

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PROPOSED ORDER

AND NOW this _____ day of December, 2017, upon consideration of Legislative Respondents’ Motion *in Limine* to Exclude Petitioners’ Exhibits 27-31, 33 and 135-161, and after having heard argument on said Motion, IT IS HEREBY ORDERED that Legislative Respondents’ Motion *in Limine* is GRANTED.

The Honorable P. Kevin Brobson

**LEGISLATIVE RESPONDENTS’ MOTION *IN LIMINE* TO EXCLUDE
PETITIONERS’ EXHIBITS 27-31, 33, AND 135-161**

Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Senate President Pro Tempore (“Legislative Respondents”), move this Court for an order *in limine* excluding Petitioners’ Exhibits 27 through 31, 33, and 135 through 161. These documents are inadmissible because they cannot be authenticated, Petitioners cannot lay adequate foundation for their admissibility, and their use or admission at trial would violate the Legislative Respondents’ absolute immunity under Pennsylvania’s Speech or Debate Clause.

I. Exhibits to the Which Legislative Respondents Object

On December 8, 2017, Petitioners filed their Pretrial Memorandum, which included Petitioners’ Exhibit List. The Exhibit List includes the following items:

27.	Turzai – 01641.DBF: Partisan Voting Data by Census Block [CD]
28.	Turzai – 01644.DBF: Partisan Voting Data by Municipality [CD]
29.	Turzai – 01653.DBF: Partisan Voting Data by County [CD]
30.	Turzai – 01674.DBF: Partisan Voting Data by Voting Tabulation District [CD]
31.	Columns Containing 10 Partisan Indices for Each Voting Tabulation District from Turzai 01674.DBF
33.	Email from J. McLean dated November 17, 2014
135.	January 20, 2012 Email from M. Turzai to M. Turzai Turzai-00217
136.	December 13, 2011 Email from K. Smith to M. Turzai Turzai-00279
137.	September 14, 2011 Email from M. Turzai to T. Jacobs Turzai-00283

138.	January 18, 2011 Email from M. Turzai to T. Boyer Turzai-00355
139.	Powerpoint Presentation “Reapportionment and Redistricting in Pennsylvania” Presentation Turzai-00359
140.	Map- “CD18 Maximized” Turzai-01364
141.	Map- “Congressional Delegation Map 1” Turzai-001373
142.	Map- “Congressional Delegation Map 2” Turzai-001374
143.	Powerpoint Presentation: “House Republican Caucus December 1, 2011” Turzai-01375
144.	November 9, 2011 Email from J. Marks to E. Arneson Turzai-01410
145.	November 9, 2011 Email from J. Marks to E. Arneson Turzai-01411
146.	Map- Southeastern Districts Turzai-01412
147.	Map- Southwestern Districts Turzai-01516
148.	Map- Statewide Districts Turzai-01517
149.	Map- Southeastern Districts Turzai-01518
150.	Powerpoint Presentation: “House Republican Caucus December 5, 2011” Turzai-01521
151.	Map- “Proposed Northeast – Enlargement” Turzai-01546
152.	Map- “Proposed NW – Enlargement” Turzai-01547
153.	Map- “Proposed S. Central – Enlargement” Turzai-01548
154.	Map- “Proposed Map- Southeast Enlargement” Turzai-01549
155.	Map- “Proposed Statewide” Turzai-01550
156.	Map- “Proposed Southwest” Turzai-01551

157.	Map-Southeastern Districts Turzai-01603
158.	Legislative Data Processing Center – Composite Listing of Congressional Districts Turzai-01606
159.	December 11, 2011 Calendar Entry Turzai-01632
160.	Map- Statewide Districts Turzai-01637
161.	Map- Statewide Districts Turzai-01638

(See Ex. A to Petitioners’ Pretrial Memorandum).

II. Absolute Immunity Under Speech Or Debate Clause

All of the documents identified above are immune from disclosure under Pennsylvania’s Speech or Debate privilege. And, given the absolute nature of the Legislative Respondents’ privilege that has previously been recognized by this Court, the Court cannot permit the Petitioners to use documents obtained indirectly when the Court clearly barred Petitioners from obtaining them directly.

Moreover, there was no waiver of the privilege. Legislative Respondent Turzai has never intentionally disclosed the documents, except in the *Agre* case where he was ordered to produce them over an objection under the U.S. Constitution Speech or Debate privilege. But, with respect to the documents produced over this objection, the three judge panel in *Agre* held as follows:¹

¹ The pertinent excerpts of the transcript of Day 4 of the *Agre* trial are attached hereto. See **Ex. A, *Agre, et al. v. Wolf, et al.***, Tr. Dec 7, 2017, PM Session, p. 7-10, 14.

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

I believe the order we entered before said that information disclosed during the discovery process could be shared with counsel, their agents, the experts and their clients, and I—I incorporate, by reference, the actual language of the order and that would remain in effect....

(**Ex. A** at p. 7) (emphasis added). After Chief Judge Smith issued the court’s Order, Judge Shwartz explained that:

The Panel is not insensitive to the fact that there is a trial starting next week where this Court applying federal law found the privilege not applicable. But, we have—we are respectful of our colleagues in the State Court who have come to a different conclusion applying different law.... [O]ur goal is to ensure that we are being respectful ... of those proceedings at the same time, not limiting counsel for their ability to use materials as a part of this case in the way that we’ve described.

Id. at p. 9.

The *Agre* court thus limited the *Agre* plaintiffs’ ability to share documents produced during discovery in *Agre* so as to “be respectful” of this Court’s holdings regarding the scope of the privilege created by Pennsylvania’s Speech or Debate Clause. Yet, the exhibits that are the subject of this Motion were almost certainly obtained as a result of an intentional leak of privileged information to Petitioners’ counsel. Petitioners’ attempt to offer them as exhibits directly contravenes the

Agre Court’s Order. Moreover, to allow Petitioners to introduce such documents into evidence in this case would substantially prejudice the Legislative Respondents by allowing Petitioners to circumvent this Court’s prior holdings regarding the Speech or Debate privilege. Petitioners must not be permitted to use the above exhibits at trial.

III. Lack of Authentication

The exhibits must also be excluded because they cannot be authenticated. “To satisfy the requirement for authenticating and identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” PA. R. EVID. 901(a). “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Zuk v. Zuk*, 55 A.3d 102, 112 (Pa. Super. 2012).

Petitioners cannot authenticate the documents that are the subject of this Motion. No one in Petitioners’ Witness List would have any knowledge or information sufficient to identify the origin or authenticity of these documents. And even if the Court permitted Petitioners to call a witness not disclosed in their Witness List (and it should not), the only persons who could properly authenticate the documents cannot be compelled to testify. Indeed, the Court has already held

that such persons cannot be compelled to testify under the Speech or Debate Clause.

IV. Lack of Foundation

The documents also cannot be relied upon because Petitioners cannot lay a proper foundation for these documents. Petitioners have not identified any witness who could establish whether or how the above-referenced exhibits were used in the drawing of Pennsylvania's 2011 congressional redistricting map. As a result, Petitioners cannot establish the foundation to utilize the documents for any relevant issue in this case. The inability to lay a foundation for these documents renders the documents or testimony derived from them inadmissible.

V. Conclusion

Accordingly, for all of the foregoing reasons, the Legislative Respondents request that the Court enter an Order precluding Petitioners from using Exhibits 27 through 31, 33, and 135 through 161 at trial.

December 10, 2017

Respectfully Submitted

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LOUIS AGRE, et al,) 17-CV-04392 (MMB)
)
Plaintiffs,)
vs.) P.M. Session
)
THOMAS W. WOLF, et al,) Philadelphia, PA
) December 7, 2017
)
Defendants.)

TRANSCRIPT OF TRIAL DAY 3
BEFORE THE HONORABLE D. BROOKS SMITH, CHIEF JUDGE
THE HONORABLE MICHAEL M. BAYLSON
THE HONORABLE PATTY SHWARTZ
UNITED STATES JUDGES

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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 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