

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT 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,

Plaintiffs,

vs.

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 Commissioner of the
Bureau of Commissions, Elections and Legislation of
the Pennsylvania Department of State,

Defendants.

No. 2:17-cv-05137-MMB

MOTION FOR EXPEDITED REMAND

Defendant, Michael J. Stack, III, Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate (“Lt. Gov. Stack”), files the following motion to expeditiously remand this case to the Supreme Court of Pennsylvania, and in support, states:

PROCEDURAL BACKGROUND

1. This action challenges the 2011 Pennsylvania congressional redistricting map exclusively under provisions of the Pennsylvania Constitution **and seeks relief in the form of redrawn districts in time for the May 2018 Primary Election and the November 2018 General Election.** It has been pending in the Commonwealth Court of Pennsylvania since June 15, 2017, when the League of Women Voters and individual voters throughout Pennsylvania (collectively “LWV”) filed their Petition for Review (“LWV Litigation”).

2. The LWV Litigation involves a challenge under Pennsylvania state constitutional provisions to the current statewide map of Pennsylvania’s 18 congressional districts. The LWV Litigation does not involve challenges under federal constitutional or statutory provisions and, thus, the federal courts do not have jurisdiction.

3. On August 10, 2017, Secretary of the Commonwealth Pedro Cortés and Commissioner of Elections Jonathan Marks timely filed an Answer and New Matter to the LWV Petition for Review. On August 18, 2017, Lt. Gov. Stack also filed a timely answer to the LWV Petition for Review.¹

4. On November 9, 2017, the Supreme Court of Pennsylvania issued an Order that requires the Commonwealth Court to issue findings of fact and conclusions of law in the LWV Litigation by December 31, 2017.

5. On November 13, 2017, Judge Brobson of the Commonwealth Court issued a scheduling order that set a pre-trial conference for November 16, 2017; required all outstanding answers to the Petition to Review to be filed by November 17, 2017; and set trial for December 11 through 15, 2017.

¹ Despite these timely filed answers, in his Notice of Removal, Defendant Scarnati inaccurately asserts that “no party has yet filed an answer to the Petition.” [ECF 1 at ¶ 9].

6. On November 15, 2017, the day before the scheduled pre-trial conference, Defendant Joseph B. Scarnati III (“Sen. Scarnati”) filed a Notice of Removal, to remove the LWV Litigation to federal court.

7. Although the LWV Litigation does not involve a federal question, Senator Scarnati, when faced with the Pennsylvania Supreme Court’s Order, sought to create a federal question out of thin air. Senator Scarnati referenced the fact that, on October 23, 2017, Governor Tom Wolf issued a Writ of Election that schedules a March 23, 2018 special election to fill Pennsylvania’s 18th Congressional District seat for the **remainder** of the term of former U.S. Representative Tim Murphy, **i.e., until January 3, 2019.**

8. In his removal papers, Sen. Scarnati alleges that somehow the mere issuance of the Writ of Election somehow interjects a question of federal law into this action. This is simply not the case.

9. Because Sen. Scarnati failed to remove the case in a timely manner, failed to seek or obtain the consent of all of the other defendants, and failed to assert any federal issue, Lt. Gov. Stack asks this Court to remand this matter to the Supreme Court of Pennsylvania.

10. Because of the expedited nature of the litigation which the Pennsylvania Supreme Court has ordered and because the efforts to impede that schedule are entirely baseless, Lt. Gov. Stack respectfully asks this Court to expeditiously issue an order that remands this matter to the Supreme Court of Pennsylvania.

DEFENDANT SEN. SCARNATI’S REMOVAL IS PROCEDURALLY IMPROPER

11. Under 28 U.S.C. § 1446(b)(2)(A), all defendants who have been properly served and joined to an action must consent to removal to federal court.

12. Lt. Gov. Stack, a Defendant in this action, did not (and does not) consent to the removal of this matter, making removal impermissible.

13. Contrary to Sen. Scarnati's assertions to the contrary, Lt. Gov. Stack is not a "nominal defendant," who would only perform a "ministerial act." There are situations where the Pennsylvania Senate is tied, and Lt. Gov. Stack may be in a position to cast a deciding vote. Penn. Const. art. IV, sec. 4. In the event the Pennsylvania state courts find that the existing congressional district map violates Pennsylvania law and requires as remedy legislative action, Lt. Gov. Stack could be called upon to cast the deciding vote regarding a new redistricting plan. *Cf. Harris v. McCrory*, 159 F. Supp.3d 600, 627 (M.D.N.C. 2016) *aff'd Cooper v. Harris*, --- U.S. ----, 137 S. Ct. 1455 (2017) (requiring the North Carolina General Assembly to redraw congressional districts after the court found them constitutionally invalid as racial gerrymanders). As a result, Lt. Gov. Stack is not a "nominal defendant."

14. Defendant Scarnati's effort to remove this action is thus improper under 28 U.S.C. § 1446, for his failure to gain the consent of each of the LWV Litigation defendants.

DEFENDANT SCARNATI'S REMOVAL IS SUBSTANTIVELY IMPROPER

15. Sen. Scarnati asserts that Governor Wolf's October 23, 2017 Writ of Election that orders a special election in the 18th District created a federal issue. This claim is a red-herring, devoid of logic and contrary to the recent holding of the Pennsylvania Supreme Court in *Fagan v Smith*, 41 A.2d 816 (Pa 2012) (distinguishing special elections to fill vacancies with reapportionment efforts to redesign districts for future terms).

16. Clearly, the Governor complied with state and federal law in issuing the Writ of Election. Thus, the Writ, in and of itself, did not create a federal issue or violate any federal rights.

17. Essentially, Sen. Scarnati asserts that the relief the LWV seek, under Pennsylvania constitutional law, somehow conflicts with the Writ of Election that schedules a special election on March 13, 2018. **There is no conflict.** The voters of the 18th congressional

district will elect a representative to fill the existing district, as currently configured, who will serve through January 3, 2019. No party in the LWV Litigation is seeking to reconfigure the 18th District, or any of the congressional districts of Pennsylvania, for the existing 115th United States Congress, which has a term from January 3, 2017 to January 3, 2019.

18. At issue is whether the existing map of 18 gerrymandered districts violates the Pennsylvania Constitution, and whether, as a remedy, a court should order that new and appropriate districts be drawn **effective for the 116th United States Congress**, which has a term from January 3, 2019 to January 3, 2021. The Primary Election in May 2018 and the General Election in November 2018 would involve candidates seeking to serve in the 116th Congress. The winner of the special election in the 18th District would serve in the 115th Congress and stand in the exact same position as every other congressional incumbent who faces the possibility of running for the 116th Congress in a district with different boundaries.

19. The Pennsylvania Supreme Court decision in *Fagan* is very instructive. As of February 29, 2012, the Pennsylvania Supreme Court had rejected a proposed redistricting map for the Pennsylvania House of Representatives and Pennsylvania Senate, applying the Pennsylvania Constitution. *See Holt v. 2011 Legislative Reapportionment Common*, 38 A.3d 711 (Pa. 2012). As a result, the Pennsylvania Supreme Court remand to the Legislative Reapportionment Commission created some uncertainty as to what a new redistricting map, which complied with the Pennsylvania Constitution, would look like for the term of office commencing in January, 2013.

20. The Speaker of the House,² took the position that he did not have to issue Writs of Election for special elections in six House or Representative Districts, despite vacancies, on the

² Notably, counsel for Sen. Scarnati here represented the Speaker of the House in that action.

basis that the legislative map for future sessions had not yet been drawn, given the *Holt* Court's remand to the Legislative Reapportionment Commission. The Supreme Court ruled that the Speaker must issue the writ and clearly held that the uncertainty associated with the future legislative map was irrelevant to the obligation to fill the existing seats immediately. The Court explained:

The district boundaries for the six vacant seats at issue here were set in the 2001 Final Reapportionment Plan, and the new members who would be elected to serve the remainder of their terms will merely step into the shoes of their predecessors—just as the Speaker and every other sitting House member who is currently seated under the districts set forth in the 2001 redistricting map. While the 2011 Legislative Reapportionment Commission continues its work on a new reapportionment plan going forward, there is no question about what districts are involved here; they are the six districts whose seats have been vacant since January 2012.

Fagan, 41 A.3d at 821 (2012)

21. Here, Governor Wolf has filled his federal obligation to order a special election to fill the 18th District for the 115th Congress, which ends on January 3, 2019. The person who is elected to fill that seat will sit in the position of each of the other Representatives, all of whom would have to run in reconfigured seats to serve on the 116th Congress if the Commonwealth Court or the Pennsylvania Supreme Court determines that a violation of the Pennsylvania Constitution has occurred. As the *Fagan* Court made abundantly clear, no conflict exists:

Every Pennsylvania House seat is voted upon every two years. A new reapportionment plan, once final, takes effect at the next ensuing primary and general election; it does not operate retroactively to remake the districts of sitting House members for the remainder of their terms; it simply does not disrupt existing terms.

Fagan, 41 A.3d at 820 (2012).

22. The Governor's Writ of Election to establish a special election in Congressional District 18, to fill out the last 10 months of the 115th Congress, simply does not create a federal issue or impact the potential reconfiguration of congressional districts for the 116th Congress, and does not warrant the removal of this state action to federal court.

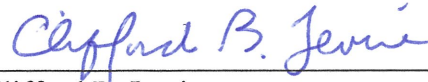
23. It is noteworthy that Sen. Scarnati did not seek to remove the case to this Court at the time the LWV filed the petition in Commonwealth Court in July 2017, or even after Governor Wolf issued the Writ of Election on October 23, 2017. Rather, he waited until after the Pennsylvania Supreme Court issued its November 9, 2017 Order setting an expedited schedule, and after the Commonwealth Court issued its scheduling order setting a pre-trial conference on November 16, 2017.

24. Seeking to avoid a Pennsylvania Supreme Court Order, with a totally contrived federal jurisdiction argument, is highly inappropriate and should be rejected expeditiously.

25. For all of these reasons, an expeditious remand of this action to the Supreme Court of Pennsylvania is appropriate.

WHEREFORE, Defendant Michael J. Stack, III, in his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, respectfully requests that this Court enter an Order REMANDING this matter back to the Supreme Court of Pennsylvania.

Respectfully submitted,



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On behalf of Defendant Michael J. Stack III, in
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Dated: November 16, 2017

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 16th day of November 2017, a true and correct copy of the foregoing MOTION FOR EXPEDITED REMAND was served electronically upon the following, through the PACER File system and by electronic mail.

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