IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. Pennsylvania General Assembly, *et al.*, *Respondents*.	**No. 261 MD 2017**

PETITIONERS' EMERGENCY APPLICATION TO COMPEL RESPONSES TO PENDING DISCOVERY REQUESTS BASED ON LEGISLATIVE RESPONDENTS' WAIVER OF ALL PRIVILEGES

Respondents Scarnati, Turzai, and the General Assembly ("Legislative Respondents") failed to comply with the November 15 deadline to file their privilege brief, thereby waiving their privilege arguments. Their removal of this case to federal court did not relieve them of their filing obligations. That is black-letter law under 28 U.S.C. § 1450, which dictates that all existing state court orders remain "in full force and effect" after a removal. Legislative Respondents were required to file their brief in federal court by November 15, but they did not do. This alone is grounds for waiver. Moreover, even if removal could ever be a basis for not timely filing – which it is not – the Court should still find waiver here in light of the egregious circumstances of this removal.

As a result of the waiver, the Court should compel the Legislative Respondents to respond in full to Petitioners' pending discovery requests, no later than Friday, November 24. The Court should also compel the General Assembly to sit for the deposition that Petitioners noticed in September. And the Court should authorize Petitioners immediately to serve their third-party subpoenas, with a 10-day response time. In granting this relief, the Court should ignore any claims of privilege by the Legislative Respondents—those claims have now been waived by virtue of Legislative Respondents' failure to file their privilege brief on November 15.

BACKGROUND

Petitioners served a first set of Requests for Production and Interrogatories on Legislative Respondents on July 14, 2017, and a second set of Requests for Production on November 14, 2017. On September 12, 2017, Petitioners noticed a deposition of the General Assembly to obtain basic information about the 2011 Districting Plan, such as the data that Legislative Respondents used in creating the plan. On July 20 and August 11, 2017, Petitioners served notice of their intent to issue third-party subpoenas for production of documents.

Rather than respond substantively to these requests, most of which have been pending for months, Legislative Respondents have objected to every single

request on the grounds of legislative privilege, "First Amendment" privilege, attorney-client privilege, executive privilege, and other purported privileges.

On October 16, 2017, in an order otherwise staying the case, the Commonwealth Court ordered Legislative Respondents to file, by November 15, a "brief in support of *all claims of privilege* which [Legislative Respondents] have asserted and/or intend to assert with respect to the discovery propounded by the Petitioners in this matter." 10/16/2017 Order ¶ 2 (emphasis added). On November 13, after the Supreme Court assumed extraordinary jurisdiction and lifted the stay, the Commonwealth Court confirmed that November 15 deadline and ordered Petitioners to file a responsive brief two days later, on November 17. The Commonwealth Court further stated: "No extensions of filing deadlines and/or requests for continuances of scheduled proceedings will be considered and/or granted absent extraordinary circumstances." 11/13/2017 Order ¶ 10.

Legislative Respondents did not file a brief asserting privilege on November 15, as ordered. Instead, on November 14, Senator Scarnati, stating that he had the consent of Speaker Turzai and the General Assembly, removed this case to the U.S. District Court for the Eastern District of Pennsylvania, even though there was no factual or legal basis to do so. Scarnati served the notice of removal by U.S. mail and did not email a courtesy copy to Petitioners' counsel (but apparently did so for Speaker Turzai's counsel, as described below). As a result, Petitioners and

their counsel first learned of the removal when Senator Scarnati notified the Pennsylvania Supreme Court of his notice of removal on the afternoon of November 15—the same day the Legislative Respondents' privilege brief was due to be filed. Early that evening, the Commonwealth Court, lacking jurisdiction as a result of the removal, appropriately canceled the pre-trial conference that had been scheduled for 1 p.m. on November 16 (today).

At roughly 2:30 a.m. this morning, November 16, less than twelve hours after learning of the removal, Petitioners filed an emergency motion to remand (attached as **Exhibit A**). Petitioners explained that Senator Scarnati had not obtained the requisite consent of all properly joined defendants; missed the statutory 30-day deadline to remove by three months; and utterly failed to establish any non-frivolous basis for federal jurisdiction. Petitioners sought expedited consideration, immediate remand, and attorneys' fees.

The federal court called an emergency hearing on the remand motion for 2 p.m. today, November 16. But less than 30 minutes before the hearing, Senator Scarnati filed a motion to withdraw the notice of removal and remand the case (attached as **Exhibit B**). According to this filing, Senator Scarnati had "understood" from Speaker Turzai's counsel that Speaker Turzai consented to removal, but was advised "[t]his afternoon" that Speaker Turzai no longer

consented. At the hearing, Senator Scarnati's counsel reiterated this sequence to the court.

The federal court immediately remanded the case to the Pennsylvania Supreme Court "with prejudice" and directed Petitioners, within 14 days, to file a freestanding motion for fees and costs. The court *sua sponte* mentioned Rule 11 of the Federal Rules of Civil Procedure.

After the case was remanded, Speaker Turzai filed, in the federal court, a response to Senator Scarnati's motion to withdraw the notice of removal. Speaker Turzai accused Senator Scarnati of "false[ly]" stating in both the notice of removal and the motion to withdraw it that Speaker Turzai had consented to removal under 28 U.S.C. § 1441, but that Speaker Turzai never consented to such removal. Response ¶¶ 2, 10, 12, 13 (attached as **Exhibit C**). This purported sequence of events, however, raises questions about Speaker Turzai's own conduct. Speaker Turzai states that Senator Scarnati's counsel emailed Speaker Turzai's counsel a copy of the Notice of Removal on Wednesday, the same day the privilege brief was due and *before* the Commonwealth Court had canceled the hearing scheduled for Thursday. Response ¶ 8. But Speaker Turzai did not request that Senator Scarnati withdraw the Notice of Removal containing purportedly false representations at that time, nor did Speaker Turzai inform the federal court. Instead, Speaker Turzai's counsel waited until the next day—after the privilege

brief was due, after Petitioners filed their motion to remand, and after the federal court scheduled an emergency hearing for this afternoon—to request that Senator Scarnati withdraw the Notice of Removal. Response ¶ 10 & exhibit thereto.

As of this filing, neither Scarnati, Turzai, nor the General Assembly has filed any brief on privilege.

ARGUMENT

I. Legislative Respondents Have Waived All Privilege Objections

A. Legislative Respondents Missed the Deadline to Assert Privilege

Legislative Respondents have waived all privilege objections. As noted, the Commonwealth Court ordered Legislative Respondents to file by November 15 a brief supporting "all claims of privilege" that the Legislative Respondents have asserted or intend to assert with respect to Petitioners' discovery requests. 10/16/2017 Order ¶ 2. On November 13, the Commonwealth Court confirmed that order and further ordered that "No extensions of filing deadlines and/or requests for continuances of scheduled proceedings will be considered and/or granted absent extraordinary circumstances." 11/13/2017 Order ¶ 10.

By failing to file their brief, Legislative Respondents waived all privilege. Although the case was removed to federal court on November 14, the November 15 privilege briefing deadline remained in place. Federal law is clear: "Whenever any action is removed from a State court to a district court of the United States, …

[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved and modified by the district court." 28 U.S.C. § 1450. "After removal, the federal court takes the case up where the State court left it off." *Kurns v. Soo Line R.R.*, 72 A.3d 636, 639 (Pa. Super. Ct. 2013) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters Local No. 70 of Alameda Cty.*, 415 U.S. 423, 436 (1974)). "The federal court accepts the case in its current posture as though everything done in state court had in fact been done in the federal court." *Id.* "[W]henever a case is removed, interlocutory state court orders are transformed by operation of 28 U.S.C. § 1450 into orders of the federal district court to which the action is removed." *Id.* (*quoting In re Diet Drugs*, 282 F.3d 220, 232 n.7 (3d Cir. 2002)).

The removal transformed the November 15 deadline set by the state court's order into a deadline of the federal court. But the Legislative Respondents did not file their privilege brief in federal court. Nor did they ask the federal court to dissolve or modify that deadline, and the federal court did not do so. Instead, Legislative Respondents simply ignored the deadline. November 15 has now come and gone.

Legislative Respondents have accordingly waived all privilege objections. Pennsylvania courts have strictly enforced 28 U.S.C. § 1450, and found waiver where a party ignored a deadline after removal of the case to federal court. *Kurns*,

72 A.3d at 639. In *Kurns*, for example, the Pennsylvania state court granted partial summary judgment prior to removal. After the case was removed, the losing side did not appeal the state court grant of summary judgment to the Third Circuit. On remand, the state court held that the losing party had "waived" her right to challenge the state court summary judgment order by failing to appeal it while the case was in federal court. *Kurns*, 72 A.3d at 641. Under § 1450, the summary judgment "order … was removed to the federal court along with the rest of the case." 72 A.3d at 641.

Even more closely analogous, in *Haber Oil Co. v. Stanley Swabbing & Well Service, Inc.*, 741 S.W.2d 611 (Tex. Ct. App. 1987), a party removed the case to federal court to "thwart" a discovery order of the state court, and then "made no attempt to keep the case in the federal court." *Id.* at 612. After removal, the deadline that the state court had set (before removal) for complying with the discovery order came to pass, and the removing party ignored it. *Id.* Upon remand, the Texas Court of Appeals held that under § 1450, the discovery order was fully applicable during the pendency of the removal to federal court, and approved the state trial court's issuance of sanctions for failure to comply. *Id.* at 612-13. "Severe sanctions must be available to secure compliance with the discovery rule, and prevent just claims from dragging on and on in courts." *Id.*

Likewise here, Legislative Respondents waived their right to assert any privileges by failing to comply with the order of the Commonwealth Court, which was transformed into an order of the federal court upon removal.

B. The Court Should Not Retroactively Extend the Briefing Deadline

In the November 13 order, the Court made clear that extensions would not be granted lightly, but rather would require "extraordinary circumstances." 11/13/2017 Order ¶ 10. There is no good cause, much less "extraordinary circumstances," that could conceivably justify extending the Legislative Respondents' deadline to file their privilege brief. If anything, the extraordinary circumstances surrounding Senator Scarnati's frivolous removal of this case warrant strict enforcement of this Court's deadlines. Petitioners appreciate the alacrity with which the Court has acted to get this case back on track. However, Petitioners request that in light of the foregoing (much of which the Court would not have known about), the Court amend its November 16, 2017 order to eliminate the paragraph extending the Legislative Respondents' time to file their brief.

Legislative Respondents missed the November 15 briefing deadline, not for any legitimate reason, but because they simply *ignored* the deadline after Senator Scarnati removed the case. The removal is no excuse. Section 1450 is clear, as described above. The entire point of § 1450 is to ensure that removal does not alter existing state court deadlines. "[T]he statute ensures that interlocutory orders

entered by the state court to protect various rights of the parties will not lapse upon removal." *Granny Goose*, 415 U.S. at 435-36. Here, as Legislative Respondents well knew, the November 15 briefing deadline was critical to protect the rights of Petitioners, who have sought discovery for months. There is prejudice in the extreme. In light of the December 11 trial date, every day counts.

Worse, the notice of removal was frivolous, and appears to have been motivated by a desire to derail proceedings in this court. To justify the failure to obtain the Governor's consent to removal, Senator Scarnati argued that the Governor was not indispensable, despite having repeatedly told this Court that the Governor is "indispensable." Ex. A at 4-5. To justify missing the 30-day removal deadline by three months, Senator Scarnati argued, contrary to well-settled law, that the Governor's Writ of Election for a March 2018 special election was an "order or other paper" that triggered a new 30-day window to remove. Ex. A at 6-7. And there was obviously no federal subject matter jurisdiction over Petitioners' exclusively state constitutional claims challenging a state statute. Ex. A at 7-11. Speaker Turzai now alleges that Senator Scarnati *lied* about Speaker Turzai's consent, both in his notice of removal and in the motion to withdraw it.

In these circumstances, giving the Legislative Respondents additional time to file their privilege brief would unfairly prejudice Petitioners and reward and encourage vexatious litigation tactics and gamesmanship of the worst sort. Senator

Scarnati, Speaker Turzai, and the General Assembly had an unambiguous obligation to file their brief on November 15 in the federal court. They should not be permitted now to leverage Senator Scarnati's baseless and allegedly dishonest notice of removal to buy additional time for their privilege brief and further delay fact discovery in this case, with a trial set to begin in three-and-a-half weeks.

CONCLUSION

The Court should compel Legislative Respondents to respond in full to Petitioners' pending discovery requests, no later than Friday, November 24. They should do so without regard to any legislative or other privileges, all of which have been waived. Their responses should include production of all documents responsive to Petitioners' requests for production, and substantive responses to Petitioners' interrogatories. The Court should also compel the General Assembly to designate a witness to sit for the deposition that Petitioners noticed in September. And the Court should authorize Petitioners immediately to serve their third-party subpoenas, with a 10-day response time.

Dated: November 16, 2017

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*,	)	
v.	)	**No. 261 MD 2017**
Pennsylvania General Assembly, *et al.*, *Respondents*.	)	

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 20____, upon consideration of Petitioners' Emergency Application to Compel Responses to Pending Discovery Requests Based on Legislative Respondents' Waiver of All Privileges, it is hereby ORDERED that the Motion is GRANTED.

Respondents Scarnati, Turzai, and the Pennsylvania General Assembly are directed to respond in full to Petitioners' pending discovery requests no later than November 24. These responses must include production of all documents responsive to Petitioners' requests for production, and substantive responses to Petitioners' interrogatories, without regard to privilege.

Respondent the Pennsylvania General Assembly is directed to designate a witness to sit for the Rule 4007.1(e) deposition noticed by Petitioners on September 12, 2017.

Petitioners may immediately serve their third-party subpoenas for production of documents. Responses to the subpoenas are due 10 days from the date of service of the subpoenas.

Paragraphs 2 and 3 of the Court's November 16, 2017 Order are RESCINDED.

BY THE COURT:

_____

J.

EXHIBIT A

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

LEAGUE OF WOMEN VOTERS, OF PENNSYLVANIA, et al., Plaintiffs, v. THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	No. 2:17-cv-05137-MMB Honorable Michael M. Baylson

PLAINTIFFS' EMERGENCY MOTION TO REMAND

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INTRODUCTION

Defendant Scarnati's notice of removal is an egregious and transparent attempt to derail state court proceedings in this case. It is procedurally defective on its face and offers no good-faith basis for federal subject matter jurisdiction. This case should be remanded immediately.

Plaintiffs filed this action in Pennsylvania state court asserting exclusively state-law claims under the Pennsylvania Constitution, seeking to invalidate the Pennsylvania statute that established Pennsylvania's 2011 congressional districting plan. On November 9, 2017, the Pennsylvania Supreme Court assumed plenary jurisdiction, and trial has been scheduled to begin December 11. Yesterday, on the literal eve of a pre-trial conference in the state court, Scarnati notified Plaintiffs that he had removed the case a day earlier. The removal is baseless:

- Scarnati did not obtain the consent of all "properly joined" defendants as required by 28 U.S.C. § 1446(b)(2)(C), including the Governor, whom Scarnati had previously described as "indispensable" because he must sign into law any newly enacted plan.

- Scarnati filed the notice of removal three months after the 30-day deadline to remove under § 1446(b)(2)(B), bizarrely asserting that the upcoming special election to replace a resigned congressman somehow triggered a new 30-day window to remove.

- There is obviously no federal question jurisdiction over Plaintiffs' exclusively state constitutional claims challenging a state statute.

- Scarnati's entire theory of federal jurisdiction rests on the false premise that Plaintiffs seek to change the districting plan for the special election set for March 2018. Plaintiffs seek no relief with respect to the special election.

- Even if Plaintiffs were seeking relief with respect to the special election (and they are not), Scarnati's purported federal-law defense would not create a federal question.

Scarnati's motive for pursuing such a frivolous removal is obvious: to delay and derail the expedited schedule ordered by the Pennsylvania Supreme Court. He's already has some success. In light of the removal, the state court cancelled today's pre-trial conference. With trial

set to begin in barely three weeks, any delay impedes the state court's ability to resolve this case in time for the November 2018 elections, as the Pennsylvania Supreme Court ordered.

This Court should not countenance such vexatious tactics. For the reasons set forth below, the Court should expedite resolution of this motion, immediately remand this case to state court without awaiting an opposition from Scarnati, and award attorneys' fees to Plaintiffs.

BACKGROUND

Plaintiffs are eighteen Pennsylvania voters, one from each congressional district in the Commonwealth.[1] They filed this action in the Pennsylvania Commonwealth Court on June 15, 2017. Their Petition for Review asserts that Senate Bill 1249, the state statute establishing Pennsylvania's 2011 congressional districting plan (the "2011 Plan"), violates the Pennsylvania Constitution—in particular, its Free Expression and Association Clauses, Art I, §§ 7, 20, Equal Protection guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5. *See* Dkt. 1-3. Plaintiffs do not assert any federal constitutional claims or other federal claims.

In line with prior redistricting challenges in Pennsylvania state courts, Plaintiffs have named as defendants several legislative parties (including Scarnati) as well as Governor Thomas W. Wolf, Lieutenant Governor Michael J. Stack III, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks of the Bureau of Commissions, Elections, and Legislation (BCEL).[2] Plaintiffs seek an injunction prohibiting Defendants from using the 2011 Plan and requiring them to enact a new plan that comports with the Pennsylvania Constitution.

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[1] The League of Women Voters of Pennsylvania was originally also a petitioner in the state court action, but the Commonwealth Court dismissed the organization as a party.

[2] The Petition for Review initially named the Commonwealth of Pennsylvania, but the Commonwealth Court dismissed the Commonwealth from the case. The Petition also initially named Pedro A. Cortés in his capacity as Secretary of the Commonwealth, but Cortés has since stepped down from that position and been replaced by Acting Secretary Torres.

On October 16, 2017, the Commonwealth Court stayed the case, with the exception of briefing related to legislative and other purported privileges. In light of the stay, Plaintiffs asked the state high court to assume "extraordinary jurisdiction" over the case and implement proceedings to decide it in time for the May 2018 congressional primaries.

On November 9, 2017, the Pennsylvania Supreme Court granted Plaintiffs' request for extraordinary relief. Dkt. 1-6 at 67-69. It vacated the stay and directed the Commonwealth Court to conduct discovery, pre-trial, and trial proceedings, and to submit findings of fact and conclusions of law to the state high court no later than December 31, 2017.

On Monday, November 13, 2017, the Commonwealth Court issued an order (attached as **Exhibit A**) scheduling trial to begin December 11 at 9:30 a.m., and a pre-trial conference for November 16 at 1:00 p.m. (i.e., today). The order also confirmed that Defendants' brief regarding legislative and other purported privilege was due November 15, and directed Plaintiffs to file their response by November 17. The order further states that "[n]o extensions of filing deadlines and/or requests for continuances of scheduled proceedings will be considered and/or granted absent extraordinary circumstances."

A day later, on November 14, Scarnati removed the case to this Court. Scarnati served the notice of removal via U.S. mail and did not email Plaintiffs' counsel a courtesy copy. Plaintiffs and their counsel first learned of the removal on the afternoon of November 15 (i.e., yesterday) when Scarnati notified the state court that he had removed the case.

ARGUMENT

I. The Notice of Removal Facially Fails to Satisfy the Statutory Prerequisites

A. Scarnati Did Not Obtain the Consent of All Properly Joined Defendants

Under 28 U.S.C. §1446(b)(2)(A), "all defendants who have been properly joined and served must join in or consent to the removal of the action." But as Scarnati acknowledges, he

does not have the consent of all defendants here. Instead, only two defendants reportedly have consented—four others have not (the Governor, Lieutenant Governor, Acting Secretary of the Commonwealth, and Commissioner of BCEL). Scarnati asserts that these defendants' consent is unnecessary because they are "nominal" defendants. Notice at 6. That is absurd.

In the removal context, "[a] nominal party is defined as one neither necessary nor indispensable to the suit. A party is necessary and indispensable to the suit if the plaintiff states a cause of action against the party, and seeks relief from the party." *Dietz v. Avco Corp.*, 168 F. Supp. 3d 747, 759 (E.D. Pa. 2016). Because "[t]he removal statutes are to be strictly construed against removal," "all doubts should be resolved in favor of remand." *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990).

The Governor is an indispensable party, and this Court need not take Plaintiffs' word for it. In the state court proceedings in this case, Scarnati himself asserted that "it is clear—and indeed undisputed—that the Governor is both a ***legally and practically indispensable party in this matter*** as his signature would be required to implement the relief sought by [Plaintiffs]." Legislative Resps.' Answer to Gov. Wolf's Preliminary Objections at 2 (attached as **Exhibit B**) (emphasis added). Scarnati criticized the Governor's request to be dismissed from the case as "curious," because the Governor "is actually responsible for implementing the relief that [Plaintiffs] seek." *Id.* at 1. And then: "the Governor is indispensable to this Petition, because the nature of the claim and relief sought here require his direct participation." *Id.* And again: "The simple fact remains that Petitioners cannot possibly achieve their requested relief without direct participation from the Governor." *Id.* at 2-3. Once more: "The Governor is indispensable; his interests here are unique and implicated." *Id.* at 3. To remove any

conceivable doubt as to his view on this matter, Scarnati declared: "There could be no clearer example of an indispensable party." *Id.*

Scarnati was right the first time, and the state court has correctly refused to dismiss the Governor from the case. If Plaintiffs prevail on the merits, the Governor would need to sign any new districting plan that the General Assembly enacts to replace the current one. Scarnati suggests that this would somehow be a "ministerial act," but a Governor's decision whether to sign a bill into law is anything but ministerial. Indeed, as Scarnati previously told the state court, the Governor might use his "veto power." *Id.* at 2. In short, the Governor is integral to the relief Plaintiffs seek: a districting plan that comports with the Pennsylvania Constitution.

The Acting Secretary of the Commonwealth and the Commissioner of BCEL are likewise proper parties. Both are responsible for the supervision and administration of Pennsylvania's elections, and thus are indispensable to Plaintiffs' request to enjoin use of the 2011 Plan. Any injunction would have to apply to these Defendants. In addition, relief against them would be necessary if any deadlines or dates for the November 2018 elections need to be adjusted, as Pennsylvania courts have ordered in prior redistricting cases. *See, e.g.*, *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 721 n.10 (Pa. 2012); *Mellow v. Mitchell*, 607 A.2d 204, 244 (Pa. 1992). Indeed, in *Mellow v. Mitchell*, the Acting Secretary of the Commonwealth and the Commissioner of BCEL were the *only* defendants in the case. Obviously the only defendants in that case were not nominal parties. *See also Ryan v. People of the State of Illinois*, No. 91 C 6832, 1991 WL 247752 (N.D. Ill. Sept. 17, 2001).

Finally, Lieutenant Governor Stack is a proper party because he serves as the President of the Pennsylvania Senate. In that capacity, Defendant Stack would vote to break any tie in the Pennsylvania Senate in enacting a new districting plan.

This is not a close call. Scarnati's failure to obtain the consent of all properly joined defendants dooms his removal of this case. It should end the matter.

B. The Notice of Removal Is Untimely

Scarnati's disregard of the 30-day deadline to remove under § 1446(b)(2)(B) is equally glaring. Plaintiffs filed this action in state court on June 15, 2017, and the parties stipulated to an effective service date of July 14, 2017. Yet Scarnati did not file his notice of removal until November 14—123 days after service. It is untimely by three months.

To attempt to circumvent this time-bar, Scarnati relies on § 1446(b)(3), which provides that, if a case is not removable based on the initial pleading, a defendant may file a notice of removal within 30 days after receiving "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Scarnati contends that Governor Wolf's October 23, 2017 Writ of Election scheduling a special election for March 2018 is an "order or other paper" that triggered a new 30-day deadline to remove. Notice at 5-6.

But it is well-recognized that "documents not generated within the state litigation generally are not recognized as 'other papers,' receipt of which can start a 30-day removal period under Section 1446(b)." 14C Fed. Prac. & Proc. Juris. § 3731 (4th ed.). Indeed, this Court has held that the phrase "order or other paper" did not even include a U.S. Supreme Court decision in another case. *See Pennsylvania v. Tap Pharm. Prods., Inc.*, 415 F. Supp. 2d 516, 526-27 (E.D. Pa. 2005). Other federal courts likewise have held that "order or other paper" includes only documents directly related to the pending case. *See, e.g., Gibson v. Clean Harbors Env. Servs. Inc.*, 840 F.3d 515, 521 (8th Cir. 2016); *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 78 (1st Cir. 2014); *McCormick v. Excel Corp.*, 413 F. Supp. 2d 967, 971 (E.D. Wis. 2006). If a court document from another case is not an "order or other paper" under § 1446(b)(3), *a fortiori*

neither is a document not arising from any judicial proceeding at all. Unsurprisingly, Scarnati does not cite a single case supporting his position.

In light of Scarnati's failure to satisfy the statutory consent and timeliness prerequisites for removal, this case should be remanded to state court.

II. This Court Lacks Subject Matter Jurisdiction

"A defendant may remove a case to federal court only if that court would have had original jurisdiction." *Ali v. DLG Dev. Corp.*, No. CV 17-1537, 2017 WL 4776754, at *4 (E.D. Pa. Oct. 23, 2017). Scarnati's assertion that there is federal question jurisdiction under 28 U.S.C. § 1331, *see* Notice ¶ 12, is nonsense. Plaintiffs assert claims *exclusively* under provisions of the Pennsylvania Constitution—they assert no federal claims, *see* Dkt. 1-3, a point Scarnati does not dispute. Because Plaintiffs' state-law claims do not "arise under" federal law, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986), there is no federal question jurisdiction.

Scarnati argues that the upcoming special election somehow creates federal question jurisdiction because "the relief Plaintiffs seek cannot be granted without resolving a substantial question of federal law," namely "whether a state court under state law can strike down a Federal congressional district in which a state 'Executive Authority' has, by Federal constitutional writ and federal law, already mandated and set a special election." Notice ¶ 18 (citing U.S. Const. art. I, § 2, and "the United States Code"). That is both factually and legally baseless.

The entire premise for Scarnati's argument—that Plaintiffs supposedly seek to change the map for the March 2018 special election—is wrong. To be clear: Plaintiffs do not and will not seek any relief whatsoever with respect to the special election, so that election cannot conceivably create a federal question in this case. Plaintiffs have never suggested in the state court proceedings that they are seeking relief with respect to the special election. To the contrary, Plaintiffs unambiguously stated that they seek to resolve the case "before the due date

for nomination petitions for the 2018 elections, which is March 6, 2018." Dkt. 1-4 at Page 24 of 66. That is the due date for the May 2018 primaries, not the March 2018 special election.

Even if Plaintiffs were seeking to affect the March 2018 special election (which they are not), Scarnati's argument would still be frivolous. Scarnati is claiming that Article I, § 2 of the U.S. Constitution provides a federal *defense* to Plaintiffs' state constitutional claims. Scarnati nowhere suggests that construing the relevant provisions of the Pennsylvania Constitution would require a court to construe Article I, § 2 or any federal law. It obviously would not. That is fatal because "[a] defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow*, 478 U.S. at 808; *see also N.J. Carpenters & the Trs. Thereof v. Tishman Const. Corp. of N.J.*, 760 F.3d 297, 302 (3d Cir. 2014) ("The existence or expectation of a federal defense is insufficient to confer federal jurisdiction.").

Scarnati's argument suffers yet another fatal flaw: the purported federal law issue that he identifies does not meet the test laid out in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005). Scarnati concedes that federal law does not *create* any cause of action in this case. His theory is instead that those state causes of action require resolution of a "substantial question of federal law," Notice ¶ 18, the category described in *Grable*. But only a "slim category" of cases qualify for federal jurisdiction under *Grable*, *see Gunn v. Minton*, 568 U.S. 251, 258 (2013), and the claims here do not. Where federal law does not create the cause of action, "federal jurisdiction over a state law claim will [only] lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258.

First, no federal claim is "necessarily raised." That standard requires that the federal question be an "essential element" of the plaintiff's "*claim*," not a hypothetical part of the defendant's *defense*. *Grable*, 545 U.S. at 315 (emphasis added); *accord Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 163, 165 (3d Cir. 2014), *aff'd*, 136 S. Ct. 1562 (2016). The *Grable* exception is for state causes of action where the state rule of decision turns on federal law, not for state causes of action where there might be a federal defense.

Second, the issue is not "actually disputed" because, again, Plaintiffs do not seek any relief with respect to the March 2018 special election.

Third, the issue Scarnati raises is not "substantial," but rather wholly meritless. Article I, § 2 of the U.S. Constitution states: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." As Scarnati acknowledges, once Governor Wolf issued the Writ of Election, the "mandate of Article I, Section 2 was completed." Notice ¶ 16. Nothing in Article I, § 2 plausibly suggests that the U.S. Constitution would bar a change in the timing of that election.

To the contrary, Article I, § 4, makes clear that state law governs the timing of congressional elections unless Congress has enacted a statute on the topic: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4. Congress, in turn, has confirmed by statute that "the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy … may be prescribed by the laws of the several States and Territories respectively." 2 U.S.C. § 8(a). The only exception is for "extraordinary circumstances," defined to mean a circumstance in which there are over *100* vacancies in the House. 2 U.S.C. § 8(b)(1), (4). That

provision does not apply. In the single case Scarnati cites, *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), the Illinois Governor had refused to issue the writ for the election at all; the court ordered him to do so, but expressly noted that the timing was up to the state and that the state statutes "require a lapse of at least 162 days from the call to the election." *Id.* at 1334-36. In other words, even in a hypothetical world in which relief in the state court would alter the timing of the March 2018 special election—which it will not because Petitioners do not seek such relief—nothing in the U.S. Constitution would prohibit that.

Fourth, any issue about what Art. I, § 2 means in this context is not "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." In 2 U.S.C. § 8(a), Congress granted *state governors* the right to decide the timing of vacancy elections. This action is all about state law. It raises state constitutional challenges to a state statute. Even if Article I, § 2 were implicated here, which it is not, it would not create federal jurisdiction under the "slim category" enunciated in *Grable*. As this Court has said, "the court must consider 'the degree to which federal law [is] in the forefront of the case and not collateral, peripheral or remote.'" *Krause v. Phila. Soul*, No. CIV.A. 09-1132, 2009 WL 1175625, at *2 (E.D. Pa. Apr. 30, 2009) (Baylson, J.) (quoting *Merrell Dow*, 478 U.S. at 814 n.11).

Scarnati has repeatedly argued that state law issues are at the forefront of this case, including in an October 30 submission to the United States Supreme Court, a full week after Governor Wolf set the special election. Scarnati nonetheless told the U.S. Supreme Court that this Court should stay the pending federal gerrymandering case, *Agre v. Wolf*, in deference to Plaintiffs' state case, because federal courts "are required to defer adjudication of a redistricting matter that a state legislative or judicial branch is already considering." Pet. for Mandamus at 6-

7, No. 17-631 (U.S. Oct. 30, 2017). Scarnati expressly *referenced* the special election as part of his argument that the Supreme Court should order the *federal court* to defer to the *state court*:

> In addition, on October 23, 2017, the Governor of Pennsylvania called a Special Election to replace U.S. Representative Tim Murphy, who resigned effective October 21, 2017. … A rush to action by the District Court threatens to impede that ongoing federal election.

Id. at 24-25. In other words, Scarnati told the U.S. Supreme Court that a federal court could not resolve the question whether the 2011 Plan is unconstitutional—or whether the special election should go forward—without infringing on state judicial prerogatives. *Id.* at 6-7. He cannot turn around and now argue that the same question is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

III. This Motion Warrants Expedited Treatment and an Immediate Remand

Under § 1447(c), the Court may remand the case "at any time" based on the lack of subject matter jurisdiction. When a district court discovers a jurisdictional defect in an improperly removed case, the court should remand the case immediately. *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999). Likewise, once a party raises by motion a failure in the statutory prerequisites for removal, an immediate remand is appropriate.

Given the patent deficiencies of the removal notice and this Court's lack of subject matter jurisdiction, as well as the expedited schedule for the state court proceeding mandated by the Pennsylvania Supreme Court, this Court should remand this matter *immediately*, without awaiting an opposition from Scarnati. Nothing he would say could salvage this removal.

Any delay in resolving this motion would substantially prejudice Plaintiffs. As stated, the Pennsylvania Supreme Court has ordered that this case be tried, and findings of fact and conclusions of law be issued, by the end of this calendar year. Trial in the state court has been set to begin December 11—barely three weeks from now. If this case is not remanded promptly,

the delay could derail the schedule imposed by the Pennsylvania Supreme Court to resolve critically important questions of state constitutional law. Indeed, Scarnati's vexatious conduct has already resulted in cancellation of the pre-trial conference that had been scheduled for today. Beyond that, Scarnati notified the state court of his removal just hours before the state court's deadline for him to submit his brief on legislative and other purported privileges, and indeed neither he nor the other legislative respondents filed such a brief on November 15. The state court had ordered Plaintiffs to file their response within two days, with a decision expected next week. Scarnati improperly used the notice of removal to avoid filing his privilege brief in an effort to delay the start of fact discovery and derail the December 11 trial.

IV. Plaintiffs Are Entitled to Attorneys' Fees Under 28 U.S.C. § 1447(c)

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* A party seeking fees need not establish that a notice of removal was frivolous. The Third Circuit, rather, has affirmed an award of attorneys' fees where "the assertion in the removal petition that the district court had jurisdiction was, if not frivolous, at best insubstantial." *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996).

Here, Scarnati's notice of removal is worse than insubstantial—it is frivolous. The failure to obtain the Governor's consent to the removal alone proves the point. Scarnati now claims that the Governor is not indispensable, after repeatedly telling the state court that the Governor is "indispensable." Scarnati's tortured attempt to avoid the 30-day time-bar based on the Governor's Writ of Election is just as bad. And his entire theory of jurisdiction rests on the

falsehood that Plaintiffs are seeking to change the map for the upcoming special election—a falsehood that, even if true, would not come close to establishing jurisdiction.

Fees are particularly warranted because of Scarnati's transparent ploy to delay. Scarnati (along with the General Assembly) filed an "emergency" mandamus petition asking the U.S. Supreme Court to stay proceedings in *Agre v. Wolf* until the state court resolves the present case. After insisting in the mandamus petition that this Court be ordered to abstain in favor of "the Pennsylvania appellate courts' decision on important questions of Pennsylvania constitutional law," Pet. for Mandamus at 20, Scarnati then removed the case to this Court.

In these circumstances, an award of attorneys' fees is warranted both to shift the cost of this sideshow to Scarnati and to deter others from engaging in such gamesmanship in the future.

CONCLUSION

For the foregoing reasons, the Court should immediately remand this case to state court and award attorneys' fees to Plaintiffs.

DATED: November 16, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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CERTIFICATE OF SERVICE

I hereby certify that on this date, November 16, 2017, I caused the foregoing Plaintiffs' Emergency Motion to Remand to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania. I further certify that simultaneously with this filing via CM/ECF, I served the foregoing Plaintiffs' Emergency Motion to Remand by electronic mail on all counsel of record for all Respondents and Intervenors in the Commonwealth Court case:

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DATED: November 16, 2017

/s/ Mary M. McKenzie
Mary M. McKenzie

EXHIBIT B

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al., *Plaintiffs*, v. THE COMMONWEALTH OF PENNSYLVANIA, et al., *Defendants*.	:	No. 17-cv-5137

EMERGENCY MOTION TO WITHDRAW NOTICE OF REMOVAL

Defendant Senator Joseph B. Scarnati, III hereby requests that the Court deem withdrawn the Notice of Removal in the above matter, and remand this action back to the Pennsylvania Supreme Court. Prior to the filing of the Notice of Removal, Defendant understood from Defendant Representative Michael Turzai's counsel that he consented to removal. This afternoon, we have been advised from counsel that Defendant Turzai does not now consent to the Notice as filed. Accordingly, this matter should be remanded.

Repsectfully submitted,

s/ Matthew H. Haverstick
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Mark E. Seiberling (No. 91256)
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Attorneys for Defendant Sen. Joseph B. Scarnati, II

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Motion to be served on counsel via the Court's CM/ECF system.

Repsectfully submitted,

s/ Matthew H. Haverstick
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Attorneys for Defendant Sen. Joseph B. Scarnati, II

EXHIBIT C

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al.,	:	**Civil Action No. 2:17-cv-5137**
Plaintiffs,	:	
v.	:	
THE COMMONWEALTH OF PENNSYLVANIA, et al.,	:	
Defendants.	:	

DEFENDANT, MICHAEL C. TURZAI'S RESPONSE TO EMERGENCY MOTION TO WITHDRAW NOTICE OF REMOVAL

Defendant, Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, by and through his undersigned counsel, respectfully submits the within Response to Defendant, Joseph B. Scarnati III's Emergency Motion to Withdraw Notice of Removal (ECF No. 9).

1. On November 14, 2017, Senator Scarnati filed a Notice of Removal of this action from the Pennsylvania Supreme Court in which it was represented to this Court that Senator Scarnati had the consent to removal under 28 U.S.C. § 1441 of Speaker Turzai. (ECF No. 1 at ¶ 24).

2. This representation is false.

3. At no point in time did the undersigned counsel for Speaker Turzai, Kathleen A. Gallagher, ever indicate to counsel for Senator Scarnati, Matthew Haverstick, that Speaker Turzai consented to the removal of this action under 28 U.S.C. § 1441. Indeed, Attorney

Gallagher never communicated with Attorney Haverstick regarding the Notice of Removal prior to the filing of the same.

4. To the contrary, on Sunday, November 12, 2017 Attorney Gallagher was advised that Attorney Haverstick believed the action was subject to removal under 28 U.S.C. § 1443, which statute does not require the consent of all Defendants prior to removal.

5. Speaker Turzai was not interested in pursuing a removal action.

6. During the afternoon of November 13, 2017, Attorney Gallagher learned that Attorney Haverstick would file a removal solely on behalf of Senator Scarnati.

7. At all times, the only ground for removal ever discussed was under Section 1443.

8. Neither Attorney Gallagher nor Speaker Turzai had any knowledge of the intent to remove this action under 28 U.S.C. § 1441. It was not until the undersigned counsel received the filed copies of the Notice of Removal on Wednesday, November 15, 2017 via e-mail service from Attorney Joshua Voss and a request for written consent to the same that it was discovered that removal was sought under Section 1441.

9. Indeed, counsel for Speaker Turzai was not provided with the opportunity to review in advance the Notice of Removal prior to its filing.

10. In light of the false representation contained in the Notice of Removal, Attorney Gallagher sent an e-mail to Attorney Haverstick on November 16, 2017 at 12:40 p.m. indicating that "[r]emoval pursuant to Section 1441, however, was never discussed and no consent was given to you or anyone else." *See* **Exhibit A**, attached hereto, E-mail dated 11/16/17 to Attorney Haverstick.

11. Accordingly, Attorney Gallagher requested that an amended notice of removal be filed to correct the false statement regarding consent. *See* Exhibit A.

12. Instead of filing an amended notice of removal, Senator Scarnati filed his Emergency Motion to Withdraw Notice of Removal in which, once again, it is improperly represented that counsel for Speaker Turzai "consented to removal" but "does not now consent to the Notice as filed," implying that Speaker Turzai or his counsel previously consented to the removal as filed. (ECF No. 9).

13. Consequently, Speaker Turzai is left with no choice but to file the within Response in order to correct the record and the false representations made to this Court.

14. To this end, and to be clear, at no point in time did Speaker Turzai's counsel or anyone else acting on Speaker Turzai's behalf state to Attorney Haverstick, or anyone else acting on Senator Scarnati's behalf, that Speaker Turzai consented to removal pursuant to 28 U.S.C. § 1441.

Dated: November 16, 2017

Respectfully submitted,

CIPRIANI & WERNER PC

/s/ Kathleen A. Gallagher

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Attorneys for Defendant Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2017, I caused the foregoing Response to Defendant, Joseph B. Scarnati III's Emergency Motion to Withdraw Notice of Removal to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties of record.

CIPRIANI & WERNER PC

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher

EXHIBIT A

From: Kathleen Gallagher
To: "mhaverstick@kleinbard.com"
Subject: LWV v. Wolf et al./Notice of Removal
Date: Thursday, November 16, 2017 12:39:36 PM

Matt:

As you are aware, I represent the Speaker in the above referenced litigation. In the Notice of Removal which you recently filed in the Eastern District, you aver that the Speaker affirmatively consented to the filing of the Notice. That averment is false. The only potential grounds for removal which were ever brought to my attention via Attorneys Torchinsky and Paszamant were a possible removal pursuant to 28 U.S.C. §1443 , which, as you are aware, does not require consent of all Defendants prior to removal. The Speaker had no objection to your proceeding in that manner on behalf of Senator Scarnati specifically because Section 1443 does not require consent. Removal pursuant to Section 1441, however, was never discussed and no consent was given to you or anyone else.

Accordingly, please file an amended Notice of Removal to correct your false statement prior to the hearing before Judge Baylson which is scheduled for today at 2:00 PM.

I anticipate your prompt cooperation in this regard.

Best regards,

KATHLEEN GALLAGHER | ATTORNEY

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