctly upheld the absolute speech or debate privilege in the civil redistricting context. For instance, in *Backus v. South Carolina*, No. 3:11-cv-03120, 2012 U.S. Dist. LEXIS 37055 (D.S.C. Feb. 8, 2012), the plaintiffs challenged a congressional districting map and sought to obtain discovery (including documents and depositions) from legislators about their intent in drafting the map. The legislators moved for a protective order on the basis that *Supreme Court of Va.* limited *Gillock*'s holding to criminal cases, and that the privilege remained absolute in the civil context. The court adopted the legislators' arguments in full and, consistent with *Supreme Court of Va*., held that, notwithstanding *Gillock*, the speech or debate privilege remained *absolute* when applied to state legislators in the civil context. *Id.*

Other lower federal court cases have reached similar conclusions. See *Chen v. City of Houston*, No. H-97-1180, at 3-4 (S.D. Tex. Oct. 31, 1997) (mem. op.) (barring deposition of city councilmember in action involving districting); *Simpson v. City of Hampton*, 166 F.R.D. 16, 18-19 (E.D. Va. 1996) (legislative immunity encompasses testimonial privilege that blocked production of legislator's files and notes in redistricting

case); see also *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298-99 (D. Md. 1992) ("[A] state legislator acting within the sphere of legitimate legislative activity may not be a party to a *civil suit concerning those activities, nor may he be required to testify regarding those same actions*.") (emphasis added) (internal citations and quotations omitted); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F.Supp. 578, 582 n.2 (E.D. Pa. 1982) (noting that deposition of legislator was prohibited).

But, a handful of lower courts have reached the opposite conclusion – that, in districting cases, the speech or debate privilege can be qualified when applied to state legislators. See, e.g., *Rodriguez v. Pataki*, 280 F.Supp. 2d 89 (S.D.N.Y. 2003), *aff'd*, 293 F.Supp. 2d 202 (S.D.N.Y. 2003); *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011); *Baldus v. Brennan*, Nos. 11-cv-562 & 11-cv-1011, 2011 WL 61225-42, at *1 (E.D. Wis. Dec. 8, 2011) (unique nature of Senate Majority Leader's testimony and documents outweighed future chilling effect on the Legislature).

The Panel below relied upon two such decisions in reaching its conclusion. See *Bethune-Hill v. Va. State Bd. of Elections*, 114 F.Supp. 3d 323, 338 (E.D. Va. 2015); *Benisek*, 241 F.Supp. 3d at 574-75. These courts held, after application of a five-part balancing test, that the speech or debate privilege is qualified and must yield

in civil redistricting cases.[10] In reaching their conclusions, both *Bethune-Hill* and *Benisek* relied almost exclusively on *dicta* from *Gillock* noting that the speech or debate privilege may be qualified as it pertains to state legislators, "where important federal interests are at stake." *Bethune-Hill*, 114 F.Supp. 3d at 333 (quoting *Gillock*); *Benisek*, 241 F.Supp. 3d at 574 (quoting *Gillock*).

Thus, the orders below can be traced back to a single quote from the Court's opinion in *Gillock*. But that quote was taken out of context by the courts in both *Benisek* and *Bethune Hill* (as well as many of their sibling cases). The full quote states:

> [W]here important federal interests are at stake, as in the enforcement of federal *criminal statutes*, comity yields. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive

[10] The five factors include: "(1) the relevance of the evidence sought, (2) the availability of other evidence, (3) the seriousness of the litigation, (4) the role of the State, as opposed to individual legislators, in the litigation, and (5) the extent to which the discovery would impede legislative action." *Benisek*, 241 F.Supp. 3d at 575. It is unclear whether the Panel below assessed these factors. While the Panel referenced the five-part test identified in previous cases, it does not appear to have performed an actual analysis of or review of the documents at issue; rather, the Panel simply held that there is no privilege and the documents must be produced wholesale. These factors appear to have originated in the redistricting context in *Rodriguez v. Pataki*, 280 F.Supp. 2d 89, in a decision from a magistrate judge on a motion to compel.

> privilege were found wanting . . . when balanced *against the need of enforcing federal criminal statutes*.

Gillock, 445 U.S. at 373 (emphasis added) (internal citations omitted). Reading the entire passage, particularly in light of the Court's rulings in *Bogan* and *Supreme Court of Va.*, makes clear that *Gillock* imposed a limited exception in the criminal context only. This Court has never come close to holding that *Gillock* should be read to apply a qualified immunity in civil cases. And it should refrain from doing so now.

3. The Rationale Behind The Speech Or Debate Privilege Supports An Absolute Privilege In The Redistricting Context

The application of the absolute speech or debate privilege in civil cases makes sense – particularly in challenges to districting legislation. As this Court unanimously recognized in *Bogan*: "[a]bsolute immunity for local legislators . . . finds support not only in history, but also in reason." 523 U.S. at 52. The speech or debate privilege was designed to "enable and encourage a representative of the public to discharge his public trust with firmness and success." *Tenney*, 341 U.S. at 373 (internal citations and quotations omitted). To do so, "it is indispensably necessary, that [the legislator] 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." *Id*. Thus, "[l]egislators are immune from deterrents to the uninhibited

discharge of their legislative duty, not for their private indulgence but for the public good." *Barr v. Mateo*, 360 U.S. 564, 575 (1959) (internal citations and quotations omitted).

Put simply, the speech or debate privilege is intended to allow legislators to avoid civil litigation that would force them, "to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503. It must be interpreted broadly to "implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel*, 408 U.S. at 618.

An exception to the absolute speech or debate privilege may be practical and logical in the criminal context, where the criminal act itself is antithetical to the legislator's representation of the people, and the denial of the privilege would only "have some minimal impact on the exercise of his legislative function." *Gillock*, 445 U.S. at 373. But, in the civil context, especially in districting cases, the calculus is much different. Redistricting is the most political of state legislative functions, and, as a result, it is fertile ground for political rivals or other branches of government to seek to interfere with the legislative function.

The primary problem with qualifying (and effectively eliminating) the speech or debate privilege in the districting context is magnified as compared with other civil contexts, because standing requirements appear to have been nearly eliminated in this context,

thereby making it that much easier for a political rival or another branch of government to advance a challenge. In fact, several courts have held that all that needs to be done to have standing to challenge a congressional districting map is find one participant from each of a state's districts who is willing to say that he has suffered harm by virtue of the map. See, e.g., *Whitford v. Gill*, 218 F.Supp. 3d 837, 930 (W.D. Wis. 2016). And, at least one district court panel has permitted statewide challenges even where the plaintiffs did not hail from all voting districts. See, e.g., *Common Cause v. Rucho*, Nos. 16-1016, 16-1164, slip op. 1, 21-37 (M.D.N.C. Jan. 9, 2018) (this matter was stayed pending review of this Court, see *Rucho v. Common Cause*, No. 17A745 (Jan. 18, 2018)). As a result of these decisions, partisan gerrymandering challenges to congressional districting maps have become ubiquitous in recent years. Indeed, since the last Census, no fewer than thirteen partisan gerrymandering cases in nine states have been commenced.[11]

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[11] See, e.g., *Agre v. Wolf*, 2018 U.S. Dist. LEXIS 4316 (Jan. 10, 2018) (three-judge court); *Diamond v. Torres*, No. 5:17-cv-05054 (E.D. Pa 2017) (ECF No. 84) (Order granting stay pending resolution in the Supreme Court of Pennsylvania) (three-judge court); *Georgia State Conference NAACP v. Kemp*, 1:17-cv-1427 (N.D. Ga. Nov. 1, 2017) (three-judge court) (ECF No. 46) (consolidating *Georgia State Conference NAACP v. Kemp*, 1:17-cv-1427 (N.D. Ga. Apr. 24, 2017) (three-judge court) (ECF No. 1) and *Brooks v. Kemp*, 1:17-cv-3856 (N.D. Ga. Oct. 3, 2017) (ECF No. 1); *League of Women Voters of Mich. v. Johnson*, 2:17-cv-14148 (E.D. Mich. Dec. 22, 2017) (ECF No. 1); *Benisek v. Lamone*, 266 F.Supp. 3d 799 (D. Md. Aug. 24, 2017); *Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 5191 (M.D.N.C., Jan. 9, 2018); *Perez v. Abbott*, 267 F.Supp. 3d 750

The Wisconsin State Assembly aptly summarized the impact of these decisions in an *amicus* brief filed in connection with *Gill v. Whitford*, No. 16-1161:

> The combined effect of decisions devaluing legislative privilege and the temptations provided by partisan gerrymandering claims offers plaintiffs easy access to their political rivals' otherwise confidential communications. That is no small concern, as legislative communications about redistricting are even more sensitive (and more valuable to the opposing party) than typical legislative deliberations. They can reveal how legislators think about particular political races, which incumbents they might view as vulnerable, which incumbents they considered pairing, and how they engage in intra-caucus decision-making. And on top of all that, there is at least some political value in subjecting a legislator from the other party to the "cost and inconvenience" of compulsory process.

(W.D. Tex. 2017), *app. dismissed, Tex. Democratic Party v. Abbott*, 138 S. Ct. 739 (2018); *League of Women Voters of Pa. v. Pennsylvania*, 2018 Pa. LEXIS 771 (Pa. 2018); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 835 F.Supp. 2d 563 (N.D. Ill. 2011); *Whitford v. Gill*, 218 F.Supp. 3d 837 (W.D. Wis. 2016), *stay granted*, No. 16-1161 (U.S. June 19, 2017); *Alabama Legis. Black Caucus v. Alabama*, 989 F.Supp. 2d 1227 (M.D. Ala. 2013), *reversed, Alabama Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Fletcher v. Lamone*, 831 F.Supp. 2d 887 (D. Md. 2011), *aff'd*, *Fletcher v. Lamone*, 567 U.S. 930 (2012); *League of Women Voters of Fla. v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013).

Brief for Wisconsin State Senate and Wisconsin State Assembly as *amicus curiae*, *Gill v. Whitford*, No. 16-1161, at 13-14 (U.S. filed Aug. 4, 2017) (citations omitted).

The concerns expressed by the Wisconsin State Assembly in *Gill* are not hypothetical. In this very case, the Panel below, with almost no apparent analysis and without any *in camera* review of the documents at issue, found the privilege to be non-existent and required Appellant and Speaker Turzai to produce hundreds of pages of non-public documents that may have been considered during the drafting of the 2011 Plan. Appellant, Speaker Turzai, and their staffs were forced to spend countless hours responding to discovery requests. Both Appellant and Speaker Turzai were required to sit for deposition, and members of their staffs were not only forced to sit for depositions, but to testify at trial as well.

And that is not all. At the trial below, counsel for the executive branch – the branch of government purportedly tasked with defending the validly passed 2011 Plan (and, unsurprisingly, a member of the opposite political party) – openly criticized Appellant and Speaker Turzai for utilizing the privileged datasets that the Panel required Appellant and Speaker Turzai to produce. See ECF No. 198-1, at 39-56. Moreover, after the documents were produced over Appellant and Speaker Turzai's objections, they were transferred by Appellees directly to petitioners in the *LOWV* case, whose counsel then intentionally leaked them to the Philadelphia Inquirer. The Inquirer, in turn, disseminated its own interpretation of the documents,

including data that may have been considered by Appellant and Speaker Turzai in crafting the 2011 Plan.

Finally, and perhaps most critically, the Pennsylvania Supreme Court's decision to invalidate the 2011 Plan and intrude upon the General Assembly's constitutionally delegated authority to create districting legislation was based, at least in part, on the non-public documents that Appellant and Speaker Turzai were required to produce in the *Agre* case.

These intrusions into the legislative function are exactly what the Framers feared would happen without a robust and absolute speech or debate privilege.

4. The Panel's Holding Is Also Inconsistent With Principles of Comity And Federalism

Principles of federalism and comity also weigh in favor of enforcing an absolute privilege in the civil redistricting context. When states joined the Union, or revised their constitutions, "they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney*, 341 U.S. at 375. As this Court has recognized, the judiciary must respect those decisions and be careful not to "overturn the tradition of legislative freedom" that was "carefully preserved in the formation of *State* and National Governments." See *id*. at 376 (emphasis added).

Pennsylvania, like virtually all of its sister states, has enacted a constitutional Speech or Debate Clause, thereby establishing a privilege corollary to the federal privilege. The Pennsylvania Speech or Debate Clause, like its federal analogue, provides that "any speech or debate in either House [of the General Assembly] *shall not be questioned in any other place.*" Pa. Const. art. II, § 15 (emphasis added).[12] The privilege is interpreted broadly "to protect legislators from judicial interference with their legitimate legislative activities." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 329 (Pa. 1986). And, because the privilege is absolute, it protects legislators from having to provide oral testimony or produce discovery concerning topics that are covered by the immunity. *Hamilton v. Hennessey*, 783 A.2d 852, 855 (Pa. Commw. Ct. 2001) (en banc). Other state courts have also upheld the privilege in the redistricting context. See *Edwards v. Vesilind*, 790 S.E.2d 469 (Va. 2016); *Homes v. Farmer*, 475 A.2d 976 (R.I. 1984); *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1098 (Ariz. Ct. App. 2003).

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[12] Pennsylvania's Speech or Debate Clause has the same scope as and is "essentially identical to and obviously derived from" the federal Speech or Debate Clause. *Consumers Educ. & Protective Ass'n v. Nolan*, 368 A.2d 675, 680 (Pa. 1977). Although Pennsylvania courts are "not bound by the cases interpreting the federal speech or debate clause, those cases provide guidance in formulating the policy considerations underlying the Pennsylvania Speech or Debate clause." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 330 (Pa. 1986); see also Steven Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221 (2003).

In applying the privilege in the *LOWV* case, the Commonwealth Court correctly held that, under the Pennsylvania Constitution's Speech or Debate Clause, documents concerning the crafting and drafting of the 2011 Plan were privileged, and entered an order protecting them from disclosure. *League of Women Voters*, No. 261 M.D. 2017, 2017 Pa. Commw. LEXIS 1097 at *2 ("[T]he Speech [or] Debate Clause must be construed 'broadly in order to protect legislators from *judicial interference* with their legitimate legislative activities.'") (emphasis in original).

But that was not the end of the story. As detailed above, while the Panel below sought to "respect" the state court ruling, a trove of documents that were produced to Appellees, and previously deemed privileged to the Commonwealth Court, found their way into the record in the *LOWV* case. The documents included spreadsheets containing detailed information about Appellant's and Speaker Turzai's thought processes with respect to redistricting and the 2011 Plan. And, these privileged documents formed at least part of the basis for the Pennsylvania Supreme Court's decision to invalidate the 2011 Plan.

The inescapable effect of the holding below is that, in redistricting cases, speech or debate privilege protections offered by state constitutions, nationwide, could be rendered null and void by federal courts upon the filing of any partisan gerrymandering claim in a federal court. Thus, if a state court litigant wishes to obtain material protected by the speech or debate privilege but cannot do so because of state constitutional

protection, all she would need to do is file a parallel lawsuit in federal court and seek the very same documents. In fact, a motion related to legislative privilege is currently pending in *League of Women Voters of Mich. v. Johnson*, 2:17-cv-14148 (E.D. Mich. Mar. 8, 2018) (ECF No. 8).

In the case below, the impact of the Panel's decision was, relatively-speaking, somewhat confined, because Appellees failed to seek testimony or evidence from various third-party witnesses and other sources. In future cases, if the Panel's decision is upheld, litigants might take a more proactive approach and seek much broader discovery in a federal redistricting case, solely to utilize the materials produced in a separate state case where such materials would otherwise be privileged. Such a sweeping result clearly violates basic notions of federalism and comity.

B. Even If A Qualified Speech Or Debate Privilege Is To Be Extended To Civil Redistricting Cases, The Qualified Privilege Should Be Predictable And Robust

Even if this Court deems it appropriate to qualify the speech or debate privilege in civil redistricting cases, the Court should not endorse the unwieldy and unpredictable balancing test adopted in *Bethune-Hill*, *Benisek* and similar cases. In some cases, including the case below, the privilege was entirely eliminated, see, e.g., *Baldus*, 2011 WL 61225-42, at *1, while in others it was qualified to a lesser extent. See, e.g., *Rodriguez*

v. Pataki, 280 F.Supp. 2d 89 (S.D.N.Y. 2003) (privilege upheld with respect to only certain discovery sought but qualified with respect to other discovery).

If the *Bethune-Hill* balancing test (see note 9, supra) is adopted by this Court, state legislators would have no idea whether their political rivals and the other branches of government would eventually gain access to non-public information that they considered in drafting legislation – or how that information would be used. Once again, the case below provides an apt example. The Panel allowed the introduction of data files produced by Appellant and Speaker Turzai. Appellees' expert witness testified about her assumptions that the data was utilized in drafting the 2011 Plan. See ECF No. 195-1 (108:15-19, 116:1-7). The data was also leaked to the press, which made baseless assumptions about how the data was used.

As British and American tradition has recognized for centuries, to legislate effectively on behalf of the people, legislators must be free to consider any and all relevant materials without the possibility of retribution. See *Barr*, 360 U.S. at 575 ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."). The balancing test endorsed by *Bethune-Hill* and its progeny, which the Panel below apparently nominally applied, simply does not allow for such freedom. As applied, legislators will be in constant fear that information they considered (or merely collected) in adopting redistricting legislation may be scrutinized out of context.

Thus, if the Court finds that the speech or debate privilege is qualified in the civil redistricting context, it should create a bright-line rule establishing a robust privilege, so that state legislators can work within a fixed set of guidelines. Appellant suggests that such a bright-line rule should clearly establish that, even if the speech or debate privilege is qualified, the facts and data considered by legislators and their aides and consultants in drafting redistricting legislation, as well as the legislators' internal thought processes and communications with aides and consultants regarding the legislation, will be privileged under the qualified immunity. While this rule would not be as broad as the absolute immunity historically applied by this Court in civil cases – it would require disclosure of communications with third parties – it would still protect the heart of the speech or debate privilege in the redistricting context.

C. This Issue Is Not Moot And Requires Resolution

Appellees will almost certainly argue that Appellant's challenge is moot because Appellees' claims failed. The mootness doctrine does not apply here.

A case or an appeal is moot "[w]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc*., 133 S. Ct. 721, 726 (2013) (citation omitted). An exception to mootness arises where an issue is capable of repetition, yet evades review. See *FEC v. Wis.*

Right to Life, Inc., 551 U.S. 449, 462 (2007). Under this exception, a case is not moot if (1) the challenged action is too short in duration to be fully litigated prior to the expiration of the action; and (2) "[t]here is a reasonable expectation that the same complaining party will be subject to the same action again." See *id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 334 (2010).

This case satisfies both requirements. Once a privilege is disregarded and the privileged materials are produced, the proverbial "cat is out of the bag." With the benefits of the privilege gone, a private litigant has no incentive to pursue an appeal, as even a reversal and an after-the-fact restoration of the privilege cannot restore the privacy that has been lost. In short, the damage has been done, cannot be undone, and so this issue is likely to evade review.

Further, the issue of the enforceability of the speech or debate privilege to state legislators in federal redistricting cases is virtually certain to repeat. Redistricting challenges have been consistently filed after every ten-year census. See, e.g., *Rucho*, Nos. 16-1016, 16-1164, slip op. 1, 21-37 (M.D.N.C. Jan. 9, 2018). Pennsylvania alone has had each of its last four redistricting plans challenged. See *Vieth v. Pennsylvania*, 188 F.Supp. 2d 532 (M.D. Pa. 2002); *In re 1991 Reapportionment*, 530 Pa. 335, 609 A.2d 132 (1992); *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F.Supp. 1507 (M.D. Pa. 1982). This litigious pattern has remained remarkably consistent even though partisan gerrymandering challenges have nearly all been unsuccessful. See *Vieth v. Jubilerer*, 541 U.S. 267,

279 (2004). And this appeal is brought less than two years from the April 1, 2020 Census day, after which the Pennsylvania Legislature will need to engage in redistricting again. There is thus a very strong likelihood this issue will repeat itself, and that Appellant and other leaders of the Republican caucus in both chambers of the Pennsylvania General Assembly will be forced once again to defend the privilege.

Accordingly, this issue is ripe and should be addressed. See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 324 (D.C. Cir. 2014) (citing *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) and *Doe v. Sullivan*, 938 F.2d 1370, 1378-79 (D.C. Cir. 1991) ("It is enough . . . that the litigant faces some likelihood of becoming involved in the same controversy in the future" and noting that a case is capable of repetition "[e]ven if its recurrence is far from certain.")). This Court should reject any argument to the contrary.

CONCLUSION

Wherefore, this Court should grant the instant appeal and reverse the lower court's rulings, with respect to the speech or debate privilege.

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Respectfully submitted,

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