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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| RICHARD VIETH, et al, Plaintiffs, | : | |
| v. | : | No. 1:CV-01-2439 (Judge Rambo) |
| THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants. | : | |

**REPLY OF PRESIDING OFFICERS TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO QUASH OR FOR PROTECTIVE ORDER**

## INTRODUCTION

On February 19, 2002, Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") moved to quash, and for a protective order against, a deposition subpoena *duces tecum* issued by Plaintiffs to Carnegie Mellon University. That same day, this Court stayed the subpoena. On February 20, Plaintiffs filed a response in opposition. Presiding Officers now reply.

## ARGUMENT

In opposing Presiding Officers' invocation of the common law legislative privilege against the subponea *duces tecum*, Plaintiffs rely primarily on two cases, *United States v. Gillock*, 445 U.S. 360 (1980), and *In re Grand Jury Investigation*, 821 F.2d 946 (3d Cir. 1987). These cases are inapplicable, however, as they arose in a criminal context. In the civil arena, both the Supreme Court and the Third Circuit consistently apply the legislative privilege enjoyed by state legislators as equivalent to the absolute privilege provided members of Congress by the Speech or Debate Clause. *See Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980) ("Although the separation of powers doctrine justifies a broader privilege for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 … (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution").

In *In re Grand Jury*, a federal grand jury subpoena was issued to the chair or the records custodian of a select committee of the Pennsylvania House of Representatives that was conducting an investigation into alleged improprieties in the purchase of granite for the expansion of the State Capitol Building. The subpoena demanded the committee's investigative records. The committee chair moved to quash the subpoenas on the basis of the legislative privilege and the district court granted the motion on most points. 821 F.2d at 949. The Third Circuit reversed. In reaching its decision, the Court felt compelled to follow the rationale of the Supreme Court in *Gillock*. *See id.* at 953-57. Notably, however, the Third Circuit makes *no* mention of *Gillock* when addressing the legislative

privilege in civil matters. *See Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760 (3d Cir. 2000); *Larsen v. Senate of Commonwealth of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998); *Lunderstadt v. Collafella*, 885 F.2d 66 (3d Cir. 1989).[1]

Likewise, while the Supreme Court in *Gillock* held that the legislative privilege did not bar the introduction of evidence concerning a state legislator charged with bribery, the Court does not extend the *Gillock* rationale to civil matters involving state legislators and the assertion of the legislative privilege. In fact, the Supreme Court, in its 1998 decision in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), reaffirmed the privilege and the rationale in *Tenney v. Brandhove*, 341 U.S. 367 (1951). Even in decisions contemporaneous with *Gillock*, there is evidence that the Supreme Court did not consider *Gillock* as narrowing the privilege in civil matters. See *Supreme Court of Virginia*, 446 U.S. at 733, decided less than three months after *Gillock*. Neither *Gillock* nor *In re Grand Jury* support Plaintiffs' contention that the privilege does not apply nor that its scope should be limited in the discovery context.[2]

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[1] Plaintiffs, in citing *In re Grand Jury*, appear to misunderstand, in part, the basis of Presiding Officers' invocation of the legislative privilege. In that case, the committee chair asserted not only legislative privilege but also a form of deliberative process privilege to shield the "thought processes" of state legislators. As with all applications of the deliberative process privilege, the Third Circuit suggested that it would not be absolute but subject to a balancing test. *See also United States v. Irvin*, 127 F.R.D. 169 (C.D. Cal. 1989) (deliberative process privilege). Here, Presiding Officers assert the common law legislative privilege, which is absolute, when applicable, and coextensive with the protections afforded federal legislators. Institutional independence is the basis for assertion of the legislative privilege and not a desire for "secrecy," as Plaintiffs suggest. *See* Plaintiffs' Memorandum in Opposition at 3.

[2] Plaintiffs correctly note that the courts in this Circuit have not yet recognized that the protections of the legislative immunity extend to discovery. This issue was raised, but not resolved in *Powell v. Ridge*, 247 F.3d 520 (3d Cir.) (declining to assume jurisdiction over interlocutory discovery appeal), *cert denied*, 151 L.Ed.2d 26 (2001). To the extent that dicta in *Powell* on the privilege may be considered here, Presiding Officers note that they are named defendants in this

Plaintiffs appear to suggest that, even if the Court recognizes and applies the legislative privilege, the Court should not quash the subpoena, because redistricting is, in Plaintiffs' characterization, a "uniquely public enterprise." *See* Plaintiffs' Memorandum in Opposition at 3. There is no exception to the privilege for redistricting cases. *See Simpson v. City of Hampton*, 166 F.R.D. 16 (E.D. Va. 1996) (denying motion to compel discovery of personal notes & files of city council in racial vote dilution case); *Marylanders for Fair Representation v. Schafer*, 144 F.R.D. 292 (D. Md. 1992) (prohibiting deposition of advisory committee members & legislators on how plan was developed & why alternative plans rejected); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578, 582 n.2 (E.D. Pa.), *aff'd* 459 U.S. 801 (1982) (granting motion for protective order against deposition inquiring into motives behind legislative reapportionment plan). The privilege is absolute when it applies. Plaintiffs also fundamentally misrepresent the nature of redistricting, which is a quintessential legislative task. *See e.g, Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination").

Finally, the "motivation" of the General Assembly, (*see* Plaintiffs' Memorandum in Opposition at 3), is an irrelevant consideration. *See United States v. O'Brien*, 391 U.S. 367, 384 (1968); *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("[t]he claim of an unworthy purpose does not destroy the privilege"). Since the privilege is co-extensive with that of Congress, one might ask whether

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action, not intervening defendants. Numerous other courts have applied the legislative privilege to prohibit discovery, in persuasive decisions. *See* Presiding Officers' Memorandum in Support at 7-8.

the Court, in a challenge to a congressional enactment, would permit discovery into communications between members of Congress and their staffs, on the one hand, and persons who provided background information to them, whether as citizens or as consultants, when such communications were not made part of the legislative history. For example, would the Court allow hypothetical plaintiffs such discovery to attempt to prove intentional partisan discrimination by the last Democrat-controlled Congress, when it passed the "Motor Voter Law?"[3] Did the congressional majority have a consultant's study showing how this measure would help them and hurt Republicans in federal elections? No matter how fervently one might believe in such a case that there was invidious motivation, it would be wrong for the Court to open the door for discovery. It would be an initial breach of privilege that could widen vastly, as it forced legislators to consider coming to the defense of the statute by attempting to waive their own privilege. In a civil case, the Court must give as much respect to a state legislative body as it would to Congress. In the instant case, moreover, the General Assembly is the peer of Congress under Article I, section 4 of the United States Constitution, which delegates the function of redistricting *directly* to state legislatures. *See Bush v. Gore*, 531 U.S. 98 (2000).

That Plaintiffs' *prima facie* claim of partisan gerrymandering under *Davis v. Bandemer* requires a showing of intentional discrimination does not weaken an

[3] The National Voter Registration Act, signed into law by President Clinton on May 20, 1993. Provisions of this statute that make it difficult if not impossible to purge the election rolls of non-existent and illegal voters have been widely criticized. *See e.g.,* Missouri Senator Kit Bond's website report on this issue, noting that in St. Louis, the dead, the missing and even pets have registered to vote and absentee ballots have come from abandoned buildings and vacant lots. http://bond.senate.gov/press_section/motorvoter.cfm. The topic is widely discussed on the internet.

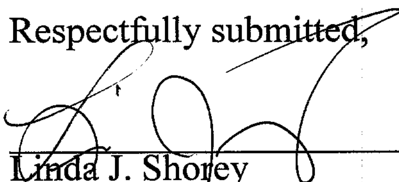
assertion of the legislative privilege. Virtually all evidence of discriminatory intent is "indirect." This is because sources of "direct" evidence are limited by long-standing principles (such as the legislative privilege) that protect the independence and integrity of the legislature. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 & 268 n.18 (1977) (counseling sensitive inquiry into "such circumstantial and direct evidence of intent *as may be available*" and acknowledging the prohibition against "judicial inquiries into legislative [] motivation"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (cautioning lower courts against "judicial intervention into the legislative realm" in gerrymandering cases); *In re Rick Perry*, 2001 Tex. LEXIS 96 *14 (Oct. 17, 2001) (refusing, in challenge to redistricting plan, to allow inquiry into intent under *Arlington Heights* absent extraordinary circumstance justifying the "unprecedented excursion into legislative immunity"). This Court may, consistent with *Bandemer*, infer discriminatory intent from objective indicia, if they exist, thereby scrupulously avoiding direct inquiry into the motive or intent of the General Assembly or a narrowing of the legislative privilege. Such an inference is, in essence, an exercise in traditional statutory construction.

## CONCLUSION

For the reasons set forth above, this Court should quash the subpoena *duces tecum* at issue or issue a protective order. While Presiding Officers believe that the legislative nature of the requested documents is clear from the subpoena's description, they do not oppose *in camera* inspection of the documents to aid this Court's inquiry.[4]

February 21, 2002

Respectfully submitted,



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[4] The contract that the Plaintiffs seek is publicly available upon request from the leader of the House Republican Caucus, who is Majority Leader Perzel, not Speaker Ryan, who is a duly-elected presiding officer of the House of Representatives. That Plaintiffs are willing to withdraw their request for the contract does not obviate the privilege concern related to the remaining documents.

## CERTIFICATE OF SERVICE

I certify that on February 21, 2002, I caused a copy of the foregoing Response of Presiding Officers to Plaintiffs' Memorandum of Law in Opposition to the Motion to Quash Subpoena or for Protective Order to be served on the following in the manner indicated:

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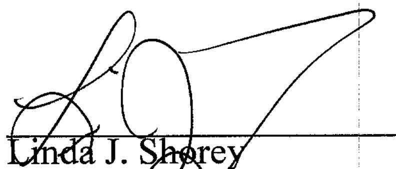

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