

**LEAGUE OF WOMEN VOTERS OF  
PENNSYLVANIA, et al.,**

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**No. 261 MD 2017**

**V.**

**COMMONWEALTH OF  
PENNSYLVANIA, et al.,**

**Respondents.**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2017, upon consideration of the Motion to Quash by non-party Governor Thomas W. Corbett, it is hereby **ORDERED** that the Motion to Quash is **GRANTED**.

BY THE COURT:

J.

**LEAGUE OF WOMEN VOTERS OF  
PENNSYLVANIA, et al.,**

**No. 261 MD 2017**

**COMMONWEALTH OF  
PENNSYLVANIA, et al.,**

**Respondents.**

AND NOW comes non-party, the Honorable Thomas W. Corbett (“Governor Corbett”), by and through his undersigned counsel, and submits the within Motion to Quash the subpoena served upon Governor Corbett by Petitioners in the above-captioned matter, and in support thereof aver as follows:

1. On August 11, 2017, Petitioners served all Respondents with a Notice of Intent to Serve a Subpoena to Produce Documents and Things for Discovery

Pursuant to Rule 4009.21 (the "Notice"), attached to which was a subpoena (the "Subpoena") addressed to non-party Governor Corbett.

2. At 5:57 p.m. on the eve of Thanksgiving, November 22, 2017, the undersigned was served with the subpoena on behalf of Governor Corbett.

3. The Subpoena proposes to direct Governor Corbett's appearance at a deposition on December 1, 2017,<sup>1</sup> and to compel the production of documents from Governor Corbett described in a request for production attached to the Subpoena and entitled "Requests." (See Exhibit "A".)

4. The document "Requests" are for "[a]ll documents referring or relating to the 2011 [Congressional Redistricting] Plan, including, but not limited to" seven (7) subcategories of documents and communications relating to the Plan, which are separately enumerated and identified as (a) through (g) in the attachment to the Subpoena. (*Id.*)

5. Additionally, the Subpoena lists seven corresponding "Deposition Topics" concerning the 2011 Plan.

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<sup>1</sup> In addition to the reasons supporting Governor Corbett's Motion to Quash the Subpoena, it is noted, and Petitioners' counsel was previously advised, that the undersigned is otherwise unavailable on Friday, December 1, 2017, to participate in any deposition in Pittsburgh, Pennsylvania as the undersigned is scheduled to be in New York City on that date. Similarly, Governor Corbett is also unavailable on December 1, 2017, as he too is scheduled to be in New York City at the time noticed in the Subpoena. Accordingly, irrespective of the outcome of the within Motion, neither counsel nor Governor Corbett are available on the date and time set forth in the Subpoena.

6. However, all of the documents<sup>2</sup> and/or information sought from Governor Corbett in the Subpoena are protected from disclosure by a number of privileges, most notably, the executive privilege, the deliberative process privilege, and the attorney-client privilege.

7. Accordingly, this Court should grant this motion and quash the instant subpoena so as to safeguard these bedrock evidentiary and testimonial privileges.

## **II. LEGAL ARGUMENT**

8. In Pennsylvania, although the “executive privilege” and the “deliberative process privilege” are two distinct privileges, they are very closely related in that both privileges prohibit disclosure of similar types of information.<sup>3</sup>

9. Each privilege applies to the Office of the Governor and Governor Corbett. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Cmwlth.

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<sup>2</sup> As the Court is aware, and as the Office of General Counsel has advised Petitioners, Governor Corbett left office in January 2015. As of that date, all documents and related information in the possession of Governor Corbett in his capacity as the Governor of Pennsylvania were left in the care, custody and control of custodians of Governor Corbett’s archives, namely the Pennsylvania Historical Museum Commission and Lebanon Valley College. Copies of the agreements with each entity relating to Governor Corbett’s archived materials have been provided to Petitioners’ counsel previously. Accordingly, Governor Corbett is not in possession of any of the documents, even if they existed, identified in Petitioners’ subpoena, or potentially responsive thereto. Of course, no matter the location of any responsive documents, if any exist, the privileges asserted herein apply to any such documents and the Subpoena should be quashed.

<sup>3</sup> The Commonwealth Court has referred to the two privileges as “coterminous,” however, the case law indicates that there are two distinct analyses that apply to each respective privilege. *See Van Hine v. Dep’t of State*, 856 A.2d 204, 212 (Pa. Commw. Ct. 2004) (“The similarities with executive privilege are apparent, and in the Court’s view the two doctrines are coterminous.”)

Ct. 2013); *Hayes v. Reed*, 1997 U.S. Dist. LEXIS 2992 (E.D. Pa. Mar. 13, 1997) (applying Pennsylvania law).

10. In addition, privileges such as the attorney-client and work product privilege unquestionably apply to Governor Corbett. *Ario v. Deloitte & Touche, LLP (In re Objections of Liquidator to the Defendants' Notices of Intent)*, 934 A.2d 1290, 1294 (Pa. Commw. Ct. 2007); *Sedat, Inc. v. Dep't of Env'tl. Res.*, 641 A.2d 1243, 1244 (Pa. Commw. Ct. 1994).

11. Here, the subpoena served on Governor Corbett must be quashed because the subpoena plainly seeks documents and information that is protected from disclosure by the executive, deliberative process, and attorney-client privileges. Indeed, the very nature of the documents requests and the deposition topics propounded by Petitioners reveal that the subject matter sought by the Subpoena, and about which Governor Corbett is proposed to be questioned, is precisely the type of information that is protected by the cited privileges.

**A. The Executive Privilege Prohibits Disclosure of Any Documents and/or Testimony that Pertain to the Function of the Executive Branch or Concern the Decisional and Consultative Responsibilities of the Governor.**

12. “[A]s chief executive,” the Governor is afforded the power “to protect the confidentiality of communications pertaining to the function of the executive branch.” *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

13. As the United States District Court for the Eastern District of Pennsylvania explained:

Confidentiality is vital not only because it serves to protect government sources of information but also because it enhances the effectiveness of investigative techniques and procedures. More importantly, **this executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can be discharged most effectively with privacy and security.**

*Id.* (emphasis added); *see also Van Hine v. Dep't of State*, 856 A.2d 204, 208 (Pa. Cmwlth. Ct. 2004) (explaining that the executive privilege is designed to prevent disclosure of documents or communications because disclosure “would seriously hamper the function of government.”).

14. Indeed, the executive privilege is designed to “safeguard free expression in giving intragovernmental advice by eliminating the possibility of outside examination as an inhibiting factor.” *Haber v. Evans*, 2004 U.S. Dist. LEXIS 7961, at \*8-9 (E.D. Pa. May 4, 2004).

15. Accordingly, if the communications and/or documents sought by Petitioners “pertain[] to the function of the executive branch,” *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8, the communications and/or documents are protected by the executive privilege.

**B. The Deliberative Process Privilege Prohibits Disclosure of Any Documents and/or Testimony Concerning Confidential Deliberations or Reflecting Opinions, Recommendations, or Advice Related to the Re-Districting Plan.**

16. Although the Pennsylvania Supreme Court has not formally adopted the deliberative process privilege, the Pennsylvania Superior Court recently held that “nothing in that Court’s decisions causes us to doubt the privilege’s validity.” *Commonwealth v. McClure*, 2017 PA Super 334 n.23 (Pa. Super. Ct. 2017).

17. Indeed, the Court in *McClure* noted that “[i]n *Tribune-Review Publ’g Co. v. Dep’t of Cmty. & Econ. Dev.*, 580 Pa. 80, 859 A.2d 1261, 1266 n.2, 1269 (Pa. 2004), while again noting that it had not yet formally adopted the privilege, the Court stated that it ‘agree[s] with the principles we articulated in *Vartan*.’”<sup>4</sup> *Id.*

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<sup>4</sup> In *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999), a plurality of the Court applied the deliberative process privilege, however, it has never been formally adopted by a majority of the Pennsylvania Supreme Court. Although judicial opinion in the Commonwealth has not been uniform as to whether the deliberative process privilege is a cognizable privilege in Pennsylvania, the prevailing view is that the privilege is applicable. Notably, the authority from the more recent decisions of courts in this Commonwealth is decidedly in favor of the privilege, including the Superior Court’s statement *less than a month ago* that “nothing in [the Pennsylvania Supreme Court’s] decisions causes us to doubt the privilege’s validity.” *McClure*, 2017 PA Super 334 n.23. See also *In re Interbranch Comm’n on Juvenile Justice*, 988 A.2d 1269, 1277-78 (Pa. 2010) (plurality decision) (“Under the deliberative process privilege, government officials may refuse to testify and may withhold documents containing ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.’” (quoting *Vartan*, 733 A.2d at 1263)); *id.* at 1283 (Bear, J., concurring and dissenting) (explaining that the party did not “articulate an argument under the deliberative process privilege” and also noting that a privilege concerning the “deliberative process” is a “legally cognizable” objection); *Commonwealth v. Lytle*, 2017 Pa. Super. Unpub. LEXIS 1297, \*5 (Pa. Super. Ct. Apr. 7, 2017) (“Deliberative process privilege ‘permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.’” (quoting *Vartan*, 733 A.2d at 1263)); *KC Equities v. Dep’t of Pub. Welfare*, 95 A.3d 918, 934 (Pa. Commw. Ct. 2014) (“The deliberations to which Little Steps sought access are protected by the deliberative process privilege” (citing *Vartan* and *In re Interbranch Comm’n*);

18. Like the executive privilege, the deliberative process privilege “recognizes that if governmental agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 381 (Pa. Cmwlth. Ct. 2014); *Van Hine*, 856 A.2d at 212 (“purpose of the privilege is to allow the free exchange of ideas and information within government agencies.”).

19. Accordingly, the deliberative process privilege “permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice.” *Ario*, 934 A.2d at 1293.

20. This includes “deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the

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*Scolforo*, 65 A.3d at 1100 (explaining that Pennsylvania’s Right to Know Law codified the common law deliberative process privilege). *But see Rae v. Pa. Funeral Directors Ass’n*, 925 A.2d 197, 205 (Pa. Commw. Ct. 2007), *vacated on other grounds* 977 A.2d 1121 (Pa. 2009). Moreover, although the Commonwealth Court in *Rae* refused to apply the deliberative process privilege to the executive branch employees in that case, the Court explained that it was possible that the deliberative process privilege *did exist* in Pennsylvania, but that it was limited to “high ranking government officials,” which was not the case in *Rae* because the employees were “two staff attorneys and an investigator.” *Id.* at 205 n.8. In contrast, here, Governor Corbett would plainly qualify as a “high ranking government official” to which the deliberative process privilege would apply. But, in any event, as the foregoing makes clear, *Rae*’s refusal to recognize the privilege is not in line with the more recent case law of this Commonwealth on the subject.



predecisional deliberations.” *Scolforo*, 65 A.3d at 1100 (quoting 65 P.S. § 67.708(b)(10)(i)).<sup>5</sup>

21. Unlike the executive privilege, however, documents and/or communications are only protected under the deliberative process privilege if the document and/or communication is both “predecisional and deliberative.” *Scolforo*, 65 A.3d at 1101.

22. “[I]nformation is pre-decisional if it reflects matters leading to a final decision of an agency.” *Ario*, 934 A.2d at 1293.

23. “[I]nformation is deliberative if it reflects the process the agency used to reach the decision.” *Id.*

24. Notably, the privilege applies even if the documents and/or communications do not actually *reveal* the processes used to make a decision; rather, the document and/or communication must merely *reflect*, “or, in other words, ‘mirrors’ or ‘shows,’ that the agency engaged in the deliberative *process*.” *McGowan*, 103 A.3d at 383.

25. If the agency carries its burden of showing that the documents and/or communications sought are both “predecisional” and “deliberative,” then the privilege applies and the information is protected from disclosure.

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<sup>5</sup> Although this quote is derived from Pennsylvania’s Right to Know Law, the Court in *Scolforo* held that the “predecisional deliberative exception set forth in Section 708(b)(10)(i) codifies the [common law] deliberative process privilege.” *Scolforo*, 65 A.3d at 1100.

**C. The Application of The Cited Privileges, and the Attorney-Client Privilege, to the Subpoena Served on Governor Corbett Requires This Court to Quash the Subpoena.**

**1. Document Requests**

26. The Subpoena requests Governor Corbett to produce “[a]ll documents referring or relating to the 2011 [Congressional Redistricting] Plan, including, but not limited to” the following seven (7) subcategories of documents and communications relating to the Plan. (See Exhibit “A” at pp. 6–7.)

27. As discussed below, these document requests plainly seek material protected by the executive and deliberative process privileges, as well as a number of other privileges.

- (a) *All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.*

28. The documents and/or information sought by this request are protected from disclosure by both the executive privilege and the deliberative process privilege.

29. With respect to the deliberative process privilege, any “proposals,” “analyses,” “memorandum,” or “notes” that are responsive to this request would necessarily reflect “that the agency engaged in the deliberative *process*.” *McGowan*, 103 A.3d at 383 (finding that documents such as an “internal briefing memo” and “proposed courses of action” were protected from disclosure).

30. Indeed, the deliberative process privilege expressly protects against disclosure of “deliberations relating to a budget recommendation, **legislative proposal, legislative amendment, contemplated or proposed policy or course of action** or any **research, memos or other documents used in the predecisional deliberations.**” *Scolforo*, 65 A.3d at 1100 (emphasis added).

31. Accordingly, this request expressly seeks documents and/or information that are plainly protected by the deliberative process privilege.

32. Moreover, any proposals, memos, analyses, or notes that were sent to or prepared by the Office of the Governor implicate the “decisional and consultative responsibilities of the Governor.” *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

33. As the courts have made clear, the executive privilege “protects and insulates” these sensitive responsibilities because these responsibilities are “discharged most effectively with privacy and secrecy.” *Id.*

34. Accordingly, the express wording of this request makes clear that any documents responsive to this request would be protected from disclosure pursuant to the deliberative process and executive privileges.

- (b) *All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.*

35. Petitioners' Request (b) also seeks information covered by both the deliberative process and executive privileges.

36. Notably, the request expressly seeks documents and/or information concerning the "considerations" used "*to develop the 2011 Plan*" and thus seeks documents that are "predecisional," *i.e.*, that concern matters "leading to a final decision" – the 2011 Plan. *Ario*, 934 A.2d at 1293.

37. This request also seeks documents reflecting the "considerations" used to develop the 2011 Plan, which are deliberative in nature.

38. For example, in *McGowan*, the Commonwealth Court found that documents and/or information concerning "the underlying issues and factors that impact the Department's assessment on such matters, in order to ultimately arrive at the Department's final position" fell within the protection of the deliberative process privilege. *McGowan*, 103 A.3d at 384. That is precisely what Request (b) seeks here.

- (c) *All documents referring or relating to how each consideration or criteria was measured, including the specific data and specific formulas used in assessing compactness and partisanship.*

39. Request (c) seeks documents and/or information that are protected by the deliberative process and executive privileges.

40. By its express terms, Request (c) seeks to discover documents concerning the *underlying process* as to how certain criteria were “consider[ed],” “measured,” and/or “asses[ed]” in order to arrive at a final decision.

41. However, as explained *supra*, any documents or information concerning “the underlying issues and factors that impact the . . . assessment . . . in order to ultimately arrive at [a] final position” is protected from disclosure by the deliberative process privilege. *McGowan*, 103 A.3d at 384.

42. Accordingly, any documents responsive to Request (c) would be privileged pursuant to the deliberative process privilege and the executive privilege, *see Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8 (executive privilege prevents disclosure of documents or communications concerning the “decisional and consultative responsibilities of the Governor.”).

- (d) *All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.*

43. Request (d) expressly seeks to discover documents concerning “how” specific criteria “affected the 2011 Plan” during the development of the 2011 Plan.

44. Again, as with Request (b) and (c), Request (d) therefore expressly seeks documents and/or information concerning “the underlying issues and factors that impact the . . . assessment . . . in order to ultimately arrive at [a] final position.” *McGowan*, 103 A.3d at 384.

45. Accordingly, as with Requests (b) and (c), any documents responsive to this request would be protected from disclosure pursuant to the deliberative process privilege and the executive privilege. *See id.*; *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8

- (e) *All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan.*

46. The executive privilege recognizes that “as chief executive” the Governor is afforded the power “to protect the confidentiality of communications pertaining to the function of the executive branch,” particularly where the communications concern the “sensitive and consultative responsibilities of the Governor.” *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

47. Therefore, any documents responsive to this request would plainly be protected from disclosure because they would disclose Governor Corbett’s

communications concerning decisions he made, and consultations he may have sought, in his role as Governor.

- (f) *All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.*

48. Request (f) likewise seeks communications protected by the executive privilege.

49. Indeed, this Request expressly seeks communications with “consultants, advisors, attorneys, or political scientists” which would, without a doubt, lead to the disclosure of communications made while Governor Corbett was exercising his “sensitive decisional and *consultative* responsibilities of the Governor.” *Id.* (emphasis added).

50. Moreover, any communications with attorneys concerning legal advice related to the 2011 Plan would be protected from disclosure by the attorney-client privilege. *Ario*, 934 A.2d at 1294; *Sedat, Inc.*, 641 A.2d at 1244 (“The existence of the attorney-client privilege and work product doctrine when attorneys act in their professional capacity for governmental agencies is well established.”).

- (g) *All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.*

51. Any documents responsive to Request (g) would implicate the “sensitive decisional and consultative responsibilities of the Governor” and are

thereby covered by the executive privilege. *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

52. Moreover, Judge Brobson concluded in his opinion granting in part the Respondents' motion to quash in this action that this Court could not "compel production of testimony or documents with respect to matters protected by the Speech and Debate Clause of the Pennsylvania Constitution." (*See* Dkt. 110-1, at p.13.)

53. Accordingly, any documents responsive to Request (g) would be protected from disclosure pursuant to the executive privilege and the Speech and Debate Clause of the Pennsylvania Constitution.

## **2. Deposition Topics**

54. In addition to the above document requests, which seek only privileged material, the Subpoena seeks to depose Governor Corbett on the below seven (7) topics, listed (1)-(7) in the Subpoena, relating to the 2011 Plan.

55. The deposition topics track closely to the document requests in the Subpoena, and thus, as with the document requests, the information sought from Governor Corbett in the stated deposition topics is protected from disclosure by the foregoing privileges.



(1). *Governor Corbett's involvement in the creation, passage, and signing into law of the 2011 Plan.*

56. Courts have made clear that “the sensitive decisional and consultative responsibilities” of the Governor are “discharged most effectively with privacy and security” and thus it benefits the public to “protect[] and insulate[]” all aspects of the Governor’s exercise of those responsibilities. *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

57. Here, Deposition Topic 1 seeks to invade this privilege by probing Governor Corbett’s exercise of these “sensitive” responsibilities, to the detriment of the public.

58. Moreover, in *Ario*, the Pennsylvania Superior Court quashed a deposition subpoena served on members of the Governor’s staff because the proposed deposition topics implicated the deliberative process privilege.

59. In that case, the proponent of the testimony sought to depose certain members of the Governor’s staff and the Insurance Commissioner’s staff concerning their involvement in regulatory matters that lead to the insolvency of an insurance company. *Ario*, 934 A.2d at 1292.

60. The Superior Court held that the Governor’s staff could not be deposed on their involvement in the matter because “[t]he information is part of the deliberative process since it reveals the decision making process and legal advice

that was given . . . before action was taken regarding the insolvency of Reliance.”  
*Id.* at 1293.

61. Here, as in *Ario*, Petitioners seek to depose Governor Corbett on his “involvement” with the 2011 Plan leading up to its passage.

62. But, as in *Ario*, Governor Corbett cannot be deposed on his involvement with the 2011 Plan, because that “information is part of the deliberative process.” *Id.*

63. Accordingly, both the executive and deliberative process privileges prohibit Governor Corbett from testifying on these matters.

(2). *Communications involving Governor Corbett referring or relating to the 2011 Plan.*

64. “[A]s chief executive,” the Governor is afforded the power “to protect the confidentiality of communications pertaining to the function of the executive branch.” *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

65. Deposition Topic 2 expressly seeks to invade that privilege by seeking all communications relating to Governor Corbett’s involvement with the 2011 Plan.

66. Because these communications are plainly protected by the executive privilege, Governor Corbett cannot be compelled to testify on these matters.

67. Moreover, as just discussed *supra* with Deposition Topic 1, testimony concerning Governor Corbett's involvement with the 2011 Plan also implicates the deliberative process privilege. *See Ario*, 934 A.2d at 1293.

(3). *Involvement of the REDistricting Majority Project (REDMAP), the RNC, or any non-Pennsylvania organizations with development of the 2011 Plan.*

68. As explained *supra*, in *Ario*, the Pennsylvania Superior Court held that members of the Governor's staff could not be compelled to testify concerning the involvement of the Governor's office and another agency, the Pennsylvania Insurance Department, relating to certain regulatory matters. *Ario*, 934 A.2d at 1293.

69. Here, as in *Ario*, Petitioners seek testimony concerning the involvement of certain entities in the "development" of the 2011 Plan.

70. In other words, this Deposition Topic seeks to discover information relating to "the decision making process" that was used "before action was taken regarding [the 2011 Plan]," which is clearly protected by the deliberative process and executive privileges. *See id.* at 1293.

- (4). *The considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.*

71. Topic 4 corresponds with Petitioners' Document Request (b), and thus, for the reasons set forth *supra* in Part II.C.1(b), which is incorporated herein by reference, this Court cannot compel Governor Corbett to be deposed on this topic.

- (5). *How each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.*

72. Topic 5 corresponds with Petitioners' Document Request (c), and thus, for the reasons set forth *supra* in Part II.C.1(c), which is incorporated herein by reference, this Court cannot compel Governor Corbett to be deposed on this topic.

- (6). *How each consideration or criterion or affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.*

73. Topic 6 corresponds with Petitioners' Document Request (d), and thus, for the reasons set forth *supra* in Part II.C.1(d), which is incorporated herein by reference, this Court cannot compel Governor Corbett to be deposed on this topic.

(7). *The goals and expected election outcomes of the 2011 Plan.*

74. Finally, Governor Corbett cannot be compelled to testify concerning his goals and/or expected outcomes of the 2011 Plan because any such testimony would clearly invade the confidentiality attached to the Governor's "decisional and consultative responsibilities." *Hayes*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8.

75. Moreover, any testimony concerning the "goals and expected outcomes" of any member of the Legislature would be protected pursuant to the Speech and Debate Clause of the Pennsylvania Constitution. (*See* Dkt. 110-1, at p. 13.)

### **III. CONCLUSION**

For all the foregoing reasons, Governor Corbett respectfully requests that this Court grant the instant Motion to Quash, and quash the subpoena served upon him by Petitioners. Any and all documents responsive to the Petitioners' Document Requests are plainly protected from disclosure by the executive, deliberative process, and attorney-client privileges, as well as the Speech and Debate Clause of the Pennsylvania Constitution. Moreover, Governor Corbett cannot be compelled to testify on the Petitioners' corresponding Deposition Topics because any testimony on these Topics would implicate these same privileges and thus are protected from disclosure. Accordingly, this Court should quash the instant subpoena in the interest of promoting the "frank exchange of ideas and

opinions” and “safeguard free expression in giving intragovernmental advice.” *McGowan*, 103 A.3d at 381; *Haber*, 2004 U.S. Dist. LEXIS 7961, at \*8-9; *see also Van Hine*, 856 A.2d at 208 (explaining that the executive privilege and deliberative process privilege are designed to prevent disclosure of documents or communications because disclosure “would seriously hamper the function of government.”).

Respectfully submitted,

**ELLIOTT GREENLEAF, P.C.**

Dated: November 27, 2017

/s/ Jarad W. Handelman  
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Corbett*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

---

LEAGUE OF WOMEN VOTERS OF  
PENNSYLVANIA, et al.,

*Petitioners,*

v.

COMMONWEALTH OF  
PENNSYLVANIA, et al.,

*Respondents.*

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: No. 261 MD 2017  
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**CERTIFICATE OF SERVICE**

I, Jarad W. Handelman, Esquire, hereby certify that on November 27, 2017,  
I caused a true and correct copy of the foregoing document to be delivered via first  
class mail, upon the person(s) below:

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Date: November 27, 2017

By: /s/ Jarad W. Handelman

JARAD W. HANDELMAN

# EXHIBIT A

No. 261 MD 20 17

League of Women Voters of Pennsylvania, et al.

COMMONWEALTH COURT  
OF PENNSYLVANIA

VS.

The Commonwealth of Pennsylvania, et al.

TO Thomas W. Corbett

1. You are ordered by the Court to come to 535 Smithfield Street, Pittsburgh  
\_\_\_\_\_ at \_\_\_\_\_, Pennsylvania on December 1, 2017 at 9 A.M.

to testify on behalf of \_\_\_\_\_ at a deposition on the topics attached hereto \_\_\_\_\_ in the above case, and to remain until excused.

2. And to bring with you the following: all of the documents described in the attached request for production

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

Issued by: Mary M. McKenzie, 1709 Benjamin Franklin Parkway, 2nd Floor, Philadelphia, PA 19103 (215) 627-7100; Attorney ID No. 47434  
(State attorney's name, address, telephone number and identification number)

BY THE COURT,

Date: July 13, 2017

By /s/ \_\_\_\_\_  
Chief Clerk

Seal of the Court

261 MD

261 MD  
No. \_\_\_\_\_, 20<sup>17</sup>

# Court Subpoena

League of Women Voters of Pennsylvania, et al..

✓

The Commonwealth of Pennsylvania, et al.

(name of person served)

DEIVED

On the \_\_\_\_\_ day of \_\_\_\_\_

COMMONWEALTH OF PENNSYLVANIA, ss:

I verify that the statements in this return of service are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904 relating the unsworn falsification to authorities.

Date \_\_\_\_\_

(ခဏ္ဍာရ်)

## DEFINITIONS

1. "2011 Plan" means the 2011 Congressional Redistricting Plan for Pennsylvania that was signed into law in 2011 by the Governor of Pennsylvania, any preliminary or draft plans that preceded the 2011 Congressional Redistricting Plan, and any proposal, strategies or plans to redraw Pennsylvania's congressional districts following the 2010 census.

2. "Document" is used in its broadest sense and is intended to be comprehensive and to include, without limitation, a record, in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) it is maintained, and includes originals and each and every non-identical copy of all writings of every kind, including drafts, legal pleadings, brochures, circulars, advertisements, letters, internal memoranda, minutes, notes or records of meetings, reports, comments, affidavits, statements, summaries, messages, worksheets, notes, correspondence, diaries, calendars, appointment books, registers, travel records, tables, calculations, books of account, budgets, bookkeeping or accounting records, telephone records, tables, stenographic notes, financial data, checks, receipts, financial statements, annual reports, accountants' work papers, analyses, forecasts, statistical or other projections, newspaper articles, press releases, publications, tabulations, graphs, charts, maps, public records, telegrams, books, facsimiles, agreements, opinions or reports of experts, records or transcripts of conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means and all other forms or types of written or printed matter or tangible things on which any words, phrases, or numbers are affixed, however produced or reproduced and wherever located, which are in Your possession, custody or control. The term "Document" includes electronical mail and attachments, data processing or computer printouts, tapes, documents contained on floppy disks, hard disks, computer hard drives, CDs, and DVDs, or retrieval

listings, together with programs and program documentation necessary to utilize or retrieve such information, and all other mechanical or electronic means of storing or recording information, as well as tape, film or cassette sound or visual recordings and reproduction for film impressions of any of the aforementioned writings.

3. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons, by any means or mode of conveying information including, but not limited to, telephone, television, or telegraph or electronic mail.

4. A request seeking production of communications with an individual or entity includes communications with the individual or entity's agents, employees, consultants, or representatives.

#### INSTRUCTIONS

1. This Request applies to all Documents within Your possession, custody or control, Your entities, affiliates, predecessors-in-interest, successors-in-interest, and all of Your past and present attorneys, agents, representatives, accountants, consultants, or employees.

2. Any Document that responds, in whole or in part, to any portion or clause of this Request should be produced.

3. This Request calls for the separate production of any copy or copies of a Document that is no longer identical by reason of notation or modification of any kind whatsoever.

4. If there are no Documents responsive to the Request, You shall so state in writing.

5. All objections should be set forth with specificity and should include a brief statement of the grounds for the objection.

6. For each Document withheld from production on the basis of a claim of any privilege or discovery immunity, identify:

- (a) the Date;
- (b) the author(s);
- (c) the recipient(s);
- (d) the type of Document;
- (e) the subject matter of the Document;
- (f) the number of pages;
- (g) the nature of the asserted privilege; and
- (h) the basis of the claim of the privilege asserted.

7. If You know, or have reason to believe, that any Document would have been responsive to the Request herein but for its loss or destruction, provide the following:

- (a) A description of the Document sufficiently particular to identify it for purposes of a court order, including, but not limited to, the type of Document, the Date, the author, the addressee or addressees, the number of pages and the subject matter;
- (b) A list of all natural persons who participated in the preparation of the Document;
- (c) A list of all natural persons to whom the Document was circulated or its contents communicated, or who were ever custodians of the Document;
- (d) State whether each Document was destroyed pursuant to a policy regarding document retention and, if so, state the terms of that policy and identify each Document or natural person who has knowledge concerning Your response or upon which or whom You relied in whole or in part in making Your response; and
- (e) If any Document was lost or destroyed other than pursuant to a policy regarding document retention, state the circumstances under which each Document was lost or destroyed and identify each Document or natural person who has knowledge of those circumstances.

8. The Request shall be read to be inclusive rather than exclusive. The connectives "and" and "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of a Request all responses that might otherwise be construed as outside its scope.



"Including" shall be construed to mean "including without limitation." The word "any" shall be construed to mean "all" and *vice versa*. The singular shall include the plural and *vice versa*.

9. This Request is continuing in nature. You should supplement Your response and produce additional Documents if You obtain or become aware of further Documents responsive to this Request.

### REQUESTS

1. All documents referring or relating to the 2011 Plan, including, but not limited to:
  - a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.
  - b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.
  - c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.
  - d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.

e. All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority Project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan.

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

## **DEPOSITION TOPICS**

### **DEFINITION**

1. "2011 Plan" means the 2011 Congressional Redistricting Plan for Pennsylvania that was signed into law in 2011 by the Governor of Pennsylvania, any preliminary or draft plans that preceded the 2011 Congressional Redistricting Plan, and any proposal, strategies or plans to redraw Pennsylvania's congressional districts following the 2010 census.

2. "Communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two persons, by any means or mode of conveying information including, but not limited to, telephone, television, or telegraph or electronic mail.

## **DEPOSITION TOPICS**

1. Governor Corbett's involvement in the creation, passage, and signing into law of the 2011 Plan.

2. Communications involving Governor Corbett referring or relating to the 2011 Plan.

3. Involvement of the REDistricting Majority Project (REDMAP), the RNC, or any non-Pennsylvania organizations with development of the 2011 Plan.

4. The considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

5. How each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.

6. How each consideration or criterion or affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.

7. The goals and expected election out comes of the 2011 Plan.

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania,	:
Carmen Febo San Miguel, James Solomon,	:
John Greiner, John Capowski, Gretchen	:
Brandt, Thomas Rentschler, Mary Elizabeth	:
Lawn, Lisa Isaacs, Don Lancaster, Jordi	:
Comas, Robert Smith, William Marx,	:
Richard Mantell, Priscilla McNulty,	:
Thomas Ulrich, Robert McKinstry,	:
Mark Lichty, Lorraine Petrosky,	:
Petitioners	:
	:
v.	: No. 261 M.D. 2017
	:
The Commonwealth of Pennsylvania;	:
The Pennsylvania General Assembly;	:
Thomas W. Wolf, In His Capacity	:
As Governor of Pennsylvania;	:
Michael J. Stack III, In His Capacity As	:
Lieutenant Governor of Pennsylvania And	:
President of the Pennsylvania Senate;	:
Michael C. Turzai, In His Capacity As	:
Speaker of the Pennsylvania House of	:
Representatives; Joseph B. Scarnati III,	:
In His Capacity As Pennsylvania Senate	:
President Pro Tempore; Robert Torres,	:
In His Capacity As Acting Secretary of	:
the Commonwealth of Pennsylvania;	:
Jonathan M. Marks, In His Capacity	:
As Commissioner of the Bureau of	:
Commissions, Elections, and Legislation	:
of the Pennsylvania Department of State,	:
Respondents	:

### MEMORANDUM AND ORDER

Presently before the Court for disposition are various discovery matters, which raise, *inter alia*, the applicability of Article 2, Section 15 of the Pennsylvania

Constitution, also known as the Speech and Debate Clause. Respondents the Pennsylvania General Assembly, Speaker of Pennsylvania House of Representatives Michael C. Turzai, and President Pro Tempore of the Pennsylvania Senate Joseph B. Scarnati III (Legislative Respondents) contend that much, if not all, of the discovery that Petitioners seek in this matter is barred by the immunity afforded under the Speech and Debate Clause, which Legislative Respondents maintain is *absolute*. Petitioners, by contrast, contend that federal courts hearing gerrymandering challenges throughout the country have recognized only a *qualified* legislative privilege, allowing discovery of the type that Petitioners seek here. *See, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015). Petitioners also directed the Court to the Florida Supreme Court decision in *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013) (*LWV of Fl.*), which also recognized only a qualified legislative privilege in the context of a gerrymandering challenge.

Pennsylvania's Speech and Debate Clause provides, in relevant part: "The members of the General Assembly . . . for any speech or debate in either House . . . shall not be questioned in any other place." Pa. Const., Art. 2, § 15. The Pennsylvania Supreme Court has held that the scope of Pennsylvania's Speech and Debate Clause is indistinguishable from its counterpart in the United States Constitution. *Consumers Educ. and Prot. Ass'n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977). Following United States Supreme Court precedent, the Pennsylvania Supreme Court held that the Speech and Debate Clause must be construed "broadly in order to protect legislators from *judicial interference* with their legitimate legislative activities." *Id.* at 680-81 (emphasis added). Our Supreme Court has further explained the breadth of the protection as follows:

[T]he immunity of the legislators must be absolute as to their actions within the “legitimate legislative sphere.” To accomplish this we must not only insulate the legislator against the results of litigation brought against him for acts in the discharge of the responsibilities of his office, but also relieve him of the responsibility of defending against such claims.

*Consumer Party of Pa. v. Cmwltth.*, 507 A.2d 323, 331 (Pa. 1986), *abrogated on other grounds by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Cmwltth.*, 877 A.2d 383 (Pa. 2005). “It is undisputed that legislative immunity [under the Speech and Debate Clause] precludes inquiry into the motives or purposes of a legislative act.” *Government of the Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985).

Not all activities of state legislators, however, are protected. To be protected, the activity in question must fall within “the sphere of legitimate legislative activity.” *Id.*; *see Gravel v. United States*, 408 U.S. 606, 624-25 (1972); *Firetree Ltd. v. Fairchild*, 920 A.2d 913, 920 (Pa. Cmwltth. 2007), *appeal denied*, 946 A.2d 689 (Pa. 2008); *but see United States v. Brewster*, 408 U.S. 501, 512 (1972) (noting that legislators often engage in activities—e.g., constituent service and newsletters—that are not purely legislative and thus not protected by Speech and Debate Clause of United States Constitution). The protections of the Speech and Debate Clause are not, however, confined to the walls of the Pennsylvania House or Pennsylvania Senate Chambers. They also extend to “fact-finding, information gathering, and investigative activities,” which “are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.” *Government of the Virgin Islands*, 775 F.2d at 521. It is also now well-settled that the protections of the Speech and Debate Clause extend to legislative staff. *See Gravel*, 408 U.S. at 616-22.

Underlying the speech and debate privilege is the preservation of the structure in our state constitution of separate but equal branches of government: “Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive *or Judiciary* into the affairs of a coequal branch, and second, the desire to protect legislative independence.” *United States v. Gillock*, 445 U.S. 360, 369 (1980) (emphasis added). “In our system, ‘the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.’” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (quoting *United States v. Johnson*, 383 U.S. 169 (1966)). As a coequal branch of the Pennsylvania General Assembly, Pennsylvania state courts are so constrained. Federal courts, however, are not. Federal courts are not compelled to honor state constitutional protections afforded to state legislatures. This explains why the federal gerrymandering cases on which Petitioners rely are neither dispositive nor persuasive. The opinions in those cases invariably address only whether state legislators are entitled to “state legislative immunity,” a *qualified* privilege sourced not in constitutional law, but in federal common law.

In *Bethune-Hill*, an opinion Petitioners rely upon, the plaintiffs initiated a federal lawsuit, challenging certain state house districts as unlawful racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution. The plaintiffs served discovery on the Virginia House of Delegates (Va. House), seeking both internal and external communications relating to the redistricting process. The Va. House asserted “legislative privilege” to shield the production of certain documents. In addressing the claim of privilege, the District Court distinguished legislative immunity and privilege for *federal* legislators, which



is derived from the Speech and Debate Clause of the United States Constitution, from state legislative immunity recognized by federal courts:

[F]ederal legislators are entitled to *an absolute* legislative immunity grounded in the Constitution for any civil or criminal action based in substance or evidence upon acts performed within the “sphere of legitimate legislative activity.” This immunity is further safeguarded by an absolute legislative privilege preventing compelled testimony or documentary disclosure regarding legislative activities in support of such claims.

...

State legislative immunity differs, however, from federal legislative immunity in its source of authority, purpose, and degree of protection. Unlike federal legislative immunity, which is grounded in constitutional law, *state legislative immunity in federal court* is governed by federal common law. Moreover, the principles animating immunity for state legislators under common law—while significant—are distinguishable from these principles underlying the constitutional immunity afforded federal legislators.

*Bethune-Hill*, 114 F. Supp. 3d at 332-33 (citation omitted) (emphasis added). The District Court specifically noted that the “separation of powers” concerns implicated where a federal court interferes in the affairs of Congress are of greater weight and importance than any concern about federal interference in a state legislative process. *Id.* at 333. Moreover, the District Court cited to the Supremacy Clause of the United States Constitution as empowering the federal courts to enforce federal law over any competing state protections. *Id.* Under federal common law, state legislative privilege and state legislative immunity is “qualified based on the nature of the claim at issue.” *Id.* at 334.

Legislative Respondents clearly are not invoking qualified legislative privilege and immunity under federal common law; rather, they are invoking

absolute legislative privilege and immunity based on the Speech and Debate Clause of the Pennsylvania Constitution. This Court is as duty bound to honor this constitutional provision in a lawsuit involving the actions of state legislators as is a federal court bound to honor the identical absolute legislative privilege and immunity sourced in the United States Constitution in a lawsuit involving the actions of federal legislators.<sup>1</sup>

Relying, then, on relevant state and federal precedent in this area, the Court concludes that Legislative Respondents in this case enjoy absolute legislative immunity under Article 2, Section 15 of the Pennsylvania Constitution. This immunity extends to activities within the “sphere of legitimate legislative activity.” In their Petition for Review, Petitioners challenge the constitutionality of the 2011 reapportionment of Pennsylvania’s congressional seats and the resulting congressional district maps. It is undisputed that Pennsylvania drew the 2011 congressional map through a legislative process, which resulted in the Congressional Redistricting Act of 2011, Act of December 22, 2011, P.L. 599, 25 P.S. §§ 3596.101-.1510 (Act 131 of 2011). Accordingly, the consideration and passage of Act 131 of 2011 was unquestionably a legitimate legislative activity. It is also beyond question that the activities of state legislators and their staff that fall

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<sup>1</sup> Petitioners’ reliance on *LWV of FL* is similarly misplaced. Although that case, like this one, involved a state court challenge to a congressional redistricting plan and the assertion of a legislative privilege in response to discovery requests, different substantive law dictated the outcome in that case. Specifically, as the Florida Supreme Court noted in its opinion, the Florida Constitution does not include a speech and debate clause. *LWV of FL*, 132 So. 3d at 143. In the absence of an express legislative privilege, the Florida Supreme Court, recognizing separation of powers concerns, opted to adopt a common law qualified legislative privilege, similar to that recognized by federal courts. See *Bethune-Hill*. Additionally, the state supreme courts in Virginia and Rhode Island, states that have a speech and debate clause in their state constitutions, have held that the speech and debate clause precluded access to legislative materials regarding redistricting. See *Edwards v. Vesilind*, 790 S.E. 2d 469 (Va. 2016); *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984).

within the sphere of this legitimate legislative activity are protected under the Speech and Debate Clause of the Pennsylvania Constitution. Accordingly, this Court lacks the authority to compel testimony or the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of Act 131 of 2011.

AND NOW, this 22<sup>nd</sup> day of November, 2017, with the foregoing legal principles in mind, the Court now considers the current discovery disputes relating to the 2011 Plan<sup>2</sup> as raised in (1) the objections of Legislative Respondents to Petitioners' notice of intent to serve subpoenas pursuant to Pa. R.C.P. No. 4009.21, filed with this Court on August 9, 2017, (2) Legislative Respondents' objections to Petitioners' notice of intent to serve a subpoena pursuant to Pa. R.C.P. No. 4009.21 on Thomas W. Corbett, former Governor of the Commonwealth of Pennsylvania (Governor Corbett), filed with this Court on August 28, 2017, (3) Petitioners' motion to strike objections to their notice of intent to serve subpoenas, filed with this Court on September 12, 2017, (4) Legislative Respondents' and the General Assembly's response to Petitioners' motion to strike objections to their notice of intent to serve subpoenas filed with this Court on September 26, 2017, and (5) assertions of privilege by Legislative Respondents with respect to Petitioners' first set of interrogatories and document requests, and makes the following rulings:

1. **Legislative Subpoenas:** Legislative Respondents object to the 11 subpoenas noticed by Petitioners and directed to the following individuals

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<sup>2</sup> For purposes of the subpoenas, Petitioners define the "2011 Plan" as

the 2011 Congressional Redistricting Plan for Pennsylvania that was signed into law in 2011 by the Governor of Pennsylvania, any preliminary or draft plans that preceded the 2011 Congressional Redistricting Plan, and any proposal, strategies or plans to redraw Pennsylvania's congressional districts following the 2010 Census.

whom Legislative Respondents describe as current and/or former employees, legislative aides, consultants, experts, and agents of Legislative Respondents: Tony Aliano, Erik Arneson, Heather Cevasco, Krysjan Callahan, Drew Crompton, Glenn Grell, John Memmi, William Schaller, Dave Thomas, Gail Reinard, and David W. Woods (collectively referred to as the Legislative Subpoenas). The Legislative Subpoenas are hereby QUASHED, as the Court lacks the authority under the Speech and Debate Clause of the Pennsylvania Constitution to compel the production of the documents sought therein. In light of this ruling, the Court need not consider the other bases for objection raised by Legislative Respondents.

2. **Third-Party Subpoenas:** Legislative Respondents object to the subpoenas noticed by Petitioners and directed to the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), and the State Government Leadership Foundation (SGLF) (collectively, Entities), and to Adam Kincaid and Thomas B. Hofeller (Individuals), whom Legislative Respondents believe are or have been associated with the RNC or the NRCC (collectively, the Third-Party Subpoenas).<sup>3</sup> The subpoenas directed to the Entities seek:

1. All documents referring or relating to the 2011 Plan, including, but not limited to:

- a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (*e.g.*, paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.

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<sup>3</sup> In addition to objecting based on the Speech and Debate Clause, Legislative Respondents also raised objections on the bases of a privilege under the First Amendment, attorney-client privilege, attorney work product doctrine, the deliberative process privilege, and the executive privilege, and that the requests are overly broad and not relevant to Petitioners' claims.

b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter[']s or area's likelihood of supporting Republican or Democratic candidates, and any others.

c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.

d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.

e. All communications since January 1, 2009, referring or relating to the 2011 Plan, including all communications to, from, or between the following organizations or individuals referring or relating to the 2011 Plan: [the RNC, the RSLC, REDMAP, the SGLF, Governor Corbett, former State Senators Pileggi and Brubaker, State Senators Scarnati, McIlhinney, Corman, Folmer, White, State Representatives Metcalfe, Grove, Cox, Dunbar, Evankovich, Gabler, Grell, Hahn, Kauffman, Knowles, Krieger, Mustio, Roac, Schlegel-Culver, Stern, any other member of the General Assembly, Thomas B. Hofeller, David W. Woods, Erik Arneson, John Memmi, William Schaller, Drew Crompton, Dave Thomas, Krysjan Callahan, Tony Aliano, Glenn Grell, Gail Reinard, Heather Cevasco, and the Republican Party of Pennsylvania.]

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

2. All documents referring or relating to the planning, purpose, execution, and results of Project REDMAP from its inception through the date of service of this subpoena.
3. All communications and reports to donors or contributors to the [RSLC] or the [SGLF] that refer, reflect, or discuss the purpose of or the strategy behind the REDMAP project or which report or evaluate the success or effectiveness of the REDMAP project in bringing about the reapportionment of congressional districts following the 2010 Census.
4. All PowerPoint slides from any training on redistricting presented to members of the Pennsylvania General Assembly (or their agents, employees, consultants, or representatives) or to Pennsylvania Governor Thomas Corbett.

The requests set forth in paragraph 1 of the subpoenas directed to the Individuals seek all documents referring or relating to the 2011 Plan, including, but not limited to:

- a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.
- b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter['s] or area's likelihood of supporting Republican or Democratic candidates, and any others.
- c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.
- d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.

e. All communications since January 1, 2009, with any affiliate of the Republican Party, including, but not limited to, the [RNC, the NRCC, the RSLC, REDMAP, or the SGLF that refer or relate to the 2011 Plan.

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

Paragraph 1(g) of each of the Third-Party Subpoenas is hereby STRICKEN based on the Speech and Debate Clause of the Pennsylvania Constitution.

Paragraph 1(e) of the subpoenas directed at the Entities is hereby STRICKEN based on the Speech and Debate Clause of the Pennsylvania Constitution to the extent that it seeks communications with former State Senators Pileggi and Brubaker; State Senators Scarnati, McIlhinney, Corman, Folmer, and White; State Representatives Metcalfe, Grove, Cox, Dunbar, Evankovich, Gabler, Grell, Hahn, Kauffman, Knowles, Krieger, Mustio, Roae, Schlegel-Culver, Stern, any other member of the General Assembly; David W. Woods, Erik Arneson, John Memmi, William Schaller, Drew Crompton, Dave Thomas, Krysjan Callahan, Tony Aliano, Glenn Grell, Gail Reinard, and Heather Cevasco.

As to the remaining categories of documents sought in the Third-Party Subpoenas, it is not clear from the wording that any and all responsive documents from the Entities and Individuals would fall within the scope of the indemnity and privilege protected by the Speech and Debate Clause of the Pennsylvania Constitution. Accordingly, the Court will not strike the Third-Party Subpoenas outright. Nonetheless, recognizing the Court's inability to compel production of testimony or documents with respect to matters protected by the Speech and Debate

Clause of the Pennsylvania Constitution, the remaining categories of documents sought in the Third-Party Subpoenas SHALL BE INTERPETED as *excluding* those documents that reflect the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of Act 131 of 2011.

3. **Governor Corbett Subpoena:** Legislative Respondents object to Petitioners' notice of intent to serve a subpoena pursuant to Pa. R.C.P. No. 4009.21 on Governor Corbett, filed with this Court on August 28, 2017.<sup>4</sup> The subpoena seeks all documents referring or relating to the 2011 Plan, including, but not limited to:

- a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.
- b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.
- c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.
- d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan.
- e. All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the [RNC, the NRCC, the RSLC, the REDistricting

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<sup>4</sup> In addition to objecting based on the Speech and Debate Clause, Legislative Respondents also raised objections on the bases of a privilege under the First Amendment, attorney-client privilege, attorney work-product doctrine, deliberative process privilege and executive privilege, and that the requests are overly broad and not relevant to Petitioners' claims.



Majority Project (REDMAP), or the SGLF] that refer or relate to the 2011 Plan.

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

It not clear from the wording that any and all responsive documents from Governor Corbett would fall within the scope of the indemnity and privilege protected by the Speech and Debate Clause of the Pennsylvania Constitution. Accordingly, the Court will not strike the subpoena outright. Nonetheless, recognizing the Court's inability to compel production of testimony or documents with respect to matters protected by the Speech and Debate Clause of the Pennsylvania Constitution, the categories of documents sought from Governor Corbett SHALL BE INTERPETED as *excluding* those documents that reflect the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of Act 131 of 2011.

4. Nothing in this Memorandum and Order precludes Legislative Respondents from contesting the admissibility of any document secured from a third party on the basis of legislative immunity and privilege under the Speech and Debate Clause of the Pennsylvania Constitution. To the extent that the categories set forth in the subpoenas may be overbroad or not likely to lead to relevant evidence, the parties and recipients of the subpoenas shall work together to refine the categories in an appropriate and expeditious manner. Nothing in this Memorandum and Order precludes the recipients from interposing their own timely objections following service. Finally, Legislative Respondents cannot raise the Governor's deliberate process privilege or the executive privilege.

**5. Attorney-Client Privilege and Attorney Work Product Doctrine:**

Legislative Respondents cannot raise objections based on attorney-client privilege or attorney work product doctrine on behalf of entities or persons to whom a subpoena will be directed.

**6. Privilege Log:** Every responsive document withheld pursuant to any asserted privilege or doctrine must be identified on a privilege log served with the response to the subpoena.

7. Petitioners are DIRECTED to serve a copy of this Order with any subpoenas served pursuant to the Order.

**8. Petitioners' First Set of Requests for Production and First Set of Interrogatories:** Petitioners have served on all Respondents a First Set of Requests for Production and First Set of Interrogatories, to which Legislative Respondents interposed objections and claimed privileges, including the protections of the Speech and Debate Clause. The Court, having reviewed the document requests and interrogatories, concludes, based on the above legal analysis, that the Court lacks the authority to compel Legislative Respondents to produce documents or provide information responsive to the interrogatories, as all topics set forth therein fall within the sphere of legitimate legislative activity under the Speech and Debate Clause of the Pennsylvania Constitution. It is, therefore, unnecessary for the Court to address the other objection and privileges raised by the Legislative Respondents.

  
P. KEVIN BROBSON, Judge

Certified from the Record

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and Order Exit