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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*.	**Civ. No. 261 MD 2017**

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of the Application of Legislative Respondents to Preclude Introduction of Privileged Evidence Otherwise Obtained in the *Agre* Case, and Petitioners' Response, it is hereby ORDERED that the Application is DENIED.

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

Last night Legislative Respondents filed an unprecedented and unsupported request that the Court bar Petitioners from "filing, disclosing or otherwise using in this Court any testimony or documents" that this Court has held are protected from compelled disclosure under the legislative privilege. Leg. Resps.' Proposed Order. The information at issue shows that the Legislative Respondents assigned partisan preference scores—to every voter tabulation district in Pennsylvania—in drawing the congressional district map enacted by Act 131. To be clear, this information is *entirely in the public domain* and was properly obtained by Petitioners. It was produced by Legislative Respondents in the federal gerrymandering case, *Agre v. Wolf*, with no protective order or any other confidentiality restriction. Legislative Respondents cite no support—and none exists—for their sweeping assertion that

legislative privilege somehow requires this Court to shield itself from *public* information, much less information about issues of such central importance. The fact of the matter is that Petitioners or anyone else can share any of this information with the entire public. The notion that every Pennsylvanian can freely access this information—but this Court cannot see it—is simply bizarre.

Legislative Respondents' Application is so unfounded that it should be summarily denied. If the Court elects not to deny the Application summarily, then the important question of whether the Court can, and if so, should, bar the filing of public information should be fully briefed and Legislative Respondents should be directed to file the first brief identifying support, if any, for the proposition that the Court cannot see, and Petitioners cannot show the Court, the material in question. There is no emergency here. Legislative Respondents have known for a full week that Petitioners were using this information, as it was described and analyzed in one of Petitioners' expert reports served on Legislative Respondents on Monday, November 27th. If they can wait that long to bring this motion, then a question raising issues of such importance can be briefed in a careful and deliberative fashion.[1]

[1] The Speech and Debate Clause, which this Court held prevents a court from *compelling* Legislative Respondents to produce certain information, does not prevent Petitioners from filing or disseminating *public* information. And any such restriction would violate the federal First Amendment as an unconstitutional prior

Legislative Respondents also say that they intend to file a motion in limine to exclude the portion of Petitioners' expert report that is based on the information produced in *Agre*. Whether public information lawfully obtained and admissible in evidence should be excluded from evidence is an entirely separate question from whether Petitioners may be prevented from "filing, disclosing or otherwise using in this Court" that information. Petitioners will file an opposition to Legislative Respondents' motion after they file it.

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restraint. *See In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (under the First Amendment, a court may not prevent a party from disseminating "information . . . gained through means independent of the court's processes," even if that information is "identical" to information the court could restrict if obtained through the court's own proceedings); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (court cannot issue a gag order on press covering evidence discussed in open court); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (invalidating injunction against publication of identity of juvenile offender when the offender's identity is already a matter of public record discussed in court).

Dated: December 4, 2017

Respectfully submitted,

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