FILED, Clerk of the Appellate Division, January 07, 2026, **A-001407-25**

MICHAEL and ROSEANN GIAMMARINO,

Plaintiffs-Respondents,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant,

and

NEW JERSEY OFFICE OF LEGISLATIVE SERVICES and GABRIEL R. NEVILLE, ESQ.,

Non-parties-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-001407-25

Civil Action

On Appeal from an Interlocutory Order of the Tax Court

Docket No. Below:
001040-2024

Sat below:
Hon. Joshua D. Novin, J.T.C.

Date of submission: January 7, 2026*

***Per the Court's Order, this motion brief dated November 25, 2025 is being re-filed as a merits brief.**

OPENING BRIEF OF NON-PARTIES-APPELLANTS, OFFICE OF LEGISLATIVE SERVICES AND GABRIEL NEVILLE, ESQ.

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PRELIMINARY STATEMENT

This interlocutory appeal motion seeks reversal of an order of the Tax Court that requires the Office of Legislative Services (OLS) – an agency of the New Jersey Legislature -- to respond to a subpoena seeking nonpublic legislative documents in connection with the enactment of a statute. As fully set forth herein, the Tax Court's order is precluded by the bar of legislative privilege and immunity secured by the New Jersey Constitution's Speech or Debate Clause and the Separation of Powers Clause. See N.J. Const. Art. IV, § 4, ¶ 9 and Art. III, ¶1.

By way of background, Plaintiffs are seeking a $5.5 million tax refund in connection with a 2018 statute amending the New Jersey Gross Income Tax. The challenged statute -- L. 2018, c. 45 (hereafter "Act") -- made various changes to the New Jersey Gross Income Tax (GIT), N.J.S.A.54A:1-1 et seq. In particular, Plaintiffs object to the Legislature's increase in the marginal tax rate of the GIT from 8.97% to 10.75% for taxpayers earning more than $5 million insofar as the Act retroactively applied this rate increase. The Act was passed and signed by the Governor on July 1, 2018. The increase in the marginal tax rate to 10.75% was made retroactive to January 1, 2018.

Plaintiffs allege that the Act's retroactive application of the marginal tax rate to a date six months prior to the enactment of the Act was "manifestly unjust." The Complaint alleges that "[t]he law discriminates against a select group of

people, including Taxpayers, by subjecting them to New Jersey Gross Income Tax to which they otherwise would not have been subject, and thereby unfairly seizes taxes that would never have been due but for the retroactive effect of the statute…" Plaintiffs seek a refund of a portion of GIT taxes paid attributable to the statute's retroactivity (i.e., $5,518,184), accrued interest and attorneys' fees.

Thus, Plaintiffs allege that L. 2018 c. 45 worked a "manifest injustice" against them by reason of the statute's retroactivity. However, even assuming, arguendo, that Plaintiffs' claim were sustainable, that assumed fact does not change the essential *legislative character* of the actions complained of -- i.e., the Legislature's enactment of a statute. In turn, because the actions complained of are unquestionably legislative in character, the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause and the Separation of Powers Clause -- and are thereby immune from judicial review.

Notwithstanding the foregoing, the Tax Court ruled that the OLS is required to respond to four of twelve categories of nonpublic legislative documents set forth in Plaintiffs' Subpoena. The Tax Court's interlocutory order is erroneous – and raises a substantial question of constitutional law involving two important provisions of the New Jersey Constitution. Furthermore, if the Tax Court's order is not reversed, the effect of the order would be to require "the court and the parties

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[to] embark[] on an improper or unnecessary course of litigation" and would vitiate OLS's defense against Plaintiffs' Subpoena based on well-settled constitutional principles. Finally, the interest of justice calls for this Court's intervention – so that the weighty constitutional questions can be promptly adjudicated before ongoing discovery in this matter moots these questions.

For the foregoing reasons, this Court should grant this interlocutory appeal motion and hear this interlocutory appeal on the merits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Plaintiffs' cause of action in the Tax Court challenging a statutory amendment to the New Jersey Gross Income Tax and seeking a $5.5 million tax refund

On February 26, 2024, Plaintiffs Michael and Roseann Giammarino filed a one-count Complaint in the Tax Court seeking a $5,518,184 tax refund in connection with a tax rate change effected by a 2018 act of the Legislature (L. 2018, c. 45 or "Act") that made various changes to the New Jersey Gross Income Tax (GIT), N.J.S.A.54A:1-1 et seq. See Aa33-40[2] (Plaintiffs' Complaint).

In particular, Plaintiffs object to the Legislature's increase in the marginal

---

[1] The Statement of Facts and Procedural History of this matter are presented together in this section, because the facts and procedural history of this matter are closely intertwined.

[2] "Aa__" refers to OLS's appellate appendix.

tax rate of the GIT from 8.97% to 10.75% for taxpayers earning more than $5 million insofar as the Act retroactively applied this rate increase. The Act was passed and signed by the Governor on July 1, 2018. The increase in the marginal tax rate to 10.75% was made retroactive to January 1, 2018. See L. 2018, c. 45, §12. Aa147.

By their Complaint, Plaintiffs allege that the Act's retroactive application of the marginal tax rate to a date six months prior to the enactment of the Act was "manifestly unjust." Aa39-39 (Complaint, ¶¶38-43). The Complaint alleges that "[t]he law discriminates against a select group of people, including Taxpayers, by subjecting them to New Jersey Gross Income Tax to which they otherwise would not have been subject, and thereby unfairly seizes taxes that would never have been due but for the retroactive effect of the statute…" Aa38 (Complaint, ¶39). Plaintiffs seek a refund of a portion of GIT taxes paid attributable to the statute's retroactivity (i.e., $5,518,184), accrued interest and attorneys' fees. Id.

B. Plaintiffs' subpoena issued to non-parties Office of Legislative Services and Gabriel Neville, Esq.

On March 7, 2025, Plaintiffs served on the New Jersey Office of Legislative Services (OLS) and Gabriel Neville, Esq., Legislative Counsel, a *subpoena duces tecum* and *ad testificandum* associated with the above-referenced Complaint in the Tax Court (hereafter "Subpoena"). Aa49-57.

By way of background, OLS is an agency of the New Jersey Legislature.

See N.J.S.A. 52:11-55 (providing that OLS "is established in the Legislative Branch of the State Government, to aid and assist the Legislature in performing its functions"). OLS is "governed by the Legislative Services Commission… [which] consist[s] of eight members of the Senate to be appointed by the [Senate] President and eight members of the General Assembly to be appointed by the Speaker." Ibid.

N.J.S.A. 52:11-60 authorizes the Legislative Services Commission to appoint a Legislative Counsel – who "shall be the chief legal officer of the Legislature and counsel to the commission and Office of Legislative Services." Ibid. At present, Mr. Neville, serves as Legislative Counsel. Aa42.

Plaintiffs' Subpoena demanded that OLS and Mr. Neville (hereafter collectively "OLS") produce the following documents:

> 1. All documents that refer or relate to any communications regarding Plaintiffs
>
> 2. All documents that refer or relate to N.J.S.A. § 54A:2-l(a)6 and {b)6.
>
> 3. All documents and communications that refer or relate to the July 1, 2018 amendment to N.J.S.A. § 54A:2-1, made effective retroactively to January 1, 2018.
>
> 4. All documents that refer or relate to any communications and/or discussions regarding N.J.S.A. 54A:2-l(a)6 and (b)6.
>
> 5. All documents that refer or relate to any communications and/or

discussions regarding the July 1, 2018 amendment to N.J.S.A. §54A:2-1, made effective retroactively to January 1, 2018 (L. 2018, c. 45, §10, A. 3088).

6. All documents that refer or relate to discussions, communications, statements, and/or decisions regarding enactment of the amendment to N.J.S.A. § 54A:2-l(a)6 and (b)6.

7. All documents that refer or relate to discussions, communications, statements, and/or decisions regarding applying the amendment to N.J.S.A. § 54A:2-1 retroactively to January 1, 2018.

8. All documents that refer or relate to the legislative history of the amendment to N.J.S.A. § 54A:2-1.

9. All documents that refer or relate to internal memorandums, discussions, communication, and /or statements between You and any member of the New Jersey State legislature regarding the amendment to N.J.S.A. § 54A:2-1.

10. All documents and communications that refer or relate to the OLS estimate that the increase in the marginal tax rate for income over $5 million from 8.97 percent to 10.75 percent, as enacted in (L. 2018, c. 45, § 10, A. 3088), may yield additional gross income tax revenue of $293.7 million to $312.0 million in fiscal year 2019. Reference is made to the Legislative Fiscal Estimate, page 3.

11. All documents and communications that refer or relate to the OLS estimate of additional gross tax revenue that is derived from the 2015 data from the Statistics of Income published annually by the Department of the Treasury. Reference is made to the Legislative Fiscal Estimate, pages 3-4.

12. All documents and communications that refer or relate to Your statement in the Legislative Fiscal Estimate that "incomes and tax liabilities for taxpayers at very high levels of income are subject to significant volatility from year to year because high-income taxpayers are more dependent on income sources that are more susceptible to changes in the economy, such as capital gains, employment bonuses, and certain types of business income." Reference is made to the

Legislative Fiscal Estimate, page 4. [Aa55-56]

The Subpoena also ordered Mr. Neville to attend and give testimony by deposition with regard to the subject matter of the Subpoena. Ibid.

By letter dated March 28, 2025, Philip Mersinger, Esq. -- Assistant Legislative Counsel of OLS – responded to the Subpoena. Aa59-60. Mr. Mersinger stated:

> [T]he documents you have requested are covered by legislative privilege. The Speech or Debate Clause of the New Jersey Constitution states:
>
>> Members of the Senate and General Assembly shall, in all cases except treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place. [N.J. Const. Art. IV, § 4, ¶ 9.]
>
> In light of the above, the Legislature through OLS will not be releasing the documents you have requested. The denial is in keeping with the general principles of legislative privilege. That notwithstanding, we are attaching a number of publicly available documents related to Assembly Bill No. 3088 of the 2018-2019 session. Perhaps these documents will be of some use to you. [Aa59-60]

By letter dated July 11, 2025, Lauren Manduke, Esq., counsel for Plaintiffs, responded to Mr. Mersinger's letter of March 28. Aa63-63. In substance, Ms. Manduke rejected OLS's assertion of legislative privilege secured by the New Jersey Constitution's Speech or Debate Clause. Ibid.

Pertinent to the application of legislative immunity and privilege, all of the documents sought in Plaintiffs' Subpoena relate to the enactment of L. 2018, c. 45 (codified as N.J.S.A. 54A:2-l (a)(6) and (b)(2)). Indeed, in Ms. Manduke's July 11 letter demanding compliance with the Subpoena, she admits precisely this: "The Subpoena requests 12 categories of documents *related to* N.J.S.A. 54A:2-l (a)(6) and (b)(2), including the retroactive application thereof." Aa62 (emphasis added). Therefore, by Plaintiffs' own admission, all of the aforementioned requested non-public documents are within the scope of legislative immunity and privilege afforded by the Speech or Debate Clause.

By letter dated September 5, Leon Sokol, counsel to OLS and Mr. Neville, responded to Ms. Manduke's letter. Mr. Sokol set forth a detailed summary of the published case law governing the application of the New Jersey Constitution's Speech or Debate Clause – and the many reasons that the Clause operates to preclude any response by OLS to the Subpoena. Aa86-99. Mr. Sokol's letter concluded by stating that "because of the above well-settled authorities applying the protections of the Speech or Debate Clause, OLS will not be producing any non-public documents in response to Plaintiffs' Subpoena and will not be preparing a privilege log." Aa98.

By email dated September 23, Ms. Manduke replied to Mr. Sokol's letter. Aa101. Ms. Manduke rejected the applicability of Speech or Debate immunity and

privilege to the non-public legislative documents sought in Plaintiffs' Subpoena. Ms. Manduke further stated that if OLS did not respond to Subpoena by September 30, then Plaintiffs intend to file a motion to compel the enforcement of the Subpoena. See id.

Accordingly, on September 30 OLS filed a motion for a protective order pursuant to R. 4:10-3 and R. 1:9-2.

C. The Tax Court's disposition of OLS's motion for a protective order

OLS's motion for a protective order was fully briefed and argued. On November 10, the Tax Court issued an order granting in part and denying in part OLS's motion for a protective order. Aa1-2. The order was supported by a 30-page written opinion. Aa3-32.

As previously noted, Plaintiffs' Subpoena contains twelve document requests "related to N.J.S.A. 54A:2-l (a)(6) and (b)(2)" (to use Plaintiffs' counsel own words). Aa62. By its opinion and order, the Tax Court: (1) quashed in their entirety Document Demands #2 through #9; (2) declined to quash Document Demand #1; and (3) declined to quash Document Demands #10 through #12.

1. The Tax Court's quashing of Plaintiffs' Document Demands #2 through #9

The Tax Court quashed Document Demands #2 through #9 because:

> The court finds that paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the Subpoena seek documents, communications, or information that directly and unambiguously relate to the amendments enacted under A. 3088 to N.J.S.A. 54A:2-1 by our Legislature. These

> broadly drafted questions seek for the OLS to produce any document, communication, statement, memorandum, decision, and/or information related to: (i) any internal communications within the OLS, (ii) by and between the OLS and any member of the New Jersey Senate or General Assembly and/or its staff, or (iii) any research, calculations, or computations performed by the OLS for itself or for any member of the New Jersey Senate or General Assembly. The court finds that these materials are clearly within the legislative sphere and are insulated from disclosure under the Speech or Debate Clause.
>
> Further, it would be overreaching by this court and an unnecessary encroachment on the Legislative Branch's independence to require that it produce a privilege log or "Vaughn index" for those documents, communications, statements, and materials that are so clearly and unmistakably within the realm of its legislative function. [Aa23-24]

Importantly, the Tax Court found that – under the broad scope of legislative privilege – not only was document production precluded with respect to Document Demands #2 through #9, but even a judicially compelled preparation of a privilege log constituted "an unnecessary encroachment on the Legislative Branch's independence." Aa24.

2. The Tax Court's determination not to quash Plaintiffs' Document Demand #1

In contrast to its disposition of Document Demands #2 through #9, the Tax Court denied the relief sought in OLS's motion for a protective order with respect to Document Demand #1. As previously noted, Document Demand #1 seeks "[a]ll documents that refer or relate to any communications regarding [p]laintiffs." Aa55.

In declining to quash Document Demand #1, the Court first stated that "t]he

legislative activity at issue in this matter involves the amendments implemented under A. 3088 to the New Jersey Gross Income Tax Act, and N.J.S.A. 54A:2-1." Aa22. However, the court then determined that the subject matter of Document Demand #1 – "communications regarding plaintiffs" – could extend to documents that are *not* within the scope of legislative privilege secured by the Speech or Debate Clause. Aa22. The Court reached this determination notwithstanding that: (1) the exclusive subject matter of Plaintiffs' Complaint is the Legislature's enactment of a tax statute and the effect of the statute on Plaintiffs, Aa33-40; and (2) the admission of Plaintiffs' own counsel that Plaintiffs' entire Subpoena "relates to" the enactment of a statute, Aa62.

3. The Tax Court's determination not to quash Plaintiffs' Document Demands #10 through #12

In contrast to the Tax Court's disposition of Document Demands #2 through #9, the Tax Court declined to quash Plaintiffs' Document Demands #10 through #12. Aa23-40.

As previously noted, Document Demands #10 through #12 seek documents and communications that refer to OLS's fiscal estimate for L. 2018, c. 45, including the amounts that the legislation would produce in additional income to the State. With regard to these Document Demands, the Tax Court held:

> Accordingly, the OLS' application seeking to quash paragraphs 10, 11, and 12 of the Subpoena is granted, in part, and denied, in part. The motion is granted insofar that paragraphs 10, 11, and 12 of the

> Subpoena seek the OLS to produce documents and/or communications: (i) that refer or relate to the OLS estimate that the increased tax rate under A. 3088 will yield additional revenue of $293.7 million to $312.0 million in the 2019 fiscal year; (ii) that refer or relate to the OLS estimate of additional gross revenue derived from Statistics of Income published annually; and (iii) that refer or relate to the OLS' statement in the Legislative Fiscal Estimate regarding the volatility of the revenues, as such documents and/or communications are immunized from production.
>
> The motion is denied insofar that paragraphs 10, 11, and 12 of the Subpoena seek OLS to produce documents and/or communications in possession of the OLS that comprise the "information provided informally by the Executive [Branch to the OLS which] indicated that the Department of the Treasury projected that the bill would increase FY 2019 State revenue collections by a net $156.8 million." The OLS shall furnish plaintiffs, within ninety (90) days of the date hereof, any documents and/or communications in possession of the OLS responsive to the above inquiry as limited by the court.
>
> Alternatively, if the OLS contends that any documents and/or communications, as limited above, responsive to paragraphs 10, 11, and 12 under the Subpoena are within the sphere of legislative activity and insulated from production under the Speech or Debate Clause, the OLS shall produce a privilege log or "Vaughn index" for plaintiffs identifying the communication, communication date, the parties to the communication, and a brief summary of the communication. Within thirty (30) days thereafter the OLS may refile its motion to quash the Subpoena with respect to those communications, explaining why it believes such communication is within the sphere of legitimate legislative activity and should be entitled to protection under the Speech or Debate Clause. [Aa28-29]

Thus, the Tax Court held that OLS was required to either produce documents or prepare a privilege log with respect to fiscal information provided by the Executive Branch to OLS in connection with the enactment of L. 2018, c. 45.

This ruling stands in contrast to the Court's ruling with respect to Document Demands #2 through #9 wherein the Court determined that "it would be overreaching by this court and an unnecessary encroachment on the Legislative Branch's independence to require that it produce a privilege log or "Vaughn index" for those documents, communications, statements, and materials that are so clearly and unmistakably within the realm of its legislative function." Aa24.

4. **The Tax Court's quashing of Plaintiffs' demand to depose Gabriel Neville, Esq, the chief legal officer of the Legislature**

The Tax Court quashed Plaintiffs' demand to depose Gabriel Neville, Esq, the chief legal officer of the Legislature. In so holding, the Court applied the Speech or Debate Clause immunity and privilege as follows:

> A request to depose a member of the legislative branch of our government presents a tremendous potential for abuse, harassment, and intimidation. As stated above, one of the core goals sought to be achieved by the framers of our state's 1947 Constitution was to immunize members of the legislative branch from "any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place." N.J. Const. art. IV, §4, ¶9. Therefore, to gauge whether the deposition of Mr. Neville should proceed, the court must decide whether the purpose of the Subpoena is to elicit testimony from Mr. Neville concerning matters that are within the sphere of legislative activity and immunized under the Speech or Debate Clause.
>
> Here, the record before this court demonstrates that plaintiffs seek to solicit testimony from Mr. Neville related to the enactment of A. 3088, the retroactive application of A. 3088, and how the OLS calculated the estimated revenues that would be derived from the amendments to N.J.S.A. 54A:2-1(a)(6). Therefore, the court finds that the testimony sought from Mr. Neville is directly and

> inextricably related to his position as chief legal officer of our Legislature and within the sphere of legitimate legislative activity. As such, Mr. Neville's testimony is insulated from being produced under the Speech or Debate Clause. Accordingly, the court finds that the OLS has shown the requisite good cause, for entry of a protective order quashing the Subpoena insofar that it seeks to compel Mr. Neville's testimony. [Aa31-32]

Notably, the Court's correct application of Speech or Debate Clause immunity and privilege in the context of a compelled deposition of a legislative officer stands in stark contrast to the Court's erroneous application of Speech or Debate Clause immunity and privilege in the context of compelled production of nonpublic legislative documents. Compare Aa21-23 and Aa31-32.

***

The Court delayed the effective of its order for ninety days (i.e., February 8, 2026). Aa2. OLS thereafter filed this timely interlocutory appeal motion.[3]

[3] Because of the delayed effective date of the Tax Court's Order, there is no immediate need for OLS to file an application for a stay of the Order pending this interlocutory appeal. This is especially so in light of the fact that interlocutory appeals are expedited. See R. 2:11-2.

LEGAL ARGUMENT

POINT I

THIS MOTION FOR LEAVE TO APPEAL SHOULD BE GRANTED, BECAUSE THE STANDARDS GOVERNING THE GRANT OF DICRETIONARY INTERLOCUTORY REVIEW ARE SATISFIED ON THIS RECORD.

Motions for leave to appeal may be granted: (1) as to "interlocutory orders that actually or effectively dismiss a party's claims or defenses"; (2) as to interlocutory "orders concerning novel questions of law"; (3) "if [the interlocutory appeal] will resolve a fundamental procedural issue and thereby prevent the court and the parties from embarking on an improper or unnecessary course of litigation"; and (4) when "justice calls for [an appellate court's] interference in the cause." Brundage v. Carambio, 195 N.J.575, 599-600 (2008).

Here, all four Brundage factors are satisfied on this record. In brief, OLS was hauled into court to disclose nonpublic legislative documents regarding the enactment of a statute – *a matter which is immune from judicial review under well-settled constitutional principles*. See Point II, infra. Notwithstanding the foregoing, the Tax Court's November 10 Order denied in part OLS's motion for a protective order. Aa1-2. The Order required OLS to respond to four of twelve document demands – all of which specifically seek nonpublic documents related to the Legislature's enactment of a general tax statute. Id. However, contrary to the Tax Court's determination, **all** of the Subpoena's document demands (including

the four at issue) are precluded by the bar of legislative privilege and immunity secured by the New Jersey Constitution's Speech or Debate Clause and the Separation of Powers Clause. See Point II, infra.

Applying the Brundage factors to this record, the Tax Court's interlocutory order raises a substantial question of constitutional law involving two important provisions of the New Jersey Constitution. See N.J. Const. Art. IV, § 4, ¶ 9 and Art. III, ¶1. Furthermore, if the Tax Court's order is not reversed, the effect of the order would be to require "the court and the parties [to] embark[] on an improper or unnecessary course of litigation" and would vitiate OLS's defense against Plaintiffs' Subpoena based on well-settled constitutional principles. Brundage v. Carambio, supra, 195 at 599-600. Finally, the interest of justice calls for this Court's intervention – so that the weighty constitutional questions can be promptly adjudicated before ongoing discovery in this matter moots these questions.

For all four reasons identified in Brundage, interlocutory appellate intervention is appropriate and warranted. Ibid. Therefore, this Court should grant this interlocutory appeal motion and hear this interlocutory appeal on the merits.

POINT II

PLAINTIFFS' SUBPOENA – SEEKING NON-PUBLIC LEGISLATIVE DOCUMENTS IN THE CUSTODY OF THE OFFICE OF LEGISLATIVE SERVICES – IS PROPERLY QUASHED IN ITS ENTIRETY BY OPERATION OF THE LEGISLATIVE IMMUNITY AND PRIVILEGE CONFERRED BY THE NEW JERSEY CONSTITUTION'S SPEECH OR DEBATE CLAUSE, ART. IV, § 4, ¶ 9. HENCE, THE TAX COURT'S INTERLOCUTORY ORDER – REQUIRING OLS TO RESPOND TO FOUR OF TWELVE DOCUMENT DEMANDS CONTAINED IN THE SUBPOENA – IS ERRONEOUS AS A MATTER OF LAW AND IS PROPERLY REVERSED ON APPEAL (Aa20-32)

A. Summary of the scope and application of legislative immunity and privilege afforded by the New Jersey Constitution's Speech or Debate Clause

The Speech or Debate Clause of the New Jersey Constitution provides that:

> Members of the Senate and General Assembly shall, in all cases except for treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place. [N.J. Const. Art. IV, § 4, ¶ 9.]

As the Appellate Division has observed, "legislative immunity guaranteed by the Speech or Debate Clause assures that the speech and conduct of legislators acting within the sphere of legitimate legislative activity will not be made the basis for a civil judgment." Teamsters Local 97 v. State, 434 N.J. Super. 393, 428 (App. Div. 2014). See also State v. Twp. of Lyndhurst, 278 N.J. Super. 192, 199 (Ch. Div. 1994) (observing that the Speech or Debate Clause was adopted as a "means of protecting the integrity of the legislative process" and "is primarily designed to

prevent encroachment upon a coequal branch of government.").[4] The protections afforded by the Clause are sweeping: legislative immunity "protect[s] legislators not only from the results of criminal and civil litigation, but also from the burden of defending themselves." State v. Gregorio, 186 N.J. Super. 138, 151-52 (Law.

[4] In this regard, the interest sought to be protected by the Speech or Debate Clause coincides with the interest sought to be protected by the New Jersey Constitution's Separation of Powers Clause. See N.J. Const., Art. III, ¶1. That Clause provides:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The doctrine of separation of powers "is a fundamental principle of our State government." In re Plan for Abolition of Council on Affordable Housing, 424 N.J. Super. 410, 427 (App. Div. 2012), aff'd as modified, 214 N.J. 444 (2013). It was designed to "maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch." David v. Vesta Co., 45 N.J. 301, 326 (1965).

Consistent with the overarching objectives of the Separation of Powers Clause, the legislative immunity and privilege conferred by the Speech or Debate Clause is a "means of protecting the integrity of the legislative process by preventing the intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." State v. Twp. of Lyndhurst, supra, 278 N.J. Super. at 199 (quoting Gilbert v. Gladden, 87 N.J. 275, 293 (1981) (Pashman, J., dissenting)). See also United States v. Brewster, 408 U.S. 501 (1972) ("[T]he purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process.").

Thus, legislative immunity and privilege are properly understood as authorized by **both** the specific mandate of the Speech or Debate Clause and the overarching objectives of the Separation of Powers Clause.

Div. 1982) (citing Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)). See also Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (holding that "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.").[5]

Thus, for example, the legislative immunity and privilege[6] afforded by the Speech or Debate Clause precludes discovery in private civil litigation against

[5] New Jersey courts – in construing and applying the State Constitution's Speech or Debate Clause – look to the decisions of the federal courts construing and applying the parallel Speech and Debate Clause of the U.S. Constitution that applies to Congress. See, e.g., Teamsters Local 97 v. State, supra, 434 N.J. Super. at 428 (stating that New Jersey courts "us[e] the United States Supreme Court's interpretation of the Federal Speech and Debate Clause in analyzing New Jersey's Speech or Debate Clause); State v. Twp. of Lyndhurst, supra, 278 N.J. Super. at 200 (relying on federal court decisions applying the federal Speech and Debate Clause in construing and applying waiver analysis under the State Constitution's Speech or Debate Clause); State v. Gregorio, supra, 186 N.J. Super. at 152 (observing that "New Jersey's speech or debate clause, like that of its federal counterpart, was designed to preserve legislative independence").

[6] The terms, "legislative immunity" and "legislative privilege," are used interchangeably in this context. The term, "immunity," refers to a legal shield of non-liability in connection with a particular civil or criminal claim. The term, "privilege," refers to a principle of evidence law that allows the holder of the evidence to withhold evidence that would otherwise be discoverable. See R. 4:10-2(e)(1). Here, as discussed in the text above, the State Constitution's Speech or Debate Clause guarantees *both immunity and privilege* for legislative activity. See, e.g., State v. Gregorio, supra, 186 N.J. Super. at 151-52 (holding that New Jersey's Speech or Debate Clause "protect[s] legislators not only from the results of criminal and civil litigation, but also from the burden of defending themselves."); State v. Twp. of Lyndhurst, supra, 278 N.J. Super. at 199 (observing that the Speech or Debate Clause "is primarily designed to prevent encroachment upon a coequal branch of government").

members of the Legislature and their staff[7] when the plaintiff is seeking to compel production of non-public legislative documents. This is so because "a private civil action, … creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 503 (1975). See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 421 (D.C. Cir. 1995) (holding that "[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) (holding that "a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put. **The bar on compelled disclosure is absolute.**")

[7] The protections of the Speech or Debate Clause extend not only to members of the Legislature but also to agencies, officers, employees and agents of the Legislature. See, e.g., Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 507 (1975) (applying legislative immunity to chief counsel to Senate subcommittee); Doe v. McMillan, 412 U.S. 306, 309 (1973) (applying legislative immunity to clerk, staff director, counsel, consultant and investigator of House committee); Gravel v. United States, 408 U.S. 606, 618 (1972) (applying legislative immunity to personal staffer of a member of Congress); Rangel v. Boehner, 785 F.3d 19, 25 (D.C. Cir. 2015) (observing that "the Supreme Court has extended the Speech or Debate Clause to aides from all walks of legislative life"). See Gravel, 408 U.S. at 616-17 ("It is literally impossible, in view of the complexities of the modern legislative process, … for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos").

(citing Eastland, 421 U.S. at 503) (emphasis added).

In State v. Gregorio, the court set forth at length the scope of legislative immunity and privilege under New Jersey's Speech or Debate Clause as follows:

> The prophylactic object of the [Speech or Debate] clause is to protect the integrity of the legislative process. **To be immune from executive and judicial review, the conduct of the member must be within the sphere of legitimate legislative activity.** In defining the contours of the immunity granted by the clause, Justice Pashman recently had occasion to review the numerous federal decisions bearing upon the question. Gilbert v. Gladden, 87 N.J. 275, 292 (1981) (dissenting opinion). Quoting from Gravel v. United States, 408 U.S. 606, 625 (1972), the Justice stated (at 293) that the conduct must be an "integral part of the deliberative and communicative processes by which members participate in committee and house proceedings **with respect to the consideration and passage or rejection of proposed legislation** ...." See also Van Riper v. Tumulty, 26 N.J.Misc. 37, 42–46 (Sup.Ct.1948). **A legislative act has consistently been defined as one "generally done in [the Legislature] in relation to the business before it.**" United States v. Helstoski, 442 U.S. 477, 488 (1979). See also Doe v. McMillan, 412 U.S. 306 (1973); United States v. Brewster, 408 U.S. 501, 525 (1972). However phrased, it is clear that only where a legislator's conduct falls within a legitimate sphere of legislative activity does the speech or debate clause protect against judicial and executive inquiry and review. [State v. Gregorio, supra, 186 N.J. Super. at 152–53 (emphasis added)]

As stated above, "[a] legislative act has consistently been defined as one "generally done in [the Legislature] in relation to the business before it." Id. at 153. Moreover, a "legislative act" unquestionably means and includes actions taken in "consideration and passage or rejection of proposed legislation." Ibid.

B. The legislative immunity and privilege conferred by the Speech or Debate

Clause applies to the *entirety* of the non-public legislative documents sought in Plaintiffs' Subpoena

Here, all of the documents sought in Plaintiffs' Subpoena plainly relate to the enactment of L. 2018, c. 45 (codified as N.J.S.A. 54A:2-l (a)(6) and (b)(2)). The Court is respectfully referred to the text of the twelve document demands contained in Plaintiffs' Subpoena – which on their face reference the challenged statute. <u>See</u> pages 5-6 of this brief (setting forth the Subpoena's Document Demands) and Aa55-56.

Indeed, in Plaintiffs' July 11 letter demanding compliance with the Subpoena, Plaintiffs' counsel admits precisely this: "The Subpoena requests 12 categories of documents ***<u>related to</u>*** **N.J.S.A. 54A:2-l (a)(6) and (b)(2)**, including the retroactive application thereof." Aa62 (emphasis added). That binding admission by Plaintiffs' counsel – by itself – ends the legal inquiry with respect to the application of legislative privilege to all twelve Document Demands.

Moreover, a review of Plaintiffs' Complaint further confirms the exclusively *legislative* focus of Plaintiffs' claim. By their Complaint, Plaintiffs are seeking a $5.5 million tax refund in connection with a 2018 statute amending the New Jersey Gross Income Tax. Aa40. The challenged statute -- L. 2018, c. 45 (hereafter "Act") -- made various changes to the New Jersey Gross Income Tax (GIT), N.J.S.A.54A:1-1 <u>et</u> <u>seq</u>. <u>See</u> Aa36 (Complaint, ¶¶24-27); Aa133-47 (L. 2018, c. 45). In particular, Plaintiffs object to the Legislature's increase in the marginal tax

rate of the GIT from 8.97% to 10.75% for taxpayers earning more than $5 million insofar as the Act retroactively applied this rate increase. See Aa38-39 (Complaint, ¶¶38-43). The Act was passed and signed by the Governor on July 1, 2018. Aa147. The increase in the marginal tax rate to 10.75% was made retroactive to January 1, 2018. See L. 2018, c. 45, §12. Aa147

Plaintiffs allege that the Act's retroactive application of the marginal tax rate to a date six months prior to the enactment of the Act was "manifestly unjust." Aa38-39 (Complaint, ¶¶38-43). The Complaint alleges that "[t]he law discriminates against a select group of people, including Taxpayers, by subjecting them to New Jersey Gross Income Tax to which they otherwise would not have been subject, and thereby unfairly seizes taxes that would never have been due but for the retroactive effect of the statute…" Aa38 (Complaint, ¶39). Plaintiffs seek a refund of a portion of GIT taxes paid attributable to the statute's retroactivity (i.e., $5,518,184), accrued interest and attorneys' fees. Aa40.

Thus, Plaintiffs allege that L. 2018 c. 45 worked a "manifest injustice" against them by reason of the statute's retroactivity. Aa38. Even assuming, arguendo, that Plaintiffs' claim were sustainable, that assumed fact does not change the essential *legislative character* of the actions complained of -- i.e., the Legislature's enactment of a statute. In turn, because the actions complained of are unquestionably legislative in character, the actions complained of are entirely

subject to legislative immunity and privilege secured by the Speech or Debate Clause.

On this record, it is patently obvious that all of the documents sought in Plaintiffs' Subpoena "relate to" the enactment of L. 2018, c. 45 (codified as N.J.S.A. 54A:2-l (a)(6) and (b)(2)). Applying Gregorio, the documents sought by Plaintiffs pertain to actions taken in "consideration and passage or rejection of proposed legislation," State v. Gregorio, 186 N.J. Super. at 153. That ends the inquiry: the documents sought in the Subpoena are "immune from executive and judicial review." Id. at 152-53.

Stated otherwise, all of the aforementioned requested documents held by OLS are subject to legislative immunity and privilege afforded by the Speech or Debate Clause. See ibid. Hence, the Tax Court's interlocutory order – requiring OLS to respond to four of twelve Document Demands contained in the Subpoena – is erroneous as a matter of law and is properly reversed on appeal

C. The Tax Court erred in declining to quash Plaintiffs' Document Demand #1 (Aa21-23)

The Tax Court denied the relief sought in OLS's motion for a protective order with respect to Document Demand #1. Aa21-23. As previously noted, Document Demand #1 seeks "[a]ll documents that refer or relate to any communications regarding [p]laintiffs." Aa55.

In declining to quash Document Demand #1, the Tax Court first stated that

"t]he legislative activity at issue in this matter involves the amendments implemented under A. 3088 to the New Jersey Gross Income Tax Act, and N.J.S.A. 54A:2-1." Aa22. However, the Court then determined that the subject matter of Document Demand #1 – "communications regarding plaintiffs" – could extend to documents that are *not* within the scope of legislative privilege secured by the Speech or Debate Clause. Aa22.

The Court reached its conclusion based on its erroneous application of the Gregorio[8] test. The Court held: "In applying this test to the information sought under paragraph 1 of the Subpoena, the court is not clear how communications, if any, referencing the plaintiffs were or could be viewed as an integral part of our legislature's deliberative and communicative process in amending the New Jersey Gross Income Tax Act, or was related to any business before the Legislature." Aa22.

The Tax Court's exceedingly narrow "slice and dice" interpretation of what constitutes the "legislature's deliberative and communicative process" is flatly inconsistent with: (1) the plain meaning of the Gregorio test of the "deliberative

---

[8] In its opinion, the Tax Court referred to the test as the "Gilbert test" (Aa17) – based on the fact that a dissenting Justice in Gilbert v. Gladden, 87 N.J. 275, 292 (1981) (Pasman J., dissenting), applied a test of legislative immunity and privilege that was originally set forth in a decision of the United States Supreme Court in Gravel v. United States, 408 U.S. 606, 625 (1972). The opinion of a dissenting Justice is not precedential. In any event, the same test derived from Gravel was applied by the court in Gregorio. See Gregorio, supra, 186 N.J. Super. at 152–53 Therefore, we shall refer to the test by reference to the Gregorio decision.

and communicative process."; and (2) the record in this case.

1. The Tax Court erroneously construed and applied the Gregorio test of what constitutes an "integral part of our legislature's deliberative and communicative process"

It order to construe and apply the Gregorio test, it is instructive to consider the facts and the result in that case. In Gregorio, a state senator was prosecuted pursuant to N.J.S.A. 2C:28-7 for willfully providing false information in a financial disclosure statement filed pursuant to Conflicts of Interest Law. Gregorio, 186 N.J. Super. at 141. The defendant state senator sought dismissal of the criminal charge on the ground of Speech or Debate immunity. Id. at 142. As noted above, the court in Gregorio first determined that "[t]o be immune from executive and judicial review, the conduct of the member must be within the sphere of legitimate legislative activity." Id. at 152-53. Applying that standard to the criminal charge brought against the state senator, the Gregorio court held:

> Judged by this standard, the submission of a financial disclosure statement does not constitute a part of the legislative or deliberative process protected by the Constitution. A criminal prosecution for the offense of falsifying governmental records will not call into question defendant's role in the integral functions of the Senate. Nor will it impair the ability of any member to participate effectively in legislative deliberations. **In sum, defendant was not performing a legislative act when he submitted the financial disclosure statement pursuant to the code of ethics.** Hence, his conduct should not be clothed with the immunity accorded legislators by the speech or debate clause. [Gregorio, 186 N.J. Super. at 153 (emphasis added)]

Thus, the Gregorio court found that legislative immunity did not apply to the actions of a legislator when he willfully provided false information in a financial disclosure statement filed pursuant to Conflicts of Interest Law. This is so because criminal prosecution of the state senator for "willfully provid[ing] false information" will *not* "impair the ability of any member to participate effectively in legislative deliberations." Ibid.

Turning to our case: The nonpublic legislative documents sought by Plaintiffs in connection with enactment of L. 2018, c. 45 *are precisely the record of nonpublic "legislative deliberations" that is the very core of the Gregorio test of legislative immunity*. Ibid. If this record is disclosed, it will inevitably "impair the ability of any member to participate effectively in legislative deliberations." Ibid.

In short, the holding in Gregorio – that a legislator's *criminal conduct* was not subject to legislative immunity – further bolsters the conclusion that nonpublic legislative documents relating to the enactment of legislation (which is all that is sought here) are plainly subject to legislative immunity and privilege.

2. The Tax Court erroneously construed and applied the decision in Brown v. City of Bordentown, 348 N.J. Super. 143 (App. Div. 2002)

Elsewhere in its opinion, the Tax Court cites the Appellate Division's decision in Brown v. City of Bordentown, 348 N.J. Super. 143, 150 (App. Div. 2002), for the proposition that "[legislative] immunity is justified and defined by the function it protects and serves, not by the person to whom it attaches." Aa19

(quoting Brown, supra, 348 N.J. Super. at 150). As applied to this case, the Brown principle of legislative immunity – centered on the "function" of the underlying act or conduct rather than the identity of the person – merely provides further support to the conclusion that the entirety of the nonpublic legislative documents sought in Plaintiffs' Subpoena are subject to legislative immunity and privilege afforded by the Speech or Debate Clause. This is so because the documents sought in Plaintiffs' Subpoena "relate to" the enactment of L. 2018, c. 45 and – as such -- pertain to actions taken in "consideration and passage or rejection of proposed legislation," State v. Gregorio, 186 N.J. Super. at 153.

Furthermore, the facts and the outcome in Brown decision – like the facts and outcome in Gregorio – fully support the conclusion that the entirety of Subpoena in this case is properly quashed. In Brown, the court considered whether -- on a motion for summary judgment -- a civil claim arising under the Law Against Discrimination (LAD) could proceed against a county legislator in light of common law immunity that is afforded to local legislators engaging in legislative action. Brown, supra, 348 N.J. Super. at 147-48. The LAD claim was based on the legislator's allegedly discriminatory hiring decision of a police chief. Id. at 148. The summary judgment record disclosed that the hiring decision may have been accomplished – *in part* – through legislative action and in part through other forms of action. Id. at 149. On this record the appellate court held that:

(1) common-law legislative immunity is a defense to an LAD claim; (2) the county commissioner enjoyed common-law legislative immunity in voting to appoint a Caucasian as a police chief; (3) however, genuine issues of material fact existed as to whether the county commissioner's asserted conduct of proposing a Caucasian for police chief position was immunized legislative activity, because it was unclear on the summary judgment record as to whether the county commissioner "acted in an administrative or executive capacity, or simply on his own, in promoting and influencing a discriminatory hiring, as opposed to his immunized legislative role." Id. at 150. As the court explained, if the county commissioner acted in an administrative, executive or personal capacity in committing the allegedly discriminatory act, then he may "be held liable under the LAD." Ibid. Accordingly, the appellate court reversed the trial court's grant of summary judgment and remanded the matter for further proceedings. Id. at 151.

The facts and outcome in Brown are easily distinguishable from this case. Importantly, Plaintiffs' Complaint in this case – in contrast to the claim in Brown -- *does not even allege that OLS or the Legislature did anything other than enact a statute*. See Aa36, 38-40 (Complaint, ¶¶25-27; 38-43). More particularly, Plaintiffs allege in their Complaint that L. 2018 c. 45 worked a "manifest injustice" against them by reason of the statute's retroactivity. Aa38. As previously noted, even assuming, arguendo, that Plaintiffs' claim were sustainable, that assumed fact

does not change the essential *legislative character* of the actions complained of -- i.e., the Legislature's enactment of a statute. In turn, because the actions complained of are unquestionably legislative in character, the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause.

Indeed, as referenced above, the appellate court in Brown held that "[legislative] immunity is justified and defined by the function it protects and serves, not by the person to whom it attaches." Brown, supra, 348 N.J. Super. at 150. As applied to our case, Brown's principle of legislative immunity fully supports the conclusion that hat the entirety of the nonpublic legislative documents sought in Plaintiffs' Subpoena are subject to legislative immunity and privilege afforded by the Speech or Debate Clause.[9]

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[9] It is also worth noting that the governing law in Brown is distinct from the governing law in this case. Local legislators (as in Brown) are subject only to common law immunity. See Brown, supra, 348 N.J. Super. at 148. By contrast, the Legislature is subject to immunity secured by the Speech or Debate Clause of the New Jersey Constitution. See N.J. Const. Art. IV, § 4, ¶ 9.

Moreover, the Legislature's constitutional immunity is bolstered by the separate constitutional authority of the Separation of Powers Clause, N.J. Const., Art. III, ¶1 -- which applies to the three branches of State government. See N.J. Const., Art. III, ¶1. Conversely, the authority of the Separation of Powers Clause does not apply to local government officials – such as the officials in Brown.

Therefore, although the reasoning and result in Brown fully support the conclusion that the entirety of the Subpoena in this case is properly quashed, it must also be noted that Brown – as a non-constitutional case – may well be less protective of

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To recapitulate: A review of Plaintiffs' Complaint discloses that it seeks relief – a tax refund of $5.5 million -- based solely on the Legislature's enactment of a tax statute and the effect of the statute on Plaintiffs. See Aa36, 38-40 (Complaint, ¶¶25-27; 38-43). More particularly, Plaintiffs allege in their Complaint that L. 2018 c. 45 worked a "manifest injustice" against them by reason of the statute's retroactivity. Aa38. However, even assuming, arguendo, that Plaintiffs' claim were sustainable, that assumed fact does not change the essential *legislative character* of the actions complained of -- i.e., the Legislature's enactment of a statute. In turn, because the actions complained of are unquestionably legislative in character, the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause.[10]

For all of the foregoing reasons, the Tax Court erred in declining to quash Plaintiffs' Document Demand #1.

D. The Tax Court erred in declining to quash Plaintiffs' Document Demands #10 - #12 (Aa24-30)

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legislative immunity than a case (as here) involving the actions of a member or agent of the Legislature.

[10] If all of this were not enough, the record also discloses the admission of Plaintiffs' own counsel that Plaintiffs' entire Subpoena "relates to" the enactment of a statute. Aa62. That admission is contained in a letter from Plaintiffs' counsel to counsel for OLS wherein Plaintiffs' counsel seeks enforcement of Plaintiffs' Subpoena. Ibid. As such, it is a binding admission and -- by itself – ends the legal inquiry.

Plaintiffs' Document Demands #10 through #12 seek documents and communications that refer to OLS's fiscal estimate for L. 2018, c. 45, including the amounts that the legislation would produce in additional income to the State. Aa55-56. With regard to these Document Demands, the Tax Court held that OLS was required to either produce documents or prepare a privilege log with respect to fiscal information provided by the Executive Branch to OLS. Aa30.

This ruling stands in stark contrast to the Court's ruling with respect to Document Demands #2 through #9 -- wherein the Court determined that "it would be overreaching by this court and an unnecessary encroachment on the Legislative Branch's independence to require that it produce a privilege log or "Vaughn index" for those documents, communications, statements, and materials that are so clearly and unmistakably within the realm of its legislative function." Aa24. That ruling by the Tax Court applies *just as much* to Plaintiffs' Document Demands #10 through #12 as it does to Plaintiffs' Document Demands #2 through #9.

Moreover, we need not reiterate the governing legal standards regarding legislative immunity and privilege that are set forth in Point IIC, supra, and the application of those standards to the Tax Court's erroneous decision to decline to quash Plaintiffs' Document Demand #1. The legal analysis contained in Point IIC is incorporated herein by reference. Suffice it to say that for the same reason that the Tax Court failed to properly apply settled Speech or Debate Clause principles

to Plaintiffs' Document Demand #1, the Court also failed to apply these principles to Plaintiffs' Document Demands #10 through #12.

The Tax Court's rationale for declining to quash Plaintiffs' Document Demands #10 - #12 is as follows:

> Nonetheless, to the extent that paragraphs 10, 11, and 12 of the Subpoena seek documents and/or communications in possession of the OLS that comprise the "information provided informally by the Executive [Branch to the OLS which] indicated that the Department of the Treasury projected that the bill would increase FY 2019 State revenue collections by a net $156.8 million," the court finds such information may fall outside the sphere of legislative activity. [Aa28]

The Tax Court cites no authority in support of its legal conclusion. Indeed, there is no such authority.

Nonpublic information held by the Legislature for use in the enactment of legislation is subject to legislative immunity and privilege – *regardless of the source of the information*. See Points IIB and IIC, supra. There is no recognized carve-out for information received from the Executive Branch – or from any other source.

For all of the foregoing reasons, the Tax Court erred in declining to quash Plaintiffs' Document Demands #10 - #12. [11]

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[11] Finally, we are constrained to briefly address the practical effects of a ruling that affirmed the Tax Court below with regard to the enforceability of Plaintiffs' Subpoena against the OLS. This court may take judicial notice that, for each two-year legislative session, greater than 10,000 pieces of legislation are introduced. If

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CONCLUSION

For the reasons set forth above, (1) Non-parties Office of Legislative Services' and Gabriel Neville's motion for leave to file an interlocutory appeal should be granted; and (2) the Tax Court's November 10 Order should be modified so that Plaintiffs' Subpoena against OLS and Mr. Neville is quashed in its entirety.

Respectfully submitted,

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By: /s/ *Leon J. Sokol*
Leon J. Sokol, Esq.

Dated: November 25, 2025

Tax Court's ruling were affirmed by this Court and thereafter applied to subpoenas issued against the Legislature and its staff, then the Legislature would be required to provide a privilege log for virtually any third-party litigant who happens to believe that the Legislature or its staff might be in possession of documents related to their case. If even a small fraction of those 10,000 pieces of legislation were to generate litigation and subsequent subpoenas issued to the Legislature, then the Legislature and its staff would need to sacrifice a significant amount of its time, energy, and attention to respond to those subpoenas rather than focus on their legislative tasks. *This is precisely what the legislative privilege and immunity afforded by the Speech or Debate Clause is intended to prevent and why the bar on compelled disclosure of nonpublic legislative documents is absolute*. See Point IIA, supra.

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MICHAEL AND ROSEANN GIAMMARINO, Plaintiffs, v. DIRECTOR, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF TAXATION, Defendant, and NEW JERSEY OFFICE OF LEGISLATIVE SERVICES AND GABRIEL R. NEVILLE, ESQ. Non-parties-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001407-25 CIVIL ACTION On Appeal from an Interlocutory Order of the Tax Court Docket No. Below: 001040-2024 Sat below: Hon. Joshua D. Novin, J.T.C. STATEMENT IN LIEU OF BRIEF

ANTHONY D. TANCINI, of full age, hereby certifies and says:

1. I am a Deputy Attorney General employed by the Department of Law and Public Safety, Division of Law, with an address of R. J. Hughes Justice Complex, P.O. Box 106, Trenton, New Jersey, 08625. In my capacity as a Deputy Attorney General, I am assigned to represent the Defendant Director, State of New Jersey, Department of the Treasury, Division of Taxation ("Division of Taxation") in the above-captioned matter.

2. Pursuant to NJ Court Rule 2:6-4(c), the general public interest does not require the adversarial participation of the Division of Taxation in the appeal and that the parties directly affected by its decision have adequately presented the issues and their arguments.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By:
Anthony D. Tancini
Deputy Attorney General

DATED: January 8, 2026

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SUPERIOR COURT OF NEW JERSEY

MICHAEL AND ROSEANN GIAMMARINO, Plaintiffs, v. DIRECTOR, STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF TAXATION, Defendant.	APPELLATE DIVISION DOCKET NO. A-001407-25 Civil Action On Motion for Leave to Appeal From: November 10, 2025 Order of the New Jersey Tax Court, Docket No. 001040-2024 Sat below: Hon. Joshua D. Novin, J.T.C.

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PRELIMINARY STATEMENT

The Office of Legislative Services' motion seeking leave to appeal ("Motion for Leave") is strewn with the same legal deficiencies that prompted the Tax Court to partially deny its motion to quash Michael and Roseann Gimmarino's (together, "Plaintiffs") March 7, 2025 *subpoena duces tecum* and *ad testificandum* ("Subpoena") issued to the Office of Legislative Services and Gabriel R. Neville Esq. (together, "OLS"). No sound reason exists for this Court to grant leave to appeal the Tax Court's March 7th Order.

OLS has relentlessly hindered discovery in this matter under the guise of blanket immunity. It argues that this immunity is so impenetrable that it cannot even produce a privilege log. OLS asked the Tax Court, and now this Court, to exempt OLS from complying with court rules and governing case law to respond to the Subpoena.

No one, not even the state, is above its discovery obligations. As described in further detail below, the Tax Court issued a well-reasoned, detailed, 30-page written decision partially granting and partially denying OLS' motion. OLS being dissatisfied that the Tax Court only *partially* ruled in its favor is not grounds to eliminate the most sacrosanct privileges afforded to all litigants by law. No grounds exist that would justify disturbing the Tax Court's opinion. Each of OLS' arguments fails, and the Motion for Leave should be denied accordingly.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This action arises out of Plaintiffs' contest of the denial by Defendant of Plaintiffs' tax refund claim in the amount of $5,518,184.00 (excluding interest) for the 2018 tax period. See Aa33-34 (Complaint, ¶¶ 1, 11). The denial of the refund was made under New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1, *et seq.*, particularly under 54A:2-1 of the statute (i.e., the "Amendment"). See id. at ¶¶ 2, 27.

On June 30, 2018, Governor Murphy agreed on a new marginal tax rate, applying only to income above $5 million at a rate of 10.75%. See id. at ¶¶ 12, 19. With the Amendment, the marginal income tax rate had a retroactive effect whereby transactions that had taken place before July 1, 2018, were to be taxed at this new rate notwithstanding that the statutory tax rate at the time of these transactions was almost two points lower, at 8.97%. See id. at ¶ 7. As a result of the Amendment's retroactive application, Plaintiffs paid more than $5.5 million in taxes on income resulting from transactions that closed in May 2018 ("Transactions"), notwithstanding deliberate measures Plaintiffs took in 2016/2017 to time the Transactions to mitigate Plaintiffs' federal and state income tax burden. See id. at ¶¶ 30, 32-37.

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[1] For clarity and the Court's convenience, Plaintiffs' Counterstatement of Facts and Procedural History have been combined, and all references to "Aa" shall refer to OLS' Appendix.

Prior to the transactions—and up and until June 30, 2018—there were no publicly available materials that prepared economic projections of a rate change on income in excess of $5 million, nor was there any indication that it would be applied retroactively. See id. at ¶¶ 34-35. Because Plaintiffs and their professionals only had access to the publicly available legislative materials and were unaware of a potential increase in the tax rate prior to June 30, 2018, Plaintiffs timed the Transactions to close before the close of the fiscal year. See id. at ¶¶ 34-37. Had Plaintiffs known that the Transactions would be retroactively taxed at a higher rate, Plaintiffs can firmly establish that they could have and would have closed the Transactions on or before December 31, 2017. See id. at ¶ 36. Plaintiffs commenced this action after their refund request for the 2018 tax period was improperly denied.

In December 2018, the Amendment was projected to generate $280 million in tax revenue and to impact roughly 8,000 taxpayers. Plaintiff's Complaint (as well as the limited discovery obtained by Plaintiffs in this action) also stated that of this amount, $25 million in tax revenue for fiscal year 2019 would be raised due to the retroactive application of the rate increase to January 1, 2018. Thus, Plaintiffs' income tax from the Transactions is more than 20% of the tax revenue that had been projected to be collected by the retroactive application of the Amendment. Plaintiffs were of the select few taxpayers actually impacted by the Amendment. See id. at ¶¶ 30-31. Not only is the retroactive application of the tax of de minimis impact to the

State, same is unconstitutional, manifestly unjust, and has resulted in a violation of the square corners doctrine, burdening Plaintiffs disproportionately. See id. at ¶ 30.

Plaintiffs first tried to obtain discovery from Defendant through requests served in August 2024. See Aa103 (Manduke Cert., ¶ 2). Defendant produced about a dozen documents consisting largely of information that was publicly available in 2018 or pertaining to the post-June 2018 timeframe. See id. Defendant produced no emails, communications, or projections with respect to the Amendment. What was provided had little bearing on the underlying issues. See id.

In March 2025, Plaintiffs issued two (2) subpoenas: the Subpoena at issue in this motion, and a subpoena to the Office of the Governor ("OOTG Subpoena"). See id. at ¶ 3. In both subpoenas, Plaintiffs requested information narrowly tailored and directly relevant to this matter, including: (1) communications regarding Plaintiffs; (2) information relating to the retroactive application of the Amendment; and (3) information relating to estimates that the increase in the marginal tax rate for income over $5 million would yield additional gross income tax revenue of $280 million (and what portion of same would be generated by applying the Amendment retroactively).

Defendant filed a motion to quash the OOTG Subpoena, asserting that the documents requested were privileged, but not the Subpoena at issue here. See id. at ¶ 4. On July 7, 2025, the Court issued a decision denying Defendant's motion insofar

that the OOTG Subpoena "seeks documents, information or testimony involving A. 3088." Aa85. Significantly, this Court held that Defendant/OOTG did not meet their burden to show that *any* privileges associated with A. 3088. See id. Thereafter, the OOTG, through Defendant's counsel, furnished a privilege log to Plaintiffs on October 6, 2025. See Aa104 (Manduke Cert., ¶ 5).

Plaintiffs received a response from OLS for this underlying Subpoena, but were once again met with resistance. Similar to the original response from the OOTG, OLS failed to engage in any good faith communication with Plaintiffs' counsel to resolve any privilege concerns notwithstanding that this court had just ruled against OOTG's position of blanket immunity and carte blanche privilege, which is an affront to the Court. Instead, OLS defiantly refused to release any documents Plaintiffs requested due to "general principles of legislative privilege."

OLS' refusal to produce a privilege log is not only inconsistent with governing authority, but contrary to OLS' prior conduct in another lawsuit litigated between this firm and OLS. See id. at ¶ 7. In 2011, this firm commenced an action against Defendant (and others) in Milligan et al. v. Dir., Div. of Taxation, et al., Docket No. 00748-2011. See id. at ¶ 8. Plaintiffs there (like Plaintiffs here) alleged that the retroactive application of a tax law was manifestly unjust and unconstitutional. See id. This firm propounded a subpoena upon OLS in the Milligan matter. See id. In stark contrast, in March 2013, the OLS produced both documents and a privilege log

to this firm (counsel for the Milligans), consistent with OLS' obligations under the Court Rules. See id.; see OLS' Privilege Log Produced in Milligan, (Manduke Cert., Aa123-129).

On September 30, 2025, OLS filed a motion for a protective order and to quash the Subpoena ("OLS Subpoena"). Plaintiffs filed an opposition and OLS filed a reply. OLS conveniently omits from its statement of facts and procedural history that on October 22, 2025, Judge Novin conducted a conference, during which he requested supplemental briefing from the parties on Harrington v. Dir., Div. of Taxation, 2016 N.J. Tax Unpub. LEXIS 12.[2] In Harrington, the then-presiding judge of the Tax Court denied a motion filed by OLS to quash a subpoena in another, but similar, Tax Court matter.[3] Both parties submitted supplemental briefings addressing that case.

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[2] R. 2:6-1(a)(1) requires that "the appendix prepared by the appellant shall contain . . . (I) such parts [of the record] as ***the appellant should reasonably assume will be relied upon*** by the respondent in meeting the issues raised" (emphasis added). OLS omitted this exhibit from its appendix in violation of the court rules. Because the Tax Court Judge requested supplemental briefing on that case, OLS "should have "reasonably assumed" Plaintiffs would reference it "in meeting the issues raised." Id. See Plaintiffs' Appendix for a copy of the Harrington opinion.

[3] Although unpublished, the Harrington decision is informative. The subpoena propounded in Harrington sought information relating to projections and/or estimates done (if any) by OLS relating to the decision to amend the law at that time to include lottery winnings as taxable gross income. The Harrington plaintiffs sought documents in OLS' possession that: (1) "evidence[d] the types of taxes or tax increases that were available in 2009 pursuant to New Jersey taxation statutes to raise money for the State to meet the State's fiscal needs";

On November 10, 2025, the Tax Court issued a detailed, thorough, well-reasoned opinion in which it partially ruled in OLS' favor, quashing requests 2-9 of Plaintiff's Subpoena. See Aa23-24 (Tax Court's Nov. 10 Decision).

What remains for OLS to produce is the following: (1) All documents that refer or relate to any communications regarding Plaintiffs; and (2) "in response to paragraphs 10, 11 and 12 of the Subpoena . . . documents and/or communications in possession of the OLS that compromise the 'information provided informally by the Executive [Branch to the OLS which] indicated that the Department of the Treasury projected that the bill would increase FY 2019 State revenue collections by a net $156.8 million.'" See id. at Aa28-29. In the alternative, the Tax Court held that

> if the OLS contends that any documents and/or communications, as limited above, responsive to paragraphs 10, 11 and 12 under the Subpoena are within the sphere of legislative activity and insulated from production under the Speech or Debate Clause***, the OLS shall produce a privilege log or "Vaughn index" for Plaintiffs*** identifying the communication, communication date, the parties to the communication and a brief summary of the communication. ***Within thirty (30) days thereafter the OLS may refile its motion to quash the Subpoena with respect to those***

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and (2) "related to the preparation of and content of the Fiscal Note." Harrington, 2016 N.J. Tax. Unpub. LEXIS at *5. After moving to quash under blanket assertions of privilege, the Harrington court held in favor of Plaintiffs that nothing in the statute OLS relied on "renders confidential the method used by [the OLS Analyst] to calculate the estimated revenue increase he predicted from income taxes on New Jersey lottery winnings as a result of the amendment." Id. at *11.

> ***communications***, explaining why it believes such communication is within the sphere of legitimate legislative activity and should be entitled to protection under the Speech or Debate Clause.

See id. (emphasis added).

Instead of honoring the Tax Court's order by providing a privilege log—with the generous opportunity to renew its application to quash the subpoena—OLS filed its motion.

LEGAL ARGUMENT

I. OLS FAILS TO ESTABLISH ANY GROUNDS WARRANTING INTERLOCUTORY RELIEF.

"[T]he standards governing grants of interlocutory review are stringent" and "leave is sparingly granted[.]" Brundage v. Estate of Carambio, 195 N.J. 575, 607 (2008). This Court has similarly instructed that leave to appeal is "granted only to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course." State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997) (citations omitted).

OLS does not, and cannot, identify any "grave damage or injustice" that will result if leave is denied. See Brundage, 195 N.J. at 599. Nor does, or can, OLS identify a "fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course." Alfano, 305 N.J. Super. at 190. Instead, OLS incredulously claims that the trial court should have denied the Subpoena in whole, instead of partially grant and partially deny it. However, OLS provides not one single authority preventing it from producing a privilege log in accordance with the November 10 Order. Because OLS has fallen far short of demonstrating leave to appeal is appropriate, this Court should summarily deny its Motion for Leave.

II. THIS COURT SHOULD NOT CONSIDER OLS' NEW, IMPROPER ARGUMENTS NOT RAISED BEFORE THE TRIAL COURT

In its motion, OLS introduces an argument that it did not raise with the trial court. OLS contends that, merely because Plaintiff's complaint concerns legislation, "the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause and the Separation of Powers clause—and are thereby immune from judicial review." OLS Br., 2. This point is raised several times in the OLS brief.

It is well established that the appellate division cannot consider arguments that were not raised with the trial court. The same logic applies in the context of a motion for leave to file an interlocutory appeal; the appellate division is limited to the record and arguments made below. If OLS insists that arguments are now available to it that were not available at the time the initial motion was denied in part, then the proper vehicle is a motion for reconsideration pursuant to R. 4:49-2, not a motion for leave to file an interlocutory appeal. See, e.g., Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" citing Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App.

Div.1959), certif, den. 31 N.J. 554, 158 A.2d 453 (1960); Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (declining to consider questions or issues not properly presented to the trial court); Cavanaugh v. Skil Corp., 164 N.J. 1 (2000) (same).

OLS is also a non-party to this case. A non-party is essentially presenting to this Court that Plaintiffs' *entire complaint* violates the Speech or Debate and Separation of Powers clauses. See OLS Br., 2. A non-party is not in a position to claim that Plaintiffs' lawsuit is "immune from judicial review." Id. Even if the Court were to entertain OLS' argument, OLS' position here is untenable; it would preclude any litigant from asserting that a statute violated the protections enshrined in the United States Constitution or New Jersey Constitution or that a statute violated the doctrine of manifest justice. Courts have addressed the retroactive effect of tax laws, such as the Amendment here, under this doctrine without any concern for separation of powers concerns. See, e.g., Oberhand v. Director, Division of Taxation, 193 N.J. 558 (2008). Yet, this is precisely the separation of powers concern OLS fears.

This Court should not consider OLS' newly raised and improper argument that Plaintiffs' lawsuit is immune from judicial review.

III. THE MOTION SHOULD BE DENIED BECAUSE THE TRIAL COURT APPROPRIATELY DENIED OLS' MOTION FOR A PROTECTIVE ORDER.

A. Standard of Review.

The appellate court reviews a trial judge's discovery rulings under the abuse of discretion standard. See State v. Brown, 236 N.J. 497, 521 (2019); Brugaletta v. Garcia, 234 N.J. 225, 240 (2018); State in Interest of A.B., 219 N.J. 542, 554 (2014); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011); Salazar v. MKGC Design, 458 N.J. Super. 551, 558 (App. Div. 2019). "[A]ppellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" Brown, 236 N.J. at 521 (quoting Pomerantz Paper Corp., 207 N.J. at 371).

A "court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." R.Y., 242 N.J. at 65 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, [the Appellate Division] reverse[s] only when the exercise

of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (internal citation omitted).

In the present matter, there exists no basis whatsoever for OLS to assert—or for this Court to find—that the trial court's November 10 Order was made without a rational explanation or that the same departed from established policies. As previously discussed, the Court issued a thorough, sensible decision allowing OLS the opportunity to produce a privilege log and then renew its application to quash the subpoena. This holding cannot be deemed "manifestly unjust" under any circumstances.

B. The Tax Court Did not Err in Declining to Quash Plaintiffs' Document Demands #1 (Aa21-23) and #10-12 (Aa 24-30).

The main argument OLS presents as to why the Tax Court erred in allowing the remaining requests to move forward comes from a letter Plaintiffs wrote to OLS on July 11, 2025. See Aa62-63. In this letter, Plaintiffs stated that the Subpoena at issue "requests 12 categories of documents related to N.J.S.A. 54A:2-1(a)(6) and (b)(2), including the retroactive application thereof." Id. at Aa62. OLS then makes a massive, illogical jump, asserting that this statement by Plaintiffs "***ends the inquiry*** . . . the actions complained of are ***unquestionably*** legislative in character . . . [and]

are ***entirely*** subject to legislative immunity and privilege secured by the Speech or Debate Clause." OLS Br. 23-24 (emphasis added).

The Tax Court did not quash the above demands because it determined that they could extend to documents not within the scope of legislative privilege. See Aa 28-29 (Tax Court's Nov. 10 Decision). The Tax Court did not agree with OLS' blanket assertion of privilege and instead emphasized that a more nuanced analysis is appropriate. This conclusion is not "manifestly unjust," "resting on an impermissible basis," and the Tax Court did not "abuse its discretion" in holding such. Chavies, 247 N.J. at 257.

Second, OLS argues that the Tax Court erroneously applied the test set forth in State v. Gregorio, 186 N.J. Super. 138 (L. Div. 1982), where,

> [t]o be immune from executive and judicial review, the conduct of the member must be in the sphere of legitimate legislative activity. In defining the contours of the immunity granted by the clause . . . the conduct must be an 'integral part of the deliberative and communicative process by which members participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation . . . [a] legislative act has consistently been defined as one 'generally done in [the Legislature] in relation to the business before it.

(quoting Gravel v. U.S., 408 U.S. 606, 625 (1981)). Contrary to OLS' argument that legislative immunity is incontestable, the Gregorio court itself stated that the doctrine has "contours" and determining what counts as "deliberative

process" is a fact-specific analysis. Gregorio, at 153.OLS has not provided any such facts. OLS presents virtually no argument as to why documents referring to communications with Plaintiffs constitutes "deliberative process." To this day, OLS has not provided any legal authority that it need not produce a privilege log.

OLS also argues that the Tax Court erroneously applied this Court's decision in Brown v. City of Bordentown, 348 N.J. Super. 143 (App. Div. 2002) because Brown is factually analogous to the case at hand, and the Tax Court incorrectly applied its holding. Although the Brown defendant was a legislator who made an allegedly discriminatory hiring decision, the legal principle and reasoning remain the same. OLS does not explain why the admittedly different set of facts make the case distinguishable. Rather, Brown does stand for the principle that not all acts undertaken by a legislative body or person are necessarily legislative in nature and entitled to privilege.

In its last convoluted argument, OLS contends that the Tax Court's reliance on Brown actually undermines its own decision. Specifically, OLS highlights "immunity is justified and defined by the function it protects and serves, not by the person to whom it attaches." Id. at 150 (quoting Forrester v. White, 484 U.S. 219, 226 (1988)). OLS then vaguely argues that, when applying this principle to the underlying case, "the entirety of the nonpublic legislative documents sought . . . are

subject to legislative immunity and privilege." OLS Br. at 30. Neither Plaintiff nor the Tax Court asserted that the immunity attached to a specific person.

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CONCLUSION

For all the reasons set forth herein, Plaintiffs respectfully request that OLS' Motion for Leave should be denied in its entirety.

COLE SCHOTZ P.C.

By: *Is/ Lauren M. Manduke*
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December 10, 2025

Date of submission: January 7, 2026*

***Per the Court's Order, this motion reply brief dated December 10, 2025 is being re-filed as a merits reply brief.**

Via e-Courts

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Appellate Division
25 West Market Street
Trenton, NJ 08625

RE: <u>Giammarino v. Director, Division of Taxation</u>
Docket No. A-001407-25

Reply letter-brief of non-parties/appellants, Office of Legislative Services and Gabriel Neville, Esq.

Dear Honorable Judges:

This firm is counsel to non-parties/movants, Office of Legislative Services and Gabriel Neville, Esq. (collectively "OLS"). Please accept this reply letter-brief – in lieu of a more formal submission -- in further support of OLS's appeal of an interlocutory order dated November 10, 2025 granting in part and denying in part its motion for a protective order.

This reply brief is being filed in order to address and correct certain erroneous

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assertions that are contained in Plaintiffs' answering appellate brief. These erroneous assertions are as follows:

1. Plaintiffs' erroneous contention that OLS "is essentially presenting to this Court that Plaintiffs' entire complaint violates the Speech or Debate and Separation of Powers clauses"

2. Plaintiffs' erroneous contention that "OLS presents virtually no argument as to why documents referring to communications with Plaintiffs constitutes 'deliberative process.'"

3. Plaintiffs' submission of the unpublished Harrington decision should be disregarded because it is wholly irrelevant to the constitutional question here presented.

Each of these points is addressed in turn.

1. Plaintiffs' erroneous contention that OLS "is essentially presenting to this Court that Plaintiffs' entire complaint violates the Speech or Debate and Separation of Powers clauses."

Plaintiffs contend that "[a] non-party [i.e., OLS] is essentially presenting to this Court that Plaintiffs' entire complaint violates the Speech or Debate and Separation of Powers clauses." Pl. Br., at 11. Plaintiffs' contention is erroneous.

We did not argue to this Court – or to the court below – that Plaintiffs' Complaint (alleging an improper retroactive application of a tax statute) *failed to state a claim.* Instead, we argued to this Court – and to the court below – that Plaintiffs' Subpoena for nonpublic legislative documents (relating to the Legislature's enactment of a tax statute) should be quashed in its entirety.

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In support of their contention, Plaintiffs state:

> In its motion, OLS introduces an argument that it did not raise with the trial court. OLS contends that, merely because Plaintiff's complaint concerns legislation, "the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause and the Separation of Powers clause—and are thereby immune from judicial review." OLS Br., 2.
>
> [Pl. Br., at 10]

However, Plaintiffs' selective citation of one sentence of OLS's brief to this Court misconstrues and distorts OLS's argument in favor of quashing Plaintiffs' Subpoena. When the quoted sentence is placed in proper context, an entirely different – and correct – meaning becomes apparent. The following is the entire paragraph of OLS's brief to this Court (from which Plaintiffs drew its selective quotation):

> Thus, Plaintiffs allege that L. 2018 c. 45 worked a "manifest injustice" against them by reason of the statute's retroactivity. However, **even assuming, arguendo, that Plaintiffs' claim were sustainable**, that assumed fact does not change the essential *legislative character* of the actions complained of -- i.e., the Legislature's enactment of a statute. In turn, because the actions complained of are unquestionably legislative in character, the actions complained of are entirely subject to legislative immunity and privilege secured by the Speech or Debate Clause and the Separation of Powers Clause -- and are thereby immune from judicial review.
>
> [OLS Br., at 2]

Obviously, since we assumed for the sake of argument Plaintiffs' claim is "sustainable," we are not *also* declaring – in the very same passage -- that Plaintiffs have

failed to state a claim.

Instead, we stated that the "actions complained of" by and through Plaintiffs' Subpoena – the very subject of OLS's motion for a protective order – are "legislative in character." Ibid. Because these actions are "legislative in character," they are – using the words of the Speech or Debate case of State v. Gregorio – "immune from … judicial review."[1] See State v. Gregorio, 186 N.J. Super. 138, 152 (Law. Div. 1982) (holding that "[t]o be immune from executive and judicial review, the conduct of the member must be within the sphere of legitimate legislative activity.").

Therefore, contrary to Plaintiffs' contention, OLS is *not* "essentially presenting to this Court that Plaintiffs' entire complaint violates the Speech or Debate and Separation of Powers clauses." Pl. Br., at 11.[2]

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[1] According to Plaintiffs, our supposed legal argument to this Court is that Plaintiffs' claim – i.e., that the retroactive application of a tax statute is unconstitutional – is not a cognizable claim because enactments of the Legislature are "immune from judicial review." Pl. Br., at 10. Leaving aside that this is decidedly **not** our legal argument that has been made to either this Court or to the court below, a moment's reflection discloses that Plaintiffs' "interpretation" of our legal argument would turn the foundational principles of Marbury v. Madison upside down. See Marbury v. Madison, 5 U.S. 137 (1803) (recognizing that a core duty of courts is to review statutes and determine if they comport with the requirements of the Constitution). For this reason alone, Plaintiffs' "interpretation" of our legal argument is untenable.

[2] Because Plaintiffs misconstrued and distorted our argument to this Court, Plaintiffs also erroneously asserted that our argument had not been raised to the trial court below. Pl. Br.,

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2. Plaintiffs' erroneous contention that "OLS presents virtually no argument as to why documents referring to communications with Plaintiffs constitutes 'deliberative process.'"

Plaintiffs assert that "OLS presents virtually no argument as to why documents referring to communications with Plaintiffs constitutes 'deliberative process.'" Pl. Br., at 15. Quite frankly, we are at a loss to understand Plaintiffs' assertion.

Here, *all* of the documents sought in Plaintiffs' Subpoena plainly relate to the enactment of L. 2018, c. 45 (codified as N.J.S.A. 54A:2-l (a)(6) and (b)(2)). The Court is respectfully referred to the text of the twelve document demands contained in Plaintiffs' Subpoena – which on their face reference the challenged statute. See Aa55-56. This conclusion is confirmed by a review of Plaintiffs' Complaint – which *exclusively* challenges an Act of the Legislature and does not challenge any non-legislative act by a member or agent of the Legislature. See OLS Br., at 22-24; see also Aa38-39 (Complaint, ¶¶38-43).

Indeed, in Plaintiffs' July 11 letter demanding compliance with the Subpoena, Plaintiffs' counsel admits precisely this: "The Subpoena requests 12 categories of documents **related to N.J.S.A. 54A:2-l (a)(6) and (b)(2)**, including the retroactive application thereof." Aa62 (emphasis added).

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at 10-11. Contrary to Plaintiffs' contention, all of our arguments that are presented to this Court (including the above argument referenced by Plaintiffs) were properly raised to the trial court below.

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Applying the Gregorio test, the documents sought by Plaintiffs pertain to actions taken in "consideration and passage or rejection of proposed legislation," State v. Gregorio, 186 N.J. Super. at 153. Under Gregorio, that ends the inquiry: the documents sought in the Subpoena are "immune from executive and judicial review." Id. at 152-53.

3. Plaintiffs' submission of the unpublished Harrington decision should be disregarded because it is wholly irrelevant to the constitutional question here presented.

In their brief to this Court, Plaintiffs discuss at length an unpublished decision of the Tax Court in Harrington v. Director, Division of Taxation, 2016 WL 736423 (Tax Court 2016). Pl. Br., at 6-7. Indeed, Plaintiffs annex a copy of the Harrington decision as an appendix to their submission to this Court. However, as set forth below, the unpublished Harrington decision should be disregarded because it is wholly irrelevant to the constitutional question here presented.

In Harrington, the Tax Court ordered the enforcement of a subpoena against OLS. Harrington, 2016 WL 736423, *5. The pertinent facts of the case are as follows.

The plaintiffs in Harrington subpoenaed OLS in order to obtain information regarding a publicly available "Fiscal Note" prepared by OLS in connection with the enactment of a statute governing the taxation of lottery winnings. Id., *2. The OLS sought to quash the subpoena based solely on the preclusive effect of N.J.S.A. 52:11–70. Id., *3. That statute

provides:

> All request for legal assistance, information or advice and all information received by the Office of Legislative Services in connection with any request for fiscal, budgetary or research service or for the drafting or redrafting of bills, resolutions or amendments thereof for introduction in the Legislature shall be regarded as confidential and no information in respect thereto shall be given to the public or to any person other than the person or persons making such request or any officer or person duly authorized to have such information, unless and until the person making such request consents thereto or the subject matter shall have been made public is some manner.
>
> [N.J.S.A. 52:11–70]

The privilege authorized by N.J.S.A. 52:11–70 is hereafter referred to as "statutory privilege."

On the record before it, the court in Harrington rejected the application of statutory privilege to the information sought in the plaintiffs' subpoena. See Harrington, 2016 WL 736423, *4. In so holding, the court relied on the enumerated exception to statutory privilege, i.e., "unless and until … the subject matter shall have been made public is some manner." Ibid.

Critically, the court in Harrington relied *exclusively* on statutory privilege (conferred by N.J.S.A. 52:11-70) in addressing the enforceability of a subpoena against OLS. The court did not consider or apply constitutional immunity and privilege conferred by the Speech or Debate Clause, N.J. Const. Art. IV, § 4, ¶ 9.

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In stark contrast to the statutory privilege conferred by N.J.S.A. 52:11-70, constitutional privilege is sweeping in its scope and application. The effect of Speech or Debate immunity and privilege is that actions taken in "consideration and passage or rejection of proposed legislation," are "immune from executive and judicial review." State v. Gregorio, 186 N.J. Super. at 152-53. Therefore, the Harrington decision has no application whatsoever to OLS's legal argument applying the New Jersey Constitution's Speech or Debate Clause, see N.J. Const. Art. IV, § 4, ¶ 9.[3]

CONCLUSION

For the reasons set forth above as well as the reasons set forth in our opening brief, (1) Non-parties Office of Legislative Services' and Gabriel Neville's motion for leave to file an interlocutory appeal should be granted; and (2) the Tax Court's November 10 Order should be modified so that Plaintiffs' Subpoena against OLS and Mr. Neville is quashed in its entirety.

[3] Furthermore, in addition to being inapplicable as a matter of law, the Harrington decision is unpublished and -- as such -- has no precedential value whatsoever. See R. 1:36-3 (providing that "[n]o unpublished opinion shall constitute precedent or be binding upon any court" and further providing that -- with exceptions not applicable here – "no unpublished opinion shall be cited by any court.").

Respectfully submitted,

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