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

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. THOMAS C. ALEXANDER, *et al.*, Defendants.	Case No. 3:21-cv-03302-MGL-TJH-RMG **THREE-JUDGE PANEL**

PLAINTIFFS' RESPONSE TO HOUSE AND SENATE DEFENDANTS' MOTION FOR CONFIDENTIALITY ORDER SPECIFIC TO LEGISLATIVELY PRIVILEGED MATERIALS

Senate and House Defendants (collectively referred to herein as "Defendants"), seek to shield from the public materials that are essential in the resolution of this litigation, including nearly the entirety of key deposition transcripts and numerous exhibits to those transcripts. ECF No. 308. The materials at issue include the depositions of Senate and House leaders such as Speaker Lucas and Chairman Murphy—key decisionmakers in congressional redistricting. They include the depositions of redistricting and Judiciary committee members such as Representative Newton and Chairman Jordan, who led the redistricting process. They include the depositions of staff members such as Emma Dean (Chief Counsel to the House Judiciary Committee), and Thomas Hauger (Geographic Information Systems (GIS) and Data Director for the House of Representatives), who drew lines placing voters in and outside of districts according to public and private criteria established by the House and Senate. And they include documents and

correspondence that these individuals considered in the redistricting process, which were introduced as exhibits at their depositions.

As the depositions reflect, all of these considerations and decisions bear on the congressional plan that will govern the lives of the public for the next decade. No doubt these materials will form part of the basis of the Court's decision in this case. Defendants seek to conceal them from the public, yet they have failed to articulate a compelling interest that outweighs the strong presumption of public access.

ARGUMENT

The Defendants' motion is predicated on the wrong legal principle and a presumption of confidentiality in public proceedings. Their approach ignores that it is a bedrock principle under both "the First Amendment and the common law tradition that court proceedings are presumptively open to the public," and that "the common-law presumptive right extends to all judicial documents and records. *Doe v. Public Citizen*, 749 F.3d 246, 265–66 (4th Cir. 2014) (citations omitted). That "presumption can be rebutted only by showing that countervailing interests heavily outweigh the public interests in access." *Id.* Indeed, the "right of public access . . . may be abrogated only in unusual circumstances." *Id.* at 266 (citation omitted). Defendants have not come close to making the requisite showing.[1]

[1] Defendants claim that the materials at issue are "protected from disclosure by statute," citing the South Carolina Freedom of Information Act (S.C. Code Ann. § 30-4-10 et seq.). ECF No. 308 at 4–5. But that statute does not require the materials at issue be kept confidential. Even if the Court were to agree that the documents, deposition transcripts, and exhibits at issue constitute "[m]emoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs," the statute does not exempt these materials from disclosure, as Defendants claim. Rather, S.C. Code Ann. § 30-4-40(a) states that a "public body **may but is not required** to exempt from disclosure the following information . . . ." (emphasis added). Thus, Defendants overstate the statute's protections and relevance.

By asking this Court to "expressly include legislatively privileged materials in a separate Confidentiality Order," Defendants shoehorn rejected arguments on legislative privilege into a new motion. The Court has already ruled on this issue. ECF Nos. 153, 299. But Defendants rehash their arguments that "the legislative privilege must [] be preserved" because of "serious ramifications on future deliberations of the Legislature." ECF No. 308 at 7. The Panel has already carefully considered the potential "chilling effect" of disclosure, and determined that Plaintiffs are entitled to discovery of certain documentation and communications from legislators, their staff, and consultants. *See* Feb. 10, 2022 Order and Op., ECF No. 153 at 15–17, incorporated by reference into the Court's July 5 Order, ECF No. 299. Indeed, the Court has recognized that "the legislative independence interest and the risk of chilling legislative functions 'is significantly reduced, if not eliminated, when the threat of personal liability is removed.'" ECF No. 153 at 16 (citing *Owen v. City of Independence*, 445 U.S. 622, 656 (1980)).[2] Moreover, despite the "sensitive" nature of communications between staff and legislators, the Court recognized that such communications may provide direct evidence of specific intent and cannot be shielded from discovery when, as here, the federal interests at stake are substantial. *Id*. (citing *Benisek v. Lamone*, 241 F. Supp. 3d 566, 576 (D. Md. 2017).

Defendants mainly cite to *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015), to argue that a new confidentiality order is needed to protect the legislative process. But Defendants misread *Bethune-Hill*, which does not stand for the notion that documents, communications, and testimony from and between legislators and their staff disclosed in litigation must be kept confidential or shielded from the public domain. As the Feb. 10 Order

[2] Plaintiffs have brought suit against Defendants in their respective official capacities for constitutional claims. Defendants do not assert, let alone provide any evidence, that personal liability is at risk by the testimony and communications they seek to shield.

explains, "*Bethune-Hill* distinguished civil suits against individual legislators from those 'against the *State* [where Plaintiffs seek] evidence to vindicate important *public* rights guaranteed by federal law, where the privilege was qualified." ECF No. 153 at n.4 (citing *Bethune-Hill*, 114 F. Supp. 3d at 334)). Applying the five-factor balancing test in the context of racial gerrymandering claims, the *Bethune-Hill* court said that the legislative independence interest weighed against disclosure. But the court then concluded that the balance of interests called for the legislative privilege to yield. *Bethune-Hill*, 114 F. Supp. 3d at 343. That the *Bethune-Hill* court considered the purpose of the legislative privilege—to protect a "distraction" interest and a "legislative independence" interest—pursuant to the fifth factor in the five-factor balancing test, does not equate to persuasive authority regarding an alleged need to shield legislators' communications, related documents, and dispositions from the public domain.

The right of public access springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny. *Doe*, 749 F.3d at 265 (citing *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004)). On that score, the Supreme Court has stressed that the core of the interests that the right of access protects is "the citizen's desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of the government." *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 598 (1978).

The legislators' claimed interests do not outweigh the rights of the public and press to judicial documents and records filed in civil proceedings.[3] The common-law presumptive right of access extends to all judicial documents and records, and can be rebutted only by showing that "countervailing interests heavily outweigh the public interests in access." *Rushford v. New Yorker*

[3] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980); *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 597 (1978); *Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014); *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 428 (4th Cir. 2005).

Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988). Further, under the First Amendment, access to particular judicial records and documents may be restricted only if "necessitated by a compelling government interest" and the denial of access is "narrowly tailored to serve that interest." *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (internal quotation marks omitted)).

The public's right to access is heightened here, where litigation concerns the actions and functions of duly elected public officers. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases"). Indeed, "[t]he interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation." *Doe v. Pub. Citizen*, 749 F.3d 246, 271 (4th Cir. 2014). That is because of the public's undeniably "strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation." *Id.* This public interest extends to issues discussed or unveiled in discovery. And "[s]ealing the discovery process in civil proceedings . . . sacrifices the traditional interest of the public in obtaining access to civil proceedings." *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 580 (4th Cir. 2004).

The documents Defendants seek to place under seal—which specifically include communications among legislators and their staff who were key decisionmakers in drawing congressional lines, as well as deposition transcripts and exhibits—implicate public concerns at the core of this litigation and at the heart of the right of access. That is, the materials at issue directly address the redistricting process subject to this litigation. This action directly addresses whether South Carolina's elected representatives have violated their citizens' constitutional rights. Shrouding key documents and communications that directly speak to that critical question, as well

as deposition transcripts for the Senate and House leaders and key representatives that led the redistricting process, and their staff who drew lines for the new district maps, would only violate the public's rights further and frustrate its acute and undeniable interest in this action. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). *See also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) ("franchise-related rights is without question in the public interest").

The burden is on Defendants to articulate a compelling interest that outweighs the strong presumption of public access. They have not articulated one. Indeed, the Court has already recognized that the risk of chilling legislative functions is significantly reduced, if not eliminated, when the threat of personal liability is removed (as it is here). ECF No. 153 at 16 (citing *Owen v. City of Independence*, 445 U.S. 622, 656 (1980)). Nor does the risk of chilling legislative function overcome the public's important federal interest at stake in this litigation. Thus, measured against the heightened public interests presented in this case, the Panel should find that Defendants have failed to demonstrate any interest sufficient to defeat the public's First Amendment right of access and to justify concealment of key materials in this case.[4]

Finally, from a procedural perspective, Defendants' motion would render trial in this case a logistical and practical nightmare. Defendants attempt to frame their motion as narrowly tailored

[4] Should the Panel determine that only the common-law presumptive right of access applies in the instant case, the Defendants have also failed to demonstrate that "countervailing interests heavily outweigh the public interests in access." *Doe v. Public Citizen*, 749 F.3d 246, 266 (4th Cir. 2014) (citing *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

and therefore reasonable, but, as stated, the materials at issue are central to addressing Plaintiffs' claims. If these materials are to be kept sealed and the courtroom doors barred under a separate confidentiality order, at least portions of the trial in this matter would be void of substantive discussion or conducted in secret. Perhaps worse, Defendants would turn trial into a series of openings and closings, going on and off the record based on the confidentiality of individual lines of testimony. None of this makes sense, and Defendants have cited no examples of redistricting cases that have been conducted this way.[5]

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Confidentiality Order Specific to Legislatively Privileged Materials.

[signature pages follow]

[5] To the contrary, in redistricting cases, courts have pierced the legislative privilege and found it does not protect "any documents or other items that were used by the Legislature in developing the redistricting plan" despite the risk of a "chilling effect" of the Legislature. *See e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 948 F. Supp. 2d 840, 845 (E.D. Wis. 2012) ("Allowing the plaintiffs access to these items may have some minimal future 'chilling effect' on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence. Additionally, given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek . . ."); *see also Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1305 (C.D. Cal. 1990).

Dated: August 3, 2022

Respectfully submitted,

/s/ Allen Chaney

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2022, a true and correct copy of the foregoing was served on all counsel of record by electronic mail.

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