

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

v.

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

No. 261 MD 2017

**APPLICATION TO EXCLUDE PORTION OF EXPERT REPORT OF DR.
GIMPEL AND TO COMPEL PRODUCTION OF UNDERLYING
INFORMATION PREVIOUSLY WITHHELD ON PRIVILEGE GROUNDS**

Petitioners submit this Application to exclude portions of the report of Legislative Respondents’ proposed expert Dr. James G. Gimpel. Dr. Gimpel presents an analysis regarding county and municipality splits that was conducted by someone else. Dr. Gimpel’s report asserts that employees of the General Assembly conducted this analysis, even though Legislative Respondents withheld any such analyses based on legislative privilege. Legislative Respondents now claim that a “non-testifying expert” conducted this analysis—but they won’t say who. Worse, Legislative Respondents have not provided the data underlying these statistics, despite the parties’ agreement to provide all such data simultaneous with their expert reports—two days ago for Dr. Gimpel. This Court should exclude the relevant portions of Dr. Gimpel’s report and compel Legislative Respondents to

produce any other data or information that they provided to their experts or that underlies their experts' reports or opinions that Legislative Respondents have withheld from discovery on privilege grounds.

BACKGROUND

In his expert report, Dr. Gimpel presents an analysis that someone else conducted regarding county and municipality splits:

As for the plan Pennsylvania presently has in place, it does have the very desirable quality of having minimized county and municipality splits from the previous plan. 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.

Table 3. Total Splits in Counties and Municipalities Under Recent Pennsylvania Redistricting Plans			
Plan Year	1992	2002	2011
Counties	27	42	39
MCDs (Municipalities)	17	97	73
Source: PA General Assembly Legislative Data Processing Center			

Gimpel Report p. 28.

Dr. Gimpel thus presents these statistics as an “[a]nalysis conducted by GIS experts in the state legislature,” and the accompanying table lists the “PA General Assembly Legislative Data Processing Center” as the source. The identical text and source identification appears in Dr. Gimpel’s report in the federal case. These statistics regarding the number of counties and municipalities split are materially different from the numbers that Petitioners’ experts found, and Petitioners believe there are errors in Dr. Gimpel’s numbers.

Before any of this, Petitioners and Legislative Respondents agreed to turn over all data underlying their respective experts’ reports, plus any other data or information necessarily to replicate the statistics in the experts’ reports, on the same day the reports were produced—December 4 for Legislative Respondents. Ex. A.

But Legislative Respondents did not turn over the data underlying the county and municipality splits in Dr. Gimpel’s report. On December 5, Petitioners emailed Legislative Respondents stating that the data was not provided and requesting that it be turned over promptly. Ex. B.

Later that evening, Legislative Respondents stated—contrary to Dr. Gimpel’s assertions that the analysis was “conducted by GIS experts in the state legislature”—that in fact “[t]his data came from a non-testifying expert in GIS retained by counsel.” Ex. B. Legislative Respondents added: “We will be sending

you hopefully tomorrow morning the summary table, and the backup tables that identify each split in the summary table.” *Id.*

Petitioners’ counsel replied, asking Legislative Respondents to identify the person(s) who conduct the analysis, their employer(s), when the analysis was conducted, when the person was supposedly retained as a non-testifying expert, and whether Dr. Gimpel had the relevant data at the time he submitted his report. Petitioners requested that Legislative Respondents answer these questions—and provide the data underlying the statistics—by 9:30 a.m. this morning, which would already be a day and half after it was supposed to disclosed. *Id.*

As of this filing, Legislative Respondents have not responded to these questions or provided the data underlying Dr. Gimpel’s statistics.

ARGUMENT

The county and municipality split statistics in Dr. Gimpel’s report must be excluded for several independent reasons.

First, Dr. Gimpel did not calculate these statistics himself, and Legislative Respondents have refused to answer whether Dr. Gimpel verified—or even had in his possession—the analysis underlying these statistics when he submitted his report. Dr. Gimpel cannot testify to statistical calculations that he did not conduct or verify, especially where the person who did conduct the analysis is not available for cross-examination. Indeed, that identify of that person remains a mystery

Second, Dr. Gimpel asserted, in both his report in this case and in his report for the federal litigation, the employees of the General Assembly calculated these statistics. The General Assembly, of course, has refused to produce any data or information regarding the 2011 Plan in discovery on the ground of legislative privilege. In fact, the very first request in Petitioners' First Set of Requests for Production to All Respondents sought "[a]ll ... analyses ... maintained referring or relating to the 2011 Plan." First Set of Requests for Production #1.a. Assuming Dr. Gimpel was telling the truth that employees of the General Assembly were the original source of these statistics, Legislative Respondents cannot rely upon it. They cannot use legislative privilege as a sword and shield to selectively disclose internal information. Petitioners request that this Court not only exclude the portions of Dr. Gimpel's report regarding the county and municipality splits, but also compel Legislative Respondents to identify and produce any other data or information that they provided to their experts or that underlies their experts' reports that Legislative Respondents have withheld from discovery on the ground of privilege.

CONCLUSION

For the reasons set forth above, Petitioners request that the Court (1) exclude the portions of Dr. Gimpel's report that present statistics on county and municipality splits; (2) compel Legislative Respondents to identify by 9 a.m. on

December 7 any other data or information that they provided to their experts or that underlies their experts' reports that Legislative Respondents have withheld from discovery on the ground of privilege; and (3) compel Legislative Respondents to produce the information identified under (2) by 12 p.m. on December 7.

Dated: December 6, 2017

Respectfully submitted,

/s/ Benjamin D. Geffen

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Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of Application to Exclude Portion of Expert Report of Dr. Gimpel and to Compel Production of Underlying Information Previously Witheld on Privilege Grounds, it is hereby ORDERED that the Application is GRANTED.

It is hereby ORDERED that:

- (1) the portions of Dr. Gimpel's report that present statistics on county and municipality splits are EXCLUDED;
- (2) by 9 a.m. on December 7, Legislative Respondents must identify any other data or information that they provided to their experts or that underlies their experts' reports that Legislative Respondents have withheld from discovery on the ground of privilege; and

(3) Legislative Respondents must produce the information identified under
(2) by 12 p.m. on December 7.

BY THE COURT:

J.

EXHIBIT A

Jacobson, Daniel

From: Shawn Sheehy <ssheehy@hvjt.law>
Sent: Wednesday, November 29, 2017 11:04 PM
To: Jacobson, Daniel
Cc: Gersch, David P.; Carolyn McGee; zzz.External.bgeffen@pilcop.org; zzz.External.mmckenzie@pubintl.org; zzz.External.mchurchill@pilcop.org; maronchick@hangle.com; mhangle@hangle.com; claudia.depalma@gmail.com; alacey@cohenlaw.com; amitinger@cohenlaw.com; clevine@cohenlaw.com; jbloom@stradley.com; kmyers@stradley.com; lbarrett@pa.gov; sconannon@pa.gov; thowell@pa.gov; LazarP@earthlink.net; lawrence.tabas@obermayer.com; rebecca.warren@obermayer.com; Freedman, John A.; Jones, Stanton; Theodore, Elisabeth; Clark, Helen Mayer; Robinson, John; Bergman, Andrew D.; Jason Torchinsky; paszamant@blankrome.com; snyderman@blankrome.com; jwixed@blankrome.com; Silberfarb, Michael D.; tgates@pa.gov; ieverhart@pa.gov; kkotula@pa.gov; Kathleen Gallagher; Jason R Mclean; Terri Kuhn; Russell Giancola; Phil Gordon
Subject: Re: League of Women Voters of Pennsylvania et al. v. Commonwealth of Pennsylvania, No. 261 MD 2017 (Pa. Commw. Ct.) - Discovery Requests Directed to Petitioners

Daniel,

I can confirm that we will provide code/information/data on December 4.

We will get the signed affidavits to you as soon as we can.

I think the protective order is already signed by the Legislative Respondents. We provided our signature blocks.

Thank you
Shawn

Sent from my iPhone

On Nov 29, 2017, at 11:00 PM, Jacobson, Daniel <Daniel.Jacobson@apks.com> wrote:

Shawn,

The data "output" you request below is well beyond the scope of our agreement, which is for data and information necessary to replicate the experts' analysis. Between the code and the shape files, you will have more than enough to replicate Dr. Chen's analysis. We will provide the output you describe below, but expect you to extend the same courtesy if we request data or output from your experts beyond that necessary to replicate their analysis.

I also realized that your response did not specify the date upon which you will provide us your experts' code/data/information. Can you confirm that you will provide this on December 4, the same day your expert reports are due?

We will await the signed copies of the Confidentiality Agreement from all three legislative defendants, plus the signed affidavits from your experts who will be seeing the data, and then we can promptly send the code and data discussed.

EXHIBIT B

Jacobson, Daniel

From: Jacobson, Daniel
Sent: Tuesday, December 05, 2017 11:48 PM
To: Jason Torchinsky; Tucker, Robert J.
Cc: Gersch, David P.; Jones, Stanton; Lewis, Patrick T.; Paszamant, Brian (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

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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

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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

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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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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

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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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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@hangle.com; mhangle@hangle.com; cdepalma@hangle.com; alattimore@hangle.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>; 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: 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
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