

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**


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 League of Women Voters of Pennsylvania, *et al.*,

*Petitioners,*

v.

The Commonwealth of Pennsylvania, *et al.*,
*Respondents.*


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**No. 261 MD 2017**

**PETITIONERS' SUPPLEMENTAL OPPOSITION TO  
APPLICATION OF LEGISLATIVE RESPONDENTS  
TO PRECLUDE INTRODUCTION OF PRIVILEGED  
EVIDENCE OTHERWISE OBTAINED IN THE *AGRE* CASE**

Pursuant to the Court's December 4 Order, Petitioners submit this supplemental opposition to the Application of Legislative Respondents to Preclude Introduction of Privileged Evidence Otherwise Obtained in the *Agre* Case.

Legislative Respondents seek to "bar" Petitioners from "filing," "disclosing," "introducing," or "otherwise using in this Court" documents or testimony that Legislative Respondents produced in the federal litigation. App. 1. Legislative Respondents provide no factual predicate for their motion. They do not identify any of the evidence they seek to bar. They say nothing about how or where it was disclosed or what its relevance is to this case.

Nothing in the law supports this extraordinary request. The information at issue constitutes direct evidence that Legislative Respondents acted with partisan

intent in drawing the 2011 congressional district map. Petitioners obtained this information properly, without any compulsion by this Court. And the information either has been or will soon be introduced at trial in the federal litigation—a point the federal court itself has recognized—and publicly reported by the media. In these circumstances, there is no legitimate basis to shield the Pennsylvania courts from such highly relevant, properly obtained, and publicly available information.

The Speech and Debate Clause, which is the sole basis for Legislative Respondents’ application, provides no authority to prevent Petitioners from filing or otherwise using in this Court information properly obtained outside of this Court’s processes. This Court held that the Clause precludes *the Court from compelling* Legislative Respondents to produce certain information. It says nothing about use of information that has been produced elsewhere.

Finally, nothing in the Application addresses whether any specific and otherwise admissible evidence should be admissible at trial. Legislative Respondents say that they will later move to exclude material from Dr. Chen’s testimony, and Petitioners will respond to any such motion at that time.

## **BACKGROUND**

On November 9, the federal court in *Agre v. Wolf* ordered Speaker Turzai and Senator Scarnati to produce the “facts and data considered in creating the 2011 Plan.” *Agre*, No. 2:17-cv-4392, ECF No. 76 ¶ 2 (E.D. Pa. Nov. 9, 2017). On

November 17, 2017, Speaker Turzai produced to the *Agre* plaintiffs a number of files responsive to the federal court's order. There was no protective order or any other restrictions in place that precluded the *Agre* plaintiffs from disseminating the files. The *Agre* plaintiffs lawfully provided the files to Petitioners.

One of the files, "Turzai - 01674.DBF," contains election results for every Voting Tabulation District (VTD) in Pennsylvania, for every statewide election, legislative election, and congressional election held in Pennsylvania during the 2004, 2006, 2008, and 2010 general elections. The files show that these elections results were then used to calculate ten different partisan indices that measured the partisan performance of each precinct in Pennsylvania for elections preceding the 2011 Plan. Three other files produced by Speaker Turzai contained the same partisan indices, but calculated at different levels of geography; namely, for each county, municipality, or census block.

## **ARGUMENT**

There is no legitimate legal basis to shield the Pennsylvania courts from information that Petitioners properly obtained without violating any privilege or confidentiality restriction, and that cuts directly to the heart of this case. To be clear, the information that Legislative Respondents seek to shield from this Court shows unambiguously that Legislative Respondents considered the partisan preferences of Pennsylvania communities in drawing the district lines for the 2011

Plan. This is direct evidence of partisan intent, one of the core elements of establishing a claim of unconstitutional partisan gerrymandering. This evidence has been produced in federal litigation without any protective order or confidentiality agreement. Indeed, as the federal court wrote in denying a protective order covering discovery in the case, this information “will be adduced during the public trial” in federal court. *Agre*, ECF No. 144 (E.D. Pa. Nov. 28, 2017). That trial began yesterday.

In addition, the media has already reported and will continue to report this information. According to one report, the *Agre* plaintiffs’ expert “testified that partisan data produced by Turzai under court order showed election returns and party registration down to the U.S. Census block level—equivalent to about one city block. Torchinsky noted several times that although partisan data may have been considered in the 2011 redistricting process, it’s still unclear what exact criteria was used to make the map in question.” *See, e.g.,* L. Lazarski, *Battle over Pa.’s congressional district map begins in federal court in gerrymandering case*, Dec. 4, 2017, <https://goo.gl/HpoLcb>.

Petitioners and Respondents all have the information at issue. The federal court has it. The public has it. In these circumstances, it would make no sense for the Pennsylvania courts to ignore extraordinarily relevant information that is in the public domain and that any Pennsylvania voter can read about. The notion that

only the Pennsylvania courts will not know of key evidence is untenable (and entirely unaddressed by Legislative Respondents).

As this Court's ruling on legislative privilege demonstrates, the Speech and Debate Clause certainly provide no legal basis for Legislative Respondents' request. This Court held that, under the Speech and Debate Clause, "this Court lacks authority to *compel* testimony or the production of documents relative to the intentions, motivations, and activities of state legislators or their staff." Mem & Op. at 7 (emphasis added). This Court based its decision on the "separation of powers" concerns associated with this Court compelling the legislature to produce testimony or information. There are no separation of powers concerns here; this Court is not being asked to compel anything from the legislative branch. Legislative Respondents cite no authority for the proposition that the Speech and Debate Clause would apply in these circumstances, and none exists.

### **CONCLUSION**

For the reasons set forth above and in Petitioners' initial opposition filed yesterday, Legislative Respondents' Application should be denied.

Dated: December 5, 2017

Respectfully submitted,

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