

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2019 MAR 11 P 3:21

18 CVS 014001

COMMON CAUSE, et al.,

WAKE CO., C.S.C.

Plaintiffs,

BY *K*

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON
REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' RESPONSE
TO LEGISLATIVE
DEFENDANTS' MOTION
FOR A PROTECTIVE
ORDER**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION	1
BACKGROUND	2
ARGUMENT.....	3
I. Legislative Defendants May Not Use Legislative Privilege as a Sword and a Shield	3
II. Plaintiffs Do Not Oppose the Protective Order if the Court Imposes Appropriate Limitations on the Evidence and Testimony That Defendants May Offer at Trial.....	5
III. In the Alternative, Plaintiffs Request the Opportunity to Challenge Legislative Defendants' Privilege Assertions	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Belmont Textile Mach. Co. v. Superba, S.A.</i> , 48 F. Supp. 2d 521 (W.D.N.C. 1999).....	3
<i>Cantwell v. Cantwell</i> , 109 N.C. App. 395, 427 S.E.2d 129 (1993).....	3, 4
<i>Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections</i> , 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011).	4
<i>Doe v. Nebraska</i> , 898 F. Supp. 2d 1086 (D. Neb. 2012)	4, 5
<i>Favors v. Cuomo</i> , 285 F.R.D. 187 (E.D.N.Y. 2012).....	3, 4, 5
<i>League of Women Voters of Pa. v. Commonwealth</i> , No. 261 M.D. 2017.....	4, 6
<i>Qurneh v. Colie</i> , 122 N.C. App. 553, 471 S.E.2d 433 (1996).....	3
<i>State v. Buckner</i> , 351 N.C. 401, 527 S.E.2d 307 (2000)	3
<i>United States v. Bilzerian</i> , 926 F.2d 1285 (2d Cir. 1991).....	5, 7
Statutes	
N.C. Gen. Stat. § 120-133(a).....	1, 7

INTRODUCTION

Legislative Defendants have filed a motion for a protective order to preclude Plaintiffs from taking the depositions of all four Legislative Defendants and of eight other current or former legislators and legislative staffers, all on the grounds of legislative privilege and immunity. While Plaintiffs disagree with these assertions of legislative privilege and immunity, Plaintiffs do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants will be precluded from offering certain evidence and testimony at trial under the well-established principle that a privilege may not be used as a sword and a shield. In other words, Plaintiffs ask this Court to confirm that, because Legislative Defendants have moved to block discovery into legislative intent and into the facts surrounding their adoption of the challenged maps, Legislative Defendants cannot themselves offer such evidence at trial.

In particular, the protective order should specify that Legislative Defendants may not offer (1) testimony from any of the twelve individuals who have asserted privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data. If the Court is not prepared to enter such an order at this time, Plaintiffs request the opportunity to file a substantive opposition to Legislative Defendants' privilege and immunity assertions, which are overbroad under N.C. Gen. Stat. § 120-133(a).

Plaintiffs request that the Court act quickly on this motion to ensure that, if the discovery is to go forward, Plaintiffs have time to take that discovery within the time allotted under the agreed scheduling order. The parties attempted to negotiate a stipulated resolution of the

protective order, but those negotiations reached an impasse. Plaintiffs note that the discovery covered by Legislative Defendants' motion for a protective order is distinct from the discovery at issue in Plaintiffs' First and Second Motions to Compel, which remain pending.

BACKGROUND

On January 24, 2019, Plaintiffs served notices of depositions upon all four Legislative Defendants—Senior Chairman of the House Select Committee on Redistricting David R. Lewis, Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, and President Pro Tempore of the Senate Philip E. Berger. *See* Legislative Defendants' Mot. for Protective Order ("Mot."), Exs. 1-4. Plaintiffs noticed the depositions for March 5, March 7, March 11, and March 12. Also on January 24, Plaintiffs served subpoenas for depositions and documents on eight individuals whom Legislative Defendants had identified in interrogatory responses as being involved in the 2017 redistricting process: Senator Trudy Wade, Senator Wesley Meredith, Senator John Alexander, Senator Dan Bishop, former Senator Robert Rucho, former Representative Nelson Dollar, legislative employee Mark Coggins, and former legislative employee Jim Blaine (collectively, the "non-party legislators and staff"). *See id.*, Exs. 5-12. Plaintiffs noticed the depositions of these individuals for dates between February 27 and March 20. Counsel for Legislative Defendants agreed to accept service of the subpoenas for these individuals and is representing them here.

On February 4, Legislative Defendants and the non-party legislators and staff filed a motion "for a protective order prohibiting plaintiffs from taking [their] depositions on the grounds of legislative immunity and legislative privilege." Mot. 3. That same day, the non-party legislators and staff responded to Plaintiffs' document subpoenas, asserting legislative privilege

and legislative immunity and refusing to produce any documents. Legislative Defendants similarly have asserted legislative privilege in response to Plaintiffs' document requests to them.

After the motion for a protective order was filed, the parties attempted to negotiate a consensual resolution to the dispute, but those negotiations reached an impasse.

ARGUMENT

While Plaintiffs believe that Legislative Defendants' assertions of legislative privilege and immunity are overbroad and erroneous in light of N.C. Gen. Stat. § 120-133(a), Plaintiffs do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants will be precluded from offering certain evidence and testimony at trial that derives from, or is within the knowledge of, the individuals subject to the protective order.

I. Legislative Defendants May Not Use Legislative Privilege as a Sword and a Shield

It is hornbook law that parties cannot use a privilege as both a "shield" to prevent discovery and a "sword" to present evidence or claims that relate to the privileged information. *State v. Buckner*, 351 N.C. 401, 410, 527 S.E.2d 307, 313 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996). A party therefore may not "use[] an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion." *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012) (quotation marks omitted). As such, parties face a "choice" of either standing on the privilege or waiving it in order to advance related evidence or claims. *Cantwell v. Cantwell*, 109 N.C. App. 395, 396, 427 S.E.2d 129, 130 (1993). Where a party elects "to stand behind its privilege and refuse[s] to produce" relevant information, "that exercise of the privilege will preclude it from introducing" related evidence at trial. *Belmont Textile Mach. Co. v. Superba*,

S.A., 48 F. Supp. 2d 521, 523 (W.D.N.C. 1999). This principle applies equally to plaintiffs and defendants. *See, e.g., Cantwell*, 109 N.C. App. at 396, 427 S.E.2d a 130.

Courts have applied the sword/shield doctrine to assertions of legislative privilege. “[C]ourts have been loath to allow a legislator to invoke the 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*, 285 F.R.D. at 212 (citing *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011)).

Courts have even applied the principle in redistricting lawsuits specifically, denying legislators the ability to offer certain evidence in defense of redistricting plans where those legislators blocked discovery based on legislative privilege. In the recent partisan gerrymandering challenge to Pennsylvania’s congressional districts, the legislative defendants asserted legislative privilege to preclude their depositions and other discovery related to legislative intent. The state trial court upheld the privilege assertions, blocking the requested discovery, and the plaintiffs in turn moved to preclude the defendants from introducing evidence related to legislative intent under the sword/shield doctrine. The trial court granted the motion and precluded the defendants “from offering evidence that [the plaintiffs] could not obtain in discovery due to [the] Court’s . . . order” upholding the defendants’ privilege assertions. Trial Tr. at 94, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (attached as Ex. A). The court further made clear that the legislative defendants could not offer expert testimony that was based on consultations with legislative staff who had been “shielded from [the plaintiffs’] deposition efforts” on the basis of privilege. *Id.* at 32.

The district court in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), similarly precluded legislators from introducing evidence at trial pursuant to the sword/shield doctrine. In

Doe, a constitutional challenge to a Nebraska statute under the Ex Post Facto Clause, the plaintiffs sought to depose Nebraska legislators regarding their intent and objectives in crafting the statute. The defendants “successfully asserted legislative privileges to thwart the plaintiffs’ effort to get at the truth.” *Id.* at 1126. At trial, the plaintiffs presented evidence that the legislature had acted with impermissible intent, and when the defendants sought to challenge that evidence, the court held that they were precluded from doing so given their prior privilege assertions. “While the defendants and their lawyers were entitled to invoke [legislative privilege]” to withhold discovery, they could not then “claim [at trial] that the evidence is lacking regarding the true motives of the law-makers.” *Id.* “That is, the defendants [were] not . . . allowed to use their privilege defenses as both a sword and a shield.” *Id.*

Here, too, Legislative Defendants must face the consequences of asserting legislative privilege to block Plaintiffs from obtaining discovery. Plaintiffs do not ask this Court to impose the extent of limitations that were imposed in *Doe*, but Legislative Defendants must at a minimum be precluded from introducing evidence and testimony that Plaintiffs would have been “potentially capable of rebutting” through the discovery that Plaintiffs were denied. *Favors*, 285 F.R.D. at 199. Legislative Defendants, in other words, may not present evidence or testimony that “in fairness requires examination of protected communications” or other discovery. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

II. Plaintiffs Do Not Oppose the Protective Order if the Court Imposes Appropriate Limitations on the Evidence and Testimony That Defendants May Offer at Trial

Plaintiffs do not oppose the court’s entry of the requested protective order if the court specifies that Legislative Defendants may not offer (1) testimony from any of the twelve individuals asserting legislative privilege and legislative immunity (2) evidence or testimony that derives directly or indirectly from non-public information from, or non-public communications

with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless that testimony or evidence is based exclusively on the public legislative record or publicly available data.

The first restriction is straightforward: Legislative Defendants cannot offer testimony from any individual whom Plaintiffs were unable to depose due to the assertions of legislative privilege and legislative immunity.

The second restriction prevents Legislative Defendants from funneling information from those twelve individuals through other witnesses, including experts. The sword/shield doctrine would serve little purpose if a party could circumvent its restrictions by relaying information from shielded witnesses to other witnesses. *See* Ex. A at 9 (explaining that legislative defendants could not introduce expert testimony based on consultations with legislative staff who had been "shielded from [the plaintiffs'] deposition efforts" by privilege assertions).¹

The third and final restriction precludes Legislative Defendants from offering evidence or testimony relating to legislative intent, unless the evidence or testimony is based exclusively on the public legislative record or publicly available data. The General Assembly's intent in drawing the challenged plans is uniquely within the knowledge of the twelve individuals asserting legislative privilege, as Legislative Defendants have identified these individuals as the sole living persons who had any involvement in drawing the state House and state Senate districts in 2017. It would be manifestly unfair for Legislative Defendants to offer evidence or testimony purporting to explain the legislature's intent in drawing specific districts or the maps as a whole, when Plaintiffs were denied the ability to take discovery from the persons who know

¹ This order of course would also prevent the twelve individuals from funneling information to witnesses for the Intervenor Defendants, who are closely aligned with Legislative Defendants.

the truth regarding the legislature's actual intent. *See Bilzerian*, 926 F.2d at 1292-93 (applying sword/shield doctrine to restrict criminal defendant from offering testimony related to his "intent"). That said, Plaintiffs believe that Legislative Defendants should be permitted to present evidence and testimony related to legislative intent that is based exclusive on the public legislative record and publicly available data (*e.g.*, expert statistical analysis based on publicly available elections data).²

III. In the Alternative, Plaintiffs Request the Opportunity to Challenge Legislative Defendants' Privilege Assertions

Given the expedited schedule in this case, Plaintiffs have decided not to oppose the motion for a protective order—and thus to forgo important discovery to which Plaintiffs are entitled—if the Court specifies that the order will carry the routine consequences set forth above. However, if the Court is not inclined to enter such a protective order at this time, then Plaintiffs will file a brief challenging the privilege and immunity assertions. The blanket assertions that have been made to prevent essentially any discovery are clearly overbroad in light of N.C. Gen. Stat. § 120-133(a). That statute waives legislative privilege over any communications between legislators and staff—and over staff entirely—in relation to redistricting legislation.

WHEREFORE, Plaintiffs do not oppose the court's entry of the requested protective order if the court specifies that Legislative Defendants may not offer (1) testimony from any of the twelve individuals asserting legislative privilege and legislative immunity (2) evidence or testimony that derives directly or indirectly from non-public information from, or non-public

² For the second and third restrictions, the date by which to determine whether information or data is "public" or "non-public" should be November 13, 2018, the date that Plaintiffs filed the complaint in this case. That specification is necessary to prevent Defendants from selectively making certain information or data "public" now where that information might support Defendants' defenses in this matter, while continuing to assert privilege to allow Plaintiffs to probe those defenses by deposing or obtaining documents from legislators.

communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless that testimony or evidence is based exclusively on the public legislative record or publicly available data. In the alternative, Plaintiffs request the opportunity to file a substantive opposition to Legislative Defendants' assertions of legislative privilege and legislative immunity.

Respectfully submitted this the 11th day of March, 2019

POYNER SPRUILL LLP

By: 

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
Caroline P. Mackie
N.C. State Bar No. 41512
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

*Counsel for Common Cause, the North
Carolina Democratic Party, and the
Individual Plaintiffs*

**ARNOLD AND PORTER
KAYE SCHOLER LLP**

R. Stanton Jones*
David P. Gersch*
Elisabeth S. Theodore*
Daniel F. Jacobson*
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
stanton.jones@arnoldporter.com

PERKINS COIE LLP

Marc E. Elias*
Aria C. Branch*
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna*
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com

*Counsel for Common Cause and the
Individual Plaintiffs*

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email* to the following persons:

Stephanie A. Brennan
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
Counsel for the State Board of Elections and its members

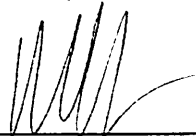
Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com

E. Mark Braden
Richard B. Raile
Trevor M. Stanley
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
Counsel for the Legislative Defendants

John E. Branch III
H. Denton Worrell
National J. Pencook
1238 E. Hargett Street, Suite 300
Raleigh, NC 27601
jbranch@shanahanmcdougal.com
dworrell@shanahanmcdougal.com

Counsel for the Intervenor Defendants

This the 11th day of March, 2019.



Edwin M. Speas, Jr.

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania,)
Carmen Febo San Miguel, James Solomon,)
John Greiner, John Capowski, Gretchen)
Brandt, Thomas Rentschler, Mary Elizabeth)
Lawn, Lisa Isaacs, Don Lancaster, Jordi)
Comas, Robert Smith, William Marx,)
Richard Mantell, Priscilla McNulty,)
Thomas Ulrich, Robert McKinstry,)
Mark Lichty, Lorraine Petrosky,)

Petitioners,)

v.)

No.)
261 M.D. 2017)

The Commonwealth of Pennsylvania;)
The Pennsylvania General Assembly;)
Thomas W. Wolf, In His Capacity)
As Governor of Pennsylvania;)
Michael J. Stack III, In His Capacity As)
Lieutenant Governor of Pennsylvania And)
President of the Pennsylvania Senate;)
Michael C. Turzai, In His Capacity As)
Speaker of the Pennsylvania House of)
Representatives; Joseph B. Scarnati III,)
In His Capacity As Pennsylvania Senate)
President Pro Tempore; Robert Torres,)
In His Capacity As Acting Secretary of)
the Commonwealth of Pennsylvania;)
Jonathan M. Marks, In His Capacity)
As the Commissioner of the Bureau of)
Commissions, Elections, and Legislation)
of the Pennsylvania Department of State,)

Pages 1 - 321)

Respondents.)

COMMONWEALTH COURT OF PENNSYLVANIA, Volume I

BEFORE: HONORABLE JUDGE KEVIN BROBSON

DATE: DECEMBER 11, 2017; 9:30 A.M.

PLACE: COMMONWEALTH COURT
PENNSYLVANIA JUDICIAL CENTER
601 COMMONWEALTH AVENUE
HARRISBURG, PA 17106

REPORTED BY: CINDY L. SEBO, RMR, CRR, RPR,

30

1 been made that way or that there's a
 2 reasonable alternative, no.
 3 This is what the intent was. That
 4 is Dr. Gimpel's proffered expert testimony
 5 that the Legislative Respondents intend to
 6 offer here.
 7 He doesn't provide in his report any
 8 references for these statements. The
 9 grounds for any of his assertions about the
 10 intent behind his particular boundaries has
 11 not been disclosed to Petitioners, as
 12 required under the rule. But we do know,
 13 partly from some of Dr. Gimpel's testimony
 14 in the Agre trial last week -- we do know
 15 that he has been provided with and relied on
 16 some sources from the General Assembly in
 17 this case. And we do know that
 18 Mr. John Memme, the chief Republican
 19 mapmaker, is an expert consultant that the
 20 Legislative Respondents have -- have
 21 retained.
 22 Dr. Gimpel is aware of that. He
 23 testified to that last week --
 24 THE COURT: Counsel, let me ask you
 25 on that point, because I read that in your

31

1 papers.
 2 Mr. Memme, was he one of the people
 3 that Petitioners sought to depose in this
 4 case?
 5 MR. CELLA: I believe he was,
 6 Your Honor.
 7 THE COURT: And your contention,
 8 then, is that Mr. Memme -- you specifically
 9 asked for Mr. Memme's deposition as a person
 10 with knowledge. There was an objection by
 11 Legislative Respondents to Mr. Memme's
 12 deposition, which this Court sustained. And
 13 your allegation now is that Mr. Memme has
 14 been feeding information to Dr. Gimpel?
 15 MR. CELLA: Well, Your Honor, that's
 16 certainly what it appears --
 17 THE COURT: I didn't ask you that.
 18 I asked you is that your allegation?
 19 MR. CELLA: I think it's a
 20 reasonable inference from the information
 21 that -- that Dr. Gimpel testified to last
 22 week. I don't -- we don't know for
 23 certain -- I don't know enough to make that
 24 allegation.
 25 THE COURT: Well, then, do I know

32

1 for certain whether it's happened, and can I
 2 use it as a basis to exclude Dr. Gimpel's
 3 testimony?
 4 MR. CELLA: Your Honor, I believe
 5 that what you do know from the record that
 6 we've provided is that some information --
 7 THE COURT: Well, I understand
 8 that. I understand that.
 9 My question is -- I find -- I think
 10 it would be incredibly compelling if, as a
 11 matter of fact, Legislative Respondents'
 12 experts have been consulting with
 13 nontestifying consultants who you sought to
 14 depose but then were shielded. I think that
 15 would be an incredibly compelling argument
 16 to seek to preclude their experts from
 17 testifying.
 18 My question is, Is that the argument
 19 that you're making? Are you -- are you
 20 asserting and are you able to prove that the
 21 Legislative Respondents' experts have been
 22 consulting with individuals who were
 23 shielded from your deposition efforts?
 24 MR. CELLA: Your Honor, what we're
 25 asserting is that through counsel --

33

1 THE COURT: No, I don't want to
 2 know what you're asserting. I want to say,
 3 Are you asserting what I just asked you are
 4 asserting?
 5 MR. CELLA: Your Honor, we're not
 6 asserting that. From the record, what we're
 7 asserting is that through counsel,
 8 Dr. Gimpel has apparently received sources
 9 of information from the General Assembly.
 10 And, perhaps, one of those sources is
 11 Mr. Memme.
 12 From the record --
 13 THE COURT: So you don't know that
 14 it's Mr. Memme?
 15 MR. CELLA: That's correct,
 16 Your Honor.
 17 THE COURT: And you don't know that
 18 it's any of the -- you don't have any
 19 information you can offer the Court today
 20 that it is any of the people that were
 21 shielded from your discovery?
 22 MR. CELLA: That's correct,
 23 Your Honor. We don't have certain
 24 information of that, but we do have some
 25 record from last week.

34	<p>1 And I -- to move --</p> <p>2 THE COURT: Well, the record from</p> <p>3 last week is not here.</p> <p>4 I will give you -- if you have proof</p> <p>5 that Mr. -- that the Legislative Respondents</p> <p>6 have been using experts who have received</p> <p>7 information from individuals that were</p> <p>8 shielded from your discovery, I will allow</p> <p>9 you to put that evidence on, because that's</p> <p>10 a troubling allegation, if that, in fact, is</p> <p>11 an allegation that you're making.</p> <p>12 MR. CELLA: Yes, Your Honor. We</p> <p>13 have statements from Dr. Gimpel that, on the</p> <p>14 one hand, are -- have no support. It could</p> <p>15 only be conjecture unless they are somehow</p> <p>16 supported by direct evidence of the intent</p> <p>17 of the mapmaker, such as Mr. Memme --</p> <p>18 THE COURT: But you don't have any</p> <p>19 direct evidence of -- of -- of -- of a -- I</p> <p>20 don't know how many times I can say it.</p> <p>21 I think you understand what I'm</p> <p>22 saying, right, that the Court's concern,</p> <p>23 based on your filing, was an allegation that</p> <p>24 the Legislative Respondents received the</p> <p>25 protection of the speech and debate clause</p>	36	<p>1 motion to exclude his testimony does depend</p> <p>2 on this question of whether, in fact,</p> <p>3 Petitioners can establish as a certainty</p> <p>4 that the information he's relying upon came</p> <p>5 from privileged sources.</p> <p>6 If it didn't come from that, then</p> <p>7 it's entirely unsupported and is simply</p> <p>8 conjecture and is not -- is not competent</p> <p>9 expert opinion in that regard.</p> <p>10 THE COURT: That -- I understand.</p> <p>11 Anything else?</p> <p>12 MR. CELLA: Yes, Your Honor, if I</p> <p>13 may, just because of the opposition that</p> <p>14 came in early this morning from Legislative</p> <p>15 Respondents.</p> <p>16 They -- I think it's -- it's</p> <p>17 interesting that the very carefully worded</p> <p>18 paragraph or couple sentences on this</p> <p>19 question of where the information</p> <p>20 Dr. Gimpel's relying on came from, and</p> <p>21 it's -- it's very engineered and so</p> <p>22 carefully -- almost as carefully as some of</p> <p>23 the boundaries in these districts that we're</p> <p>24 talking about in this case.</p> <p>25 He -- they say --</p>
35	<p>1 immunity to shield depositions of former --</p> <p>2 current and former legislative staffers, and</p> <p>3 then those current and former, one or more,</p> <p>4 legislative staffers who were shielded under</p> <p>5 speech and debate immunity from discovery</p> <p>6 have been providing information to their</p> <p>7 testifying experts?</p> <p>8 If that, in fact, is the case, then</p> <p>9 I am very interested in that. If you cannot</p> <p>10 establish that to be the case, then it's a</p> <p>11 different analysis.</p> <p>12 MR. CELLA: Understood, Your Honor.</p> <p>13 MR. GERSCH: Your Honor, might we</p> <p>14 have a moment to consult with our colleague</p> <p>15 to help answer your question?</p> <p>16 THE COURT: Sure.</p> <p>17 (Counsel confer.)</p> <p>18 MR. CELLA: Your Honor, one source</p> <p>19 of information that Petitioners have cited</p> <p>20 is Exhibit C to our brief, which is that</p> <p>21 exchange from the Agre trial last week,</p> <p>22 but -- and we certainly intend to ask</p> <p>23 Dr. Gimpel about this question on the stand,</p> <p>24 if -- if we're permitted to do so.</p> <p>25 But I don't think that the -- our</p>	37	<p>1 THE COURT: Well, lawyers can do</p> <p>2 that.</p> <p>3 MR. CELLA: Yes, Your Honor.</p> <p>4 THE COURT: They're very skilled.</p> <p>5 MR. CELLA: Well, these skilled</p> <p>6 lawyers have said that Dr. Gimpel didn't use</p> <p>7 any data from any nonpublic source or a</p> <p>8 source that was not disclosed to</p> <p>9 Petitioners. And that careful wording, I</p> <p>10 think, leaves the question open of, Did</p> <p>11 Dr. Gimpel rely on any nonpublic source, not</p> <p>12 necessarily data, but some other source,</p> <p>13 perhaps, of legislative intent. Did he rely</p> <p>14 on that? And that hasn't been disclosed,</p> <p>15 and the Legislative Respondents haven't</p> <p>16 answered that question in their reply brief.</p> <p>17 They also say that Dr. Gimpel did</p> <p>18 not speak with any legislator or legislative</p> <p>19 employee.</p> <p>20 Did they include past legislators --</p> <p>21 past legislative employees in that? They</p> <p>22 haven't answered that question either.</p> <p>23 So, Your Honor, just to conclude,</p> <p>24 Dr. Gimpel has said that he's received</p> <p>25 sources of information from the</p>

86	<p>1 THE CLERK: The Court is now in 2 recess. 3 - - - 4 (Whereupon, a recess was taken from 5 10:48 a.m. to 11:32 a.m.) 6 THE CLERK: All rise. The 7 Commonwealth Court will now resume session. 8 THE COURT: Please be seated, 9 everyone. 10 I want to thank counsel for the 11 well-argued and, for the most part, concise 12 oral arguments on the pending motions in 13 limine. 14 As lawyers know, motions in limine 15 have much greater impact in cases where 16 there's actually a jury. The theory being 17 that if you allow certain evidence in during 18 a jury trial and then -- if you allow it in, 19 period, it's kind of hard to unring the 20 bell. Use whatever analogy you want to 21 use -- put the toothpaste back in the tube, 22 put the water back over the dam -- whatever 23 you want to use. 24 But that's why motions in limine are 25 generally filed; it's to essentially stop</p>	88	<p>1 Ultimately, the lawyers will have 2 the opportunity, I am assuming, to make what 3 additional arguments they want to make to 4 the Supreme Court with regard to anything 5 that happens here. But I want to put that 6 predicate out there, particularly for the 7 nonlawyers in the room. 8 So here are my rulings -- 9 MR. TUCKER: Your Honor, there's two 10 brief matters that we need to address with 11 the Court before the Court rulings. 12 THE COURT: I was so excited to 13 give my rulings, though. You completely 14 ruined my flow. 15 Please approach -- approach, please. 16 MR. TUCKER: And, Your Honor, we do 17 apologize for interrupting. We are very 18 much looking forward to your rulings, but 19 these two issues, I think, impact your 20 rulings. 21 So we wanted to inform the Court 22 that, first of all, with regards to 23 Dr. Gimpel's report, we are going to go 24 ahead and withdraw Pages 17 to 29 of his 25 report. Those are the sections of his</p>
87	<p>1 the evidence from being presented to a jury. 2 One of my charges, as I said at the 3 outset, as the Judge in this case is to 4 create a record, create a -- as fulsome a 5 record as possible for the Supreme Court 6 Justices to review the record and review my 7 proposals on findings of fact and 8 conclusions of law, but, ultimately, for the 9 Supreme Court to decide the case based on 10 the evidence that's produced here. So many 11 of my rulings here are based with that 12 charge in mind. 13 What does that mean? It means that 14 I may be allowing things in during this 15 trial that if there were a jury sitting 16 here, I wouldn't. 17 And it also doesn't mean that just 18 because I'm allowing certain evidence in, 19 that I am -- as I write my findings of fact 20 or I do my legal analysis, that I am going 21 to consider them or weigh them one or 22 another, or what have you. 23 It simply means that I am creating 24 a -- I'm leaning in favor of creating as 25 fulsome a record as possible.</p>	89	<p>1 report that he -- that were -- part of it 2 that was addressed during argument on the 3 motions in limine with the chart on the 4 county splits, and the other part is the 5 district-by-district -- 6 THE COURT: Counsel, you're going 7 way too fast for me, Number 1. If you could 8 move the microphone up closer to your mouth, 9 that would be really helpful. 10 Okay. There you go. 11 Now, as I understand it, you are 12 going to withdraw a portion of Dr. Gimpel's 13 report and -- and, correspondingly, I 14 assume, reduce the scope of his testimony? 15 MR. TUCKER: That's correct. 16 THE COURT: Okay. And what were 17 the pages of the report that you're going to 18 withdraw? 19 MR. TUCKER: Sure. It's Pages 17 to 20 29 of his report. And I believe withdrawing 21 those pages addresses the Petitioners' 22 motion in limine on Dr. Gimpel -- 23 MR. FREEDMAN: Your Honor, it 24 doesn't -- 25 THE COURT: Hold --</p>

90	<p>1 MR. FREEDMAN: -- the Petitioners 2 would like to be heard on that matter as 3 well. 4 But I will let counsel proceed. 5 THE COURT: Thank you. That's very 6 nice of you. 7 Go ahead. 8 MR. TUCKER: That's -- that's the 9 first thing -- 10 THE COURT: That's the nub of it? 11 MR. TUCKER: That's the nub of it on 12 Dr. Gimpel. 13 THE COURT: Let's do Dr. Gimpel, 14 and then we'll do whatever your next thing 15 is. 16 MR. TUCKER: Sure. No problem. 17 THE COURT: Go ahead and retreat to 18 counsel table. 19 MR. TUCKER: Thank you. 20 MR. FREEDMAN: Your Honor, 21 John Freedman from Arnold & Porter Kaye 22 Scholer. 23 Pages 17 through 29 are the 24 district-by-district analysis. We are 25 assuming they are being withdrawn because</p>	92	<p>1 report. 2 MR. TUCKER: Thank you, Your Honor. 3 MR. FREEDMAN: We don't think it 4 goes far enough. 5 THE COURT: That's -- all I've 6 heard is -- all I've heard is their 7 withdrawal. And they've offered to 8 withdraw; you've accepted their withdrawal. 9 They withdraw it. 10 MR. FREEDMAN: Thank you. 11 THE COURT: Okay. You're welcome. 12 MR. TUCKER: Your Honor, the second 13 matter relates to the evidence that was 14 admitted into the Agre case, and there's 15 some questions from the Court about what was 16 actually admitted and what was not admitted. 17 And we went back and checked and 18 matched up all the exhibits on their exhibit 19 list to the Agre transcript and identified 20 that there was one of them that, it looks 21 like, was admitted in the Agre case, and 22 that is Petitioners' Exhibit 140. 23 We just want to make the Court -- 24 correct the record and make sure the Court 25 was clear on that.</p>
91	<p>1 there was some merit in our suggestion, 2 accusation, what you will, that it was 3 infected by materials that had been blocked 4 by legislative privilege -- 5 THE COURT: Don't assume that. 6 Why don't you just assume that they 7 were trying to avoid a conflict? 8 MR. FREEDMAN: There are other 9 aspects of the report that we complained 10 about in our motion starting at Page 3, 11 Pages 10 through 17 that also contain 12 similar characterizations that appear to us 13 to be of the same ilk as the portions that 14 they have withdrawn -- 15 THE COURT: Let me ask you this 16 question: Do you have any objection to them 17 withdrawing Pages 17 through 29? 18 MR. FREEDMAN: At a minimum, no. 19 THE COURT: So you have no 20 objection to their offer to withdraw 21 Pages 17 through 29? 22 MR. FREEDMAN: That's correct. 23 THE COURT: Okay. Thank you. 24 We will accept your willingness to 25 withdraw Pages 17 through 29 of the Gimpel</p>	93	<p>1 THE COURT: Thank you. 2 MR. TUCKER: Thank you. 3 THE COURT: Okay. First is 4 Petitioners' motion to exclude or limit 5 Intervenor's testimony. I'm going to grant 6 motion. 7 As far as the witnesses that the 8 Intervenor's are going to call, I'm going to 9 grant the motion and preclude the testimony 10 of a potential -- or of an existing 11 Congressional candidate. 12 The reason why is because I don't 13 think I need an existing Congressional 14 candidate to inform the Court as to how 15 prejudicial a change in the maps will be. 16 I think everybody understands that 17 if the maps change, that that will certainly 18 change who can or cannot run for office and 19 the corresponding burden associated with 20 that. 21 In reality, I'll say, anecdotally, 22 I'm not sure it changes who can or cannot 23 run, because I don't think you need to be a 24 resident of your Congressional district to 25 run for Congress. With that being said, I</p>

94

1 understand the practical burden associated
 2 with being a carpetbagger, so to speak.
 3 But, nonetheless, I don't think we need any
 4 testimony on that particular inconvenience.
 5 I also -- I will also limit the
 6 number of witnesses that can testify as
 7 party chairs and the number of witnesses
 8 that can testify as so-called "Republicans
 9 at large." The Intervenors can present the
 10 testimony of one party chair and one
 11 Republican at large, but the rest of the
 12 testimony seems, to me, to be duplicative.
 13 So in that regard, that motion will
 14 be granted.
 15 Next is Petitioners' motion to limit
 16 or preclude Legislative Respondents from
 17 presenting evidence or argument about
 18 intent, motives and activity in enacting the
 19 2011 Plans.
 20 I'm going to grant that motion to
 21 the extent that it seeks to bar
 22 Legislative Respondents from offering
 23 evidence that Petitioners could not obtain
 24 in discovery due to this Court's
 25 November 22nd, 2017 order regarding the

95

1 speech and debate clause, a provision in the
 2 Pennsylvania Constitution.
 3 As far as the request to limit
 4 argument, that's -- we'll wait to see what
 5 argument they want to have. But I was
 6 concerned in the motion there was some
 7 suggestion that they could -- that the
 8 Legislative Respondents will be precluded
 9 from making any arguments about the evidence
 10 that the Petitioners might produce, and that
 11 seemed to be overbroad. So we'll deal with
 12 that more on a case-by-case basis.
 13 But as far as the speech and debate
 14 immunity and sword and shield argument, I
 15 think the order I just provided on the
 16 record adequately addresses Petitioners'
 17 concerns.
 18 The next motion is Petitioners'
 19 motion to exclude the testimony of
 20 Dr. Wendy Cho, critical to the expert report
 21 of Dr. Chen. I'm going to deny that motion.
 22 Next is Plaintiffs' motion to
 23 exclude Dr. Gimpel's expert testimony
 24 regarding the effect of the 2011 Plans.
 25 The Court has already accepted the

96

1 Legislative Respondents' proffer to withdraw
 2 Pages 17 through 29. Accordingly, the Court
 3 expects that there will be no testimony on
 4 that portion of that expert report; however,
 5 we are otherwise going to deny the motion.
 6 I would note that this ruling is
 7 also subject to the order I just dictated
 8 previously with regard to speech and debate
 9 immunity, but I will also note that, given
 10 the oral argument, I am going to give
 11 Petitioners wide latitude to cross-examine
 12 Dr. Gimpel.
 13 Next is Legislative Respondents'
 14 motion regarding REDMAP.
 15 I am going to deny the motion;
 16 however, I am going to note that if there
 17 were a jury here, I would probably exclude
 18 the evidence.
 19 And I probably will not be
 20 personally assigning any weight to that
 21 evidence, unless, of course, there's any
 22 kind of testimony tying, specifically, the
 23 REDMAP data or the REDMAP evidence that's
 24 going to be offered at the trial and
 25 admitted as an exhibit to the particular

97

1 legislators.
 2 The remaining motions relate to the
 3 Federal Court litigation in the Agre matter.
 4 And they are Petitioners' motions to allow
 5 the use of documents from the Agre case and
 6 Legislative Respondents' motion to exclude
 7 the same, as well as the
 8 Legislative Respondents' motion to exclude
 9 Dr. Chen's expert report.
 10 For purposes of this case, we are
 11 going to allow the use in this case of any
 12 documents of record in the Federal
 13 litigation.
 14 So what does that mean? That means
 15 to the extent that a document is -- appears
 16 on the docket in the Federal litigation and
 17 is, therefore, public, that document can be
 18 used in this litigation, assuming it can be
 19 admitted in terms of authenticity and
 20 relevance and all those other objections.
 21 The Court will also allow the offer
 22 of documents that were actually admitted
 23 into evidence at the trial in the Agre case.
 24 The Court will also allow experts to
 25 use the documents, so long as those experts