No. 18-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,
Plaintiffs-Appellees,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:17-cv-05137-MMB (Hon. Michael M. Baylson)

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Plaintiff-Appellee League of Women Voters makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations:

None

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3. If there is a publicly held corporation which is not party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4. In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

Dated: July 30, 2018

/s/ R. Stanton Jones
Counsel for Plaintiffs-Appellees

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JURISDICTIONAL STATEMENT

Defendant-Appellant Joseph B. Scarnati III appeals a final judgment in favor of Plaintiffs-Appellees, eighteen Pennsylvania voters. The district court had jurisdiction under 28 U.S.C. §1441 to consider whether this matter was removable from state court. After remanding the case to state court, the district court retained jurisdiction to award fees and costs to Plaintiffs under 28 U.S.C. § 1447(c). *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1257-59 (3d Cir. 1996). On April 13, 2018, the district court issued a Memorandum Opinion (JA3-19) and Order (JA2) awarding Plaintiffs $29,360.02 in fees and costs on the ground that there was no objectively reasonable basis for the removal. Senator Scarnati timely appealed on April 16, 2018. JA1. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's award of fees and costs.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Senator Scarnati had no objectively reasonable basis for removal where not all properly joined parties consented, the removal was untimely, and additionally there was no plausible basis for federal jurisdiction. JA8-13, 326-30, 387-91, 443-44.

2. Whether the district court abused its discretion in reducing the number of accountable hours by 20 percent to account for unavoidable duplication of

efforts, in calculating the lodestar based on a blended rate reflective of market rates in Philadelphia, and in awarding reasonable research costs. JA15-19.

3. Whether the district court abused its discretion in holding Scarnati personally liable for the fee award, as Plaintiffs expressly requested in their motion for fees and costs, rather than shifting the burden for Scarnati's litigation misconduct to the Commonwealth's taxpayers. JA17, 400, 447.

STATEMENT OF RELATED PROCEEDINGS

This matter has not previously been before this Court, and the underlying proceedings have since concluded in state court, with the Pennsylvania Supreme Court holding that Pennsylvania's 2011 congressional districting plan violated the Pennsylvania Constitution. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). The U.S. Supreme Court declined to stay the state court's decision. *See Turzai v. League of Women Voters of Pennsylvania*, No. 17A909, 2018 WL 1372352 (U.S. Mar. 19, 2018). Scarnati and other defendants filed a petition for a writ of certiorari, which remains pending. No. 17-1700 (S. Ct.).

There are three other cases that involve the same underlying subject matter. In *Agre v. Wolf*, Pennsylvania citizens filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory judgment that the 2011 plan violated the Elections Clause of the United States Constitution. 284 F. Supp. 3d 591, 592 (E.D. Pa. 2018). On January 10, 2018, the three-judge district

court entered judgment for the defendants. *Id*. at 594. The plaintiffs appealed to the U.S. Supreme Court, which dismissed the appeal as moot on May 29, 2018. *Agre v. Wolf*, 138 S. Ct. 2576 (Mem.) (2018).

In *Diamond v. Torres*, other Pennsylvanians filed suit in the United States District Court for the Eastern District of Pennsylvania, challenging the 2011 plan under both the Elections Clause as well as the First and Fourteenth Amendments to the United States Constitution. Complaint at 17-20, No. 5:17-cv-05054 (E.D. Pa. Nov. 9, 2017). On April 9, 2018, the court dismissed the case pursuant to a joint stipulation. Order at 1, No. 5:17-cv-05054 (E.D. Pa. Apr. 9, 2018).

And in *Corman v. Torres*, certain Pennsylvania state legislators and Pennsylvania congressmen filed suit in the United States District Court for the Middle District of Pennsylvania, requesting an injunction prohibiting certain state officials from implementing the Pennsylvania Supreme Court's remedial districting plan and directing those officials instead to conduct Pennsylvania's 2018 congressional primary and general elections under the 2011 plan. Verified Complaint at 40, No. 1:18-cv-00443 (M.D. Pa. Feb. 22, 2018). The Plaintiffs in this case intervened in the *Corman* case to defend their interest in the underlying state court judgment. Order Granting Intervention at 1-2, No. 1:18-cv-00443 (M.D. Pa. Mar. 2, 2018). On March 19, 2018, the three-judge district court dismissed the *Corman* case based on lack of subject matter jurisdiction and denied

a motion for a preliminary injunction. Mem. Opinion at 23, No. 1:18-cv-00443 (M.D. Pa. Mar. 19, 2018) (per curiam).

STATEMENT OF THE CASE

In June 2017, Plaintiffs-Appellees, eighteen Pennsylvania voters, filed this action in the Commonwealth Court of Pennsylvania, challenging Pennsylvania's 2011 congressional districting map exclusively under the Pennsylvania Constitution. On November 14, in the midst of expedited pre-trial proceedings for a trial set to begin December 11 in the state court, Defendant-Appellant Joseph B. Scarnati III, President Pro Tempore of the Pennsylvania Senate, removed the case to federal court. On its face, the removal was objectively frivolous. Scarnati had not obtained the consent of all properly joined defendants as required by 28 U.S.C. § 1446(b)(2)(C). He filed the notice more than three months after the 30-day deadline to remove under § 1446(b)(2)(B). And the notice did not and could not identify any non-frivolous basis for federal jurisdiction over Plaintiffs' exclusively state-law claims. Making matters worse, Scarnati's co-defendant Michael Turzai, Speaker of the Pennsylvania House of Representatives, has claimed that Scarnati's notice of removal was predicated on a material "false representation."

Scarnati's improper motive for pursuing such a frivolous removal was obvious: to delay and derail the expedited schedule ordered by the Pennsylvania Supreme Court. Because a notice of removal automatically divests the state court

of jurisdiction, even a frivolous removal like the one here allows a litigant the opportunity to throw a wrench in expedited state court proceedings.

Beyond its objective frivolity and subjective bad faith, Scarnati's removal was prejudicial to Plaintiffs. Because the removal threatened to derail the December 11 trial in state court, Plaintiffs' counsel had no choice but to drop everything and work around the clock to prepare an emergency motion to remand, which they filed barely twelve hours after first learning of the removal. Some of Plaintiffs' counsel then traveled from Washington, D.C. to Philadelphia for an emergency hearing on the motion. Further delay was avoided only by the district court's alacrity in reviewing the motion and scheduling the emergency hearing.

What happened next is hard to believe. Less than 30 minutes before the emergency hearing, Scarnati moved to withdraw his notice of removal and remand the case to state court on the ground that Turzai had initially consented to the removal but then notified Scarnati's counsel that he no longer consented. The district court promptly remanded the case to state court, where it belonged. Then, after the district court's remand order, Turzai accused Scarnati of making "false representations"—in both the notice of removal and the motion to withdraw it—that Turzai had consented. According to Turzai, he had never consented to the removal. Scarnati's counsel then provided a sworn affidavit accusing Turzai of being the one making a "'false' allegation." It is remarkable that the Speaker of

the Pennsylvania House and the President Pro Tempore of the Pennsylvania Senate have accused each other of lying to a federal court in connection with this removal.

This appeal concerns the district court's award of attorneys' fees and costs to Plaintiffs for responding to the removal. First, the award was warranted because there was no objectively reasonable basis for the removal. As the district court correctly concluded, the removal was marred by two obvious procedural defects: Scarnati did not obtain the consent of all properly joined defendants, and the notice of removal was untimely. Also, although the district court did not reach the issue, there was no plausible basis for federal jurisdiction over Plaintiffs' exclusively state-law claims. Second, the amount of the award—which the district court substantially reduced from what Plaintiffs requested—was well within the court's discretion. Finally, the district court properly ordered Scarnati to pay the award personally, as Plaintiffs had requested to avoid burdening Pennsylvania taxpayers with the costs of Scarnati's misconduct. This Court should affirm.

A. Pre-Removal Procedural History

Plaintiffs are eighteen Pennsylvania voters, one from each congressional district in the Commonwealth.[1] JA49-55. They filed the underlying action in the

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

Pennsylvania Commonwealth Court on June 15, 2017, asserting that Senate Bill 1249, the state statute establishing Pennsylvania's 2011 congressional districting plan (the "2011 Plan"), violated the Pennsylvania Constitution's 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. JA3, 86-92. Plaintiffs did not assert any federal claims.

Plaintiffs named as defendants President Pro Tempore Scarnati and Speaker Turzai ("Legislative Defendants"), 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) (together with the Legislative Defendants, "Defendants").[2] JA56-57. Plaintiffs sought an injunction prohibiting Defendants from using the 2011 Plan and requiring them to enact a new plan that comported with the Pennsylvania Constitution. JA92-93.

On October 16, 2017, the Commonwealth Court granted Legislative Defendants' motion to stay the case, with the exception of briefing related to

[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.

legislative and other asserted evidentiary privileges. JA3, 320. Plaintiffs then asked the Pennsylvania Supreme Court to assume "extraordinary jurisdiction" over the case, lift the stay, and decide the case in time for the May 2018 congressional primaries. JA103-07, 123.

On November 9, 2017, the Pennsylvania Supreme Court granted Plaintiffs' request for extraordinary relief. JA4, 320-21. The state high court 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, no later than December 31, 2017. JA4, 320-21.

The Commonwealth Court acted promptly to implement the state high court's order. On November 13, the Commonwealth Court issued an order setting a pre-trial conference for November 16 at 1:00 p.m., and scheduling trial to begin December 11 at 9:30 a.m. JA342-43. The court ordered Legislative Defendants to file a brief regarding their assertions of legislative and other purported privileges—legal questions that had to be resolved before discovery—on November 15. *Id.*

B. The Removal and Remand

On November 14, 2017, one day after the Commonwealth Court issued its scheduling order, Scarnati removed the case to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441(a), despite having no legal or factual basis to do so. JA4, 13, 20-26. In the notice of removal,

Scarnati purported to rely on Governor Wolf's announcement on October 23, 2017 that the state would hold a special election to fill, for the remaining nine months of the congressional term, the seat of a Pennsylvania congressman who had resigned. JA21-25. Scarnati asserted that this Writ of Election constituted an "other paper" that restarted the 30-day removal clock, and that this Writ of Election also created a "federal question" establishing federal subject matter jurisdiction over Plaintiffs' exclusively state-law claims. JA24-25.

Although the parties had agreed to electronic service, Scarnati served the notice of removal via U.S. mail without emailing Plaintiffs a courtesy copy, although he apparently emailed a copy to Turzai. JA371. Plaintiffs first learned of the removal on the afternoon of November 15, when Scarnati notified the Pennsylvania Supreme Court. Br. 8.

As a consequence of Scarnati's removal, Plaintiffs were forced to set aside their intensive trial preparation efforts and spend approximately twelve hours preparing an emergency motion to remand. Plaintiffs filed that motion in the early hours of November 16. JA384. The emergency remand motion explained that Scarnati had not obtained the requisite consent of all properly joined defendants; that he missed the statutory 30-day deadline to remove by three months; and that he failed to establish any non-frivolous basis for federal jurisdiction. JA387-94.

Around 9:00 a.m. on November 16, the district court scheduled an emergency hearing on Plaintiffs' motion to remand for 2:00 p.m. the same day. JA4, 359, 384. Plaintiffs' counsel from Arnold & Porter immediately got on a train to Philadelphia for the emergency hearing, where they were joined by Plaintiffs' counsel from the Public Interest Law Center. JA5, 23-24, 381. Before the hearing, Governor Wolf indicated in a filing that Scarnati had not consulted the executive branch defendants before removing the case, and that the executive branch defendants did not consent. JA363-64.

Then, less than 30 minutes before the hearing, Scarnati filed an emergency motion to withdraw his notice of removal and remand the case to state court. JA4, 23, 27, 366. In the motion to withdraw, Scarnati represented that Turzai had originally consented to removal, but that earlier that afternoon Turzai's counsel advised Scarnati's counsel that Turzai "does not now consent to the Notice as filed." JA366. Scarnati's counsel repeated this representation at the hearing, stating that the notice of removal "was filed at the time with consent from the parties whom we believed we needed consent from." JA26.

Shortly after the hearing, the district court remanded the case to state court with prejudice and directed Plaintiffs to file a motion for fees and costs within 14 days. JA369.

The drama did not end there. Later that evening, Turzai filed a response to Scarnati's motion to withdraw the notice of removal, in which he accused Scarnati of "false[ly] represent[ing]" to the court that Turzai had consented to the removal pursuant to 28 U.S.C. § 1441. JA5, 370. Turzai stated unequivocally that "at no point in time did [his] counsel or anyone else acting on [his] behalf" consent to the removal under that statute. JA370. Almost two weeks later, Scarnati's counsel sent Plaintiffs a letter disputing Turzai's account of the pre-removal discussions and declaring in a sworn affidavit that Turzai falsely claimed to have never consented. JA33-35, 37-38. According to Scarnati's counsel, "not only did Rep. Turzai's counsel expressly give consent to the filing of the Notice of Removal directly to [Scarnati's counsel] on November 13, 2017, ... the consent was unconditional." JA33.

On remand, on January 22, 2018, following a trial in Commonwealth Court, the Pennsylvania Supreme Court held that the 2011 Plan violated the Pennsylvania Constitution and enjoined its use in future congressional elections starting with the May 2018 primaries. *See* JA12. The state high court's order gave the General Assembly and the Governor until February 15, 2018 to reach agreement on a replacement plan. *See id*. Ultimately, because the General Assembly did not pass any plan, the Pennsylvania Supreme Court adopted a court-drawn remedial plan for use in the 2018 congressional primaries and general elections.

C. The District Court's Award of Fees and Costs

Pursuant to the district court's November 17 order, Plaintiffs filed a motion for fees and costs under 28 U.S.C. § 1447(c) on the ground that there was no objectively reasonable basis for removal, which was pursued in bad faith and was prejudicial to Plaintiffs. JA387-396. Plaintiffs sought $52,736.52 for the fees and costs incurred in preparing the remand motion, preparing for and attending the emergency hearing on that motion, and preparing the fee motion itself. JA396-400. In their motion, Plaintiffs expressly asked the court to hold Scarnati and his attorneys "jointly and severally liable for the award" to "avoid placing the burden for such fees and costs on Pennsylvania taxpayers." JA400. Scarnati filed an opposition to Plaintiffs' fee motion but did not respond to this specific aspect of it.

On April 13, 2018, the district court granted Plaintiffs' motion for fees and costs, but significantly reduced the amount of the award from what Plaintiffs had requested. JA2. The court concluded that Scarnati lacked any objectively reasonable basis for removal. The court explained that, regardless of whether Scarnati had received consent from Turzai (the other legislative defendant), 28 U.S.C. § 1441 required the consent of *all* properly joined defendants, including the executive branch defendants. The court rejected Scarnati's argument that the executive branch defendants were mere "nominal" parties whose consent was unnecessary, observing that the argument was both contrary to Third Circuit

precedent and "blatantly inconsistent" with Scarnati's repeated arguments in state court that the executive branch defendants were "indispensable parties." JA9-11.

The district court independently concluded that "federal jurisdiction did not exist because the removal was untimely"—it was not filed within 30 days after the filing of the complaint, as 28 U.S.C. § 1446(b)(3) requires. JA11. The court found that Scarnati lacked any objectively reasonable basis to believe that the Writ of Election filed by Governor Wolf—which set a special election to fill a vacant seat—somehow restarted the clock for removal purposes. JA11-13.

The district court did not reach the question of whether there was federal question jurisdiction, another prerequisite for removal under 28 U.S.C. § 1441. The court found no need to resolve this jurisdictional question because, "ignor[ing] the political considerations that may have been motivating various parties," it was "clear, as a matter of law, that legitimate grounds for removal did not exist" in light of the lack of consents and untimeliness. JA13. The court also stated that it was not deciding whether "improper motive or bad faith is involved." JA14.

The district court awarded $26,240 in fees and $3,120.02 in costs. In calculating the fee award, the court applied a blended hourly rate of $400 (roughly the median of the Public Interest Law Center attorneys' rates) for all Plaintiffs' counsel's accountable hours, rather than applying Plaintiffs' out-of-state counsel's normal billing rates. JA15-17. The court noted that this was a case "of

tremendous public importance" and that "[a] good deal of urgent research and preparation of the motion to remand was necessary and deserve[d] compensation." JA16. Even so, the district court reduced the number of hours expended by Plaintiffs' attorneys by 20% to "account for overlap." JA17. The district court awarded all expenses documented by Plaintiffs. JA17-19.

The court also concluded that, "[u]nder all the circumstances," Scarnati "should personally be liable for these fees and costs." JA19.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in awarding fees and costs to Plaintiffs to compensate for their efforts in responding to Scarnati's objectively baseless notice of removal.

First, the district court correctly concluded that Scarnati had no objectively reasonable basis for removal. Scarnati did not receive consent from "all defendants who have been properly joined and served" to remove the case, as required by 28 U.S.C. §1446(b)(2)(A). The executive branch defendants were not "nominal" parties, and thus Scarnati could not remove the case absent their consent. Yet Scarnati did not seek or receive the consent of any of those defendants, despite telling the state court that they were indispensable parties. The notice of removal was independently baseless because it was not filed within the 30-day statutory deadline, and the Governor's Writ of Election was not an "order

or other paper" that would trigger a new 30-day deadline to remove. And even if Scarnati had obtained consent from all the defendants and the notice was timely, the removal would still have been objectively unreasonable because the underlying state-court action presented no federal question supporting federal jurisdiction.

Second, the district court did not abuse its discretion in calculating the lodestar amount or in including research costs in the award. The district court applied at a reasonable blended rate that was approximately equal to the median hourly rate for the Public Interest Law Center attorneys, who are based in Philadelphia, and discounted the number of attorneys hours expended. And the court acted well within its discretion in including Plaintiffs' Westlaw fees incurred in connection with opposing the removal and seeking remand.

Finally, the district court did not abuse its discretion in holding Scarnati personally liable for his egregious litigation misconduct rather than allowing the costs of his illegitimate actions to be picked from taxpayer pockets.

STANDARD OF REVIEW

This Court reviews an award of fees and costs under 28 U.S.C. § 1447(c) for abuse of discretion. *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996). Although an erroneous legal conclusion may constitute an abuse of discretion, the abuse of discretion standard applies even where the appellant alleges that "[a] district court bas[ed] its decision on a clearly erroneous finding of

fact, an erroneous legal conclusion, or an improper application of law to fact." *Siebert v. Norwest Bank Mn.*, 166 F. App'x 603, 606 (3d Cir. 2006) (quoting *Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 226 (3d Cir. 2003)). In fact, because the language of § 1447(c) makes clear that any such award is discretionary, this Court lacks authority to review a fee award under § 1447(c) "for anything other than abuse of discretion." *Id.*

ARGUMENT

Scarnati's notice of removal was objectively unreasonable for three separate and independent reasons. The district court's decision awarding fees and costs to Plaintiffs as compensation for the time and resources required to respond to Scarnati's baseless delay tactic was correct and should be affirmed.

I. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS NO OBJECTIVELY REASONABLE BASIS FOR REMOVAL

Under 28 U.S.C. § 1447, district courts may award fees and costs where "the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, the district court correctly concluded there was no objectively reasonable basis for removal because Scarnati did not obtain the consent of all "properly joined" defendants and he missed the statutory removal deadline. JA10-12. The removal for objectively baseless for the additional reason that there was no plausible basis for federal question jurisdiction. Each of these defects alone would warrant a filing that there

was no objectively reasonable basis for the removal. Collectively, the plethora of obvious procedural and substantive defects rendered this removal utterly frivolous.

A. Scarnati Did Not Obtain Consent From All Properly Joined Defendants

When, as here, a defendant removes a case to federal court under 28 U.S.C. § 1441(a), it is a basic rule that "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. §1446(b)(2)(A). A removing party's failure to obtain the requisite consents alone warrants an award of fees and costs. *Hammer v. Scott*, 137 F. App'x 472, 475 (3d Cir. 2005). Here, the district court held that Scarnati's notice of removal was defective and objectively unreasonable because he failed to obtain consent from the executive branch defendants—Governor Wolf, Lieutenant Governor Stack, the Acting Secretary of the Commonwealth, and the Commissioner of the Bureau of Commissions, Election, and Legislation. JA8-11, 26. That holding is correct.

Scarnati does not dispute that he lacked the executive branch defendants' consent to removal. Instead, he contends that these defendants were "nominal parties" whose consent was unnecessary. That view is objectively unreasonable.

"Nominal parties are generally those without a real interest in the litigation." *Bumberger v. Ins. Co. of N. Am.*, 952 F.2d 764, 767 (3d Cir. 1991); *see Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92–93 (2005) (party is not nominal where it "has a vital interest"). In the removal context, "while nominal ... parties may be

disregarded [in considering remand], indispensable parties may not." *Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987). "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).

It is patently unreasonable to suggest that the Governor of Pennsylvania, who would have been responsible for signing any remedial redistricting legislation, was a "nominal" party without any "real interest" in this litigation. The same is true of the other executive branch defendants, who include the Pennsylvania officials—the Secretary of the Commonwealth and the chief election official--responsible for the supervision and administration of Pennsylvania's elections.

These defendants not only had a real interest in the litigation, they were indispensable to it. JA11. As the district court correctly observed, Scarnati's position that the Governor was nominal for purposes of removal is "blatantly inconsistent" with Scarnati's position in state court that the Governor was indispensable. *Id.* In the state court proceedings, Scarnati 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]." JA348 (emphasis added). Scarnati repeatedly

stated that the Governor was indispensable because "the nature of the claim and relief sought here require his direct participation" and "his interests here are unique and implicated." JA349. Indeed, Scarnati declared: "There could be no clearer example of an indispensable party." *Id.* In light of these statements, the district court correctly held that Scarnati had no objectively reasonable basis for removing without the consent of the Governor and other executive branch defendants.

Scarnati now contends that a party can be simultaneously indispensable and nominal, but cites no authority supporting this notion, which this Court's precedent expressly rejects. *Steel Valley Auth.*, 809 F.2d at 1010. The Supreme Court's decision in *Lincoln Property* did not hold that a party can be simultaneously indispensable and nominal; it noted, citing a state-law equivalent of a qui tam action, that a party can be simultaneously *formal* and nominal. 546 U.S. at 92 (citing *McNutt ex rel. Leggett, Smith, & Lawrence v. Bland*, 2 How. 9, 14 (1844)). And *Bacon v. Rives*, 106 U.S. 99 (1882), stands for the opposite of the proposition for which Scarnati cites it (at Br. 27-28). *Bacon* held that parties are nominal and may be disregarded for purposes of removal if they are *not* necessary or indispensable. 106 U.S. at 104 (party was "neither necessary nor indispensable").

Scarnati also argues that state pleading rules and "procedural law" do not determine whether a defendant is a nominal party for purposes of removal, and that nominal-party status is a "practical inquiry." Br. 27. But the executive branch

defendants were not named because of state procedural law; they were named because they have a practical and indeed substantial stake in the case. As noted, Scarnati described the Governor in his filings in the state court as "both a legally and *practically* indispensable party," JA348, whose "interests … are unique and implicated," JA349. The very cases Scarnati relies on make the obvious point that a party with an "immediately apparent stake in the litigation" is not nominal. *Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013). "A named defendant who admits involvement in the controversy and would be liable to pay a resulting judgment is not 'nominal.'" *Lincoln Property*, 546 U.S. at 92. The same applies to named defendants who would be required to implement the injunctive relief sought in a resulting judgment. And the executive branch defendants were active litigants, making arguments to the state court in pre-trial proceedings and at trial, and submitting motions and papers throughout the case. *See, e.g.*, JA226-32, 363-64. Scarnati cites no authority or legal basis for his notion (at Br. 29) that the executive branch defendants were nominal because they ultimately agreed that the 2011 Plan was unconstitutional.

Indeed, as the district court noted, Scarnati "cite[d] no factually similar Third Circuit precedent even suggesting that the executive defendants are nominal." JA11. That was an understatement. To this day, Scarnati has cited no case from any court holding that executive branch officials responsible for

enforcing and administering state laws are nominal defendants in a lawsuit challenging the constitutionality of those laws, much less one where the relief sought would require one defendant to sign, and other defendants to implement, a new and different law. The district court did not abuse its discretion in concluding that Scarnati lacked an objectively reasonable basis for asserting that these defendants were nominal.[3]

But regardless of whether Scarnati needed the executive branch defendants' consent to the removal (and he did), Scarnati still lacked consent from Turzai, a legislative defendant who Scarnati agrees was not nominal. Turzai advised the court below that "[a]t no point in time did Speaker Turzai's counsel or anyone else

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[3] In a footnote, Scarnati claims that *Norman v. Cuomo*, 796 F. Supp. 654 (N.D.N.Y. 1992), is "directly on point" and supports his position. Br. 29 n.10. Not so. In *Norman*, the four non-consenting defendants were party to an action seeking a declaratory judgment that the state's new reapportionment plan *complied* with federal and state law. 796 F. Supp. at 656-57. The court found that these defendants were nominal parties because they had not taken steps to obstruct implementation of the plan, and thus any declaratory judgment against them would not provide any relief to plaintiffs or further their interests. *Id*. at 658-59. By contrast, during the course of this litigation, the executive branch defendants continued to fulfill their supervisory and administrative duties related to election preparations under the 2011 Plan. *See* JA262-263. The relief sought by Plaintiffs—an injunction use of the 2011 Plan and the implementation of a new, lawful plan—would require the executive branch defendants to respect the new boundaries in executing their election-related responsibilities. Thus, a "cause of action or claim for relief . . . could be stated against [them] or on [their] behalf." *Norman*, 796 F. Supp. at 658 (internal quotation marks omitted). The executive branch defendants were not nominal parties under this standard, either.

acting on Speaker Turzai's behalf state to [Scarnati's counsel], or anyone else acting on Senator Scarnati's behalf, that Speaker Turzai consented to removal pursuant to 28 U.S.C. § 1441." JA372. Scarnati's failure to obtain consent from both the executive branch defendants and Turzai obviously doomed the removal.

B. The Notice of Removal Was Obviously Untimely

The district court correctly concluded that the removal was objectively unreasonable for an additional, independent reason: it was untimely. There is no dispute that Scarnati filed the notice of removal long after the 30-day deadline to remove under § 1446(b)(2)(B). JA11-12. Plaintiffs filed this action in state court on June 15, 2017, and Scarnati did not file his notice of removal until November 14, 2017—more than three months after the deadline passed.

To attempt to circumvent this straightforward 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 remove 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 asserts that Governor Wolf's October 23, 2017 Writ of Election scheduling a special congressional election for March 2018 was an "other paper" that triggered a new 30-day deadline to remove. Br. 30. Scarnati so argues even though the relief requested in the state

court would in no way affect the special election, which instead was held to fill one seat for the balance of a term after a congressman resigned. *See infra* p. 27.

Scarnati's Writ-of-Election argument has zero merit. As the district court concluded, under this Court's precedent, the "pleading, motion, order or other paper" language "only 'address[es] developments *within a case*.'" *A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 210 (3d Cir. 2014) (emphasis added); JA12. "Other paper" can refer to answers to deposition questions, correspondence between the parties, or other materials created *in the litigation* that is removed. JA12-13 (citing cases). By contrast, as the leading treatise on civil procedure explains, "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)." Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3731 (4th ed.). Numerous federal courts have so held. *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).

The district court did not abuse its discretion in holding that the untimeliness rendered Scarnati's removal objectively unreasonable. In considering requests for fees and costs under § 1447(c), courts have shown little tolerance for legal justifications for a removal that "even a minimal amount of research" would have debunked. *Neshaminy Mall v. Sports Favorites, Inc.*, No. 07-4789, 2008 WL

2019126, at *2 (E.D. Pa. May 8, 2008). For instance, in *Zawatsky v. Jeddo Stars Athletic Ass'n*, No. 3:17-CV-0621, 2017 WL 4778541 (M.D. Pa. Oct. 23, 2017), the court awarded fees and costs under § 1447(c) where even a "little effort and minimal research" would have revealed that certain deposition testimony did not constitute an "other paper" making the case removable. *Id.* at *6.

Scarnati now acknowledges all this. But he argues that the Third Circuit has recognized an exception to the rule that only documents created within the litigation can restart the removal clock, and that he was seeking an "extension" of that exception. Br. 31. No such suggestion appeared in his notice of removal, JA24-25, and in any event Scarnati had no reasonable basis to believe that the Writ of Election in this case could possibly justify an exception to the rule limiting the phrase "other paper" to other paper in the case.

Scarnati hangs his hat on *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), which applied a "narrow" exception to the general rule that an "order" within the meaning of § 1446(b)(3) means only an order in the state-court litigation. *Id.* at 198, 201-02. *Doe* involved a U.S. Supreme Court decision that amounted to an "unequivocal order directed to a party to the pending litigation, explicitly authorizing it to remove any cases it is defending." *Id.* at 202. This Court held than an exception was appropriate only because the "order" at issue (1) "came from a court superior in the same judicial hierarchy"; (2) "was directed

at a particular defendant"; and (3) "expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues." *Id*. at 202-03.

This Court has "limited" *Doe* to the "unique circumstances" in that case, "namely compliance with a higher court's holding that explicitly authorized a particular party to remove all of its pending cases to federal court." *A.S.*, 769 F.3d at 211. And this Court has refused to extend the *Doe* exception even to an order in a *Third Circuit* decision "involving the same defendant" as the pending state-court action and providing grounds for removal. *Id.*

None of the *Doe* factors, nor anything resembling them, is present here. Scarnati does not contend that Governor Wolf's Writ of Election was an "order," which is the language *Doe* interpreted; he contends that it was an "other paper," which *Doe* did not address Br. 30, 32. To this day, Scarnati has cited no authority to support this view, nor any authority suggesting that a Writ of Election or any document remotely like it is an "other paper" restarting the removal clock. And if this document, which had nothing to do with the state-court litigation and was prompted by the resignation of a Pennsylvania congressman, is an "other paper," then anything is an "other paper." It was objectively unreasonable for Scarnati to remove in the hopes that this Court would unreasonably expand an exception the

Court has already cabined to its facts in to a completely different and unrelated context. It certainly was not an abuse of discretion for the district court to so hold.

C. There Was Obviously No Federal Question Jurisdiction

The removal here was objectively unreasonable for a third reason: this state-court action presented no federal question, and thus the district court lacked subject matter jurisdiction. The Third Circuit 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*, 99 F.3d at 1261. Here, Scarnati's assertion of federal jurisdiction was worse than insubstantial—it was frivolous. Although the district court did not reach the question of subject matter jurisdiction, this Court can affirm on this ground as well. *Williams v. Sec'y Pa. Dep't of Corrections*, 848 F.3d 549, 572 (3d Cir. 2017) ("[W]e may affirm a judgment on any ground apparent from the record, even if the district court did not reach it." (internal quotation marks omitted)).

With exceptions not relevant here, a defendant may remove a case under 28 U.S.C. § 1441(a) only if the federal district court would have "original jurisdiction" over the state-court action. Scarnati's assertion that the district court had federal question jurisdiction under 28 U.S.C. § 1331, *see* JA23, is nonsense. Plaintiffs asserted claims *exclusively* under provisions of the Pennsylvania Constitution. They asserted no federal claims. Because Plaintiffs' state-law claims

did not "arise under" federal law, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986), there was no federal question jurisdiction.

Scarnati argued below that the March 2018 special election somehow created 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." JA24 (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 sought to change the map for the March 2018 special election—was wrong. Plaintiffs sought no relief whatsoever with respect to the special election, so that election could not conceivably have created a federal question in this case. Plaintiffs never suggested in the state-court proceedings that they sought relief with respect to the special election. To the contrary, Plaintiffs unambiguously stated that they sought to resolve the case "before the due date for nomination petitions for the 2018 elections, which is March 6, 2018." JA330-31. That was the due date for the May 2018 primaries, not the March 2018 special election.

But even if Plaintiffs were seeking to affect the March 2018 special election (which they were not), Scarnati's argument was still frivolous. Scarnati claimed

that Article I, § 2 of the U.S. Constitution provided a federal *defense* to Plaintiffs' state constitutional claims. Scarnati nowhere suggested that construing the relevant provisions of the Pennsylvania Constitution required a court to construe Article I, § 2 or any federal law. It obviously did 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 jurisdictional argument suffered yet another manifestly obvious and fatal flaw: the purported federal law issue that he identified does not meet the test laid out in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005). Scarnati conceded that federal law did not create any cause of action in this case. His asserted theory was instead that, in light of the Writ of Election, Plaintiffs' state-law causes of action required resolution of a "substantial question of federal law," JA24, the category described in *Grable*. But where federal law does not create the cause of action, "federal jurisdiction over a state law claim will [only] lie [under *Grable*] 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." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

First, no federal claim was "necessarily raised." *Grable* does not create an exception to the critical distinction between federal *claims* and federal *defenses*. The "necessarily raised" 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; *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-law claims where the state-law rule of decision turns on federal law, not for state-law claims that might face a federal defense.

Second, the issue was not "actually disputed" because, again, Plaintiffs sought no relief with respect to the March 2018 special election.

Third, the issue Scarnati raised was 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." Scarnati's notice of removal stated that once Governor Wolf issued the Writ of Election, the "mandate of Article I, Section 2 was completed." JA23. Nothing in Article I, § 2 plausibly suggests that the U.S. Constitution would have barred a change in the timing of the special election.

To the contrary, Article I, § 4 makes clear that state law generally governs the timing of congressional elections, including special elections, and Congress 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). In other words, even in a hypothetical world in which Plaintiffs had sought to alter the timing of the March 2018 special election—which they did not—nothing in the U.S. Constitution would plausibly have prohibited that.

Fourth, any issue about what Art. I, § 2 meant in this context was not "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." The underlying action was all about state law. It raised state constitutional challenges to a state statute. Indeed, two weeks before removing this state case to federal court, Scarnati urged the U.S. Supreme Court to stay a pending federal gerrymandering case, *Agre v. Wolf*, in deference to Plaintiffs' state case, specifically citing the special election as a *reason* that federal courts should defer to state courts. Pet. for Mandamus at 6-7, 24-25, No. 17-631 (U.S. Oct. 30, 2017). In other words, Scarnati told the U.S. Supreme Court that a federal court could not resolve the question whether the 2011 Plan was unconstitutional—or whether the special election should go forward—without infringing on state judicial prerogatives. *Id.* at 6-7.

In sum, Scarnati's notice of removal was objectively unreasonable for three reasons: he lacked the consent of all properly joined defendants; the removal was

untimely; and there was no plausible basis for federal jurisdiction. The district court's decision to award fees and costs was not an abuse of discretion.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMING THE AMOUNT OF FEES AND COSTS

District courts have "considerable discretion" in determining the amount of fees and costs to award under § 1447(c). *Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 362 (3d Cir. 2001); *accord South Annville Twp. v. Kovarik*, 651 F. App'x 127, 132 (3d Cir. 2016). Here, the district court made reasonable findings of fact and acted well within the bounds of its board discretion in awarding $29,360.02 to Plaintiffs for the fees and costs incurred as a result of Scarnati's removal. JA2.

A. The District Court's Finding as to the Number of Hours Expended Was Reasonable

The district court did not abuse its discretion in concluding that 65.6 hours was a reasonable time for Plaintiffs' counsel to have spent responding to Scarnati's notice of removal and preparing their motion for fees and costs.[4]

Attorneys' fees are calculated using the "lodestar method." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995). Under this method, courts multiply "the number of hours reasonably expended by the reasonable hourly rate." *Local Union No. 1992 of the Int'l*

[4] Scarnati does not challenge the district court's determination that Plaintiffs should be compensated for the time spent preparing the fee petition. *See* JA33-36.

Brotherhood of Elec. Workers v. Okonite Co., 358 F.3d 278, 287 (3d Cir. 2004) (internal quotation marks omitted). In determining the number of hours to input into the calculation, district courts "should review the time charged, decide whether the hours set out were reasonably expended" for the work, and then "exclude those that are excessive, redundant, or otherwise unnecessary." *PIRG*, 51 F.3d at 1188 (internal quotation marks omitted). The district court followed those steps in arriving at a fair number of hours reasonably expended for the work.

Scarnati's frivolous attempt to remove this case created an "emergency situation," JA16, that necessitated immediate coordinated efforts of a diligent team of lawyers. In a case of undeniable and overwhelming public import, the removal jeopardized the accelerated schedule that the Pennsylvania Supreme Court put into place specifically to enable the possibility of relief in time for the 2018 primary and general elections. As the district court observed, "[t]he removal was filed just as the trial that had been ordered by the Pennsylvania Supreme Court was about to start." JA16. Plaintiffs divided the urgent work of research, writing, editing, and hearing preparation among all available members of the trial team.

The district court reviewed Plaintiffs' fee request and concluded that, "[g]iven the understandable urgency with which the Plaintiffs' attorneys worked" between the time they learned of the removal and Scarnati's withdrawal of his removal notice, "the time expended and fees requested are probably more than in

an ordinary case." JA16-17. The court commented that all of the written work product submitted by Plaintiffs was "excellent." JA16. Even so, the court found it appropriate to reduce the number of hours expended by 20 percent to account for "unavoidable duplication of effort" by the Arnold & Porter and Public Interest Law Center lawyers who worked well into the night to prepare and file the removal motion barely twelve hours after first learning of the removal. JA16. The court thus arrived at a reasonable 65.6 hours as the amount compensable for Scarnati's removal, discounted from the 81.8 hours for which Plaintiffs sought fees. These 65.6 hours covered researching and filing of three separate briefs—the emergency motion to remand, the motion for fees, and the reply—along with hearing preparation and attendance. There is nothing unreasonable about that number.

Plaintiffs spent approximately 43 hours drafting a 13-page motion to remand that involved researching multiple intricate legal issues not previously raised in this case; 20 hours preparing for, attending, and strategizing before and after the emergency hearing; and 19 hours drafting a 20-page substantive motion and reply s fees and costs. *See* AddJA43-47, 49-60. As the district court explained, "[a] good deal of urgent research and preparation of the motion to remand was necessary and deserves compensation." JA14. The court would have been well within its discretion to award fees for the amount of hours actually spent, without reduction. The fact that the court reduced the total number of hours by 20 percent makes the

award unassailable. *Cf. In re Infospace, Inc.*, 330 F. Supp. 2d 1203, 1214 (W.D. Wash. 2004) (reducing fee award by 5 percent to discount for duplication and inefficiency where 29 lawyers reported working on case).

The cases cited by Scarnati actually support the district court's award in this case. In *Maldonado v. Houstoun*, 256 F.3d 181 (3d Cir. 2001), the court concluded that 120 hours was a reasonable time for research and briefing on a single issue that resulted in an "excellent brief of 41 pages"; that 24 hours was a reasonable amount of time to prepare for a 20-minute oral argument, and that 10 hours was reasonable to prepare a simple six-page fee petition. *Id.* at 186-88. In *Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association Trust v. Castellano*, 164 F. Supp. 3d 705 (E.D. Pa. 2016), the court concluded that 62.4 hours spent on an 18-page motion for summary judgment that had 8 pages of legal argument was excessive and reduced the awardable amount to 31.2 hours. *Id.* at 715. Here, the district court awarded approximately 34.4 hours (80% of 43 hours) to file a 13-page remand motion with 10 pages of legal argument addressing three separate issues (as well as multiple sub-issues). *See* JA15, 322-337. Finally, in *Styers v. Pennsylvania*, 621 F. Supp. 2d 239 (M.D. Pa. 2008), the court found that 48 hours was an appropriate amount of time for a 13-page brief that was "fairly straightforward and did not present any particularly difficult or novel" issues of law. *Id.* at 244.

Scarnati finds it "astounding" that "*10 attorneys*" worked on the motion to remand and prepared for the emergency hearing, arguing that "much of the work allegedly performed" must have been duplicative. Br. 34-35. This Court should not share in his astonishment. Researching and drafting a motion to remand in less than twelve hours, with no prior notice that the case would be removed and with an urgent need to have it remanded immediately, necessitated dividing up research and drafting tasks. In the end, Plaintiffs drafted an "excellent" substantive brief, JA16, identifying multiple deficiencies in the notice of removal and justifying expedited treatment. The district court is not the first to have awarded fees for the work necessary to respond to an "all-hands-on-deck" emergency. *See, e.g.*, *IRAP v. Kelly*, No. 2:17-cv-1761-JLS-AFMx, 2017 WL 3263870, at *6, *9 (C.D. Cal. July 27, 2017) (awarding attorneys' fees for a team of nineteen attorneys working 709.14 hours to file an emergency habeas petition and TRO application and attend a hearing); *Condon v. Wilson*, No. 2:14-cv-4010-RMG, 2015 WL 12862712, at *5, *7 (D.S.C. Aug. 10, 2015) (awarding fees that included compensation for 68 hours by a team of seven attorneys in resisting emergency stay motions).

Second, Plaintiffs seek to recover fees for five attorneys' time spent preparing for and attending the hearing, not ten. *See* Br. 35; JA43-47, 49-60 (hearing fees requested for S. Jones, D. Gersch, M. McKenzie, M. Churchill, and B. Geffen). In any event, the focus of the lodestar calculation is the number of

hours worked, not the number of participating attorneys. The latter consideration is material only to the extent that there was a duplication of efforts, a factor the district court more than adequately addressed by reducing the number of accountable hours by 20 percent. *See Hensley*, 461 U.S. at 434. Although Scarnati asserts that "[c]learly, much of the work allegedly performed" was "duplicative," he does not identify any actual duplication. Nor could he. Under these circumstances, the district court would not have abused its discretion in applying no "duplication" discount at all, much less a 20 percent discount as was done.

B. The District Court's Use of a Blended Rate Was Reasonable

The district court did not err in calculating the lodestar amount using a "blended hourly rate" of $400 based on the "fair median hourly rate" for the Public Interest Law Center lawyers. JA17. The determination of the appropriate billing rate is a factual question subject to a clearly erroneous standard of review. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 709 (3d Cir. 2009). An award of a reasonable hourly rate that differs from a proffered billing rate is reviewed for abuse of discretion. *See Wash. v. Philadelphia Cty. Court of Common Pleas*, 89 F.3d 1031 (3d Cir. 1996).

The district court's use of a blended hourly rate was well within the bounds of its discretion. In calculating a reasonable hourly rate, courts "should assess the experience and skill of the prevailing party's attorneys and compare their rates to

the rates in the prevailing community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 180 (3d Cir. 2001). Courts may also properly consider "counsel's usual billing rate" and their "perception of counsel's skill and experience during the trial of the underlying matter, as well as the quality of his moving papers." *Mantz v. Steven Singer Jewelers*, 100 F. App'x 78, 81 (3d Cir. 2004).

The district court appropriately employed these considerations in determining the reasonable hourly rate that should apply in this case. First, the district court declined Plaintiffs' request to apply an exception to the forum rate rule, instead concluding that Plaintiffs were entitled only to "what is appropriate under the prevailing and customary Philadelphia legal fees." JA15. The district court noted that Arnold & Porter and the Public Interest Law Center are both "well-known and well-qualified" and had submitted "excellent" written work. JA15-16. In particular, the court praised the "outstanding work of the Public Interest Law Center" and its knack for "taking on difficult cases and achieving excellent results for their clients." JA16. Finally, the court concluded that it would "not engage in complex arithmetic" given the "brief period of time that is at issue here" and applied a rate approximately equal to the "fair median hourly rate" for the Public Interest Law Center attorneys rather than the out-of-forum rates billed by the Arnold & Porter attorneys. JA17. This was no abuse of discretion.

Scarnati argues that the usual hourly rates of the Arnold & Porter lawyers were "excessive and unreasonable" for the Eastern District of Pennsylvania. Br. 36-37. But whether Arnold & Porter's usual rates are commensurate with market rates in Philadelphia is irrelevant to this appeal, because the district court declined to use those out-of-forum rates in calculating the fee award. JA15. Instead, the court relied solely on the rates of the Public Interest Law Center attorneys who are based in Philadelphia, which Scarnati approvingly described as "very similar and in-line" with the rates set forth by the Community Legal Services of Philadelphia. Br. 37-38. Given his apparent approval of the Public Interest Law Center's rates, it is curious that Scarnati complains that the district court "conjure[d] a Public Interest Law Center and Arnold & Porter 'blended rate' out of thin air." Br. 39. In fact, the court disregarded Arnold & Porter's rates, relying solely on the Public Interest Law Center rates in calculating the reasonable blended rate that it applied to all attorneys working on the case. JA17. The $400 hourly rate the court applied is in fact lower than the normal billing rates of *all* Arnold & Porter attorneys, is an approximately 50% reduction of the median Arnold & Porter hourly rate ($790), and is based on rates with which Scarnati does not take issue. *See* JA36-39.

Plaintiffs dispute Scarnati's assertion that the Arnold & Porter affidavit was deficient. Br. 37. But even assuming that the affidavit *is* insufficient to establish an appropriate usual billing rate for the Arnold & Porter attorneys, there is no

reason to find that the district court abused its discretion in setting a reasonable rate. It is well established that if the party seeking fees does not submit sufficient evidence regarding the requested rates, the district court "has discretion to determine what award is reasonable." *Carey v. City of Wilkes-Barre*, 496 F. App'x 234, 237 (3d Cir. 2012); *see also Loughner*, 260 F.3d at 180 ("Having rejected the prevailing party's evidence of rates, the District Court was free to affix an adjusted rate."); *Maldonado*, 256 F.3d at 187 (court adopted CLS rates as reasonable where "each of the parties offer[ed] very little evidence" pertaining to hourly rates). This practice is commonplace. *See, e.g.*, *J.J. School Dist. of Philadelphia*, No. 12-cv-2531, 2014 WL 2611044, at *3 (E.D. Pa. June 10, 2014); *Gilliard v. City of Philadelphia*, No. Civ. A. 03-3939, 2004 WL 1902483, at *3 (E.D. Pa. Aug. 24, 2004). Scarnati identifies no authority suggesting that a defect in an affidavit "warrant[s] the complete denial of fees." Br. 40.

C. The District Court's Award of Research Costs Was Reasonable

The district court did not abuse its discretion in concluding that Plaintiffs are entitled to recover the costs for their online legal research. Courts in this Circuit have long held that the cost of using "computer-aided legal research" may be awarded as a reimbursable expense because it is "certainly reasonable, if not essential, in contemporary legal practice." *Wehr v. Burroughs Corp.*, 619 F.2d

276, 285 (3d Cir. 1980);[5] *see also O'Farrell v. Twin Bros. Meats, Inc.*, 889 F. Supp. 189, 193-94 (E.D. Pa. June 15, 1995) (awarding costs for computerized research); *Laubach v. Fid. Consumer Discount Co.*, Civ. A. No. 885-1902, 1986 WL 10645, at *3 (E.D. Pa. Sept. 25, 1986) (same); *Pitchford Sci. Instrument Corp. v. PEPI, Inc.*, 440 F. Supp. 1175, 1178 (W.D. Pa. 1977) (same). Courts in other jurisdictions are in accord. *See, e.g.*, *InvesSys, Inc. v. McGraw-Hill Cos., Ltd.*, 369 F.3d 16, 22 (1st Cir. 2004) (awarding costs for computer-assisted research); *Adolph Coors Co. v. Truck Ins. Exchange*, 383 F. Supp. 2d 93, 97 (D.D.C. 2005) (same). The reason for this is simple: the use of such research services "replaces by instantaneous and supposedly infallible retrieval, many hours which would be billable if performed by human talent." *Pitchford*, 440 F. Supp. at 1178. As Judge Posner of the Seventh Circuit has explained, "if reimbursement [of those expenses] at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of … the computer." *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992).

Plaintiffs submitted sufficient evidence to recover costs for computerized research. The affidavit of Arnold & Porter attorney R. Stanton Jones indicated that

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[5] Scarnati incorrectly states that Plaintiffs below did not "cite[] a single case or authority from this Circuit to support their claim of reimbursement for computer research costs." Br. 40. Plaintiffs cited *Wehr*. JA446 n.2.

the chart detailing the Westlaw expenses was generated from Arnold & Porter's internal expense reporting system. AddJA44, 47.[6] Mr. Jones also stated that those expenses were "reasonably incurred in the litigation of this case." *Id.* As the district court noted, the Westlaw research entries corresponded with a "lengthy description of the tasks undertaken by the various attorneys, including the precise topics Ms. Murphy researched." JA19. In addition to being necessary, Plaintiffs' research costs thus were also "properly documented." *Borrell v. Bloomsburg Univ.*, 207 F. Supp. 3d 454, 523 (M.D. Pa. 2016). It was not an abuse of discretion for the court to include an award of Westlaw charges based on this information.

Scarnati asserts that "it can be assumed that computer research costs are simply an item of overhead built into an attorney's fee." Br. 41. But Scarnati offers no basis for that "assumption," which would be contrary to all the precedent just cited, including this Court's caselaw, separately awarding fees for computer research costs. "It is common knowledge that large law firms regularly track computer-assisted research costs 'by client' (both Westlaw and Lexis make this easy) and then bill clients directly for those costs." *InvesSys, Inc.*, 369 F.3d at 23;

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[6] The district court noted that the narrative for the largest single entry of charges on November 15, 2017 described Westlaw research conducted by associate John Robinson, while Sara Murphy was listed as the timekeeper. JA18-19. That research was conducted by Mr. Robinson in support of the motion to remand.

see also Case v. Unified School Dist. No. 233, 157 F.3d 1243, 1258 (10th Cir. 1998) ("Westlaw charges are expenses normally itemized and billed in addition to the hourly rate."). Plaintiffs advised the district court that "WestLaw/Lexis charges are routinely passed on to the client," JA398, and it was no abuse of discretion for the court to include those costs in the award.

Scarnati cites no decision that has required parties to present specific "evidence" about how computer research costs are treated. *Nugget Distributors Co-op of America, Inc. v. Mr. Nugget, Inc.*, 145 F.R.D. 54 (E.D. Pa. 1992), is inapposite. *Nugget* simply held that a particular statute at issue—which was not the removal statute—excluded research costs because they were not specifically enumerated. *Id.* at 56, 59. And in *BD v. DeBuono*, 177 F. Supp. 2d 201, 209 (S.D.N.Y. 2001), the court explicitly acknowledged four other cases in the very same district where computerized research charges were awarded as a separate element in the requesting party's fee applications, rather than as overhead built into the attorneys' fees. Given this Court's precedent holding that research costs are compensable, it was not an abuse of discretion for the district court to award them.[7]

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[7] Scarnati does not dispute that that Arnold & Porter attorneys' train travel is reimbursable, but requests clarification as to the amount of fees requested. Br. 42 n.11. Plaintiffs only seek reimbursement for two Arnold & Porter attorneys' time and travel costs to attend the hearing. Those attorneys are Mr. Gersch and Mr. Jones. Associate Dan Jacobson purchased tickets for four attorneys to travel to the

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III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING SCARNATI PERSONALLY LIABLE FOR THE AWARD

District courts have a "great deal of discretion and flexibility … in fashioning awards of costs and fees" under § 1447. *Morgan Guar. Trust Co. v. Republic of Peru*, 971 F.2d 917, 924 (2d Cir. 1992); *accord Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993). And § 1447(c) "does not contain any express or even any implied limitation on the court's authority" to award fees and costs "to be paid either by the defendants, by their attorneys, or by both the defendants and their attorneys, jointly and severally." *Wis. v. Missionaries to the Preborn*, 798 F. Supp. 542, 543-44 (E.D. Wis. 1992). Here, the district court did not abuse its discretion in holding that Scarnati, rather than Pennsylvania's taxpayers, should bear the costs of his frivolous removal.

A. Scarnati Forfeited Any Objection to Personal Liability for Fees

Scarnati criticizes the district court for failing to discuss in detail why Scarnati should be held personally liable. Br. 16-17. But Scarnati raised no objection to personal liability in his briefing below, even though Plaintiffs expressly requested that the district court hold Scarnati and his counsel "jointly and

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hearing from D.C. ($580), of which Plaintiffs requested $290 (half the cost). *See* JA47. Mr. Gersch and Mr. Jones purchased their own return tickets for $212 and $246, respectively. *See id.*

severally liable for the award" so as "[t]o avoid placing the burden for such fees and costs on Pennsylvania taxpayers." JA400; *see also* JA446-47 (Plaintiffs' reply brief reiterating request to hold Scarnati liable and noting that "Scarnati does not identify any law that would prevent this Court from holding him, and his attorneys, liable for any fees assessed."). By failing to raise the issue in the district court proceedings, Scarnati forfeited any objection to personal liability for the award of fees and costs. *See Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006) ("Generally, failure to raise an issue in the District Court results in its waiver on appeal.").

B. The District Court Had Discretion To Hold Scarnati Personally Liable for the Award Based on His Objective Unreasonableness

Waiver aside, it is hornbook law that a public official may be held personally liable for his or her official activities where, as here, those activities were objectively unreasonable. That is the standard that the Supreme Court has applied for the past 35 years in the context of qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Supreme Court explained in *Harlow*, "[w]here an official could be expected to know that certain conduct would violate [the law], he should be made to hesitate." 457 U.S. at 819. That is a complete answer to Scarnati's concerns that imposing attorneys' fees on him could produce "undue timidity." Br. 20. Timidity here would have been perfectly due and could have prevented a frivolous removal. *Harlow* expressly rejects any notion that consideration of "subjective

good faith" should inform the question whether to impose personal liability on officials. *Id.* at 816-17. Given this precedent, it certainly was not an abuse of discretion for the district court below to conclude that Scarnati's objectively unreasonable conduct in this case merited the imposition of personal liability.

Scarnati fails to cite any authority for the proposition that he cannot be held personally liable for fees and costs under the removal statute for having pursued removal without any objectively reasonable basis. Instead, he points to precedent involving 42 U.S.C. § 1983 and § 1988, which Scarnati describes as "substantial analogous authority," and which permits public officials to be held personally liable for fee awards in § 1983 cases only upon a finding of "bad faith." Br. 17. Scarnati's argument ignores important differences between the fee-shifting provision in 42 U.S.C. § 1988 (applicable to § 1983 actions) and the fee-shifting provision in the removal statute. Courts need not construe § 1447 by reference to § 1988, as the "goals and objectives of the two Acts are … not completely similar." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 521-23 (1994) (declining to adopt "dual standard" for awarding fees under Civil Rights Act for fee awards under 1909 Copyright Act even where language was "virtually identical").

Section 1988 permits an award of reasonable attorneys' fees automatically to prevailing plaintiffs in § 1983 and other types of civil rights cases. 42 U.S.C. § 1988(b). The purpose of this fee-shifting regime is to "ensure effective access to

the judicial process for persons with civil rights grievances," who might otherwise not have the means to bring their claims. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks omitted). As such, the general rule is that a prevailing plaintiff will recover its attorneys' fees unless special circumstances would make such an award unjust. *Id.* The fee-shifting statute is not meant to deter litigation misconduct by defendants—and in fact the availability of fees does not depend on defendants having engaged in any misconduct—but rather to incentivize plaintiffs to act as "private attorneys general" in enforcing their civil rights. *See* S. Rep. No 94-1011, 1976 U.S.C.C.A.N. 5908, 5910 (1976). Relying on the "legislative history" of § 1988, the Supreme Court held that these fees "generally" should be awarded against an official in his official capacity, unless the official acts in bad faith. *Hutto v. Finney*, 437 U.S. 678, 700 (1978).

The fee-shifting provision of the removal statute is entirely different. It authorizes courts to award fees and costs to the non-removing party upon remand. 28 U.S.C. § 1447(c). But in stark contrast to § 1988, fees are not awarded "as a matter of course" to the party that prevailed in obtaining remand, but only as a form of sanction for litigation misconduct—namely pursuing an objectively unreasonable removal. In this context, the purpose of shifting fees is to "reduce[] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140

(2005). The availability of fees does not turn on the plaintiff having prevailed in obtaining remand, but on the unreasonableness of the removal itself. *Id.* at 141. Courts generally may award fees under § 1447(c) only where the removing party "lacked an objectively reasonable basis for seeking removal." *Id.*

Therein lies the critical difference between actions under § 1983 and § 1447; the former requires a virtually automatic shift in fees to encourage the vindication of plaintiffs' rights, while the latter is meant to deter unreasonable and improper litigation misconduct by defendants and to reimburse plaintiffs subject to such baseless tactics. In the context of § 1983, absent a bad faith requirement, fees could be awarded against an official in his or her individual capacity as matter of course, simply because the plaintiff prevailed in the suit. But fees are not available under the removal statute simply because the defendant obtains a remand; the court rather must find litigation misconduct, *i.e.*, that the removal was objectively unreasonable. In other words, the analogue to the bad faith requirement in the § 1983 context is already built into the standard for shifting fees in the removal context. There is nothing "unfair" or unreasonable about holding an official personally liable for his or her objectively unreasonable litigation tactics. And concerns about "undue timidity" on the part of public officials have no application to § 1447, where a public official can be liable not just for being wrong, but only if the official's conduct is objectively unreasonable. Br. 20. Nor does Scarnati point

to anything in the legislative history to § 1447 that would support an additional requirement of subjective bad faith to hold an official personally liable for an objectively unreasonable removal. *Cf. Hutto*, 437 U.S. at 700 (relying on legislative history of § 1988 to support bad faith requirement).

To superimpose a requirement of bad faith into § 1447, as Scarnati suggests, Br. 21, would *reduce* its deterrent value by allowing official-capacity defendants to remove cases without any objectively reasonable basis, confident that taxpayers would pick up the check if and when fees are awarded. Such a requirement would undermine Congress' "desire to deter removals intended to prolong litigation and impose costs on the other party." *Martin*, 546 U.S. at 133. Thus, this Court has reasonably held that "[b]ad faith on the part of the removing party is not a prerequisite to an award of attorneys fees" under § 1447(c). *Siebert*, 166 F. App'x at 607.

In light of the above, Scarnati's reliance on *Kentucky v. Graham*, 473 U.S. 159 (1985), is misplaced. In *Graham*, the Supreme Court held that a plaintiff prevailing in a § 1983 action against a government official in his or her personal capacity could not recover fees from the government, a nonparty in the case. *Id.* at 167-68. The Court noted that, because "fee liability runs with merits liability," and since the government could not be substantively liable on a *respondeat superior* basis, it was not liable for fees if the opposing party prevailed. *Id.* at 168. By

contrast, fees under § 1447 attach not to a loss on the merits, but to litigation misconduct. There is no danger of a removing party being made liable for an award of attorneys' fees and costs just because the case was remanded.

The question here is whether Scarnati, an *active participant* in this case, should be held responsible for his decision to obstruct the state-court litigation by pursuing an objectively baseless removal. It is not an abuse of discretion to conclude that the person "ultimately responsible" for the frivolous litigation tactics employed here, rather than the taxpayers of Pennsylvania, should bear the associated costs. *Baldus v. Members of Wis. Gov. Accountability Bd.*, 843 F. Supp. 2d 955, 960 (E.D. Wis. 2012). If public officials sued in their official capacity can avoid the consequences of their misconduct by ducking behind their titles and passing the buck (quite literally) to taxpayers, there is nothing to prevent those officials from filing frivolous notices of removal whenever they wish.

Scarnati's due process argument fails. There is no due process deprivation where the removing party has an opportunity to contest the proposed award before the district court. *See Savino v. Savino*, 590 F. App'x 80, 81 (2d Cir. 2015) (no due process violation where appellant had opportunity to contest fees in briefing before district court); *Step Plan Servs., Inc. v. Koresko*, 219 F. App'x 249, 250 (3d Cir. 2007) (same). Scarnati was repeatedly put on notice that Plaintiffs sought to hold him personally accountable for the fees and costs incurred as a result of his

frivolous removal. JA400 ("To avoid placing the burden for such fees and costs on Pennsylvania taxpayers, Senator Scarnati and his counsel ... should be held jointly and severally liable for the award."); JA446-47 ("this court should hold Scarnati ... liable for any award of fees and costs"). He simply failed to respond.

C. Even if Bad Faith Were Required, Scarnati Acted in Bad Faith

Even if a finding of subjective bad faith were required to impose the fee award on Scarnati personally, it is clear that Scarnati's objectively unreasonable removal was taken in bad faith. This Court can affirm on that ground because it is supported by the record and indeed was pressed by Plaintiffs below. *Brightwell v. Lehman*, 637 F.3d 187, 191 (3d Cir. 2011) (citing *U.S. v. Agnew*, 407 F.3d 193, 196 (3d Cir. 2005)).

Scarnati transparently sought to delay the state-court litigation by making contrary arguments to different courts to suit his needs. As described, he flip-flopped on whether the Governor was a "nominal" or "indispensable" party to this suit, telling the district court that the Governor was "nominal" after repeatedly telling the state court that he was "indispensable." Scarnati also changed his position on the appropriate forum for this issue. After insisting in the "emergency" mandamus petition in *Agre v. Wolf* that the district court there be ordered to abstain in favor of "the Pennsylvania appellate courts' decision on important questions of Pennsylvania constitutional law," Pet. for Mandamus, *supra*, at 20, Scarnati then

removed this case on the grounds that federal court was the proper forum to address "whether a state court under state law can strike down a Federal congressional district" in which the state has set a special election, JA24 ¶ 18. Scarnati's strategy throughout the state-court proceedings was to obstruct at every turn, no matter the cost to the taxpayers or the prejudice to Plaintiffs. The removal was one instance of that broader litigation strategy, based not at all on the merits of the case but rather on political calculations.

In accepting extraordinary jurisdiction over this case, the Pennsylvania Supreme Court recognized that the case "involves issues of immediate public importance" and therefore must "proceed expeditiously forthwith." JA320-21. Scarnati's removal was nothing more than a frivolous attempt to undercut the state court's command. His bad faith is apparent, although the district court declined to resolve the issue. *See* JA14. If this Court concludes that a finding of bad faith is necessary to avoid burdening Pennsylvania taxpayers with Scarnati's objectively unreasonable litigation misconduct, the Court should either make a finding of bad faith or remand to the district court to make that determination in the first instance.

Finally, if this Court concludes that the district court abused its discretion to hold Scarnati personally liable for the attorneys' fees award, the Court should instead impose the fee award on Scarnati's attorneys. Pennsylvania taxpayers

should not foot the bill for litigation misconduct by a public official, particularly when it is possible to impose the burden on those responsible for the wrongdoing.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Dated: July 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LAR 28.3(d)

The undersigned hereby certifies that the following attorneys whose names appear on this brief are active members of the bar of this court:

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1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,510 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.

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Dated: July 30, 2018

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I hereby certify that on July 30, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users.

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