Received 11/20/2017 11:29:26 PM Commonwealth Court of Pennsylvania

Filed 11/20/2017 11:29:00 PM Commonwealth Court of Pennsylvania
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

PETITIONERS' BRIEF IN OPPOSITION TO
PRIVILEGE ASSERTIONS BY THE LEGISLATIVE RESPONDENTS

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INTRODUCTION

The Court should overrule all privilege objections advanced by the General Assembly, Speaker Turzai, and Senator Scarnati (collectively, "Legislative Respondents").

"[N]early every court to address the issue in the redistricting context" has "conclude[d] that state legislators enjoy only a qualified evidentiary privilege." *Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 217 (E.D.N.Y.2012). In all of the currently ongoing lawsuits challenging partisan gerrymandering—in Wisconsin, in Maryland, in North Carolina, and in the federal court in Pennsylvania—plaintiffs were permitted to take extensive discovery from the legislature relating to how the challenged maps were drawn. This Court should do the same here.

Prohibiting discovery in this case would frustrate rather than advance the protections of the Pennsylvania Constitution. Petitioners do not seek to impose personal liability on any legislator—which is the focus of Pennsylvania's Speech and Debate Clause—but rather to vindicate the rights of Pennsylvania's citizens and voters under the Constitution's equal protection and free expression guarantees. And the Pennsylvania Supreme Court has repeatedly held that the Speech and Debate Clause cannot operate to "insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." *Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 545 Pa. 324,

332 (1996). Partisan gerrymandering claims are justiciable under the Pennsylvania Constitution, intent is central to proving such claims, and the Speech and Debate Clause does not trump other constitutional provisions by precluding discovery of the information that would provide the most direct evidence of the Legislature's intent. It would be especially paradoxical if the Pennsylvania Supreme Court did not have access to the same type of evidence that is being produced in the federal court, just as it would be paradoxical if Pennsylvania voters asserting their rights under their own constitution in their own courts were precluded from accessing evidence that would be available to them in the federal courts. The Court should overrule the assertion of privilege and order Legislative Respondents to respond to Petitioners' discovery requests.

The Court should also order Legislative Respondents to produce a knowledgeable witness for an immediate deposition concerning the role played by the Republican Party and any affiliated individuals and organizations in creating the 2011 Plan. This Court's October 16 order required Legislative Respondents to provide a "factual statement" that "identif[ed] *with specificity* the connection between the proposed third-party recipient and the legislature, if any, during the relevant period," 10/16/2017 Order ¶ 2 (emphasis added), but Legislative Respondents have flouted that order. As a consequence, the Court should overrule any objections to those third-party subpoenas.

The Court should also overrule Legislative Respondents' objections based on a First Amendment privilege and the attorney-client/work product privilege. Legislative Respondents' assertion of a First Amendment privilege is entirely conclusory, does not identify even a single decision of any court anywhere holding that *government officials* may assert a First Amendment privilege against discovery, and ignores this Court's order to "identify facts" in support of any First Amendment privilege claim. 10/16/2017 Order ¶ 2.

As for attorney-client privilege and work-product protection, Legislative Respondents offer only boilerplate, stating that responsive documents "might" be protected and asking this Court to delay resolution of the issue to an unspecified later date. There is no time for that. In any event, this Court's October 16 order expressly and unambiguously required Legislative Respondents to brief, by November 15, "all claims of privilege." 10/16/2017 Order ¶ 2. This Court already extended that deadline once as a result of the failed removal to federal court. Legislative Respondents nonetheless failed to brief the application of the attorney-client or work-product privilege or to support their privilege claim with any facts. Both under this Court's order and hornbook law, that claim is waived.

Finally, the Court should overrule all outstanding objections to the six third-party subpoenas to individuals and entities affiliated with the national Republican Party, and to the third-party subpoena to Governor Corbett. The Court has already

authorized service of those subpoenas, and none are barred by the legislative or any other privilege.

ARGUMENT

I. The Speech and Debate Clause Does Not Preclude Discovery

A. Overwhelming Precedent Holds That Legislative Privilege Must Be Pierced in a Gerrymandering Case

Pennsylvania's Speech and Debate Clause, Pa. Const. art. II, § 15, does not bar discovery in a lawsuit challenging unconstitutional partisan gerrymandering. First, the Pennsylvania Supreme Court has held that "[t]he Speech and Debate clause does not insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." *Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 545 Pa. 324, 332 (1996). That is what this case is about: whether the legislature acted in accord with the Pennsylvania Constitution when it enacted the 2011 Plan. The Speech and Debate Clause was "designed to preserve legislative independence, not supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972). The Clause does not protect "all things in any way related to the legislative process," *id.* at 516, and does not "prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions," *id.* at 528. *See Consumers Ed. & Protective Ass'n v. Nolan*, 470 Pa. 372, 382 (1977) (Pennsylvania's clause is "essentially identical to and obviously derived from the [federal] Speech and Debate Clause").

Holding that legislative privilege bars discovery here would violate the Pennsylvania Supreme Court's direct admonition: the Speech or Debate Clause cannot bear an interpretation under which the "court's duty to interpret and enforce the Pennsylvania Constitution would be abrogated, thus rendering ineffective the tripartite system of government which lies at the basis of our constitution." *Pa. State Ass'n*, 545 Pa. at 331. The core purpose of the clause is to protect "*individual* legislators," *Pa. AFL-CIO by George v. Commonwealth*, 691 A.2d 1023, 1034 (Pa. Commw. Ct. 1997) (emphasis added), in lawsuits threatening to hold them "*personally* liable," *Kennedy v. Commonwealth*, 546 A.2d 733, 736 (Pa. Commw. Ct. 1988) (internal quotation marks omitted) (emphasis added). Petitioners do not seek to impose any personal or individual liability in this case, instead they sue legislators only in their official capacities. What is beyond debate is that "[t]he purpose of the protection afforded legislators is not to forestall judicial review of … legislative action." *Sweeney v. Tucker*, 375 A.2d 698, 704 (Pa. 1977) (internal quotation marks omitted). Courts in Pennsylvania have thus repeatedly held that the Clause simply does not apply in lawsuits "alleg[ing] that the General Assembly, as a whole, violated … the Pennsylvania Constitution," as opposed to lawsuits targeting "individual legislators." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 118-19 (Pa. Commw. Ct. 1998), *aff'd,* 562 Pa. 632 (2000) (internal quotation marks omitted).

Equally important, Pennsylvania courts have repeatedly concluded that the Speech and Debate Clause does not apply to "political activities," even where those activities may have some claimed nexus to legislative activity. Contrary to Legislative Respondents' assertions, "the immunity of the Speech and Debate Clause does not extend to a number of legitimate legislative activities." *Hamilton v. Hennessey*, 783 A.2d 852, 860 (Pa. Commw. Ct. 2001), *aff'd*, 569 Pa. 101 (2002) (quoting *Schiaffo v. Helstoski*, 492 F.2d 413, 418 (3d Cir. 1974)). Rather, the Pennsylvania Supreme Court has adopted the U.S. Supreme Court's conclusion that activities that are "political in nature" are "beyond [the] scope of protection afforded by the Clause," and has deemed that analysis "persuasive in our interpretation of the state" Speech and Debate Clause. *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 248 (2003).

The en banc Commonwealth Court, likewise relying on federal cases interpreting the federal privilege, has enforced a distinction between activity "which is clearly part of the legislative process—such as voting, speaking on the floor or conducting a legislative hearing—and conduct which is incidentally related to the legislative process." Hamilton, 783 A.2d at 861 (internal quotation marks omitted). "Political matters," in particular, do not enjoy "the protection afforded by the Speech and Debate Clause." *Id.* at 860 n.5 (quoting *Brewster*, 408 U.S. at 512). The Court of Common Pleas applied the same distinction, holding

that legislative privilege does not apply to "legitimate legislative activities" to the extent they involve "political matters." *McNaughton v. McNaughton*, 72 Pa. D. & C.4th 363, 372-73 (Com. Pl. 2005) (quoting *Brewster*, 408 U.S. at 512). The court held there that discovery into "appointments political in nature, fall directly under the category of items not protected under the Speech and Debate Clause." *Id.* at 374.

The activity about which Petitioners seek discovery in this case falls squarely within the unprotected category: Petitioners seek discovery not about votes or floor speeches or hearings, but about whether the mapmakers who came up with the 2011 Plan engaged in unconstitutional gerrymandering to advance partisan political goals. In a case alleging that the Pennsylvania legislature unlawfully directed its mapmakers to target Democratic voters to rig the next decade's worth of elections, in violation of the Pennsylvania Constitution, the Speech and Debate Clause does not provide protection. As the General Assembly observes, the Speech and Debate Clause protects those things that a "Legislator does as a representative of a *constituency*." GA Br. 20-21 (emphasis added); *Pa. Sch. Boards Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs, Teamsters Local 502*, 569 Pa. 436, 452 (2002) ("[T]he Speech and Debate Clause insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.") (internal

quotation marks omitted). It does not insulate activities by a legislature on behalf of a partisan political party in an effort to ensure that constituents who affiliate with the other political party have no voice in government.

Enforcing these two distinctions—between cases involving the constitutionality of legislation and those involving the personal liability of individual legislators, and between cases involving political rather than truly legislative matters—courts have overwhelmingly concluded that a "legislative privilege" does not protect legislators from discovery in gerrymandering cases. Indeed, "nearly every court to address the issue in the redistricting context" has "conclude[d] that state legislators enjoy only a qualified evidentiary privilege." *Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 217 (E.D.N.Y.2012).

For example, in the ongoing Wisconsin partisan gerrymandering case, the plaintiffs obtained discovery revealing that the map was drawn by legislative staffers working with an outside expert who created a regression model to assess the partisan character of every geographic unit in Wisconsin, and together they created and analyzed a series of plans with the goal of maximizing the Republican advantage, eventually picking a map that they calculated would ensure Republicans "would maintain a 54 seat majority while garnering only 48% of the statewide vote." *Whitford v. Gill*, 218 F. Supp. 3d 837, 846-52 (W.D. Wis. 2016) (describing evidence and testimony of legislative staffers). As a prior district court

in Wisconsin explained: "legislative privilege does not protect any documents or other items that were used by the Legislature in developing the redistricting plan." *Baldus v. Brennan*, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011), *order clarified*, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011). Given "the highly relevant and potentially unique nature of the evidence" and "the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply." *Id.*

Likewise, in the Maryland case, which involves claims that Democrats gerrymandered the state's congressional districts to dilute the votes of Republicans, the court ordered state legislators to (1) testify about their intent in drawing the 2011 map, (2) to produce all draft maps, and (3) to produce all communications relating to the 2011 map with other legislators, Democratic political entities like the DNC and DCCC, and any third-party consultant or expert, among others. *Benisek v. Lamone*, 241 F. Supp. 3d 566, 570-71 & n.3, 577 (D. Md. 2017).

And there was extensive discovery in the North Carolina case: Thomas Hofeller, the RNC redistricting director and RNC, RSLC, and SGLF consultant

who drew the maps in North Carolina, was deposed about how he drew the maps to maximize Republican advantage, and legislative leaders were also deposed.[1]

In the current federal case in Pennsylvania, *Agre v. Wolf*, the three-judge panel likewise concluded "that the legislative privilege is a qualified privilege that may be pierced and which *at a minimum* does not shield communications with third-parties associated with REDMAP nor protect facts and data considered in connection with redistricting." ECF 76 at 1, No. 17-cv-4392 (emphasis added). The Court thus required the Intervenor-Defendants there, i.e., Speaker Turzai and Senator Scarnati, to initially and immediately produce all documents "reflecting requested communications between Intervenor Defendants (including their staffs and agents) and REDMAP's representatives," and to produce all "requested facts and data considered in creating the 2011 Plan." *Id*. at 2.

Similarly, in a Florida partisan gerrymandering case, the Florida Supreme Court held that the legislative privilege is only qualified, and permitted discovery of "all … information and communications pertaining to the constitutional validity of the challenged apportionment plan," other than "the thoughts or impressions of

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[1] *See, e.g.*, Plaintiffs Post-Trial Findings of Fact and Conclusions of Law at 4-8 (Nov. 6, 2017) (discussing testimony), *available at* https://www.brennancenter.org/sites/default/files/legal-work/CC_LWV_v_Rucho_CommonCause-Plaintiffs-Final-Proposed-Findings-of-Fact-and-Conclusions-of-Law.pdf.

[2] For example, Petitioners seek documents "referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units

individual legislators and legislative staff members." *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 154 (Fla. 2013).

Federal courts in gerrymandering cases have generally applied a five-factor test to determine whether to permit state legislators to avoid discovery through a legislative privilege: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the purposes of the privilege." *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337-38 (E.D. Va. 2015); *see also Benisek v. Lamone,* 241 F. Supp. 3d 566, 575 (D. Md. 2017); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections,* No. 11-C-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). "This balancing inquiry ensures that legislative privilege, like all evidentiary privileges, applies 'only to the very limited extent that ... a public good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Benisek*, 241 F. Supp. 3d at 574 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

Each of these factors supports piercing any privilege in this case. First, all of the evidence Petitioners seek is inarguably highly relevant: that evidence includes information about the considerations and criteria that were used in drawing the 2011 Plan, how those considerations or criteria were measured (e.g.,

the formulas for assessing compactness or partisanship of the districts), what rules or principles the mapmakers were instructed to follow in applying these considerations or criteria to the 2011 Plan, and communications with Republican Party entities and other third parties.[2] As in the Wisconsin case, "[a]ny documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent." *Baldus*, 2011 WL 6122542, at *1; *accord Benisek*, 241 F. Supp. at 575 ("[W]e readily conclude that the evidence sought here [as to legislative considerations in drawing the map] focuses on core issues in the litigation."). Respondents Turzai and Scarnati, in their submission to the federal court in *Agre*, conceded that the "General Assembly's intent may be relevant" for purposes of this factor. ECF 57 at 13, No. 17-cv-04392.

Second, this evidence is uniquely in the hands of Legislative Respondents and the proposed recipients of the third-party subpoenas. The 2011 Plan was

[2] For example, Petitioners seek documents "referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as 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 others." Petr's First Set of Requests for Production, RFP #1(b). Likewise, Petitioners seek documents referring or relating to how these considerations or criterion were measures, such as the formula that Respondents used to assess compactness and partisanship in drawing the 2011 Plan. RFP #1(c). Petitioners also seek "documents referring or relating to how these considerations or criteria affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criteria in developing the 2011 Plan." RFP #1(d). Petitioners also seek communications relating to the 2011 Plan with affiliates of the Republican Party, such as the RNC, the NRCC, the RSLC, RedMAP, or the SGLF, and with any other third parties. RFP #1(e), (f). Petitioners have also issued interrogatories on these same issues.

drawn in secret. Pet'n ¶¶ 50-52, 66, 69-75. The individuals who have documents or knowledge establishing whether the 2011 Plan was drawn with partisan intent are the Legislative Respondents, the third-party subpoena recipients—or other participants in drawing the 2011 Plan whose identities can only be uncovered by discovery to Legislative Respondents and the third-party subpoena recipients. Indeed, Respondents Turzai and Scarnati have admitted as much. In seeking to intervene in the federal *Agre* litigation challenging the 2011 Plan, they argued that the information they possess is "necessary" to that litigation: "From a pragmatic perspective, Applicants possess the information regarding the 2011 Plan, which is necessary to this litigation." ECF 45-3 at 5, No. 17-cv-04392. They explained that they were "an integral part of the process of drawing and enacting the 2011 Plan." *Id.* at 2. Other courts have recognized in partisan gerrymandering cases that "the ability to depose a witness [who participated in drawing maps] and obtain *direct* evidence of motive and intent" is critical and justifies piercing the privilege. *Benisek*, 241 F. Supp. 3d at 575-76.

Third, the litigation is plainly serious and of the utmost importance. In its order assuming extraordinary jurisdiction, the Pennsylvania Supreme Court declared that "the present case involves issues of immediate public importance." Order at 1, *LWV-PA v. Commonwealth*, No. 159 MM 2017 (Pa. Nov. 9, 2017).

"[F]ew issues could be more serious to preserving our system of representative democracy." *Benisek*, 241 F. Supp. 3d at 576.

Fourth, the role of the Commonwealth in this litigation strongly supports piercing the privilege. As the three-judge panel explained in *Benisek*:

> When individual legislators are the targets of litigation, the possibility of their suffering individualized consequences can significantly increase the need for legislative privilege. But here, the witnesses have no personal stake in the litigation and face no direct adverse consequence if the plaintiffs prevail. The plaintiffs have brought their suit not against individual state legislators but against the State's agents who are, in their official capacity, responsible for the electoral process in Maryland, and the adverse impact on the individual legislators is minimal.

241 F. Supp. 3d at 576. So too here. In *Agre*, Respondents "concede[d] that the fourth factor weighs in favor of disclosure because Plaintiffs are directly challenging government action." ECF 57 at 14, No. 17-04392.

Fifth, as noted, the purpose of the privilege is to protect individual legislators from personal civil or criminal liability for their legislative activities and to ensure they can vote without the threat of personal repercussions, not to impair the judiciary's ability to review the constitutionality of legislative enactments. *Pa. State Ass'n of Cty. Comm'rs*, 545 Pa. at 331-32.

Legislative Respondents suggest that these cases are irrelevant because they are federal court cases, Turzai/Scarnati Br. 16, but that is wrong. Indeed, Legislative Respondents told the U.S. Supreme Court just the opposite in seeking to stay the *Agre* case. They argued that "the same issues underlying the Legislative

Privilege in the Commonwealth Court are implicated by the discovery sought from Applicants [i.e., the Legislative Respondents] in the District Court." Pet. for Writ of Mandamus at 2, *In re: Michael C. Turzai et al.*, No. 17-631 (U.S. Oct. 30, 2017).[3] Legislative Respondents further stated that their privilege objections in *Agre* "are nearly identical to the objections at issue in the Pennsylvania Action." *Id.* at 21. Legislative Respondents cannot argue to the U.S. Supreme Court that the privilege issues implicated in federal partisan gerrymandering cases are "the same" or "nearly identical" to the privilege issues implicated in Pennsylvania state court, and then turn around and tell this Court that federal partisan gerrymandering cases are "inapposite" because "this is not a federal court case." Turzai/Scarnati Br.17.

It does not matter that the privilege potentially applicable to state legislators in federal court derives from common law, while the privilege potentially applicable in this Court derives from the Pennsylvania Constitution, because their scope is the same. *Cf.* Turzai/Scarnati Br. 17-19. The Court need not take Petitioners' word for it. In *Agre*, these same Legislative Respondents argued that the federal common law privilege for state legislators is "coterminous" with the federal constitutional privilege. ECF 57 at 6, No. 17-cv-04392; *see also Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240, 248 (3rd Cir. 1998) (holding

[3] https://www.brennancenter.org/sites/default/files/legal-work/Agre_v_Wolf-Emergency-Petition-for-Writ-of-Mandamus.pdf

same). And the Pennsylvania Speech and Debate clause is "essentially identical" to the federal constitutional privilege. *Pa. State Ass'n of Cty. Comm'rs*, 545 Pa. at 330. The common law privilege applicable in federal redistricting cases and the Pennsylvania Speech and Debate Clause are both derived from the federal clause, *Benisek*, 241 F. Supp. 3d at 573, and there is no reason to interpret them differently.

The Pennsylvania Supreme Court has held twice now that partisan gerrymandering claims are justiciable under the Pennsylvania Constitution, and that legislative intent is relevant to proving such claims. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). It would be paradoxical if federal courts could obtain information from Pennsylvania's legislature in assessing the constitutional validity of Pennsylvania legislation, but the Pennsylvania Supreme Court was prohibited from obtaining that same information. It would also be paradoxical if the federal courts could make their determinations based on the most direct evidence while the Pennsylvania Supreme Court could not. And it would be truly astonishing if the voters of this Commonwealth suing in their own courts for their own uniquely Pennsylvanian rights might be thwarted by their inability to obtain key information that the federal courts would grant them.

These decisions piercing the privilege in federal redistricting cases further the purpose of the Pennsylvania Speech and Debate Clause, and they are consistent with Pennsylvania courts' interpretations of that Clause. *See supra.* Although the Clause sometimes extends "to matters beyond pure speech or debate in either House," it does so "only when necessary to prevent indirect impairment of such deliberations." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Requiring Respondents to turn over the information at issue in this case would not threaten "the integrity or independence" of the legislature. *Id.* at 625. Accordingly, this Court should hold that the legislative privilege does not apply.

B. At a Minimum, The Court Should Permit Discovery into (1) Facts and Data Relating to the Drawing of the 2011 Map and (2) Communications Between Respondents and Third-Party Consultants or Political Organizations

As *Agre* held, "at a minimum," the legislative privilege does not protect basic factual information about the process for and considerations involved in drawing the 2011 map, and communications between respondents and third-party consultants or political organizations. ECF 76 at 1, No. 17-cv-04392.

1. The Court Should Permit Discovery into the Facts and Data Relating to the 2011 Map

The *Agre* court has already permitted discovery into the "facts and data considered in connection with redistricting," and this Court should at a minimum do the same. None of the Legislative Respondents has articulated any legitimate

reason why the independence and the integrity of any legislator would be threatened if Respondents were required to produce this information and to produce a witness (such as the staff member or consultant who drew the map) who could explain it. Thus, for example, courts in gerrymandering cases require the production of "all documents reflecting strictly factual information—regardless of source," including "all 'materials and information available to lawmakers at the time a decision was made,'" and "all documents or communications produced by committee, technical, or professional staff" as opposed to personal staff. *Bethune-Hill*, 114 F. Supp. 3d at 343 (quoting *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *9).

For avoidance of doubt, because "facts and data" is vague, this includes such information as the identity of the mapmakers and any outside consultants who participated in drawing or selecting the 2011 Plan; the considerations and criteria that the mapmakers used to develop and evaluate the 2011 Plan; how those considerations and criteria were measured; any instructions that were given to the mapmakers, such as an instruction to maximize the number of Republican seats; the data and formulas that were used or considered in developing the 2011 Plan, including in assessing such things as compactness and partisanship; all draft or alternative maps that were considered and rejected; and any factual analyses of draft or alternative maps and the final map, including but not limited to any

analyses of the likely partisan outcome, compactness, or other attributes of the draft or alternative maps and the final map. This is exactly the kind of information that courts have considered subject to discovery in all of the recent partisan gerrymandering lawsuits. *See supra*.

Respondents should also be required to answer Petitioners' interrogatories on these topics and to produce witnesses who participated in drawing the maps and who can testify about the facts and data described above and explain the documents and data that Respondents produce. This need not be any individual legislator's personal staff member and Petitioners do not intend to ask questions about any individual legislator's personal motivations, but rather to ask about the facts. Likely, a single witness with a reasonably accurate memory will be enough.

Indeed, Petitioners' request to depose the General Assembly about such information under Rule 4007.1(e) has been pending since September. The General Assembly argues in a cursory footnote that it is immune from Rule 4007.1(e) because the Pennsylvania Constitution does not "designate the Legislative Branch as a 'government agency' and does not designate a 'CEO.'" GA Br. 41-42 n.16. But the absence of a CEO is neither here nor there, and the General Assembly has designated *itself* an "agency" in legislation. *See, e.g.*, 65 Pa.C.S. § 703 (defining "Agency" to include "the General Assembly"). The Pennsylvania Rules of Appellate Procedure expressly define the General Assembly as a "[g]overnment

unit" and as an "agenc[y] of the Commonwealth." Pa.R.A.P. 102 ("Government unit" includes "[t]he Governor and the departments, boards, commissions, officers, authorities and other agencies of the Commonwealth, including the General Assembly and its officers and agencies ... .").

The General Assembly can sue and be sued, it has managed to hire counsel to represent it separately from Speaker Turzai and Senator Scarnati, and it has never suggested that it is an improper defendant in this litigation. The purpose of Rule 4007.1(e) is to allow for the depositions of litigants other than natural persons, and to "avoid the wholesale subpoenaing of named directors, officers, and others where the inquirer does not know the identity of the exact person or persons who will be able to testify as to the requested information." Explanatory Comment—1978 to Pa. R. Civ. Proc. 4007.1. The General Assembly cites zero authority for the suggestion that it, alone among all other litigants, is immune from deposition.

2. The Privilege Does Not Protect Communications with Political Operatives and Groups, Consultants, or Other Third Parties

Wholly apart from requiring the "facts and data" discovery discussed above, the Court should also order Legislative Respondents to produce all responsive documents and communications exchanged with (a) political operatives and (b) outside consultants, and to respond to interrogatories about those

communications. It would twist Pennsylvania's Constitution beyond all recognition to conclude that language barring legislators from being questioned "for any speech or debate in either House," art. II, § 15, privileges their external communications with partisan political operatives and outside consultants. *See Bethune-Hill*, 114 F. Supp. 3d at 343 (requiring production of all responsive documents "shared with, or received from, any individual or organization outside the employ of the legislature").

Legislative Respondents argue that the work "performed by consultants who are retained by legislators" is protected. Turzai/Scarnati Br. 11. As an initial matter, the Court should order immediate production of all communications with "any affiliate of the Republican Party, including but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority Project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan," First Set of RFPs, 1(e), including any agents, employees, consultants, or representatives of those entities, *see* First Set of RFPs, Definition 9. Respondents do not assert in their brief that they retained or paid those entities, and they were required to identify any payments by this Court's October 16 order. Nor do they cite a single decision holding that the legislative privilege applies to the identity of or communications with third parties whom the

legislature has not retained. Accordingly, those communications are not privileged. Respondents should also be required to immediately produce any responsive communications with any other third parties who were not retained by the legislature, First Set of RFPs, 1(f), to answer Petitioners' outstanding interrogatories concerning the identities and role played by affiliates of the Republican Party in creating the 2011 Plan, and to produce a witness to testify about that role. *See infra*.

If anybody who participated in the 2011 Plan was technically in the employ of the General Assembly but was paid by an outside group, Respondents should be required to identify such individuals and produce all communications with them. *See Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 663 (E.D. Va. 2014) (holding that redistricting staffer who "was paid as an independent contractor by the House Republican Campaign Committee" did not enjoy privilege).

But Respondents should also be required to produce responsive communications with third parties, including consultants, that were paid or retained by the legislature. Although many courts have held that the receipt of payment from outside the legislature automatically pierces the privilege, *Page*, 15 F. Supp. 3d at 664, no court has held the contrary. No court has suggested that the fact that the legislature pays a third party automatically preserves the legislative privilege over communications a legislature sends to a third-party consultant, even

if that consultant is assisting the legislator in creating legislation. To the contrary, courts in redistricting litigation regularly conclude that communications with any outside consultants are non-privileged. *E.g.*, *Baldus v. Brennan*, 2011 WL 6122542, at *2 ("First, and most importantly, the Court finds it all but disingenuous for the Legislature to argue that these items be subject to privilege in a Court proceeding determining the constitutionality of the Legislature's actions, when the Legislature clearly did not concern itself with maintaining that privilege when it hired outside consultants to help develop its plans. The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services."); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (rejecting application of privilege to "experts and/or consultants retained or utilized by [legislators] to assist in the redistricting process"). That is especially so if a consultant is hired to perform *political* services, since political activities are not even protected when undertaken by a legislator him or herself. *See supra*.

The cases Legislative Respondents cite relating to third parties (Turzai/Scarnati Br. 11; GA Br. 27-38) are not to the contrary. Legislative Respondents mischaracterize *Edwards v. Vesilind*, which simply held that communications with third parties are not *blanket* unprotected, and remanded for the lower court to consider whether the third party was serving as a legislator's "alter ego." *Edwards v. Vesilind*, 292 Va. 510, 531, 535 (2016). *Edwards*

expressly held that "political … consultants" are less likely to be covered by the privilege. *Id.* at 533. *Gravel* involved a senator's personal "aide," who had been "added to the Senator's staff." 408 U.S. at 609. It hardly "establish[es] that the activities and communications of [all] those assisting a legislator with legislative activities fall within the protection of the Speech or Debate clause." *Cf.* GA Br. 26. And *Doe v. McMillan*, 412 U.S. 306 (1973), which Respondents also cite, does not "announce, or even suggest, the blanket extension of legislative privilege or immunity to legislative consultants." *Page*, 15 F. Supp. 3d at 661-62 (explaining that the consultant in *McMillan* was protected because he was the equivalent of a "legislative aide").

Turzai and Scarnati's lone Pennsylvania case on third parties, *Parsons v. Pennsylvania Higher Education Assistance Agency*, 910 A.2d 177, 187 (Pa. Commw. Ct. 2006), stands for the opposite proposition for which Respondents cite it and rejected the application of legislative privilege. The General Assembly's lone Pennsylvania case, *Firetree, Ltd. v. Fairchild*, 920 A.2d 913 (Pa. Commw. 2007), is entirely inapposite: it involved personal *immunity* of a legislator who was sued in tort for public statements relating to legislative activity. *Id.* at 915. It did not even mention a discovery privilege, much less a privilege against discovery of communications to third parties. "[I]t would be both unseemly and a misuse of public assets to permit an individual hired with taxpayer money to conceal from

the taxpayers themselves otherwise admissible evidence" of allegedly unconstitutional motives affecting their voting rights.'" *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645, at *2 (E.D. Wis. Dec. 20, 2011) (internal quotation marks).

C. For Similar Reasons, the Court Should Overrule Any Privilege Objections to the Subpoenas Served on Republican Political Organizations and Affiliates

Six of the third-party subpoenas were directed to outside individuals or entities: (1) Thomas Hofeller and (2) Adam Kincaid, both of whom worked on redistricting for national Republican political organizations; (3) the Republican National Committee (RNC); (4) the National Republican Congressional Committee (RNCC), (5) the Republican State Leadership Committee (RSLC); and (6) the State Government Leadership Foundation (SGLC). This Court has now permitted service of the subpoenas, but ordered Petitioners to note that they were subject to a pending privilege objection.

This Court should now overrule that objection. As explained in the previous section, none of the communications with these individuals or groups are privileged, both because political activities are not protected by the privilege and because Legislative Respondents state in their brief that the Legislature did not pay any of these individuals or entities. *See supra*.

The Court should also order Legislative Respondents to immediately produce a witness for deposition who is knowledgeable about the role that these individuals and groups played in developing the 2011 Plan. In October, the Commonwealth Court expressly ordered all Legislative Respondents to provide a "factual statement" that "identif[ied] *with specificity* the connection between the proposed third-party recipient and the legislature, if any, during the relevant period, and whether the General Assembly paid for those recipient services." 10/16/2017 Order ¶ 2 (emphasis added).

Legislative Respondents have flagrantly disregarded the first part of that court order. The General Assembly offers no factual statement *at all.* And the only facts in Turzai and Scarnati's brief are designed to evade the order. With respect to Hofeller, Kincaid, the RNC, and the NRCC only, Turzai and Scarnati offer a footnote stating that while it is "unknown" to them, "it is of course possible that one or more of these parties was involved in advising members of the General Assembly with respect to the 2011 Plan." Turzai/Scarnati Br. 6 n.6. But with respect to the RSLC and the SGLF—which are the two national Republican organizations that were and are in charge of redistricting—Turzai and Scarnati *do not include such a footnote*. In other words, they do not deny knowledge of the connection between the RSLC, the SGLF, and the 2011 Plan, and they do not deny

that there was a connection. Instead, they simply ignore this Court's order to identify that connection, much less with specificity.

The entire point of the Court's order was to require Legislative Respondents to say, with specificity, whether national Republican organizations or operatives were involved in any way in creating the 2011 Plan. There is no more time to waste, and the Court should order Legislative Respondents to produce a witness for an immediate deposition on the relationship between the Legislative Respondents and the outside Republican political organizations with respect to the 2011 Plan.

II. To the Extent Any Legislative Privilege Exists, Legislative Respondents Have Waived It

To the extent the Court concludes that legislative privilege otherwise applies in this matter, Respondents have waived it. "Absence of waiver is one of the elements required to establish ... privilege." *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014). A party can waive privilege expressly, by disclosing privileged information to a third party, or implicitly, by putting privileged material "in issue" in the case. *See Commonwealth v. Harris*, 32 A.3d 243, 253 (Pa. 2011); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994). This "fairness principle," which "is often expressed in terms of preventing a party from using [a] privilege as both a shield and a sword," is "so self-evident" that courts have often seen "no need to support it with either citation

to authority or further analysis." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).

Applying these principles, courts have held that a party has waived privilege in a variety of circumstances. Of particular importance is "at issue" waiver: a party who raises an issue cannot selectively invoke the privilege. *See Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). In *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), a defendant charged with securities fraud sought to testify at trial that he had acted in good faith, i.e., that his intent was to comply with the securities laws, without disclosing the content or even the existence of any privileged communications and without asserting an advice-of-counsel defense. *Id.* at 1291. Because the assertion of good faith necessarily called into question the defendant's communications with his attorney, the Second Circuit held that such testimony implicitly waived the attorney-client privilege. *See id.* at 1291-94. As the court explained, a party "may not use [a] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Id.* at 1292. "[T]he privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *Id.* Similarly, in *Hearn*, the Court held that defendants waived privilege by invoking a qualified-immunity defense; in doing so, defendants "placed the [otherwise privileged attorney-client] information at issue" because the legal advice they received was

"germane to the qualified immunity defense they raised" and the assertion of the privilege "deprive[d] plaintiff of information necessary" to rebut the defense." 68 F.R.D. at 581.[4]

In redistricting cases, too, "courts have been loath to allow a legislator to invoke the [legislative] 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). "It is well settled that the legislative privilege ... may be waived." *Id.* In *Doe v. Nebraska*, 98 F. Supp. 2d 1086 (D. Neb. 2012), the court held that defendants could not simultaneously both assert legislative privilege barring discovery of the Nebraska legislature's motives in passing a statute and also argue that plaintiff's evidence regarding the true motives of the legislature was lacking. *Id.* at 1126. The court held that the defendants "w[ould] not be allowed to use their privilege defenses as both a sword and a shield," as they attempted to do by both denying an impermissible intent and withholding discovery about their intent. *Id.*

Here, Legislative Respondents have not only denied that Petitioners can establish impermissible legislative intent, *see* Legislative Respondents' Preliminary Objections ¶ 58, they have affirmatively advanced arguments that can

[4] *Cf. Powell v. Ridge,* 247 F.3d 520, 523 (3d Cir. 2001) (rejecting Pennsylvania General Assembly leaders' invocation of legislative privilege that would enable the General Assembly to "seek discovery, but not respond to it; take depositions, but not be deposed, and testify at trial, but not be cross-examined"; such a privilege "does not exist").

be proven or disproven by the very evidence that Legislative Respondents seek to withhold. In paragraph 34 of their preliminary objections, Legislative Respondents contend that "it is difficult to adjudicate partisan gerrymandering claims because political party affiliation is an inherently mutable characteristic as voters often vote for different parties in both different elections and in the same election." *Id.* ¶ 34. But Petitioners dispute that the mutable nature of party affiliation prevents mapmakers from entrenching a party in power over time. To the contrary, Petitioners contend that with the use of modern technology, mapmakers can do precisely that. The best evidence refuting Legislative Respondents' assertion, however, is the evidence from the mapmakers themselves—evidence that Legislative Respondents seek to withhold based on privilege. Legislative Respondents cannot claim that political party affiliation is "inherently mutable" while at the same time preventing discovery into the question whether they made assessments of how a district is likely to vote.

Similarly, in paragraph 71, Legislative Respondents assert that Petitioners living in jurisdictions with majority Democratic registration suffer no injury simply because they are in the majority in those districts. Petitioners will show that party registration is not the sole or even predominant criterion that mapmakers use in evaluating how a district is likely to vote. But, again, the best evidence to test Legislative Respondents' claim would come from the evidence that Legislative

Respondents seek to withhold. The inherent unfairness in Legislative Respondents relying on assertions about how they say the mapmaking process is done while simultaneously withholding any discovery about that process is precisely what the sword-and-shield doctrine of waiver is designed to prevent. *See, e.g.*, *Favors*, 285 F.R.D. at 212; *Doe*, 898 F. Supp. 2d at 1126.[5]

The General Assembly asserts that "individual legislators" cannot "waive" the legislative privilege on behalf of the General Assembly. GA Br. 21. That is both incorrect and irrelevant. It is incorrect because the privilege protects "individual legislators." *Pa. AFL-CIO*, 691 A.2d at 1034. It is irrelevant because the General Assembly itself is a defendant in this lawsuit, and it has itself put facts in issue in its preliminary objections that waive the privilege.

III. The First Amendment Privilege Does Not Apply

Speaker Turzai and Senator Scarnati also assert, in the most cursory fashion, a so-called "First Amendment" privilege, which the Court should reject in its entirety. That is what happened in *Agre*, where the three-judge panel—which included the Chief Judge of the Third Circuit—summarily overruled Respondents' First Amendment privilege argument. ECF 76 at 1, No. 17-cv-04392.

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[5] Separately, Respondents have waived all privilege objections by failing to file their privilege brief on time. *See* Petitioners' Emergency Application to Compel Responses to Pending Discovery Requests Based on Legislative Respondents' Waiver of All Privileges. Petitioners do not ask the Court to revisit its ruling denying this application, but include it here for purposes of completeness and preservation.

First, no such privilege could possibly apply on the facts here. The First Amendment protects the public against infringement of rights by the government.[6] Respondents do not cite a single case supporting the assertion of a First Amendment Privilege by the government or government officials against members of the public—not one. Petitioners are similarly aware of no such case, and this case should not be the first.

The few cases Respondents do cite provide no support for any First Amendment privilege here. Respondents cite *Buckley v. Valeo* for the proposition that organizations have a right to advocate "privately," Turzai/Scarnati Br. 23, but *Buckley* is a case *upholding* compelled disclosure of political contributions. 424 U.S. 1, 75 (1976). *Buckley* noted that in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court protected the NAACP from compelled disclosure of membership lists to the government where the organization made an "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Respondents do not and cannot offer any similar showing.

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[6] *See, e.g.*, *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 450 (1958) ("the immunity from *state scrutiny* of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful *private interests privately* and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.") (emphases added).

Speaker Turzai and Senator Scarnati's suggestion that it would "burden" their "First Amendment rights" to disclose their "political affiliations" with the Republican party, or their "lobbying strategy," Br. 23, is preposterous. Nor can they assert the objection on behalf of non-parties. *Id*. at 24 n.18.[7]

Second, this Court has twice ordered Legislative Respondents to "identify facts on which they intend to rely in support of their 'First Amendment' privilege claim." 10/16/2017 Order ¶ 2; *see also* 11/16/2016 Order ¶ 2 (reiterating earlier briefing requirements). Respondents assert that disclosure of communications with third parties "will reveal these organizations' protected information and chill the ability of lobbying organizations to communicate effectively with their legislators." Turzai/Scarnati Br. 23-24. That is a conclusory legal assertion. Respondents offer no *facts* at all, much less facts as to how disclosure would purportedly "chill" any protected speech. *See id.* This is obviously insufficient, both under the Court's order and under *NAACP v. Alabama*.

[7] Respondents oddly suggest in footnote 18 that the third-party subpoena recipients should receive another bite at the apple to assert legislative privilege. While it is true that Petitioners took the view back in September that the third-party subpoenas should be served immediately so that the third parties could assert legislative privilege, Legislative Respondents successfully opposed service of the third-party subpoenas in September on the theory that Legislative Respondents were the right party to assert the legislative privilege on behalf of all third-party subpoena recipients. They cannot now change their tune.

IV. Respondents Have Waived Any Attorney-Client Privilege or Work Product Argument By Failing to Properly Assert It

The General Assembly offers one paragraph of boilerplate language about attorney-client and work product privilege, without attempting to apply it to *any* document request, interrogatory, or deposition request pending in this case and without producing a privilege log. GA Br. 41-42. Speaker Turzai and Senator Scarnati offer three paragraphs of boilerplate. They note only that there is one request that would elicit communications with attorneys, four third-party subpoenas directed to individuals who happen to be attorneys, and that the "remaining requests" seek, "at least in part," documents or information that "might" be shielded by attorney-client privilege. Turzai/Scarnati Br. 25. They further assert that there are "likely" to be responsive documents that are protected by attorney-client or work product privilege. *Id.* They ask the Court to defer resolution of attorney-client and work product privilege and say that a ruling would be "premature." *Id.*

Enough is enough. This Court's October 16 order required Respondents to brief "all claims of privilege." And under Pennsylvania law, the party invoking the privilege must "initially set forth facts showing that the privilege has been properly invoked." *E.g.*, *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012, 1019 (Pa. Super. Ct. 2015). "[I]f the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the

other party, *and the communication is not protected*." *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. Ct. 2008) (emphasis added); *see also* Pa.R.C.P. 4009.12(b)(2) ("[d]ocuments or things not produced shall be identified with reasonable particularity together with the basis for non-production").

There is no longer time for another round of briefing and objections about attorney-client privilege issues. Turzai and Scarnati state that, "[s]ince the Supreme Court's recent Order lifting the stay in this case, Legislative Respondents have re-initiated the process of collecting and analyzing documents for production." Br. 25. But this response makes no sense: there was never any stay of the privilege issue. Legislative Respondents have had these requests since *June*.

With trial set to begin in three weeks, it would be wildly unfair to allow Legislative Respondents to delay discovery further through yet another round of privilege objections. Legislative Respondents have not offered a single fact sufficient to show that attorney-client or work product privilege applies to *any* of the requested documents. Respondents Turzai and Scarnati note that one subpart of one request includes communications with attorneys, but the mere fact that an attorney is present on a communication does not shield that communication from disclosure. Further, "the attorney-client privilege does not protect mere facts," *California Univ. of Pa. v. Schackner*, 168 A.3d 413, 421 (Pa. Commw. Ct. 2017), which is the vast majority of what Petitioners seek, such as the considerations or

criteria that were used in developing the 2011 Plan, the instructions that Respondents gave to the mapmakers, the data the mapmakers considered, the method by which they assessed partisanship, draft maps, and their analyses of likely partisan outcomes produced by any draft maps and the final map.

V. Legislative Respondents Waive Their Objections to the Subpoena to Governor Corbett

After objecting since August to service of a subpoena to former Governor Corbett, Legislative Respondents now acknowledge in a footnote that they had no basis to offer any purported "executive privilege" objections on behalf of Governor Corbett in the first place. Turzai/Scarnati Br. 4 n.4. In light of the exigency of this litigation and their obligation to act in good faith, it is unclear why Legislative Respondents waited until November 17 to alert the Court that they no longer objected to service of the subpoena. In any event, the Pennsylvania Supreme Court has not adopted an executive privilege. The Court has authorized service of this subpoena, but should hold that it is no longer subject to any pending privilege objection.[8]

CONCLUSION

The Court should overrule Legislative Respondents' privilege objections.

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[8] The General Assembly argues in a footnote (Br. 39 n.13) that communications with the governor are protected by legislative privilege. It cites no authority for that proposition (the one case the General Assembly cites is not a privilege case at all). The governor obviously is not a legislative employee or alter ego of any legislator, and in the absence of any authority in any court supporting the General Assembly's argument, this Court should overrule it.

Dated: November 20, 2017

Respectfully submitted,

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