

Respondents.

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Appear on Signature Page*

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

Petitioners,

V.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*,

Respondents.

Civ. No. 261 MD 2017

**PETITIONERS' RESPONSE TO MOTION OF LEGISLATIVE
RESPONDENTS TO SET DEADLINE
FOR PARTIES' WITNESS DISCLOSURES**

This Court's order of November 17, 2017 requires the parties to disclose the fact witnesses they intend to call at trial in the pretrial memoranda due December 8, 2017. Petitioners agree with Legislative Respondents that the parties should

disclose fact witnesses before that date to the extent they are known, for the convenience of the parties and consistent with this Court's order to disclose trial exhibits before December 8 "*to the extent [the parties] have identified some or all of their trial exhibits.*" 11/28/17 Order (emphasis added). Petitioners repeatedly informed Legislative Respondents, as indicated in the email chain attached as Exhibit A, that Petitioners would disclose the fact witnesses they have identified by this coming Monday, December 4. *See, e.g.,* Email from D. Gersch to S. Sheehy, 11/29/17, at 4:13 PM ("Again, subject to your agreement to do the same, we are happy to agree to disclose the fact witnesses who we know will be called, and we'll later promptly supplement, if we learn of more.").

After some negotiation, Legislative Respondents advised that they would "agree to 9:30am on December 4 as the deadline to disclose witnesses," provided that Petitioners agreed to produce all their witnesses for deposition in Philadelphia or Pittsburgh on certain days next week and that there would be no supplementation after December 4. *See* Email from S. Sheehy to D. Gersch, 11/29/17 at 1:08 PM.

Both of these conditions were facially unreasonable. As to the scheduling of any depositions, all Petitioners have been deposed or have their depositions scheduled in agreed-upon locations, with the exception of one Petitioner whose deposition is being rescheduled for medical reasons. By definition, then, any other

witness would be a non-party (or perhaps a Respondent) whom Petitioners cannot compel to appear anywhere, ever. Nonetheless, Petitioners readily agreed to try to have any such depositions held in Philadelphia or Pittsburgh as that would be more convenient for all. *See* Email from D. Gersch to S. Sheehy, 11/29/17 at 4:13 PM.

Legislative Respondents' no-supplementation demand was equally unreasonable. Petitioners' investigation of this matter is ongoing, as is discovery. Legislative Respondents made their first production of documents in this case just *yesterday*. Moreover, it is Legislative Respondents—not Petitioners—who know the relevant facts about potential fact witnesses with knowledge about the 2011 Plan, and the reason time is so short in the first place is because Legislative Respondents sought and obtained a stay and then further delayed these proceedings by frivolously removing this case to federal court. Petitioners would provide a final witness list if they could, but Petitioners have not decided on a final witness list. Petitioners committed to “promptly supplement” their initial witness disclosure if they learned of any additional witnesses after 9:30 AM on December 4. *See* Email from D. Gersch to S. Sheehy, 11/29/17 at 8:54 AM.

Reversing course, Legislative Respondents now insist that instead of exchanging witness lists at 9:30 AM on December 4, the exchange needs to be tomorrow. Legislative Respondents are simply engaging in unnecessary

harassment given that just yesterday they were prepared to do the exchange on the morning of December 4.

Legislative Respondents also now appear to seek to limit any supplementation of the witness list to “persons identified through discovery obtained after 5 p.m. on December 1 so long as the supplementation is without delay.” Motion at 3. Petitioners agree that any supplementation must be “without delay,” but the limitation as to “persons identified through discovery obtained after 5 p.m.” is also unreasonable. Given the expedited schedule in this case and that Petitioners have no control over other parties, Petitioners should have every opportunity to develop their case without being cabined by artificial deadlines, especially deadlines that are inconsistent with those the Court ordered in its scheduling order.

Accordingly, Petitioners request that the Court enter an order requiring that:

The parties exchange initial witness lists on December 4, 2017 by 9:30 AM and that if they later decide to call any additional witnesses, they must promptly supplement their disclosure and make best efforts to assist opposing counsel in arranging for a deposition of such person next week in Philadelphia or Pittsburgh on December 4, 5 or 6.

Dated: November 30, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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Counsel for Petitioners

EXHIBIT A

From: Shawn Sheehy [<mailto:ssheehy@hvit.law>]

Sent: Thursday, November 30, 2017 8:55 AM

To: Gersch, David P.; Shawn Sheehy; 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'; 'sconcannon@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; Jacobson, Daniel; Robinson, John; Bergman, Andrew D.; Jason Torchinsky; 'paszamant@blankrome.com'; 'snyderman@blankrome.com'; 'jwixted@blankrome.com'; 'Silberfarb, Michael D.'; 'tgates@pa.gov'; 'ieverhart@pa.gov'; 'kkotula@pa.gov'

Cc: 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.) - Witness Disclosure

Mr. Gersch,

As to your first point: Petitioners have Legislative Respondents' discovery now and you had yesterday, today, and Friday to review that production to determine any other witnesses Petitioners may call. Under the Court's order from Tuesday, if you know the identities of your witnesses, you must identify them without delay. Legislative Respondents' request that Petitioners identify their witnesses by Friday at noon is therefore reasonable.

Furthermore, in this truncated trial schedule that Petitioners asked for, Petitioners have sufficient time to identify witnesses. Petitioners also just produced 3,000 pages of documents. Petitioners know if there are any witnesses they intend to call from that production. We therefore think that for Legislative Respondents to have an opportunity to depose any of these witnesses before the close of discovery, we need to know who you intend to call by Friday so we can get the necessary subpoenas served.

In an effort to be reasonable, Legislative Respondents are fine with allowing Petitioners to supplement their witness list [after Friday](#), with the limitation that the supplemented witness list will only contain witnesses that you learned of in discovery received [after Friday](#). Under the terms of yesterday's order, please supplement your witness list "without delay."

We would also ask that if you serve a trial subpoena on a witness that you inform them that Legislative Respondents will want to depose them sometime between [December 4-7](#). If they do not make themselves available, Legislative Respondents will object to their appearing as witnesses.

Thank you.

Sincerely,

Shawn Sheehy

From: "david. com" <david.gersch@apks.com>

Date: Wednesday, November 29, 2017 at 4:13 PM

To: Shawn Sheehy <ssheehy@hvjtlaw.com>, "CMcgee@c-wlaw.com" <CMcgee@c-wlaw.com>, "bgeffen@pilcop.org" <bgeffen@pilcop.org>, "mmckenzie@pubintl.org" <mmckenzie@pubintl.org>, "mchurchill@pilcop.org" <mchurchill@pilcop.org>, "maronchick@hangley.com" <maronchick@hangley.com>, Michele Hangley <mhangley@hangley.com>, "claudia. com" <claudia.depalma@gmail.com>, "alacey@cohenlaw.com" <alacey@cohenlaw.com>, "amitinger@cohenlaw.com" <amitinger@cohenlaw.com>, "clevine@cohenlaw.com" <clevine@cohenlaw.com>, "jbloom@stradley.com" <jbloom@stradley.com>, "kmyers@stradley.com" <kmyers@stradley.com>, "lbarrett@pa.gov" <lbarrett@pa.gov>, "scon cannon@pa.gov" <scon cannon@pa.gov>, "thowell@pa.gov" <thowell@pa.gov>, "LazarP@earthlink.net" <LazarP@earthlink.net>, Lawrence Tabas <Lawrence.Tabas@obermayer.com>, "rebecca. com" <rebecca.warren@obermayer.com>, "john. com" <john.freedman@apks.com>, "stanton. com" <stanton.jones@apks.com>, "elisabeth. com" <elisabeth.theodore@apks.com>, "helen. com" <helen.clark@apks.com>, "daniel. com" <daniel.jacobson@apks.com>, "john. com" <john.robinson@apks.com>, "andrew. com" <andrew.bergman@apks.com>, Jason Torchinsky <jtorchinsky@hvjtlaw.com>, Brian Paszamant <Paszamant@BlankRome.com>, Jason Snyderman <Snyderman@BlankRome.com>, John Wixted <JWixted@BlankRome.com>, Michael Silberfarb <msilberfarb@blankrome.com>, Timothy Gates <tgates@pa.gov>, "ieverhart@pa.gov" <ieverhart@pa.gov>, "kkotula@pa.gov" <kkotula@pa.gov>

Cc: "Kathleen com" <KGallagher@c-wlaw.com>, Jason Mclean <JRMclean@c-wlaw.com>, Terri Kuhn <TKuhn@c-wlaw.com>, Russell Giancola <RGiancola@c-wlaw.com>, Phil Gordon <pgordon@hvjtlaw.com>

Subject: RE: League of Women Voters of Pennsylvania et al. v. Commonwealth of Pennsylvania, No. 261 MD 2017 (Pa. Commw. Ct.) - Witness Disclosure

Shawn,

Thank you for your reply. We seem to be making some progress. But, we cannot agree to your conditions. In particular, you seem to be ignoring the very practical reasons why your proposed limitations make no sense for us.

As to your first point (that we should not be permitted to supplement after the morning of December 4), I don't know that we'll discover any more people we want to call at trial after Monday, but this is a problem entirely of your clients' making. Discovery is ongoing next week. The relevant information is not in Petitioners' hands; it is in the hands of Respondents. And you have provided exactly zero discovery until today -- and that only because the Court ordered you to do so. I'd also point out that the case has been stayed at your clients' behest until exactly 19 days ago. So, we're not going to agree not to find and disclose additional trial witnesses after Monday morning. Again, subject to your

agreement to do the same, we are happy to agree to disclose the fact witnesses who we know will be called, and we'll later promptly supplement, if we learn of more.

As to your second point regarding the location of depositions, we would be delighted to have the depositions in a convenient location and Philadelphia and Pittsburgh are entirely acceptable to us. That said, you are overlooking that by definition, since you will have deposed all of our clients, anyone else we name that you may wish to depose is not going to be ours to control. If you want their deposition you may have to subpoena them and they may insist on being deposed somewhere else. That said, I can assure you that we will do our best to have the depositions in a convenient location and I also can assure you that Philadelphia will be at the top of our list.

We hope you will agree to the proposal we made this morning. We'll be available if you want to discuss.

David

David P. Gersch
Senior Counsel

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From: Shawn Sheehy [<mailto:ssheehy@hvjt.law>]

Sent: Wednesday, November 29, 2017 1:08 PM

To: Gersch, David P.; Shawn Sheehy; Carolyn McGee; zzz.External.bgeffen@pilcop.org; zzz.External.mmckenzie@pubintl.org; zzz.External.mchurchill@pilcop.org; maronchick@hangley.com; mhangley@hangley.com; claudia.depalma@gmail.com; alacey@cohenlaw.com; amitinger@cohenlaw.com; clevine@cohenlaw.com; jbloom@stradley.com; kmyers@stradley.com; lbarrett@pa.gov; sconcannon@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; Jacobson, Daniel; Robinson, John; Bergman, Andrew D.; Jason Torchinsky; paszamant@blankrome.com; snyderman@blankrome.com; jwixted@blankrome.com; Silberfarb, Michael D.; tgates@pa.gov; ieverhart@pa.gov; kkotula@pa.gov

Cc: 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

Mr. Gersch,

Legislative Respondents will agree to 9:30am on December 4 as the deadline to disclose witnesses under two conditions:

1. Petitioners agree not to supplement their witness list after this deadline. Legislative Respondents need to know who Petitioners witnesses are with sufficient time to depose them before close of discovery on December 7.
2. Petitioners agree to produce these witnesses for deposition in either Philadelphia or Pittsburgh on Tuesday, Wednesday, or Thursday of next week. If not, Legislative Respondents will object to the witness.

Please let me know by COB today if this is acceptable.

Thank you.

Sincerely,

Shawn Sheehy

Senior Litigation Associate

Holtzman Vogel Josefiak Torchinsky

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From: "david. com" <david.gersch@apks.com>

Date: Wednesday, November 29, 2017 at 8:54 AM

To: Shawn Sheehy <ssheehy@hvjt.law>, "CMcgee@c-wlaw.com" <CMcgee@c-wlaw.com>, "bgeffen@pilcop.org" <bgeffen@pilcop.org>, "mmckenzie@pubintl.org" <mmckenzie@pubintl.org>, "mchurchill@pilcop.org" <mchurchill@pilcop.org>, "maronchick@hangley.com" <maronchick@hangley.com>, Michele Hangley <mhangley@hangley.com>, "claudia. com" <claudia.depalma@gmail.com>, "alacey@cohenlaw.com" <alacey@cohenlaw.com>, "amitinger@cohenlaw.com" <amitinger@cohenlaw.com>, "clevine@cohenlaw.com" <clevine@cohenlaw.com>, "jbloom@stradley.com" <jbloom@stradley.com>, "kmyers@stradley.com" <kmyers@stradley.com>, "lbarrett@pa.gov" <lbarrett@pa.gov>, "sconcannon@pa.gov" <sconcannon@pa.gov>, "thowell@pa.gov" <thowell@pa.gov>, "LazarP@earthlink.net" <LazarP@earthlink.net>, Lawrence Tabas <Lawrence.Tabas@obermayer.com>, "rebecca. com" <rebecca.warren@obermayer.com>, "john. com" <john.freedman@apks.com>, "stanton. com" <stanton.jones@apks.com>, "elizabeth. com" <elizabeth.theodore@apks.com>, "helen. com" <helen.clark@apks.com>, "daniel. com" <daniel.jacobson@apks.com>, "john. com" <john.robinson@apks.com>, "andrew. com" <andrew.bergman@apks.com>, Jason Torchinsky <jtorchinsky@hvjt.law>, Brian Paszamant <Paszamant@BlankRome.com>, Jason Snyderman <Snyderman@BlankRome.com>, John Wixted <JWixted@BlankRome.com>, Michael Silberfarb <msilberfarb@blankrome.com>, Timothy Gates <tgates@pa.gov>, "ieverhart@pa.gov" <ieverhart@pa.gov>, "kkotula@pa.gov" <kkotula@pa.gov>

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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

Shawn,

Thank you for your email regarding exchange of witness lists. As you know, discovery is ongoing and we have yet to receive any of your discovery so December 1 is too early to exchange witness lists.

But, we'll be prepared to identify by 9:30 AM on the morning of December 4, those fact witnesses who we know will be called and we'll later promptly supplement, if we learn of more. As a practical matter, given that you will already have deposed all the petitioners and you also know and have chosen not to depose any other parties, I don't think we're going to be identifying a lot of new people who you'll need or want to depose.

Please confirm if this is acceptable and, if so, that you will do likewise.

I ask that counsel for the other parties advise us of their position.

David

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From: Shawn Sheehy [<mailto:ssheehy@hvjt.law>]

Sent: Tuesday, November 28, 2017 4:02 PM

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Cc: 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

Mr. Gersch,

Because discovery closes on December 7 and the Parties must disclose trial witness lists the following day, the Legislative Respondents propose that the Petitioners agree to disclose who they intend to call at trial by this Friday, December 1. This will provide the Legislative Respondents, pursuant to the

Pennsylvania Rules of Civil Procedure, with the week of December 4 to depose any other potential witnesses prior to the close of discovery, if any.

The Legislative Respondents will also provide its witness list by Friday, December 1.

Given the impending deadlines, please respond by 9am tomorrow (Wednesday) morning.

Thank you.

Sincerely,

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<http://www.apks.com>