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261 MD 2017

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**

[PROPOSED] ORDER

AND NOW, this ___ day of _____, 2017, upon consideration of Petitioners' Motion *In Limine* To Preclude Legislative Respondents From Offering Evidence Or Argument About Their Intentions, Motivations, And Activities In Enacting The 2011 Plan, it is hereby **ORDERED** that the Motion is **GRANTED**, and accordingly, Legislative Respondents are **BARRED** from introducing evidence or argument regarding (1) Legislative Respondents' intentions, motivations, and activities in enacting Pennsylvania's 2011 congressional districting plan ("2011 Plan") and (2) whether Democratic voters are an identifiable political group.

BY THE COURT

_____

J.

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**

PETITIONERS' MOTION *IN LIMINE* TO PRECLUDE LEGISLATIVE RESPONDENTS FROM OFFERING EVIDENCE OR ARGUMENT ABOUT THEIR INTENTIONS, MOTIVATIONS, AND ACTIVITIES IN ENACTING THE 2011 PLAN

Petitioners, by and through undersigned counsel, respectfully move the Court *in limine* for entry of an order barring Respondents the General Assembly, Speaker Michael Turzai, and President Pro Tempore Joseph Scarnati (collectively, "Legislative Respondents") from offering evidence or argument regarding topics about which they withheld discovery on the grounds of legislative privilege. Specifically, Legislative Respondents and their counsel should be barred from offering evidence or argument regarding (1) Legislative Respondents' intentions, motivations, and activities in enacting Pennsylvania's 2011 congressional districting plan ("2011 Plan") and (2) whether Democratic voters are an identifiable political group.

The reasons and grounds for this motion are set forth in the accompanying memorandum of law.

Dated: December 10, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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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**

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION *IN LIMINE* TO PRECLUDE LEGISLATIVE RESPONDENTS FROM OFFERING EVIDENCE OR ARGUMENT ABOUT THEIR INTENTIONS, MOTIVATIONS, AND ACTIVITIES IN ENACTING THE 2011 PLAN

In *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), the Supreme Court held that, to establish a partisan gerrymandering claim under the equal protection guarantees of the Pennsylvania Constitution, the petitioner must show "intentional discrimination against an identifiable political group." *Id.* at 332. Petitioners sought discovery in this case from Legislative Respondents and others concerning their intent in crafting and enacting Pennsylvania's 2011 congressional districting plan ("2011 Plan"), including whether they identified and intentionally discriminated against Democratic voters. But Legislative Respondents successfully invoked legislative privilege to refuse discovery into their "intentions, motivations, and activities" with respect to the 2011 Plan.

At trial, Petitioners will meet their burden to prove that the 2011 Plan did intentionally discriminate against Democratic voters. Indeed, Petitioners will present overwhelming evidence of discriminatory intent. Under the well-established "sword and shield" doctrine, Legislative Respondents cannot introduce evidence or argument challenging Petitioners' evidence on these issues. Legislative Respondents cannot use legislative privilege as both a sword and a shield, withholding discovery about their "intentions, motivations, and activities," but then introducing evidence or argument at trial challenging Petitioners' evidence that the 2011 Plan intentionally discriminates against Democratic voters. This Court accordingly should bar Legislative Respondents from offering evidence or argument at trial about their "intentions, motivations, and activities" with respect to the 2011 Plan.

BACKGROUND

In discovery, Petitioners asked Legislative Respondents to identify and produce documents about the criteria or considerations used to develop the 2011 Plan, including 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 other criteria or considerations. Petitioners also asked how each criterion or consideration was measured and how it affected the 2011 Plan.

Legislative Respondents withheld this information on grounds of legislative privilege. Respondents Turzai and Scarnati claimed that "the documents and information sought are protected from disclosure under Pennsylvania's . . . legislative privilege." Turzai/Scarnati Privilege Brief at 2. They argued that "[b]ecause the discovery sought by Petitioners exclusively concerns Legislative Respondents' consideration, drafting and crafting of the 2011 Plan, the documents and information sought clearly relate to legislative activity and therefore are immune from discovery." *Id.* The General Assembly argued that "[t]he discovery seeks to discover the motives, background, development, and objectives relating to [the 2011 Plan]," and that "the Speech or Debate privilege fully safeguards the General Assembly, its current and former Senators, Representatives, and legislative leaders, and all internal alter egos, such as legislative staff and counsel, against petitioners' discovery." GA Privilege Brief at 39.

On November 17, the Court sustained Legislative Respondents' legislative privilege claims, holding that the court lacked 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 [the 2011 Plan]." Order at 7. Petitioners thus were barred from taking discovery in this case about the "intentions, motivations, and activities" around the 2011 Plan, including whether Democratic voters were identified and targeted.

ARGUMENT

Because Legislative Respondents invoked legislative privilege as a shield to withhold discovery about their intent in enacting the 2011 Plan, they should be precluded from introducing evidence or argument at trial as a sword to challenge Petitioners' evidence and arguments about Legislative Respondents' discriminatory intent.

It is well established that "a privilege cannot be used as both a shield and a sword." *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003) (citing *United States v. Rylander*, 460 U.S. 752, 758 (1983)). "The non-legal equivalent of that truism is equally to the point: 'You can't have it both ways.'" *Id.* The Pennsylvania Supreme Court has recognized the sword/shield doctrine. *See Octave ex rel Octave v. Walker*, 103 A.2d 1255, 1263 (Pa. 2014). The doctrine applies in the context of various privileges. *See, e.g., id.* (privilege under the Mental Health Procedures Act); *Gallatin Fuels, Inc. v. Westchester Ins. Co.*, No. 02-2116, 2006 WL 2289789 at *1 (W.D. Pa. 2006) (attorney-client privilege); *In re Chevron Corp.*, 650 F.3d 276, 287 (3d Cir. 2011) (work product doctrine).

The sword/shield doctrine applies equally to defendants and plaintiffs. *See, e.g., US Airline Pilots Ass'n v. Pension Ben. Guar. Corp.*, 274 F.R.D. 28, 32 (D.D.C. 2011); *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C.

2009). Defendants may not assert a defense, such as a purported lack of "intent," that "in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

The sword/shield doctrine has been applied to legislative privilege specifically. "[C]ourts have been loath to allow a legislator to invoke the privilege at the discovery stage, only to selectively waive it thereafter in order to offer evidence to support the legislator's claims or defenses." *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012). For example, in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), a constitutional challenge to a Nebraska statute under the Ex Post Facto Clause, the plaintiffs sought to depose Nebraska legislators regarding their intent and objectives in crafting the statute. The defendants "successfully asserted legislative privileges to thwart the plaintiffs' effort to get at the truth." *Id.* at 1126.

At trial, the plaintiffs presented evidence that the legislature had acted with impermissible intent. When the defendants sought to challenge that evidence, the court held that they were precluded from doing so under the sword/shield doctrine. "While the defendants and their lawyers were entitled to invoke [legislative privilege]" to withhold discovery, they could not then "claim [at trial] that the evidence is lacking regarding the true motives of the law-makers." *Id.* "That is,

the defendants will not be allowed to use their privilege defenses as both a sword and a shield." *Id.*

Similarly, here, Legislative Respondents cannot withhold evidence of their intent in enacting the 2011 Plan and then seek to show, through evidence or argument at trial, that they acted without discriminatory intent. Petitioners requested discovery on intent and Legislative Respondents withheld it based on legislative privilege. Having withheld information about intent under the shield of legislative privilege in this case, Legislative Respondents cannot now use the privilege as a sword to challenge Petitioners' evidence of intent. *See Doe*, 898 F. Supp. 2d at 1126.

Petitioners likewise requested discovery as to whether Legislative Respondents considered Democratic voters to be an "identifiable group" in crafting the 2011 Plan. For example, in Petitioners' request for materials relating to factors considered in developing the 2011 Plan, Petitioners specifically referenced the consideration of "a voter or area's likelihood of supporting Republican or Democratic candidates."

Legislative Respondents invoked legislative privilege to withhold this information in this case as well. The sword/shield doctrine squarely prevents Legislative Respondents from offering evidence or argument suggesting that Democratic voters are not an identifiable political group, while withholding

discovery into whether Legislative Respondents *in fact identified such people as a political group*. *See Doe*, 898 F. Supp. 2d at 1126. In other words, Legislative Respondents have within their possession evidence as to whether or not they identified Democratic voters as a political group. Legislative Respondents cannot now offer evidence or argument that could be proved or disproved with the materials over which they have asserted privilege. *See Mikulan v. Allegheny County*, No. 15-1007, 2017 WL 2374430 at *6 (W.D. Pa. May 31, 2017) ("It would be extremely unfair to allow the County to withhold this evidence from [Plaintiff] in discovery and then allow the County to turn around and argue that it did not discriminate against [Plaintiff] based on withheld legal advice.").

Similarly, Legislative Respondents' witnesses cannot offer alternative or hypothetical purported motivations they might have had in creating the 2011 Plan, other than partisan intent. Again, Legislative Respondents invoked legislative privilege to withhold materials in this case that would show whether any alternative motivation existed. Legislative Respondents cannot now have their witnesses speculate as to such motivations.

CONCLUSION

For the foregoing reasons, Legislative Respondents should be barred from offering evidence or argument regarding should topics about which they withheld discovery on the grounds of legislative privilege.

Dated: December 10, 2017

Respectfully submitted,

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