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 Scarnati III*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania,

et al.,

Petitioners,

v.

The Commonwealth of Pennsylvania,

et al.,

Respondents.

)
)
)
)
) Civ. No. 261 MD 2017

**LEGISLATIVE RESPONDENTS MEMORANDUM OF LAW IN
OPPOSITION TO PETITIONERS' APPLICATION TO EXCLUDE
PORTIONS OF THE EXPERT REPORT OF PROFESSOR GIMPEL AND
TO COMPEL PRODUCTION OF UNDERLYING INFORMATION
PREVIOUSLY WITHHELD ON PRIVILEGE GROUNDS**

Respondents Michael C. Turzai and Joseph B. Scarnati III (collectively, “Legislative Respondents”) file this Memorandum of Law in Opposition to Petitioners’ Application to Exclude Portions of the Expert Report of Dr. James G. Gimpel, Ph.D, and to Compel Production of Underlying Information Previously Withheld on Privilege Grounds (the “Application”).

INTRODUCTION

Petitioners’ Application rests on the mistaken notion that Professor Gimpel relies upon data for which Legislative Respondents are claiming legislative privilege. Petitioners further complain that Legislative Respondents “have not provided the data underlying these statistics.” Both contentions are incorrect.

First, Petitioners’ complaint regarding the data not being provided is premature. Within hours after Petitioners filed the Application, Legislative Respondents, through counsel, provided the underlying data. Indeed, this data was promised in an email communication between counsel on December 5, 2017 at 11:23 p.m and it was submitted to Petitioners on the following day.

Second, contrary to Petitioners’ characterization, the data at issue is not information for which Legislative Respondents are claiming legislative privilege.

Rather, it was prepared by a non-testifying expert who was retained after this action commenced. As such, there is no merit to Petitioners’ “sword and shield” argument, namely, that Legislative Respondents are attempting to gain an unfair advantage by relying upon evidence they are withholding on legislative privilege grounds.

Petitioners’ haste in rushing to file this unnecessary Application is underscored by their failure to articulate any prejudice from the production of this data a mere two days after Professor Gimpel’s report was served. Petitioners themselves are continuing to provide corrections due to oversights in their own expert reports—most recently, the submitted correction to the report of Dr. Christopher Warshaw. Given the expedited discovery and pretrial schedule in this case, it should not be surprising that both sides have needed to make corrections.

In sum, Petitioners’ Application should be denied because: (a) Pennsylvania law permits Professor Gimpel to rely upon data from a non-testifying expert; (b) Petitioners are now in possession of the data at issue; (c) the data is not subject to the legislative privilege; and (d) Petitioners have suffered no prejudice.

I. BACKGROUND

Petitioners served their expert reports on November 27, 2017. Legislative Respondents served their expert reports, including Professor Gimpel’s report, one week later. Despite the short timeframe, Professor Gimpel’s report is 50 pages in

length, and contains several tables of data.

The report includes data about districts in which counties and municipalities were split. Professor Gimpel's expert report mistakenly states that he received the data underlying these charts from an employee of the General Assembly when it was in fact received from a consulting GIS expert retained by Senator Scarnati's counsel. On December 5, 2017, counsel for Petitioners requested the data. Upon receiving this request, Legislative Respondents realized the citation indicating that the data was received from an employee of the General Assembly was inaccurate. Later that night, counsel for Legislative Respondents advised Petitioners:

You have asked about Professor Gimpel's source of data for his splits table in his expert report. This data came from a non-testifying expert in GIS retained by counsel to assist where necessary with GIS tasks who used the shapefile from the legislative reapportionment website and the underlying geo[]graphy data from US Census. We will be sending you hopefully tomorrow morning the summary table, and the backup tables that identify each split in the summary table.

As you are all well aware, I am in trial in *Agre*, and am doing my best to provide this information as soon as possible.

We will ask Professor Gimpel to submit an errata identifying the source of the data.

A true and correct copy of the December 4-6, 2017 e-mail exchange between counsel for Legislative Respondents and counsel for Petitioners, excluding attachments, is attached hereto as **Exhibit A**.

The following night, Legislative Respondents' counsel submitted the following to Petitioners' counsel, which attached the backup data for the data regarding municipality and county splits:

Attached for your review is the material that was provided by the non-testifying GIS consultant retained by Blank Rome, and consulted by me. I, in turn, sent that material to Professor Gimpel. The material originated with shapefiles from the Legislative Reapportionment website (which is publicly available as you are aware). The website is here: <http://www.redistricting.state.pa.us/>. There is a link to shapefiles right off their homepage.

The attached PDFs were provided to Professor Gimpel. He then verified this data, and included the summary chart in his report. Under Pennsylvania procedures, there is not requirement that the identity of the non-testifying expert who assisted counsel be disclosed.

This work was conducted in November of 2017 by a person retained by counsel in September of 2017. This consultant was not an employee of the General Assembly nor of any arm of the Commonwealth's government when this analysis was conducted and then provided by counsel to Professor Gimpel.

I hope this resolves all of your questions.

Id. Respondents' email answered all of Petitioners' questions (except for the identity of the consultant, which is not subject to disclosure), and provided all of the underlying data.

II. ARGUMENT

A. The Data Set Should Not Be Excluded Because Professor Gimpel Relied On Data Received From A Consulting Expert

Petitioners argue that the data regarding splits should be excluded because Dr. Gimpel received the data from a consulting expert and did not compile it himself. Petitioners are wrong. This Court has recognized that an “expert may incorporate a non-testifying expert’s findings into his own express opinion, however, he is not permitted to merely restate another’s conclusions without espousing his own expertise and judgment.” *Harris v. Phila. Facilities Mgmt. Corp.*, 106 A.3d 183, 192 (Pa. Commw. Ct. 2014) (citations and quotations omitted); *see also Commonwealth v. Towles*, 106 A.3d 591, 605 (Pa. 2014) (“An expert opinion may be based on inadmissible facts or facts not in evidence, including other expert opinions and hearsay statements, as long as such facts are of a type reasonably relied on by experts in that profession.”).

Here, as the excerpt from Petitioners’ own Application demonstrates, Professor Gimpel did not simply restate the non-testifying expert’s conclusions. Rather, he relied upon the factual data supplied by that expert—data which has been disclosed to Petitioners—in reaching *his own opinion* that the reduction of county and municipality splits in the 2011 Plan was not an easy achievement given factors such as Pennsylvania’s population settlement and the demand for equal population districts:

Analysis conducted by GIS experts in the state legislature indicate that the number of total splits in counties dropped from 42 to 39, and, more remarkably, the number of total splits in municipalities dropped from 97 to 73 (see Table 3). Not only were the total number of splits reduced, but the number of counties and municipalities with any split at all was reduced, from 29 to 28 for counties and from 94 to 68 for municipalities. These are not easy achievements under the constraints posed by Pennsylvania's underlying population settlement, the demand for equal population districts, and the other goals of the redistricting process.

Application at 2 (quoting Gimpel Report at 28). As such, Professor Gimpel's reliance upon information derived from a non-testifying expert is entirely appropriate in this context.

B. The Data Should Not Be Excluded Under A Sword And Shield Analysis

Petitioners also argue that the data compilation should be excluded based on the incorrect assertion that Professor Gimpel received the data from an employee of the General Assembly. Specifically, Petitioners contend that the data compilation should be excluded under a sword and shield argument because Respondents have withheld production of documents from the General Assembly under the legislative privilege. Petitioners are once again wrong.

As detailed above, although Professor Gimpel mistakenly stated in his expert report that the data compilation was received from an employee of the General Assembly, the data was, in fact, received from a consulting GIS expert who was

retained by Senator Scarnati’s counsel after this case was filed. The consulting expert was not an employee of the General Assembly when he compiled the data, and, when compiling the data, the consulting expert did not utilize any information or data from any employee of the General Assembly. Instead, the data compilation was compiled by the consulting expert utilizing publicly available data that has always been available to Petitioners and their experts. The specific publicly available data utilized by the consulting expert has now been submitted to Plaintiffs’ expert. Thus, since the data compilation was not received from, or based on any information from, the General Assembly, the sword and shield analysis is not applicable, and the evidence should not be excluded.¹

C. Petitioners Fail To Articulate Any Prejudice

It should not escape the Court’s notice that, glaringly absent from Petitioners’ application is any allegation of prejudice. Indeed, with the oversight cured and the data provided within 48 hours of the initial service of Professor Gimpel’s report—and with Petitioners themselves making similar corrections to their own expert reports—Petitioners should not be heard to complain about this oversight. Indeed, Petitioners’ belief that “there are errors in Professor Gimpel’s

¹ Petitioners also ask the Court to require Legislative Respondents to identify any additional data submitted from their consulting expert to their testifying experts. Other than the data compilation described herein, no data or analyses from Legislative Respondents consulting expert have been utilized or relied upon by any of Legislative Respondents’ testifying experts.

numbers” because they differ from the numbers used by Petitioners’ experts, is not grounds for exclusion, but rather is more appropriately a subject for cross-examination. Accordingly, Petitioners’ hastily filed application should be denied.

III. CONCLUSION

For all of the foregoing reasons, Legislative Respondents’ respectfully request that Petitioners’ application be denied.

Dated: December 7, 2017

Respectfully Submitted,

BLANK ROME, LLP

By: /s/ Brian S. Paszamant
Brian S. Paszamant, Esquire
Jason A. Snyderman, Esquire
John P. Wixted, Esquire
One Logan Square
130 North 18th Street
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Counsel for Joseph B. Scarnati III

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By: /s/ Jason Torchinsky
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45 North Hill Drive, Suite 100
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*Admitted Pro Hac Vice Counsel for
Michael C. Turzai & Joseph B. Scarnati III*

CIPRIANI & WERNER, P.C.

By: /s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Carolyn Batz McGee
John E. Hall, Esquire
650 Washington Road, Suite 700
Pittsburgh, PA 15228

Counsel for Michael C. Turzai

EXHIBIT “A”

Wixted, John P.

From: Jason Torchinsky <jtorchinsky@hvjlaw.com>
Sent: Wednesday, December 6, 2017 11:18 PM
To: Jacobson, Daniel; Tucker, Robert J.
Cc: Gersch, David P.; Jones, Stanton; Lewis, Patrick T.; Paszamant, Brian
Subject: Re: LWV of Pa. v. Com. -- witnesses
Attachments: Split Counties in PA Congressional Plans[1][1][1].pdf; Split Municipalities in PA Congressional Plans[1][1].pdf; Split Political Subdivisions in PA Congressional Plans[1][1].pdf; Split Precincts in PA Congressional Plans[1][1].pdf; Split Wards in PA Congressional Plans[2][1].pdf

All,

My apologies for the delay, but I was in court in Agre from before 9am this morning through nearly 6pm this evening, and have been working on matters related to that case since then. I will likely be in court in Agre again most of the day tomorrow.

Attached for your review is the material that was provided by the non-testifying GIS consultant retained by Blank Rome, and consulted by me. I, in turn, sent that material to Professor Gimpel. The material originated with shapefiles from the Legislative Reapportionment website (which is publicly available as you are aware). The website is here: <http://www.redistricting.state.pa.us/> There is a link to shapefiles right off their homepage.

The attached PDFs were provided to Professor Gimpel. He then verified this data, and included the summary chart in his report. Under Pennsylvania procedures, there is no requirement that the identity of the non-testifying expert who assisted counsel be disclosed.

This work was conducted in November of 2017 by a person retained by counsel in September of 2017. This consultant was not an employee of the General Assembly nor of any arm of the Commonwealth's government when this analysis was conducted and then provided by counsel to Professor Gimpel.

I hope this resolves all of your questions.

Thanks,
Jason

From: "Jacobson, Daniel" <Daniel.Jacobson@apks.com>
Date: Tuesday, December 5, 2017 at 11:48 PM
To: Jason Torchinsky <jtorchinsky@hvjt.law>, "Tucker, Robert J." <rtucker@bakerlaw.com>
Cc: "Gersch, David P." <David.Gersch@apks.com>, "Jones, Stanton" <Stanton.Jones@apks.com>, "Lewis, Patrick T." <plewis@bakerlaw.com>, Brian Paszamant <Paszamant@BlankRome.com>
Subject: RE: LWV of Pa. v. Com. -- witnesses

Jason,

Your email raises a number of troubling questions. Please provide the following information:

- The name of the person(s) who conducted this analysis
- The person's current employer
- When this work was conducted
- When this person was retained as an expert by you
- Was this person employed in any capacity by the General Assembly at the time they conducted the analysis (or now)
- Who paid for this work at the time it was conducted
- Whether Dr. Gimpel had the data underlying these portions of the report at the time he submitted his report

Please provide answers to all of these questions -- along with all of the data -- by 930am tomorrow, otherwise we will be forced to take appropriate action.

Daniel Jacobson
Associate

Arnold & Porter Kaye Scholer LLP

601 Massachusetts Ave., NW | Washington, DC 20001-3743

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daniel.jacobson@apks.com | www.apks.com

From: Jason Torchinsky [mailto:jtorchinsky@hvjt.law]
Sent: Tuesday, December 05, 2017 11:23 PM
To: Tucker, Robert J.; Jacobson, Daniel
Cc: Gersch, David P.; Jones, Stanton; Lewis, Patrick T.; Paszamant, Brian (Paszamant@BlankRome.com)
Subject: Re: LWV of Pa. v. Com. -- witnesses

Counsel,

You have asked about Professor Gimpel's source of data for his splits table in his expert report. This data came from a non-testifying expert in GIS retained by counsel to assist where necessary with GIS tasks who used the shapefile from the legislative reapportionment website and the underlying geography data from US Census. We will be sending you hopefully tomorrow morning the summary table, and the backup tables that identify each split in the summary table.

As you are all well aware, I am in trial in *Agre*, and am doing my best to provide this information as soon as possible.

We will ask Professor Gimpel to submit an errata identifying the source of the data.

Thanks,
Jason

From: "Tucker, Robert J." <rtucker@bakerlaw.com>
Date: Tuesday, December 5, 2017 at 11:13 PM
To: "Jacobson, Daniel" <Daniel.Jacobson@apks.com>
Cc: "Gersch, David P." <David.Gersch@apks.com>, "Jones, Stanton" <Stanton.Jones@apks.com>, "Lewis, Patrick T." <plewis@bakerlaw.com>, Jason Torchinsky <jtorchinsky@hvjt.law>, Brian Paszamant <Paszamant@BlankRome.com>
Subject: RE: LWV of Pa. v. Com. -- witnesses

Daniel,

I'm copying some of my co-counsel who I think can answer your question.

Regards,

Robert Tucker

Partner

BakerHostetler

200 Civic Center Drive | Suite 1200
Columbus, OH 43215-4138
T +1.614.462.2680

rtucker@bakerlaw.com
bakerlaw.com



From: Jacobson, Daniel [<mailto:Daniel.Jacobson@apks.com>]

Sent: Tuesday, December 05, 2017 10:58 PM

To: Tucker, Robert J.

Cc: Gersch, David P.; Jones, Stanton; Lewis, Patrick T.

Subject: RE: LWV of Pa. v. Com. -- witnesses

Rob, please advise on the status of providing the data, in unaltered form, for Table 3 and text above it. Please also advise asap whether Dr. Gimpel had this data at the time he submitted his report.

Daniel Jacobson

Associate

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daniel.jacobson@apks.com | www.apks.com

From: Tucker, Robert J. [<mailto:rtucker@bakerlaw.com>]

Sent: Tuesday, December 05, 2017 4:43 PM

To: Jacobson, Daniel

Cc: Gersch, David P.; Jones, Stanton; Lewis, Patrick T.

Subject: RE: LWV of Pa. v. Com. -- witnesses

Daniel,

The data for tables 7 and 8 was provided. I'm working on the data for Table 3.

Robert Tucker

Partner

BakerHostetler

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Columbus, OH 43215-4138
T +1.614.462.2680

rtucker@bakerlaw.com
bakerlaw.com



From: Jacobson, Daniel [<mailto:Daniel.Jacobson@apks.com>]
Sent: Tuesday, December 5, 2017 3:01 PM
To: Tucker, Robert J. <rtucker@bakerlaw.com>
Cc: Gersch, David P. <David.Gersch@apks.com>; Jones, Stanton <Stanton.Jones@apks.com>; Lewis, Patrick T. <plewis@bakerlaw.com>
Subject: RE: LWV of Pa. v. Com. -- witnesses

Rob,

On p. 28 of Dr. Gimpel's report, in the second full paragraph and for Table 3, Dr. Gimpel says he relies on an "analysis conducted by GIS experts in the state legislature." We do not see this analysis in the data turned over last night. Please send this analysis to us in unaltered form as soon as possible, but no later than 6 pm this evening.

In addition, we do not see the data underlying Tables 7 and 8 in his report. Please indicate whether you provided this data, and if not, provide that by 6pm as well.

Best,
Dan

Daniel Jacobson
Associate

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601 Massachusetts Ave., NW | Washington, DC 20001-3743
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daniel.jacobson@apks.com | www.apks.com

From: Tucker, Robert J. [<mailto:rtucker@bakerlaw.com>]
Sent: Tuesday, December 05, 2017 12:10 AM
To: Jacobson, Daniel
Subject: FW: LWV of Pa. v. Com. -- witnesses

Can you confirm receipt of all three reports. One of them was 14MB and I got a few emails kicked back to me.

Robert Tucker
Partner

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From: Tucker, Robert J.
Sent: Monday, December 4, 2017 11:56 PM

To: Mimi McKenzie <mmckenzie@pubintl.org>; Ben Geffen <BGeffen@pubintl.org>; jbloom@stradley.com; kmyers@stradley.com; lbarrett@pa.gov; sconcannon@pa.gov; thowell@pa.gov; maronchick@hangley.com; mhangley@hangley.com; cdepalma@hangley.com; alattimore@hangley.com; alacey@cohenlaw.com; amitinger@cohenlaw.com; clevine@cohenlaw.com; lazarp@earthlink.net; cmcgee@c-wlaw.com; kgallagher@c-wlaw.com; jtorchinsky@hvjt.law; ssheehy@hvjt.law; Lewis, Patrick T. <plewis@bakerlaw.com>; paszamant@blankrome.com; snyderman@blankrome.com; jwixed@blankrome.com; msilberfarb@blankrome.com; morris-d@blankrome.com; yhan@blankrome.com; gorman@blankrome.com; mhaverstick@kleinbard.com; mseiberling@kleinbard.com; jvoss@kleinbard.com; ieverhart@pa.gov; kkotula@pa.gov; tgates@pa.gov; lawrence.tabas@obermayer.com; rebecca.warren@obermayer.com; timothy.ford@obermayer.com; mabbott@c-wlaw.com; 'Russell Giancola' <RGiancola@c-wlaw.com>

Cc: Michael Churchill <mchurchill@pubintl.org>; Gersch, David P. <David.Gersch@apks.com>; Jones, Stanton <Stanton.Jones@apks.com>; Theodore, Elisabeth <Elisabeth.Theodore@apks.com>; Jacobson, Daniel <Daniel.Jacobson@apks.com>

Subject: RE: LWV of Pa. v. Com. -- witnesses

Attached are the expert reports from Professors McCarty and Cho being served on behalf of Legislative Respondents in this matter. I've also attached their CVs. I should be sending along the final report on behalf of Professor Gimpel shortly.

Regards,

Robert Tucker
Partner

BakerHostetler

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Columbus, OH 43215-4138
T +1.614.462.2680

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bakerlaw.com



From: Tucker, Robert J.

Sent: Monday, December 4, 2017 9:24 AM

To: Mimi McKenzie <mmckenzie@pubintl.org>; Ben Geffen <BGeffen@pubintl.org>; jbloom@stradley.com; kmyers@stradley.com; lbarrett@pa.gov; sconcannon@pa.gov; thowell@pa.gov; maronchick@hangley.com; mhangley@hangley.com; cdepalma@hangley.com; alattimore@hangley.com; alacey@cohenlaw.com; amitinger@cohenlaw.com; clevine@cohenlaw.com; lazarp@earthlink.net; cmcgee@c-wlaw.com; kgallagher@c-wlaw.com; jtorchinsky@hvjt.law; ssheehy@hvjt.law; Lewis, Patrick T. <plewis@bakerlaw.com>; paszamant@blankrome.com; snyderman@blankrome.com; jwixed@blankrome.com; msilberfarb@blankrome.com; morris-d@blankrome.com; yhan@blankrome.com; gorman@blankrome.com; mhaverstick@kleinbard.com; mseiberling@kleinbard.com; jvoss@kleinbard.com; ieverhart@pa.gov; kkotula@pa.gov; tgates@pa.gov; lawrence.tabas@obermayer.com; rebecca.warren@obermayer.com; timothy.ford@obermayer.com; mabbott@c-wlaw.com

Cc: Michael Churchill <mchurchill@pubintl.org>; Gersch, David P. <David.Gersch@apks.com>; Jones, Stanton <Stanton.Jones@apks.com>; Theodore, Elisabeth <Elisabeth.Theodore@apks.com>; Jacobson, Daniel <Daniel.Jacobson@apks.com>

Subject: RE: LWV of Pa. v. Com. -- witnesses

Counsel,

Attached are Legislative Respondents' Initial Disclosures of Witnesses.

Robert Tucker
Partner

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bakerlaw.com



From: Mimi McKenzie [<mailto:mmckenzie@pubintl.org>]

Sent: Monday, December 4, 2017 9:11 AM

To: Ben Geffen <BGeffen@pubintl.org>; jbloom@stradley.com; kmyers@stradley.com; lbarrett@pa.gov; sconcannon@pa.gov; thowell@pa.gov; maronchick@hangley.com; mhangley@hangley.com; cdepalma@hangley.com; alattimore@hangley.com; alacey@cohenlaw.com; amitinger@cohenlaw.com; clevine@cohenlaw.com; lazarp@earthlink.net; cmcghee@c-wlaw.com; kgallagher@c-wlaw.com; jtorchinsky@hvjt.law; ssheehy@hvjt.law; Lewis, Patrick T. <plewis@bakerlaw.com>; Tucker, Robert J. <rtucker@bakerlaw.com>; paszaman@blankrome.com; snyderman@blankrome.com; jwixed@blankrome.com; msilberfarb@blankrome.com; morris-d@blankrome.com; yhan@blankrome.com; gorman@blankrome.com; mhaverstick@kleinbard.com; mseiberling@kleinbard.com; jvoss@kleinbard.com; ieverhart@pa.gov; kkotula@pa.gov; tgates@pa.gov; lawrence.tabas@obermayer.com; rebecca.warren@obermayer.com; timothy.ford@obermayer.com; mabbott@c-wlaw.com

Cc: Michael Churchill <mchurchill@pubintl.org>; Gersch, David P. <David.Gersch@apks.com>; Jones, Stanton <Stanton.Jones@apks.com>; Theodore, Elisabeth <Elisabeth.Theodore@apks.com>; Jacobson, Daniel <Daniel.Jacobson@apks.com>

Subject: FW: LWV of Pa. v. Com. -- witnesses

Counsel,

Petitioners intend to call one or more of the following witnesses live at trial:

Lisa Isaacs
Mary Elizabeth Lawn
Mark Lichty
William Marx
Thomas C. Rentschler
Robert Smith

Senator Andrew E. Dinniman
Representative Gregory Vitali

Jowei Chen, Ph.D.
John J. Kennedy, Ph.D.
Wesley Pegden, Ph.D.
Christopher Warshaw, Ph.D.

Petitioners intend to designate deposition testimony for any Petitioner who does not testify live. If schedule and time permit, Petitioners may elect to call some or all of the remaining Petitioners to give live trial testimony.

Mimi McKenzie

Legal Director
The Public Interest Law Center
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mmckenzie@pubintl.org

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<http://www.apks.com>

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