Received 12/10/2017 11:50:11 AM Commonwealth Court of Pennsylvania

Filed 12/10/2017 11:50:00 AM 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**

[PROPOSED] ORDER

AND NOW, this ___ day of _____, 2017, upon consideration of Petitioners' Motion *In Limine* To Admit Evidence Produced By Speaker Turzai In *Agre* Litigation And Properly Obtained By Petitioners, it is hereby **ORDERED** that the Motion is **GRANTED**, and accordingly, the materials Speaker Turzai produced in the federal gerrymandering litigation, *Agre v. Wolf*, may be admitted at the trial of this case, and any motion by Legislative Respondents seeking to exclude such materials 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' MOTION *IN LIMINE* TO ADMIT EVIDENCE PRODUCED BY SPEAKER TURZAI IN *AGRE* LITIGATION AND PROPERLY OBTAINED BY PETITIONERS

Petitioners, by and through undersigned counsel, respectfully move the Court *in limine* for entry of an order admitting the materials Speaker Turzai produced in the federal gerrymandering litigation, *Agre v. Wolf*, and denying any motion by Legislative Respondents seeking to exclude such materials. The materials at issue were properly obtained by Petitioners without compulsion by this Court. The materials are already in the public domain. And these materials are highly probative here—they show, conclusively and directly, that Pennsylvania's 2011 congressional district map was drawn with partisan intent to disadvantage Democratic voters. The Speech and Debate Clause does not prevent the introduction of these materials at trial in this case.

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**

PETITIONERS' MOTION *IN LIMINE* TO ADMIT EVIDENCE PRODUCED BY SPEAKER TURZAI IN *AGRE* LITIGATION AND PROPERLY OBTAINED BY PETITIONERS

Petitioners, by and through undersigned counsel, respectfully move the Court *in limine* for an order permitting Petitioners to introduce as evidence certain materials produced by Speaker Turzai in the federal *Agre* litigation. Legislative Respondents have indicated that they plan to object to such evidence on grounds of legislative privilege. But Petitioners properly obtained the materials without violating any protective order or other confidentiality restriction, and the information is already in the public domain. These materials are highly relevant—they conclusively establish that Pennsylvania's 2011 congressional districting map was crafted intentionally to discriminate against Democratic voters. In these circumstances, legislative privilege has no application, and there is no legitimate reason for shielding the Court from this evidence of discriminatory intent.

BACKGROUND

In the federal gerrymandering case, *Agre v. Wolf*, Speaker Turzai was ordered to produce—and did produce—certain materials related to the crafting of the 2011 map. These materials were produced without any protective order or other confidentiality restriction. Petitioners lawfully and properly obtained these materials. They were discussed in open court at the *Agre* trial and are also in the public domain. Petitioners intend to introduce certain of these materials as evidence at trial in this case. There are two basic categories of this evidence:

First, Petitioners intend to introduce evidence showing that Legislative Respondents assigned partisan preference scores to every Voting Tabulation District in Pennsylvania in drawing the 2011 map. *See* Petrs. Exs. 27-31. On November 9, the federal court in *Agre* ordered Speaker Turzai and Senator Scarnati to produce to the *Agre* plaintiffs the "facts and data considered in creating the 2011 Plan." Order, *Agre*, No. 2:17-cv-4392, ECF No. 76 ¶ 2 (E.D. Pa. Nov. 9, 2017). In response, on November 17, Speaker Turzai produced a number of files, including Petitioners' Exhibits 27-30 (Turzai – 01641.DBF; Turzai – 01644.DBF; Turzai – 01653.DBF; Turzai – 01674.DBF). Speaker Turzai's counsel expressly stated via email that these documents constituted "the facts and data considered in creating the 2011 Plan." Petrs. Ex. 33 (email from J. Mclean).

Petitioners' expert, Dr. Jowei Chen, has analyzed these documents. The details are in his report, but in summary he will testify that Petitioners' Exhibit 30—"Turzai – 01674.DBF"—contains election results for every Voting Tabulation District (VTD) in Pennsylvania, for every statewide election, legislative election, and congressional election between 2004 and 2010. The file shows that these elections results were used to calculate ten different partisan indices that measured the partisan performance of each VTD in Pennsylvania. The indices assign positive, higher numbers to VTDs with higher support for Republican candidates and lower, negative numbers for precincts with higher support for Democratic candidates. The other files—Petitioners' Exhibits 27-29—also report all or some of this same information at different levels of geography, namely counties, municipalities, and census blocks. Petitioners' Exhibit 31 is a summary exhibit isolating the ten partisan indices from Exhibit 30. Dr. Chen will testify to his opinion that these files, which Speaker Turzai has represented constitute the "facts and data considering in creating the 2011 Plan," demonstrate a significant and intentional effort at measuring and comparing the partisan performance of Pennsylvania voters at several different levels of Pennsylvania geography.

Second, Petitioners intend to introduce a series of maps and related documents produced by Speaker Turzai in *Agre* that show the creators of the 2011 map repeatedly analyzed proposed maps by creating a partisan score for each

potential new congressional district. For example, Petitioners' Exhibit 155, entitled "Proposed Statewide," contains the shape of a proposed redistricting map and assigns a partisan score to each of the 18 proposed districts. Thus, for example, the map assigns "D" scores ranging from "D3.93" to "D38" to proposed First, Second, Thirteenth, Fourteenth, and Seventeenth Districts. ***Those are the five districts the Democrats won in 2012, 2014, and 2016.*** The map then assigns a score of D0.8 to a proposed Eighth District, and scores ranging from R1.24 to R10.8 to the remaining districts—***which are districts that Republicans won in 2012, 2014, and 2016***. Petitioners' Exhibit 154 is a "Southeast Enlargement" of a "Proposed Map" that contains similar partisan scoring of proposed districts.

Petitioners' Exhibit 150 is a PowerPoint presentation to the House Republican Caucus from the "Office of the Majority Leader," i.e., Speaker Turzai, dated December 5, 2011. The presentation contains alternative "proposed maps" for Pennsylvania's congressional delegation, along with images showing that Speaker Turzai's office assigned a partisan score to each proposed congressional district. For example, the slide entitled "Congressional Delegation Proposed Map 1: SW Enlargement" assigns scores like "R7.31" and "R.13.5" to various proposed districts. The slide entitled "Congressional Delegation Proposed Map: District 7" assigns scores ranging from "D4" to "D38" for proposed First, Second, Thirteenth, and Seventeenth Districts, as well as "R_" partisan scores to other districts.

Likewise, Petitioners' Exhibit 140 is a document entitled "CD18 Maximized" that contains a partisan score for each of the 18 proposed districts in an apparent effort to "maximize[]" the number of districts that would produce a Republican seat. (These examples are illustrative; there are additional such exhibits.)

On December 5, this Court denied Legislative Respondents' request to preclude Petitioners from "filing, disclosing, introducing, or otherwise using" such materials in this Court. 12/5/17 Order at 1-2. Petitioners submit this motion *in limine* because they anticipate that Legislative Respondents will challenge the admissibility of such documents at trial under the Speech and Debate Clause.

ARGUMENT

All of the evidence at issue is admissible. The legislative privilege under Pennsylvania's Speech and Debate Clause prevents the Court from *compelling* disclosure. It does not prevent a litigant from introducing highly relevant evidence that the litigant properly obtained elsewhere without any compulsion by the Court, and that is already in the public domain.

The evidence at issue shows unambiguously that Legislative Respondents considered the partisan preferences of Pennsylvania communities in drawing the congressional district lines for 2011. It shows that in creating the 2011 map they calculated a partisan score reflecting the expected performance of each proposed district. And it shows that they drew a map designed to maximize the number of

districts with a Republican advantage. This is conclusive, direct evidence of partisan intent, one of the core elements of establishing a claim of unconstitutional partisan gerrymandering. And it also proves, conclusively and directly, that Legislative Respondents not only considered Democratic voters to be an "identifiable" political group in each district, but that they in fact *identified* such voters with mathematical precision. This evidence was produced in the federal *Agre* litigation without any protective order or other confidentiality restrictions. It was discussed at length in open court this past week at the *Agre* trial.

According to one media report, the *Agre* plaintiffs' expert "testified that partisan data produced by Turzai under court order showed election returns and party registration down to the U.S. Census block level—equivalent to about one city block." L. Lazarski, *Battle over Pa.'s congressional district map begins in federal court in gerrymandering case*, Dec. 4, 2017, https://goo.gl/HpoLcb.

Petitioners and Respondents have the materials at issue. The federal court has them. They were discussed in open court last week. The public has the materials. In these circumstances, the Pennsylvania courts should have them too. The Speech and Debate Clause doesn't say otherwise

A. The Speech and Debate Clause Does Not Preclude The Use of Evidence Properly Obtained and in the Public Domain

The Speech and Debate Clause provides no basis to exclude any of this evidence. This Court held that, under the Speech and Debate Clause, "this Court

lacks authority to *compel* testimony or the production of documents relative to the intentions, motivations, and activities of state legislators or their staff." 11/22/17 Order at 7 (emphasis added). The Court reiterated the point in its December 5 order denying Legislative Respondents' motion to bar Petitioners from using or otherwise disclosing the materials at issue in this case. 12/5/17 Order at 2. The Court explained that its prior order sustaining Legislative Respondents' claim of legislative privilege "did not conclude that such testimony or documents are categorically barred from consideration in this matter—only that the Court cannot *compel* the production of such testimony and documents." *Id.* (emphasis added)

Nothing in the text of the Speech and Debate Clause precludes the introduction of evidence properly obtained and in the public domain, simply because it bears on a legislator's motivations or activities. The Clause states: "[T]he members of the General Assembly . . . for any speech or debate in either House . . . shall not be questioned in any other place." Pa. Const. art. 2, § 15. The introduction of evidence that Petitioners properly obtained via the *Agre* litigation and that is now in the public domain is in no way the equivalent of "question[ing]" any member of the General Assembly against his or her will. Petitioners are not aware of any decision by any court in Pennsylvania holding that the Speech and Debate Clause extends beyond compelled production to prohibit the introduction of evidence in the public domain bearing on the legislature's activities.

Nor should this Court create one. "[E]videntiary privileges are not favored" in Pennsylvania. *Commonwealth v. Stewart*, 690 A.2d 195, 197 (Pa. 1997). "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* (internal quotation marks omitted). Courts should therefore extend a privilege "only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.*

No public good would come of excluding this evidence. Quite the contrary. While the Speech and Debate Clause is grounded in the Pennsylvania Constitution, so are Petitioners' claims in this case. The Supreme Court has held twice that partisan gerrymandering claims are justiciable under the Pennsylvania Constitution. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). The Supreme Court has also held that the 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*, 681 A.2d 699, 703 (Pa. 1996). The Speech and Debate Clause does not require the Court to blind itself from highly relevant information bearing directly on the core questions in this case.

The Speech and Debate Clause was designed to "protect legislators from *judicial interference* with their legitimate legislative activities." *Consumers Ed. & Protective Ass'n v. Nolan*, 368 A.2d 675, 680-81 (Pa. 1977) (emphasis added). This Court has already held that the clause protects against *state court judicial interference*, not interference by the federal courts. The Court held that the separation of powers rationale that underlies the Speech and Debate Clause applies to compelled production by "Pennsylvania state courts," while "Federal courts . . . are not" "so constrained." 11/22/17 Privilege Order at 4. There are no separation of powers concerns here, as this Court is not being asked to compel anything from the legislative branch. It does not "interfere" with legitimate legislative activities for this Court to consider evidence about those activities that is in the public domain in the course of evaluating the constitutionality of a statute. Indeed, any other holding would contravene the principle that the Speech and Debate Clause was "designed to preserve legislative independence, not supremacy." *United States v. Brewster*, 408 U.S. 501, 508 (1972).

Other courts reject the notion that the existence of a privilege or prohibition on compelled discovery shields litigants from the use of evidence obtained properly through other means, especially where, as here, that information is in the public domain. As the Eleventh Circuit has explained, "[a]llowing parties to use, for purposes of litigation, documents they have lawfully obtained, regardless of

whether they could have obtained them through discovery in the case in which they use them, furthers" the goals of civil litigation. *Glock v. Glock, Inc.*, 797 F.3d 1002, 1008 (11th Cir. 2015); *see also In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) ("Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak."); *Falise v. Am. Tobacco Co.*, 193 F.R.D. 73, 84 (E.D.N.Y. 2000) ("In light of the public attention that will doubtlessly be given to these cases, as well as the availability of these documents to the general public, a trial at which these plainly critical documents are unavailable to the finder of fact could seriously undermine the public's confidence in the integrity of the court's processes. Indeed, it would understandably be difficult for the public to accept a verdict where the finders of fact did not have access to documents that have been characterized by public officials as 'clearly a smoking howitzer.'").

No useful public policy purpose would be served by trying to restrict the use of information that is already in the public domain. That the Speech and Debate Clause is a constitutional privilege does not alter this conclusion. As the U.S. Supreme Court has held in the context of the Fifth Amendment privilege, that privilege protects against *compulsion* only: "[a] party is privileged from producing the evidence, but not from its production." *Couch v. United States*, 409 U.S. 322, 328 (1973) (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913) (Holmes,

J.)). Privileges "adhere[] . . . to the person, not to information that may incriminate him." *Id.*

B. The Documents That Petitioners Intend to Introduce Were Discussed Publicly At Length in the *Agre* Trial

The Speech and Debate Clause simply does not bear on the question of whether documents obtained without compulsion by the Court and already in the public domain may be introduced as evidence in a constitutional challenge to legislation. But it would be especially odd to bar the use of this information given that the documents are not only in the public domain, but were discussed at length just last week in open court in a public trial.

Plaintiffs' expert in *Agre*, Anne Hanna, submitted a 44-page "[r]eport on analysis of the GIS dataset provided" in the "Speaker Turzai Production.'" ECF 153-2. Another plaintiff expert, Daniel McGlone, likewise submitted a report about the Turzai production data that is also available publicly on the docket in *Agre*. ECF 153-1. Both of those reports were admitted into evidence in *Agre*.

Plaintiffs' experts also testified on the public record about this material at length:

- McGlone explained that "[t]he Turzai production data …. contained dozens of fields of partisan election data, election return data and voter registration data. . . . it's the total number of votes for Democrats and Republicans for every single election state-wide and national from 2004 to 2010, even-numbered years, not includ[ing] special elections." *Agre* 12/4/17 A.M. Trial Tr. 162:7-163:18. He further testified that the data "was in very – very heavily detailed down to the smallest geographic unit

that we even use when we're making maps, which is the census block." 12/4/17 A.M. Trial Tr. 164:8-20.

- McGlone testified about this data additionally at 12/4/17 A.M. Trial Tr. 165:15-25; 167:19-168:6; 168:12-169:5; 172:16-22; 173:13-21; 174:11-175:3; 181:25-182:22; 184:24-185:5.

- Plaintiffs' counsel in *Agre* also expressly discussed the email from Speaker Turzai's counsel producing this data and stating that it constituted "the facts and data [considered] in creating the 2011 plan." 12/4/17 P.M. Trial Tr. 3:17-4:8.

- The Turzai partisanship data was also discussed at length in the testimony of Plaintiffs' expert Anne Hanna. *See* 12/4/17 P.M. Trial Tr. 77:15-78:12; 78:23-79:4; 87:16-88:2; 102:15-103:4; 102:15-103:4; 108:15-19; 110:14-114:17; 116:1-117-11; 117:14-122:14; 125:10-126:8; 126:21-127:1; 130:19-131:16; 132:20-133:11.

- Hanna also testified publicly and at length about the proposed congressional districting maps that Speaker Turzai produced. She explained that "there were 31 such maps," including the one entitled "CD18 Maximized." 12/5/17 AM Trial Tr. 6:2-9; 8:7-19; 9:7-17; 12:18-13:23; 17:3-18:10; 19:5-9; 20:11-21:14; 22:9-23:3; 24:15-27:6. Hanna explained that this map had 18 numbers at the top left in "the form of either a letter followed by a number and the letter is either D or R, and then the numbers, you know, are ranging from it looks like zero to 39.4 is the largest," and that the numbers appeared to be a reflection of the estimated partisan lean of the 18 proposed districts.

Petitioners should not be prevented from using this properly obtained, publicly available, and highly probative information.

CONCLUSION

The Court should deny any motion by Legislative Respondents seeking to exclude the materials produced by Speaker Turzai in the federal *Agre* litigation.

Dated: December 10, 2017

Respectfully submitted,

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