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

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP,

and

TAIWAN SCOTT, on behalf of himself and all other similarly situated persons,

Plaintiffs,

v.

THOMAS C. ALEXANDER, in his official capacity as President of the Senate; LUKE A. RANKIN, in his official capacity as Chairman of the Senate Judiciary Committee; JAMES H. LUCAS, in his official capacity as Speaker of the House of Representatives; CHRIS MURPHY, in his official capacity as Chairman of the House of Representatives Judiciary Committee; WALLACE H. JORDAN, in his official capacity as Chairman of the House of Representatives Elections Law Subcommittee; HOWARD KNAPP, in his official capacity as interim Executive Director of the South Carolina State Election Commission; JOHN WELLS, Chair, JOANNE DAY, CLIFFORD J. EDLER, LINDA MCCALL, and SCOTT MOSELEY, in their official capacities as members of the South Carolina Election Commission,

Defendants.

Case No. 3:21-cv-03302-MGL-TJH-RMG

THREE-JUDGE PANEL

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

Defendants Thomas C. Alexander (in his official capacity as President of the Senate) and Luke A. Rankin (in his official capacity as Chairman of the Senate Judiciary Committee) (collectively, the "**Senate Defendants**"), and James H. Lucas (in his official capacity as Speaker

of the South Carolina House of Representatives[1]), Chris Murphy (in his official capacity as Chairman of the South Carolina House of Representatives Judiciary Committee), and Wallace H. Jordan (in his official capacity as Chairman of the South Carolina House of Representatives Redistricting Ad Hoc Committee) (collectively, the "**House Defendants**"), by and through their undersigned counsel, hereby jointly reply to Plaintiffs' response [ECF No. 316] to their Joint Motion for a separate Confidentiality Order specifically to deem legislatively privileged materials as confidential [ECF No. 308] (hereinafter "**Joint Motion**").

ARGUMENT

Throughout their response, Plaintiffs continue to conflate the issues of discoverability, admissibility, and confidentiality with respect to materials covered by legislative privilege. [*See* ECF No. 316]. Contrary to Plaintiffs' assertion, Senate Defendants and House Defendants do not seek to re-litigate the issue of whether legislatively privileged materials are discoverable. The Panel has ruled that such materials are discoverable in a case involving allegations like the ones made in this case and Senate Defendants and House Defendants have complied with those rulings [ECF Nos. 153 and 299)] fully and produced those legislative materials accordingly. However, whether these materials are discoverable is an entirely separate issue from the one the Joint Motion raises—namely, whether such materials may be appropriately designated as confidential. [*See* ECF No. 308]. Instead of responding to the merits of the Joint Motion, Plaintiffs resort to bluster and alarmist tactics, exaggerating concerns about how confidentiality designations will make this trial a "logistical and practical nightmare." [ECF No. 316 at 6]. This concern rings particularly hollow

[1] On May 12, 2022, James H. Lucas stepped down as Speaker of the South Carolina House of Representatives. The current Speaker of the House is Representative G. Murrell Smith, Jr.

when considering that Plaintiffs themselves have designated nearly every document they have produced as confidential.[2]

Plaintiffs ignore that confidentiality designations are routinely dealt with at trial, that this case is a bench trial, and that this Panel is particularly well-equipped to deal with the issues related to the admissibility of evidence and the treatment of that evidence at trial. Indeed, significant portions of the designations Plaintiffs have challenged to date relate to the previously challenged State House districts—and issues related to those districts have been resolved by a settlement. Therefore, it is highly unlikely that many, if not most, of the challenged documents and deposition excerpts will be an issue at trial—and Plaintiffs' efforts to confuse the issues here demonstrate the weakness of their arguments. Moreover, it leads to a concern about the potential extra-judicial use of legislatively privileged materials by Plaintiffs after the upcoming trial is concluded.

In her February 10, 2022 Order, United States Circuit Judge J. Michelle Childs (a former member of this Panel) ruled that while communications between staff and legislators are "*particularly sensitive,*" they "cannot be completely shielded *from discovery*." [ECF No. 153 at 16 (emphasis added)]. Thus, Judge Child's Order for the Panel limited discovery of documents "to those which provide direct evidence of specific intent." *Id.*

However, her Order, which allowed for the discovery of legislatively privileged materials, did not address whether those materials should be treated as confidential—and the existing Confidentiality Order (which is the standard Order used in this district and was entered prior to Judge Child's February 10, 2022 Order) does not address the issue of whether legislatively

[2] Plaintiffs have also designated as confidential several publically available documents, including Redistricting Guidelines and Criteria that appear on the House and Senate websites, despite the Confidentiality Order prohibiting such designations. [*See* ECF No. 123 at ¶ 3 ("Information or documents which are available in the public sector may not be designated as confidential.")].

privileged information should be treated as confidential as the legislative privilege issue had not been raised by either party at that time.[3] Of course, as noted in the Joint Motion, the Panel has issued separate Confidentiality Orders [ECF Nos. 227 and 284] (at the request of the Plaintiffs and with the consent of all parties) with respect to the treatment of membership records of the organizational Plaintiff here—and legislatively privileged information should receive similar protections. The fact that the membership records of the organizational Plaintiff are confidential will, of course, require special care when dealing with the issues of admissibility of those records at trial—but that does not mean that those materials should lose their confidentiality protections. And the same should hold true for legislatively privileged materials.

To reiterate one of the primary concerns raised in the Joint Motion, Senate Defendants and House Defendants' interest in keeping such material confidential stems from a potential chilling effect on future legislative processes surrounding redistricting. [*See* ECF No. 308 at 7-8]. Indeed, if every personal email, conversation, and text message between legislators and staff were thrust into public view every redistricting cycle, it would impede the legislative process and would undoubtedly lead to a less transparent process in future cycles (an issue Plaintiffs themselves raised in this litigation). Plaintiffs only response on this issue is that Senate Defendants and House Defendants' concern lacks merit because there is no risk of personal liability. However, this

[3] House Defendants have separately moved [ECF No. 314] for an Order confirming their confidentiality designations under the current Confidentiality Order [ECF No. 123] as protected from disclosure under the South Carolina Freedom of Information Act exemption for "[m]emoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs," S.C. Code Ann. § 30-4-40(a)(8). Plaintiffs argue that the General Assembly is still permitted to disclose such information if they so choose. [See ECF No. 316 at 2 n.1]. However, the General Assembly has elected to not disclose such information, and Plaintiffs fail to show how this statute does not protect such materials from disclosure in light of such a decision.

argument completely misses the mark, as Senate Defendants and House Defendants are concerned about this issue's effect on future deliberations, not the deliberations at issue in this trial.

Further, Senate Defendants and House Defendants do not "misread" *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015),[4] nor do they attempt to relitigate the application of the five-factors delineated therein as far as discoverability is concerned. Still, the fifth factor – the purpose of the legislative privilege – is applicable to the legislature's interests in avoiding public disclosure of such documents, even if they have already been deemed discoverable.

Plaintiffs also state that communications among legislators and their staff, as well as deposition transcripts and exhibits, are "at the core of this litigation" and "directly address the redistricting process subject to this litigation." [ECF No. 316 at 5]. Again, that does not automatically mean that such documents and communications lose *all* protections and should, thus, face the possibility that they are made available extra-judicially to the public. Again, many of the confidentiality designations challenged to date by Plaintiffs relate to the earlier, and now completed, State House district litigation. In the event that this Panel issues the Order sought by the Joint Motion, the Defendants will make new designations pursuant to the Order and the Plaintiffs will, of course, be able to challenge those designations. And if the Panel upholds a

[4] The *Bethune-Hill* decision referenced above addresses only the discoverability of legislatively privileged information—it does not address confidentiality. As noted herein, courts in other circuits have, however, squarely addressed this issue in re-districting cases. Moreover, a review of the docket sheet in *Bethune-Hill* indicates that the *Bethune-Hill* Panel required the technical assistant to the Special Master assigned to redistrict at the court's direction to sign an Oath of Confidentiality and to "promise to keep strictly confidential any and all information" related to the drawing of maps. *Bethune-Hill v. Virginia State Bd. of Elections*, 3:14-cv-00852-REP-AWA-BMK, ECF No. 281-1 (Oct. 23, 2018). It therefore appears that the *Bethune-Hill* Panel agreed that while legislatively privileged materials may be discoverable in a redistricting case, the map-drawing (or re-drawing) process should not be fully open to the public.

particular confidentiality designation and evidence related thereto is actually admitted at trial, there is a process in place for the use of confidential materials in this litigation under the terms of the current Order [*see* ECF No. 123 at ¶ 6] (which is replicated in the Proposed Order submitted in connection with the Joint Motion) and Plaintiffs have already followed that process in a recent filing when submitting confidential documents to the Panel [*see* ECF No. 298 at 7 n.3; Exhibits C-G].

Indeed, courts in other redistricting cases have allowed discovery and depositions into legislatively privileged material, but have subjected them to standing confidentiality orders. *See, e.g., League of United Latin Am. Citizens v. Abbott*, No. EP21CV00259DCGJESJVB, 2022 WL 1570858, at *3 (W.D. Tex. May 18, 2022). The Fifth Circuit noted that this approach was "admirably prudent, cautious, vigilant, and narrow," and "accords with the public interest." *League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022); *see also Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014) ("Given the sensitive nature of the documents sought and the importance of preserving confidential communication among legislators, the Court is not inclined to fully pierce the legislative privilege at this point by authorizing complete and public disclosure of the documents and ESI at issue."); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011) ("In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law.").

Such an application of confidentiality in the redistricting context is not novel, and it is particularly warranted here to support full and frank legislative deliberation and to avoid a chilling

effect on the General Assembly in future redistricting cycles. And if legislatively privileged materials and information related thereto (or other confidential information) are actually deemed by this Panel to be admissible at a public trial, any issues related to how those materials are received, considered and treated are best left to the sound discretion of this Panel as such issues arise.

CONCLUSION

Based on the foregoing, Senate Defendants and House Defendants respectfully request that this Panel grant their Motion and issue a separate Confidentiality Order specifically covering legislatively privileged materials [ECF No. 308].

[signature pages follow]

Respectfully submitted,

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