

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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League of Women Voters of Pennsylvania, <i>et al.</i> ,	)	
	)	
<i>Petitioners,</i>	)	
	)	<b>No. 261 MD 2017</b>
v.	)	
	)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,	)	
	)	
<i>Respondents.</i>	)	

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**PETITIONERS’ RESPONSE TO LEGISLATIVE RESPONDENTS’  
MOTIONS *IN LIMINE* TO EXCLUDE  
PETITIONERS’ EXHIBITS 27-31, 33 AND 135-161, AND  
TO EXCLUDE CERTAIN TESTIMONY OF JOWEI CHEN, PH.D.**

Legislative Respondents have moved to exclude certain materials that Speaker Turzai produced in the federal *Agre* case—and an analysis of those materials by Petitioners’ expert Dr. Chen—on the ground that Petitioners obtained the materials in violation of an order of the *Agre* court. That is not only verifiably false, but thoroughly dishonest. Let there be zero mistake: no court order or any other restriction prevented Petitioners from obtaining the materials Speaker Turzai produced in *Agre*. In claiming otherwise, Legislative Respondents knowingly misstate the clear record from *Agre*. Their own counsel told the *Agre* court on Thursday that no order prevented dissemination of the materials Petitioners received. This Court should deny Legislative Respondents’ motions.

## BACKGROUND

On November 9, the *Agre* court ordered Speaker Turzai and Senator Scarnati to produce the “facts and data considered in creating the 2011 plan.” ECF 76 at 2 (Ex. A). Nothing in the court’s order restricted use or disclosure of these materials. *Id.* On November 17, Speaker Turzai produced 13 files under cover of an email stating that those files constituted “the facts and data considered in creating the 2011 Plan.” Petrs. Trial Ex. 33. This production included the data files containing partisan voting indices that Dr. Chen analyzed in his expert report, including Petitioners’ Trial Exhibits 27-31.

Also on November 17, Speaker Turzai moved for a protective order in *Agre*. As the *Agre* court noted, the Speaker sought an order that would apply to his deposition and “would arguably extend to production of documents that [the] Court ha[d] previously ordered.” ECF No. 114 at 1 (Ex. B). On November 22, the *Agre* court denied the request for a protective order. *Id.* at 2.

On November 27, Petitioners served Legislative Respondents with Dr. Chen’s expert report. The report includes the analysis (on pp. 38-41) of certain files produced by Speaker Turzai in *Agre*. Petrs. Trial Ex. 1 (Chen Report).

Thereafter, Speaker Turzai asked the *Agre* court to seal his deposition. On November 28, the *Agre* court denied this request. The court stated, however, that “to enable the parties to focus on completing discovery and preparing for trial, *all*

*depositions and any exhibits used at any deposition*, may only be disclosed to counsel, their agents (such as paralegals and other assistants), their clients, and experts until trial begins.” ECF No. 144 at 2 (Ex. C) (emphasis added). On the same day, the court ordered Speaker Turzai to produce additional documents without regard to legislative privilege. ECF No. 142 (Ex. D). In response, Speaker Turzai produced powerpoints, maps, and other documents that are now Petitioners Exhibits 135-161.

Speaker Turzai knew full well that the *Agre* court’s November 28 order restricting use of his deposition did not apply to any past or future document production. Indeed, on December 3, Speaker Turzai moved the *Agre* court for an order “similar to [the November 28 deposition order] prohibiting the parties from distributing the Speaker’s document production to those outside of this litigation.” ECF 171-1 at 1 (Ex. E). There, Speaker Turzai stated that he knew Petitioners were receiving materials he produced in *Agre*, and argued that a protective order was needed to prevent “the free dissemination of the Speaker’s document production.” *Id.* at 3.<sup>1</sup>

The *Agre* court ruled on that motion on Thursday, December 7, in the colloquy that Legislative Respondents selectively quote in their motions *in limine*.

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<sup>1</sup> This motion also assertion, incorrectly, that Petitioners had obtained information through Speaker Turzai’s *deposition*. Petitioners corrected the record with the federal court, and Legislative Respondents have not denied that their assertion lacked any factual basis and was false.

Referencing the November 28 order restricting use of Speaker Turzai's deposition, Chief Judge Smith at one point early on mistakenly suggested that the order prevented disclosure of *document productions*, not just the deposition. 12/7/17 P.M. Trial Tr. 7 (Ex. F). After comments from Judge Schwartz suggested a similar confusion, the *Agre* plaintiffs' counsel, Ms. Ballard, clarified that the "material that was produced in discovery . . . was not covered by the Court's original order" regarding the deposition and that the "discovery is gone, out," and "there's no way we can get it back." *Id.* at 10. Then, in transcript pages that Legislative Respondents *omit from the attachment to their motion*, Judge Schwartz acknowledged that the court's November 28 order did not cover materials Speaker Turzai produced, stating: "I respect that and -- and I will be -- stand corrected . . . in terms of the past order." *Id.* at 10-11.

If this were not clear enough, in transcript pages that Legislative Respondents *also omit*, Speaker Turzai's own counsel expressly confirmed that the *Agre* plaintiffs' disclosure of Speaker Turzai's document production had not violated the court's November 28 order or any order. *Id.* at 13, lines 20-25. To avoid any conceivable doubt, we have reproduced the relevant page of the trial transcript below (the entire colloquy is attached as Exhibit F):

1 respectful of that.

2 MS. GALLAGHER: And that's all I'm asking, Your  
3 Honor. Those were, you know -- documents were produced subject  
4 to -- I mean, we had made a claim of legislative privilege in  
5 those documents. We know that some of that information has  
6 already been shared. It has showed up on proposed stipulations  
7 from out in the --

8 JUDGE SCHWARTZ: Well, I don't -- I would not  
9 consider that to be in violation of any order, right?

10 MS. GALLAGHER: No.

11 JUDGE SCHWARTZ: They -- they were -- they  
12 didn't -- at the time the order was drafted and the way it  
13 was, focusing on getting through the deposition and the  
14 production of -- identification of the exhibits during the  
15 deposition.

16 MS. GALLAGHER: What we would just ask, and that was  
17 the motion that we put -- we filed on Sunday, I believe it was,  
18 to cover the additional information which had been filed --  
19 which had been exchanged.

20 JUDGE SCHWARTZ: But, it wasn't covered by the order  
21 that we originally had issued.

22 MS. GALLAGHER: Not the original order. It was --

23 JUDGE SCHWARTZ: So, they're not -- they're not in  
24 de -- default of that order.

25 MS. GALLAGHER: No, I'm not claiming they are.

Thus, the court made clear that the *Agre* plaintiffs were not “in violation of any order,” and Speaker Turzai’s counsel agreed without equivocation. She added: “I’m not claiming they are.”

Speaker Turzai’s counsel then asked the *Agre* court to “extend” the prior order to cover documents produced in discovery that had been shared with Petitioners’ counsel. *Id.* at 14. The court refused, explaining that “[w]e can’t extend something that was not covered by the order before.” *Id.* The court further explained, “our directive is intended to be prospective” and applied only to documents that “ha[ve]n’t already been put out.” *Id.*

Counsel for Legislative Respondents obviously know all of this. They know perfectly well that Petitioners already had the information produced by Speaker Turzai; that is why they were making the motion in the first place in *Agre*. And counsel for Speaker Turzai twice denied to the federal court on Thursday that the *Agre* plaintiffs’ decision to share discovery documents with Petitioners violated any order of the *Agre* court.

### **LEGISLATIVE RESPONDENTS’ FALSE CHARGES**

Legislative Respondents now contradict their statements to the federal court, making a series of false assertions in their motions *in limine* filed earlier today. In their *Motion in Limine to Exclude Certain Testimony by Jowei Chen*, Legislative Respondents assert that Dr. Chen’s testimony about the files described in his

November 27 report “would be based on privileged information leaked to Petitioners’ counsel in violation of an Order in the *Agre* case.” *Motion* at 3. They similarly state in their related motion that Petitioners obtained the document production “as a result of an intentional leak of privileged information,” and that “Petitioners attempt to offer [the *Agre* documents] . . . directly contravenes the *Agre* Court’s Order.” *MIL to Exclude Petitioners’ Exhibits 27-31, 33, and 135-161*, at pp.5-6.

As the recitation above makes clear, those statements are demonstrably false. None of the documents that Petitioners have listed as exhibits in this case were obtained in violation of any order by the *Agre* court, as Speaker Turzai’s counsel admitted to the *Agre* court just this past Thursday. Indeed, all of the Speaker Turzai documents on Petitioners’ exhibit list were received by Petitioners before Thursday.

Legislative Respondents also raise authentication and foundation objections incredibly suggesting that the materials Speaker Turzai produced are “materials of unknown origin.” Petitioners intend to respond to those objections at the proper time at trial; Petitioners rather file this brief to correct the factual misstatements in Legislative Respondents’ motions *in limine* filed earlier today.

## CONCLUSION

For the foregoing reasons, Legislative Respondents' motions *in limine* to exclude Petitioners' Exhibits 27-31, 33, and 135-161, and to exclude certain testimony of Dr. Chen, should be denied.

Dated: December 10, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

<p>LOUIS AGRE, WILLIAM EWING, FLOYD MONTGOMERY, JOY MONTGOMERY, RAYMAN SOLOMON</p> <p>v.</p> <p>THOMAS W. WOLF, Governor of Pennsylvania, PEDRO CORTES, Secretary of State of Pennsylvania, JONATHAN MARKS, Commissioner of the Bureau of Elections – in their official capacities</p>	<p>CIVIL ACTION NO. 17-4392</p>
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ORDER RE: PLAINTIFFS' MOTION TO COMPEL

BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:

The Court having considered the submissions and arguments of counsel concerning Plaintiffs' motion to compel [ECF No. 51]; and the Court determining 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; and the Court overruling the assertion of the First Amendment privilege; and the Court seeking to limit the time period for which relevant documents must be produced; and for good cause shown;

AND NOW, this 8<sup>th</sup> day of November, 2017, it is ORDERED that:

1. No later than November 17, 2017, Intervenor Defendants shall produce documents from the period January 1, 2009 through December 31, 2012, that are

requested in Plaintiffs' discovery demands and over which Intervenor Defendants do not claim privilege;

2. No later than November 17, 2017, Intervenor Defendants shall produce requested facts and data considered in creating the 2011 Plan;

3. No later than November 17, 2017, Intervenor Defendants shall produce documents reflecting requested communications between Intervenor Defendants (including their staffs and agents) and REDMAP's representatives;

4. No later than November 17, 2017, Defendants shall produce privilege logs; and

5. If there are challenges to the assertion of a privilege and/or work product rule, then the parties shall meet and confer and make a good faith effort to resolve the dispute. If the dispute is not resolved, it shall be presented as follows: the parties shall create a joint log that sets forth only the documents for which there is a challenge concerning the assertion of the privilege/work product rule, and the joint log shall contain, in addition to the standard columns on the log listing items such as the identities of the author and recipient of the document, the type of document, and a description of the contents of the document, two additional columns: (a) a column setting forth the reasons why the privilege does not apply, should be pierced, or has been waived, and (b) a column explaining why the privilege/work product rule applies, should not be pierced, or has not been waived. Any such disputes shall be presented no later than November 24, 2017.

BY THE COURT:

s/Patty Shwartz

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PATTY SHWARTZ, U.S.C.J.

# **EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>LOUIS AGRE</b>, <i>et al.</i></p> <p style="text-align: center;">v.</p> <p><b>THOMAS W. WOLF</b>, Governor of Pennsylvania, <b>ROBERT TORRES</b><sup>*</sup>, Acting Secretary of State of Pennsylvania, <b>JONATHAN MARKS</b>, Commissioner of the Bureau of Elections – in their official capacities.</p>	<p><b>CIVIL ACTION</b></p> <p><b>NO. 17-4392</b></p>
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**ORDER**

**BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:**

The Legislative Defendant, Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives (the “Speaker”) has filed a Motion for Protective Order (ECF 87), contending that he should not be deposed at all, and if a deposition is allowed, that he can invoke legislative privilege barring any testimony about his deliberative process or subjective intent regarding the 2011 Congressional redistricting at issue in this case. Speaker’s Motion also extends to any information relating to fact finding, information gathering, and investigative activities in consideration of redistricting legislation, and would arguably extend to production of documents that this Court has previously ordered, including documents from third parties.

The Speaker’s Motion for Protective Order will be **DENIED**. There is no claim of privilege as to documents and communications with third parties. The Court does not recognize as authoritative any precedent that implies that the Speaker can refuse to answer questions about his own intent, motive, communications with the public or outside of the members and staff of

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<sup>\*</sup> As of October 11, 2017, Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is hereby substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

the legislature. The Court recognizes that some decisions have allowed for a “deliberative process privilege” extending to internal communications leading up to the passage of legislation. However, it appears that no court has ever held that this is an absolute privilege, but only a qualified privilege. Upon consideration of the important issues in this case, and the fact that the scope of discovery in this case is generally limited to a period of 2010-2012, i.e. at least five years old, and the fact that intent and/or motive are factors considering in gerrymandering cases, see, e.g., Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017), the Court sees no reason to protect any of this information from discovery in this case. Therefore, it is on this 22<sup>nd</sup> day of November, 2017 ORDERED that the Speaker’s Motion for Protective Order [ECF No. 87] is **DENIED**

**BY THE COURT:**

/s/ **Michael M. Baylson**

**11/22/2017**

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**MICHAEL M. BAYLSON**  
**United States District Court Judge**

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# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

<b>LOUIS AGRE, et al.</b>  v.  <b>THOMAS W. WOLF</b> , Governor of Pennsylvania, <b>ROBERT TORRES<sup>1</sup></b> , Acting Secretary of State of Pennsylvania, <b>JONATHAN MARKS</b> , Commissioner of the Bureau of Elections – in their official capacities.	<b>CIVIL ACTION</b>  <b>NO. 17-4392</b>
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**ORDER REGARDING LEGISLATIVE DEFENDANT TURZAI'S MOTION FOR A PROTECTIVE ORDER TO PROCEED WITH HIS DEPOSITION UNDER SEAL**

**BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:**

Legislative Defendant Michael C. Turzai has moved to have his deposition taken and maintained under seal based in part on his view that the Amended Complaint will be dismissed. The fact that a motion to dismiss is pending does not prevent discovery from proceeding in accordance with the Federal Rules of Civil Procedure. Moreover, because the Court has already concluded that the Elections Clause claim has survived the motion to dismiss, this claim will proceed to trial and the parties may conduct discovery concerning that claim, including taking depositions. The subjects that are likely to be inquired about during the deposition will likely be the subject of the testimony that will be adduced during the public trial commencing December 4, 2017 concerning the acts of public officials and entities. There is no known basis that would support allowing such trial testimony to be presented under seal. As a result, there is no basis for sealing deposition testimony concerning the same topic. The movant's concern that a party may attempt to use the deposition in another proceeding does not provide good cause to seal the deposition as there is no clearly defined harm by allowing the deposition to proceed.

Applications concerning the use of the deposition in such other proceedings can be presented to

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<sup>1</sup> As of October 11, 2017, Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is hereby substituted as a defendant. *See* Fed. R. Civ. P. 25(d).



those tribunals. For these reasons, the movant has not provided good cause, Fed. R. Civ. P. 26(c), for the entry of the requested protective order.

**IT IS THEREFORE NOW** this 28th day of November, 2017, **ORDERED** that the motion for a protective order to allow the deposition of Legislative Defendant Michael Turzai to be sealed [ECF 129] is denied. However, to enable the parties to focus on completing discovery and preparing for trial, all depositions and any exhibits used at any deposition, may only be disclosed to counsel, their agents (such as paralegals and other assistants), their clients, and experts until trial begins.

**BY THE COURT:**

**s/Patty Shwartz**  
**PATTY SHWARTZ**  
**United States Circuit Judge**

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# **EXHIBIT D**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>LOUIS AGRE, et al.</b></p> <p style="text-align:center"><b>v.</b></p> <p><b>THOMAS W. WOLF</b>, Governor of Pennsylvania, <b>ROBERT TORRES*</b>, Acting Secretary of State of Pennsylvania, <b>JONATHAN MARKS</b>, Commissioner of the Bureau of Elections – in their official capacities.</p>	<p><b>CIVIL ACTION</b></p> <p><b>NO. 17-4392</b></p>
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**ORDER RE: ASSERTION OF LEGISLATIVE PRIVILEGE  
AND DELIBERATIVE PRIVILEGE AND  
“CONSENT” MOTION FOR PROTECTIVE ORDER**

**BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:**

Issues have been presented which relate to the assertion by the Legislative Intervenor Defendants of legislative privilege and deliberative privilege, and a Privilege Log by Speaker Turzai (ECF 118). This Court has previously entered an order denying Speaker Turzai’s Motion for a Protective Order based on these privileges (ECF 114). Counsel for Speaker Turzai have apparently interpreted that Order as extending only to Speaker Turzai’s deposition. The Court, however, intended it as a ruling on any assertion of legislative privilege or deliberative privilege. The Court notes that Senator Scarnati had filed a similar motion (ECF 111), but then counsel withdrew it (ECF 117). It appears from the documents that Speaker Turzai’s deposition is scheduled for Tuesday, November 28, 2017 and therefore this Court will rule promptly on pending motions related to this issue.

In addition, counsel for Plaintiffs and Speaker Turzai have entered into a “stipulated protective order” and filed a “Consent Motion for the Entry of Protective Order” (ECF 116),

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\* As of October 11, 2017, Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is hereby substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

which would keep any privileged material “confidential,” with limited exceptions. However, the Executive Defendants, Governor Wolf, et al. did not consent and have asserted an opposition to the entry of this protective order, primarily citing Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994), which is the leading case in this Circuit limiting the designation of discovery materials, in a case of public interest, as confidential.

The Court has reviewed the “Joint Privilege Log Regarding Legislative Defendant Speaker Turzai’s Privilege Log” (ECF 118 and 123) which contains statements by both Plaintiffs and Speaker Turzai on the assertion of this privilege. The Court **OVERULES** all of the Speaker’s objections to producing documents based on legislative or deliberative privilege. The Court has considered the claims in the case and the contents of the privilege log and has again concluded that the information is relevant and may shed light on the intent/motivation for the map; the information is sought in a serious litigation that seeks to enforce public rights; the information sought provides information about legislative purpose that cannot be obtain from alternate sources, and prohibiting access to such information “could thus obscure important evidence of the purpose and intent of the legislative action.” Benisek v. Lamone, 241 F. Supp.3d 566, 575-76 (D. Md. 2017). We have considered whether ordering disclosure would have any chilling effect or future timidity on the part of the Legislature and have concluded that the serious issues in the case and the Legislature’s role in crafting the redistricting plan at issue and the fact that the Legislature is the only source of the evidence concerning its intent and motivation all outweigh this minimal potential effect.

The Court notes that both Legislative Defendants, Speaker Turzai and Senator Scarnati, have filed a Notice of Additional Authority (ECF 110), which cites to a decision of Judge Brobson of the Commonwealth Court in the pending “Pennsylvania” litigation, enforcing

Pennsylvania's absolute privilege against discovery into legislative activity. Although we have respect for the decision of the Commonwealth Court interpreting Pennsylvania law, we note that this is a federal court, adjudicating a claim under the Constitution and laws of the United States and pursuant to Fed. R. Evid. 501, we are guided by federal law in determining privilege issues.

This Court, on this 28<sup>th</sup> day of November, 2017, therefore **ORDERS** that Speaker Turzai shall produce all of the documents for which he has asserted legislative or deliberative privilege, prior to or during his deposition.

In addition, the Court will **DENY** the Consent Motion for Protective Order (ECF 116).

**BY THE COURT:**

/s/ Michael M. Baylson

**11/28/2017**

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**MICHAEL M. BAYLSON**  
**United States District Court Judge**

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# **EXHIBIT E**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>Louis Agre <i>et al.</i>,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Civil Action No. 2:17-cv-4392</b>
	:	
<b>v.</b>	:	
	:	
<b>Thomas W. Wolf <i>et al.</i>,</b>	:	
	:	
<b>Defendants.</b>	:	

**LEGISLATIVE DEFENDANT MICHAEL C. TURZAI'S MEMORANDUM IN  
SUPPORT OF HIS MOTION FOR PROTECTIVE ORDER REGARDING  
DOCUMENTS PRODUCED IN DISCOVERY**

On November 27, 2017 the Speaker filed a Motion for Protective Order to Proceed with His Deposition Under Seal. (*See* ECF No. 129). On November 28, 2017, this Court entered an Order, (ECF No. 144), that all depositions and any exhibits may only be disclosed to counsel, their agents, their clients, and experts until trial begins. On the same day, November 28, 2017, the Court also entered an Order, (ECF No. 142), which held that the Speaker did not possess legislative or deliberative process privilege over documents requested in discovery by Plaintiffs, and which ordered that the Speaker produce such documents.<sup>1</sup> For the reasons identified below, the Speaker requests that the Court enter a Protective Order similar to ECF No. 144 prohibiting the parties from distributing the Speaker's document production to those outside of this litigation. The Speaker also requests that, in the event this matter is dismissed or judgment is entered as a matter of law in favor of Legislative Defendants, any documents produced by the Speaker in discovery and not introduced at trial be destroyed.

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<sup>1</sup> The Order finding that the Speaker maintained no legislative or deliberative process privilege over any of the documents requested in discovery by Plaintiffs regarding the 2011 Plan was entered without the benefit of an *in camera* review of those documents.

The expedited nature of this case has condensed the normal litigation schedule such that the Speaker was required to produce documents in discovery prior to Plaintiffs establishing the elements or validity of their purported claim. Under a conventional litigation schedule, facial challenges to the validity of a plaintiff's claim are resolved prior to the parties engaging in discovery and document production. Thus, ordinarily, if the plaintiff does not present a legally cognizable or valid claim, there is no discovery or document production. Due to the expedited schedule in this matter, the Speaker has been required to produce documents in discovery prior to this Court's determination of whether Plaintiffs have stated a legally cognizable claim.

Indeed, on November 30, 2017, four days prior to trial, the parties submitted briefing requested by the Court on precisely this issue. On Friday, December 1, 2017, the Court, noting that Plaintiffs' explanation of their claim was "inconsistent and not sufficiently specific," Ordered Plaintiffs to submit a listing of the elements of their Elections Clause claim by 9:00 a.m. on the morning of trial, December 4, 2017. (ECF No. 169). The Court also cautioned Plaintiffs that "any failure to articulate such a cognizable standard may be considered by a motion under Fed.R.Civ.P. 50 at the close of Plaintiffs' case." (*Id.*). Thus, due to the condensed timeline in this matter, the Speaker has produced documents in a case where the elements of Plaintiffs' claims will be unknown on the morning of trial and where Plaintiffs' claims may not even be cognizable.

The consequence of the Speaker's production of documents in this matter is all the more harmful given the parallel litigation involving the 2011 Plan in the Pennsylvania Commonwealth Court, wherein trial begins on December 11, 2017. As the Court is aware, the Commonwealth Court has ruled that the Speaker maintains an absolute privilege over the very same documents that have been produced in discovery in this matter. A protective order over the Speaker's



document production in this matter that extends through trial, and that requires the destruction of any of the documents not introduced at trial, prevents those documents from being used (improperly) outside this litigation. In fact, such an order in this matter is necessary. On Saturday, December 2, 2017, the Petitioners in *League of Women Voters of Pennsylvania, et al. v. Commonwealth of Pennsylvania, et al.*, 261 M.D. 2017 (the “Pennsylvania Action”) served proposed Stipulations of Fact that include express reference to information obtained by Plaintiffs in this matter through document production and the Speaker’s deposition.<sup>2</sup> The obvious sharing of information between Plaintiffs and the Petitioners in the Pennsylvania Action further highlights the need for the requested protective order, particularly given that this same information is protected by an absolute privilege per the Pennsylvania Commonwealth Court’s Order in the Pennsylvania Action. The Speaker’s requested protective order would avoid the irreparable harm that would result from the free dissemination of the Speaker’s document production in the face of a Pennsylvania appellate court ruling that those same documents are subject to absolute privilege.

There is no countervailing concern the other parties could raise in opposition to this narrowly tailored request for a protective order. First, this order would not impede the ability to try this case, as it would not affect the introduction of any document at trial. Second, the other parties cannot identify a valid need for retention of any of the Speaker’s document production that is not introduced at trial. Federal Rule of Civil Procedure 5(d) forbids parties from filing discovery material, and federal courts have held that, as such, there is no public right of access to discovery material that is not used at trial. *See SEC v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2d. Cir. 2001); *Bond v. Utreras*, 585 F.3d 1061, 1075-76 (7<sup>th</sup> Cir. 2009); *see also Kyles v. J.K.*

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<sup>2</sup> The Speaker reserves the right and intends to seek relief for the apparent violation of the Court’s Order regarding the deposition of the Speaker remaining confidential until the time of trial. *See* (ECF No. 144).

*Guardian Sec. Serv.s*, 2006 U.S. Dist. LEXIS 57299 (N.D. Ill. 2006) (noting provision in protective order requiring destruction of discovery material following trial); *Jackpot Enterp., Inc. Sec. Litig.*, 1991 U.S. Dist. LEXIS 16326 (D. Nev. 1991) (same).

Accordingly, the Speaker respectfully requests that this Court enter a protective order requiring that the Speaker's document production in this matter only be disclosed to counsel, their agents, their clients, and experts in this matter. Further, the Speaker requests that, in the event this matter is dismissed or judgment is entered as a matter of law in favor of Legislative Defendants, the parties are ordered to destroy any of the Speaker's document production not introduced at trial, and so certify within 24 hours of the conclusion of trial in this matter.

Dated: December 3, 2017

Respectfully submitted,

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# **EXHIBIT F**

1 It would be unusual to order a destruction at the conclusion of  
2 a trial when there are many proceedings that could occur as a  
3 result of the trial and things that could happen after that.  
4 So, what the -- the Panel has decided to do was not require  
5 anything to be destroyed nor returned, but simply that:

6 Discovery that was produced that did not result in  
7 evidence produced in the trial be used only for the purposes of  
8 this litigation and if in case that something comes up during  
9 proceedings that may occur after this trial and that they not  
10 be disclosed beyond the order we had already entered.

11 I believe the order we had entered before said that  
12 information disclosed during the discovery process could be  
13 shared with counsel, their agents, the experts and their  
14 clients, and I -- I incorporate, by reference, the actual  
15 language of the order and that would remain in effect. And  
16 that's how we were planning on to resolving the protective  
17 orders which were ECF-171 and 174. I see both -- we have all  
18 counsel standing. So, since we don't hear from the Executive  
19 Chief, may I call upon counsel, as --

20 JUDGE SMITH: Please.

21 JUDGE SCHWARTZ: -- the Executive? Go ahead.

22 MS. HANGLEY: Thank you, Your Honor. I understand  
23 that the ruling has been made. For the record, the Executive  
24 Defendants do oppose putting any limitations on the discovery  
25 taken in this case. The Pansy factors have not been met. They

1 haven't even been stated. We believe in transparency that this  
2 is an important public -- public event, this trial, and it's  
3 important public proceedings and that the public and that  
4 litigants in related cases have a right to know what has  
5 happened in this case.

6 JUDGE SCHWARTZ: Well, there's nothing that's  
7 limiting, of course, what's happened in the -- during the  
8 course of the trial or anything filed on the public docket.  
9 But, we're treating discovery material like discovery material  
10 is often treated in cases, which is usually used -- not -- not  
11 that there are restrictions; but, it's usually used between the  
12 parties. It's not -- discovery is not a public process.  
13 People don't get to come to depositions and, so, we don't view  
14 the -- kind of, the limitations on how it could be used  
15 implicating Pansy in the sense of confidentiality or sealing.  
16 We're not doing that. We're just limiting how it could be used  
17 and we are limiting to whom it can be disclosed if it was not  
18 material that was introduced in this case.

19 The Panel is not insensitive to the fact that there  
20 is a trial starting next week where this Court applying federal  
21 law found the privilege not applicable. But, we have -- we are  
22 respectful of our colleagues in the State Court who have come  
23 to a different conclusion applying different law. And our --  
24 our goal and -- and I, of course, call my -- call on my  
25 colleagues to -- to amplify; but, our goal is to ensure that we

1 are being respectful of -- of those proceedings at the same  
2 time, not limiting counsel for their ability to use materials  
3 as a part of this case in the way that we've described.

4 MS. HANGLEY: And, Your Honor, --

5 MR. ARONCHICK: Could -- could I just amplify a  
6 minute, just -- just to say?

7 JUDGE SMITH: Ver -- very quickly, sir.

8 MR. ARONCHICK: Very quickly. So, that in the -- in  
9 the record, for example, of this case, there were many  
10 references to things like, excuse me, the Turzai data and  
11 expert reports, I mean, those kinds of things that weren't  
12 actually marked as exhibits and introduced as exhibits, but,  
13 they were referenced frequently throughout the record in this  
14 case. And is it our understanding that if they were involved  
15 in the record in this case that that's in the public domain,  
16 even if the actual document that they were referring to wasn't  
17 marked and put into the record?

18 JUDGE SMITH: The reference is in the public domain.  
19 The underlying document is not.

20 MS. BALLARD: Your Honor, if I may?

21 JUDGE SMITH: Quickly, please.

22 MS. BALLARD: The -- we understood the Court's order  
23 regarding not -- not sharing documents to cover the -- the  
24 defendants' depositions and any exhibits used at their  
25 depositions. That's what the order referred to. Many of the

1 things that Your Honors have alluded to or that Mr. Aronchick  
2 has alluded to, they are cats that are long out of the bag.  
3 They were not covered by the original order. So, we can't go  
4 back. There's no way that we can now institute some sort of a  
5 confidentiality agreement.

6 JUDGE SCHWARTZ: I know. And that was the -- that  
7 was not the Court's intention and if that's what you understood  
8 it to be, we are not looking to retrofit past evidence. If  
9 there was a reference in this public record to material and  
10 that material was admitted into evidence, then, it's within the  
11 public purview.

12 MS. BALLARD: Oh, no. We're --

13 JUDGE SCHWARTZ: Do you want to give me a concrete  
14 example?

15 MS. BALLARD: -- we're not talking -- I'm not talking  
16 about that. I'm talking about material that was produced in  
17 discovery that was not covered by the Court's original order  
18 that said we could not share deposition transcripts of the  
19 Legislative Defendants or any exhibits that were used in those  
20 depositions. That's what the order covered. It was not our  
21 understanding that the order covered everything else that was  
22 produced in discovery and everything else that was produced in  
23 dis -- discovery is gone, out. It's -- you know, there's no  
24 way we can get it back.

25 JUDGE SCHWARTZ: I respect that and -- and I will



1 be -- stand corrected --

2 MS. BALLARD: Thank you.

3 JUDGE SCHWARTZ: -- in terms of the past order. The  
4 big concern was what happened with the Legislative Defendants  
5 and what the Legislative Defendants produced, right?

6 MS. GALLAGHER: Your Honor, if we can --

7 MS. BALLARD: That's what we're talking about, --

8 MS. GALLAGHER: -- if I -- if --

9 MS. BALLARD: -- Your Honor.

10 MS. GALLAGHER: If I may, Your Honor. From the time  
11 we got -- excuse me -- the original order went to the exhibits  
12 and the --

13 JUDGE SCHWARTZ: And the deposition testimony.

14 MS. GALLAGHER: -- evidence and went to the  
15 deposition. Now, subsequent to that, there was a very  
16 significant production, the one which was the subject, I  
17 believe and part of the motion for sanctions, from Speaker  
18 Turzai and that was the reason, you know. And, again, that is  
19 the evidence, also, to which we're referring. It was produced  
20 subsequent to the Court's order and it was our understanding at  
21 that time that everything, exhibits, we didn't know what would  
22 be what, all right, and that that production should be subject  
23 to it.

24 I understand --

25 JUDGE SCHWARTZ: I think my problem is I don't know

1 what that production is because when you gesture with your  
2 hand, it -- and you pointed to the side of the bench, --

3 MS. GALLAGHER: Okay.

4 JUDGE SCHWARTZ: -- that was the privileged material  
5 that I --

6 MS. GALLAGHER: Oh, and if you will recall, the  
7 order that Judge Baylson issued on the date of Speaker  
8 Turzai's deposition dealt with everything that was produced  
9 subject to the privileged material. Originally, those  
10 privileges had gone to legislative privilege as well as  
11 attorney/client and work product. It would be our concern that  
12 those would also be disseminated. They were not introduced  
13 into evidence and there was a claim of privilege. They -- they  
14 postdate --

15 JUDGE SMITH: Which privilege, though, counsel, the  
16 attorney/client privilege?

17 MS. GALLAGHER: And legislative privilege, which I  
18 thought was the impetus of this -- of the Court's decision with  
19 respect to Judge Bronson's order in the case in Pennsylvania,  
20 which upholds privilege.

21 JUDGE SCHWARTZ: It's not an impetus of the order.  
22 It's just a cons --

23 MS. GALLAGHER: Okay. Sorry.

24 JUDGE SCHWARTZ: -- you know, we're not -- we're not  
25 ignoring the fact that that order is there and we want to be

1 respectful of that.

2 MS. GALLAGHER: And that's all I'm asking, Your  
3 Honor. Those were, you know -- documents were produced subject  
4 to -- I mean, we had made a claim of legislative privilege in  
5 those documents. We know that some of that information has  
6 already been shared. It has showed up on proposed stipulations  
7 from out in the --

8 JUDGE SCHWARTZ: Well, I don't -- I would not  
9 consider that to be in violation of any order, right?

10 MS. GALLAGHER: No.

11 JUDGE SCHWARTZ: They -- they were -- they  
12 didn't -- at the time the order was drafted and the way it  
13 was, focusing on getting through the deposition and the  
14 production of -- identification of the exhibits during the  
15 deposition.

16 MS. GALLAGHER: What we would just ask, and that was  
17 the motion that we put -- we filed on Sunday, I believe it was,  
18 to cover the additional information which had been filed --  
19 which had been exchanged.

20 JUDGE SCHWARTZ: But, it wasn't covered by the order  
21 that we originally had issued.

22 MS. GALLAGHER: Not the original order. It was --

23 JUDGE SCHWARTZ: So, they're not -- they're not in  
24 de -- default of that order.

25 MS. GALLAGHER: No, I'm not claiming they are.

1 All I'm asking is that the Court extend now.

2 JUDGE SCHWARTZ: We can't extend something that that  
3 was not covered by the order before. We're just talk -- we're  
4 trying to freeze-frame things, I think is the best way I can  
5 describe it. If it hasn't already been put out and it wasn't  
6 subject by that order, that's how we should proceed. But, I  
7 will certainly turn to --

8 JUDGE SMITH: Our --

9 JUDGE SCHWARTZ: -- Judge Baylson.

10 JUDGE SMITH: -- our directive is intended to be  
11 prospective and we're cutting it off here. To the extent we  
12 need to readdress the matter maybe later this afternoon, time  
13 permitting, we'll do so.

14 We're now going to move to closing arguments. The  
15 order of those closing arguments will be as follows, given the  
16 points that were made before the midday recess: The  
17 Legislative Defendants will go first, with 30 minutes available  
18 to them. However, what we have done is split the baby. The  
19 Legislative Defendants may reserve such time as they wish to  
20 respond to the Executive Defendants who will close second. So,  
21 it will be Legislative Defendants, Executive Defendants, any  
22 "rebuttal" from the Legislative Defendants right afterward and,  
23 finally, closing by the Plaintiffs. Are the Legislative  
24 Defendants ready to proceed?

25 MR. TORCHINSKY: Yes, Your Honor, we are. Oh, Your