IN THE SUPREME COURT OF PENNSYLVANIA

NO. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,
***Petitioners*,**

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

GOVERNOR THOMAS W. WOLF'S REPLY IN SUPPORT OF HIS PROPOSED REMEDIAL PLAN

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Governor Thomas W. Wolf submits this Reply solely to address two points in Legislative Respondents' Brief in Opposition dated February 18, 2018: Legislative Respondents' discussions of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("VRA"), and of municipality splits.

With respect to the VRA, Legislative Respondents incorrectly describe the Governor's map, and their brief grossly misconstrues the VRA's requirements, suggesting that the VRA's complex and nuanced inquiries can be boiled down into bright-line racial quotas. *See* Leg. Resp. Br. at 10-12. While this Court has moved past any disputes over the Governor's map by adopting a different remedial map, Governor Wolf believes that he should not let the Legislative Respondents' inaccurate statements of facts and law go uncorrected, especially since they come from high-placed legislative officials who should have a firm command of voting rights laws.

First, Legislative Respondents' contention that the Governor's map "eliminate[s] Pennsylvania's only majority-minority district," is factually inaccurate. In fact, the Governor's map contains *two* districts in which non-Hispanic voting age whites are in the minority. District 2 remains a majority-minority district based on an African-American / Hispanic coalition, and District 1

is majority-minority based on an African-American / Hispanic / Asian coalition.[1] Thus, the premise of Legislative Respondents' argument is simply false.

Second, Legislative Respondents incorrectly reduce the complex jurisprudence regarding Section 2 of the VRA to a simple 50% target. The VRA is not such a blunt tool, however; it cannot be satisfied merely by meeting arbitrary thresholds, and is not designed to enforce them. Instead, a court examining a VRA challenge must engage in a fact-specific inquiry to determine whether a minority group's voting power has been diluted. The court begins with the three requirements set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986): (1) the minority group must be "sufficiently large and geographically compact to constitute a majority"; (2) the minority group must be "politically cohesive"; and (3) the white majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. Each of the *Gingles* factors must be met as a precondition for any Section 2 challenge, but they are merely "threshold conditions" to the consideration of the "totality of circumstances" test that is used to determine if a proposed map violates Section 2. *Growe v. Emison*, 507 U.S. 25,

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[1] Majority-minority districts based on coalitions of minority groups are cognizable under the VRA. *Huot v. City of Lowell*, No. CV 17-10895-WGY, --- F. Supp. 3d. ---, 2017 WL 5615573, at *3-7 (D. Mass. Nov. 21, 2017) (citing cases and adopting majority view that "minority coalition claims are cognizable under Section 2"); *Growe v. Emison*, 507 U.S. 25, 37-42 (1993) (assuming, without deciding, that minority coalition claims are cognizable under Section 2).

38-40 (1993). "Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion). Legislative Respondents make no attempt to show that any of these conditions exist in Philadelphia.

Legislative Respondents also disregard the potential of so-called crossover districts – districts in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13 (plurality opinion). The Supreme Court has cautioned against VRA challenges that "too far downplay[] the significance of a longtime pattern of white crossover voting." *Cooper v. Harris*, 137 S. Ct. 1455, 1471 (2017); *see also, e.g.*, *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 562 (E.D. Va. 2016) (adopting plan created by special master determining that, because of a well-established history of crossover voting, "a [black voting-age population] 'somewhat above' 40% would preserve African-American voters' ability to elect the representative of their choice in the Third District").

Philadelphia, with its concentrations of Democrats of every race, has great potential to create such crossover districts. The existing District 2, for example, was 56.7% African-American under the 2011 map, yet in 2016 it elected Dwight Evans – an African-American candidate – with 90.2% of the vote. This suggests

that, far from voting as a bloc *against* the preferred candidate of minority voters, a majority of white voters in District 2 *supported* the preferred candidate of the African-American majority.[2] The potential for crossover districts opened the door to the possibility of creating a districting map that gave communities of color the opportunity to elect their chosen candidates to *two* districts, not one. By creating two such districts, the Governor's map did not disregard the VRA, as Legislative Respondents argue; it advanced the purposes of the VRA by opening up new potential for minority candidates. "Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more." *Bartlett*, 556 U.S. at 23.

Legislative Respondents' second point, that "the Governor's Plan also incorrectly reports municipal splits," Leg. Resp. Br. at 12, is itself factually incorrect. The Governor made use of a database that included incorporated boroughs and cities, found at ftp://ftp2.census.gov/geo/tiger/TIGER2010/PLACE/2010/, and correctly counted

[2] The 2012 and 2014 elections in District 2 were similar, with Chaka Fattah – also an African-American candidate – receiving 89.3% and 87.7% of the vote.

splits in those entities. Legislative Respondents used a database that also included townships: ftp://ftp2.census.gov/geo/tiger/TIGER2010/COUSUB/2010/. Use of either metric was consistent with the Court's January 26, 2018 order.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: February 20, 2018

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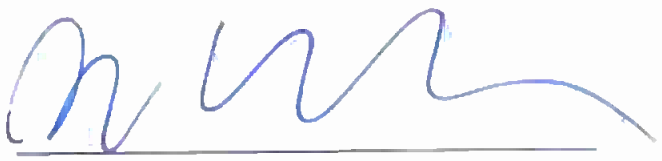
CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Record of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

I certify that the preceding Application and Brief do not contain confidential information.



Michele D. Hangley

February 20, 2018

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[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2018, upon consideration of Governor Thomas W. Wolf's Application for Leave to File a Reply in Support of His Proposed Remedial Plan, it is hereby ORDERED that the Application for Leave to File a Reply is GRANTED. The Prothonotary is directed to accept for filing the Reply that was submitted as Exhibit A to Governor Wolf's Application.

BY THE COURT:

_____

J.