NO. 18-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEAGUE OF WOMEN VOTERS, ET AL.,
Plaintiff-Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Defendant-Appellants

Appeal from the Opinion and Order of the United States District Court
For the Eastern District of Pennsylvania
No. 2:17-cv-05137-MMB

BRIEF FOR APPELLANT SENATOR JOSEPH B. SCARNATI III, IN HIS OFFICIAL CAPACITY AS THE PRESIDENT PRO TEMPORE OF THE SENATE

Dated: May 29, 2018

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**Application for admission forthcoming*

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I. STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION.

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction pursuant to the 28 U.S.C. § 1441, which governs removal of state court actions to federal courts by defendants. Although the action was remanded, the District Court retained jurisdiction to address Plaintiff-Appellees' request for fees and costs caused by allegedly improper removal. *See* 28 U.S.C § 1447(c).

On April 13, 2018, the District Court issued a final Order and Memorandum, granting Appellees' Motion for Remand and holding that Appellant Senator Joseph B. Scarnati III was required to reimburse Appellees for fees and costs in his personal capacity, rather than his official capacity. *See* 4/13/2018 Order (the "Order") (App. 2); 4/13/2018 Memorandum (the "Memorandum") (App. 3). This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291. *Accord Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 226 (3d Cir. 2003) (explaining that this Court has appellate jurisdiction over challenges relating to an award for fees and costs relating to removal under 28 U.S.C § 1441).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Whether the District Court erred in holding Appellant Senator Scarnati personally liable for fees and costs incurred as a result of removal, *see* Memorandum at 17 (App. 19), where he was not involved in the underlying action – or any matter related thereto – in his personal capacity, and where Appellees' Motion for Remand was directed at Senator Scarnati solely in his official capacity.[1]

2. Whether the District Court erred in finding that Appellant Senator Scarnati lacked an objectively reasonable basis for removing the action and, on that basis, imposed liability for fees and costs, *see* Memorandum at 11-12 (App. 13-14), despite being presented with clear legal authority to the contrary (App. 410).

3. Whether the District Court erred in calculating the total sum of compensable fees and costs, *see* Order (App. 1), and ignoring the settled *Lodestar* method. (App. 15-19).

[1] Senator Scarnati is mindful that, under the Local Rules of this Court, he is required to not only indicate the specific pages of the appendix containing the lower court's ruling on an issue presented for review, but also showing that such issue was "raised," and "objected to[.]" 3d Cir. L.A.R. 28.1(a)(1). However, as explained below, the question of Senator Scarnati's individual liability had not been raised in any way by any of the parties or the District Court prior to the entrance of the Order; as such, compliance with that provision is impossible.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS.

The specific issues presented for this Court's review – related to the District Court's award of fees and costs and its allocation of liability – are not the subject of any other action presently before this Court, or any other past or present legal action, arbitration, or administrative proceeding and have not been. However, the underlying legal dispute pertaining to the Pennsylvania Congressional Redistricting Act of 2011, *see* 25 P.S. §§ 3596.101, *et seq*. (the "2011 Plan"), has been the subject of three other actions in addition to the present one.

A. ***Agre v. Wolf.***

On October 2, 2017, a group of voters initiated an action in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that the 2011 Plan violated the Elections Clause of the United States Constitution, *see* U.S. CONST. Art. I, Sec. 4, as well as their First and Fourteenth Amendment rights, *see* U.S. CONST. amend. I & XIV, and an injunction prohibiting further use of the 2011 Plan. *See Agre v. Wolf,* 284 F. Supp. 3d 591 (E.D. Pa. 2018). Although Senator Scarnati was not originally named as a defendant, he – along with Speaker of the Pennsylvania House of Representatives Mike Turzai ("Speaker Turzai") – successfully moved to intervene. The matter was eventually assigned to a three-

judge panel pursuant to 28 U.S.C. § 2284(a),[2] consisting of the Honorable D. Brooks Smith, Chief Judge of this Court; the Honorable Patty Schwartz, a Circuit Judge of this Court; and the Honorable Michael M. Baylson, District Judge from the Eastern District of Pennsylvania, who also presided over the matter presently before this Court. *Id.* at § 2284(a). A four-day trial concluded on December 7, 2017, and on January 10, 2018, the panel entered a final judgment in favor of Defendants, with Judge Baylson dissenting. Judge Smith and Judge Schwartz filed separate concurring opinions agreeing with the disposition, but for differing reasons.[3] Plaintiffs subsequently lodged an appeal with the United Sates Supreme Court, where it is presently pending.

B. ***Diamond v. Torres.***

On November 9, 2017, another challenge was filed to the 2011 Plan in the United States District Court for the Eastern District of Pennsylvania. The allegations largely tracked those in *Agre*. Senator Scarnati, again joined by Speaker Turzai, successfully moved to intervene and obtained a stay pending the resolution

[2] Section 2284 provides: "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." *Id.* [full cite needed]

[3] Specifically, Judge Smith reasoned that Plaintiffs' political gerrymandering claim was not justiciable, while Judge Schwartz would have ruled that Plaintiffs' challenge was unsustainable under the particular facts before the panel.

of *Agre*. After *Agre* was decided, the matter was stayed once again following the State Supreme Court's January 22 *per curiam* order invalidating the 2011 Plan, *see League of Women Voters of Pa. v. Commonwealth of Pa.* 175 A.3d 282 (Pa. 2018) (*per curiam*), and was subsequently dismissed pursuant to joint stipulation of the parties.

C. ***Corman v. Torres.***

On February 22, 2018, various members of the United States Congress, along with the Majority Leader of the Pennsylvania State Senate, Jacob Corman, and the Chairman of the Senate State Government Committee, Michael Folmer, commenced an action in the United States District Court for the Middle District of Pennsylvania seeking to enjoin the State officials responsible for overseeing elections from implementing the State Supreme Court's new judicially-devised redistricting scheme. Specifically, Plaintiffs argued that: (a) conducting the forthcoming elections under the newly-drawn boundaries would violate the Elections Clause of the United States Constitution, as the State Supreme Court performed a function expressly delegated to the State General Assembly; and (b) even if the decision to invalidate the 2011 Plan was sustainable as an abstract legal proposition, the State Supreme Court violated that provision by promulgating a new map without affording the legislature an adequate opportunity to redress the alleged infirmity.

On March 19, 2018, the District Court entered a per curiam order dismissing the action on the pleadings, finding that the Plaintiffs lacked standing. On April 3, 2018, a *pro se* individual filed a Motion in the District Court, seeking to intervene and requesting reconsideration of dismissal. That Motion was denied, which is the subject of an appeal currently pending before this Court.

IV. STATEMENT OF FACTS

On June 15, 2017, Appellees, a group of Pennsylvania voters, commenced the underlying state court action in the Commonwealth Court of Pennsylvania, challenging the 2011 Plan on various state law grounds. *See* Notice of Removal, Ex. A (App. 44). In addition to Senator Scarnati and Speaker Turzai, both of whom were named solely in their official capacities as the President Pro Tempore of the State Senate and Speaker of the House of Representatives, Appellees also named the following Executive Branch officials as defendants (the "Executive Defendants"): Governor Thomas W. Wolf, Lieutenant Governor Michael J. Stack III, Secretary of the Commonwealth Pedro D. Cortez,[4] and Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State, Jonathan M. Marks. Notably, all of the Executive Defendants were also named solely in their official capacities (App. 43).

On November 9, 2017, acting upon an application submitted by Appellees, the Pennsylvania Supreme Court assumed plenary jurisdiction over the case. In the *per curiam* order announcing its decision to exercise jurisdiction, the State Supreme Court directed the Commonwealth Court to assign the matter to a

[4] Because Secretary Cortez resigned after the action was filed in the Commonwealth Court, Robert Torres, who became acting secretary was substituted for Pedro Cortez by operation of law. The record does not demonstrate that any of the parties took any formal steps to effectuate the substitution.

commissioned judge of that tribunal "to conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which [Appellees'] claims may be decided (App. 320).

In the meantime, on October 23, 2017 Governor Wolf issued a Writ of Election, setting a special election for March 13, 2018 to fill the vacancy created in the 18th Congressional District as a result of a resignation (App. 317). In direct and specific response to the Writ of Election, Senator Scarnati, who was named in the state court suit solely in his official capacity, removed the state court litigation to the District Court. The District Court's first electronic notice of the opening of the matter was sent via the CM/ECF system at 3:39 P.M. on November 15, 2017. After various filings, including an emergency motion to remand by Senator Scarnati himself, at 2:55 P.M. on November 16, 2017 (App. 369), the District Court entered an order remanding the case back to state court.[5]

[5] After the action was remanded, Judge Brobson of the Commonwealth Court held evidentiary hearings and on December 29, 2017 issued his Recommended Findings of Fact and Conclusions of Law, opining that the 2011 Plan should be upheld. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 786 (Pa. 2018). The State Supreme Court promptly listed the matter for oral argument and issued an expedited briefing schedule. *See id.* at 767. Appellees, joined by the Executive Defendants, submitted briefs in opposition to Judge Brobson's recommendation and urged the court to invalidate the 2011 Plan. Senator Scarnati and Speaker Turzai, on the other hand, argued that such relief was inappropriate. The State Supreme Court, on a four-three vote, subsequently entered a *per curiam* Order on January 22, 2018, invalidating the 2011 Plan and fixing a timeline for the submission of a remedial map for its review. *See* 175 A.3d 282 (*per curiam*). On February 7, 2018, the court issued an opinion explaining its

Shortly thereafter, Senator Scarnati, acting through undersigned counsel representing him in his official capacity, offered to resolve the dispute for $9,650, chiefly to reimburse Appellees' counsel for the inconvenience of traveling to a hearing that proved largely unnecessary (App. 412-13). Appellees declined the offer and, instead, filed a Motion for Fees and Costs (the "Motion"), arguing that Senator Scarnati lacked an objectively reasonable basis for removal, and seeking nearly $50,000 in attorneys' fees for a case that was "live" in the District Court for less than 24 hours (App. 412-13). The matter, according to Appellees, was staffed by 10 attorneys, who billed in excess of 80 attorney hours, and purportedly generated fees and $3,000 in costs. Of the 80 hours, nearly 20 hours (approximately 25% of the total hours) was spent exclusively on drafting the Motion. On average, Appellees sought over $600 per hour for each attorney.

On April 13, 2018, the District Court entered an Order granting the Motion in part (the "Order"), pursuant to its authority under 28 U.S.C. § 1447(c) (relating to the imposition of fees for improper removal) (App. 1). The District Court awarded $29,360.02 in fees and costs, but offered little insight into how this figure was derived (App. 1). Furthermore, in its Memorandum accompanying the Order, under a heading titled, "Who Should Be Responsible for Payment of These Fees

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rationale for declaring the 2011 Plan unconstitutional. *See* Because the aforementioned deadlines were ultimately not satisfied, the State Supreme Court ordered the implementation of its own redistricting scheme on February 19, 2018.

and Costs," the District Court stated: "Under all the circumstances, the Court finds that Senator Scarnati should personally be liable for these fees and costs." Memorandum at 17 (App. 19). No further rationale was offered for this holding; notably, however, the Court expressly refused to find an "improper motive or bad faith." *See id.* at 12 (App. 14). According to the Order, Senator Scarnati was required to remit payment within 14 days – *i.e.*, by April 27, 2018. *See* Order (App. 1).

With respect to the merits of Appellees' assertion that removal was improper, the Court's rationale was, in essence, twofold. First, the District Court held that Senator Scarnati's failure to secure consent from the Executive Defendants rendered removal improper (App. 10-11),[6] and second, it held that the Writ of Election did not constitute an "other paper" and, thus, Senator Scarnati did not have thirty days from the issuance of that writ – *i.e.* until November 22, 2017 – to effect timely removal (App. 12-15).

On April 16, 2018, Senator Scarnati filed a Notice of Appeal, and on April 26, 2018, filed a Motion asking the District Court to stay its Order pending appellate review, specifically highlighting the considerable doubt surrounding the

[6] Although Appellees also attempted to place Speaker Turzai's consent at issue, the District Court's discussion of this aspect of the removal is focused almost exclusively on the consent of the Executive Defendants and appears to make no finding as to "[w]hether or not the dispute with Speaker Turzai regarding consent was a simple misunderstanding[.]" (App. 10).

decision to hold Senator Scaranti personally liable. The following day, the District Court granted the Motion and entered an Order staying enforcement of the award.

V. SUMMARY OF ARGUMENT

The District Court committed three discrete errors in granting Appellees' request for fees and costs.

First, and most importantly, because Senator Scarnati had never been involved in this action in his individual capacity, the District Court erred in holding him *personally* liable for fees and costs. The Order plainly contravenes settled precedent distinguishing between personal-capacity and official-capacity actions and admonishing courts to observe that distinction when allocating liability in actions involving governmental officials. Furthermore, the limited exceptions to this general rule are not presently relevant, as they are inapplicable under the facts of this case and, indeed, are not even mentioned in the District Court's Memorandum Opinion accompanying the Order.

Second, setting aside the clear error in imparting liability on a party who had no personal stake in this action, the District Court also erred in holding that Senator Scarnati lacked an objectively reasonable basis for removing the action, as it misinterpreted and overlooked several crucial legal principles in reaching that conclusion.

Third, and finally, even if Appellees are entitled to fees and costs, the District Court erred in calculating the amount they are owed. Not only did the court fail to apply the *Lodestar* method, which is the settled formula for calculating the

specific sum of money due for attorneys' fees, but it also awarded fees for matters that, traditionally, are not compensable.

VI. STATEMENT OF STANDARD AND SCOPE OF REVIEW

Generally, a District Court's decision concerning the imposition of fees for improper removal under 28 U.S.C. § 1447(c) is reviewed for abuse of discretion. *See Roxbury Condo. Ass'n*, 316 F.3d at 227. However, as explained below, the three distinct issues implicated in this appeal are reviewed pursuant to this Court's plenary standard of review, as they involve questions of law, or applications of fact to law. Although a District Court's findings of fact are ordinarily entitled to considerable deference under the "abuse of discretion" standard, its legal conclusions, or applications of law to fact are subject to the more exacting scrutiny under the rubric of "plenary review." *See LaSalle Nat. Bank v. First Connecticut Holding Grp., LLC.*, 287 F.3d 279, 288 (3d Cir. 2002) ("An abuse of discretion occurs when the court bases its opinion on a clearly erroneous finding of fact, an erroneous legal conclusion, or an improper application of law to fact."); *see also Raab v. City of Ocean City, New Jersey*, 833 F.3d 286, 292 (3d Cir. 2016) (acknowledging that a court's decision pertaining to an award of fees is reviewed for abuse of discretion, but emphasizing that, if such a decision is based on conclusions of law, review is plenary). Indeed, in the specific context of an award of fees under the removal statute, this Court has explained that, while it is precluded "from reviewing the District Court's remand order for purposes of reversing it, 'some evaluation of the merits of the remand order is necessary to

review an award of attorney's fees.'" *Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 227 (3d Cir. 2003).

Here, each of the errors at issue involve a purely legal inquiry. First, whether Senator Scarnati, in the absence of a specific finding of bad faith, may be held personally liable when he was not a party to the action, is a question of law. Second, whether the Governor was a nominal party whose consent was superfluous and whether the Writ of Elections constituted "other paper" under the statute are also legal questions. Third, the District Court's calculation of the amount purportedly owed to Appellees similarly turns on the application of the law to the facts.

VII. ARGUMENT

A. The District Court Erred in Imposing Personal Liability on Senator Scarnati in his Individual Capacity.

In holding Senator Scarnati personally liable, the District Court violated settled judicial principles – expressed both by this Court and the United States Supreme Court – which cautioned courts against conflating official liability with personal liability. This distinction, moreover, is based on core due process principles; as such, even if the District Court's conclusion – *i.e.* that a public official sued solely in his official capacity may be liable in his personal capacity – is somehow legally sustainable (which it is not), sanctioning Senator Scarnati without providing him adequate notice and an opportunity to defend himself violated due process.

i. The District Court erred as a matter of law in finding Senator Scarnati personally liable for fees and costs Appellees incurred after suing him solely in his official capacity.

The District Court, without analysis or explanation, found Senator Scarnati personally liable for attorneys' fees and costs even though he was named as a defendant solely in his official capacity. As noted above, the District Court's rationale in this respect consisted of a single sentence. *See* Memorandum at 17 (App. 19) ("Under all the circumstances, the Court finds that Senator Scarnati should personally be liable for these fees and costs."). This utter absence of *any*

substantive analysis is especially staggering given that Appellees never materially advanced any arguments along such lines. Because holding Senator Scarnati personally liable is simply inconsistent with federal court precedent and deprived him of due process, this Court should, at a minimum, reverse and vacate that particular aspect of the District Court's Order.

As a preliminary matter, substantial analogous authority – which the District Court did not even acknowledge, let alone discuss – contradicts its decision to hold Senator Scarnati personally liable for fees and costs in this action. Specifically, in the context of actions under 42 U.S.C. § 1983 ("1983 actions"), the U.S. Supreme Court, as well as this Court, have held that governmental officials sued in their official capacities generally may not be held personally liable for attorneys' fees stemming from their actions. *See Hutto v. Finney*, 437 U.S. 678, 700 (1978) ("[L]egislative history makes it clear that in such suits attorney's fee awards should generally be obtained either directly from the official, *in his official capacity*, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (emphasis added)); *Skehan v. Bd. of Trustees of Bloomsburg State Coll*., 590 F.2d 470, 495 (3d Cir. 1978) (applying the Supreme Court's decision in *Hutto*).

In terms of the underlying rationale, a common thread running through these decisions is that an "official-capacity" action "*is not* a suit against the official

personally, for the real party in interest is the entity[,]" and, indeed, such an action is "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis in original); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978) (explaining that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent").

The United States Supreme Court's *Graham* decision, where the Court was faced with essentially the inverse of the present circumstances, is distinctly instructive. There, various governmental officials were successfully sued in their personal (rather than official) capacities and the plaintiffs subsequently sought to collect attorneys' fees from the state entity to which they belonged. *Graham*, 473 U.S. at 162-63. The Supreme Court, however, held that the state entity may not be compelled to pay attorneys' fees where officials are sued in their personal capacities. Collapsing the distinction between the individual, and the official capacity in which he is sued, the Court reasoned, is tantamount to permitting recovery against a non-party. Explaining that clear demarcation, the Court aptly concluded:

> That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty. Yet that would be the result were we to hold that fees can be recovered from a governmental entity following victory in a personal-capacity action against government officials.

Id. at 168. In sum, the thrust of the Supreme Court's reasoning is that "liability on the merits and responsibility for fees go hand in hand[,]" and that "the party legally responsible for relief on the merits[,]" is also the party responsible for fees. *Id.*

The same concerns are implicated here. Joseph Scarnati, a private citizen with protected interests like all other citizens, has suddenly been ordered to pay attorneys' fees and costs, even though he was not a party to this action. Significantly, Senator Scarnati has never been involved in this – or, for that matter, any other action related to the subject of congressional redistricting – in his *personal* capacity. Rather, the "real party in interest," *id.* at 166, was the President Pro Tempore of the State Senate; Senator Scarnati, for his part, was named only because he was the person occupying that post at the time of removal. Nor is there any basis in fact or law for concluding that Senator Scarnati somehow *personally* became a party when he removed.

Applying the Supreme Court's directive that liability for fees and costs is coextensive with responsibility for the relief brings the District Court error into sharper focus, as the relief Appellees sought – *i.e.* the institution of a new congressional redistricting plan – could only be afforded them by Senator Scarnati in his official capacity, not in his *personal* capacity.[7]

[7] Notably, one of the factual scenarios that the *Graham* Court highlighted to illustrate the distinction between official and personal capacity suits actually manifested itself in this very action. Specifically, the Court noted that, while "[i]n

Moreover, transposing *personal* liability in this manner is against public policy because it "may cause state officers to 'exercise their discretion with undue timidity.'" *Hutto*, 437 U.S. at 699 n.32; *see also Owen v. City of Indep., Mo.*, 445 U.S. 622, 653 n.37 (1980) (recognizing that "different considerations come into play when governmental rather than personal liability is threatened[,]" and concluding that "imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds").

Importantly, as well, there is no basis for concluding that these precepts are not equally applicable in the remand context. Although developed in the Section 1983 context, the above-referenced concepts also have been discussed and adopted in other circumstances. *See Andrews v. Daw*, 201 F.3d 521, 524 (4th Cir. 2000) (relying on *Graham* to hold that a party sued "in his official capacity is [not] in

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an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office," in a personal-capacity suit against such an official, the plaintiff would have to pursue his claim against the decedent's estate.

Here, as noted above, when the action was initiated, Pedro Cortes was named as a Defendant in his official capacity as the Secretary of the Commonwealth. When Secretary Cortes resigned, his successor Secretary Torres was seemingly substituted automatically. *Compare* App. for Extraordinary Relief (reflecting Secretary Cortes in the caption); *with* Order Granting App. (listing Secretary Torres in the caption).

privity with himself in his individual capacity" for purposes of *res judicata* based on the distinction drawn in *Graham*); *U.S. ex rel. Burlbaw v. Regents of New Mexico State Univ*., 324 F. Supp. 2d 1209, 1217 (D.N.M. 2004) (noting that "[t]he individual-capacity lawsuit and the attendant qualified-immunity doctrine are not limited to § 1983 cases, but have been applied in numerous cases addressing alleged violations of various federal statutes" and collecting various authorities in support of that proposition) (citing *Cornforth v. Univ. of Oklahoma*, 263 F.3d 1129, 1132–33 (10th Cir. 2001)); *Tapley v. Collins*, 211 F.3d 1210, 1215 (11th Cir. 2000); *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir.1995); *United States ex rel. Adrian v. Regents of the University of California*, 363 F.3d 298, 402 (5th Cir. 2004).

Finally, the only exception that has been recognized to the rule set forth above is in instances where the public official acts in bad faith. *See Hutto*, 437 U.S. at 700. A contrary rule, this Court has warned, would be "manifestly unfair when, as here, the individual officers have no personal interest in the conduct of the State's litigation[.]" *Sekhan*, 590 F.2d at 495 (quoting *Hutto*, 437 U.S. at 699 n.32). Assuming, *arguendo*, the same principle applies under § 1447(c), the District Court expressly declined to find that Senator Scarnati acted in bad faith: "[T]his Court will not come to any conclusion that improper motive or bad faith is

involved. Strategic choices about jurisdiction are common in litigation." Memorandum at 11-12 (App. 13-14).

Given the substantial countervailing authority – and in light of the compelling precepts on which those decisions are predicated – it is clear that the District Court's decision was plainly in error.

ii. The District Court's Imposition of Personal Liability on Senator Scarnati Violated his Right to Due Process.

Because Senator Scarnati was not a party in his personal capacity to any of the underlying proceedings, the Order entered against him violated his due process rights. To explain, as evidenced by the Supreme Court's repeated efforts to delineate the confines of official and personal liability, it is clear that the distinction is not mere formalism, but rather, raises core questions of fairness. *See Hutto v. Finney*, 437 U.S. 678, 699 n.32 (1978). Generally, before a court may award attorneys' fees or costs, or otherwise sanction a party, it must provide notice of the pendency of the action so as to afford an opportunity to respond. The failure to do so violates due process. *See McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 249 (3d Cir. 2014) ("Due process requires that the party against whom sanctions might be imposed receive notice that sanctions are being considered.").

Here, Senator Scarnati was not put on notice that sanctions were being considered against him in his individual capacity, as Plaintiffs' request for attorneys' fees was directed at Senator Scarnati in his role as the State Senate President Pro Tempore. Similarly, the Court did not indicate at any point prior to entering the Order that Senator Scarnati may be personally liable for attorneys' fees or costs incurred by Appellees solely in the exercise of his duties as an officer of the State Senate. In the absence of even a minimal opportunity to respond, the Order violates his due process protections.

The decisions of the Supreme Court discussed above demonstrate that the scope of a public official's personal liability is a matter of immense public import, and presents questions of constitutional dimensions.[8] Both the United States Constitution and the public interest, therefore, are best served by reversing the Order of the District Court to avoid the clear infringements on Senator Scarnati's due process guarantees, because "[i]n the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights[.]" *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883–84 (3d Cir. 1997).

B. **The District Court Erred In Holding that Senator Scarnati Lacked an Objectively Reasonable Basis for Removing the State**

[8] *See Skehan,* 590 F.2d at 495 (noting that failure to properly distinguish between a party's personal and official capacity may also implicate constitutional concerns under the Eleventh Amendment).

Action as the Executive Defendants Were Nominal Parties Whose Consent Was Unnecessary and the Writ of Election Constituted "other paper" Under the Removal Statute.

As a preliminary matter, it is necessary to set the proper analytical framework. Senator Scarnati is not presently before this Court to re-litigate the merits of his removal theory and this Court's decision on this appeal need not pass on the underlying viability of Senator Scarnati's basis for removal. Indeed, on balance, this Court may even find that Senator Scarnati's legal arguments are unpersuasive. Nevertheless, it is plainly manifest that Senator Scarnati, at the very least, had an objectively reasonable basis for removal.

Indeed, in reviewing Section 1447(c), the Supreme Court was persuaded that Congress did *not* intend to permit only "obvious cases" to be removed; the Court perceived instead that Congress understood certain non-obvious cases would be removed and yet later be deemed inappropriate for a federal court. *See Martin Franklin Capital Corp.,* 546 U.S. 132, 140 (2005). The Supreme Court divined that the statute was not fashioned to mete out punishment in those cases where a party, acting reasonably, attempted to extend the law. *See id.* In other words, *Martin* sets forth what is – in actuality – a rather mundane proposition in this Circuit in particular; namely, a good faith or even novel legal argument, though unsuccessful, is not the fodder for a fee award. *See Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 70 (3d Cir. 1988) (holding "novel and unsuccessful"

argument was "not plainly unreasonable" and thus did not warrant Rule 11 sanctions)

Accordingly, just because the legal theory for removal was not an "obvious" success, does not mean it warrants sanctions. *See Martin*, 546 U.S. at 140. With that in mind, as is made plainly apparent in the ensuing discussion, while Senator Scarnati's grounds for removal may not have been "obvious," he had reasonable grounds.

i. The Executive Defendants were nominal defendants and the District Court's determination to the contrary conflates two discrete concepts.

In determining that Senator Scarnati's failure to obtain consent from the Executive Defendants rendered removal objectively unreasonable, the District Court misinterpreted the settled principle that a removing party is not required to seek the consent of a nominal party. See *Johnson v. SmithKline Beecham Corp*., 724 F.3d 337, 358 (3d Cir. 2013) (explaining that "a federal court must disregard nominal or formal parties" in determining whether removal was effective). Indeed, the principal rationale for the District Court's decision in this respect, entails (at best) a perfunctory analysis of the central arguments concerning nominal parties.

Rather than discussing those concepts, the District Court emphasized the fact that – in opposing Governor Wolf's request to be dismissed from the action at the early stages of the state court proceedings – Senator Scarnati argued that the

Governor was "indispensable" to the action.[9] Contrary to the District Court's conclusion, however, Senator Scarnati's argument that Governor Wolf was "indispensable" to the state court proceedings was not "blatantly inconsistent" with his position that Governor Wolf was "nominal." (App. 11).

As explained in Senator Scarnati's brief in opposition to the Motion for Fees and Costs, whether a party is "indispensable," such that its joinder was required in Pennsylvania state court is a wholly separate inquiry from whether it is "nominal" for purposes of removal. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92 (2005) (explaining that, whether a party is real in the removal context turns on whether it

[9] The District Court also rejected Senator Scarnati's argument that Governor Wolf was nominal because, according to the court, "[s]uch a position belies the emphasis throughout the removal process of the Governor's role in issuing the writ of election in the Eighteenth Congressional District that Senator Scarnati claimed made the removal timely." (App. 10). This rationale is similarly unpersuasive. It was the Writ of Election and its effect on the electoral process that made removal timely – not Governor Wolf's participation in issuing the writ. In fact, the Governor's role in the process is largely ministerial, as he has limited discretion once a vacancy has been created. *See* 25 P.S. § 2777. A defendant whose role is simply that of a "designated performer of a ministerial act," is the quintessential nominal party whose consent is unnecessary. *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 130 (D.D.C. 2013) (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92 (2005)). Moreover, whatever discretion the Governor *does* have certainly had no bearing on the Federal Question identified by Senator Scarnati: "Does a writ issued under Article I, Section 2, Clause 4 of the United States Constitution preclude review of a federal congressional map under state law until the special election set by the writ is completed and the congressional seat filled?" Br. in Opp. to Mot. for Fees and Costs at 12. *See* U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.")

"has a vital interest," without reference to any "state pleading rules[.]"); *Broyles v. Bayless*, 878 F.2d 1400, 1402 (11th Cir. 1989) (explaining that, in determining whether "an individual, although a party to the lawsuit, is a real and substantial party to the litigation," federal courts "do not consider the controlling state's procedural law as to who must be a party to any given action," but rather look to the substance of the complaint). Pennsylvania state courts employ a far more technical standard in determining whether a party is indispensable than Federal Courts do in deciding whether a party is "nominal," so as to obviate the need for its consent. While the former analysis turns on the structure of the action, the latter looks to the substance. *Compare Vill. Charter Sch. v. Chester Upland Sch. Dist.*, 813 A.2d 20, 26 (Pa. Cmwlth. 2002) (holding that an officer of the Commonwealth is indispensable where the ultimate relief requested cannot be effectuated without that officer's action); *with Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013) (explaining that assessment of "nominal party status is a practical inquiry" grounded in the actual interests at stake).

Indeed, this is not a novel distinction. The United States Supreme Court has expressly recognized, a party may be necessary to ensure that an action is procedurally sound, but may, nevertheless, be "nominal," such that failure to obtain its consent will not defeat removal. *See Bacon v. Rives*, 106 U.S. 99, 104 (1882) (holding that a party was nominal despite being indispensable because their

relation to the suit was "merely incidental, arising from the necessity of preserving the means whereby complainants might, if successful in this suit, obtain satisfaction of their demands against [Plaintiff]."). Notably, as well, this construct is consistent with the equitable principles underlying the "nominal party exception," which are intended to ensure that, on the one hand, all parties with a genuine interest agree on removal, but to prevent, on the other hand, parties with no actual interest in the outcome from impeding removal. *See Hartford Fire Ins. Co.*, 736 F.3d at 259. (observing "[t]his exception helps to prevent a party from overriding congressionally prescribed bases for removal through strategic pleading").

As such, Governor Wolf clearly was an indispensable party in the state court action, since the ultimate relief that Appellees sought could not be implemented without his signature enacting the legislation. *See Vill. Charter Sch.*, 813 A.2d at 26 (holding that, because the relief requested would require the Secretary of Education to deduct certain funds from the respondent for the benefit of the petitioner, he was an indispensable party, despite the fact that the controversy, at its core, did not implicate the Secretary's interests). Just as clearly, however, given that Governor Wolf repeatedly disavowed any "real interest" in defending the lawsuit, Senator Scarnati had an objectively reasonable basis for removing the matter without the Executive Defendant's consent. Indeed, Governor Wolf's

nominal status is further crystalized by the fact that he actually assumed a position that was entirely aligned with that of Appellees and directly opposed to that of a party defending an action.[10]

The District Court's failure to engage in the foregoing analysis and instead render a ruling based on Senator Scarnati's discussion – in a state court proceeding – of a legal standard that has no application to this analysis was an error of law.

ii. The District Court erred in holding that the Writ of Election did not constitute an "other paper" so as to render removal timely.

[10] The decision in *Norman v. Cuomo*, 796 F. Supp. 654 (N.D.N.Y. 1992) is directly on point, albeit not binding on this Court. There, an action was initiated in state court challenging New York State's legislative districts. Four of the eight named defendants participated in the removal of that case. However, the remaining four defendants, which included the Governor, Lieutenant Governor, and two members of the New York General Assembly, withheld their consent and, in fact, filed affidavits expressing their opposition to removal. A three-judge panel denied Plaintiffs' motion to remand, holding that the failure of the four non-consenting defendants to actively participate in the case rendered them "nominal" parties, whose consent was unnecessary. The *Norman* court reasoned that, "[w]hen one . . . considers that the non-consenting defendants have not taken steps that conflict with plaintiffs' position, . . .their nominal status becomes abundantly clear." *Id.* at 658. The panel further explained that:

> The nominal role of the non-consenting defendants in this suit becomes especially clear when contrasted to the role played by the removing defendants . . .. Unlike the non-consenting defendants, [the removing defendants have] formally asserted a legal position adverse to these plaintiffs and, through the companion suit, has taken affirmative steps to [block the relief sought by the plaintiffs].

Id. at 659.

Under 28 U.S.C. § 1446, when a state court matter is not initially removable, the matter may nevertheless later be removed within 30 days "after receipt by the defendant, through service or otherwise, of a copy of 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." 28 U.S.C. § 1446(b)(3) (emphasis added). The October 23, 2017 Writ of Election, according to Senator Scarnati, caused the state court matter to suddenly, and for the first time, pose a substantial federal question (explained in the following section) so as to warrant removal. *See* Notice at ¶ 18 (App. 24).

The District Court concluded that the Writ of Election was not an "other paper" within the meaning of Section 1446(b)(3) because it was generated "outside of th[e] particular dispute" between the parties. *See* Mem. at 11. Yet this conclusion ignores Third Circuit precedent and the unique circumstances of this case. To illuminate, this Court has *already* recognized one exception to the "general" intra-judicial-paper rule. Indeed, in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), this Court carved out an admittedly "narrow" rule that an order from the Supreme Court in a different case to the one before a removal court can subject the case to removal under Section 1446(b)(3) where the order gives specific direction on removal. *See id.* at 201-02; *see also A.S. ex rel. Miller v. SmithKine Beecham Corp.*, 769 F.3d 204, 210 (3d Cir. 2014) (noting the Third

Circuit "has recognized a narrow exception to the general rule" under Section 1446(b)(3), citing *Doe*).

To clarify, Senator Scarnati did not argue then (and is not arguing now) that the Writ of Election fits within the specific *Doe* exception. In this matter, had the case not been remanded, Senator Scarnati intended to argue, in good faith, that a narrow exception was warranted under the equally unique circumstances here. Specifically, in the main, those circumstances were: a state-court challenge to federal congressional maps where in the midst of the litigation, a named-party-defendant issues a federal writ that locks in the extant federal districts and makes them immune from state court challenge for a period of time. Notably, this Court itself just recognized in *A.S.* in 2014, the exception in *Doe* was borne out of "unique circumstances," which, seemingly, gave the Circuit Court comfort that the rule would not become an exception to swallow the whole. *See id.* at 21.

These circumstances, Senator Scarnati believed—then and now—warranted a good faith extension of the law under Section 1446(b)(3), especially given that (1) the Supreme Court has not yet weighed in to foreclose such an argument ; and (2) the Third Circuit *has* weighed in and *has recognized* at least one exception (i.e., it has opened the door for potential additional exceptions). Against this backdrop, it is important to emphasize, once again, that just because Senator Scarnati's

position was not an "obvious" success, does not mean it warrants sanctions. *See Martin*, 546 U.S. at 140.

Thus, because Senator Scarnati had an objective reasonable basis to seek removal under the belief that the Writ of Election was an appropriate "other paper" under Section 1446(b)(3), his removal was timely and the District Court's ruling to the contrary was in error.

C. **The District Court's Award of Attorneys' Fees and Costs was Erroneous, Excessive, and Unreasonable.**

Section 1447(c) of the removal statute provides for the payment of "just" attorneys' fees and costs incurred as the result of an unsuccessful removal. *See* 28 U.S.C. § 1447(c). The burden is on the party seeking attorneys' fees to prove not only its entitlement to fees but that the amount requested is reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3rd Cir. 1990).

This Court calculates awards of attorneys' fees applying the "lodestar method." Using this method, the court multiplies "the number of hours reasonably expended by the reasonable hourly rate." *See Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). The District Court in this case, without reference to the lodestar method and stating that it would "not engage in complex arithmetic" (Mem. at 15), simply determined Appellees' "just" attorneys' fees to be $26,240.00 and their "just" costs to be $3,120.02. *See* 4/13/18 Order (App. 1). The District Court's calculations, however, are legally and factually erroneous,

excessive and unreasonable for a number of reasons, so as to warrant a significant reduction, if not the outright denial, of the requested fees and costs.

i. The number of hours allegedly worked by ten attorneys from two firms over less than a twenty-four hour period is unreasonable.

The first step in determining the reasonableness of a fee request is assessing whether the time spent was reasonable. *See Maldonado*, 256 F.3d at 184. In calculating the number of hours reasonably expended, a court should review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described, and then exclude those that are excessive, redundant, or otherwise unnecessary. *Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185 (3d Cir.1995). It does not follow that the amount of time actually expended is the amount of time *reasonably* expended. *Arc of New Jersey, Inc. v. Twp. of Voorhees*, 986 F. Supp. 261, 268 (D.N.J. 1997). Indeed, hours that would not generally be billed to one's own client are not properly billed to an adversary. *Public Interest Research Group*, 51 F.3d at 1188. As such, where three attorneys are present at a hearing when one would suffice, fees should be denied for the excess time. *Arc of New Jersey*, 986 F. Supp. at 268.

The District Court made no effort to examine the reasonableness of the time spent by Appellees' attorneys on the motion to remand and fee petition. Rather, the District Court simply based its fee calculation on the total number of hours spent

working on the case with an arbitrary twenty percent reduction, albeit at a reduced rate (which rate is also excessive, *see infra,* Section). The District Court also, without citing any authority, gave credit to Appellees' attorneys for the alleged "emergency" nature of the removal proceedings.

The District Court's first electronic notice of the opening of the matter was sent via the CM/ECF system at 3:39 P.M. on November 15, 2017. After various filings, including an emergency motion to remand by Senator Scarnati himself, the district court at 2:55 P.M. on November 16, 2017 entered an order remanding the case back to state court. Thus, the case was "live" in the District Court for just under 24 hours. In that period, Appellees staffed the case with 10 attorneys, who billed in excess of 80 attorney hours, purportedly generating nearly $50,000 in attorneys' fees and $3,000 in costs. Indeed, 6 attorneys from Arnold & Porter—3 associates, 2 partners and a senior counsel—allegedly spent 38.7 hours in a 24-hour time period working on the motion to remand and preparing for a hearing on that motion. (App. 397). On top of that, another 4 attorneys from the Public Interest Law Center—2 staff attorneys, the legal director and an of counsel—allegedly spent another 24.3 hours over that same 24-hour time period also working on the same motion to remand and also preparing for the same hearing. *See id.* That amounts to an astounding *10 attorneys* working 63 hours over a 24-

hour period on what ultimately became a 13-page motion to remand and a brief 15-minute hearing before the District Court.

Clearly, much of the work allegedly performed by these *10 attorneys* over a 24-hour period was duplicative and redundant. Indeed, it would strain credulity to argue that *10 attorneys* from two different law firms was necessary to research, draft and file a 13-page motion to remand. It would similarly defy belief that *10 attorneys* needed to prepare for a hearing on that motion and that no less than *6 attorneys* needed to be present for the hearing on that motion to remand. *See id*. Accordingly, at the very least, the 63 hours of time spent by *10 attorneys* from two law firms to work on Appellees' motion to remand and prepare for a brief hearing on that motion, plus 19 hours spent on the fee petition, should have been reduced significantly to exclude redundant and excess time. *See Reg'l Employers' Assurance Leagues Voluntary Employees' Beneficiary Ass'n Tr. v. Castellano*, 164 F. Supp. 3d 705, 715 (E.D. Pa. 2016) (concluding that 62.4 hours for five attorneys to work on 18-page response to motion for summary judgment was excessive and should be reduced by half); *Styers v. Pennsylvania*, 621 F. Supp. 2d 239, 244 (M.D. Pa. 2008) (concluding that 71.99 hours for attorney to work on 13-page response to motion for summary judgment was excessive and should be reduced). The District Court's arbitrary twenty percent reduction "to account for overlap" is

unsupported by evidence or application of the appropriate legal standard and should be reversed.

ii. Arnold & Porter's proposed hourly billing rates are unreasonable for this market.

The second step in determining the reasonableness of a fee request is assessing whether the attorneys' hourly rates are reasonable. *See Maldonado*, 256 F.3d at 184. A reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant legal community. *Id.* In determining a reasonable hourly rate, the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Id.* This "forum rate rule" dictates that generally an out-of-town lawyer would not receive the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged. *Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 704 (3d Cir. 2005). The prevailing party bears the burden of establishing by way of satisfactory evidence, in addition to the attorneys' own affidavits, that the requested hourly rates meet this standard. *Maldonado*, 256 F.3d at 184.

The hourly rates submitted by Appellees for Arnold & Porter attorneys were excessive and unreasonable and did not reflect the prevailing market rates for the

Eastern District of Pennsylvania. Indeed, the rates proposed by Arnold & Porter of Washington, DC were more than double and almost three times the prevailing rates for the Eastern District as established by Community Legal Services of Philadelphia (CLS). Moreover, the affidavit submitted by Arnold & Porter to support their out-of-market rates was so woefully deficient and unsatisfactory in meeting Appellees' burden of reasonableness that no fees should have been awarded for those attorneys' work at all. *See* Exhibit C to Motion. At the very least, the exorbitant rates submitted by Arnold & Porter should have been significantly reduced by the District Court.

As noted previously, Appellees had the burden of establishing that their proposed rates were reasonable. *See Maldonado*, 256 F.3d at 184. Unlike the thorough and comprehensive affidavit submitted by the Public Interest Law Center to support its proposed hourly rates, the affidavit submitted by Arnold & Porter consisted of six general paragraphs and offered no detail as to the skill, experience, or reputation of *any* of the attorneys who allegedly worked on this matter. As for the reasonableness of the attorneys' rates proposed by Arnold & Porter, the affidavit merely relied on the notion that, because these are the "standard billing rates" currently charged for the identified attorneys in Washington, DC, they must be reasonable in the Eastern District of Pennsylvania. This is clearly insufficient, however, as Arnold & Porter had the burden of showing that its rates were

commensurate with the market rates in Philadelphia. *See Schofield v. Trustees of Univ. of Pennsylvania*, 919 F. Supp. 821, 830 (E.D. Pa. 1996). Accordingly, the District Court should not have accepted or relied upon the affidavit, which should have been stricken by the District Court and the entirety of Appellees' fee request denied.

Even assuming *arguendo* that the affidavit submitted by Arnold & Porter was not so defective to warrant the complete denial of fees, the hourly rates proposed for the out-of-town Arnold & Porter attorneys were grossly excessive, unreasonable and not reflective of the rates charged in the Philadelphia market. Although the proposed hourly rates may be representative of what Arnold & Porter charges in the Washington, DC market, those rates were not representative of Philadelphia market rates. Indeed, courts of this Circuit have routinely found the fee schedule established by CLS to be a fair reflection of the prevailing market rates in Philadelphia. *See Maldonado*, 256 F.3d at 187; *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir. 1987) ("there nevertheless comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries"). And the CLS fee schedule is very similar and in-line with the fee schedule of the Public Interest Law Center. Not surprisingly, the CLS and Public Interest Law Center rates are approximately one-half to one-third of the hourly rates proposed by Arnold & Porter (App. 19).

Arnold & Porter has offered no evidence that any special skill, experience or reputation warrants a higher rate than those rates established by CLS or the Public Interest Law Center, nor could they. *See Interfaith*, 426 F.3d at 705. Indeed, the motion to remand researched and drafted by the Washington, DC-based Arnold & Porter concerned discrete issues of *Pennsylvania* constitutional law, to which no out-of-state attorney could reasonably argue any special skill or expertise, particularly attorneys that had to seek *pro hac vice* admittance into this jurisdiction in the first place.

Given the objective unreasonableness of the hourly rates submitted by Arnold & Porter, it was an abuse of the District Court's discretion to simply, because it did not wish to engage in mathematic calculation, conjure a Public Interest Law Center and Arnold & Porter "blended rate" out of thin air. *See* Memorandum at 15. Applying the market rates as established by the Public Interest Law Center would result, at the very least, in a nearly 80% reduction in the total amount of fees requested by Arnold & Porter. And that, of course, is assuming no deduction in the number of hours allegedly worked, which, as detailed above, is warranted and required here. The District Court's failure to make appropriate evaluation of the reasonableness of the hours incurred by Appellees' counsel should, at a minimum, require a remand so that the District Court can perform the required evaluations and calculations.

iii. Computer research costs are not recoverable.

Appellees are not entitled to recover their requested costs for Westlaw computer research. Specifically, the District Court awarded Appellees $2,185 in costs allegedly incurred by Arnold & Porter Associate Sara Murphy to conduct "Westlaw Computer Research." *See* Memorandum at 16-17 (App. 18-19). However, the documentation provided by Arnold & Porter does not adequately describe the research performed, nor is it even evident from the documentation that the alleged research had anything to do with preparing the motion to remand. The District Court acknowledged this fact in its Opinion (App. 18): "Defendants are correct that it is entirely unclear from Plaintiffs' documentation whether the Westlaw fees were even incurred in connection with this litigation." Absent sufficient explanation or detail, the request for computer research costs should be denied on this ground alone. *See Borrell v. Bloomsburg Univ.*, 207 F. Supp. 3d 454 (M.D. Pa. 2016) (prevailing parties are generally entitled to recover any reasonable costs associated with litigating their claims, provided that the costs are necessary and properly documented). In light of this fact, it was clearly an abuse of the District Court's discretion to award the Westlaw costs.

Moreover, neither Appellees nor the District Court cited a single case or authority from this Circuit to support their claim of reimbursement for computer research costs. Indeed, the only case cited by Appellees to support their request for

reimbursement is a non-precedential case from the U.S. District Court for the District of Columbia, which is not binding in this Circuit. *See* Motion at 18 (citing *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 97 (D.D.C. 2005)). But, in the *Adolph Coors* case, the District Court specifically noted that it was the practice of the attorneys involved in that case to pass along computer research costs to their clients. *See* 383 F. Supp. 2d at 97.

Here, Arnold & Porter has presented no evidence that it is typical for Arnold & Porter attorneys to pass along the costs of Westlaw computer research to their clients. Absent such evidence, it can be assumed that computer research costs are simply an item of overhead built into an attorney's fee. *See Nugget Distributors Co-op. of Am., Inc. v. Mr. Nugget, Inc.*, 145 F.R.D. 54, 59 (E.D. Pa. 1992) (holding that cost of computer assisted legal research could not be recovered by prevailing parties since cost of legal research, whether manual or computerized, was facet of attorney fee). This is particularly true, where, as here, Arnold & Porter is allegedly billing out a newly-licensed associate at a staggering rate of $445/hr. *See BD v. DeBuono*, 177 F. Supp. 2d 201, 209 (S.D.N.Y. 2001) ("Westlaw fees are simply an item of overhead, and as such should be built into the fees charged, rather than

unbundled and reimbursed separately."). Accordingly, the District Court's award of $2,185.73 in Westlaw computer research costs must be denied.[11]

[11] Appellees also sought to recover the costs for *three* attorneys from Arnold & Porter to travel by train from Washington, DC to Philadelphia to attend the hearing on their motion to remand (App. 396). Senator Scarnati does not dispute whether train travel may be reimbursable, but instead disputes how the fares for each of the three attorneys varies from $290 to $246 to $212, respectively. *See id.* Presumably, all three attorneys from the same law firm and same location traveled together and the three fares should be identical.

VIII. CONCLUSION

For the foregoing reasons, Senator Scarnati respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

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**Application for admission forthcoming*

CERTIFICATE OF SERVICE

On May 29, 2018, I served all parties by filing the foregoing on the Court's ECF filing system.

/s/ Matthew H. Haverstick

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NO. 18-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEAGUE OF WOMEN VOTERS, ET AL.,
Plaintiff-Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Defendant-Appellants

Appeal from the Opinion and Order of the United States District Court
For the Eastern District of Pennsylvania
No. 2:17-cv-05137-MMB

JOINT APPENDIX FILED BY APPELLANT SENATOR JOSEPH B. SCARNATI III, IN HIS OFFICIAL CAPACITY AS THE PRESIDENT PRO TEMPORE OF THE SENATE

VOLUME I (JA1-JA19)

Dated: May 29, 2018

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**Application for admission forthcoming*

VOLUME I

VOLUME 2

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

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

NOTICE OF APPEAL

Notice is hereby given that DEFENDANT JOSEPH B. SCARNATI, III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on April 13, 2018 (Document 29), which granted Plaintiffs' Motion for Counsel Fees and Costs.

Respectfully submitted,

Dated: April 16, 2018

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al. **v.** **THE COMMONWEALTH OF PENNSYLVANIA, et al.**	**CIVIL ACTION** **NO. 17-5137**

ORDER

AND NOW this 13th day of April, 2018, for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that Plaintiffs' Motion for Counsel Fees and Costs (ECF 24) is **GRANTED** and Senator Scarnati shall pay to Plaintiffs counsel fees in the amount of $26,240.00, and costs in the amount of $3,120.02, for a total of $29,360.02, within 14 days.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON
United States District Court Judge

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al. **v.** **THE COMMONWEALTH OF PENNSYLVANIA, et al.**	**CIVIL ACTION** **NO. 17-5137**

MEMORANDUM

Baylson, J. **April 13, 2018**

I. Introduction

Plaintiffs League of Women Voters, et al. seek attorney's fees in the amount of $49,616.50 and costs in the amount of $3,120.02 for Defendant Senator Joseph Scarnati's allegedly improper removal of this case to this Court in a challenge to Pennsylvania's congressional map.

This Court must therefore decide whether Plaintiffs may recover fees and costs related to the removal of this case to federal court, whether the work expended was reasonable (and at what rates), and who, ultimately, should be liable.

II. Brief History of this Litigation

A short chronology of events is appropriate to set the background for the disposition of this issue. This case was filed in the Commonwealth Court of Pennsylvania on June 15, 2017, asserting claims brought exclusively under the Pennsylvania Constitution that Congressional districts in Pennsylvania were improperly "gerrymandered" to favor election of Republican congressmen.

After the case was filed, a judge of the Commonwealth Court entered a stay of proceedings on October 16, 2017. The Pennsylvania Supreme Court, acting on a special writ, vacated the stay

on November 9, 2017 and remanded the matter to the Commonwealth Court for a judge of that court to conduct an evidentiary hearing and make findings of fact by December 31, 2017.

On October 23, 2017, Governor Wolf issued a writ of election to set the date of a special election to fill the then-vacant congressional seat for the Eighteenth District. That writ of election set the date for the special election for March 13, 2018.

On November 14, 2017, Senator Scarnati removed the Commonwealth Court case to this Court. Senator Scarnati sought removal under 28 U.S.C. § 1441, and asserted that the removal was timely under 28 U.S.C. § 1446(b)(3) because it was filed within 30 days of receipt of "an amended pleading, motion, order or other paper" making the case removable. (Removal Pet. ¶¶ 20-22, ECF 1.) Specifically, Senator Scarnati argued that the writ of election, which he claimed was issued by Governor Wolf pursuant to authority conferred by Article I, Section 2, Clause 4 of the U.S. Constitution, was an "order or other paper" "introduc[ing] a new, central federal question squarely into this matter," such that this court possessed federal question jurisdiction. (Id.)

The case was assigned to me as a "related" case to Agre v. Wolf, Civil Action No. 17-4392, a gerrymandering case pending before a three judge court pursuant to 28 U.S.C. § 2284(a). Motions to Remand were filed on November 16, 2017 by Plaintiffs and by Defendant Lieutenant Governor Stack (who had not consented to removal), asserting that the removal was improper, and seeking remand to the Pennsylvania Supreme Court. (Pls.' Mot. to Remand, ECF 2; Stack Mot. to Remand, ECF 5.) That same day, after this Court had scheduled a hearing for 2:00 PM that afternoon, Senator Scarnati filed an "Emergency Motion to Withdraw Notice of Removal" at 1:30 PM seeking remand on the grounds that House Speaker Turzai did not consent to removal. (ECF 9.)

This Court held the hearing as scheduled at 2:00 PM on November 16, 2017, which some of Plaintiffs' counsel had traveled from Washington, DC to attend. Thereafter, the Court entered an order remanding the case to the Pennsylvania Supreme Court with prejudice. (Remand Order, ECF 15.)

At 5:23 PM on November 16, 2017, after the Court entered its order remanding the case, Speaker Turzai docketed a response to the removal motion, to which was attached an e-mail from his counsel to Senator Scarnati's counsel, stating that counsel had not discussed removal under 28 U.S.C. § 1441, but rather under 28 U.S.C. § 1443, which does include a requirement that all defendants consent to removal. (See ECF 21, Def. Turzai's Resp. to Mot. to Withdraw Notice of Removal.)

On November 30, 2017, Plaintiffs filed the instant motion requesting a total of $52,736.52 in fees and costs associated with the removal. (ECF 24.) Senator Scarnati filed a memorandum of law in opposition on December 14, 2017. (ECF 26.) Plaintiffs replied on December 21, 2017. (ECF 27.)

III. Summary of Parties' Arguments

Plaintiffs assert that Senator Scarnati's removal was improper for several reasons and that they are entitled to fees and costs, which Senator Scarnati disputes. It is undisputed that Senator Scarnati removed the state court action pursuant to 28 U.S.C. § 1441, the general statute allowing removal of actions to federal court.

Plaintiffs argue that the removal was procedurally improper under 28 U.S.C. § 1446, which sets a number of procedural requirements for removal, including actions removed under 28 U.S.C. § 1441. (Pls.' Mot. for Fees at 7-14, ECF 24.) Plaintiffs assert that Senator Scarnati did not obtain the consent of all defendants including the "Executive Defendants" (Governor Wolf and

others in the Executive Branch of the Pennsylvania state government) as required by 28 U.S.C. § 1446(b)(2)(A); and the removal was untimely under 28 U.S.C. § 1446(b)(2)(B). As a result, Plaintiffs assert, they are entitled to attorney's fees and costs under 28 U.S.C. § 1447(c), which allows district courts to award costs and fees associated with an improper removal. (Id.) Plaintiffs also assert Senator Scarnati's assertion of federal jurisdiction was frivolous, and that sanctions are warranted under Rule 11 and the Court's "inherent authority." (Id. at 18-20.)

Senator Scarnati responds that he initially had consent from Speaker Turzai to remove to federal court and it was not necessary to obtain the consent of the executive defendants because they were merely "nominal" defendants; the removal was timely; and he raised at least a colorable theory of federal jurisdiction. (Scarnati Opp. to Pls.' Fee Mot. at 4-15, ECF 25.)

Defendants also make a number of arguments to minimize their financial liability, if any:

- Plaintiffs should not be allowed to collect fees for the preparation of their fee motion ("fees on fees")
- Plaintiffs' counsel based in Washington, D.C. should be reimbursed at lower rates prevailing in Philadelphia
- Plaintiffs should not be allowed to charge for the costs of their Westlaw research
- The Court should not hold Senator Scarnati (in his personal capacity) and his lawyer jointly and severally liable

(Id. at 16-27.)

Plaintiffs dispute that Senator Scarnati has any favorable case law support for any of the propositions he advances, and reply that the hours expended were justified by the exigent nature of the pending removal. Plaintiffs further assert that their Washington-based counsel, despite working pro bono, should be compensated at their usual rate because it would have been impossible to engage other counsel on such short notice, and urge this Court to follow Baldus v.

Members of Wisconsin Gov't Accountability Bd., 843 F. Supp. 2d 955 (E.D. Wis. 2012), a redistricting challenge in which a court held counsel for legislative defendants and their law firm jointly and severally liable for plaintiffs' fees and costs in a discovery dispute.

IV. Analysis

28 U.S.C. § 1447 provides that "a[n] order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Id. The Supreme Court recently clarified the standard for an award of attorney's fees when granting remand:

> Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c).

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005) (affirming denial of fees where the plaintiff had waited fifteen months to file a remand motion and did not dispute the reasonableness of the defendant's removal arguments).

The Court finds that the "unusual circumstances" identified in Martin existed in this case, but will address the parties' arguments regarding jurisdiction.

A. Whether an objectively reasonable basis for removal existed

In the present fee petition, the parties dispute whether federal jurisdiction existed in this case, which asserted only questions of state law. Senator Scarnati asserts that federal jurisdiction was proper under Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005)

and Gunn v. Minton, 568 U.S. 251, 258 (2013), which Plaintiffs dispute. Gunn established that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." 568 U.S. at 258. In its opposition to the fee motion, Senator Scarnati identified the federal question as, "Does a writ issued under Article I, Section 2, Clause 4 of the United States Constitution preclude review of a federal congressional map under state law until the special election set by the writ is completed and the congressional seat filled?" (Scarnati Opp. to Pls.' Fee Mot. at 13, ECF 26.)

Plaintiffs assert that the Grable and Gunn factors were not met, and the removal was a transparent attempt to interrupt ongoing state court proceedings in which the state courts would have been interpreting their own state's law. (Pls.' Reply at 12-13, ECF 27.).

1. Consent to Removal

Senator Scarnati's removal stated that Senator Scarnati and Speaker Turzai had consented to removal, that consent from the Pennsylvania General Assembly would soon be forthcoming, and that the consent of the executive branch defendants was not required because they were "nominal parties against whom no real relief was sought." (Removal ¶¶ 26- 27, ECF 1.) The Notice of Removal cited only case law from other jurisdictions, as discussed further below.

Numerous provisions of federal law govern removal to federal court. The most general of these is 28 U.S.C. § 1441, which provides in subsection (a) that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where

such action is pending." 28 U.S.C. § 1441(a). A number of more specialized subsections governing removals follow, including 28 U.S.C. § 1443, which allows civil rights actions pending in state court to be removed in certain circumstances. 28 U.S.C. § 1446, "Procedure for removal of civil actions," requires that "[w]hen a civil action is removed solely under section 1441(a), 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) (emphasis added). Section 1446(b)(3) provides that non-diversity cases, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of 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." 28 U.S.C. § 1446 (b)(3).

In his opposition to the fee motion, Senator Scarnati expanded on his earlier assertion that the executive branch defendants were "nominal" parties who did not need to consent to removal, and for the first time cited Third Circuit precedent in support of that argument. In Johnson v. SmithKline Beecham Corp., 724 F.3d 337 (3d Cir. 2013), relied upon by Senator Scarnati, the Third Circuit stated in a footnote that "[a]lthough removal generally requires 'unanimity among the defendants,' that requirement does not extend to nominal parties." Id. at 359 n.27. Johnson was a diversity personal injury action in which one of the plaintiffs was a Pennsylvania citizen. Id. at 340. The Third Circuit held that a "dissolved corporation" named as a defendant was a "nominal party with no interest in the litigation," and accordingly ignored its citizenship. Id. at 358. In the other Third Circuit case cited by Senator Scarnati, Bumberger v. Ins. Co. of N. Am., 952 F.2d 764 (3d Cir. 1991), also a diversity personal injury action, the Third Circuit vacated the district court's grant of partial summary judgment and its conclusion that the insurer of a company

involved in an auto accident was a nominal party, and remanded for further findings. These cases are hardly comparable to the status of the executive branch defendants, and do not establish that the executive defendants were nominal parties. The cases from other jurisdictions Senator Scarnati cites are of no greater help. See Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002) (international union that did not discipline its local affiliate); S.E.C. v. Cherif, 933 F.2d 403, 414-16 (7th Cir. 1991) (record was unclear in district court as to whether the account holder for the lead defendant in an SEC civil enforcement action was a nominal defendant); Busby v. Capital One, N.A., 932 F. Supp. 2d 114, 130 (D.D.C. 2013) (recorder of deeds found to be a nominal party where she was named as a defendant "only insofar as she…received and recorded" allegedly fraudulent documents).

Whether or not the dispute with Speaker Turzai regarding consent to removal was a simple misunderstanding, Senator Scarnati fails to support his claim that the executive branch defendants were "nominal" parties. Such a position belies the emphasis throughout the removal process of the Governor's role in issuing the writ of election in the Eighteenth Congressional District that Senator Scarnati claimed made the removal timely. Plaintiffs also point to representations by Senator Scarnati in state court proceedings in this very action disputing that the governor was an "indispensable party":

> Governor Wolf offers two related, but flawed, arguments in support of his request to be dismissed from this suit. First, he claims that because the relief sought can be ordered against the government Respondents, he is not an indispensable party who must be named. In support of this claim he cites cases in which plaintiffs sought to invalidate legislation where there was: (i) no requirement that the legislation be redrafted; and (ii) no request—as there is here—to enact a new law in its place. Other than that, he makes virtually no argument as to why he is not an indispensable party. In actuality, the Governor is indispensable to this Petition, because the nature of the claim and relief sought here require his direct participation. Most importantly, the remedy sought in this case (i.e. passage of a

new redistricting law) legally mandates that the Governor sign any new law.

(State Court Ans. to Gov.s' Prelim. Obj. at 2, ECF 2-2) (emphasis added.) Senator Scarnati's position that the executive defendants were indispensable for purposes of state law, and nominal, but not indispensable for purposes of federal law, is blatantly inconsistent. As discussed above, Senator Scarnati cites no factually similar Third Circuit precedent even suggesting that the executive defendants are nominal. Senator Scarnati also ignores the holding of the Third Circuit that when district courts consider remand, "nominal or fraudulently joined parties may be disregarded," but "indispensable parties may not." Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987). As Plaintiffs note, this Court has defined a nominal party to litigation "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) (citation omitted). Plaintiffs' state court complaint plainly names the executive defendants as defendants and requests relief from them in the form of not proceeding with Congressional elections under the 2011 map. (State Court Compl. at 50, ECF 1-3.)

2. Timeliness of the Removal

Moreover, federal jurisdiction did not exist because the removal was untimely. Where an action is not initially removable, a defendant may remove "within 30 days after receipt by the defendant, through service or otherwise, of a copy of 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." 28 U.S.C. § 1446(b)(3) (emphasis added). The state court complaint, filed June 15, 2017, had long since been ongoing by the time of the removal, but Senator Scarnati nonetheless

asserted that the Writ of Election issued by Governor Wolf on October 23, 2017 was an "order or other paper" making removal on November 14, 2017 timely. (Notice of Removal, ECF 1 at 5.) Under existing case law, it was not, and no objectively reasonable basis for jurisdiction therefore existed.

A.S. ex rel. Miller v. SmithKline Beecham Corp., 769 F.3d 204 (3d Cir. 2014), is the lead case in this Circuit on the timeliness of removals made under 28 U.S.C. § 1446(b)(3). In Miller, the plaintiff, a Pennsylvania resident, had tried unsuccessfully early on in the litigation to remove to federal court, but the action was remanded on the basis of lack of diversity. Id. at 207. The plaintiff tried again to remove on the basis of diversity of citizenship shortly after the Third Circuit issued a decision in a different case holding SmithKline Beecham to be a citizen of Delaware—which came down nearly a year and a half after filing the Miller lawsuit in state court. Id. Although the plaintiffs sought removal within 30 days of the issuance of the previous appellate decision, the Third Circuit found Miller's removal untimely. The panel held that the "amended pleading, motion, order or other paper" language in 28 U.S.C. § 1446(b)(3) "only 'address[ed] developments within a case,' and, therefore, court decisions in different cases d[id] not count as an 'order.'" Miller, 769 F.3d at 210 (quoting Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 969 (8th Cir. 2007)). See also Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 266 (5th Cir. 2001) (collecting cases).

In Papp v. Fore-Kast Sales Co., 842 F.3d 805 (3d Cir. 2016), the Third Circuit stated in a footnote that one of the parties "concede[d] that answers to deposition questions 'can constitute "other paper" for purposes of triggering the time for removal under 28 U.S.C. § 1446(b).'" Id. at 816 n.10.

Romulus v. CVS Pharmacy, Inc., 770 F.3d 67 (1st Cir. 2014), is also instructive. Romulus relied on a treatise to support its holding that correspondence between the plaintiff and the defendant concerning damages qualified as an "other paper":

> In general, "[t]he federal courts have given the reference to 'other paper' an expansive construction and have included a wide array of documents within its scope." 14C Wright & Miller, Federal Practice and Procedure § 3731 (4th ed.). As such,
>
> [V]arious discovery documents such as deposition transcripts, answers to interrogatories and requests for admissions, as well as amendments to ad damnum clauses of complaints, and correspondence between the parties and their attorneys or between the attorneys usually are accepted as "other papers," receipt of which can initiate a 30–day period of removability.
> Id. (citations omitted).

Romulus, 770 F.3d at 78.

Thus, the general rule appears to be that courts are lenient about construing documents as "other papers" within the context of specific litigation between parties, but much stricter about removal when the party seeking a federal forum relies on a document outside that particular dispute. See Miller, 769 F.3d at 210; 14C Wright & Miller, Federal Practice and Procedure § 3731 (4th ed.).

In considering the circumstances of this case, the Court will ignore the political considerations that may have been motivating various parties. However, considering a "plain vanilla" review, it is clear, as a matter of law, that legitimate grounds for removal did not exist because the executive branch defendants were not "nominal" and also the removal was untimely.

In making this conclusion, the Court is not stating any opinion on whether there was "colorable" federal jurisdiction precluding this Court from hearing this case based on language in United States Constitution, Article I, Section 4, clause 1. Similarly, this Court will not come to

any conclusion that improper motive or bad faith is involved. Strategic choices about jurisdiction are common in litigation. Gerrymandering, as a Constitutional issue, is a vast territory of legal issues. The United States Supreme Court has yet to hand down any definitive holding on the extent to which gerrymandering violates the United States Constitution, or the power of state courts over Congressional elections.

B. Amount of Fees and Costs

The Court determines that Plaintiffs are entitled to an award of counsel fees and costs. It is clear under established legal principles that Senator Scarnati did not have any reasonable basis to remove this case to this Court.

As subsequent events have developed, the Supreme Court of Pennsylvania entered an order, reversing the decision of Commonwealth Court Judge Brobson that the court did not have the power to correct the allegedly gerrymandered Congressional districts. The Pennsylvania Supreme Court, in several highly publicized decisions, ordered a new map drawn and when the legislature did not do so, itself promulgated a new map which will be in effect for the 2018 Congressional elections in Pennsylvania. League of Women Voters of Pennsylvania v. Commonwealth, 175 A.3d 282, 284 (Pa. 2018) (order announcing forthcoming opinion of the Pennsylvania Supreme Court); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018) (opinion invalidating 2011 congressional map); League of Women Voters v. Commonwealth, No. 159 MM 2017, 2018 WL 936941, at *4 (Pa. Feb. 19, 2018) (adopting its own plan). The United States Supreme Court rejected attempts to reverse these decisions of the Pennsylvania Supreme Court. Turzai v. League of Women Voters of Pennsylvania, No. 17A909, 2018 WL 1372352, at *1 (U.S. Mar. 19, 2018).

1. Amount of Fees

In general, "a prevailing party's attorneys should be compensated based on market rates in the vicinage of the litigation. However, if a prevailing party can show that it required the particular expertise of counsel from another vicinage, or that local counsel were unwilling to take on the litigation, then it will be entitled to compensation based on prevailing rates in the community in which its attorneys practice." Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 699 (3d Cir. 2005).

Plaintiffs argue that the Washington-based lawyers at Arnold & Porter Kaye Scholer ("Arnold & Porter") should be reimbursed at their normal Washington, DC rates, rather than lower rates applicable in Philadelphia:

> Plaintiffs' counsel should be awarded fees at their standard billing rates under the second exception to the "forum rate rule," which applies "when local counsel are unwilling to handle the case." Interfaith Community Organization v. Honeywell Intern., Inc., 426 F.3d 694, 705 (3d Cir. 2005) (citations omitted). Plaintiffs' counsel learned of the removal mid-afternoon on Wednesday and filed the emergency motion to remand within 12 hours. It is obvious that it would have been impossible to secure the services of a local firm to research and brief the remand motion within that time period, much less to do it *pro bono*, like Arnold & Porter. Moreover, the immediate and extraordinary threat posed by the removal left Plaintiffs' counsel with no choice but to immediately respond with available resources.

(Pls.' Reply Br. at 4, ECF 27.)

This Court concludes that Plaintiffs are not entitled a calculation of fees on any basis other than what is appropriate under the prevailing and customary Philadelphia legal fees. The Court does not rely on any cases distinguishing between so-called "chief counsel" and so-called "local counsel." The two firms involved in representing the Plaintiffs from the start, Arnold & Porter and the Public Interest Law Center ("PILCOP"), are both well-known and well-qualified to represent the Plaintiffs in this case. Although the undersigned did not get to observe them in any

detail, the Court has had significant opportunity to become familiar with the outstanding work of the Public Interest Law Center of Philadelphia. The PILCOP attorneys are renowned for taking on difficult cases and achieving excellent results for their clients.[1] Thus, the Court rejects any reliance on differences between so-called "chief counsel" and "local counsel." Whether the work was done by the Arnold & Porter firm or by PILCOP, or jointly, all of the written work in this case in this Court, although very limited because of the eventual agreement by Senator Scarnati to withdraw the removal, was excellent. A good deal of urgent research and preparation of the motion to remand was necessary and deserves compensation.

The Court also agrees with Plaintiffs that this amounted to an "emergency situation." This case is one of tremendous public importance. The removal was filed just as the trial that had been ordered by the Pennsylvania Supreme Court was about to start. Plaintiffs had good and sufficient reasons for wanting this case to remain in the Pennsylvania state court system, and the removal threatened the success of that jurisdictional strategy.[2]

Although the Court has decided to award attorneys' fees and will take into the account the emergency nature of the situation, there was some perhaps unavoidable duplication of effort by the Arnold & Porter and PILCOP lawyers. This is not a critical comment, but rather reflects the urgency of reviewing the law and getting the remand papers filed. Given the understandable urgency with which Plaintiffs' attorneys worked, between the time that the removal was filed, and it being withdrawn some hours later, as this Court was about to embark on a hearing on the Plaintiffs' petition for remand, the time expended and fees requested are probably more than in an

[1] Two of my former law clerks have been attorneys at PILCOP, but are no longer working there.
[2] The undersigned has recognized the historical background of gerrymandering and the judicial treatment of gerrymandering in the United States Supreme Court and lower courts, in a dissenting opinion in Agre v. Wolf, 284 F. Supp. 3d 591, 648-735 (E.D. Pa. 2018). An appeal in pending in the United States Supreme Court.

ordinary case. However, not every hour spent by numerous attorneys in two different locations, working on an important matter, requires 100% compensation from an opposing party even though the merits favor the Plaintiffs.

Counsel for Plaintiffs have submitted voluminous information about their normal hourly rates. Considering the brief period of time that is at issue here, the Court will not engage in complex arithmetic. The Court believes a fair result is to take the total number of hours spent by all attorneys, 82 hours, reduce it by 20% to account for overlap, and apply a blended hourly rate, $400 per hour, which appears to be a fair median hourly rate for the PILCOP lawyers.[3] The Court believes that the resulting award of $26,240.00 is a fair measure of fees to be awarded in this case. As for the claimed expenses, the Court will award all of the expenses which have been documented by Plaintiffs' counsel, including the Westlaw research costs, totaling $3,120.02.

a. Whether time to prepare the fee petition is itself compensable

The above calculation includes time spent preparing the fee petition. Plaintiffs cite a number of district court cases outside this Circuit in which the court has awarded fees for litigating a fee petition under 28 U.S.C. § 1447(c) have been found to be compensable. See, e.g., MFC Twin Builders LLC v. Farjado, 2012 WL 3862399, at *8 (E.D. Cal. 2012); Yazdani v. Access ATM, 474 F. Supp. 2d 134, 137-38 (D.D.C. 2007); Albion Pacific Property Resources, LLC v. Seligman, 329 F. Supp. 2d 1163, 1175 (N.D. Cal. 2004). Neither this Court nor the Third Circuit has squarely addressed whether time spent preparing § 1447(c) fee petitions is compensable. However, it has allowed "fees on fees" in civil rights cases; without fees on fees, "the attorney's fee to which he or she is entitled by law is in fact diminished." Hernandez v. Kalinowski, 146

[3] As a pro bono law firm, PILCOP has some, but not extensive, opportunities to calculate the appropriate hourly rate which it would use for fee petitions such as this.

F.3d 196, 199 (3d Cir. 1998). The court continued with an example:

> For example, assume a plaintiff succeeds on the merits of a civil rights claim and, in doing so, incurs $10,000 in "direct and reasonable" costs and attorney's fees. That fee represents the attorney's time expended. Further assume that the plaintiff's attorney is forced to spend an additional $2000 in time to compel the defendant to pay the $10,000 costs and fees owed. If the plaintiff is not allowed to recover the "fees on fees," the plaintiff would not receive the $2000 to pay the attorney. In the case of an impecunious plaintiff, as most prisoners are, the end result would be that the attorney would in fact receive a fee based on time that is less than that authorized by law.

Id. Defendants try to distinguish this case as purely a civil rights case, but the mathematical point holds: only if a court awards fees on fees can a party truly be made whole for the time and costs incurred by their attorneys.

b. Westlaw

Plaintiffs, who request $2,185 in Westlaw fees, are correct that Westlaw fees are compensable in Third Circuit. In 1980, the Third Circuit held that "[u]se of computer-aided legal research such as LEXIS, or WESTLAW, or similar systems, is certainly reasonable, if not essential, in contemporary legal practice." Wehr v. Burroughs Corp., 619 F.2d 276, 285 (3d Cir. 1980). However, the court cautioned that "the amount of use must be reasonable in order to be allowed." Id. Plaintiffs assert in their opening brief that Westlaw fees are regularly passed on to clients. (Pls.' Br. at 18.)

Defendants are correct that it is entirely unclear from Plaintiffs' documentation whether the Westlaw fees were even incurred in connection with this litigation. (See Arnold & Porter Kaye Scholer LLP Costs, ECF 24-3). Plaintiffs do not contest this in their reply brief. The narrative for the largest single entry of Westlaw charges on November 15, 2017 (the day before oral argument) by associate Sara Murphy is "Westlaw Computer Research by ROBINSON JOHN

MULTI-SEARCH TIME CLASS." (Id.) No attorney named John Robinson appeared in this case, and it is unclear who this is. However, this description of the Westlaw research appears immediately below a lengthy description of the tasks undertaken by the various attorneys, including the precise topics Ms. Murphy researched. The Court finds that the Westlaw research was reasonable.

V. Who Should Be Responsible for Payment of These Fees and Costs

Under all the circumstances, the Court finds that Senator Scarnati should personally be liable for these fees and costs. The Court has not located any federal law authority as to whether Senator Scarnati may be reimbursed.

VI. Conclusion

For the reasons stated above, the Court will make an award of counsel fees and costs to PILCOP. See attached order.

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NO. 18-1838

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEAGUE OF WOMEN VOTERS, ET AL.,
Plaintiff-Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Defendant-Appellants

Appeal from the Opinion and Order of the United States District Court
For the Eastern District of Pennsylvania
No. 2:17-cv-05137-MMB

JOINT APPENDIX FILED BY APPELLANT SENATOR JOSEPH B. SCARNATI III, IN HIS OFFICIAL CAPACITY AS THE PRESIDENT PRO TEMPORE OF THE SENATE

VOLUME II (JA20-JA450)

Dated: May 29, 2018

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**Application for admission forthcoming*

VOLUME I

VOLUME 2

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*, v. 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. _____

NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA:

Defendant Joseph B. Scarnati III, in his capacity as Pennsylvania Senate President Pro Tempore ("Senator Scarnati"), by his respective undersigned counsel and reserving all defenses

and objections, hereby gives notice under 28 U.S.C. §§ 1441 and 1446 of the removal to the United States District Court for the Eastern District of Pennsylvania of the above-captioned action pending against him in the Supreme Court of Pennsylvania. In support of this removal, Senator Scarnati states as follows:

I. PROCEDURAL HISTORY AND PLAINTIFFS' ALLEGATIONS

1. On June 15, 2017, Plaintiffs commenced an action in the Commonwealth Court of Pennsylvania by filing a Petition for Review (Exhibit A), docketed at 261 MD 2017.

2. In the Petition, Plaintiffs alleged that the congressional redistricting plan drafted and adopted by General Assembly and other Defendants in 2011 violated the Pennsylvania Constitution. By way of relief, Plaintiffs request, *inter alia*, that those districts be struck down and redrawn.

3. On October 11, 2017—while the Petition was still pending in the Commonwealth Court—Plaintiffs filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court ("the Application") (Exhibit B), docketed at 159 MM 2017, asking the Court to assume plenary jurisdiction over the Commonwealth Court matter.

4. After Plaintiffs filed the Application, but before the Pennsylvania Supreme Court acted on it, on October 21, 2017, the Honorable Tim Murphy resigned his seat in Congress as the Representative of the 18th Congressional District in Pennsylvania.

5. Rep. Murphy's resignation created a vacancy in Pennsylvania's U.S. congressional representation.

6. In consequence, on October 23, 2017, under his mandate under the United States Constitution, the United States Code, and Pennsylvania law, *see* U.S. Const. art. I, § 2, cl. 4; 2 U.S.C. § 8(a); 25 P.S. § 2777, Pennsylvania Governor Thomas Wolf issued a Writ of Election

setting a special election for March 13, 2018 to fill the vacancy created in the 18th Congressional District (Exhibit C).[1]

7. On November 9, 2017, the Supreme Court of Pennsylvania issued an Order (the "Order") (Exhibit D) granting the Application, assuming plenary jurisdiction over the matters set forth in the Application, and directing the President Judge of the Commonwealth Court of Pennsylvania to designate a judge of that court to administer the case "[u]nder the continuing supervision" of the Supreme Court's plenary jurisdiction.

8. The Order further instructed the Commonwealth Court to expedite the matter and have the specially-designated judge file findings of facts and conclusions of law with the Prothonotary of the Supreme Court of Pennsylvania no later than December 31, 2017.

9. As of the date of this filing, no party has yet filed an answer to the Petition for Review.

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[1] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. Const. art. I, § 2, cl. 4.

"Except as provided in subsection (b), the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." 2 U.S.C. § 8(a).

"Whenever a vacancy shall occur or exist in the office of Representative in Congress from this State during a session of Congress, or whenever such vacancy shall occur or exist at a time when the members of Congress shall be required to meet at any time previous to the next general election, the Governor shall issue, within ten days after the happening of said vacancy, or after the calling of an extraordinary session of Congress during the existence of said vacancy, a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held on a date named in said writ, which shall not be less than sixty (60) days after the issuance of said writ. In all other cases no such special election to fill said vacancy shall be held. The Governor may fix, in such writ of election, the date of the next ensuing primary or municipal election as the date for holding any such special election." 25 P.S. § 2777.

II. JURISDICTION

10. Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

12. Under 28 U.S.C. § 1441, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

13. Article I, Section 2 of the United States Constitution provides that "[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. Const. art. I, § 2, cl. 4.

14. This provision of the United States Constitution has been interpreted as a constitutional mandate that requires the relevant governor to timely issue such a writ. *See Jackson v. Ogilvie*, 426 F.2d 1333, 1336-37 (7th Cir. 1970).

15. Additionally, the United States Code sets forth guidelines on filling vacancies in Congress, incorporating directives of state law. *See* 2 U.S.C. § 8(a); *see also* 25 P.S. § 2777.

16. The mandate of Article I, Section 2 was completed by Governor Wolf on October 23, 2017 with the filing of his Writ of Election to fill the vacated seat in Congress for the 18th Congressional District.

17. In consequence, an election is already *in progress* to fill the 18th Congressional seat; indeed, over the weekend, Pennsylvania Republicans picked State Representative Rick Saccone to stand as the Republican nominee for the March 13, 2018 special election.

18. Because the special election currently underway to fill the vacancy created in the 18th Congressional District was set in accordance with the dictates of Article I, Section 2 of the United States Constitution as well as the United States Code, the relief Plaintiffs seek cannot be granted without resolving a substantial question of federal law. That question, specifically, is 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.

19. Based on the expedited deadline set by the Pennsylvania Supreme Court with the Order (demanding that findings of fact and conclusions of law be submitted by the Commonwealth Court by December 31, 2017), resolution of the pending state court matter will necessarily require resolution of the substantial federal question stated above, since resolution of the matter will seemingly occur before the March 2018 special election set by the Governor's constitutional writ.

20. Under 28 U.S.C. § 1446, if a case is not removable at its inception, but a subsequent "pleading, motion, order or other paper" has the effect of bringing the action within the ambit of federal jurisdiction, removal may be filed within 30 days after receipt of such pleading, motion, order or other paper. 28 U.S.C. § 1446(b)(3).

21. Here, the Writ of Election issued by Governor Wolf on October 23, 2017 is an "order or other paper" as contemplated by 28 U.S.C. § 1446 that, for the first time, introduced a new, central federal question squarely into this matter, as set forth above. Moreover, the November 9, 2017 Order of the Pennsylvania Supreme Court makes clear that the substantial

federal question now involved must be addressed before the pending state court matter can be resolved.[2] This dynamic, for the first time, created federal question jurisdiction.

22. This Notice of Removal is filed within 30 days of the "order or other paper" and, accordingly, this removal is timely. *See* 28 U.S.C. § 1446.

III. OTHER PROCEDURAL REQUIREMENTS

23. This Notice meets all of the other procedural requirements of 28 U.S.C. § 1446.

24. *First*, under 28 U.S.C. § 1446(b)(2)(A), all defendants who have been "properly" joined and served must consent to a removal; as of the date of this Notice, Senator Scarnati has the consent of Defendants the General Assembly of Pennsylvania and State Representative Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives (collectively, "the General Assembly Defendants").

25. Upon information and belief, the General Assembly Defendants will be filing written notice of their consent to removal with the Court in the coming days.

26. The consent required under 28 U.S.C. § 1446(b) does *not* require the consent of *every* defendant, *see generally* 28 U.S.C. § 1446(b)(2)(A) (requiring only consent of defendants "properly" joined), and, as such, does not require the consent of so-called "nominal defendants." Nominal defendants include those "against whom no real relief is sought." *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002). Furthermore, "[p]arties are not 'real' when they are joined 'only as the designated performer of a ministerial act,' or have no

[2] Furthermore, the expedited deadline set by the Pennsylvania Supreme Court coupled with the expedited deadline already established by this Court in one of the two pending related claims, challenging Pennsylvania's 2011 congressional districts, *see Agre v. Wolf*, 17-CV-4392, creates the real possibility of a due process violation by compelling the same parties in multiple matters to resolve the same substantial federal issues in a compressed fashion.

'control of, impact on, or stake in the controversy.'" *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 130 (D.D.C. 2013) (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92, (2005))).

27. Against the foregoing, the consent of the Commonwealth of Pennsylvania, Governor Wolf, Lieutenant Governor Michael Stack, Acting Secretary of the Commonwealth Robert Torres, and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan Marks is not required, as they are nominal parties against whom no real relief is sought.

28. *Second*, because Plaintiffs filed the Application in the Pennsylvania Supreme Court's middle district, which encompasses the counties set forth in the margin,[3] this case is being appropriately removed to the United States District Court for the Eastern District of Pennsylvania since this is a federal district encompassing the division within which the state court matter is pending. *See* 28 U.S.C. § 1441(a).

WHEREFORE, Senator Scarnati hereby removes this action from the Supreme Court of Pennsylvania to the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441 and 1446.

[3] Counties included in the Pennsylvania Supreme Court's middle district are: Adams, Berks, Bradford, Bucks, Carbon, Centre, Chester, Clinton, Columbia, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Montgomery, Montour, Monroe, Northampton, Northumberland, Perry, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, York. *See* County Map by Regions, United Judicial System of Pennsylvania, *available at*: http://www.pacourts.us/assets/files/setting-3563/file-3267.pdf?cb=20710f.

Respectfully submitted,

Dated: November 14, 2017

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JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.

(b) County of Residence of First Listed Plaintiff N/A
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Benjamin Geffen
Public Interst Law Center, 1709 Benjamin Franklin pkwy., Flr. 2
Philadelphia, PA 19103; (267) 546-1308

DEFENDANTS
COMMONWEALTH OF PENNSYLVANIA, ET AL.

County of Residence of First Listed Defendant N/A
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
For Senator Joseph B. Scarnati III: Matthew H. Haverstick
Kleinbard LLC, One Liberty Place, 46th Flr., 1650 Market Street
Philadelphia, PA 19103; (215) 496-7225

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*
- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*
Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☒ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*
☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. 1441
Brief description of cause:
Challenges to Pennsylvania's congressional districts

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions):*
JUDGE Baylson (EDPa) DOCKET NUMBER 17-cv-4392; 17-cv-5054

DATE
11/14/2017

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: Suite 1600, 700 Louisiana Street, Houston TX 77002

Address of Defendant: 1650 Market Street, 46th Floor, Philadelphia, PA 19102

Place of Accident, Incident or Transaction: _____

(*Use Reverse Side For Additional Space*)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?

(Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes☐ No☑

Does this case involve multidistrict litigation possibilities? Yes☐ No☑

RELATED CASE, IF ANY:

Case Number: 17-cv-4392 Judge Baylson Date Terminated: Ongoing

17-cv-5054

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes☐ No☑
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes☑ No☐
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes☐ No☑
4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? Yes☐ No☑

CIVIL: (Place ✔ in ONE CATEGORY ONLY)

A. *Federal Question Cases*:

1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act-Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☑ All other Federal Question Cases

(Please specify) Voting

B. *Diversity Jurisdiction Cases*:

1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability — Asbestos
9. ☐ All other Diversity Cases

(Please specify) _____

ARBITRATION CERTIFICATION

(*Check Appropriate Category*)

I, Matthew H. Haverstick, counsel of record do hereby certify:

☐ Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000.00 exclusive of interest and costs;

☒ Relief other than monetary damages is sought.

DATE: 11/14/2017 _____ Attorney-at-Law 85072 Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 11/14/2017 _____ Attorney-at-Law 85072 Attorney I.D.#

CIV. 609 (5/2012)

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

CASE MANAGEMENT TRACK DESIGNATION FORM

	:	CIVIL ACTION
v.	:	
	:	NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ( )

(b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ( )

(c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ( )

(d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ( )

(e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ( )

(f) Standard Management – Cases that do not fall into any one of the other tracks. (X)

11/14/2017		Defendant Joseph B. Scarnati
Date	**Attorney-at-law**	**Attorney for**
215-496-7225	215-568-0140	mhaverstick@kleinbard.com
Telephone	**FAX Number**	**E-Mail Address**

(Civ. 660) 10/02

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant's foregoing Notice of Removal has been served, via first-class mail, postage prepaid, upon the following counsel on the date set forth below:

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Case 2:17-cv-05137-MMB Document 51-2 Filed 11/14/17 Page 4 of 5

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Matthew H. Haverstick

Dated: November 14, 2017

EXHIBIT "A"

Received 6/15/2017 10:25:11 AM Commonwealth Court of Pennsylvania

Filed 6/15/2017 10:25:00 AM Commonwealth Court
261 MD 2017

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.

No.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notification. Ademas, la corte puede decider a favor del demandante y require que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado immediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal sevicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede consequir alstencia legal.

Colegio de Abogados de Condado de Dauphin
Abogado Servicio de Referencia
213 North Front Street
Harrisburg, PA 17101
(717) 232-75

David P. Gersch
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Counsel for Petitioners; Additional Counsel Appear on Signature Page

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.

No.

TO:

Commonwealth of Pennsylvania
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Pennsylvania General Assembly
c/o Senator Joseph B. Scarnati III
Senate President Pro Tempore
Senate Box 203025
Harrisburg, PA 17120-3025
Room: 292 Main Capitol Building
c/o Representative Michael C. Turzai
Speaker of the House
139 Main Capitol Building
PO Box 202028
Harrisburg, PA 17120-2028

Governor Thomas W. Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120

Lieutenant Governor Michael J. Stack III
President of the Senate
200 Main Capitol Building
Harrisburg, Pennsylvania 17120

Representative Michael C. Turzai
Speaker of the House
139 Main Capitol
PO Box 202028
Harrisburg, PA 17120-2028

Senator Joseph B. Scarnati III
Senate President Pro Tempore
Senate Box 203025
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Room: 292 Main Capitol

Secretary Pedro A. Cortés
Pennsylvania Department of State
Office of the Secretary
302 North Office Building
Harrisburg, PA 17120

Commissioner Jonathan M. Marks
Pennsylvania Department of State
Bureau of Commissions, Elections and Legislation
210 North Office Building, 401 North Street
Harrisburg, PA 17120

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

BY: */s/ Mary M. McKenzie*

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Attorney ID No. 47434
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

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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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.

No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

1. This case is about one of the greatest threats to American democracy today: partisan gerrymandering. A partisan gerrymander occurs when the political party in control of redistricting redraws congressional or state legislative districts to entrench that party in power and prevent voters affiliated with the minority party from electing candidates of their choice. The result is that general election outcomes are rigged—they are predetermined by partisan actors sitting behind a computer, not by the candidates, and not by the voters.

2. This practice is illegal and has been condemned by the Supreme Courts of the United States and the Commonwealth of Pennsylvania. The U.S. Supreme Court has explained that "[p]artisan gerrymanders . . . are incompatible with democratic principles." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alterations omitted). The Pennsylvania Supreme Court has written that a partisan gerrymander would violate the Pennsylvania Constitution when "there was intentional discrimination against an identifiable political group" that resulted in "an actual discriminatory effect on that group." *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). A partisan gerrymander "burdens rights of fair and effective representation" by enabling one political party to entrench itself in power while diluting the votes of citizens who affiliate with the

party out of power. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

3. While neither political party has a monopoly on the practice, this case challenges the partisan gerrymandering of the Commonwealth's current congressional districts by the Republican majority in the Pennsylvania General Assembly. Following the 2010 Census, Republican legislators dismantled Pennsylvania's existing congressional districts and stitched them back together with the goal of maximizing the political advantage of Republican voters and minimizing the representational rights of Democratic voters. According to the Brennan Center for Justice, the districting plan that resulted (the "2011 Plan"), which was signed into law by the Republican then-Governor, is one of the three most "extreme" gerrymanders in the nation.[1] Indeed, by some measures, Pennsylvania's gerrymander is the "worst offender" in the country.[2]

4. The 2011 Plan was the product of a national movement by the Republican Party to entrench its own representatives in power by utilizing the latest advances in mapmaking technologies and big data to gerrymander districts more effectively than ever before. Republican mapmakers used sophisticated

[1] Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice, at 1 (2017), *available at* https://www.brennancenter.org/publication/extreme-maps.

[2] *Id.* at 9.

computer modeling techniques, in Pennsylvania and elsewhere, to manipulate district boundaries with surgical precision to maximize the number of seats their party would win in future elections.

5. And their effort has been overwhelmingly successful. In 2012, Republican candidates won only 49% of the statewide congressional vote, but remarkably won 13 of 18—or 72%—of Pennsylvania's congressional seats. In 2014 and 2016, Republican candidates retained the same 72% share of Pennsylvania's seats, even while winning only 55% and 54% shares of the statewide vote.

6. The 2011 Plan achieved these lopsided results by "packing" Democratic voters into five districts that are overwhelmingly Democratic, and "cracking" the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. The result is a districting plan that is utterly unresponsive to—and often flouts—the will of voters. For example, even though Democratic candidates won 6 points more in the statewide vote in 2012 compared to 2014, the number of Democrats elected was no different across the two elections.

7. The composition of the enacted districts reflects how the Republicans responsible for redistricting achieved this partisan result. For example, the city of Reading—a Democratic stronghold—was carved out of the 6th Congressional

District, where it would naturally reside, and placed into the 16th District, where Republicans made up the majority. Similarly, in the 17th District, the Democratic-leaning cities of Scranton (in Lackawanna County), Wilkes-Barre (in Luzerne County), and Easton (in Northampton County) were packed into a district that was already reliably Democratic, removing any risk that Wilkes-Barre voters (who would reside in the 11th District if county boundaries were respected) would tilt the 11th District to Democrats. And in the 7th District, portions of the city of Chester were carved out by packing these voters into the reliably Democratic 1st District.

8. As illustrated infra at Paragraphs 55-59, these decisions resulted in district lines that are absurd. Pennsylvania's 7th Congressional District has been described as "Goofy Kicking Donald Duck."[3] The 12th District could be mistaken for the boot of Italy. The 6th resembles the State of Florida, with perhaps a longer and more jagged Panhandle. These shapes lay bare the lengths that Republicans went to deny Petitioners and millions of other voters their constitutional rights and to lock in an artificial political advantage for Republicans.

[3] Aaron Blake, *Name That District Contest Winner: 'Goofy Kicking Donald Duck'*, Wash. Post, Dec. 29, 2011, https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html?utm_term=.a7863a1c4f3a.

9. While the districts are so bizarrely engineered that the only fair inference is that the Republican mapmakers made them so for partisan advantage, this partisan purpose is confirmed by an array of statistical techniques. Indeed, just as modern technology enabled Republicans to accomplish their gerrymander with more precision than ever before, it can be used to expose this discrimination for what it is. Computer modeling used by political scientists demonstrates that the Republican bias of the enacted plan could not have resulted from the use of traditional redistricting criteria such as contiguity and compactness, and cannot be explained by any natural clustering of voters in Pennsylvania. Rather, it is a statistical certainty that the Republican bias of the enacted plan could have resulted *only* from impermissible partisan intent.

10. Other statistical tests further confirm that the enacted plan reflects a deliberate and successful effort to disadvantage Democratic voters. The "efficiency gap," which a three-judge panel recently applied in striking down Wisconsin's state house districts, measures how many votes the enacted plan "wastes" for the disfavored party, relative to the favored party, through cracking and packing. *See generally Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *jurisdictional statement filed* (U.S. Mar. 24, 2017) (No. 16-1161). In 2012, the efficiency gap of Pennsylvania's congressional districts was *the largest* in the nation. Another test for identifying political gerrymandering is the "mean-median

gap," which measures the gap between the average Democratic vote share across the Commonwealth and Democratic vote share in the median district, *i.e.*, the district either party would need to win to earn a majority of districts. Again, Pennsylvania's mean-median gap is one of the largest in the nation, reflecting the deliberate effort to maximize the number of seats Republicans win by packing Democrats into a few districts.

11. A variety of statistical modeling techniques and tests all lead to the same conclusion: the enacted plan could have resulted only from unconstitutional partisan intent, and the effect of that discrimination is significant and enduring.

12. Along with other forms of equitable relief, Petitioners seek a judicial declaration that the enacted plan, by discriminating against Democratic voters on the basis of their political expression and affiliation, violates the Pennsylvania Constitution.

PARTIES

A. Petitioners

13. The League of Women Voters of Pennsylvania ("LWVPA"), a nonpartisan political organization, encourages the informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League supports full voting and representational rights for all eligible

Commonwealth citizens and opposes efforts to disadvantage or burden voters based on their political affiliation.

14. Petitioner Carmen Febo San Miguel is an Executive Director of a non-profit cultural organization and a former physician who resides in the 1st Congressional District in Philadelphia. Febo San Miguel is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 1st District under the 2011 Plan with over 80% of the vote, at times with the Democratic candidate running unopposed.

15. Petitioner James Solomon is a retired federal employee who resides in Philadelphia in the 2nd Congressional District. Solomon is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 2nd District since 2002 with over 85% of the vote.

16. Petitioner John Greiner is a software engineer who resides in the 3rd Congressional District, in Erie, Erie County. Greiner is a registered Democrat and has consistently voted for Democratic candidates for Congress. Before the 2011 Plan, the 3rd District was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But the Republican representative, Mike Kelly, has comfortably won reelection in every election since the 2011 Plan, running unopposed in 2016.

17. Petitioner John Capowski is a law professor emeritus residing in Camp Hill, Cumberland County, in the 4th Congressional District. Capowski is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 4th District was a competitive district: Republicans won in 2002 and 2004, and Democrats won in 2006, 2008, and 2010. But the Republican representative, Scott Perry, has easily won reelection in every election since the 2011 Plan.

18. Petitioner Gretchen Brandt is a mother of two and a school board director residing in the 5th Congressional District, in State College, Centre County. Brandt is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 5th District since 2002.

19. Petitioner Thomas Rentschler is a former school teacher and attorney who resides in Exeter Township, Berks County, which falls in the 6th Congressional District. Rentschler is a registered Democrat who has consistently voted for Democratic candidates for Congress. The 6th District had been an extremely competitive district under the prior congressional plan, with 4 of the 5 congressional elections decided by less than 5 points. But the 6th district has been far less competitive under the 2011 Plan, with the Republican representative winning each election by more than 12 points.

20. Petitioner Mary Elizabeth Lawn is a chaplain at a retirement community who lives in Chester, Delaware County. Lawn is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Lawn's home fell in the 1st Congressional District, which has consistently elected Democrats. But under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

21. Petitioner Lisa Isaacs is an attorney who resides in the 8th Congressional District in Morrisville, Bucks County. Isaacs is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 8th District was a competitive district: Republicans won in 2002, 2004, and 2010, while Democrats won in 2006 and 2008. Under the 2011 Plan, however, Republican candidates have won by 8 points or more in each election.

22. Petitioner Don Lancaster is a retired teacher who resides in Indiana County, in the 9th Congressional District. Lancaster is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 9th District since 2002 with more than 60% of the vote.

23. Petitioner Jordi Comas is an academic and chef residing in Lewisburg, Union County. Comas is a registered Democrat in Pennsylvania's 10th Congressional District who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 10th District was often a competitive district: Republicans won in 2002, 2004, and 2010, and Democrats won in 2006 and 2008. But the Republican representative, Tom Marino, easily won election in 2012 with over 65% of the vote and has been comfortably reelected ever since.

24. Petitioner Robert Smith, a retired health executive, resides in Bear Creek Village Borough, Luzerne County, in the 11th Congressional District. Smith is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 11th District was often a competitive district: Democrats won in 2002, 2004, 2006 and 2008, but were unseated in 2010 when a Republican, Lou Barletta, defeated the Democratic incumbent. Since the 2011 Plan, Lou Barletta has comfortably won reelection with about 60% of the vote.

25. Petitioner William Marx is a high school civics teacher and Army Reservist residing in Delmont, Westmoreland County, which falls in the 12th Congressional District. Marx is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Democrats won every congressional election in the 12th District since 2002, often winning over 60

percent of the vote. Since redistricting, Republicans have won every election, winning by more than 18 points in the last two elections.

26. Petitioner Richard Mantell is a retired school administrator residing in Jenkintown, Montgomery County, which sits in the 13th Congressional District. Mantell is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, elections in the 13th District were generally competitive, with Democrats winning each election but with less than 60% of the vote in three out of five elections. But after Democratic voters were packed into the district under the 2011 Plan, Democrats won easily in 2012 and 2014 and ran unopposed in the 2016 election.

27. Petitioner Priscilla McNulty is a manager at a non-profit who resides in the 14th Congressional District in Pittsburgh, Allegheny County. McNulty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have easily won every congressional election in the 14th District since 2002.

28. Petitioner Thomas Ulrich is a retired school teacher who resides in Bethlehem, Lehigh County, falling in the 15th Congressional District. Ulrich is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 15th District since 2002.

29. Petitioner Robert B. McKinstry, Jr. is an environmental attorney who resides in East Marlborough Township, Chester County, in the 16th Congressional District. McKinstry is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 16th District since 2002.

30. Petitioner Mark Lichty is a retired attorney and manufacturer who resides in East Stroudsburg, Monroe County, in the 17th Congressional District. Lichty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 17th District since 2002.

31. Petitioner Lorraine Petrosky is a retired preschool teacher who resides in the 18th Congressional District in Latrobe, Westmoreland County. Petrosky is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 18th District since 2002, almost always with more than 60% of the vote.

B. Respondents

32. Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.

33. Respondent the Pennsylvania General Assembly is the state legislature for the Commonwealth of Pennsylvania and is comprised of the State

House and State Senate. The General Assembly convenes in the State Capitol building in Harrisburg, Pennsylvania.

34. In Pennsylvania, the boundaries for congressional districts are redrawn every ten years after the national census by legislative action in a bill that proceeds through both chambers of the General Assembly and is signed into law by the Governor. In 2011, Republicans controlled every step of that process. Most of the Respondents named below were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek.

35. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity only. As Governor, Respondent Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan.

36. Respondent Pedro A. Cortés is the Secretary of the Commonwealth and is sued in his official capacity only. In that capacity, he is charged with the general supervision and administration of Pennsylvania's elections and election laws.

37. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State and is sued in his official capacity only. In that capacity, he is charged with the

supervision and administration of the Commonwealth's elections and electoral process.

38. Respondent Michael J. Stack III, the Lieutenant Governor of the Commonwealth, serves as President of the Pennsylvania Senate and is sued in his official capacity only.

39. Respondent Michael C. Turzai is the Speaker of the Pennsylvania House of Representatives and is sued in his official capacity only.

40. Respondent Joseph B. Scarnati III is the Pennsylvania Senate President Pro Tempore and is sued in his official capacity only.

JURISDICTION

41. The Court has original jurisdiction over this Verified Petition for Review pursuant to 42 Pa. Cons. Stat. § 761(a).

FACTUAL ALLEGATIONS

A. National Republican Party Officials Target Pennsylvania For Partisan Gerrymandering

42. In the years leading up to the 2010 census, national Republicans leaders undertook a concerted effort to gain control of state governments in critical swing states such as Pennsylvania. The Republican State Leadership Committee (RSLC) codenamed their plan "the REDistricting Majority Project," or "REDMAP." REDMAP's goal was to "control[] the redistricting process in . . .

states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn."[4]

43. The RSLC intended that this project would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[5] The REDMAP homepage explains that "Republicans [had] an opportunity to create 20-25 new Republican Congressional Districts through the redistricting process. . . , solidifying a Republican House majority."[6]

44. Pennsylvania was a key REDMAP "target state." As the second most populous swing state in the nation, Pennsylvania currently holds 18 seats in the U.S. House of Representatives. Pennsylvania is also one of only a handful of states that has consistently lost seats in the U.S. House of Representatives every ten years through reapportionment, having lost at least one House seat every ten years since 1920. These features of Pennsylvania's political landscape make it a prime target for partisan gerrymandering.

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[4] *2012 REDMAP Summary Report*, Redistricting Majority Project (Jan. 4, 2013), http://www.redistrictingmajorityproject.com/?p=646.

[5] *Id.*

[6] Redistricting Majority Project, http://www.redistrictingmajorityproject.com/ (last visited June 9, 2017).

45. Heading into the November 2010 election, Democrats held the Pennsylvania House by a slim margin. The RSLC focused its resources on Pennsylvania in the 2010 election, targeting and winning three key house races that would swing control of the Pennsylvania House to Republicans. During that same election, Republicans also won the governorship, while retaining control of the Pennsylvania Senate. Thus, after the 2010 election, Republicans had exclusive control over congressional redistricting in Pennsylvania. The Republicans quickly set to work to redraw the congressional map in a way that would entrench the Republican Party's dominance in Pennsylvania's delegation to the U.S. House for the next decade.

46. On information and belief, Republicans, including key members of the Pennsylvania Senate and House Committees on State Government, communicated with Republican leaders in Washington, D.C. and elsewhere to create a plan that would maximize the number of Republicans elected to the U.S. House.

47. Mapmakers seeking to create a partisan gerrymander do so primarily through two means—"cracking" and "packing" voters of the opposing political party into congressional districts that will dilute their political power. "Cracking" is achieved by dividing a party's supporters among multiple districts so that they fall short of a majority in each district. "Packing" involves concentrating one

party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere. This cracking and packing results in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing).

48. Republicans worked with highly skilled and partisan mapmakers to generate the most advantageous possible map for the Republican Party. Using sophisticated computer software and data such as voter registration information and election results, the Republicans' mapmakers created a plan that virtually guaranteed the Republican Party would win in the large majority of Pennsylvania's congressional districts. Their entire aim was to burden the representational rights of Democratic voters, making it nearly impossible for Democrats in cracked districts to elect representative of their choice, and wasting the votes of Democrats in packed districts.

49. Democrats were not involved in the drawing of the map. The Republican mapmakers created the 2011 Plan through a secret process to avoid scrutiny from Democrats and the general public.

C. Republicans Introduce Senate Bill 1249

50. On September 14, 2011, Republicans introduced their redistricting bill, Senate Bill 1249. The bill's primary sponsors were all Republicans: Majority

Floor Leader Dominic F. Pileggi, President Pro Tempore Joseph B. Scarnati III, and Senator Charles T. McIlhinney Jr. The Republican leadership went to extraordinary lengths to conceal their intent.

51. As introduced, Bill 1249 was simply an empty shell. It contained no map showing the proposed congressional districts. Each congressional district was described in the following fashion: "The [Number] District is composed of a portion of this Commonwealth." The same held true through the second reading of the bill. This was a deliberate effort on the part of the Republicans to prevent Democrats and the public from understanding the nature of the Republicans' redistricting plan.

52. Then, three months after they had introduced SB 1249, on the morning of December 14, 2011—the day of the vote on the bill—the Republicans suddenly amended the bill to add for the first time the actual descriptions of the congressional districts. Once the details of the plan were released, it became clear why the Republicans had kept it a secret.

53. As explained below, SB 1249 represented, by any measure, one of the most extreme partisan gerrymanders in American history. One of Pennsylvania's leading political scientists, Franklin & Marshall political science professor Terry Madonna, described it as "[t]he most gerrymandered map [he had] seen in the

modern history of our state."[7] Even Sean Trende, who testified in defense of Wisconsin's gerrymandered map in *Whitford v. Gill*, suggests that Pennsylvania's map might be "the Gerrymander of the Decade."[8]

54. To accomplish their gerrymander, Republicans "packed" Democrats into "a group of Rorschach-inkblot districts,"[9] and then "cracked" the rest into districts that would vote reliably Republican. Michael Barone and Chuck McCutcheon, writing for *The Almanac of American Politics*, described the plan as follows:

> The plan ruthlessly sewed the state, particular the Philadelphia suburbs, into a crazy quilt. Montgomery County, about the population of one district, was split five ways to boost the suburban Republican trio of Jim Gerlach, Mike Fitzpatrick, and Pat Meehan, who were happy to feed their trickiest inner suburbs to Philadelphia's Democrats. Mapmakers even awkwardly appended a portion of Amish Country to Meehan's 7th District. In the northeast, Republicans stuffed Blue Dog [Tim] Holden's 17th District with the liberal labor bastions of Scranton, Wilkes-Barre, and Easton to relieve pressure on freshman Republican Lou Barletta in the 11th District and Charlie Dent in the Lehigh Valley's 15th.
>
> In the west, Republicans split the city of Erie to shore up freshman Mike Kelly and carefully merged [Jason] Altmire and [Mark] Critz in such a way that neither Democrat could plausibly run elsewhere but

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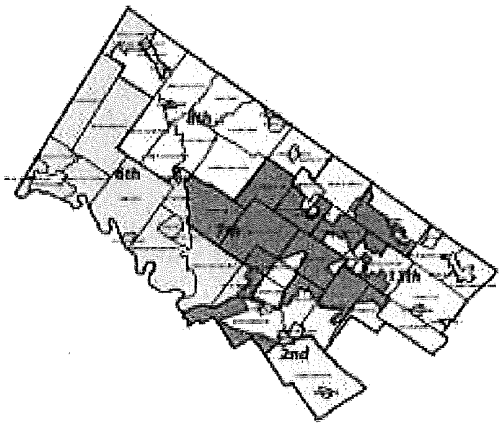
[7] Charles Thompson, *Congressional Redistricting Puts Pa. Congressmen at a Distance*, Harrisburg Patriot-News, Dec. 18, 2011, http://www.pennlive.com/midstate/index.ssf/2011/12/congressional_redistricting_pu.html.

[8] Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, Real Clear Politics (Dec. 14, 2011), http://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html.

[9] *Id.*

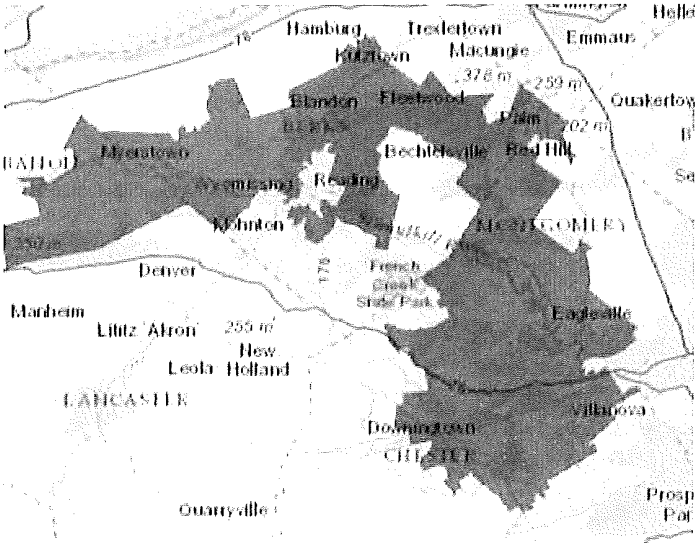
either would still be vulnerable in a general election. Sure enough, Critz defeated Altmire in a bitter primary and Republican Keith Rothfus defeated Critz in November. Back east, Holden lost his primary to a more liberal Democrat, and in November, Republicans held onto their other 12 seats without much of a fight.

55. The "crazy quilt" that the Republicans devised ignores all traditional redistricting criteria and serves no legitimate purpose. It fractures local political subdivisions rather than keeping them intact. For example, enough voters live in Montgomery County for that county to have its own congressional district. But, as seen below, under SB 1249, Montgomery County is split among five districts.[10] Not a single one of those five Congressmen lives in Montgomery County. Other counties—such as Berks and Chester—are similarly divided.

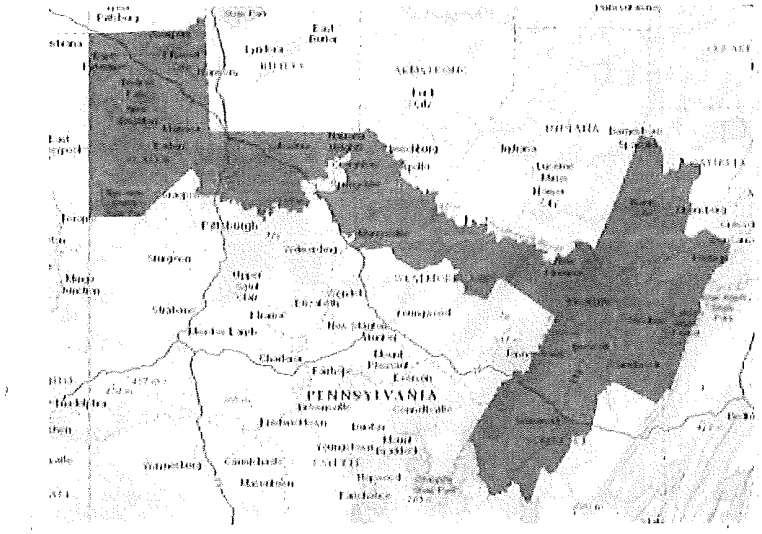


[10] Dan Sokil, *Fair Districts PA Urges Residents to Spread the Word of Redistricting Reform Effort*, Times Herald, May 3, 2017, http://www.timesherald.com/article/JR/20170503/NEWS/170509919.

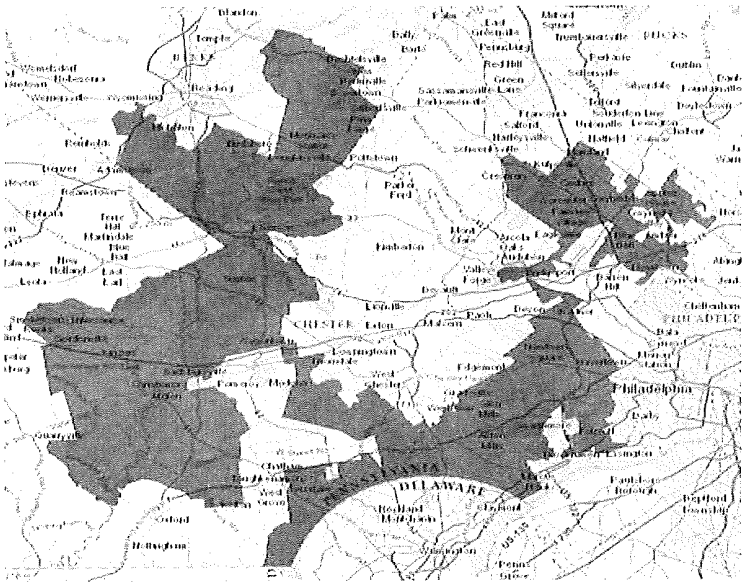
56. SB 1249 also resulted in district shapes that make the gerrymander obvious. For example, Pennsylvania's 6th District now looks like the State of Florida:



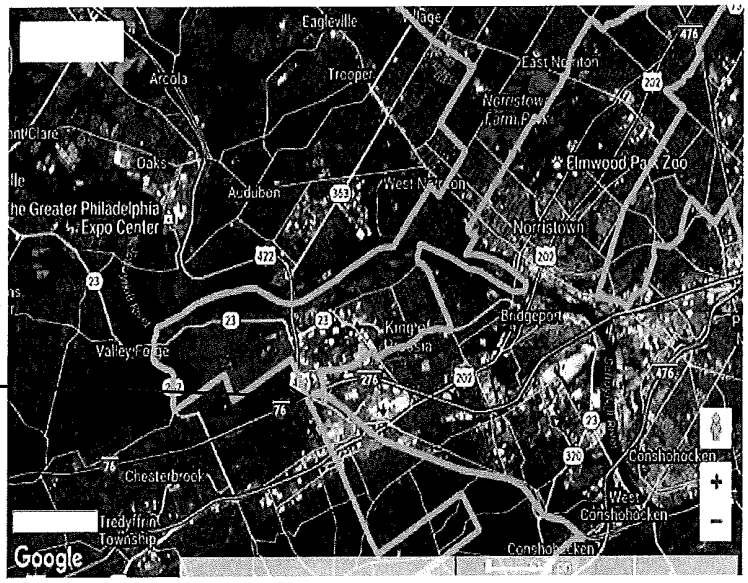
57. The 12th District looks like the boot of Italy:



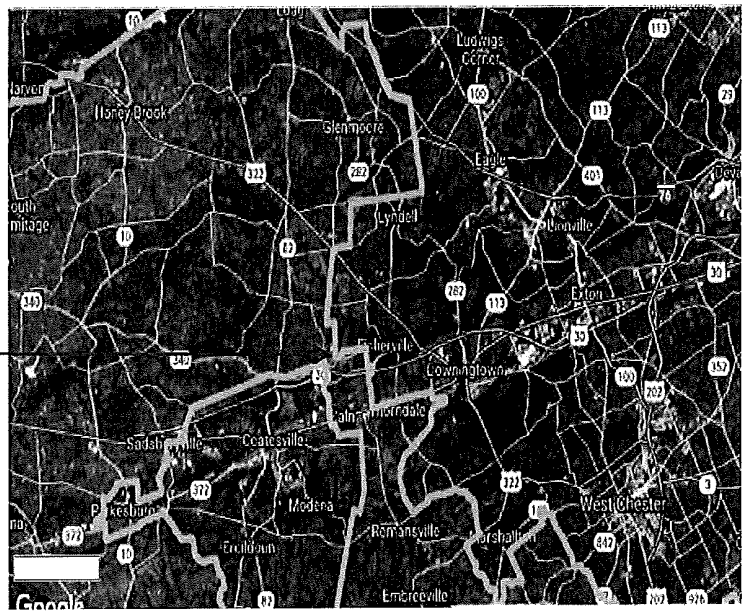
58. And Pennsylvania's notorious 7th District—"Goofy kicking Donald Duck"—is spread out among five counties. At one point in King of Prussia, the district is so narrow that it is held together only by a Creed's Seafood & Steaks. At another point in Coatesville, it is only a medical endoscopy center that connects one part of the district to another.



Creed's Seafood & Steaks



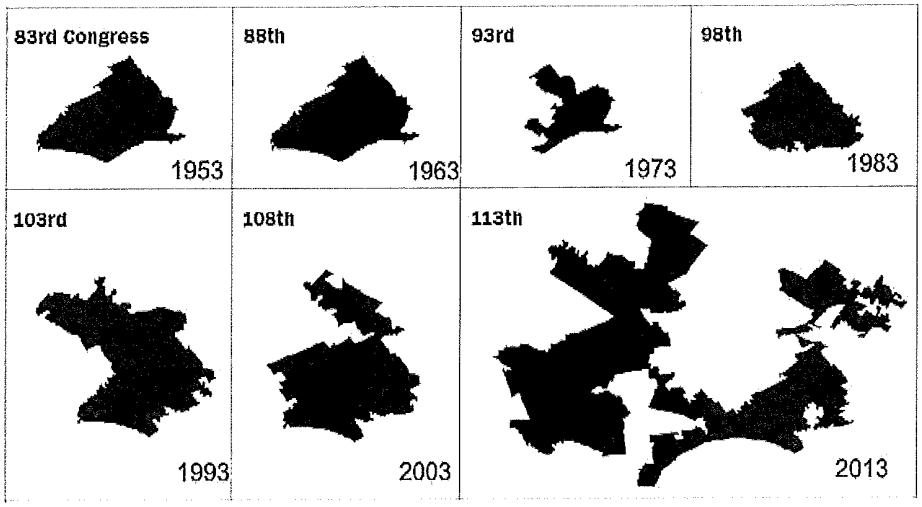
Brandywine GI Associates (endoscopy center)



59. There is no legitimate, constitutionally permissible reason for drawing districts in this manner. As depicted below, the evolution of the 7th District over

time lays bare the lengths to which Republicans have gone to construct the district to their advantage.[11]

THE EVOLUTION OF PENNSYLVANIA'S SEVENTH DISTRICT



60. The 2011 Plan for the entire state is shown in the appendix attached hereto.

61. Because of the way Republicans redrew district boundaries, members of entire communities are denied a right to cast a vote that has any meaning. For example, when Republicans redrew the 6th District, they carefully carved out the city of Reading to make the 6th "safe" for Republicans. They then forced Reading into the solidly Republican 16th district, where the votes of Democratic voters are virtually certain never to matter. As a result, Reading residents "really . . . don't

[11] Christopher Ingraham, *What 60 Years of Political Gerrymandering Looks Like*, Wash. Post, May 21, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm_term=.8fb7e83fcbba.

have true representation[;] [their] voice is really muted because of the gerrymandering that's taken place in Pennsylvania."[12]

62. Republicans used a similar technique in the 17th District, where they packed the Democratic-leaning cities of Scranton, Wilkes-Barre, and Easton into a district that was already reliably Democratic, and removed any risk that Wilkes-Barre voters (which would reside in the 11th District if county boundaries were respected) would tilt the 11th District to the Democrats.

63. In the 7th District, Republicans carved out many Democratic voters in the city of Chester, packing them into the reliably Democratic 1st District.

64. Republicans packed minority voters into the 1st and 2nd Districts to waste their votes. The 1st District now has 66% minority voters, while the 2nd District now has 71% minority voters. Since the 2011 Plan, both districts have reliably produced super-majority votes for Democratic candidates of over 80% of the vote. In the 2nd District, the Democratic representative has won over 87% of the vote in every election since the 2011 Plan.

65. Republicans consistently redrew district lines to their advantage across the Commonwealth, taking one competitive district after another and

[12] Lindsay Lazarski, *Dividing Lines: How Pennsylvania's Elections Really Are Rigged, Keystone Crossroads*, https://keystonecrossroads.atavist.com/dividing-lines-how-pennsylvanias-elections-really-are-rigged.

transforming it into a safe Republican district. For example, under the 2003 plan, in the 11th District, 57.5% of voters voted for Barack Obama in the 2008 presidential election. After redistricting, however, only 47.7% of voters were 2008 Obama voters, a 9.8% swing.

66. On the day the 2011 Plan was both revealed and voted upon in the Senate, Democratic Senators protested that the plan was partisan, that it was proposed with "extremely short notice," and that the process lacked any transparency. As Democratic Senator Anthony H. Williams explained, "[M]aybe if we had . . . transparency, openness, and most importantly, inclusion, we could have shared the responsibility of coming up with a[] . . . much more representative map. That is not what happened . . . . [W]e have a map that not one Democrat had anything to do with on this side of the aisle."

67. Democratic Senator Jay Costa unsuccessfully introduced an amendment to the Republican plan that he believed would create 8 districts favorable to Republicans, 4 districts favorable to Democrats, and 6 swing districts.

68. The Republican majority in the Pennsylvania Senate set SB 1249 for a vote on the very same day that they first publicly disclosed the descriptions of the new districts. The bill passed in the Senate by a vote of 26-24. Not one Democratic Senator voted for the bill.

69. On December 15, 2011 and December 20, 2011, the Pennsylvania House of Representatives considered SB 1249. As in the Senate, Democratic representatives vociferously objected to the lack of transparency in adopting the plan and to its partisan nature.

70. Democratic representative Dan Frankel observed that the plan was clearly an effort to entrench Republicans in power: "[W]hat is taking place here today, in my view, is a very cynical attempt to institutionalize a Republican majority of congressional seats in Pennsylvania. . . . That is not good for our politics. . . . This is not the way we ought to be governing; to overreach, to go through contortions to create districts that are safe for a majority of Republican members of Congress is not good public policy. We ought to reject this. This is not good government; this is a very cynical way to do government."

71. Democratic Representative Frank Dermody similarly objected: "[T]he way our system is supposed to work is that the voters are supposed to pick the politicians. With this map, the politicians pick the voters. This map sets up districts that are gerrymandered beyond recognition."

72. Democratic Representative Robert Freeman added: "SB 1249 contains the worst case of gerrymandering in Pennsylvania in living memory. . . . A look at the configuration of the congressional district map of 1249 reveals twisted and

distorted districts that were drawn purely for political advantage, with no consideration for compactness of districts or communities of interest."

73. Democratic Representative Steve Samuelson protested about the lack of transparency: "When this bill had first reading, the Senate had no plan [i.e., the bill had no substantive content]. When this bill had second reading, the Senate had no plan. The map was not revealed until December 13. The details . . . were not available until 9 a.m. on December 14. . . . [T]he public had about 14 hours to see the details. Now, since the Senate came out with their plan on Wednesday, the public has had a grand total of 5 days."

74. Democratic Representative Babette Josephs similarly protested the extraordinary lack of transparency in what she called a "dreadful" plan, noting that she had never before "seen a hearing in this legislature on a blank bill." "You could not tell, looking at the bill or looking for a map, what . . . the Republicans had in mind."

75. Democratic Representative Michael Hanna offered an amendment to "create a fair redistricting map . . . [that] will minimize district splits in counties and municipalities and ensure equality of representation across the 18 congressional districts," but, as with Senator Costa's amendment, the House amendment failed.

76. Notwithstanding Democratic opposition, SB 1249 passed in the House on December 20, 2011 by a vote of 136-61. In the end, with passage of the bill a *fait accompli* because of the Republican majority, 36 Democrats voted for the bill. Pennsylvania's Republican Governor, Tom Corbett, signed the bill into law in time for the 2002 U.S. Congressional election. The 2011 Plan remains in effect today.

D. Senate Bill 1249 Burdened the Representational Rights of Democratic Voters

77. Senate Bill 1249 achieved exactly the effect REDMAP intended. In the 2012 election, each party's share of the two-party vote in the districts the party won were as follows:

District	Democratic Vote	Republican Vote
1	84.9%	
2	90.5%	
13	69.1%	
14	76.9%	
17	60.3%	
3		57.2%
4		63.4%
5		62.9%
6		57.1%
7		59.4%
8		56.6%
9		61.7%
10		65.6%
11		58.5%
12		51.7%
15		56.8%
16		58.4%
18		64.0%
Average in Districts	**77.0%**	**59.3%**
Statewide Vote Share	**50.8%**	**49.2%**

78. The chart demonstrates how Republicans were able to rig the system so that Democrats could win only 5 of 18 districts even though Democrats won a *majority*—50.8%—of statewide congressional votes in the 2012 election. The average winning percentage in districts Democrats won was an astronomical 77.3%, reflecting the packing of Democrats into five districts. *Not a single winning Republican candidate* earned this large a share of the vote in his district. Victorious Republican candidates all won by much smaller margins, winning between 51.7% and 65.6% of the vote, for an average winning percentage of only 59.3%. In other words, the 2011 Plan guaranteed that Democrats would win a small number of House seats by very large margins, while Republicans would win the lion's share of seats by much smaller, although still comfortable, margins.

79. Republican officials pointed out that the 2011 Plan enabled Republicans to win the Commonwealth's delegation even in years when Democrats outperformed them, boasting that Republicans had achieved a large majority of the congressional seats even as Democrats won the important state-wide races: "The impact of this investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly 9 points and reelected President Obama by

more than 5 points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House."[13]

80. In 2014, Republicans won 55.5% of the statewide congressional vote and remained at 13 of 18 seats. Although the percentage of seats Republicans won—72%—was still grossly disproportionate to their statewide vote share, it is nonetheless telling that Republicans won an extra 6 percentage points of the statewide congressional vote compared to 2012 but did not pick up any additional House seats. That is because the 2011 Plan is utterly unresponsive to the will of the voters. Democrats are locked into the 5 districts in which they are packed, and therefore do not lose—and cannot gain—seats with any normal swing in the statewide vote.

81. In 2016, the results were almost identical. Republicans won 53.9% of the statewide congressional vote and again won 13 of 18, or 72%, of the congressional seats.

82. In both the 2014 and 2016 elections, the margin of victory in districts Democrats won was far higher than the margin of victory in districts Republicans won; in 2014, the average vote share for successful Democratic candidates was 73.6%, as compared to 63.4% for successful Republicans candidates (excluding

[13] *2012 REDMAP Summary Report*, The Redistricting Majority Project, http://www.redistrictingmajorityproject.com/?cat=1 (last visited June 7, 2017).

uncontested elections), and for 2016 the average vote share was 74.2% for successful Democratic candidates and 61.1% for successful Republican candidates (excluding uncontested elections).

83. That the 2011 Plan is the product of naked partisan gerrymandering is confirmed by any number of other measures. In recent years, political scientists and mathematicians have developed a number of sophisticated modeling techniques and tests to identify political gerrymanders. These tests each independently demonstrate the magnitude of the 2011 Plan's Republican bias, the fact that this bias could have resulted only from an intentional effort to benefit Republicans and to disadvantage Democrats.

84. One recognized way to test whether the 2011 Plan is the product of partisan bias is to ask whether observing traditional redistricting criteria such as contiguity, compactness, equal population, and minimizing county splits could reasonably be expected to produce a plan that yields the results generated by the actual 2011 Plan. The answer is a resounding "no."

85. Political scientists can answer this question by using computer modeling to generate alternative plans that adhere to traditional redistricting

criteria but do not aim to advance partisan goals.[14] These alternative plans thus account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas.

86. Performing this modeling for Pennsylvania congressional districts yields thousands of alternative plans that comply with traditional districting principles. But not one produces the partisan bias of the 2011 Plan. That is, using the *actual* voting results from past Pennsylvania statewide elections, and then interposing those voting results over the district boundaries in each alternative plan, not a single alternative plan produces a result in which Republicans would win a 13-5 advantage in Pennsylvania's congressional delegation. This modeling demonstrates, with statistical certainty, that the 13-5 Republican advantage under the 2011 Plan is not the result of neutral factors such as population clustering. Rather, the bias of the 2011 Plan is necessarily the result of an intentional effort to favor Republicans.

87. Mathematicians at Carnegie Mellon University and the University of Pittsburgh have developed an alternative modeling approach that also demonstrates

[14] *See, e.g.*, Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf.

the partisan intent behind the 2011 Plan.[15] Using a modeling technique known as "Markov chain" analysis, these mathematicians take the enacted plan as a starting point and then make a series of random adjustments to the district boundaries by swapping precincts, while maintaining districts that are contiguous, of equal population, and as compact as the ones in the 2011 Plan. It can be proved mathematically using this approach that if the enacted plan were drawn without bias, these changes should not change the statistical properties of the plan. But the professors find that random changes to the 2011 Plan greatly diminish the Republican advantage. The professors conclude that the 2011 Plan has a Republican bias that cannot be the result of external factors such as the political geography of Pennsylvania.

88. Yet another statistical approach that measures partisan gerrymanders is the efficiency gap. This measure, which the three-judge panel in *Whitford* applied in striking down Wisconsin's state house districts, measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, defined as the number of votes cast for losing candidates of that party (as a measure of cracked

[15] Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with supplement at* https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf.

votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election.

89. The efficiency gap for Pennsylvania's congressional districts is enormous. For example, in the 2012 election, Democrats wasted 2,442,621 votes, compared to Republicans who wasted only 1,093,328 votes. The resulting efficiency gap of 24.5% was *the highest in the nation* among states that have more than two congressional districts. These figures demonstrate the massive number of Democrats in cracked districts who were deprived of the ability to elect officials of their choice, and the massive number of Democrats packed into districts where their votes were diluted.

90. Another measure of partisan gerrymandering is the "mean-median gap." The measure looks at the Democratic vote share in each of Pennsylvania's 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance, which because Pennsylvania has an even number of districts, is the average of Democrats' vote shares in the

districts where Democrats performed the ninth and tenth best out of the 18 districts. Gerrymandering does not impact the mean vote share, since that is a statewide figure. But it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. If, as in 2012, the Democratic vote share in the median district is lower than the mean Democratic vote share statewide, that necessarily indicates there are a disproportionately large number of Democratic voters in a few, packed districts. And it indicates that it is more difficult for Democrats to win the median district and hence a majority of seats: the larger the mean-median gap, the greater the mean vote share across the state that Democrats need to bring their vote share in the median district above 50%.

91. As illustrated below, in the 2012 election, the mean Democratic vote share across all Pennsylvania districts was 50.46%, but the median Democratic vote share was just 42.81% (the average of the 6th and 3rd Districts, which were Democrats' ninth and tenth best districts). Accordingly, the mean-median gap was 7.65%, which was the fifth largest of all congressional slates in the country for the 2012 election. This gap shows the disproportionate percentage of the statewide vote that Democrats would need to win a majority of congressional seats. Democrats would have needed to win the 3rd District to win a majority of seats,

and Democrats would have needed to win an additional 7.2% of the vote there to win—even though Democrats already won over 50% of the vote statewide.

92. Indeed, it would be nearly as difficult for Democrats to win just *two additional seats*. In 2012, Democrats would have needed to flip the 8th District to win two additional seats (*i.e.*, to win their seventh best district), but Democrats received just 43.4% share of the vote in the 8th District. These figures show how Republicans skewed the districts to maximize the numbers of seats they would win and render these seats immune from normal swings in the statewide vote.

District	Democratic Vote Share
10	34.4%
18	36.0%
4	36.6%
5	37.1%
9	38.3%
7	40.6%
11	41.5%
16	41.6%
3	42.8%
6	42.9%
15	43.2%
8	43.4%
12	48.3%
17	60.3%
13	69.1%
14	76.9%
1	84.9%
2	90.5%
Mean	**50.5%**
Median	**42.8%**

93. The mean-median gaps for the 2014 and 2016 held steady at roughly the same levels. The mean-median gap was 7.46% for the 2014 election and 7.61% for the 2016 election, again showing the degree to which Democratic votes are packed and cracked.[16]

94. In short, a host of manageable tests, including the computer modeling and statistical tests described above, demonstrate that the 2011 Plan was

[16] These mean-median gaps were calculated by using actual vote totals from the 2014 and 2016 congressional elections, except in districts that were uncontested. Results in uncontested districts were imputed using a statistical regression model that predicts 2014 and 2016 election results based on each district's results in the 2012 congressional elections.

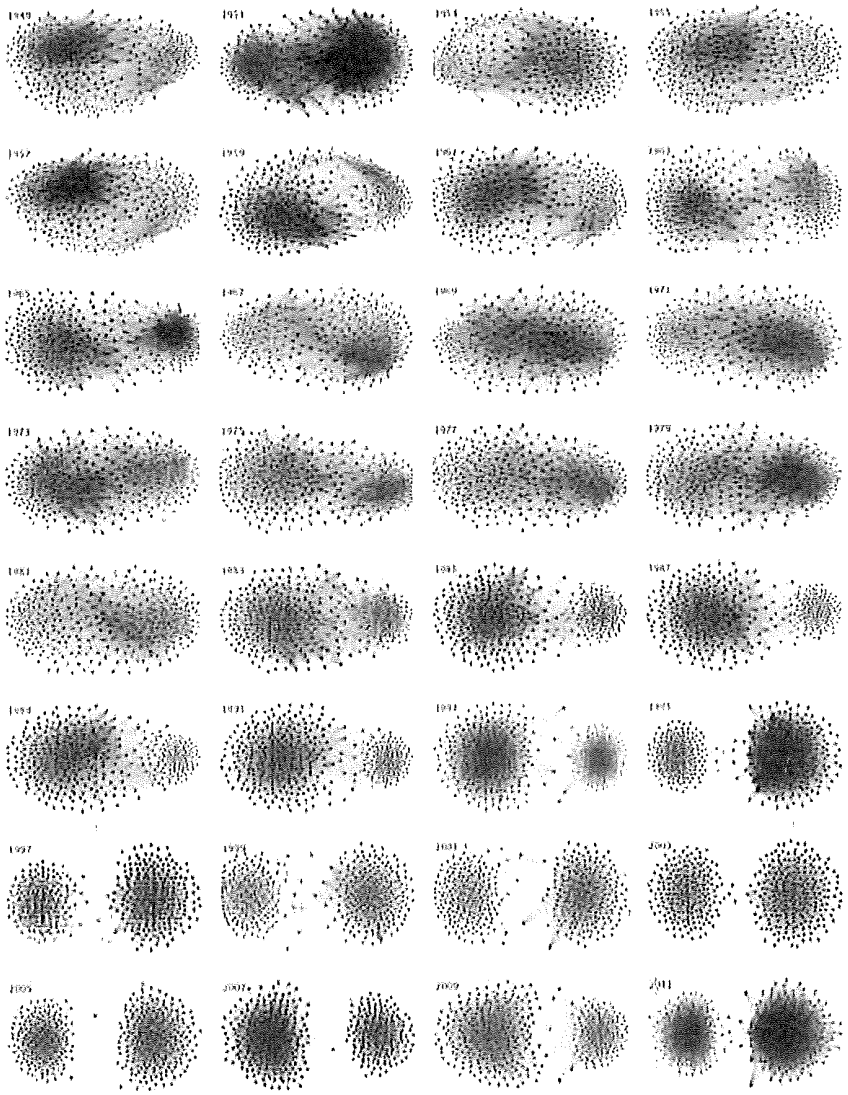
intentionally drawn to minimize the influence of Democratic voters, that it has had precisely that effect, and that it will continue to do so for the life of the plan.

95. The effects of the gerrymander go beyond election results. In today's Congress, representatives are simply not responsive to the views and interests of voters of the opposite party. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office.

96. The increasing and extreme polarization of the U.S. House of Representatives is readily apparent. Numerous studies have documented this trend, including a 2015 article co-authored by Clio Andris from Pennsylvania State University.[17] Andris et al. gathered data for each Congress on the number of times each Member of Congress voted with every other Member. In the chart below, Andris et al. represent each Member with a red or blue dot and group the dots to show how often each pair of Members voted with one another; the closer two dots

[17] *See* Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS One (2015).

are to one another, or the thicker the line connecting them, the more often those two Members voted with each other. The trend over time is remarkable. It shows that, in recent years, Members have voted almost exclusively with Members of the same party and rarely, if ever, have joined with representatives from the opposing party to vote on a bipartisan basis.



97. The Members of Pennsylvania's Congressional delegation are no exception to this trend. As the chart below demonstrates, in the two Congresses following the 2011 Plan, these Members almost always voted with a majority of other members of the same party and rarely crossed over to vote with members of the other party.[18]

[18] Data are from the Washington Post's "U.S. Congress Votes Database," http://projects.washingtonpost.com/congress/114/house/members/ (last visited June 12, 2017).

District	Representative(s)	Party	Voting with Majority of Same Party	
			112th Congress	113th Congress
1	Bob Brady	D	94%	93%
2	Chaka Fattah	D	95%	96%
3	Mike Kelly	R	93%	96%
4	Jason Altmire	D	64%	N/A
4	Scott Perry	R	N/A	95%
5	Glenn Thompson	R	91%	93%
6	Jim Gerlach	R	86%	91%
7	Patrick Meehan	R	86%	92%
8	Mike Fitzpatrick	R	81%	85%
9	Bill Shuster	R	94%	96%
10	Tom Marino	R	95%	95%
11	Lou Barletta	R	92%	95%
12	Mark Critz	D	77%	N/A
12	Keith J. Rothfus	R	N/A	96%
13	Allyson Schwartz	D	94%	95%
14	Mike Doyle	D	93%	95%
15	Charles W. Dent	R	86%	91%
16	Joe Pitts	R	95%	95%
17	Tim Holden; Matt Cartwright	D	76%	96%
18	Tim Murphy	R	93%	96%

98. These figures illustrate that when voters artificially lose the ability to elect representatives of their party, they also lose any chance of having their views represented in Congress.

COUNT I
Violation of the Pennsylvania Constitution's
Free Expression and Association Clauses, Art. I, §§ 7, 20

99. Petitioners hereby incorporate Paragraphs 1 through 98 above as if they were fully set forth herein.

100. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

101. Article I, Section 20 provides: "The citizens have a right in a peaceable manner to assemble together for their common good . . . ."

102. Pennsylvania's constitution "provides protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). This "broader protection[] of expression than the related First Amendment guarantee" applies "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

103. Pennsylvania's Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote.

104. The 2011 Plan has the purpose and the effect of subjecting Petitioners and other Democratic voters to disfavored treatment by reason of their political views, their votes, and the party with which they choose to associate.

105. The Pennsylvania General Assembly expressly and deliberately considered the political views, voting histories, and party affiliations of Petitioners and other Democratic voters when it created the 2011 Plan.

106. The General Assembly drew the 2011 Plan with the intent to burden and disfavor those voters, including Petitioners, by reason of conduct protected by Article I, Sections 7 and 20, and with the intent to burden forms of expression that are protected by those provisions.

107. The Plan has had the effect of burdening and disfavoring Democratic voters in Pennsylvania, including Petitioners, by reason of their constitutionally-protected conduct. The Plan has prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process, and the Plan has the effect of suppressing the political views and expression of Democratic voters. By contrast, the Plan favors Republican voters, by ensuring that they will be able to associate with fellow Republican voters to elect the representatives of their choice and to influence the electoral, and thus political, process.

108. The Plan also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under Article I,

Section 7, and Article I, Section 20. Republicans "penalize[d] [Petitioners] for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016).

109. For instance, Petitioner Mary Elizabeth Lawn has resided at the same home in Chester since 2004, but her congressional district was changed under the 2011 Plan. Lawn previously was in the 1st Congressional District, which has consistently elected Democrats, but under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

110. Petitioner John Greiner's District, the 3rd Congressional District, was subject to cracking under the 2011 Plan. The 3rd District previously was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But since the 2011 Plan, the district is no longer competitive. The Republican representative, Mike Kelly, comfortably won reelection in 2014 and 2016, and the district is so skewed that Kelly was able to run unopposed in 2016.

111. Like Greiner, Petitioner Robert Smith was also subject to cracking. Smith resides in Pennsylvania's 11th Congressional District. Prior to the 2011 Plan, the 11th District was a competitive district: the Democratic candidate won by

a mere 3% in 2008, and the Republican candidate won the seat in 2010. But since the 2011 Plan, the Republican Representative, Lou Barletta, has won every election by more than 17%.

112. With respect to each of these Petitioners and others, Republicans "expressly and deliberately considered [their] protected . . . conduct, including their voting histories and political party affiliations, when it redrew the lines of" their districts. *Shapiro*, 203 F. Supp. 3d at 595. And Republicans "did so with an intent to disfavor and punish [Petitioners] by reason of their constitutionally protected conduct." *Id.* This intentional retaliation had an "actual effect" that would not have occurred but-for the retaliation. *Id.* Petitioners such as Lawn, Greiner, and Smith are no longer able to elect representatives of their choice or to influence the political process.

113. The 2011 Plan cannot be explained or justified by reference to Pennsylvania's geography or other legitimate redistricting criteria.

COUNT II
Violation of the Pennsylvania Constitution's
Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5,

114. Petitioners hereby incorporate Paragraphs 1 through 113 above as if they were fully set forth herein.

115. The General Assembly is not "free to construct political gerrymanders with impunity." *Erfer*, 794 A.2d at 334. On the contrary, a congressional

redistricting plan violates the Pennsylvania Constitution's equal protection guarantees if (1) the plan reflects "intentional discrimination against an identifiable political group"; and (2) "there was an actual discriminatory effect on that group." *Id.* at 332; *see also Whitford*, 218 F. Supp. 3d 837 (finding equal protection violation in Wisconsin redistricting where there was both discriminatory purpose and effects).

116. Here, the enacted plan reflects intentional discrimination against an identifiable political group—that is, Petitioners and other Democratic voters. Pennsylvania's congressional districts were drawn as part of a nationwide movement to use redistricting to maximize Republican seats in Congress and entrench these Republican members in power. Analyses such as the computer modeling of districts that would observe traditional districting criteria, the Markov Chain analysis, and the efficiency and mean-median gaps leave no room for doubt on this score. They conclusively demonstrate that the 2011 Plan could not have resulted "legitimate legislative objective[s]," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment), but could have resulted only from discriminatory partisan intent.

117. The enacted plan also works an actual discriminatory effect. A plan works such an effect when (1) "the identifiable group has been, or is projected to be, disadvantaged at the polls"; and (2) "by being disadvantaged at the polls, the

identifiable group will lack political power and be denied fair representation." *Erfer*, 794 A.2d at 332. Here, the enacted plan disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights.

118. Statewide, the computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans' advantage is nearly impossible to overcome. Indeed, one need look only at the results of the 2012 election to see the effects of the gerrymander: Democrats won only 28% of Pennsylvania's seats despite winning a majority of the statewide congressional vote.

119. The effects are likewise significant for individual voters. For Petitioners such as James Greiner and Robert Smith who live in cracked districts, these voters are "essentially shut out of the political process." *Erfer*, 794 A.2d at 333 (citation and quotation marks omitted). They are artificially denied any realistic opportunity to elect representatives of their choice, with the demographics of their districts skewed to ensure Republican victories. And given the extreme partisanship of their representatives, these voters have no meaningful opportunity to influence legislative outcomes. Their representatives simply do not weigh Democratic voters' interests and policy preferences in deciding how to act.

120. For Petitioners such as Carmen Febo San Miguel and James Solomon who live in packed Democratic districts, the "weight" of their votes has been

substantially diluted. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Their votes have no marginal impact on election outcomes, and representatives will be less responsive to their individual interests or policy preferences.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against Respondents, and:

a. Declare that the 2011 Plan is unconstitutional and invalid because it violates the rights of Petitioners and all Democratic voters in Pennsylvania under 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.

b. Enjoin Respondents, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. house members using the 2011 Plan;

c. Establish a new congressional districting plan that complies with the Pennsylvania Constitution, if Respondents fail to enact a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner;

d. Enjoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party membership, registration, affiliations or political activities, or voting histories;

e. Enjoin the Pennsylvania General Assembly from using data regarding a voter's political party membership, registration, affiliation, political activities, or voting history in any future redistricting process of congressional districts, where such use burdens or penalizes an identifiable group, a political party, or individual voters based on their political beliefs, political-party membership, registration, affiliations or political activities, or voting histories.

Dated: June 15, 2017

/s/ Mary M. McKenzie

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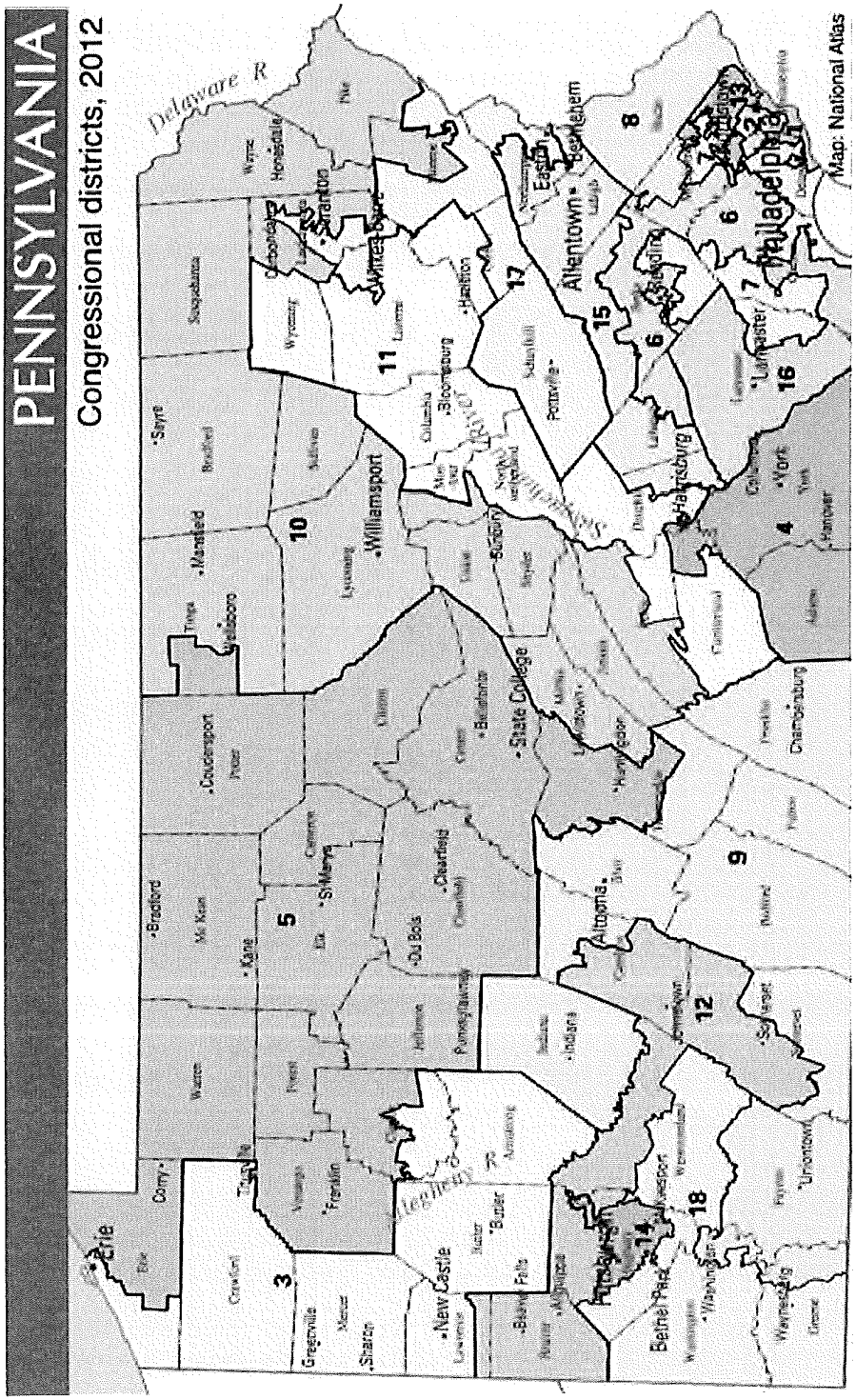
Appendix


PENNSYLVANIA
Congressional districts, 2012
Map: National Atlas
Delaware R.
Erie
Corry
Warren
Forest
Venango
Clarion
Jefferson
Clearfield
Cambria
Somerset
Bedford
Fulton
Huntingdon
Blair
Centre
Mifflin
Juniata
Perry
Cumberland
Adams
Franklin
Crawford
Mercer
Lawrence
Butler
Armstrong
Indiana
Westmoreland
Fayette
Greene
Washington
Allegheny
Beaver
Beaver Falls
New Castle
Sharon
Pittsburgh
Bethel Park
Monongahela
Uniontown
Waynesburg
McKean
Potter
Tioga
Bradford
Sullivan
Wyoming
Lycoming
Clinton
Centre
Union
Snyder
Northumberland
Columbia
Montour
Schuylkill
Carbon
Monroe
Pike
Wayne
Susquehanna
Lackawanna
Luzerne
Scranton
Wilkes-Barre
Hazleton
Pottsville
Bloomsburg
Williamsport
Sunbury
Lewisburg
Mount Carmel
Shamokin
Mahanoy City
Tamaqua
Lehigh
Northampton
Bethlehem
Easton
Allentown
Berks
Reading
Lebanon
Dauphin
Harrisburg
Lancaster
York
Adams
Hanover
Chambersburg
State College
Altoona
Johnstown
Somerset
Philadelphia
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VERIFICATION

I, Suzanne Almeida, on behalf of the League of Women Voters of Pennsylvania, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Petition for Review are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed: Suzanne Almeida

Dated: June 14, 2017

EXHIBIT "B"

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Counsel for Petitioners; additional counsel appear on the signature page

IN THE SUPREME COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.[1]

No. _____

APPLICATION FOR EXTRAORDINARY RELIEF UNDER 42 PA.C.S. § 726 AND PA. R.A.P. 3309

[1] The Commonwealth of Pennsylvania was the lead Respondent below, but was dismissed from the case by the Commonwealth Court on October 4, 2017.

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INTRODUCTION

This suit presents an issue of extraordinary and immediate importance to the voters of this Commonwealth and the integrity of its democratic institutions. Petitioners allege that the Commonwealth's current congressional districts are rigged. Following the 2010 census, the Republican-controlled General Assembly employed sophisticated technology to gerrymander the Commonwealth's congressional districts more egregiously and effectively than ever before, manipulating district boundaries to discriminate against Petitioners and other Democratic voters on the basis of their political views, their votes, and the party with which they choose to associate. The gerrymander of Pennsylvania congressional districts has been ranked as one of the most "extreme" in the nation, and by some measures, it is the "worst offender" in the country.[2]

The three elections that have now passed under the districting plan (the "2011 Plan") provide overwhelming evidence of the gerrymander's effects. The map gives Republicans 13 out of 18 seats irrespective of swings in the vote, and even when Democratic candidates win a majority of votes statewide. It is difficult to conceive of a starker violation of the free expression and equal protection provisions of the Pennsylvania Constitution. Petitioners ask this Court to exercise

[2] Laura Royden & Michael Li, Extreme Maps, Brennan Center for Justice, at 1, 9 (2017), *available at* https://www.brennancenter.org/publication/extreme-maps.

its extraordinary jurisdiction to ensure that they and millions of other Pennsylvania voters obtain redress for the violation of their rights in time for the 2018 elections.

Petitioners sought to proceed in the Commonwealth Court in time for the 2018 congressional elections. Petitioners filed a Petition for Review in the Commonwealth Court on June 15, 2017—ten months before the 2018 primaries and nearly a year and half before the 2018 general elections. But the only thing that has happened in the Commonwealth Court is delay. Three respondents, the General Assembly and the Republican legislative leaders from both chambers (collectively "the General Assembly"), filed an application in late August to stay this case pending the U.S. Supreme Court's review in *Gill v. Whitford*, No. 16-1161 (S. Ct.), a case challenging Wisconsin's state legislative districts that involves solely federal constitutional claims. The Commonwealth Court set a hearing on the stay application for a month and half later—on October 4, 2017—and failed to act on Petitioners' request to accelerate the hearing. At that October 4 hearing, the Commonwealth Court stated that it would not resolve this case in time for the 2018 election. Acknowledging that this lawsuit raises only *Pennsylvania* constitutional claims, the Commonwealth Court nonetheless decided to stay the case pending the U.S. Supreme Court's decision in *Gill*, except that it will address certain privilege issues in the interim. Petitioners are left with no choice but to turn to this Court to vindicate their constitutional rights.

There is direct precedent for this Court to exercise plenary jurisdiction. This Court did so in the last congressional gerrymandering case filed under the Pennsylvania Constitution, *Erfer v. Commonwealth*, 794 A.2d 325 (2002), and with much less time than is available here. In *Erfer*, the petitioners filed suit in the Commonwealth Court in January 2002, seven months later in the election cycle than Petitioners filed suit here. When the Commonwealth Court indicated that it would not resolve *Erfer* in time for the next election, this Court exercised plenary jurisdiction, ordered an evidentiary hearing to be completed by February 8, 2002, and then heard and decided the case. This Court has more time here than in *Erfer* and indeed, at the October 4 hearing, the Commonwealth Court noted that an exercise of this Court's plenary jurisdiction, as in *Erfer*, would enable the case to proceed more quickly. And unlike in *Erfer,* here the Court has the results of three elections under the 2011 Plan, which provide critical record evidence that was lacking in *Erfer*.

There is no serious question whether this case can and should be resolved expeditiously and in time for the 2018 elections. It can and should, a fact that is highlighted by a separate, recently filed lawsuit challenging Pennsylvania's congressional districts in federal court. *Agre v. Wolf*, No. 2:17-cv-04392-MMB (E.D. Pa.). *Agre* was filed just nine days ago, on October 2, 2017, nearly four months after Petitioners filed suit here. Federal District Judge Michael Baylson

immediately convened a hearing on October 10, 2017. Judge Baylson referenced a letter he had received from the General Assembly's counsel stating that the Commonwealth Court intended to stay this case (attached as Exhibit D). But Judge Baylson advised the parties that a stay of the federal case pending *Gill* would be inappropriate. The court then entered a scheduling order setting a tentative trial date of December 5, 2017. *Agre v. Wolf*, ECF No. 20. Judge Baylson and two other federal judges (who will be designated by Chief Judge Smith of the Third Circuit) will preside over that trial. The federal court proceedings in a case filed much later than this one illustrate that it is entirely possible to resolve these claims in time for the 2018 elections. Surely if the federal court could hear the federal claims in two months, Petitioners should be permitted to have their claims under the Pennsylvania Constitution adjudicated in their first-filed case.

Indeed, the highest Court of this Commonwealth should take this case and render its independent judgment on Petitioners' claims. At issue is a state law passed by the state legislature that Petitioners allege violates their state constitutional rights. This Court has emphatically rejected the "radical," "highly inappropriate" notion that partisan gerrymandering claims should escape review under the Pennsylvania Constitution. *Erfer*, 794 A.2d at 331. Petitioners, who reside in each of Pennsylvania's eighteen congressional districts, meticulously

detailed the history and effects of the gerrymander in their Petition, carefully developed their state constitutional claims, and have retained multiple experts to testify at trial. *See* Pet. for Review (attached as Exhibit A). Some of these experts will detail how the 2011 Plan rips apart historical communities of interest in Pennsylvania. Others will present computer modeling techniques and statistical evidence that prove with certainty that the 2011 Plan cannot be explained by the use of traditional districting criteria—but can be explained only by partisan intent—and that the 2011 Plan has had its intended effects. Petitioners have developed overwhelming evidence of the 2011 Plan's unconstitutionality, and the courts of this Commonwealth should hear this case without delay.

This Court has made clear that "Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while [federal courts] struggles to articulate a standard to govern a similar federal question." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002). Petitioners respectfully request that this Court exercise its discretion to take this case and render its independent judgment on a matter of immediate public importance to the citizens of the Commonwealth.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

I. The Petition

Petitioners filed their Petition for Review in the Commonwealth Court on June 15, 2017. Petitioners—who include the League of Women Voters of Pennsylvania and eighteen individual Pennsylvania voters ranging from a chaplain to retired school teachers to an Army Reservist—allege that the 2011 Plan violates their fundamental rights under the Pennsylvania Constitution. Pet. ¶¶ 14-31, 104-113, 115-120. As set forth in the Petition, the basic facts are as follows:

Leading up to the 2010 elections, national Republicans leaders targeted Pennsylvania as a key state for a national Republican State Leadership Committee plan known as "the REDistricting Majority Project," or "REDMAP." Pet. ¶ 42. REDMAP's goal was to "control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn." *Id.* They were successful—Republicans took control of both chambers of the General Assembly and the Governorship. Pet. ¶ 45.

National and state Republicans quickly set to work to redraw Pennsylvania's congressional map in a way that would entrench the Republican Party in power. Pet. ¶ 45. Republican mapmakers used sophisticated computer modeling to implement the gerrymander, through techniques known as "cracking" and

"packing." The mapmakers "packed" Democratic voters into 5 districts that are overwhelmingly Democratic, and "cracked" the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. *Id.* ¶¶ 6, 47.

The result of these efforts was a districting plan that is utterly unresponsive to the will of voters. In 2012, Republican congressional candidates won a *minority*—only 49%—of the total statewide vote, but still won a remarkable 13 of 18—72%—of congressional seats. Pet. ¶¶ 77-79. In 2014 and 2016, Republicans won 55% and 54% of the statewide vote and still won the exact same 13 seats. *See id.* ¶¶ 80-81. Thus, even though Democrats won an extra 6 percentage points of the statewide congressional vote in 2012 compared to 2014, they did not win any additional House seats. The 2011 Plan locks Democrats into the 5 districts in which they are packed, and Democrats do not lose—and cannot gain—seats with any normal swing in the statewide vote.

These lopsided results were the product of an intentional effort to discriminate against Democratic voters and cannot be explained by traditional districting criteria. The tortured shapes of various districts are inexplicable except as an exercise of raw partisanship. For instance, Pennsylvania's 7th District has been dubbed "Goofy kicking Donald Duck" to reflect its absurd shape, and in some places is so narrow that the only thing holding the district together is a

steakhouse (in King of Prussia) or a medical endoscopy center (in Coatesville). Pet. ¶¶ 58. Other districts are just as bizarrely shaped. *Id.* ¶¶ 56-57. The 2011 Plan also rips apart local communities. Montgomery County, for example, is split across five districts, and not a single one of the five Congressman for those districts actually lives in Montgomery County. *Id.* ¶ 55. Other counties such as Berks and Chester are torn apart. *Id.*

The evidence of the impermissible intent and effects of the gerrymander is not limited to district shapes. Far from it. Political scientists and mathematicians have recently developed a number of statistical measures and computer modeling techniques to identify partisan gerrymanders, and these tests each independently demonstrate the Republican bias of the 2011 Plan.

One such methodology is the computer modeling of University of Michigan political scientist Jowei Chen. Pet. ¶ 85. Professor Chen's work uses computer simulations to generate alternative plans that adhere to traditional districting criteria (such geographic compactness, contiguity, and respect for communities of interest), and do not aim to advance partisan goals. *Id.* These alternative plans account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas. *Id.* Applied to Pennsylvania's congressional districts, Professor Chen's methodology produces thousands of alternative plans that comport with

traditional districting criteria, and *not a single one* of those plans produce the 13-5 Republican advantage that exists under the 2011 Plan. *Id.* ¶ 86. This modeling demonstrates with statistical certainty that the Republican bias of the 2011 Plan is not the result of neutral factors and can only have resulted from of an intentional effort to discriminate against Democratic voters. *Id.*

Another modeling approach was developed by mathematicians at Carnegie Mellon University and the University of Pittsburgh. Pet. ¶ 87. This approach, which employs a methodology known as a "Markov chain analysis," takes the enacted plan as a starting point and then makes a series of random adjustments to the district boundaries. *Id.* Simply making random changes greatly diminishes the Republican advantage under the 2011 Plan, which the professors show mathematically proves that the 2011 Plan's Republican bias is not the result of neutral factors such as population patterns. *Id.*[3]

Two other measures of partisan gerrymandering show the extent of the gerrymander as well: the "mean-median gap" and the "efficiency gap." The mean-median gap measures the extent to which one party's voters are disproportionately packed into a few districts, and it shows how difficult it would be for that party to win a majority of statewide seats. Pet. ¶¶ 90-92. The efficiency gap measures the

[3] *See* Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with supplement at* https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf.

extent to which the districting plan "wastes" one party's votes relative to the other party's through cracking and packing. *Id.* ¶¶ 88-89. Under the 2011 Plan, Pennsylvania's mean-median gap and efficiency gap for congressional elections have been among the highest in the nation. *Id.* ¶¶ 88-92. Indeed, Pennsylvania's efficiency gap was *the highest in the nation* for the 2012 election. *Id.* ¶ 89. Thus, at least four different statistical tests and modeling techniques each independently demonstrate that the 2011 Plan was intentionally drawn to entrench Republicans in power regardless of the will of the voters, and that it has had precisely that effect.

The Petition asserts two counts, both brought solely under the Pennsylvania Constitution. Count I alleges that the 2011 Plan violates Petitioners' rights under Pennsylvania's Free Expression and Association Clauses, Art. I, §§ 7, 20. Petitioners allege that the 2011 Plan intentionally and unconstitutionally discriminates against Democratic voters by reason of their political viewpoints, their past votes, and the political party with which they associate. Pet. ¶¶ 100-07. In other words, the 2011 Plan constitutes content- and viewpoint-based legislation that burdens Petitioners on the basis of their speech, expressive conduct, and political associations, and the General Assembly cannot possibly demonstrate that the 2011 Plan satisfies strict scrutiny. Petitioners additionally allege that 2011 Plan violates the Free Expression and Association Clauses by *retaliating* against Petitioners for having engaged in prior protected speech and expressive conduct.

Id. ¶¶ 108-13; *see Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (denying motion to dismiss partisan gerrymandering claims premised on a free speech retaliation theory). This Court's prior decision on partisan gerrymandering in *Erfer* did not address the free expression and association claims asserted in Count I here. *See Erfer*, 794 A.2d at 328 n.2 (expressly noting that the Court did not consider these claims).

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania's Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (*i.e.*, Petitioners and other Democratic voters) and accomplishes actual discriminatory effects. Petitioners allege that these effects go beyond election results given the extreme polarization of today's Congress. *Id.* ¶¶ 93-98. Congress' extreme partisanship magnifies the effects of partisan gerrymandering because representatives simply are not responsive to the views and interests of voters of the opposite party. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office. Petitioners thereby are shut of the political process as a result of the 2011 Plan.

II. The Commonwealth Court Has Delayed Proceedings and Will Not Resolve This Case for the 2018 Elections

The Petition was filed on June 15, 2017, nearly a year and half before the 2018 general elections and ten months before the primaries. However, there has been no movement in the Commonwealth Court to resolve the case in time for those elections; there has been only delay.

On August 9, 2017, the General Assembly filed an application to stay this case pending the U.S. Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (S. Ct).[4] On August 23, before Petitioners had even filed their opposition to the stay, the Commonwealth Court scheduled a hearing on the stay application for October 4—nearly a month and a half later. Petitioners moved on September 12 for an earlier hearing and for a conference to expedite the schedule for the case, with the goal of holding a trial in January 2018. The Commonwealth Court did not rule on the request.

At that October 4 hearing, Judge Pellegrini presided and made clear that he would not resolve the case in time for the 2018 elections. Tr. of Oct. 4, 2017 Hr'g at 27-29 (attached as Exhibit B). "I can tell you it isn't going to happen," the court said. *Id.* at 28. The court suggested however, that filing a "King's Bench" petition

[4] Other Respondents including the Lieutenant Governor, the Secretary of the Commonwealth, and the Commissioner of Elections opposed the stay.

would be the one way the case could potentially be resolved in the time frame needed for the 2018 election. *See id.* at 29; *see also id.* at 24-25.

With respect to the stay application, the court stated its *disagreement* with the General Assembly's primary ground for seeking a stay, which is that the U.S. Supreme Court's in *Gill* could "moot" this case by holding that federal partisan gerrymandering claims are non-justiciable. *Id.* at 10-11. The court "agree[d]" with Petitioners that *Gill* cannot moot this case because the Pennsylvania Supreme Court has twice held that partisan gerrymandering under the Pennsylvania Constitution are justiciable, and *Gill* could not alter this binding state precedent. *Id.* at 26. Nonetheless, the court advised the parties that it would stay the case pending *Gill*, except for the resolution of privilege issues. None of the Preliminary Objections that have been pending since August will be resolved, nor will the General Assembly produce *any* discovery until the stay is lifted.

ARGUMENT

I. This Court Should Exercise Its Plenary Jurisdiction and Resolve this Case Before the 2018 Elections

A. There is an Urgent Need for this Court to Exercise Jurisdiction

This Court's intervention is necessary to protect the constitutional rights of millions of Pennsylvania voters. Under 42 Pa.C.S. § 726, "[t]his Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance that is pending before another court of this Commonwealth." *Bd. of*

Revision of Taxes v. City of Phila., 4 A.3d 610, 620 (Pa. 2010). If ever there were a case that is of "immediate public importance," it is this one.

Petitioners allege that the General Assembly discriminated and retaliated against them on the basis of their political viewpoints, resulting in congressional elections that are unresponsive to their votes and rigged against them. The three congressional elections that have occurred under the 2011 Plan bear this out and provide overwhelming evidence of the intent and enduring effects of the gerrymander. Those elections show that Republican candidates are all but assured 13 of 18 seats in Pennsylvania's congressional delegation, and millions of Pennsylvania voters are artificially deprived of any hope of electing a representative of their choice. Petitioners, and the voters of Pennsylvania at large, should not be made to suffer through another congressional election that deprives them of "fundamental" constitutional rights that "go[] to the very roots of our representative form of government." *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (quoting *Wilson v. Phila. Sch. Dist.*, 195 A. 90, 99 (Pa. 1937)). "Swift resolution of this matter" is essential to "promote confidence in the authority and integrity of [this Commonwealth's] institutions." *Bd. of Revision*, 4 A.3d at 620.

Extraordinary jurisdiction is particularly warranted here because "the record clearly demonstrates" the violation of "[P]etitioners' rights." *Id.* With respect to Petitioners' claims under Article I §§ 7 and 20, for instance, the 2011 Plan

constitutes content- and viewpoint-based legislation intended to burden particular speech, expressive conduct, and political associations; namely, the speech, expressive conduct, and political associations of voters who support Democratic candidates for Congress. The General Assembly cannot credibly deny that this was the intent of the statute. Indeed, the General Assembly will apparently offer ***no*** fact witnesses in defense of the 2011 Plan and their defenses set forth in its Preliminary Objections are almost entirely legal in nature, such as an argument that *Erfer* was wrongly decided and that partisan gerrymandering cases are nonjusticiable[5] Nor will the General Assembly be able to plausibly argue that the 2011 Plan serves a "compelling state interest," and it certainly will not be able to plausibly argue that the 2011 Plan was "narrowly drawn" to accomplish any legitimate interest. *Pap's*, 812 A.2d at 612. This Court applies strict scrutiny to *any* content- or viewpoint-based legislation, *see id.* at 611-13, and it is difficult to imagine what substantive defense, if any, the General Assembly will raise on the merits here.

[5] The General Assembly has asserted privilege as to every single discovery request in the case, including those asking to identify the persons who participated in making the 2011 Plan. While Petitioners believe the privilege objections are not properly asserted, if these hold, then it will be impossible for the General Assembly to call any fact witness to defend the plan.

B. There is Precedent for this Court to Exercise Extraordinary Jurisdiction and to Resolve this Case Before the Next Election

Erfer is on-point precedent for this Court to exercise its plenary jurisdiction and to resolve this case in time of the 2018 elections. In *Erfer*, the petitioners brought a partisan gerrymandering challenge to the congressional districting plan that followed the 2000 census. As here, the petitioners originally filed their suit in the Commonwealth Court and sought expedited consideration so that the case could be resolved in time for the 2002 election. *Erfer*, 794 A.2d at 328. But as in the instant case, the Commonwealth Court made clear that it would not resolve the case in time for the election, as it scheduled a hearing for the day after the closing date for filing nomination petitions. *Id.* The petitioners then filed an application with this Court to exercise its plenary jurisdiction, the Court granted the application, and it directed that there be an evidentiary hearing by a date certain that would ensure this Court's review sufficiently in advance of the election deadlines. *Id.*; *see also Perzel v. Cortes*, 870 A.2d 759, 762 (Pa. 2005) (exercising extraordinary jurisdiction in another election matter).

The time frame in *Erfer* was far more compressed than it is here. The original Petition for Review in *Erfer* was not filed in the Commonwealth Court until January 10, 2002. *Id.* This Court exercised its plenary jurisdiction on January 29, 2002, and directed the Commonwealth Court to hold an evidentiary hearing and issue findings of fact and conclusions of law by February 8, 2002, just

ten days later. *Id.* Here, Petitioners filed their suit seven months earlier in the election cycle, on June 15, 2017. Despite the delays in the Commonwealth Court, there are still nearly five months before the due date for nomination petitions for the 2018 elections, which is March 6, 2018.[6]

This Court can resolve this case in that time frame. Petitioners propose that the parties conduct discovery and pretrial proceedings in time for a January trial under the plenary supervision of this Court. The trial should be straightforward and will provide a more than adequate record for this Court to rule on the merits. There is time to resolve this case before the 2018 elections, and this Court should make every effort to do so.

Even if this Court is unable to resolve this case in time for the 2018 election, however, it should still exercise extraordinary jurisdiction over this case. As the Secretary of the Commonwealth and the Commissioner of Elections noted in their opposition to the stay in the Commonwealth Court, allowing for protracted

[6] That March 8 deadline will also be nearly 9 months from the date the Petition was filed, on June 15, 2017. Recent redistricting cases show that courts can resolve gerrymandering claims in that amount of time. For example, the district court in *Bethune-Hill v. Virginia State Board of Elections* held a trial on plaintiffs' gerrymandering claims less than seven months after plaintiffs filed their complaint. *See* Complaint, No. 3:14-cv-00852 (E.D. Va. filed Dec. 22, 2014), ECF No. 1; Minute Entry, No. 3:14-cv-00852 (E.D. Va. July 7, 2015) (noting bench trial held). The court in *League of Women Voters of North Carolina v. Rucho*, a partisan gerrymandering case, scheduled trial for just nine months after plaintiffs filed their complaint. *See* Complaint, No. 16-cv-011664 (M.D.N.C. filed Sept. 22, 2016), ECF No. 1; Notice of Trial, No. 16-cv-011664 (M.D.N.C. May 23, 2017) (setting trial date of June 26, 2017). And the recently filed federal lawsuit, *Agre*, was not filed until October 2, 2017, nearly four months after this case, and it has already been set for trial.

proceedings in the Commonwealth Court could jeopardize the ability to resolve this case in time for the *2020* elections, which will be the final election under the 2011 Plan before the next census. Answer of Sec. of Com. Pedro A. Cortés & Comm'r of Elec. Jonathan Marks in Opp'n to App. to Stay Case at 7 n.3 (filed Aug. 23, 2017). This risk is real given the stay that is now in place, which could last until the end of June 2018 if that is when the U.S. Supreme Court decides *Gill,* and given that the Commonwealth Court intends to have legal issues resolved piecemeal by the en banc court. *See* Ex. B at 30.

II. There is No Reason to Delay this Case

The General Assembly argued below, and is likely to argue in their opposition to this application, that this case should be put on hold until the U.S. Supreme Court rules in *Gill*. That argument has no merit and pays short shrift to the Pennsylvania Constitution and courts of this Commonwealth.

The General Assembly's central argument below was that *Gill* may "moot" this case if the U.S. Supreme Court decides that federal partisan gerrymandering claims are nonjusticiable. But as even the Commonwealth Court recognized, such a holding would not and could not moot Petitioners' claims, because this Court twice has squarely held that partisan gerrymandering claims *are* justiciable under the Pennsylvania Constitution. *See Erfer*, 794 A.2d 325; *In re 1991 Legis. Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992).

The General Assembly also argued below that a stay was proper because *Gill* may establish legal standards that could affect a decision on the merits of Petitioners' claims, but that argument was equally wrong. *Gill* is a case applying federal law to state legislative districts in Wisconsin. Petitioners bring claims exclusively under the Pennsylvania Constitution. The General Assembly has not offered a *single* prior instance in which Pennsylvania courts have stayed claims under the Pennsylvania Constitution because of the pendency of claims in a different case under the federal constitution. Moreover, Petitioners bring claims under the Free Expression and Association Clauses of Article I, §§ 7, 20, which this Court has repeatedly held "provide[] protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's*, 812 A.2d at 605 (internal quotation marks omitted). Given these "broader protections," any ruling in *Gill* denying the plaintiffs' federal First Amendment claims would not be controlling of Petitioners' Pennsylvania free speech claims here, as the procedural history of *Pap's* well-illustrates. *See id.* at 598-611. Finally, as detailed in Petitioners' opposition to the stay filed below (attached as Exhibit C), there are extensive factual and evidentiary differences between this case and *Gill*, including that Petitioners rely upon several statistical measures and modeling techniques that were not presented in *Gill*.

Nor does the recently filed federal lawsuit present any ground for delay. Quite the opposite—it is well-settled that state law claims asserted in state court should take primacy, or, at minimum, proceed in parallel, where there is similar federal litigation. *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Petitioners reside in all eighteen of Pennsylvania's congressional districts, filed their lawsuit nearly four months before the federal lawsuit, and have carefully and meticulously built overwhelming evidence of violations of their rights under the Pennsylvania Constitution. That evidence will include testimony from several different experts, some of whom will detail how the current plan splits apart historical communities of interest in Pennsylvania, and others of whom will present conclusive statistical evidence proving the partisan intent and effects of the 2011 Plan. Petitioners' case will be ready to proceed to trial in time for the 2018 elections, and as this Court said in *Pap's*, "Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while [federal courts] struggles to articulate a standard to govern a similar federal question." 812 A.2d at 611.

In short, there is no compelling reason to delay the proceedings and the vindication of Petitioners' constitutional rights. This Court has made clear time and again that "the fundamental rights guaranteed by the Pennsylvania Declaration of Rights 'cannot lawfully be infringed, even momentarily.'" *Id.* at 607 (quoting

Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa. 1921)). This Court's intervention is necessary to prevent precisely that from happening.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court exercise its extraordinary jurisdiction over this matter and implement proceedings (including, if desirable, the appointment of a special master) to ensure timely resolution of this case before the 2018 congressional elections. In the alternative, even if this Court does not implement a schedule to resolve this case before the 2018 elections, Petitioners request that this Court still exercise its extraordinary jurisdiction to ensure a timely and efficient adjudication of this case without further delay.

Dated: October 11, 2017

Respectfully submitted,

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Counsel for Petitioners*

* Attorneys from Arnold & Porter Kaye Scholer LLP were admitted to represent Petitioners *pro hac vice* at the Commonwealth Court, and their applications for *pro hac vice* admission in this Court are forthcoming

EXHIBIT A

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, JAMES WRIGHT, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; 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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.

Docket No.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notification. Ademas, la corte puede decider a favor del demandante y require que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado immediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal sevicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede consequir alstencia legal.

Colegio de Abogados de Condado de Dauphin
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, JAMES WRIGHT, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY, Petitioners, v. THE COMMONWEALTH OF PENNSYLVANIA; 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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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, Respondents.	Docket No.

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NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

BY: */s/ Mary M. McKenzie*

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY, Petitioners, v. 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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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, Respondents.	Docket No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

1. This case is about one of the greatest threats to American democracy today: partisan gerrymandering. A partisan gerrymander occurs when the political party in control of redistricting redraws congressional or state legislative districts to entrench that party in power and prevent voters affiliated with the minority party from electing candidates of their choice. The result is that general election outcomes are rigged—they are predetermined by partisan actors sitting behind a computer, not by the candidates, and not by the voters.

2. This practice is illegal and has been condemned by the Supreme Courts of the United States and the Commonwealth of Pennsylvania. The U.S. Supreme Court has explained that "[p]artisan gerrymanders . . . are incompatible with democratic principles." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alterations omitted). The Pennsylvania Supreme Court has written that a partisan gerrymander would violate the Pennsylvania Constitution when "there was intentional discrimination against an identifiable political group" that resulted in "an actual discriminatory effect on that group." *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). A partisan gerrymander "burdens rights of fair and effective representation" by enabling one political party to entrench itself in power while diluting the votes of citizens who affiliate with the party out of power. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

3. While neither political party has a monopoly on the practice, this case challenges the partisan gerrymandering of the Commonwealth's current congressional districts by the Republican majority in the Pennsylvania General Assembly. Following the 2010 Census, Republican legislators dismantled Pennsylvania's existing congressional districts and stitched

them back together with the goal of maximizing the political advantage of Republican voters and minimizing the representational rights of Democratic voters. According to the Brennan Center for Justice, the districting plan that resulted (the "2011 Plan"), which was signed into law by the Republican then-Governor, is one of the three most "extreme" gerrymanders in the nation.[1] Indeed, by some measures, Pennsylvania's gerrymander is the "worst offender" in the country.[2]

4. The 2011 Plan was the product of a national movement by the Republican Party to entrench its own representatives in power by utilizing the latest advances in mapmaking technologies and big data to gerrymander districts more effectively than ever before. Republican mapmakers used sophisticated computer modeling techniques, in Pennsylvania and elsewhere, to manipulate district boundaries with surgical precision to maximize the number of seats their party would win in future elections.

5. And their effort has been overwhelmingly successful. In 2012, Republican candidates won only 49% of the statewide congressional vote, but remarkably won 13 of 18—or 72%—of Pennsylvania's congressional seats. In 2014 and 2016, Republican candidates retained the same 72% share of Pennsylvania's seats, even while winning only 55% and 54% shares of the statewide vote.

6. The 2011 Plan achieved these lopsided results by "packing" Democratic voters into five districts that are overwhelmingly Democratic, and "cracking" the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. The result is a districting plan that is utterly unresponsive

[1] Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice, at 1 (2017), *available at* https://www.brennancenter.org/publication/extreme-maps.

[2] *Id.* at 9.

to—and often flouts—the will of voters. For example, even though Democratic candidates won 6 points more in the statewide vote in 2012 compared to 2014, the number of Democrats elected was no different across the two elections.

7. The composition of the enacted districts reflects how the Republicans responsible for redistricting achieved this partisan result. For example, the city of Reading—a Democratic stronghold—was carved out of the 6th Congressional District, where it would naturally reside, and placed into the 16th District, where Republicans made up the majority. Similarly, in the 17th District, the Democratic-leaning cities of Scranton (in Lackawanna County), Wilkes-Barre (in Luzerne County), and Easton (in Northampton County) were packed into a district that was already reliably Democratic, removing any risk that Wilkes-Barre voters (who would reside in the 11th District if county boundaries were respected) would tilt the 11th District to Democrats. And in the 7th District, portions of the city of Chester were carved out by packing these voters into the reliably Democratic 1st District.

8. As illustrated infra at Paragraphs 55-59, these decisions resulted in district lines that are absurd. Pennsylvania's 7th Congressional District has been described as "Goofy Kicking Donald Duck."[3] The 12th District could be mistaken for the boot of Italy. The 6th resembles the State of Florida, with perhaps a longer and more jagged Panhandle. These shapes lay bare the lengths that Republicans went to deny Petitioners and millions of other voters their constitutional rights and to lock in an artificial political advantage for Republicans.

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[3] Aaron Blake, *Name That District Contest Winner: 'Goofy Kicking Donald Duck'*, Wash. Post, Dec. 29, 2011, https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html?utm_term=.a7863a1c4f3a.

9. While the districts are so bizarrely engineered that the only fair inference is that the Republican mapmakers made them so for partisan advantage, this partisan purpose is confirmed by an array of statistical techniques. Indeed, just as modern technology enabled Republicans to accomplish their gerrymander with more precision than ever before, it can be used to expose this discrimination for what it is. Computer modeling used by political scientists demonstrates that the Republican bias of the enacted plan could not have resulted from the use of traditional redistricting criteria such as contiguity and compactness, and cannot be explained by any natural clustering of voters in Pennsylvania. Rather, it is a statistical certainty that the Republican bias of the enacted plan could have resulted *only* from impermissible partisan intent.

10. Other statistical tests further confirm that the enacted plan reflects a deliberate and successful effort to disadvantage Democratic voters. The "efficiency gap," which a three-judge panel recently applied in striking down Wisconsin's state house districts, measures how many votes the enacted plan "wastes" for the disfavored party, relative to the favored party, through cracking and packing. *See generally Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *jurisdictional statement filed* (U.S. Mar. 24, 2017) (No. 16-1161). In 2012, the efficiency gap of Pennsylvania's congressional districts was *the largest* in the nation. Another test for identifying political gerrymandering is the "mean-median gap," which measures the gap between the average Democratic vote share across the Commonwealth and Democratic vote share in the median district, *i.e.*, the district either party would need to win to earn a majority of districts. Again, Pennsylvania's mean-median gap is one of the largest in the nation, reflecting the deliberate effort to maximize the number of seats Republicans win by packing Democrats into a few districts.

11. A variety of statistical modeling techniques and tests all lead to the same conclusion: the enacted plan could have resulted only from unconstitutional partisan intent, and the effect of that discrimination is significant and enduring.

12. Along with other forms of equitable relief, Petitioners seek a judicial declaration that the enacted plan, by discriminating against Democratic voters on the basis of their political expression and affiliation, violates the Pennsylvania Constitution.

PARTIES

A. Petitioners

13. The League of Women Voters of Pennsylvania ("LWVPA"), a nonpartisan political organization, encourages the informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League supports full voting and representational rights for all eligible Commonwealth citizens and opposes efforts to disadvantage or burden voters based on their political affiliation.

14. Petitioner Carmen Febo San Miguel is an Executive Director of a non-profit cultural organization and a former physician who resides in the 1st Congressional District in Philadelphia. Febo San Miguel is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 1st District under the 2011 Plan with over 80% of the vote, at times with the Democratic candidate running unopposed.

15. Petitioner James Solomon is a retired federal employee who resides in Philadelphia in the 2nd Congressional District. Solomon is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 2nd District since 2002 with over 85% of the vote.

16. Petitioner John Greiner is a software engineer who resides in the 3rd Congressional District, in Erie, Erie County. Greiner is a registered Democrat and has consistently voted for Democratic candidates for Congress. Before the 2011 Plan, the 3rd District was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But the Republican representative, Mike Kelly, has comfortably won reelection in every election since the 2011 Plan, running unopposed in 2016.

17. Petitioner John Capowski is a law professor emeritus residing in Camp Hill, Cumberland County, in the 4th Congressional District. Capowski is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 4th District was a competitive district: Republicans won in 2002 and 2004, and Democrats won in 2006, 2008, and 2010. But the Republican representative, Scott Perry, has easily won reelection in every election since the 2011 Plan.

18. Petitioner Gretchen Brandt is a mother of two and a school board director residing in the 5th Congressional District, in State College, Centre County. Brandt is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 5th District since 2002.

19. Petitioner Thomas Rentschler is a former school teacher and attorney who resides in Exeter Township, Berks County, which falls in the 6th Congressional District. Rentschler is a registered Democrat who has consistently voted for Democratic candidates for Congress. The 6th District had been an extremely competitive district under the prior congressional plan, with 4 of the 5 congressional elections decided by less than 5 points. But the 6th district has been far less competitive under the 2011 Plan, with the Republican representative winning each election by more than 12 points.

20. Petitioner Mary Elizabeth Lawn is a chaplain at a retirement community who lives in Chester, Delaware County. Lawn is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Lawn's home fell in the 1st Congressional District, which has consistently elected Democrats. But under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

21. Petitioner Lisa Isaacs is an attorney who resides in the 8th Congressional District in Morrisville, Bucks County. Isaacs is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 8th District was a competitive district: Republicans won in 2002, 2004, and 2010, while Democrats won in 2006 and 2008. Under the 2011 Plan, however, Republican candidates have won by 8 points or more in each election.

22. Petitioner Don Lancaster is a retired teacher who resides in Indiana County, in the 9th Congressional District. Lancaster is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 9th District since 2002 with more than 60% of the vote.

23. Petitioner Jordi Comas is an academic and chef residing in Lewisburg, Union County. Comas is a registered Democrat in Pennsylvania's 10th Congressional District who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 10th District was often a competitive district: Republicans won in 2002, 2004, and 2010, and Democrats won in 2006 and 2008. But the Republican representative, Tom Marino, easily won election in 2012 with over 65% of the vote and has been comfortably reelected ever since.

24. Petitioner Robert Smith, a retired health executive, resides in Bear Creek Village Borough, Luzerne County, in the 11th Congressional District. Smith is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 11th District was often a competitive district: Democrats won in 2002, 2004, 2006 and 2008, but were unseated in 2010 when a Republican, Lou Barletta, defeated the Democratic incumbent. Since the 2011 Plan, Lou Barletta has comfortably won reelection with about 60% of the vote.

25. Petitioner William Marx is a high school civics teacher and Army Reservist residing in Delmont, Westmoreland County, which falls in the 12th Congressional District. Marx is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Democrats won every congressional election in the 12th District since 2002, often winning over 60 percent of the vote. Since redistricting, Republicans have won every election, winning by more than 18 points in the last two elections.

26. Petitioner Richard Mantell is a retired school administrator residing in Jenkintown, Montgomery County, which sits in the 13th Congressional District. Mantell is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, elections in the 13th District were generally competitive, with Democrats winning each election but with less than 60% of the vote in three out of five elections. But after Democratic voters were packed into the district under the 2011 Plan, Democrats won easily in 2012 and 2014 and ran unopposed in the 2016 election.

27. Petitioner Priscilla McNulty is a manager at a non-profit who resides in the 14th Congressional District in Pittsburgh, Allegheny County. McNulty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have easily won every congressional election in the 14th District since 2002.

28. Petitioner Thomas Ulrich is a retired school teacher who resides in Bethlehem, Lehigh County, falling in the 15th Congressional District. Ulrich is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 15th District since 2002.

29. Petitioner Robert B. McKinstry, Jr. is an environmental attorney who resides in East Marlborough Township, Chester County, in the 16th Congressional District. McKinstry is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 16th District since 2002.

30. Petitioner Mark Lichty is a retired attorney and manufacturer who resides in East Stroudsburg, Monroe County, in the 17th Congressional District. Lichty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 17th District since 2002.

31. Petitioner Lorraine Petrosky is a retired preschool teacher who resides in the 18th Congressional District in Latrobe, Westmoreland County. Petrosky is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 18th District since 2002, almost always with more than 60% of the vote.

B. Respondents

32. Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.

33. Respondent the Pennsylvania General Assembly is the state legislature for the Commonwealth of Pennsylvania and is comprised of the State House and State Senate. The General Assembly convenes in the State Capitol building in Harrisburg, Pennsylvania.

34. In Pennsylvania, the boundaries for congressional districts are redrawn every ten years after the national census by legislative action in a bill that proceeds through both chambers of the General Assembly and is signed into law by the Governor. In 2011, Republicans controlled every step of that process. Most of the Respondents named below were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek.

35. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity only. As Governor, Respondent Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan.

36. Respondent Pedro A. Cortés is the Secretary of the Commonwealth and is sued in his official capacity only. In that capacity, he is charged with the general supervision and administration of Pennsylvania's elections and election laws.

37. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State and is sued in his official capacity only. In that capacity, he is charged with the supervision and administration of the Commonwealth's elections and electoral process.

38. Respondent Michael J. Stack III, the Lieutenant Governor of the Commonwealth, serves as President of the Pennsylvania Senate and is sued in his official capacity only.

39. Respondent Michael C. Turzai is the Speaker of the Pennsylvania House of Representatives and is sued in his official capacity only.

40. Respondent Joseph B. Scarnati III is the Pennsylvania Senate President Pro Tempore and is sued in his official capacity only.

JURISDICTION

41. The Court has original jurisdiction over this Verified Petition for Review pursuant to 42 Pa. Cons. Stat. § 761(a).

FACTUAL ALLEGATIONS

A. National Republican Party Officials Target Pennsylvania For Partisan Gerrymandering

42. In the years leading up to the 2010 census, national Republicans leaders undertook a concerted effort to gain control of state governments in critical swing states such as Pennsylvania. The Republican State Leadership Committee (RSLC) codenamed their plan "the REDistricting Majority Project," or "REDMAP." REDMAP's goal was to "control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn."[4]

43. The RSLC intended that this project would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[5] The REDMAP homepage explains that "Republicans [had] an opportunity to create 20-25 new Republican Congressional Districts through the redistricting process. . . , solidifying a Republican House majority."[6]

44. Pennsylvania was a key REDMAP "target state." As the second most populous swing state in the nation, Pennsylvania currently holds 18 seats in the U.S. House of Representatives. Pennsylvania is also one of only a handful of states that has consistently lost

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[4] *2012 REDMAP Summary Report*, Redistricting Majority Project (Jan. 4, 2013), http://www.redistrictingmajorityproject.com/?p=646.

[5] *Id.*

[6] Redistricting Majority Project, http://www.redistrictingmajorityproject.com/ (last visited June 9, 2017).

seats in the U.S. House of Representatives every ten years through reapportionment, having lost at least one House seat every ten years since 1920. These features of Pennsylvania's political landscape make it a prime target for partisan gerrymandering.

45. Heading into the November 2010 election, Democrats held the Pennsylvania House by a slim margin. The RSLC focused its resources on Pennsylvania in the 2010 election, targeting and winning three key house races that would swing control of the Pennsylvania House to Republicans. During that same election, Republicans also won the governorship, while retaining control of the Pennsylvania Senate. Thus, after the 2010 election, Republicans had exclusive control over congressional redistricting in Pennsylvania. The Republicans quickly set to work to redraw the congressional map in a way that would entrench the Republican Party's dominance in Pennsylvania's delegation to the U.S. House for the next decade.

46. On information and belief, Republicans, including key members of the Pennsylvania Senate and House Committees on State Government, communicated with Republican leaders in Washington, D.C. and elsewhere to create a plan that would maximize the number of Republicans elected to the U.S. House.

47. Mapmakers seeking to create a partisan gerrymander do so primarily through two means—"cracking" and "packing" voters of the opposing political party into congressional districts that will dilute their political power. "Cracking" is achieved by dividing a party's supporters among multiple districts so that they fall short of a majority in each district. "Packing" involves concentrating one party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere. This cracking and packing results in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing).

48. Republicans worked with highly skilled and partisan mapmakers to generate the most advantageous possible map for the Republican Party. Using sophisticated computer software and data such as voter registration information and election results, the Republicans' mapmakers created a plan that virtually guaranteed the Republican Party would win in the large majority of Pennsylvania's congressional districts. Their entire aim was to burden the representational rights of Democratic voters, making it nearly impossible for Democrats in cracked districts to elect representative of their choice, and wasting the votes of Democrats in packed districts.

49. Democrats were not involved in the drawing of the map. The Republican mapmakers created the 2011 Plan through a secret process to avoid scrutiny from Democrats and the general public.

C. Republicans Introduce Senate Bill 1249

50. On September 14, 2011, Republicans introduced their redistricting bill, Senate Bill 1249. The bill's primary sponsors were all Republicans: Majority Floor Leader Dominic F. Pileggi, President Pro Tempore Joseph B. Scarnati III, and Senator Charles T. McIlhinney Jr. The Republican leadership went to extraordinary lengths to conceal their intent.

51. As introduced, Bill 1249 was simply an empty shell. It contained no map showing the proposed congressional districts. Each congressional district was described in the following fashion: "The [Number] District is composed of a portion of this Commonwealth." The same held true through the second reading of the bill. This was a deliberate effort on the part of the Republicans to prevent Democrats and the public from understanding the nature of the Republicans' redistricting plan.

52. Then, three months after they had introduced SB 1249, on the morning of December 14, 2011—the day of the vote on the bill—the Republicans suddenly amended the bill

to add for the first time the actual descriptions of the congressional districts. Once the details of the plan were released, it became clear why the Republicans had kept it a secret.

53. As explained below, SB 1249 represented, by any measure, one of the most extreme partisan gerrymanders in American history. One of Pennsylvania's leading political scientists, Franklin & Marshall political science professor Terry Madonna, described it as "[t]he most gerrymandered map [he had] seen in the modern history of our state."[7] Even Sean Trende, who testified in defense of Wisconsin's gerrymandered map in *Whitford v. Gill*, suggests that Pennsylvania's map might be "the Gerrymander of the Decade."[8]

54. To accomplish their gerrymander, Republicans "packed" Democrats into "a group of Rorschach-inkblot districts,"[9] and then "cracked" the rest into districts that would vote reliably Republican. Michael Barone and Chuck McCutcheon, writing for *The Almanac of American Politics*, described the plan as follows:

> The plan ruthlessly sewed the state, particular the Philadelphia suburbs, into a crazy quilt. Montgomery County, about the population of one district, was split five ways to boost the suburban Republican trio of Jim Gerlach, Mike Fitzpatrick, and Pat Meehan, who were happy to feed their trickiest inner suburbs to Philadelphia's Democrats. Mapmakers even awkwardly appended a portion of Amish Country to Meehan's 7th District. In the northeast, Republicans stuffed Blue Dog [Tim] Holden's 17th District with the liberal labor bastions of Scranton, Wilkes-Barre, and Easton to relieve pressure on freshman Republican Lou Barletta in the 11th District and Charlie Dent in the Lehigh Valley's 15th.
>
> In the west, Republicans split the city of Erie to shore up freshman Mike Kelly and carefully merged [Jason] Altmire and [Mark] Critz in such a way that neither

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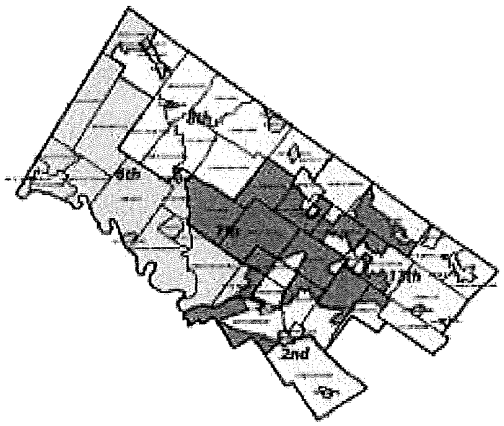
[7] Charles Thompson, *Congressional Redistricting Puts Pa. Congressmen at a Distance*, Harrisburg Patriot-News, Dec. 18, 2011, http://www.pennlive.com/midstate/index.ssf/2011/12/congressional_redistricting_pu.html.

[8] Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, Real Clear Politics (Dec. 14, 2011), http://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html.

[9] *Id.*

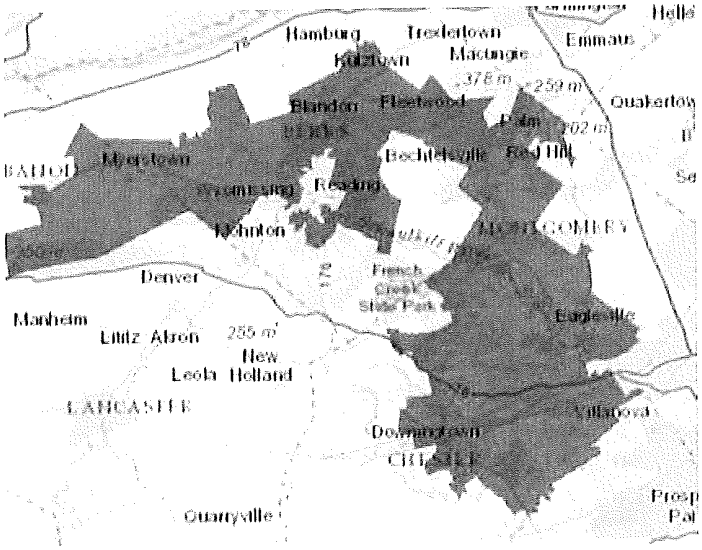
> Democrat could plausibly run elsewhere but either would still be vulnerable in a general election. Sure enough, Critz defeated Altmire in a bitter primary and Republican Keith Rothfus defeated Critz in November. Back east, Holden lost his primary to a more liberal Democrat, and in November, Republicans held onto their other 12 seats without much of a fight.

55. The "crazy quilt" that the Republicans devised ignores all traditional redistricting criteria and serves no legitimate purpose. It fractures local political subdivisions rather than keeping them intact. For example, enough voters live in Montgomery County for that county to have its own congressional district. But, as seen below, under SB 1249, Montgomery County is split among five districts.[10] Not a single one of those five Congressmen lives in Montgomery County. Other counties—such as Berks and Chester—are similarly divided.

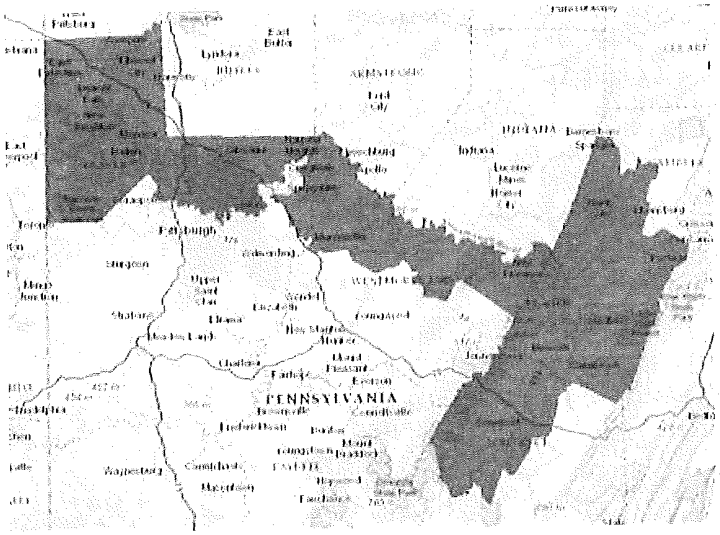


[10] Dan Sokil, *Fair Districts PA Urges Residents to Spread the Word of Redistricting Reform Effort*, Times Herald, May 3, 2017, http://www.timesherald.com/article/JR/20170503/NEWS/170509919.

56. SB 1249 also resulted in district shapes that make the gerrymander obvious. For example, Pennsylvania's 6th District now looks like the State of Florida:

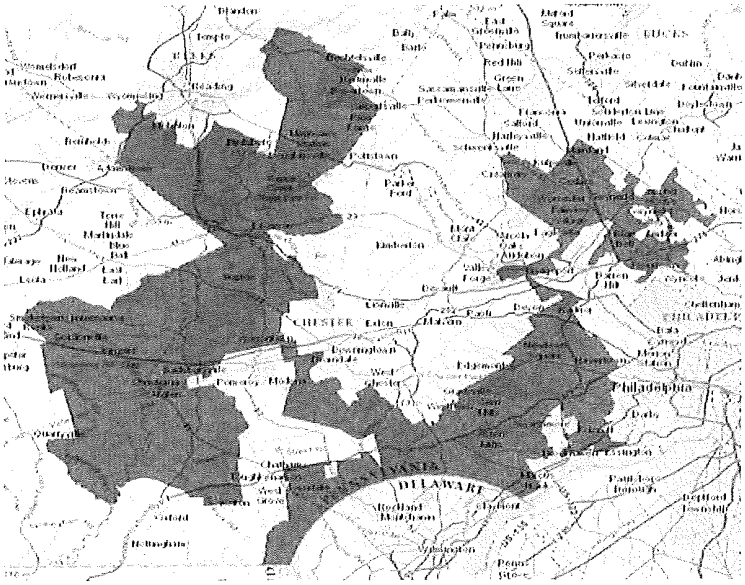


57. The 12th District looks like the boot of Italy:

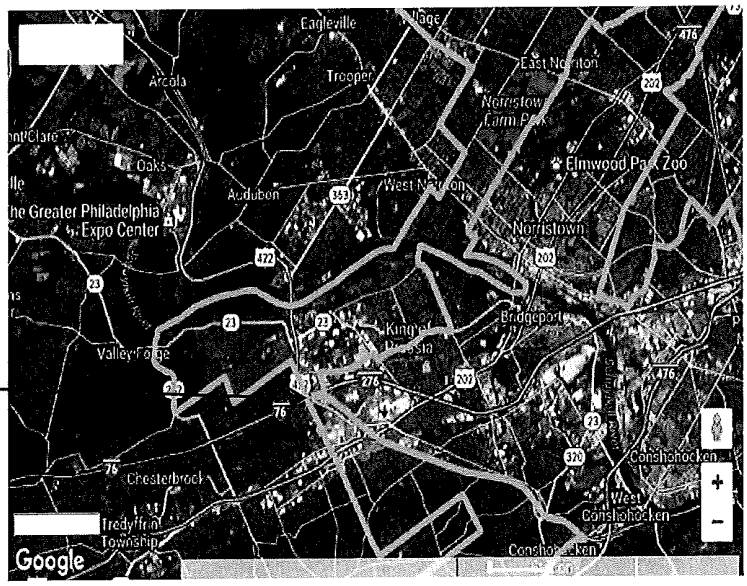


58. And Pennsylvania's notorious 7th District—"Goofy kicking Donald Duck"—is spread out among five counties. At one point in King of Prussia, the district is so narrow that it

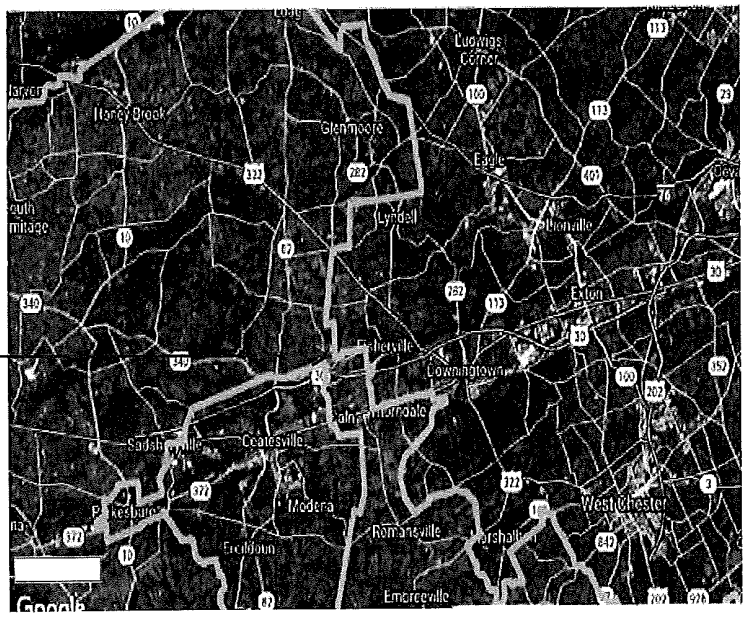
is held together only by a Creed's Seafood & Steaks. At another point in Coatesville, it is only a medical endoscopy center that connects one part of the district to another.



Creed's Seafood & Steaks

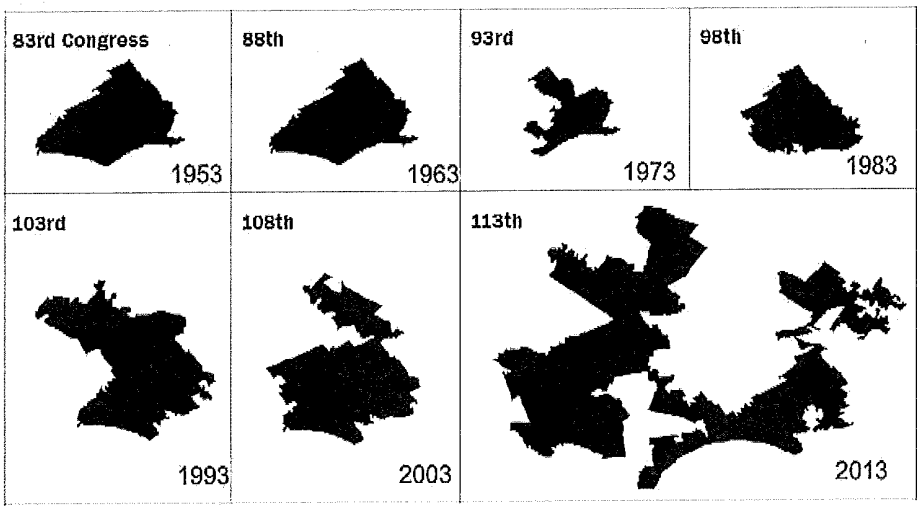


Brandywine GI Associates (endoscopy center)



59. There is no legitimate, constitutionally permissible reason for drawing districts in this manner. As depicted below, the evolution of the 7th District over time lays bare the lengths to which Republicans have gone to construct the district to their advantage.[11]

THE EVOLUTION OF PENNSYLVANIA'S SEVENTH DISTRICT



60. The 2011 Plan for the entire state is shown in the appendix attached hereto.

61. Because of the way Republicans redrew district boundaries, members of entire communities are denied a right to cast a vote that has any meaning. For example, when Republicans redrew the 6th District, they carefully carved out the city of Reading to make the 6th "safe" for Republicans. They then forced Reading into the solidly Republican 16th district, where the votes of Democratic voters are virtually certain never to matter. As a result, Reading

[11] Christopher Ingraham, *What 60 Years of Political Gerrymandering Looks Like*, Wash. Post, May 21, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm_term=.8fb7e83fcbba.

residents "really . . . don't have true representation[;] [their] voice is really muted because of the gerrymandering that's taken place in Pennsylvania."[12]

62. Republicans used a similar technique in the 17th District, where they packed the Democratic-leaning cities of Scranton, Wilkes-Barre, and Easton into a district that was already reliably Democratic, and removed any risk that Wilkes-Barre voters (which would reside in the 11th District if county boundaries were respected) would tilt the 11th District to the Democrats.

63. In the 7th District, Republicans carved out many Democratic voters in the city of Chester, packing them into the reliably Democratic 1st District.

64. Republicans packed minority voters into the 1st and 2nd Districts to waste their votes. The 1st District now has 66% minority voters, while the 2nd District now has 71% minority voters. Since the 2011 Plan, both districts have reliably produced super-majority votes for Democratic candidates of over 80% of the vote. In the 2nd District, the Democratic representative has won over 87% of the vote in every election since the 2011 Plan.

65. Republicans consistently redrew district lines to their advantage across the Commonwealth, taking one competitive district after another and transforming it into a safe Republican district. For example, under the 2003 plan, in the 11th District, 57.5% of voters voted for Barack Obama in the 2008 presidential election. After redistricting, however, only 47.7% of voters were 2008 Obama voters, a 9.8% swing.

66. On the day the 2011 Plan was both revealed and voted upon in the Senate, Democratic Senators protested that the plan was partisan, that it was proposed with "extremely

[12] Lindsay Lazarski, *Dividing Lines: How Pennsylvania's Elections Really Are Rigged*, *Keystone Crossroads*, https://keystonecrossroads.atavist.com/dividing-lines-how-pennsylvanias-elections-really-are-rigged.

short notice," and that the process lacked any transparency. As Democratic Senator Anthony H. Williams explained, "[M]aybe if we had . . . transparency, openness, and most importantly, inclusion, we could have shared the responsibility of coming up with a[] . . . much more representative map. That is not what happened . . . . [W]e have a map that not one Democrat had anything to do with on this side of the aisle."

67. Democratic Senator Jay Costa unsuccessfully introduced an amendment to the Republican plan that he believed would create 8 districts favorable to Republicans, 4 districts favorable to Democrats, and 6 swing districts.

68. The Republican majority in the Pennsylvania Senate set SB 1249 for a vote on the very same day that they first publicly disclosed the descriptions of the new districts. The bill passed in the Senate by a vote of 26-24. Not one Democratic Senator voted for the bill.

69. On December 15, 2011 and December 20, 2011, the Pennsylvania House of Representatives considered SB 1249. As in the Senate, Democratic representatives vociferously objected to the lack of transparency in adopting the plan and to its partisan nature.

70. Democratic representative Dan Frankel observed that the plan was clearly an effort to entrench Republicans in power: "[W]hat is taking place here today, in my view, is a very cynical attempt to institutionalize a Republican majority of congressional seats in Pennsylvania. . . . That is not good for our politics. . . . This is not the way we ought to be governing; to overreach, to go through contortions to create districts that are safe for a majority of Republican members of Congress is not good public policy. We ought to reject this. This is not good government; this is a very cynical way to do government."

71. Democratic Representative Frank Dermody similarly objected: "[T]he way our system is supposed to work is that the voters are supposed to pick the politicians. With this map,

the politicians pick the voters. This map sets up districts that are gerrymandered beyond recognition."

72. Democratic Representative Robert Freeman added: "SB 1249 contains the worst case of gerrymandering in Pennsylvania in living memory. . . . A look at the configuration of the congressional district map of 1249 reveals twisted and distorted districts that were drawn purely for political advantage, with no consideration for compactness of districts or communities of interest."

73. Democratic Representative Steve Samuelson protested about the lack of transparency: "When this bill had first reading, the Senate had no plan [i.e., the bill had no substantive content]. When this bill had second reading, the Senate had no plan. The map was not revealed until December 13. The details . . . were not available until 9 a.m. on December 14. . . . [T]he public had about 14 hours to see the details. Now, since the Senate came out with their plan on Wednesday, the public has had a grand total of 5 days."

74. Democratic Representative Babette Josephs similarly protested the extraordinary lack of transparency in what she called a "dreadful" plan, noting that she had never before "seen a hearing in this legislature on a blank bill." "You could not tell, looking at the bill or looking for a map, what . . . the Republicans had in mind."

75. Democratic Representative Michael Hanna offered an amendment to "create a fair redistricting map . . . [that] will minimize district splits in counties and municipalities and ensure equality of representation across the 18 congressional districts," but, as with Senator Costa's amendment, the House amendment failed.

76. Notwithstanding Democratic opposition, SB 1249 passed in the House on December 20, 2011 by a vote of 136-61. In the end, with passage of the bill a *fait accompli*

because of the Republican majority, 36 Democrats voted for the bill. Pennsylvania's Republican Governor, Tom Corbett, signed the bill into law in time for the 2002 U.S. Congressional election. The 2011 Plan remains in effect today.

D. Senate Bill 1249 Burdened the Representational Rights of Democratic Voters

77. Senate Bill 1249 achieved exactly the effect REDMAP intended. In the 2012 election, each party's share of the two-party vote in the districts the party won were as follows:

District	Democratic Vote Share	Republican Vote Share
1	84.9%	
2	90.5%	
13	69.1%	
14	76.9%	
17	60.3%	
3		57.2%
4		63.4%
5		62.9%
6		57.1%
7		59.4%
8		56.6%
9		61.7%
10		65.6%
11		58.5%
12		51.7%
15		56.8%
16		58.4%
18		64.0%
Average in Districts Won	**77.0%**	**59.3%**
Statewide Vote Share	**50.8%**	**49.2%**

78. The chart demonstrates how Republicans were able to rig the system so that Democrats could win only 5 of 18 districts even though Democrats won a *majority*—50.8%—of statewide congressional votes in the 2012 election. The average winning percentage in districts Democrats won was an astronomical 77.3%, reflecting the packing of Democrats into five districts. *Not a single winning Republican candidate* earned this large a share of the vote in his district. Victorious Republican candidates all won by much smaller margins, winning between

51.7% and 65.6% of the vote, for an average winning percentage of only 59.3%. In other words, the 2011 Plan guaranteed that Democrats would win a small number of House seats by very large margins, while Republicans would win the lion's share of seats by much smaller, although still comfortable, margins.

79. Republican officials pointed out that the 2011 Plan enabled Republicans to win the Commonwealth's delegation even in years when Democrats outperformed them, boasting that Republicans had achieved a large majority of the congressional seats even as Democrats won the important state-wide races: "The impact of this investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly 9 points and reelected President Obama by more than 5 points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House."[13]

80. In 2014, Republicans won 55.5% of the statewide congressional vote and remained at 13 of 18 seats. Although the percentage of seats Republicans won—72%—was still grossly disproportionate to their statewide vote share, it is nonetheless telling that Republicans won an extra 6 percentage points of the statewide congressional vote compared to 2012 but did not pick up any additional House seats. That is because the 2011 Plan is utterly unresponsive to the will of the voters. Democrats are locked into the 5 districts in which they are packed, and therefore do not lose—and cannot gain—seats with any normal swing in the statewide vote.

81. In 2016, the results were almost identical. Republicans won 53.9% of the statewide congressional vote and again won 13 of 18, or 72%, of the congressional seats.

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[13] *2012 REDMAP Summary Report*, The Redistricting Majority Project, http://www.redistrictingmajorityproject.com/?cat=1 (last visited June 7, 2017).

82. In both the 2014 and 2016 elections, the margin of victory in districts Democrats won was far higher than the margin of victory in districts Republicans won; in 2014, the average vote share for successful Democratic candidates was 73.6%, as compared to 63.4% for successful Republicans candidates (excluding uncontested elections), and for 2016 the average vote share was 74.2% for successful Democratic candidates and 61.1% for successful Republican candidates (excluding uncontested elections).

83. That the 2011 Plan is the product of naked partisan gerrymandering is confirmed by any number of other measures. In recent years, political scientists and mathematicians have developed a number of sophisticated modeling techniques and tests to identify political gerrymanders. These tests each independently demonstrate the magnitude of the 2011 Plan's Republican bias, the fact that this bias could have resulted only from an intentional effort to benefit Republicans and to disadvantage Democrats.

84. One recognized way to test whether the 2011 Plan is the product of partisan bias is to ask whether observing traditional redistricting criteria such as contiguity, compactness, equal population, and minimizing county splits could reasonably be expected to produce a plan that yields the results generated by the actual 2011 Plan. The answer is a resounding "no."

85. Political scientists can answer this question by using computer modeling to generate alternative plans that adhere to traditional redistricting criteria but do not aim to advance partisan goals.[14] These alternative plans thus account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas.

[14] *See, e.g.*, Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf.

86. Performing this modeling for Pennsylvania congressional districts yields thousands of alternative plans that comply with traditional districting principles. But not one produces the partisan bias of the 2011 Plan. That is, using the *actual* voting results from past Pennsylvania statewide elections, and then interposing those voting results over the district boundaries in each alternative plan, not a single alternative plan produces a result in which Republicans would win a 13-5 advantage in Pennsylvania's congressional delegation. This modeling demonstrates, with statistical certainty, that the 13-5 Republican advantage under the 2011 Plan is not the result of neutral factors such as population clustering. Rather, the bias of the 2011 Plan is necessarily the result of an intentional effort to favor Republicans.

87. Mathematicians at Carnegie Mellon University and the University of Pittsburgh have developed an alternative modeling approach that also demonstrates the partisan intent behind the 2011 Plan.[15] Using a modeling technique known as "Markov chain" analysis, these mathematicians take the enacted plan as a starting point and then make a series of random adjustments to the district boundaries by swapping precincts, while maintaining districts that are contiguous, of equal population, and as compact as the ones in the 2011 Plan. It can be proved mathematically using this approach that if the enacted plan were drawn without bias, these changes should not change the statistical properties of the plan. But the professors find that random changes to the 2011 Plan greatly diminish the Republican advantage. The professors conclude that the 2011 Plan has a Republican bias that cannot be the result of external factors such as the political geography of Pennsylvania.

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[15] Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with supplement at* https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf.

88. Yet another statistical approach that measures partisan gerrymanders is the efficiency gap. This measure, which the three-judge panel in *Whitford* applied in striking down Wisconsin's state house districts, measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, defined as the number of votes cast for losing candidates of that party (as a measure of cracked votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election.

89. The efficiency gap for Pennsylvania's congressional districts is enormous. For example, in the 2012 election, Democrats wasted 2,442,621 votes, compared to Republicans who wasted only 1,093,328 votes. The resulting efficiency gap of 24.5% was *the highest in the nation* among states that have more than two congressional districts. These figures demonstrate the massive number of Democrats in cracked districts who were deprived of the ability to elect officials of their choice, and the massive number of Democrats packed into districts where their votes were diluted.

90. Another measure of partisan gerrymandering is the "mean-median gap." The measure looks at the Democratic vote share in each of Pennsylvania's 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance, which because Pennsylvania has an even number of districts, is the average of Democrats' vote shares in the districts where Democrats performed the ninth and tenth best out of the 18 districts.

Gerrymandering does not impact the mean vote share, since that is a statewide figure. But it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. If, as in 2012, the Democratic vote share in the median district is lower than the mean Democratic vote share statewide, that necessarily indicates there are a disproportionately large number of Democratic voters in a few, packed districts. And it indicates that it is more difficult for Democrats to win the median district and hence a majority of seats: the larger the mean-median gap, the greater the mean vote share across the state that Democrats need to bring their vote share in the median district above 50%.

91. As illustrated below, in the 2012 election, the mean Democratic vote share across all Pennsylvania districts was 50.46%, but the median Democratic vote share was just 42.81% (the average of the 6th and 3rd Districts, which were Democrats' ninth and tenth best districts). Accordingly, the mean-median gap was 7.65%, which was the fifth largest of all congressional slates in the country for the 2012 election. This gap shows the disproportionate percentage of the statewide vote that Democrats would need to win a majority of congressional seats. Democrats would have needed to win the 3rd District to win a majority of seats, and Democrats would have needed to win an additional 7.2% of the vote there to win—even though Democrats already won over 50% of the vote statewide.

92. Indeed, it would be nearly as difficult for Democrats to win just *two additional seats*. In 2012, Democrats would have needed to flip the 8th District to win two additional seats (*i.e.*, to win their seventh best district), but Democrats received just 43.4% share of the vote in the 8th District. These figures show how Republicans skewed the districts to maximize the

numbers of seats they would win and render these seats immune from normal swings in the statewide vote.

District	Democratic Vote Share
10	34.4%
18	36.0%
4	36.6%
5	37.1%
9	38.3%
7	40.6%
11	41.5%
16	41.6%
3	42.8%
6	42.9%
15	43.2%
8	43.4%
12	48.3%
17	60.3%
13	69.1%
14	76.9%
1	84.9%
2	90.5%
Mean	**50.5%**
Median	**42.8%**

93. The mean-median gaps for the 2014 and 2016 held steady at roughly the same levels. The mean-median gap was 7.46% for the 2014 election and 7.61% for the 2016 election, again showing the degree to which Democratic votes are packed and cracked.[16]

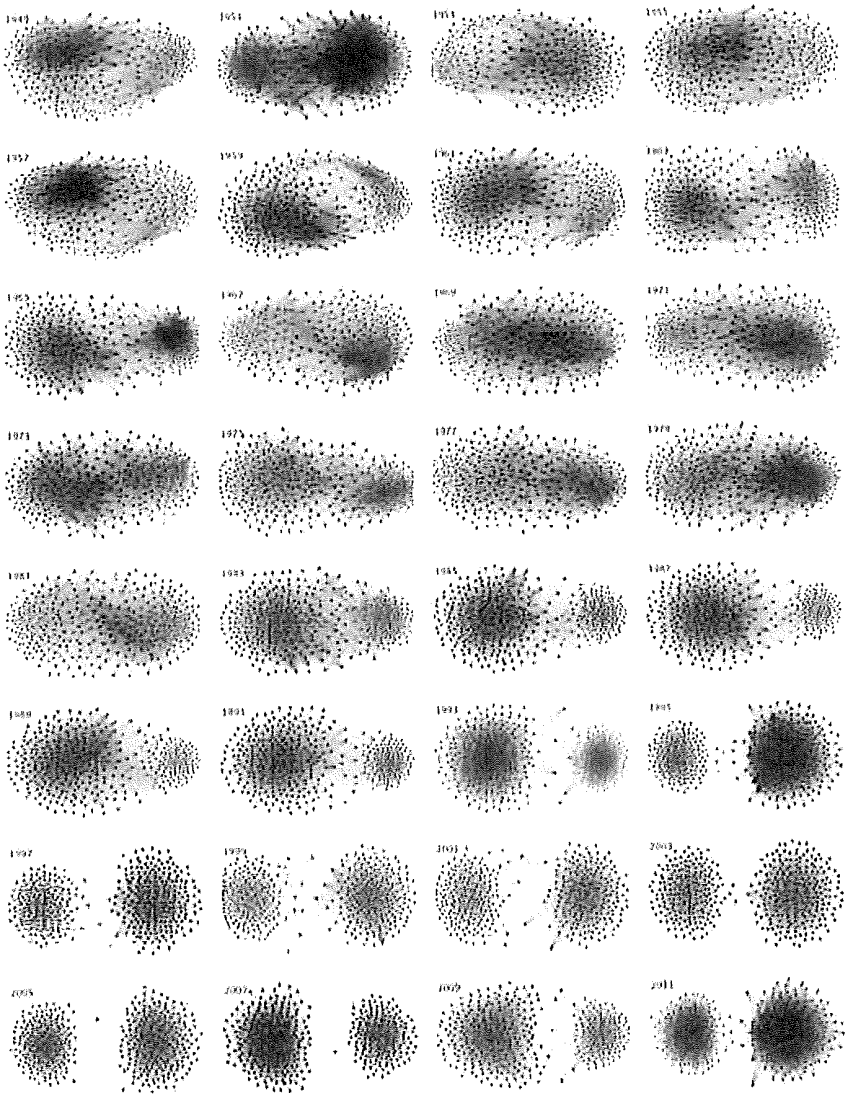
94. In short, a host of manageable tests, including the computer modeling and statistical tests descried above, demonstrate that the 2011 Plan was intentionally drawn to minimize the influence of Democratic voters, that it has had precisely that effect, and that it will continue to do so for the life of the plan.

[16] These mean-median gaps were calculated by using actual vote totals from the 2014 and 2016 congressional elections, except in districts that were uncontested. Results in uncontested districts were imputed using a statistical regression model that predicts 2014 and 2016 election results based on each district's results in the 2012 congressional elections.

95. The effects of the gerrymander go beyond election results. In today's Congress, representatives are simply not responsive to the views and interests of voters of the opposite party. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office.

96. The increasing and extreme polarization of the U.S. House of Representatives is readily apparent. Numerous studies have documented this trend, including a 2015 article co-authored by Clio Andris from Pennsylvania State University.[17] Andris et al. gathered data for each Congress on the number of times each Member of Congress voted with every other Member. In the chart below, Andris et al. represent each Member with a red or blue dot and group the dots to show how often each pair of Members voted with one another; the closer two dots are to one another, or the thicker the line connecting them, the more often those two Members voted with each other. The trend over time is remarkable. It shows that, in recent years, Members have voted almost exclusively with Members of the same party and rarely, if ever, have joined with representatives from the opposing party to vote on a bipartisan basis.

[17] *See* Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS One (2015).



97. The Members of Pennsylvania's Congressional delegation are no exception to this trend. As the chart below demonstrates, in the two Congresses following the 2011 Plan, these Members almost always voted with a majority of other members of the same party and rarely crossed over to vote with members of the other party.[18]

[18] Data are from the Washington Post's "U.S. Congress Votes Database," http://projects.washingtonpost.com/congress/114/house/members/ (last visited June 12, 2017).

District	Representative(s)	Party	Voting with Majority of Same Party	
			112th Congress	113th Congress
1	Bob Brady	D	94%	93%
2	Chaka Fattah	D	95%	96%
3	Mike Kelly	R	93%	96%
4	Jason Altmire	D	64%	N/A
4	Scott Perry	R	N/A	95%
5	Glenn Thompson	R	91%	93%
6	Jim Gerlach	R	86%	91%
7	Patrick Meehan	R	86%	92%
8	Mike Fitzpatrick	R	81%	85%
9	Bill Shuster	R	94%	96%
10	Tom Marino	R	95%	95%
11	Lou Barletta	R	92%	95%
12	Mark Critz	D	77%	N/A
12	Keith J. Rothfus	R	N/A	96%
13	Allyson Schwartz	D	94%	95%
14	Mike Doyle	D	93%	95%
15	Charles W. Dent	R	86%	91%
16	Joe Pitts	R	95%	95%
17	Tim Holden; Matt Cartwright	D	76%	96%
18	Tim Murphy	R	93%	96%

98. These figures illustrate that when voters artificially lose the ability to elect representatives of their party, they also lose any chance of having their views represented in Congress.

COUNT I
Violation of the Pennsylvania Constitution's
Free Expression and Association Clauses, Art. I, §§ 7, 20

99. Petitioners hereby incorporate Paragraphs 1 through 98 above as if they were fully set forth herein.

100. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and

every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

101. Article I, Section 20 provides: "The citizens have a right in a peaceable manner to assemble together for their common good . . . ."

102. Pennsylvania's constitution "provides protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). This "broader protection[] of expression than the related First Amendment guarantee" applies "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

103. Pennsylvania's Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote.

104. The 2011 Plan has the purpose and the effect of subjecting Petitioners and other Democratic voters to disfavored treatment by reason of their political views, their votes, and the party with which they choose to associate.

105. The Pennsylvania General Assembly expressly and deliberately considered the political views, voting histories, and party affiliations of Petitioners and other Democratic voters when it created the 2011 Plan.

106. The General Assembly drew the 2011 Plan with the intent to burden and disfavor those voters, including Petitioners, by reason of conduct protected by Article I, Sections 7 and 20, and with the intent to burden forms of expression that are protected by those provisions.

107. The Plan has had the effect of burdening and disfavoring Democratic voters in Pennsylvania, including Petitioners, by reason of their constitutionally-protected conduct. The Plan has prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process, and the Plan has the effect of suppressing the political views and expression of Democratic voters. By contrast, the Plan favors Republican voters, by ensuring that they will be able to associate with fellow Republican voters to elect the representatives of their choice and to influence the electoral, and thus political, process.

108. The Plan also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under Article I, Section 7, and Article I, Section 20. Republicans "penalize[d] [Petitioners] for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016).

109. For instance, Petitioner Mary Elizabeth Lawn has resided at the same home in Chester since 2004, but her congressional district was changed under the 2011 Plan. Lawn previously was in the 1st Congressional District, which has consistently elected Democrats, but under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

110. Petitioner John Greiner's District, the 3rd Congressional District, was subject to cracking under the 2011 Plan. The 3rd District previously was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But since the 2011 Plan, the district is no longer competitive. The Republican representative, Mike Kelly, comfortably won reelection in 2014 and 2016; and the district is so skewed that Kelly was able to run unopposed in 2016.

111. Like Greiner, Petitioner Robert Smith was also subject to cracking. Smith resides in Pennsylvania's 11th Congressional District. Prior to the 2011 Plan, the 11th District was a competitive district: the Democratic candidate won by a mere 3% in 2008, and the Republican candidate won the seat in 2010. But since the 2011 Plan, the Republican Representative, Lou Barletta, has won every election by more than 17%.

112. With respect to each of these Petitioners and others, Republicans "expressly and deliberately considered [their] protected . . . conduct, including their voting histories and political party affiliations, when it redrew the lines of" their districts. *Shapiro*, 203 F. Supp. 3d at 595. And Republicans "did so with an intent to disfavor and punish [Petitioners] by reason of their constitutionally protected conduct." *Id.* This intentional retaliation had an "actual effect" that would not have occurred but-for the retaliation. *Id.* Petitioners such as Lawn, Greiner, and Smith are no longer able to elect representatives of their choice or to influence the political process.

113. The 2011 Plan cannot be explained or justified by reference to Pennsylvania's geography or other legitimate redistricting criteria.

COUNT II
Violation of the Pennsylvania Constitution's
Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5,

114. Petitioners hereby incorporate Paragraphs 1 through 113 above as if they were fully set forth herein.

115. The General Assembly is not "free to construct political gerrymanders with impunity." *Erfer*, 794 A.2d at 334. On the contrary, a congressional redistricting plan violates the Pennsylvania Constitution's equal protection guarantees if (1) the plan reflects "intentional discrimination against an identifiable political group"; and (2) "there was an actual

discriminatory effect on that group." *Id.* at 332; *see also Whitford*, 218 F. Supp. 3d 837 (finding equal protection violation in Wisconsin redistricting where there was both discriminatory purpose and effects).

116. Here, the enacted plan reflects intentional discrimination against an identifiable political group—that is, Petitioners and other Democratic voters. Pennsylvania's congressional districts were drawn as part of a nationwide movement to use redistricting to maximize Republican seats in Congress and entrench these Republican members in power. Analyses such as the computer modeling of districts that would observe traditional districting criteria, the Markov Chain analysis, and the efficiency and mean-median gaps leave no room for doubt on this score. They conclusively demonstrate that the 2011 Plan could not have resulted "legitimate legislative objective[s]," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment), but could have resulted only from discriminatory partisan intent.

117. The enacted plan also works an actual discriminatory effect. A plan works such an effect when (1) "the identifiable group has been, or is projected to be, disadvantaged at the polls"; and (2) "by being disadvantaged at the polls, the identifiable group will lack political power and be denied fair representation." *Erfer*, 794 A.2d at 332. Here, the enacted plan disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights.

118. Statewide, the computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans' advantage is nearly impossible to overcome. Indeed, one need look only at the results of the 2012 election to see the effects of the gerrymander: Democrats won only 28% of Pennsylvania's seats despite winning a majority of the statewide congressional vote.

119. The effects are likewise significant for individual voters. For Petitioners such as James Greiner and Robert Smith who live in cracked districts, these voters are "essentially shut out of the political process." *Erfer*, 794 A.2d at 333 (citation and quotation marks omitted). They are artificially denied any realistic opportunity to elect representatives of their choice, with the demographics of their districts skewed to ensure Republican victories. And given the extreme partisanship of their representatives, these voters have no meaningful opportunity to influence legislative outcomes. Their representatives simply do not weigh Democratic voters' interests and policy preferences in deciding how to act.

120. For Petitioners such as Carmen Febo San Miguel and James Solomon who live in packed Democratic districts, the "weight" of their votes has been substantially diluted. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Their votes have no marginal impact on election outcomes, and representatives will be less responsive to their individual interests or policy preferences.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against Respondents, and:

a. Declare that the 2011 Plan is unconstitutional and invalid because it violates the rights of Petitioners and all Democratic voters in Pennsylvania under 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.

b. Enjoin Respondents, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. house members using the 2011 Plan;

c. Establish a new congressional districting plan that complies with the Pennsylvania Constitution, if Respondents fail to enact a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner;

d. Enjoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party membership, registration, affiliations or political activities, or voting histories;

e. Enjoin the Pennsylvania General Assembly from using data regarding a voter's political party membership, registration, affiliation, political activities, or voting history in any future redistricting process of congressional districts, where such use burdens or penalizes an identifiable group, a political party, or individual voters based on their political beliefs, political-party membership, registration, affiliations or political activities, or voting histories.

Dated: June 15, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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Counsel for Petitioners

Appendix

2. Respondent objects to these Interrogatories to the extent that they seek information that is protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege, and the common interest privilege. Respondent hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. Respondent reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. Respondent objects to Petitioners' discovery requests to the extent that they purport to require him to provide information that is not presently in his possession, custody or control.

4. Respondent objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent Respondent has any such information that is responsive to any of

Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. Respondent objects to these Interrogatories to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. Respondent incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, Respondent does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, Respondent does not concede that any information which may be provided is admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. Respondent hereby reserves the right to object to the use, at trial or otherwise, of any information provided in response to any Interrogatory.

8. Respondent reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. Respondent's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

OBJECTIONS TO INTERROGATORIES

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

ANSWER: Respondent incorporates his Preliminary Statement and General Objections. Further, Respondent specifically objects to this Interrogatory on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege and the Attorney Work Product Privilege, and/or the Common Interest Privilege.

Respondent further specifically objects to this Interrogatory on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad, and intended to cause unreasonable annoyance, and expense to Respondent.

By way of further Answer, Respondent has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Interrogatory until such time as the Court has decided whether or not this litigation will move forward.

2. For each person identified in response to Interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

ANSWER: **See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

ANSWER: **See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

ANSWER: **See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the

2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

Dated: August 14, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Respondent Joseph B. Scarnati, III's Objections to Petitioners' First Set of Interrogatories to All Respondents was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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Dated: August 14, 2017

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EXHIBIT D

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October 6, 2017

VIA FACSIMILE (267) 299-5078

Honorable Michael M. Baylson
U.S. District Court Judge
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Agre *et al.* v. Wolf *et al.*, No. 17-4392 (MMB)
Pretrial Conference For October 10, 2017 (ECF 2)

Dear Judge Baylson:

This Firm represents Senator Joseph Scarnati, the President Pro Tempore of the Pennsylvania Senate. Kathleen Gallagher of Cipriani & Werner, P.C. represents Representative Michael Turzai, the Speaker of the Pennsylvania House of Representatives. Jason Torchinsky of Holtzman Vogel Josefiak Torchinsky PLLC represents the President Pro Tempore and the Speaker.

We understand that Your Honor has scheduled a pretrial conference for Tuesday, October 10, 2017 in the above-referenced action. Given the unusual nature of the case, including the necessary appointment of a three-judge panel, we assume that the conference on Tuesday will likely address matters relating to scheduling. For that reason, we respectfully request the Court's permission, on the President Pro Tempore and the Speaker's behalf, to participate in Tuesday's pretrial conference for the reasons set for below.

As the Court may be aware, a Petition for Review concerning the constitutionality of Pennsylvania's 2011 Congressional map is currently pending before the Pennsylvania Commonwealth Court. *See League of Women Voters of Pennsylvania, et al., v. Commonwealth, et al.*, No. 261 M.D. 2017 (Comm. Ct. June 15, 2017). We represent the President Pro Tempore and the Speaker, who have been named as respondents in that action, which involves claims substantially similar to the claims advanced in this action. After an October 4, 2017 argument before the Commonwealth Court, that Court advised that it soon will be entering an order that,

BLANK ROME LLP
COUNSELORS AT LAW

inter alia, stays that action pending the outcome of the Supreme Court of the United States' resolution of *Gill v. Whitford*, No. 16-1161 (Oral argument held Oct. 3, 2017).

Although we just recently learned of the pendency of this action, the President Pro Tempore and the Speaker intend to file a motion to intervene in the near future. Courts typically grant a legislator's motion to intervene in redistricting actions because the requested relief generally requires the legislature to redraw districts. *See, e.g., Bethune-Hill v. Va. State Bd. Of Elections*, No. 14-0852 (E.D. Va. Feb. 23, 2015) (three-judge court); *Perry v. Perez*, 565 U.S. 388, 392 (2012) (noting that redistricting is primarily the duty of the State and even where a legislative drawn map fails preclearance, it remains the legislature's duty to draw new compliant districts). And, a review of the Complaint filed in this action discloses Plaintiffs' desire to have the Pennsylvania legislature craft legislation to redraft Pennsylvania's Congressional districts. Accordingly, the President Pro Tempore and the Speaker, in their official capacities, will necessarily be directly impacted by this litigation. As a result, we respectfully request permission to participate in Tuesday's pretrial conference.

Thank you in advance for your time and attention to this matter.

Respectfully yours,

BRIAN S. PASZAMANT

cc: Jason Torchinsky, Esquire (via email)
Kathleen A. Gallagher, Esquire (via email)
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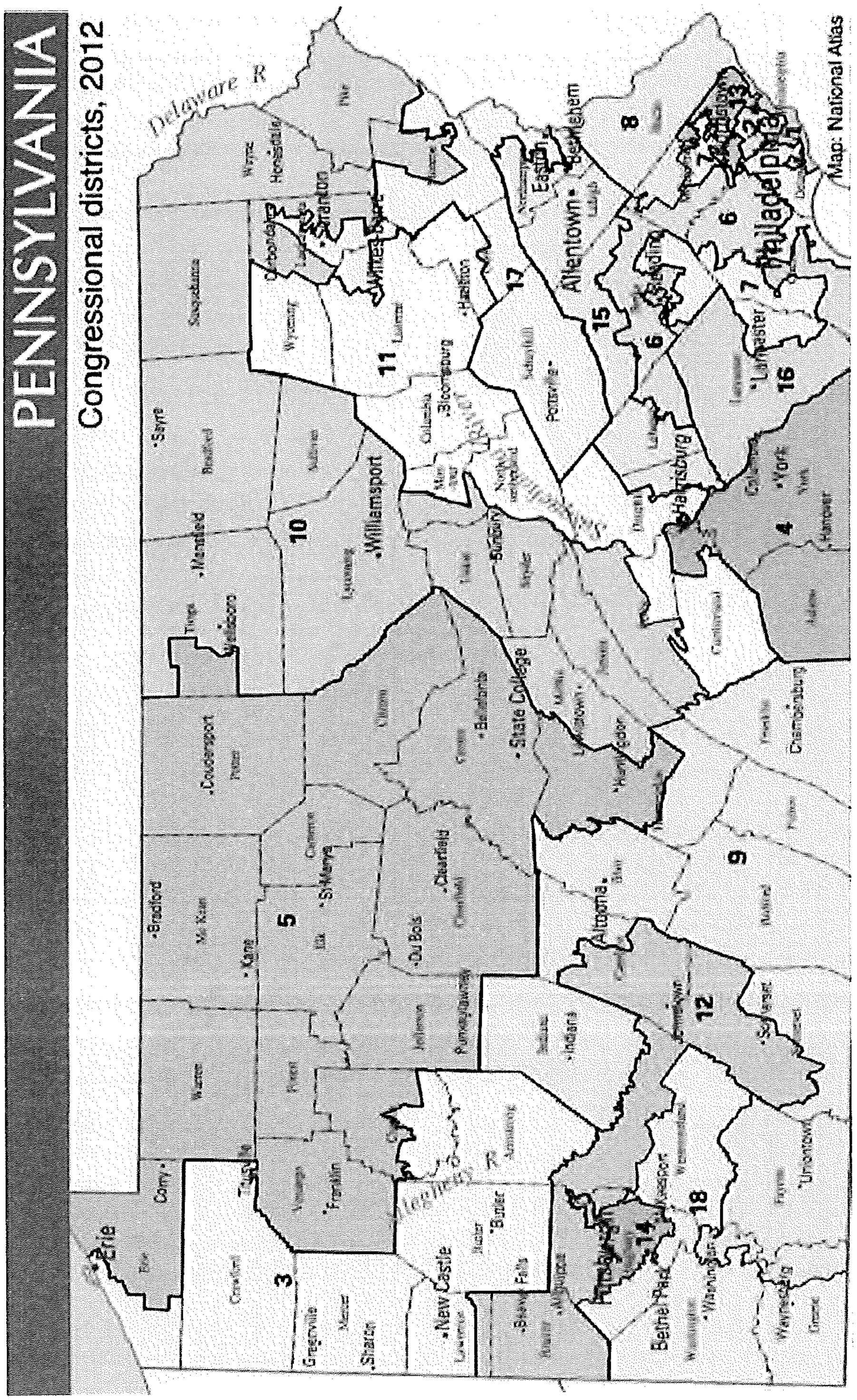
PENNSYLVANIA
Congressional districts, 2012
Map: National Atlas

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, JAMES WRIGHT, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY, Petitioners, v. THE COMMONWEALTH OF PENNSYLVANIA; 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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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, Respondents.	Docket No.

PROOF OF SERVICE

I hereby certify that this 15th day of June, 2017, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfied the requirements of Pa.R.A.P. 121:

Commonwealth of Pennsylvania
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
Service Method: Certified mail

Pennsylvania General Assembly
c/o Senator Joseph B. Scarnati III
Senate President Pro Tempore
Senate Box 203025
Harrisburg, PA 17120-3025
Room: 292 Main Capitol Building
c/o Representative Michael C. Turzai
Speaker of the House
139 Main Capitol Building
PO Box 202028
Harrisburg, PA 17120-2028
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Governor Thomas W. Wolf
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Harrisburg, PA 17120
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Lieutenant Governor Michael J. Stack III
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Representative Michael C. Turzai
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Pennsylvania Department of State
Office of the Secretary
302 North Office Building
Harrisburg, PA 17120
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Commissioner Jonathan M. Marks
Pennsylvania Department of State
Bureau of Commissions, Elections and Legislation
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BY: */s/ Mary M. McKenzie*

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Counsel for Petitioners

VERIFICATION

I, Suzanne Almeida, on behalf of the League of Women Voters of Pennsylvania, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Petition for Review are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed: Suzanne Almeida

Dated: June 14, 2017

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky, Petitioners	:	
v.	:	No. 261 MD 2017
The Commonwealth of Pennsylvania; The Pennsylvania General Assembly; Thomas W. Wolf, In His Capacity As Governor of Pennsylvania; Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania And President of the Pennsylvania Senate; Michael C. Turzai, In His Capacity As Speaker of the Pennsylvania House of Representatives; Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore; Pedro A. Cortes, In His Capacity As 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, Respondents	:	

TRANSCRIPT OF PROCEEDINGS

Before: THE HONORABLE DAN PELLEGRINI, Senior Judge

Date: October 4, 2017, 10:00 a.m.

Place: Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Courtroom No. 3001
Harrisburg, Pennsylvania

APPEARANCES:

David P. Gersch, Esquire
Mary M. McKenzie, Esquire
Elisabeth S. Theodore, Esquire
For - Petitioners

Jonathan S. Goldman, Esquire
For - The Commonwealth of Pennsylvania, Respondent

Thomas P. Howell, Esquire
For - Thomas W. Wolf, In His Capacity As Governor of Pennsylvania, Respondent

Clifford B. Levine, Esquire
For - Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, Respondent

Jason Torchinsky, Esquire
Brian S. Paszamant, Esquire
Kathleen A. Gallagher, Esquire
For - The Pennsylvania General Assembly; Michael C. Turzai, In His Capacity As Speaker Of the Pennsylvania House of Representatives; and Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore, Respondents

Kathleen M. Kotula, Esquire
Timothy E. Gates, Esquire
For - Pedro A. Cortes, In His Capacity As 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, Respondents

THE COURT CRIER: All rise. Commonwealth Court is now in session. The Honorable Dan Pellegrini presiding.

THE COURT: Good morning, counsel. Please be seated.

What this case proves is if you touch something, it comes back to you even if it's 15 years later. I was the -- for lack of a better term, the master in the Erfer case. And I consider -- just to inform people, I consider myself -- my role in this case pretty similar to what occurred in Erfer. I am going to tee this case up as much as I can and send it over to a court en banc for decision rather -- and I've been promised that even if there's a hearing, I may not have to hear it. But there's fake promises too, so I don't -- but generally that's the -- the role that I'm having in this case.

Now there are two motions set for today. The first motion -- one motion dealt with the intervention of the Republican Party. I am not going to hear that today because looking at the preliminary objections, that's intertwined with the preliminary objection to the League of Women Voters on standing. It's pretty much a similar issue, so that will be determined together.

But I am going to allow the Republican Party if it so desires -- and this really doesn't matter for either party because there's individual plaintiffs and individual

intervenors who the Republican Party and the League of Women Voters are associated with. But if the Republican Party wants to participate today, I'm going to allow their participation.

And with that, we will get to the presiding officers' motion which I'm going to call the -- the legislators' motion for a stay of the proceedings pending the decision of the Supreme Court in Gill versus Whitford.

MR. TORCHINSKY: Thank you, Your Honor.

May it please the Court, Jason Torchinsky on behalf of Senator Scarnati, Speaker Turzai, and the General Assembly.

We're here today because the petitioners are in fact seeking proportional representation, something that the courts of this Commonwealth and the federal courts have squarely rejected. This map has been around since 2011, and Pennsylvania citizens have elected members of the House of Representatives under this map for three terms. It was not until -- this case was not filed until seven years after the map was adopted and eight months after the Whitford decision was decided by the lower court in Wisconsin. And now petitioners are here seeking to ask you to rush to their conclusion.

There is a real possibility that Gill will render -- render moot or resolve either all of this case or

major portions of this case. And petitioners don't deny that Gill is going to have a significant impact on at least half and maybe more than half of their case.

Their claim really boils down to two fundamental issues: an Equal Protection claim and a Free -- Free Expression and Association claim. And the Israelit decision both sides agree kind of sets forth the standard that this Court has before it today which is the stay should be issued if another pending case might resolve or render moot this matter.

THE COURT: Well, let me ask this question.

MR. TORCHINSKY: Sure.

THE COURT: If -- if the Supreme Court in Gill versus Whitford which was argued yesterday --

MR. TORCHINSKY: Yes.

THE COURT: -- and maybe we should just say what Justice Kennedy decides -- if they come down with affirmed, just affirmed, so we know the rationale, we know everything, what happens?

MR. TORCHINSKY: If --

THE COURT: They're probably not here. They're probably down in federal court, alleging their federal claim; but other than that, on the state claim.

MR. TORCHINSKY: If there -- if there is a summary affirmance in Whitford, then this Court will need to wrestle

with how a summary -- and let's assume for a moment it's a summary affirmance which is --

THE COURT: Well, essentially it's not a summary affirmance; let's say an affirmance adopting the three-judge panel decision in Whitford.

MR. TORCHINSKY: Right. I mean, if that -- if that happens, then this case is not mooted. And this case will go forward, and this Court will have to decide how the Whitford decision impacts what the Supreme Court --

THE COURT: So in other words we do the same efficiency calculations that the Whitford court did.

MR. TORCHINSKY: Well, I think there are some -- I think there are some differences. For example, in the Wisconsin case -- and, again, this gets more to merits than to our --

THE COURT: No, but what --

MR. TORCHINSKY: -- application for stay.

THE COURT: See, one of the reasons for the stay, the -- the petitioners are contending that you essentially conceded; if the Supreme Court came down and affirmed the three-judge panel in Whitford, that you pretty much conceded that the -- that they win.

MR. TORCHINSKY: No. We don't agree with that at all. And, you know, we have not briefed that issue, although we have submitted preliminary objections that do -- that do

get to merits. And if the Court wants to --

THE COURT: Let me ask you this question: how do you win if they adopt the three-judge panel decision?

MR. TORCHINSKY: A couple of things. First of all, the efficiency gap was -- was one measure, but as oral argument in the Supreme Court illustrated yesterday, the efficiency gap was not the fundamental -- it was not the fundamental piece of social science hodgepodge that the District Court relied on. So we have -- and petitioners in this case have made clear that they've got other social science hodgepodge that they intend -- that they intend to introduce in front of the Court, whether they call it --

THE COURT: Okay.

MR. TORCHINSKY: -- the efficiency gap or parts -- and every --

THE COURT: In other words, we -- we'll have to look at the test, how that efficiency gap test relates to Pennsylvania.

MR. TORCHINSKY: Correct.

THE COURT: And if the numbers are roughly the same, what happens?

MR. TORCHINSKY: Well, so -- so you have to evaluate all of the different social science measures and listen to -- to their side's experts and our side's experts debate the various social science measures and how they apply

here in Pennsylvania and --

THE COURT: In other words, what you're saying is it's not going to be an easy test.

MR. TORCHINSKY: No, it's not going to be an easy test at all.

THE COURT: Okay. Another -- I -- the real answer I wanted to get was they're contending that essentially you conceded that if Whitford was decided against you, you lose; and you're not.

MR. TORCHINSKY: No, not at all, Your Honor.

THE COURT: Okay. Let me ask the second question.

MR. TORCHINSKY: Sure.

THE COURT: One of the allegations that they make is that the petitioner -- that the -- Wisconsin, the defenders of the present reapportionment system in Wisconsin argued that there -- the test should be compact, contiguous, and as few municipal boundaries as possible which in Pennsylvania means counties. If they adopt that test, what happens?

MR. TORCHINSKY: Well, I think that that -- I think if you read carefully what the state of Wisconsin was saying in their briefing in Gill, I think that their position was that the -- their adherence to traditional redistricting factors was -- was essentially a defense. Whether this map complies with traditional redistricting factors is some- --

is a factual question for the Court and something that should -- and we're not -- we're not conceding that traditional redistricting factors were not considered in this case.

THE COURT: You mean Goofy kicking somebody.

MR. TORCHINSKY: I mean, look, that's their description of the district but --

THE COURT: I know. At a certain point in time, there has to be -- you know, you have to look at a map. Okay.

MR. TORCHINSKY: I mean, look, the state is roughly shaped like a rectangle, but the various counties, the various municipalities don't share rectangular shapes.

THE COURT: What you're essentially arguing then is that in Gill, we have to know what the Supreme Court says.

MR. TORCHINSKY: Yes.

THE COURT: And the Supreme Court could come out with a decision that you win, and the Supreme Court could come out with a very clear standard that you lose.

MR. TORCHINSKY: You meaning who? Meaning the state of Wisconsin?

THE COURT: Meaning you.

MR. TORCHINSKY: I mean, look, the -- whatever the Supreme Court decides in Gill will have an impact on this case and will set forth the test that we need to -- that we need to work underneath if the Supreme Court in some way

affirms Whitford.

THE COURT: See, the problem I'm having with your position is you keep arguing in a sense that it doesn't matter what happens in Gill and -- because if -- and that's the reason for the stay. What you're saying is it is essential to the matter of your stay that Gill could be determinative, and what you're saying is -- that's -- that's the core of your argument.

MR. TORCHINSKY: No --

THE COURT: And the answer is Gill could be determinative.

MR. TORCHINSKY: Your Honor, I think that -- I think you're -- you're misunderstanding our argument. On the application for stay, the standard that this Court had set forth in Israelit is that the pending case might resolve or render moot the case. If -- if Gill determines that political gerrymandering cases are non-justiciable, then we have -- you know, then that significantly impacts this case. If --

THE COURT: Well, let's stop there. I agree the merits, but hasn't Pennsylvania decided that the issue is justiciable?

MR. TORCHINSKY: Well, Your Honor, if you go back -- and obviously this Court is very familiar with the Erfer case and with the '91 Legislative Reapportionment case.

Prior to the '91 Legislative Reapportionment case, the Pennsylvania Supreme Court had made clear that it found political gerrymandering claims to be non-justiciable.

THE COURT: We're an intermediate court.

MR. TORCHINSKY: Right. But the only reason that the Pennsylvania Supreme Court changed its mind is that it said that on Equal Protection matters, the Pennsylvania Equal Protection Clauses are coextensive with the federal Equal Protection Clauses. So the only reason that the Supreme -- the Pennsylvania Supreme Court came out differently in '91 was because of the U.S. Supreme Court's decision in Bandemer. If that decision is reversed, the keystone on which the Pennsylvania Supreme Court decision was built has been kicked out from underneath it. And that is certainly something this Court can consider.

THE COURT: Let me ask this question. This gets to -- we're here under a state constitutional claim.

MR. TORCHINSKY: That's correct.

THE COURT: And this will get to the -- kind of the ultimate resolution. Because the Supreme Court adopted the decision in -- in -- going way back and relied on federal law, is the state constitutional determination affected for us for the Supreme -- because the U.S. Supreme Court changes?

MR. TORCHINSKY: Well, so here's -- here's the potential problem that -- that the courts could -- could

face. If the Pennsylvania courts say the Bandemer -- you know, the Bandemer test is what we're going to apply and Gill versus Whitford puts forward some different test, at least with respect to compliance with the First Amendment and the Fourteenth Amendment, there's no doubt that the U.S. Supreme Court -- whatever the U.S. Supreme Court says, you know, under the Supremacy Clause would override anything that the Pennsylvania Supreme Court said depending on which one was more or less restrictive. And we don't know where that's going to be, so --

THE COURT: No. No. My point is the Supreme Court interprets the Pennsylvania Constitution.

MR. TORCHINSKY: Yes.

THE COURT: They don't have to make it coextensive with the federal law.

MR. TORCHINSKY: You're right; they don't have to. But there's at least 60 years of precedent that says it does.

THE COURT: And if they wanted to, they could still stick with the Bandemer test.

MR. TORCHINSKY: That is correct; they could. But that would be a reversal of 60 years plus of state supreme court precedent.

THE COURT: They usually go in lockstep, but sometimes they don't.

MR. TORCHINSKY: On Equal Protection, I don't think

that anybody has -- has pointed out any case where the Pennsylvania Supreme Court has not moved in lockstep with the federal courts on Equal Protection claims.

THE COURT: We -- we call it uniformity when we don't want to move in lockstep.

MR. TORCHINSKY: Right. But -- but, Your Honor, again, no party here has brought forward or found any case where at least on Equal Protection grounds --

THE COURT: I agree with you that the Supreme Court in -- our Supreme Court in election matters has generally adopted the federal standards.

MR. TORCHINSKY: Right. And -- and again, I'm not aware of any case and our research has not determined any case where the Pennsylvania Supreme Court has deviated there.

THE COURT: So I should follow the federal court, not the last pronouncement of the state supreme court?

MR. TORCHINSKY: Your Honor --

THE COURT: You should probably say no. You know why? Because then I've got to follow Bandemer.

MR. TORCHINSKY: Your Honor, I think all we're asking you to -- we're not asking you to make that decision right now. We're just asking you to take a breath and have this case heard when the Court has all of the legal pronouncements from the Supreme Court in -- from the U.S. Supreme Court in front of it so you can make that evaluation.

Without knowing what Gill is going to say, it puts this Court in a very difficult position. And what we're asking you to do is to get this case right and not rush it. And that's why we're asking you to stay.

We're not asking you for an indefinite stay. We're not asking you to -- to stay this case because of some other trial happening in some other state. We're asking you to stay this case while the U.S. Supreme Court decides the case that was --

THE COURT: I understand --

MR. TORCHINSKY: -- argued yesterday.

THE COURT: -- your position. I understand your position. But one of the issues for a stay is -- is that the stay will help us, but it is not determinative. And the question is whether or not we should allow the ancillary matters to continue while we await.

MR. TORCHINSKY: Well, I mean, the Israelit standard is that --

THE COURT: And I was hoping that you were going to say it's done; I mean, the -- if the efficiency standard comes in or the other standard, we agree that if they adopt the opinion in -- in -- the three-judge panel in Whitford, then the case is over.

MR. TORCHINSKY: Yeah. No, we don't -- we don't agree with that, Your Honor.

THE COURT: So in other words litigation is going to go on forever.

MR. TORCHINSKY: Oh, no. I mean, Your Honor -- I mean, your -- your -- your assumption there is that Whitford was going to affirm the three-judge court. I mean, that was the underlying premise to your question.

THE COURT: Well, if --

MR. TORCHINSKY: What we're saying is --

THE COURT: But if -- I'm going to ask --

MR. TORCHINSKY: -- that's an unknown.

THE COURT: See, that's not the question that I'm -- I'm going to ask them that question.

MR. TORCHINSKY: Right. I mean, Your Honor -- I mean, remember the standard in Israelit isn't that the case will definitively -- that we know for -- for sure, for a hundred percent certainty that Whitford will definitively decide this case. What we know is that there's a possibility that it might resolve or render moot --

THE COURT: It --

MR. TORCHINSKY: -- the case.

THE COURT: Well, how -- well --

MR. TORCHINSKY: It might.

THE COURT: -- it's only going to render it moot in your favor.

MR. TORCHINSKY: And that's quite possible which is

why --

THE COURT: Or it could render your position untenable.

MR. TORCHINSKY: It could -- it could cause a change in our position. Yes.

THE COURT: Yes.

MR. TORCHINSKY: But, you know, exactly what that might be, we don't know. And that's why we're just saying --

THE COURT: See, I finally got an answer out of you that augers in favor of a stay rather than we're going to have this constant litigation no matter what happened or continuing litigation that -- we're -- we're going to have -- we don't need all the intermediate steps before we get to a hearing. And essentially what you're saying is you need Whitford to determine what you're going to do and what your strategy is going to be.

MR. TORCHINSKY: I mean, without Whitford, this Court is stabbing in the dark as to what the standards are. This Court -- I mean, they're basically saying we've -- we've amassed this social science hodgepodge -- and it's -- it's the same thing that happened in the oral argument yesterday. They've got this social science hodgepodge. And somehow between all these different social science metrics, they're asking the Court to devise some mathematical test here that the Court should declare is the constitutional standard.

You know, and it is quite possible that if Whitford says that, you know, some social science hodgepodge mathematical test is the answer under the federal constitution, that the Pennsylvania courts could determine something else.

THE COURT: They could come up with the Pennsylvania constitutional standard of compact, contiguous, and -- and doesn't violate as many governmental boundaries as close as or -- the word -- the word absolute is somewhere in there.

MR. TORCHINSKY: Right.

THE COURT: And that's a justiciable standard.

MR. TORCHINSKY: That -- that is. And in -- in the Wisconsin case, there are in fact standards in the state constitution -- in the Wisconsin State Constitution for their legislative districts.

THE COURT: That's -- that's what Wisconsin is arguing --

MR. TORCHINSKY: Right.

THE COURT: -- should be applied to the congressional districts.

MR. TORCHINSKY: Now that's not present -- no. No. The Wisconsin case was about their state assembly districts, not their congressional districts.

THE COURT: No, I'm talking about that's what the

state of Wisconsin is arguing in the U.S. Supreme Court should be the standard that should be applied to determine whether districts are gerrymandered impermissibly.

MR. TORCHINSKY: No. I think what Wisconsin was saying is the fact that their state assembly districts met with the -- the traditional districting criteria that are in fact in their state constitution for their state assembly districts should provide them -- should provide them a defense.

In this case here, there are -- for the state legislative districts, there are in fact criteria in the state constitution for what applies to the state legislature, but there's nothing in the state constitution that applies those criteria to congressional districts.

THE COURT: No, but my --

MR. TORCHINSKY: And --

THE COURT: My point is, is that there are justiciable standards.

MR. TORCHINSKY: Maybe.

THE COURT: In other words, the Pennsylvania Constitution doesn't provide a judicial standard even if you apply it to the congressional districts.

MR. TORCHINSKY: I mean, look -- I mean, compactness and contiguity are -- are standards that -- that are justiciable and -- and have been recognized by courts. I

mean, we're not -- we're not standing here telling you that compactness and contiguity are not justiciable, but unless there was a statute or a constitutional requirement that compactness and contiguity apply here in the way that the plaintiffs are seeking it --

THE COURT: No, that's --

MR. TORCHINSKY: -- that's a different case.

THE COURT: That's not my point. My point is -- is if the Supreme Court wanted to come up with a standard under federal law, they could apply that standard. They're not limited to what you call the statistical gobbledygook.

MR. TORCHINSKY: I think that was Justice Roberts -- Chief Justice -- the Chief Justice's words. But, no, you're right. I mean -- and that's why we're saying --

THE COURT: So there could be a standard for a judicial -- a justiciable standard for reapportion- -- for impermissible gerrymandering.

MR. TORCHINSKY: That's right. If compactness and contiguity --

THE COURT: Our Supreme Court applies it all the time.

MR. TORCHINSKY: I mean, if -- if compactness and contiguity and keeping municipalities and counties whole is the standard in Pennsylvania, that would be a change in the law from where we are now, but that's a standard that is

administrable.

THE COURT: I think you should look at the William Penn case that just came down on justiciability on the Education Clause. Supreme Court has made -- our Supreme Court last week made a major change in justiciability.

MR. TORCHINSKY: I will review that decision, Your Honor.

THE COURT: It's about a hundred pages, so I'll give you some time.

MR. TORCHINSKY: Thanks.

THE COURT: Okay. Do you have anything else you wanted to add?

MR. TORCHINSKY: No. I think that's it for now, Your Honor. May I have some rebuttal time?

THE COURT: Sure.

MR. TORCHINSKY: Thank you.

MR. GERSCH: Good morning. David Gersch for the petitioners from the firm of Arnold & Porter Kaye Scholer.

No stay should issue in this case. We filed a well pled petition. We've invoked the jurisdiction --

THE COURT: Well, you filed a -- it may have been well pled in federal court. It wasn't -- I don't know if it was well pled in state court. There's a preliminary objection outstanding that we're a fact pleading state, not a notice pleading state.

MR. GERSCH: We understand, Your Honor.

THE COURT: I'm a follower of Justice -- Judge Aldisert. So you -- you probably don't know, but he was the judicial guru about fact pleading is important and notice pleading is a story.

MR. GERSCH: Certainly. And we think we've pled the relevant facts. My point, Your Honor, is we --

THE COURT: I'm sorry to interrupt you on something that was a tangent.

MR. GERSCH: It's quite all right.

THE COURT: It was something that always bothers me about the way people plead in the court. Okay.

MR. GERSCH: Understood, Your Honor.

My real point is we've invoked the Court's jurisdiction on a theory that as Your Honor currently recognizes, the Pennsylvania Supreme Court says we're entitled to go forth on Article I, Section X of the U -- of the Pennsylvania Constitution says --

THE COURT: Well, what about their argument that's dependent upon the -- the United States Supreme Court's decision in the 1991 reapportionment case and if they find in Gill that it's not justiciable, they predict that our Supreme Court is going to find that it's not justiciable under federal law?

MR. GERSCH: That is their argument, and they're

wrong. This is not a question of what we predict the Pennsylvania Supreme Court is going to do. There's law; the Pennsylvania Supreme Court has ruled. They ruled in the 1991 legislative apportionment case. They've ruled in Erfer. That's the law in Pennsylvania. The way you change the law is you go back up to the Supreme Court and you tell the Supreme Court, There have been new developments, Supreme Court; please change the law. That's how it works. This is Constitutional Law 101.

The reason that Gill can never, ever moot this case is that the U.S. Supreme Court has no power to rule on Pennsylvania law. It's that simple.

THE COURT: Well, that gets to --

MR. GERSCH: It's that simple.

THE COURT: Well, that gets to the point is -- Bandemer. The Supreme Court applied the test in Bandemer which is -- which they described in Erfer as onerous. And we're an intermediate court. Your argument is essentially I've got to follow -- our court has to follow Bandemer.

MR. GERSCH: Our -- our position is that Erfer controls. There is language in Erfer which actually says at this juncture, counsel hasn't called to our attention a reason to read the Equal Protection Clause differently. That's in Erfer. But Erfer -- Erfer is the law. Erfer is the law.

THE COURT: Yeah. And -- and if it goes to our -- our court en banc and what -- and before -- and let's say Whitford hasn't come down, what do they apply?

MR. GERSCH: Well, there are two answers. One, on the Equal Protection arguments, Erfer is the law unless I can make an argument under that language in Erfer that says, Show us something different. But that -- but Erfer -- Erfer is what's controlling on the Equal Protection claim.

But we also have in our first count -- that's our second count, the Equal Protection claim. Our first count is a Freedom of Expression, Freedom of Association claim. On that, the law in Pennsylvania is quite clearly different and more protected.

THE COURT: How is it different?

MR. GERSCH: Well, the key case is Pap's. Pap's is a case that went -- that was the topless dancing case. And I'm sure Your Honor will recall where the case went from the Pennsylvania Supreme Court to the U.S. Supreme Court. The U.S. Supreme Court said nude dancing isn't protected expression. It went back. It was remanded to -- the Pennsylvania Supreme Court said, yes, not under the U.S. Constitution, but our constitutional protections for Freedom of Expression are broader. And under our constitution, Pap's is protected; they're engaging in protected conduct.

So the one thing we know when we go to the Supreme

Court -- and let me just digress there and say I think Your Honor had right it on the ball. Our job is to tee this case up for the Pennsylvania Supreme Court. The Pennsylvania Supreme Court are the only people that are going to decide this in the long run, and --

THE COURT: So why didn't you file King's Bench?

MR. GERSCH: Well, that's an interesting question, Your Honor. I've been told by everyone that it's an arcane procedure and who knows what will happen.

THE COURT: That's what happened in Erfer.

MR. GERSCH: Well, first they -- no, first they filed here.

THE COURT: Yeah. And we scheduled the hearing a couple of weeks before the primary, like March 8th as I recall from the opinion, which petitions have to be filed for the districts in the middle of February. And so the Supreme Court said, That's not fast enough. They took King's Bench, and then I was appointed the master.

MR. GERSCH: Well, we'll -- we'll take that as your suggestion if --

THE COURT: Well --

MR. GERSCH: Maybe -- maybe that will happen. But we're not there.

THE COURT: It's not a suggestion. I'm saying it's going to the Supreme Court. That was the procedure that was

followed in Erfer. If you want to stay here, we'd be perfectly happy to hear you.

MR. GERSCH: Thank you, Your Honor.

No, my only point was that in Erfer, they -- they first went to the Commonwealth Court, and they tried to get a fast hearing in Commonwealth Court. And that's what we're trying to do here. And -- but -- but the bottom line is the same, the bottom line whether Your Honor were to sit as master or whether Your Honor or some other -- other judge would try the case for the -- for the Commonwealth Court en banc, however it's going to work. What we're doing, what the parties and the Court are doing are setting the stage for the Pennsylvania Supreme Court to make a decision. And right now Pennsylvania law is that this case can go ahead.

And in addition to the Equal Protection theory, we have the Freedom of Expression theory which Erfer said they weren't reaching. Erfer said they were not going to reach that claim. So that -- that issue has never been decided, and that issue is not going to turn on what the U.S. Supreme Court said.

I want to come back to why they can't moot. They can't moot this case because the U.S. Supreme Court does not have judicial power to speak to Pennsylvania law. And if they want to bring these theories of non-justiciability -- and also they have a stand- -- it's not just justiciability.

They have a standing argument where they say that one -- one voter can't challenge the whole map. I don't know why they make that argument because we have voters in each jurisdiction. But they make that argument. Erfer rejected it. If they want that argument, they've got to go back to the Pennsylvania Supreme Court. This Court -- this Court isn't going to overrule Erfer. That's not the function of the Commonwealth Court.

THE COURT: That -- I think I can say that.

MR. GERSCH: Then we're -- then we're together on that, Your Honor.

THE COURT: And that's why I'm having the problem. I'm -- he's arguing that the Supreme Court -- I don't know -- he's arguing -- respondents are arguing that the Supreme Court may decide the issue is not justiciable so then we should decide it's not justiciable.

And you're -- you're -- you're essentially saying -- and I -- and I agree; I don't think we can change that justiciability decision here. But I also find out that if -- if our Supreme Court adopted Bandemer, I don't know how we -- this Court changes their analysis in Bandemer. That's up to the -- our Supreme Court. And I think you just said you agree.

MR. GERSCH: I agree on the Equal Protection claim --

THE COURT: You don't --

MR. GERSCH: -- that was decided by Bandemer. The Freedom of Expression issue was never reached by Erfer. It was never reached in Erfer, so --

THE COURT: Now the other issue that you raised in your pleading is that we have to move fast because we -- the nineteen -- the 2018 elections are coming. Well, if we move -- if we moved as fast as we can, I don't think we can get this case decided by March 1.

Let's say we tee it up and you get a decision out of this Court the fastest with all of the brief -- it will take everybody with all the papers -- and we don't have any discovery filed in this case; this won't be heard by this Court -- earliest December, maybe not until February. Then let's say you win. Government parties appeal. They get an automatic supersedeas. We're up to the Supreme Court. We're past the filing date.

I don't see -- if we moved as fast as possible -- the decision in Whitford came down by the three-judge panel a year ago, and that's an automatic appeal up to the Supremes. It took them a year to hear it. If we do this in six months, everything, all the Pennsylvania state proceedings, we don't -- we don't make it.

I mean, do we have to stop -- you know, one of the ways you look at things, do we have to stop and -- we're

saying we're not going to hear it until 2018 -- and I don't know if this Court can even do that; I'm sure the -- I don't even know if our Supreme Court can do it -- the 2018 congressional elections. See, I don't -- I mean, the idea of speed is -- I don't know how we can affect the 2018 elections. Tell me how.

MR. GERSCH: Well, Your Honor, let me answer I guess on several levels. I may be hearing an argument that maybe we should be filing King Bench -- King's Bench. But -- but let's -- let's -- I guess on the -- I would answer first on the theoretical and then on a practical level.

On the theoretical level, I would say we should keep going and try and get this case done for 2018 until and unless it turns out we can't. But we shouldn't abandon the -- the hope at the beginning.

THE COURT: The present status of the case you can hope, but I can tell you it isn't going to happen. I mean, if we -- we move cases pretty fast, and the fastest we can do something like this is probably three months by the time you -- you do your briefs. And the biggest part is you do your briefs. And then we review the briefs. And then the opinion has to be circulated, and assuming there's no dissents, that's about three months. And then it goes up to the Supreme Court. And let's say they do it in three months. I don't see how we do it.

MR. GERSCH: Well, Erfer was done from beginning to end in two months, and they didn't have the advantage of a case that was filed in June the year before.

THE COURT: Why? Why was it done in two months?

MR. GERSCH: It was done in two. I don't know why.

THE COURT: Because they -- the Supreme Court accepted King's Bench --

MR. GERSCH: Okay. That was the -- that was behind my first answer.

THE COURT: Yeah.

MR. GERSCH: But I think on a theoretical level, what we ought to be doing is trying to get it done. On a practical level, we think that the -- we're willing to strip our case down a little bit. But what we need is a ruling on the privilege issues. We have a request for a 407 -- 4007.1(e) deposition of the General Assembly. They've raised privilege arguments. We'll be filing our brief next week. We think that that -- that ought to resolve the key issues in the case.

I don't -- I don't think there's a tremendous amount of discovery. I looked at the discovery schedule in the North Carolina case, the case the League of Women Voters brought there. Their entire discovery plan -- the Court clearly told them to come up with a plan together because they submitted a joint plan. And the plan was 40 depositions

per side, two and a half months, and we'll be ready to go to trial.

THE COURT: Let me -- let me --

MR. GERSCH: We don't need 40 depositions.

THE COURT: Let me tell you, I think one of the -- I think the privilege of the General Assembly is an important issue.

MR. GERSCH: Yes, it is.

THE COURT: I may ship that over to the court en banc. That's an important issue as is as to whether -- how far does that extend out. Now you allege in your pleadings that it was the Republican National Committee, the red states group that did it, red flag group, something red.

MR. GERSCH: RED- -- REDMAP.

THE COURT: REDMAP did it, that did it. And the -- the issue is, how far out does this extend? Does it extend to, like, ALEC, you know, like, ALEC who came in and -- I mean, they essentially drafted some bills that went to the General Assembly. And the General Assembly admitted it, and so it wasn't -- it wasn't an issue in dispute. How far out does that privilege extend? And I think that's an important issue. And I --

MR. GERSCH: It is.

THE COURT: -- probably would send that to a court en banc and not treat it as a -- as a pure discovery issue

because the preliminary research I've done on it, it's generally you want to depose an individual legislator and we say no.

MR. GERSCH: Well, actually Your Honor is touching on another great issue --

THE COURT: Or how they vote.

MR. GERSCH: Your Honor is touching on a great issue which is -- and this is why we -- we served the deposition notice -- a lot of how that ruling might turn out might depend on who actually did the drawing of the map. I don't know that we need to speak to any legislator. I would suspect we don't.

The most important thing for us to find out is how did they draw the map. It's not -- we're not interested in the discussions in the smoke-filled rooms. We're not interested -- when I say not interested, I think if we had more time, I would seek all of that. And we could argue about it forever. As you -- as you said, the litigation could go on forever. If we want to get this case done by 2018 or for the 2018 elections, I've got to strip it down to its essentials.

THE COURT: You're going to have to strip it down that you want no discovery and -- I mean, essentially if we had -- we have -- if we had a motion for summary relief -- do you know what -- you're looking at me.

MR. GERSCH: It's probably not what I filed.

THE COURT: A motion for summary relief is under 1513 of the appellate rules, and it kind of gets rid of all the other little steps. And it can be filed anytime after the initial pleading. And what it does, it -- if there's purely legal issues, it allows us to review those immediately by either a panel or a court en banc. And generally most of our original jurisdiction cases that are important are decided that way. We don't have a trial, although we could have a trial, because the parties can stipulate enough facts that we can get to the important issues. So that would be some way to get that up there, up to the court en banc.

But I don't see -- I don't see how. I mean, everybody says we're going to do this for 2018. We've been here since 2012. We've been sitting here, and nobody said this -- you know, this case had to be decided for the -- I guess this was done in 2011 for the 2012.

MR. GERSCH: That's correct, 2011.

THE COURT: And nobody said -- came here and -- there was nothing filed, nothing. There was one for the 2000 but nothing filed challenging the 2010 reapportionment. And now it's -- we're almost ready for the 2020 reapportionment.

MR. GERSCH: Well, Your Honor, all I can say is we filed our case at a time that was I think well over a year before the 2018 elections. We filed it in -- I think there

were about seven months. That's about the same time as Bethune-Hill versus Virginia Board of Elections which the Supreme Court decided this past term, the U.S. Supreme Court. That case went to trial, all the way from complaint to trial, not -- not expedited, seven months.

THE COURT: Was that in the Rocket District?

MR. GERSCH: Yes, it was.

THE COURT: Okay. Fifty-five days to trial.

MR. GERSCH: But it -- but it can be done. It can be done with all due process.

THE COURT: It -- it can be done, but -- but from what you just said, we're stuck with Bandemer.

MR. GERSCH: Only on the Equal Protection claim, Your Honor.

THE COURT: Okay. In other words, you're going to --

MR. GERSCH: Only on the Equal Protection claim.

THE COURT: -- abandon the Bandemer claim, the -- the Equal Protection claim.

MR. GERSCH: We're not abandoning it.

THE COURT: Okay.

MR. GERSCH: We have both. We have both, Your Honor.

So to conclude, there ought not be any stay. There's no way that Gill or any decision by the U.S. Supreme

Court can moot this case. We ought to be moving this case as swiftly as possible.

Your Honor, I might add, we have pending a motion for a scheduling conference. Whether Your Honor disagrees with us on expedition or not, we'd like to have that scheduling conference as promptly as possible. If possible, we'd have it -- we're prepared to have it today. But we'd like to have it as promptly as possible.

THE COURT: Okay. Do you have any rebuttal?

MR. TORCHINSKY: Yes, Your Honor.

I'll be brief. I think the Court highlighted well the significant legislative privilege issues that are going to be before this Court as a legal matter. I also want to point out and -- and as the Court noted, the -- the Pennsylvania Supreme Court in Erfer noted that the -- the standards here to prevail on -- under the Bandemer test -- let's call it that for a moment -- are -- are particularly onerous. And there are case-dispositive preliminary objections pending as well.

And, again, how those are decided may well be impacted by -- by Gill versus Whitford. And that's why we think that this Court should get this case right and not rush which is basically what the Pennsylvania Supreme Court did in the Holt case in 2012. It actually allowed -- it actually allowed elections to go forward in malapportioned districts

because there hadn't been --

THE COURT: Legislative districts?

MR. TORCHINSKY: It was legislative districts. It allowed, you know, elections to go forward in -- in malapportioned legislative districts and essentially using the twenty -- you know, using the -- even though we had new census numbers, the districts were clearly malapportioned. The state let it go anyway because the Court said we just don't have enough time and we'd rather get this right than rush it.

And what I'm hearing from the petitioners is we need to rush it. And what I'm hearing from the Pennsylvania Supreme Court is in these election cases and particularly when these kinds of rights are at issue, we need to get it right. And that's why the Court should grant our application for a stay.

THE COURT: They didn't do that in Erfer.

MR. TORCHINSKY: They didn't, but they did ten years later in Holt.

THE COURT: What I'm saying is they were inconsistent.

MR. TORCHINSKY: Welcome to redistricting law.

THE COURT: Okay. You know the problem with redistricting law? Nobody really gets good at it because they only do it once every ten years.

MR. TORCHINSKY: All right. Thank you, Your Honor. Nothing further.

THE COURT: Thank you.

MR. LEVINE: Your Honor, there are other parties.

THE COURT: Oh. You're -- I didn't know that you were another party. Who do you represent?

MR. LEVINE: The Lieutenant Governor.

THE COURT: The Lieutenant Governor.

MR. LEVINE: Yes.

THE COURT: Okay. You want out. But I haven't scheduled that for today. Is that about right?

MR. LEVINE: Well, may it please the Court, Clifford Levine on behalf of the Lieutenant Governor. And, no, we do not want out. And we feel very strongly that the Court should consider what is an obviously grotesque reapportionment map and should consider the implications.

And -- and I'm not going to go through the previous arguments. You certainly heard those, and they were well made. But the couple of points that we would like to make is we need to tee this up. If the -- if the -- if the legislative leaders from the Republican side were coming here and saying, listen, we acknowledge that the map was done for gerrymandering purposes, that it has the effect of year after year creating a basically 13 to 5 sort of disparity despite the state being pretty much a purple state, then we would

have a clear factual purpose. But if they intend to come back and say no, that there are other justifications: compactness, population, then those are factual matters which is appropriate to look at and would appropriately -- regardless of whether or not there would be a privilege, if they want to come in and assert as a defense that this is not done just for pure gerrymandering reasons, then they're putting that at issue and we would have the right to participate.

THE COURT: Maybe I should have asked the other party, but if -- if we have a standard of compact, contiguous, and violates as few lines as possible and we say there's a dot in the middle of Centre County and the computer is going to -- to draw the lines, you know, the program is -- you can't -- as few county lines as possible, but it's as compact and contiguous as you can do -- and my understanding is with computers, you can make -- the compactness is the most important part -- but -- and it's untouched by human hands; in other words, the computer did it, no -- no intent to discriminate, and there's 18 Republican legislators and the efficiency standard goes way out of whack for Congressmen, what happens?

MR. LEVINE: Well, then it could have -- well, so if there was no intent, if it just sort of happened to fall from the heavens and you had a grossly distorted map and the

effect was --

THE COURT: No, it wasn't a gross- -- it was a perfect map.

MR. LEVINE: Oh, a perfect map. Well, if it's a perfect map, they could be justified; here was our process --

THE COURT: Untouched by -- untouched by Republicans or Democrats.

MR. LEVINE: Here was our process. But you ultimately still have to have -- even under Pennsylvania law, there's still -- you know, we have situations where we look at maps, and we try to make a determination of something that even can look irrational. We have that in -- in spot zoning context under the state constitution all the time.

THE COURT: No, that part I understand. But what I'm saying -- what I'm asking is, I am positing a map where there's -- everybody admits there's no discrimination. A computer draws it. And it just so happens that more Republicans -- the same percentage of Republicans win now and the efficiency standard -- the efficiency gap is worse than in Wisconsin. And the Supreme Court comes down and says if you have an efficiency gap worse than Wisconsin, you lose. Would a state be required then to gerrymander districts to comply with the efficiency gap?

MR. LEVINE: I don't know -- not necessarily, I mean, as to each case. And we deal with this in the state

legislative commission situation --

THE COURT: I'm just -- it's just --

MR. LEVINE: Well, you have -- for instance, Philadelphia is heavily Democratic. So if you create districts, that tends to be skewed Democratic. So as long as you're trying to keep intact municipal boundaries, et cetera. But if the purpose and sole purpose which --

THE COURT: I took that out.

MR. LEVINE: Yeah. But -- well -- so that -- but the issue is -- I think -- look --

THE COURT: No, the point is, does efficiency gap standard mean that you have to -- that no matter how you -- if you draw the map with -- untouched by human hands, that you have to have a proportional -- you have -- the efficiency gap would -- would then mean that you have to draw the map to come into compliance with the outcome of the efficiency gap.

MR. LEVINE: Well, I mean, somebody is designing the program in the first place. So I think you would have the right -- all we're saying is you would have the right to explore what happened. And they're not coming in here and saying this is -- they're not resting their whole case on a non-justiciability argument. They are saying here's what it is.

Now if you talk about the teeing it up, if we're going to have en banc decisions and if we're going to go to

the full Court -- and we certainly respect the Court's prerogative to design that -- then we're -- now we really need to start pressing this now because if we wait until end of June for the Supreme Court to issue a ruling, then we -- then we start the process and we go to other hearings.

THE COURT: See, everybody is concerned that the Supreme Court will wait till June. I think your -- every -- my concern is the Supreme Court will file November 1st.

MR. LEVINE: Well, we don't know --

THE COURT: I mean --

MR. LEVINE: -- and basically --

THE COURT: I mean, because then there may be a way to get to the March standard because we have a clear standard -- and I'm -- well, first of all, I don't think we'll decide it. It will be down in federal court and they'll file there.

MR. LEVINE: Well, and based on precedent, I think it's fair to conclude we may end up with a 4 to 1 to 4 decision. So there are a lot of -- a lot of things that can happen, but there are the state claims. And all we're asking is, let's start the process. There are issues. It's not that complicated. I was involved personally in the -- the redistricting. There's a computer program. They're looking at performance, what are the standards for performance. So these are easy, one day type of depositions that we could have a better understanding of what took place. And so we

can move that along and -- and proceed. And then once we have that, we can address the state claims.

THE COURT: It will take people to read the briefs more than a day.

MR. LEVINE: Well, I appreciate that, but --

THE COURT: I've never seen so much paper filed in a -- we had -- before I came in, there were two -- two more pleadings in the queue for me to look at which I haven't had a chance to get to.

Okay. Thank you.

MR. LEVINE: So thank you, Your Honor.

THE COURT: Okay. Can I see counsel in three minutes in the conference room?

THE COURT CRIER: Court is now in recess.

(Whereupon, a RECESS was taken at 10:46 a.m.)

(Whereupon, the proceedings concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the proceedings of the above cause and that this copy is a correct transcript of the same.

DATED: October 10, 2017

Rebecca Toner, RPR

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PETITIONERS' BRIEF IN OPPOSITION TO APPLICATION TO STAY CASE PENDING THE U.S. SUPREME COURT'S RULING IN *GILL V. WHITFORD*

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INTRODUCTION

This suit alleges that the Republican legislature and then-Governor manipulated Pennsylvania's congressional districts to rig elections and deprive Petitioners of their fundamental constitutional rights. Faced with these grave constitutional claims, the General Assembly[1] asks this court to do nothing except delay. The General Assembly's stay application is meritless. It is nothing more than a brazen effort to deny Petitioners their day in court and insulate the challenged districting plan (the "2011 Plan") from judicial review. The test for a stay is whether a different case "might resolve or render moot" the instant matter. *Israelit v. Montgomery Cty.*, 703 A.2d 722, 724 n.3 (Pa. Commw. Ct. 1997). Given the legal, factual, and evidentiary differences between this case and *Gill v. Whitford*, No. 16-1161 (S. Ct.), there is no possibility that *Gill* will "resolve or render moot" this case.

The General Assembly's first argument—that this case will be "mooted" if the U.S. Supreme Court in *Gill* holds that partisan gerrymanders are non-justiciable (Stay Br. at 12-13)—fails as a matter of law. *Gill* involves a challenge to partisan gerrymandering under the United States Constitution, while this lawsuit asserts claims exclusively under the Pennsylvania Constitution. The Pennsylvania Supreme Court has twice ruled that state constitutional challenges to partisan

[1] The stay application was filed by the General Assembly, Speaker of the Pennsylvania House of Representatives Michael C. Turzai, and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati III. This brief refers to these Respondents collectively as the "General Assembly."

gerrymanders are justiciable as a matter of Pennsylvania law. Because that holding binds this Court regardless of what *Gill* holds, resolution of the justiciability question in *Gill* cannot "resolve or render moot" this case.

The General Assembly's fallback argument—that *Gill* supposedly is "nearly identical" to this case and therefore may offer relevant guidance on the merits (Stay Br. at 1)—is also wrong. For one, there is plenty of work to do in this case before reaching the merits, including discovery to be taken and privilege questions to be resolved. As to the merits, this case is not *Gill*. Petitioners offer *different* legal claims, *different* theories, and *different* evidentiary support. Petitioners assert claims under Pennsylvania's free speech provisions, which the Pennsylvania Supreme Court has held provide broader protections than the federal First Amendment rights at issue in *Gill*. Petitioners also assert an additional free speech theory—for unconstitutional retaliation—that is not presented at all in *Gill*.

Moreover, while the *Gill* defendants argue that there can be no constitutional violations because the districts in Wisconsin's legislative map are allegedly compact, Pennsylvania's congressional districts are anything but compact and thus would fail even the test proposed by the *Gill* defendants. (For this reason, the General Assembly's lengthy preliminary objections raise no such defense.) Petitioners' claims are also supported by multiple statistical measures and modeling techniques not presented in *Gill*. Thus, even if the U.S. Supreme Court

says something of interest in *Gill*, the standard for a stay is not whether the pending case might merely "impact" this matter (Stay Br. at 13); it is whether the pending case "might resolve or render moot" the instant matter. *Israelit*, 703 A.2d at 724 n.3. *Gill* will not.

The General Assembly's balance-of-equities analysis is even more strained. Because this case will go forward no matter what *Gill* holds, and because no party in *Gill* disputes that the legislature's intent is relevant in assessing a partisan gerrymandering claim, all of the privilege and other discovery issues that the General Assembly raises will need to be litigated sooner or later. A stay will not relieve the General Assembly of the burdens of the discovery, to the extent those are legitimate "burdens" at all when asserted to thwart the constitutional rights of millions of Pennsylvania voters.

Petitioners, in contrast, will suffer substantial prejudice from a stay. A stay could last as long as eleven months, until the U.S. Supreme Court's term ends in late June 2018. As the General Assembly well knows, and as the Secretary of the Commonwealth and Commissioner of Elections note in their opposition to a stay, such delay would eliminate any possibility of resolving this case in time for the 2018 elections, and could make it difficult to resolve this case in time for even the 2020 elections. The Pennsylvania Supreme Court has made clear that "the fundamental rights guaranteed by the Pennsylvania Declaration of Rights 'cannot

lawfully be infringed, even momentarily.'" *Pap's A.M v. City of Erie*, 812 A.2d 591, 607 (Pa. 2002) (quoting *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 A. 70, 72 (1921)). But a stay would do just that, causing further deprivation of Petitioners' constitutional rights.

Petitioners, and the citizens of the Commonwealth at large, have an overwhelming interest in resolving this case as expeditiously as possible. No legitimate reason exists to hold this case in abeyance for potentially eleven months while the U.S. Supreme Court considers a case that involves different law, different theories, different facts, different evidence, and a different state's districting plan.

COUNTERSTATEMENT OF RELEVANT FACTUAL AND PROCEDURAL HISTORY

I. The Petition

The Petition challenges the 2011 Plan as an unconstitutional partisan gerrymander. The consequence of this gerrymander is that congressional elections in Pennsylvania are rigged; they are determined not by the voters, but by partisan actors sitting behind a computer.

The General Assembly's 2011 congressional map is one of the most extreme gerrymanders in the nation. Using sophisticated computer modeling to draw bizarre and indefensible district lines, the General Assembly "packed" Democratic voters into 5 districts that are overwhelmingly Democratic, and "cracked" the

remaining Democratic voters by spreading them across the other 13 districts, such that Republicans constitute a majority of voters in each of these 13 districts. *See* Pet. ¶¶ 54-64. The result has been a 13-5 Republican advantage in congressional elections regardless of how Pennsylvania voters cast their ballots. *See id.* ¶¶ 77-82. In 2012, Republican congressional candidates won only 49% of the statewide vote but still won 13 of the Commonwealth's 18 congressional seats. *Id.* ¶ 79. In 2014 and 2016, Republicans won 55% and 54% of the statewide vote and still won the exact same 13 seats. *See id.* ¶¶ 80-81. In short, the results are utterly non-responsive to the will of the voters.

The evidence of impermissible partisan intent and effect here is overwhelming. In addition to the results of three straight elections showing that the outcome is impervious to the will of the voters, the tortured shapes of the districts are damning evidence of a partisan gerrymander. Some districts snake through half a dozen others and are in places only as wide as a single business establishment. Pet. ¶¶ 56-59. The shape of the 2011 Plan is inexplicable except as an exercise of partisan gerrymandering. Not surprisingly, six years after the Plan's creation, the General Assembly has failed to produce any alternative explanation for how the districts were created. Nor is the evidence of partisan gerrymandering confined to the shape of the districts. As described in further detail below, an array of computer modeling techniques and statistical measures all confirm that the 2011

Plan represents an unconstitutional gerrymander that has significant effects on electoral outcomes and the representational rights of Petitioners.

The individual Petitioners in this case are 18 registered Pennsylvania voters, ranging from a chaplain to retired school teachers to a military veteran, all of whom allege that the 2011 Plan violates their fundamental rights under the Pennsylvania Constitution. Pet. ¶¶ 14-31, 104-113, 115-120. Count I of the Petition alleges that the 2011 Plan violates Petitioners' rights under Pennsylvania's Free Expression and Association Clauses, Art. I, §§ 7, 20, which the Pennsylvania Supreme Court has held provide greater protection than the First Amendment of the U.S. Constitution. *Pap's A.M v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). Petitioners allege that the 2011 Plan has the purpose and effect of disfavoring Petitioners and other Democratic voters by reason of their political views, their past votes, and the political party with which they associate, in violation of Art. I, §§ 7, 20. Pet. ¶¶ 100-07. Petitioners additionally allege that 2011 Plan violates the Pennsylvania Constitution's prohibition against retaliating against individuals on the basis of their protected speech and political views. *Id.* ¶¶ 108-13.

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania's Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (*i.e.*, Petitioners and other

Democratic voters) and accomplishes actual discriminatory effects. With respect to the discriminatory effects, Petitioners allege—unlike in *Gill* or in any other partisan gerrymandering case—that the extreme partisanship of today's Congress magnifies the effects of gerrymandering because members of Congress overwhelmingly no longer represent the views and interests of voters of the opposite party. *Id.* ¶¶ 95-98. That is, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes.

Petitioners ask the Court to declare the 2011 Plan unconstitutional and enjoin its use in future primary or general elections. Petitioners further urge that, if Respondents fail to enact a new plan that comports with the Pennsylvania Constitution in a timely manner, the Court should do so.

II. *Gill*

On November 21, 2016, a three-judge district court in the Western District of Wisconsin ruled that Wisconsin's state general assembly districts constituted an unconstitutional partisan gerrymander. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). The plaintiffs in *Gill* brought exclusively federal constitutional claims under the First Amendment and Equal Protection Clause of the U.S. Constitution. The district court, in a 159-page opinion that extensively detailed and relied upon the unique history of Wisconsin's state legislature districts, held

that the districting plan had the intent and effect of violating the plaintiffs' federal constitutional rights.

On June 19, 2017, the U.S. Supreme Court agreed to hear *Gill*. *See* 137 S. Ct. 2268 (2017) (postponing the question of jurisdiction to the hearing of the case on the merits). The case is scheduled to be argued on October 3, 2017, and the Court is expected to issue its decision by the end of June 2018. As explained in further detail below, the *Gill* defendants ask the U.S. Supreme Court to hold as a bright-line rule that the Wisconsin plan cannot constitute an unconstitutional gerrymander because the districts there are compact and not bizarrely shaped. The *Gill* defendants and their amici also focus much of their attention on the "efficiency gap," which they argue was the statistical measure relied upon by the *Gill* plaintiffs and the three-judge district court.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Trial courts in Pennsylvania have authority to "stay proceedings in a case pending the outcome of another case, where the latter's result might resolve or render moot the stayed case." *Israelit*, 703 A.2d at 724 n.3. For the reasons explained below, there is no possibility that the U.S. Supreme Court's decision in *Gill* "might resolve or render moot" this matter.

REASONS FOR DENYING A STAY

I. No Basis Exists to Stay Petitioners' State Law Claims Pending a Federal Court's Decision on Exclusively Federal Claims

A. *Gill* Will Not Moot This Case

The General Assembly's central argument is that this case would be "mooted" if the U.S. Supreme Court decides in *Gill* that partisan gerrymandering claims are nonjusticiable. (Stay Br. at 11-13). This argument is wrong and ignores controlling Pennsylvania Supreme Court precedent.

The Pennsylvania Supreme Court has twice squarely held that partisan gerrymandering claims *are* justiciable under the Pennsylvania constitution. *See Erfer v. Com.*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). *Erfer* explained that, in *1991 Reapportionment*, the Pennsylvania Supreme Court "determined that the claim [for partisan gerrymandering] was justiciable." 794 A.2d at 331 . Put differently, "a litigant c[an] raise claims that a reapportionment plan effected a political gerrymander and thus violated the U.S. and Pennsylvania Constitutions." *Id.* These state law decisions on justiciability are controlling. A U.S. Supreme Court holding that federal partisan gerrymandering claims are nonjusticiable as a matter of federal law would not and could not control this case. Indeed, *Erfer* expressly rejected the notion that only the federal Constitution is relevant in a partisan gerrymandering lawsuit. "Without clear support for the radical conclusion that our Commonwealth's Constitution is

nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the organic legal document of our Commonwealth." *Id.*

Moreover, even as to the federal constitutional claims in *Gill*, the Generally Assembly's position is baseless and misleading. The General Assembly's assertion that the U.S. Supreme Court "may … determine" that federal partisan gerrymandering claims are nonjusticiable (Stay Br. at 12) ignores the fact that the Court has rejected this exact argument in its last three decisions on partisan gerrymandering. The Court held that such claims *are* justiciable in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), a fact the General Assembly fails to disclose. The General Assembly states that a "four justice plurality" in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), concluded that partisan gerrymandering claims are nonjusticiable. (Stay Br. 11-12). But the General Assembly fails to advise this Court that the plurality did not speak for the court on the justiciability question and that, to the contrary, *five Justices* in *Vieth* confirmed that they would adhere to *Bandemer*'s conclusion that federal partisan gerrymandering claims are justiciable. Justice Kennedy described *Bandemer* as "the controlling precedent on the question of justiciability," and stated that he "reject[ed] the plurality's conclusions as to nonjusticiability." *Vieth*, 541 U.S. at 310-11 (Kennedy, J., concurring); *accord id.* at 326 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.*

at 355 (Breyer, J., dissenting). Justice Kennedy's 2006 opinion for the Court in *LULAC v. Perry*, 548 U.S. 399 (2006), reaffirmed the point. Justice Kennedy explained that *Bandemer* "held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy," that a "majority" in *Vieth* declined to hold political gerrymanders nonjusticiable, and that the Court was not "revisit[ing] the justiciability holding." *LULAC*, 548 U.S. at 413-14.

In short, the General Assembly is asking this Court to stay a case involving state law gerrymandering claims that Pennsylvania's highest court has found to be justiciable, because a federal court "may" reverse itself and decide that federal gerrymandering claims are nonjusticiable—a hypothetical holding that would have no impact on the justiciability of the state constitutional claims presented here. The General Assembly identifies no case in which *any* court *anywhere* has granted a stay in such circumstances, and we are aware of none.

B. This Case and *Gill* Involve Different Claims fand Governing Law

The General Assembly's fallback argument, that this Court should issue a stay because *Gill* "will likely establish the standards governing [Petitioners'] claims," is equally wrong. (Stay Br. at 2). Petitioners bring claims exclusively under the Pennsylvania Constitution, and those state constitutional claims are different from the federal constitutional claims in *Gill*.

Petitioner's first claim is under the Free Expression and Association Clauses of Article I, §§ 7, 20 of the Pennsylvania Constitution, which the Pennsylvania Supreme Court has repeatedly held "provide[] protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's*, 812 A.2d at 605 (internal quotation marks omitted). The Court has explained that these "broader protections" are "firmly rooted in Pennsylvania history and experience" and apply "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)). Given these broader protections, any ruling in *Gill* denying the plaintiffs' federal First Amendment claims would not be controlling of Petitioners' Pennsylvania free speech claims here.

The procedural history of *Pap's* illustrates the point. There, the U.S. Supreme Court had reversed an earlier Pennsylvania Supreme Court decision and held that the ordinance in question did not violate the federal First Amendment. *Pap's*, 812 A.2d at 598-99. On remand, the Pennsylvania Supreme Court held that, notwithstanding the U.S. Supreme Court's judgment that the ordinance did not violate federal free speech rights, different and more speech-protective standards applied under Pennsylvania's free speech provisions, and the ordinance violated those provisions. *Id.* at 601-11. *Pap's* thus makes clear that any U.S. Supreme Court decision denying the federal First Amendment claims in *Gill* would

not "resolve or render moot" Petitioners' free speech claims under the Pennsylvania Constitution. *Israelit*, 703 A.2d at 724 n.3

Moreover, *Pap's* emphasized that it is particularly important for Pennsylvania courts to render their "independent judgment" on "distinct and enforceable" Pennsylvania constitutional rights where "the governing federal law, to which [Pennsylvania courts] ordinarily would look for insight and comparison, has been fluid and changing and still is not entirely clear." *Id.* at 611. The Court stated, in language directly applicable here, that:

> As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question.

Id. Thus, while the General Assembly argues that the standards for federal partisan gerrymandering claims are "unknown" given recent U.S. Supreme Court jurisprudence, such uncertainty weighs *in favor* of this Court moving forward on Petitioners' state constitutional claims. Petitioners' "fundamental rights" under the Pennsylvania Constitution should not remain "uncertain" while the U.S. Supreme Court "struggles to articulate a standard to govern a similar federal question." *Id.*

The General Assembly also ignores the fact that Petitioners raise an additional free speech theory not presented in *Gill*—that Republican officials unlawfully retaliated against Petitioners for exercising their protected rights under Article I, §§ 7, 20. Pet. ¶ 108. The *Gill* plaintiffs do not pursue a free speech

retaliation claim, and accordingly the U.S. Supreme Court will not provide any substantive guidance on the standards governing such a claim. Petitioners' distinct retaliation claim alone provides reason to deny the request for a stay.

There is also no need to wait for the U.S. Supreme Court's ruling as relevant to Petitioners' equal protection claim. Again, *Pap's* is instructive. The Pennsylvania Supreme Court noted that in a prior decision, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), the Court had "theretofore held the double jeopardy clause of the Pennsylvania Constitution to be coextensive with the federal double jeopardy clause." *Pap's*, 812 A.2d at 607 (citing *Smith*, 615 A.2d at 325). Even though the Pennsylvania Supreme Court had previously held the federal and state standards coextensive, and even though it was "not clear" how the case would be decided "under the then-prevailing federal standard," that "did not deter [the Pennsylvania Supreme Court] from effectuating [its] separate judgment under the Pennsylvania Constitution" and holding that double jeopardy applied. *Id.* (citing *Smith*, 615 A.2d at 325). There is the same pressing need here for the Pennsylvania courts to render their independent judgment on Petitioners' equal protection rights under the Pennsylvania Constitution.

In any event, the General Assembly fails to explain how a decision by the U.S. Supreme Court providing guidance on the standards for an equal protection claim would actually alter, as a practical matter, the proceedings that would go

forward ***right now*** absent a stay. No party in *Gill* suggests that partisan intent and effects—the primary focus of discovery in this case—should be irrelevant in assessing an equal protection partisan gerrymandering claim. *See infra* at 23-25; *see also Erfer*, 794 A.2d at 332 (assessing partisan intent and effect in evaluating partisan gerrymandering claim). As explained below, the intent and effects inquiries turn on facts and statistical measures that differ between this case and *Gill*, and that are subjects of Petitioners' discovery requests..

Finally, the General Assembly's argument that the "Supremacy Clause" provides justification for a stay because *Gill* might affirm the lower federal court's holding is just silly. (Stay Br. at 17). The General Assembly suggests that Petitioners "may seek to amend their Petition to add nearly identical federal claims, or perhaps withdraw this case and file a new claim in federal court." *Id.*; *see id.* at 3-4. In other words, the General Assembly asks for a stay pending *Gill* because *Gill* might impact hypothetical federal claims that Petitioners do not bring, or a hypothetical federal lawsuit that Petitioners have not filed. This Court should resolve the stay motion based on the actual case that Petitioners filed, not the non-existent one the General Assembly conjures up.[2]

[2] The General Assembly elsewhere inconsistently asserts that the U.S. Supreme Court's decision to grant a stay in *Gill* somehow "suggests that the *Whitford* decision is likely to be reversed." (Stay Br. at 11). The General Assembly cites zero support for this statement. Rather the General Assembly infers this broad principle from the fact that there was one redistricting case recently in which the U.S. Supreme Court *denied* a stay. (Stay Br. at 11) (citing *McCrory v. Harris*, 136 S. Ct. 1001 (2016)). The premise does not support the conclusion.

II. Petitioners Will Present Facts and Evidence That *Gill* Will Not Address

Petitioners also paper over the extensive factual and evidentiary differences between this case and *Gill*. These differences crystallize why the General Assembly's stay argument makes no sense. The *Gill* defendants ask the U.S. Supreme Court to rule that there can be no constitutional violation because Wisconsin's districts are allegedly compact, but Respondents have no argument here that Pennsylvania's congressional districts are compact—because they are not. And while the briefing in *Gill* focuses largely on the "efficiency gap" as a measure of partisan gerrymandering, Petitioners here rely upon at least three other statistical modeling techniques and measures that the U.S. Supreme Court will not address. All of these factual and evidentiary differences mean that, even if the Supreme Court were to rule in favor of the defendants in *Gill*, that would not resolve this case.

A. The 2011 Plan Flunks the Test Proposed by the *Gill* Defendants

The *Gill* defendants propose a bright-line rule for assessing partisan gerrymanders. If that test were adopted by the U.S. Supreme Court, Pennsylvania's 2011 Plan would fail it. The *Gill* defendants advocate a "rule" that there can no constitutional violation for a partisan gerrymander if the relevant districts "comply with traditional redistricting principles"—meaning if they are compact (*i.e.*, not bizarrely shaped), contiguous, equal in population, and minimize

municipality splits. *Gill v. Whitford*, No. 16-1161, Brief For Appellants at 60-61 (July 2017) (hereinafter "Gill Merits Br."). The *Gill* defendants assert that the Wisconsin districts at issue in *Gill* comport with these requirements. *See id.*

Whatever the merits of that assertion in *Gill*, the 2011 Plan indisputably does not "comply with the traditional districting principles." *Id.* Pennsylvania's congressional districts are anything but compact: districts such as the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Sixteenth, and Seventeenth twist and turn and sprawl out over vast stretches of land. *See* Pet. ¶¶ 56-58; app'x. The Sixth District snakes through six other districts. *Id.* ¶ 56. The Twelfth District runs through five others. *Id.* ¶ 57. The Seventh is as self-evidently gerrymandered as any district in the United States, so narrow in parts that it is only as wide as a single restaurant. *Id.* ¶ 58. The 2011 Plan also splits apart municipalities and communities of interest, such as the cities of Chester and Reading. *Id.* ¶ 7. These districts are so bizarrely shaped as to make a mockery of any claim by the General Assembly that they were produced by any even-handed process. Indeed, as explained below, Petitioners allege that computer modeling techniques confirm that the 2011 Plan could not be the result of adherence to any traditional districting criteria. Not surprisingly, the General Assembly does not even raise the *Gill* defendants' "compactness" defense. Thus, even if the Supreme Court were to

adopt the rule that the *Gill* defendants propose, that would in no way help Respondents here.

B. Petitioners Rely on Statistical Measures Other Than the Efficiency Gap

The General Assembly points to the fact that *Gill* involves the efficiency gap, which the Petition also cites. But the General Assembly ignores the three other statistical measures and modeling techniques that Petitioners allege will demonstrate the impermissible partisan intent and effects of the gerrymander here, and that are not presented in *Gill*.

In their Supreme Court briefs, the *Gill* defendants and their *amici* focus much of their attention on the efficiency gap and their critiques of it. *Gill* Merits Br. at 48-53.[3] They argue, for example, that the efficiency gap "fails to account for . . . political geography" and purported clustering of "Democratic voters . . . in big cities," and that it rests on an assumption of proportional representation. *Id.* at 20, 50; *see Gill*, Brief for *Amici Curiae* Wisc. State Senate and Wisc. State Assembly in Supp. or Appellants at 22 (Apr. 24, 2017) (capitalization omitted) (hereinafter "Wisconsin Legislature Br."). Petitioners do not agree with these critiques, but regardless, the Petition invokes a number of other statistical measures and

[3] Indeed, counsel for the General Assembly in the instant case filed an *amicus* brief on behalf of the Republican National Committee in *Gill* that argues the efficiency gap is the keystone of the case. *Gill*, Br. of *Amici Curiae* Republican Nat'l Comm. & Nat'l Republican Cong. Comm. In Supp. Of Appellants at 2 (Apr. 24, 2017).

modeling techniques that are independent of the efficiency gap and that address the very critiques of the efficiency gap raised in *Gill*.

For instance, the Petition cites the computer modeling of University of Michigan political scientist Jowei Chen. *See, e.g.*, Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017). Professor Chen's work uses a computer algorithm producing simulated districting plans to show that no alternative plan adhering to traditional districting criteria (including geographic compactness, contiguity, and respect for communities of interest, such as county boundaries) would ever produce a 13-5 Republican advantage in Pennsylvania's congressional delegation. Pet. ¶¶ 85-86. This approach accounts for Pennsylvania's unique political geography and natural population patterns and does not rely upon any assumption of proportional representation. The substance of the Chen approach is not addressed in the district court's opinion in *Gill* or in the *Gill* defendants' Supreme Court briefs.

The Petition also cites a computer modeling technique known as a "Markov chain" that is entirely different from anything presented in *Gill*. Pet. ¶¶ 87. The Markov chain analysis takes the enacted plan as a starting point and then makes a series of random adjustments to the district boundaries. Mathematicians at Carnegie Mellon University and the University of Pittsburgh find that, using this approach, making random changes does greatly diminish the Republican advantage

under the 2011 Plan. The professors assert that this mathematically proves that the 2011 Plan has a Republican bias that cannot be the result of neutral factors such as population clustering. *See* Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with* supplement at https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf.

Yet another measure of partisan gerrymandering that the Petition cites is the "mean-median gap." Pet. ¶¶ 90-93. That measure looks at the Democratic vote share in each of Pennsylvania's 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance. Gerrymandering does not impact the mean vote share, since that is a statewide figure, but it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. This measure shows that there are a disproportionately large number of Democratic voters packed into a small number of districts. And it demonstrates that it is more difficult for Democrats to win the median district and hence a majority of seats. Under the 2011 Plan, Pennsylvania consistently has had one of the largest mean-median gaps in the nation for

congressional elections. The *Gill* defendants and their *amici* do not discuss the mean-median gap in any detail in their Supreme Court briefs.

In short, the Petition does not rely solely or even primarily on the efficiency gap that is the focus of briefing in *Gill*. Thus, even if the U.S. Supreme Court were to reject the efficiency gap, a holding that would not be binding on the Pennsylvania courts in any event, that holding would in no way foreclose the other statistical measures presented in this case.

C. Petitioners Will Establish Effects of Gerrymandering Not Presented in *Gill* Regarding Lack of Representation

Petitioners allege that the effects of the gerrymander under the 2011 Plan are magnified by the extreme partisanship of today's Congress. Petitioners allege that Pennsylvania's representatives no longer represent the views and interests of voters of the opposite party, and that therefore, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose the ability to influence legislative outcomes. *See* Pet. ¶¶ 95, 98, 107, 112.

These allegations, which will be supported by empirical and other evidence, will provide an independent basis for concluding that 2011 Plan produces unconstitutional effects, *see Erfer*, 794 A.2d at 333, and will also address one of the primary arguments raised by the Wisconsin Legislature in defense of the districts at issue in *Gill*. The Wisconsin Legislature argues that "voters who support losing candidates are not deprived of representation or access to the

political process." Wisconsin Legislature Br. at 23 (capitalization omitted). The Legislature asserts that in "Wisconsin and across the country, legislators represent all of their constituents—not just the ones who voted for them," and therefore "voters are represented even if they voted for the losing candidate. *Id.* at 23-24 (emphasis omitted). These arguments do not appear to have been tested at trial in *Gill*, but they will be here—another difference between the two cases.

III. The Balance of Equities Weighs Overwhelmingly Against a Stay

A. *Gill* Will Have No Effect on the Need for Discovery in This Case

The General Assembly asserts that it will "necessarily [suffer] harm" if this Court does not grant a stay because the General Assembly would need to "conduct[] extensive . . . discovery, including identifying, accumulating, and conducting privilege reviews of documents and materials sought by Petitioners." (Stay Br. at 18). But *Gill* will have no impact on the need for such discovery. As explained, there is no possibility that *Gill* will moot this "entire case." *Supra* 10-12. Nor is there any possibility that *Gill* will hold that discriminatory intent—the element to which discovery is most pertinent—is not an element of a constitutional claim regarding partisan gerrymandering. Intent is a standard element of equal protection claims. *E.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). No party in *Gill* asks the Supreme Court to hold otherwise.

Accordingly, this case will go forward no matter what the U.S. Supreme Court holds in *Gill*. All of the privilege and other discovery issues that the Generally Assembly identifies will need to be litigated here, and nothing in the *Gill* decision is likely to be pertinent to their resolution. There is no legitimate reason to delay resolving these discovery issues, or conducting discovery as to the legislative history of the 2011 Plan more generally, pending a decision in *Gill* regarding a different districting plan with a different legislative history and different evidence of partisan intent and governed by separate constitutional provisions. The General Assembly merely invokes these discovery considerations as cover for their true objective—delay for the purposes of delay.

Indeed, the General Assembly's claim of a "burden" in responding to the discovery requests is one of their own making. Petitioners seek straightforward, factual information regarding who drew the 2011 Plan, the criteria used, and other information relevant to the Plan's creation and its intended effects. The General Assembly and other Respondents know the answers to these questions, and any discovery disputes will occur only because they are choosing to conceal this information from the public. The desire of government officials to oppose transparency regarding their own actions is not a cognizable burden, and certainly not one that justifies delaying adjudication of the constitutional rights of Petitioners and millions of other Pennsylvania citizens who pay the very taxes about which the

General Assembly purports to be so concerned. Finally, the General Assembly has raised objections to virtually all discovery in this case on grounds of privilege, *see* Ex. A, Respondent's Objections to Petitioners' Notice of Intent to Serve Subpoenas at 2 (objecting to *all* information requested in subpoenas on ground that disclosure "is prohibited pursuant to the Speech and Debate Clause of the Pennsylvania Constitution"), and fails to disclose to this Court that if they get their way, there may be not very much discovery at all.[4] The General Assembly cannot have it both ways.

B. A Stay Would Substantially Prejudice Petitioners

In contrast to the General Assembly, Petitioners would suffer real prejudice from a stay. The Pennsylvania Supreme Court has made clear that "the fundamental rights guaranteed by the Pennsylvania Declaration of Rights 'cannot lawfully be infringed, even momentarily.'" *Pap's*, 812 A.2d at 607 (quoting *Spayd*, 113 A. at 72); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that a deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Latta v. Otter*, 771

[4] Respondents Turzai and Scarnati have also invoked legislative privilege to object to all discovery sought in this case. *See* Ex. B, Respondent Turzai's Objections to Petitioners' First Set of Requests for Production at 2; Ex. C, Respondent Turzai's Objections to Petitioners' First Set of Interrogatories at 2; Ex. D, Respondent Scarnati's Objections to Petitioners' First Set of Interrogatories at 2.

F.3d 496, 500 (9th Cir. 2014) (dissolving stay in light of "the public's interest in equality of treatment of persons deprived of important constitutional rights"); *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) (holding that consideration of "the injury to the parties being stayed" was "of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights").

A stay here would do just that. The Generally Assembly acknowledges that a stay would likely mean that this case would languish for "eleven months": the U.S. Supreme Court's next term will conclude at the end of June 2018, and the Supreme Court often issues opinions in its most important or controversial cases at the end of the term. *See* (Stay Br. at 18). At the earliest, the Supreme Court will not decide *Gill* until the new year, given that the argument is not until October.

Thus, as the Secretary of the Commonwealth and the Commissioner of Elections explain in their opposition to the stay, a stay would render it extremely difficult to resolve this case and implement a new plan in time for the 2018 election. Cortés & Marks Opp. at 5-7. A stay may even jeopardize the ability to resolve this case in time for the *2020* elections, which will be the final election under the 2011 Plan before the next census. The 2020 primaries will be held on April 28, 2020. *See* 25 Pa. Stat. § 2753. Candidates will be able to start circulating nomination petitions on January 28, 2020, and those petitions will be

due on February 18, 2020. *See id.* §§ 2868; 2873(d). Given the uncertainties inherent in any litigation, it is not unlikely that granting a stay would prevent Petitioners from obtaining relief even for 2020—effectively mooting this case.

This Court should reject the General Assembly's effort to run out the clock. Every new election under the 2011 Plan violates Petitioners' constitutional rights anew. As Congress votes on extraordinarily important matters from healthcare to taxes to education, any delay in providing a Petitioners a fair opportunity to elect representatives of their choice will cause real and concrete prejudice. The notion that Petitioners should suffer further deprivations of their voting and representational rights, because the Assembly prefers to avoid the commonplace sort of discovery attendant to any serious lawsuit, is untenable.

Nor is there any merit to the General Assembly's suggestion that a stay would not be "unduly prejudicial" because Petitioners purportedly "delay[ed] . . . bringing this suit." (Stay Br. at 18). In *Erfer*, the Pennsylvania Supreme Court dismissed a lawsuit brought in 2002 challenging the districting plan created after the 2000 census. 794 A.2d at 328. The Court concluded that the petitioners lacked evidence establishing that that plan had an impermissible partisan effect. *Id.* at 334. The reason that Petitioners now know the 2011 Plan is perhaps the "worst offender" in the nation is precisely because of the data that exists from the elections since the 2011 Plan went into place, data that was unavailable in *Erfer*.

And Petitioners will use the data from the 2012, 2014, and 2016 elections not only to show the magnitude of the gerrymander, but also its durability and thus how it has entrenched Republicans in power. For instance, it is from comparing the 2012 to the 2014 and 2016 elections that it is clear that Republicans' hold on 13 of 18 seats does not change even with large swings in the vote. *See* Pet. ¶ 5. The timing of Petitioners' suit is also partly attributable to the aforementioned statistical modeling techniques and measures that Petitioners will present in this case. These techniques and measures were all developed in the last few years and will be a critical part of Petitioners' case.[5]

IV. Other Gerrymandering Cases Are Different From This Case

The General Assembly points to gerrymandering cases in federal court in Maryland and North Carolina where stays have been requested or granted. The Maryland Court has granted a stay but the North Carolina court is considering a request for a stay pending *Gill*; it has not granted one. In both of those cases, discovery has been completed. *See* Status Report, *Benisek v. Lamone*, No. 13-cv-03233 (D. Md. June 2, 2017), Dkt. 180 ("Discovery is complete, with the exception of the deposition of Plaintiffs' expert, . . . [which] will be completed Monday, June 5, 2017."); Order, *League of Women Voters of North Carolina v.*

[5] *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. Law. Rev. 831 (2015); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Elec. L.J. 312, 312 (2015); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Quarterly J. Pol. Sci. 239 (2013).

Rucho, No. 16-cv-01164 (M.D.N.C. Mar. 1, 2017), Dkt. Entry 47 (setting discovery deadline of April 28, 2017). Those courts have done all the work, except trying the case. That is very different from this suit, where the General Assembly seeks a stay at the outset of the case, before any discovery has been taken. Finally, both the Maryland and North Carolina cases involve federal constitutional claims, like *Gill*, and therefore *Gill* could have a dispositive or significant impact on those suits. That is not the case here for the many reasons outlined above.

CONCLUSION

For the reasons stated above, the Court should deny the request for a stay.

Dated: August 28, 2017

Respectfully submitted,

/s/ David P. Gersch

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Exhibit A

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IN THE COMMONWEALTH COURT, PENNSYLVANIA

CIVIL DIVISION

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA , CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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,

Respondents.

CASE NUMBER: 261 MD 2017

RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO SERVE SUBPOENAS PURSUANT TO RULE 4009.21

FILED ON BEHALF OF:

MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE PENNSYLVANIA GENERAL ASSEMBLY, Respondents.

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FILED ON BEHALF OF:

SENATOR JOSEPH B. SCARNATI III, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, Respondent.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO SERVE SUBPOENAS PURSUANT TO RULE 4009.21

Respondents Michael C. Turzai and Joseph B. Scarnati III, by and through their undersigned counsel, pursuant to Pa. R. Civ. P. 4009.21(c) set forth the following Objections to the Petitioners' Notice of Intent to Serve Subpoenas to Produce Documents and Things pursuant to Pa. R. Civ. P. 4009.21 and state in support thereof:

1. On July 17, 2017, Petitioners served Respondents with 17 documents entitled, ***Notice of Intent to Serve a Subpoena to Produce Documents and Things for Discovery Pursuant to Rule 4009.21*** (collectively, "the Notices"). A copy of each of the Notices is attached hereto as composite Exhibit "A".

2. Attached to each of the 17 Notices is a Subpoena directed to various third-party individuals and entities which Subpoena seeks the production of certain documents (the "Subpoenas"). The documents requested by each Subpoena are nearly identical and

all of the Subpoenas seek the production of information pertaining to the 2011 Congressional Redistricting.

3. Of the 17 Subpoenas, 11 are addressed to current and/or former employees of Respondents, including but not limited to former Chiefs of Staff, and Legislative Assistants. One is addressed to a former Republican Member of the Pennsylvania House of Representatives (collectively referred to as the "Legislative Subpoenas").

4. The remaining six Subpoenas are directed to the Republican National Committee ("RNC"), the National Republican Congressional Committee, the Republican State Leadership Committee and the State Government Leadership Foundation as well as two individuals who, upon information and belief, have been associated with the RNC or NRCC (collectively referred to as the "Entity Subpoenas").

5. Respondents object to the Subpoenas in that the Subpoenas are improper and subject to protective orders and/or quashing in that:

a. Production of the information sought via the Legislative Subpoenas is prohibited pursuant to the Speech and Debate Clause of the Pennsylvania Constitution out of which the Legislative Privilege arises, PA. Const. Art 2, Sec. 15. *See Consumers Educ. & Prot. Ass'n v. Nolan*, 368 A.2d 675, 680 (Pa. 1977) and Firetree, Ltd. v. Fairchild, 920 A.2d 913, 918-919 (Pa. Cmwlth. 2007); and

b. Both the Legislative Subpoena and the Organization Subpoena request documents protected by First Amendment Privilege, *Pennsylvanians for Union Reform v. Pa. Office of Admin.*, 129 A.3d 1246 (Pa. Cmwlth. 2014), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir.

2010); *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); and

c. The Subpoenas seek the production of documents protected by the attorney-client privilege and the attorney work product doctrine, 42 Pa.C.S. § 5928; Pa. R.C.P. No. 4003.3; *see Levy v. Senate of Pennsylvania*, 65 A. 3d 361 (Pa. 2013), *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011); and

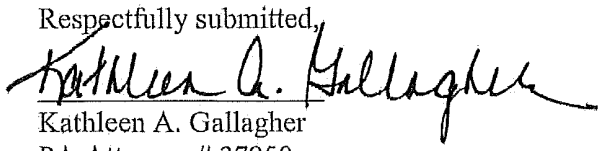
d. The Subpoena requests are overly broad, *see* Pa. R.C.P. No 4003.1(a); Pa. R.C.P. No. 4011; *see also In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89 (Pa. 2006); *Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Cmwlth. 2001); and

e. The Subpoenas seek the production of information that is not relevant to the Petitioners' claims. *See* Pa. R.C.P. No 4003.1(a); Pa. R.C.P. No. 4011; *see also Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Cmwlth. 2001); *Croyle v. Smith*, 78 Pa. D. & C.4th196; *see generally* Pa.R.E. 401.

WHEREFORE, for all of the foregoing reasons, Respondents respectfully submit the within Objections to the Subpoenas and request that the Court issue an Order prohibiting Petitioners from effectuating service of the Subpoenas.

Dated: August 9, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

That counsel for the Respondent, REPRESENTATIVE MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE PENNSYLVANIA GENERAL ASSEMBLY, hereby certifies that a true and correct copy of the ***RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO SERVE SUBPOENAS PURSUANT TO RULE 4009.21*** has been served on the 9th day of August, 2017 to the following entities, by first class mail, postage pre-paid:

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That the same document was served to counsel identified below by electronic mail by agreement of the parties:

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Respectfully submitted,

BY: Kathleen A. Gallagher

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Exhibit B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF REQUESTS FOR PRODUCTION TO ALL RESPONDENTS

Respondent, Michael C. Turzai, in His Capacity as Speaker of the Pennsylvania House of Representatives, (hereinafter "the Speaker"), by and through his undersigned counsel, and pursuant to the Pennsylvania Rules of Civil Procedure 4006(a)(1)(2) and 4009.12(a)(1) and Rules 311 and 313 of the Original Jurisdiction Rules of the Commonwealth Court, hereby serves his Objections to Petitioners' First Set of Requests for Production to all Respondents.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1. The Speaker objects to the overly broad and burdensome nature of these Requests for Production of Documents. They are overly broad and unduly burdensome insofar as they request information and documents from the Speaker that are neither material nor relevant to this litigation.

2. The Speaker objects to these discovery requests to the extent that they seek information and/or documents that are protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege and the common interest privilege. The Speaker hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information or document in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. The Speaker reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. The Speaker objects to Petitioners' discovery requests to the extent that they purport to require him to provide information that is not presently in his possession, custody or control.

4. The Speaker objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent The Speaker has any such information that is responsive to any of Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. The Speaker objects to these Requests for Production of Documents to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. The Speaker incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, the Speaker does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, the Speaker does not concede that any information which may be provided or documents produced are admissible in evidence or reasonably calculated to lead to the

discovery of admissible evidence. The Speaker hereby reserves the right to object to the use, at trial or otherwise, of any document produced herewith or information provided in response to any Request.

8. The Speaker reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. Respondent's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

DOCUMENTS REQUESTED

1. All documents referring or relating to the 2011 Plan, including, but not limited to:

a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.

RESPONSE: The Speaker incorporates his Preliminary Statement and General Objections. Further, the Speaker specifically objects to Request Number 1, including all subparts thereto, on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege, the Attorney Work Product Privilege and the Common Interest Privilege.

The Speaker further specifically objects to Request Number 1 and all subparts thereof on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad and intended to cause unreasonable annoyance, embarrassment, oppression and undue expense to The Speaker.

By way of further Answer, The Speaker has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Request until such time as the Court has decided whether or not this litigation will move forward.

b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, nice or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or

principle guiding the use of each consideration or criteria in developing the 2011 Plan.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

e. All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority Project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.

Dated: August 14, 2017

Respectfully submitted,

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Admission to be filed for Joseph B. Scarnati III, In His Capacity as Pennsylvania Senate President Pro Tempore and Admission Pending for the Pennsylvania General Assembly

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of ***RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF REQUESTS FOR PRODUCTION TO ALL RESPONDENTS*** was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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Respectfully submitted,

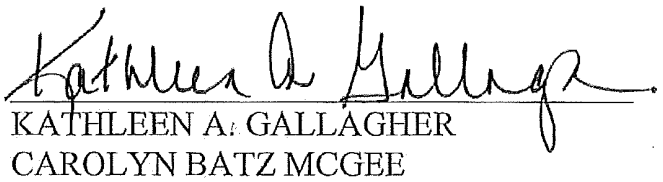
BY: 

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Exhibit C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF INTERROGATORIES TO ALL RESPONDENTS

Respondent, Michael C. Turzai, in His Capacity as Speaker of the Pennsylvania House of Representatives, (hereinafter "the Speaker"), by and through his undersigned counsel, and pursuant to the Pennsylvania Rules of Civil Procedure 4006(a)(1)(2) and 4009.12(a)(1) and Rules 311 and 313 of the Original Jurisdiction Rules of the Commonwealth Court, hereby serves the within Objections to Petitioners' First Set of Interrogatories to All Respondents.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1. The Speaker objects to the overly broad and burdensome nature of these Interrogatories. They are overly broad and unduly burdensome insofar as

they request information from The Speaker that is neither material nor relevant to this litigation.

2. The Speaker objects to these Interrogatories to the extent that they seek information that is protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege, and the common interest privilege. The Speaker hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. The Speaker reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. The Speaker objects to Petitioners' discovery requests to the extent that they purport to require the Speaker to provide information that is not presently in his possession, custody or control.

4. The Speaker objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent the Speaker

has any such information that is responsive to any of Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. The Speaker objects to these Interrogatories to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. The Speaker incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, The Speaker does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, The Speaker does not concede that any information which may be provided is admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. The Speaker hereby reserves the right to object to the use, at trial or otherwise, of any information provided in response to any Interrogatory.

8. The Speaker reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. The Speaker's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

ANSWERS TO INTERROGATORIES

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

ANSWER: The Speaker incorporates his Preliminary Statement and General Objections. Further, the Speaker specifically objects to this Interrogatory on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege and the Attorney Work Product Privilege, and/or the Common Interest Privilege.

The Speaker further specifically objects to this Interrogatory on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad, and intended to cause unreasonable annoyance, and expense to The Speaker.

By way of further Answer, The Speaker has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Interrogatory until such time as the Court has decided whether or not this litigation will move forward.

2. For each person identified in response to Interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

Dated: August 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of ***RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF INTERROGATORIES TO ALL RESPONDENTS*** was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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Exhibit D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

RESPONDENT JOSEPH B. SCARNATI III'S OBJECTIONS TO PETITIONERS' FIRST SET OF INTERROGATORIES TO ALL RESPONDENTS

Respondent Joseph B. Scarnati III ("Respondent") hereby serves his Objections to Petitioners' First Set of Interrogatories to All Respondents pursuant to Pennsylvania Rule of Civil Procedure 4006.

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1. Respondent objects to the overly broad and burdensome nature of these Interrogatories. They are overly broad and unduly burdensome insofar as they request information from Respondent that is neither material nor relevant to this litigation.

2. Respondent objects to these Interrogatories to the extent that they seek information that is protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege, and the common interest privilege. Respondent hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. Respondent reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. Respondent objects to Petitioners' discovery requests to the extent that they purport to require him to provide information that is not presently in his possession, custody or control.

4. Respondent objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent Respondent has any such information that is responsive to any of

Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. Respondent objects to these Interrogatories to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. Respondent incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, Respondent does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, Respondent does not concede that any information which may be provided is admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. Respondent hereby reserves the right to object to the use, at trial or otherwise, of any information provided in response to any Interrogatory.

8. Respondent reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. Respondent's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

OBJECTIONS TO INTERROGATORIES

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

ANSWER: Respondent incorporates his Preliminary Statement and General Objections. Further, Respondent specifically objects to this Interrogatory on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege and the Attorney Work Product Privilege, and/or the Common Interest Privilege.

Respondent further specifically objects to this Interrogatory on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad, and intended to cause unreasonable annoyance, and expense to Respondent.

By way of further Answer, Respondent has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Interrogatory until such time as the Court has decided whether or not this litigation will move forward.

2. For each person identified in response to Interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

ANSWER: **See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

ANSWER: **See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

ANSWER: **See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the

2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

Dated: August 14, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Respondent Joseph B. Scarnati, III's Objections to Petitioners' First Set of Interrogatories to All Respondents was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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Dated: August 14, 2017

Respectfully Submitted,

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EXHIBIT D

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October 6, 2017

VIA FACSIMILE (267) 299-5078

Honorable Michael M. Baylson
U.S. District Court Judge
United States District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Agre *et al.* v. Wolf *et al.*, No. 17-4392 (MMB)
Pretrial Conference For October 10, 2017 (ECF 2)

Dear Judge Baylson:

This Firm represents Senator Joseph Scarnati, the President Pro Tempore of the Pennsylvania Senate. Kathleen Gallagher of Cipriani & Werner, P.C. represents Representative Michael Turzai, the Speaker of the Pennsylvania House of Representatives. Jason Torchinsky of Holtzman Vogel Josefiak Torchinsky PLLC represents the President Pro Tempore and the Speaker.

We understand that Your Honor has scheduled a pretrial conference for Tuesday, October 10, 2017 in the above-referenced action. Given the unusual nature of the case, including the necessary appointment of a three-judge panel, we assume that the conference on Tuesday will likely address matters relating to scheduling. For that reason, we respectfully request the Court's permission, on the President Pro Tempore and the Speaker's behalf, to participate in Tuesday's pretrial conference for the reasons set for below.

As the Court may be aware, a Petition for Review concerning the constitutionality of Pennsylvania's 2011 Congressional map is currently pending before the Pennsylvania Commonwealth Court. *See League of Women Voters of Pennsylvania, et al., v. Commonwealth, et al.*, No. 261 M.D. 2017 (Comm. Ct. June 15, 2017). We represent the President Pro Tempore and the Speaker, who have been named as respondents in that action, which involves claims substantially similar to the claims advanced in this action. After an October 4, 2017 argument before the Commonwealth Court, that Court advised that it soon will be entering an order that,

BLANK ROME LLP
COUNSELORS AT LAW

inter alia, stays that action pending the outcome of the Supreme Court of the United States' resolution of *Gill v. Whitford*, No. 16-1161 (Oral argument held Oct. 3, 2017).

Although we just recently learned of the pendency of this action, the President Pro Tempore and the Speaker intend to file a motion to intervene in the near future. Courts typically grant a legislator's motion to intervene in redistricting actions because the requested relief generally requires the legislature to redraw districts. *See, e.g., Bethune-Hill v. Va. State Bd. Of Elections*, No. 14-0852 (E.D. Va. Feb. 23, 2015) (three-judge court); *Perry v. Perez*, 565 U.S. 388, 392 (2012) (noting that redistricting is primarily the duty of the State and even where a legislative drawn map fails preclearance, it remains the legislature's duty to draw new compliant districts). And, a review of the Complaint filed in this action discloses Plaintiffs' desire to have the Pennsylvania legislature craft legislation to redraft Pennsylvania's Congressional districts. Accordingly, the President Pro Tempore and the Speaker, in their official capacities, will necessarily be directly impacted by this litigation. As a result, we respectfully request permission to participate in Tuesday's pretrial conference.

Thank you in advance for your time and attention to this matter.

Respectfully yours,

BRIAN S. PASZAMANT

cc: Jason Torchinsky, Esquire (via email)
Kathleen A. Gallagher, Esquire (via email)
Alice W. Ballard, Esquire (via email)

EXHIBIT "C"

PRESS RELEASE (HTTPS://WWW.GOVERNOR.PA.GOV/TOPIC/PRESS-RELEASE/), VOTING & ELECTIONS (HTTPS://WWW.GOVERNOR.PA.GOV/TOPIC/VOTING-ELECTIONS/)

Governor Wolf Sets Special Election for Pennsylvania's 18th Congressional District

October 23, 2017

Harrisburg, PA – Governor Wolf today issued a Writ of Election setting a date of March 13, 2018 for a special election to fill Pennsylvania's vacant 18th Congressional District:

TO THE SECRETARY OF THE COMMONWEALTH, THE COUNTY BOARDS OF ELECTION OF THE COUNTIES OF ALLEGHENY, GREENE, WASHINGTON AND WESTMORELAND, GREETINGS:

WHEREAS, in consequence of the October 21, 2017 resignation of the Honorable Tim Murphy, who was elected a Member of the One Hundred Fifteenth Congress of the United States for the Eighteenth Congressional District of the Commonwealth of Pennsylvania, as said district is established by law, a vacancy exists in the representation of the Commonwealth in the House of Representatives of the Congress of the United States:

NOW, THEREFORE, I, Tom Wolf, Governor of the Commonwealth of Pennsylvania, in pursuance of the provisions of the Constitution
of the United States and of Section 627 of the Act of the June 3, 1937 (P.L. 1333, No. 320), as amended, 25 P.S. § 2777, do issue this Writ of Election commanding you to do your respective duties according to law and to hold a special election in the said Eighteenth Congressional District of the Commonwealth of Pennsylvania on

TUESDAY, MARCH 13, 2018

for the election of a Representative in the House of Representatives of the Congress of the United States to fill the vacancy aforesaid. And you are hereby required and enjoined to give lawful notice of the cause and conduct of said special election, and make return thereof in the manner and form as by law directed and required.

GIVEN under my hand and the Great Seal of the State, at the City of Harrisburg, this twenty-third day of October in the year of our Lord, two thousand and seventeen, and of our Commonwealth the two hundred and forty-second.

EXHIBIT "D"

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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,	:	No. 159 MM 2017
Petitioners	:	
v.	:	
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,	:	

Respondents :
:
:

ORDER

PER CURIAM

AND NOW, this 9th day of November, 2017, this Honorable Court, having determined that the present case involves issues of immediate public importance requiring this Court's assumption of plenary jurisdiction, it is hereby ordered that Petitioners' Application for Extraordinary Relief is **GRANTED**.

On October 16, 2017, the Commonwealth Court granted an Application for Stay filed by Respondents Joseph B. Scarnati, President Pro Tempore of the Pennsylvania Senate, Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and the General Assembly of Pennsylvania. This stay is hereby vacated and the case will proceed expeditiously forthwith.

Under the continuing supervision of this Court, the case is hereby remanded to the Commonwealth Court and directed to President Judge Mary Hannah Leavitt for assignment to a commissioned judge of the Commonwealth Court with instructions to conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided. The Commonwealth Court shall file with the Prothonotary of this Court its findings of fact and conclusions of law no later than **December 31, 2017**.

Petitioners' Application for Leave to File a Reply in Support of Petitioner's Application for Extraordinary Relief, Application for Leave to Supplement the Application

for Extraordinary Relief, and Praecipe to Provide Supplemental Authority in Support of Petitioners' Application for Extraordinary Relief, treated as an application for leave to supplement the Application for Extraordinary Relief, are hereby **GRANTED**. The Legislative Respondents' Motion for Oral Argument is hereby **DENIED**.

Jurisdiction retained.

Chief Justice Saylor, Justice Baer and Justice Mundy note their dissent.

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

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

PLAINTIFFS' EMERGENCY MOTION TO REMAND

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INTRODUCTION

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

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

- Scarnati did not obtain the consent of all "properly joined" defendants as required by 28 U.S.C. § 1446(b)(2)(C), including the Governor, whom Scarnati had previously described as "indispensable" because he must sign into law any newly enacted plan.
- Scarnati filed the notice of removal three months after the 30-day deadline to remove under § 1446(b)(2)(B), bizarrely asserting that the upcoming special election to replace a resigned congressman somehow triggered a new 30-day window to remove.
- There is obviously no federal question jurisdiction over Plaintiffs' exclusively state constitutional claims challenging a state statute.
- Scarnati's entire theory of federal jurisdiction rests on the false premise that Plaintiffs seek to change the districting plan for the special election set for March 2018. Plaintiffs seek no relief with respect to the special election.
- Even if Plaintiffs were seeking relief with respect to the special election (and they are not), Scarnati's purported federal-law defense would not create a federal question.

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

B. The Notice of Removal Is Untimely

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

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

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

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

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

II. This Court Lacks Subject Matter Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. This Motion Warrants Expedited Treatment and an Immediate Remand

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED: November 16, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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CERTIFICATE OF SERVICE

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

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DATED: November 16, 2017

/s/ Mary M. McKenzie
Mary M. McKenzie

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky, Petitioners	:	
v.	:	No. 261 M.D. 2017
The Commonwealth of Pennsylvania; The Pennsylvania General Assembly; Thomas W. Wolf, In His Capacity As Governor of Pennsylvania; Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; Michael C. Turzai, In His Capacity As Speaker of the Pennsylvania House of Representatives; Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore; Pedro A. Cortes, In His Capacity As 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, Respondents	:	

ORDER

AND NOW, this 13th day of November, 2017, in furtherance of the Order of the Supreme Court of Pennsylvania entered on November 9, 2017, it is hereby **ORDERED**:

1. The Application for Leave to Intervene filed August 10, 2017, is **GRANTED**.

2. Paragraph 3 of the Court's October 16, 2017 Order is **RESCINDED**.

3. In response to the brief filed pursuant to paragraph 2 of the Court's October 16, 2017 Order, Petitioners shall file their brief on or before November 17, 2017. The Court will not accept a reply brief.

4. Preliminary objections challenging the standing of Petitioner League of Women Voters of Pennsylvania (LWVP) are **SUSTAINED**, and LWVP is **DISSMISSED** as a party petitioner in this action. *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (holding that entity not authorized by law to exercise right to vote in Commonwealth lacks standing to file political gerrymandering claims).

5. All remaining preliminary objections are **OVERRULED**. This ruling is based on the presence of disputed issues of fact and the exigency of the matter, which does not allow time for the Court to rule on the merits of these preliminary objections.

6. Answers to the Petition for Review must be filed by November 17, 2017.

7. Answers to New Matter, if any, must be filed by November 22, 2017.

8. Oral argument and, if necessary, hearing on motions in limine and remaining pretrial matters will be held on Monday, December 11, 2017, in Courtroom 3001 of the Pennsylvania Judicial Center, Harrisburg,

Pennsylvania, beginning at 9:30 a.m. Trial will begin the same day following disposition thereof and continue day-to-day until concluded.

9. A pre-trial conference will be held Thursday, November 16, 2017, at 1:00 pm., in the President Judge's Conference Room, Suite 5204 of the Pennsylvania Judicial Center, Harrisburg, Pennsylvania, for the purposes of discussing all scheduling matters not addressed in this Order and any other procedural matters which the parties wish to bring to the Court's attention.

10. No extensions of filing deadlines and/or requests for continuances of scheduled proceedings will be considered and/or granted absent extraordinary circumstances.

P. KEVIN BROBSON, Judge

Certified from the Record
NOV 13 2017
And Order Exit

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

ORDER

AND NOW, this day of , 2017, upon consideration of Respondent Governor Thomas W. Wolf's Preliminary Objections to the Petition for Review, and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **OVERRULED**.

BY THE COURT:

_____

J.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,

Petitioners,

v.

The Commonwealth of Pennsylvania, *et al.*,

Respondents.

Civ. No. 261 MD 2017

RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S ANSWER TO GOVERNOR THOMAS W. WOLF'S PRELIMINARY OBJECTIONS

Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively, "Opposing Respondents") file this Answer to Governor Thomas W. Wolf's Preliminary Objections to the Petition for Review filed by Petitioners League of Women Voters of Pennsylvania, *et al.* (collectively, "Petitioners") pursuant to Pennsylvania Rule of Appellate Procedure 1516(b).

PRELIMINARY STATEMENT

In this suit to invalidate the Commonwealth's current congressional district lines, Respondent Governor Thomas Wolf ("Governor Wolf" or "the Governor") wants to be dismissed under Pennsylvania Rule of Civil Procedure 1028(a)(4). It is a curious position. Like Petitioners, he is a Democrat who perceives the Commonwealth to be improperly gerrymandered (his re-election campaign has called the current congressional boundary lines "rigged").[1] Unlike Petitioners, however, he is actually "responsible for implementing the relief" that they seek. His bare-bones Preliminary Objections, then, are better characterized as more of a political maneuver as

[1] *See, e.g.*, https://petitions.signforgood.com/endgerrymandering (Visited September 8, 2017).

it remains 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 Petitioners.

Governor Wolf offers two related, but flawed, arguments in support of his request to be dismissed from this suit. First, he claims that because the relief sought can be ordered against the government Respondents, he is not an indispensable party who must be named. In support of this claim he cites cases in which plaintiffs sought to invalidate legislation where there was: (i) no requirement that the legislation be redrafted; and (ii) no request—as there is here—to enact a new law in its place. Other than that, he makes virtually no argument as to why he is not an indispensable party. In actuality, the Governor is indispensable to this Petition, because the nature of the claim and relief sought here require his direct participation. Most importantly, the remedy sought in this case (i.e. passage of a new redistricting law) legally mandates that the Governor sign any new law. But there are other rights unique to his office that could be implemented as part of the redistricting process sought here, including, *inter alia*, the potential use of his veto power, and his ability to call an extraordinary session of the General Assembly. The simple fact remains that Petitioners cannot possibly achieve their requested

relief without direct participation from the Governor. There could be no clearer example of an indispensable party.

Second, the Governor claims that the Petition is legally insufficient because there exists no substantive allegation against him. But there is no substantive allegation against any Respondent named in the suit in an official capacity. In fact, Petitioners specifically allege that "[m]ost of the Respondents named[, including Governor Wolf . . .] were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties ***who would be responsible for implementing the relief Petitioners seek***." (Pet. at ¶ 34 (emphasis added).) Regardless, "it cannot be the law that a party may be deemed essential only if the plaintiff specifically alleges that the party engaged in wrongdoing or seeks relief directly involving such party." *City of Philadelphia v. Phila. Parking Auth.*, 798 A.2d 161, 166 (Pa. 2002) (per curiam) (Castille, J., concurring). Rather, where declaratory relief is sought—as it is here—Pennsylvania law is clear that all indispensable parties must be included. This analysis therefore collapses into the first inquiry. The Governor is indispensable; his interests here are unique and implicated.

Whatever political motivations may be driving the Governor in his efforts to bow out of this suit, they cannot change the fact that his direct

participation is legally necessary in order to obtain the relief sought in the Petition. Therefore, his Preliminary Objections fail and must be overruled.

ANSWER TO AVERMENTS

Opposing Respondents respond to the averments of the numbered paragraphs of Governor Wolf's Preliminary Objections as follows:

1. Admitted.

2. Admitted in part, and denied in part. Opposing Respondents admit that Act 131 of 2011 (Act of Dec. 22, 2011, P.L. 598, No. 131) ("the 2011 Plan") was proposed in the General Assembly as Senate Bill 1249 of 2011. Opposing Respondents admit further that Petitioners filed a Petition for Review (the "Petition") in this Court alleging that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania, and the equal protection provisions in Pennsylvania Constitution, codified at Art. I, §§ 1 and 26, and Art. I, §5. The remaining averments are denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. The Petition speaks for itself and any characterization thereof is strictly denied.

3. Admitted.

4. Admitted in part, and denied in part. Opposing Respondents admit only that Governor Wolf was elected in November 2014 and inaugurated on January 20, 2015. After reasonable investigation, Opposing Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph about Governor Wolf's "role in the enactment of [the 2011 Plan.]" Therefore, Opposing Respondents deny those allegations.

5. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required.

6. Admitted in part, and denied in part. Opposing Respondents admit that Petitioners named Governor Wolf in his official capacity as Governor of the Commonwealth. But by way of further response, there are additional allegations against Governor Wolf that make clear that he is an indispensable party to this suit. For example, in addition to alleging that "Governor Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan," Petitioners allege that the individual Respondents named in their official capacities, including Governor Wolf, are the parties "who would be responsible for implementing the relief Petitioners seek." (Pet. at ¶ 34.) Otherwise, the Petition speaks for itself and any characterization thereof is strictly denied.

7. Denied. In fact, there are additional allegations regarding Governor Wolf, including Petitioners' allegation that he, along with the other individual Respondents named in their official capacities, are the parties "who would be responsible for implementing the relief Petitioners seek." (*Id.*) Indeed, the Petitioners seek as relief "enact[ment of] a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner[,]" which is a political process triggering the Governor's role of final approval of any such legislation. The Petition speaks for itself and any characterization thereof is strictly denied.

Preliminary Objection of Respondent Governor Wolf – Legal Insufficiency of the Pleading/Failure to State a Claim (Demurrer), Pa.R.C.P. 1028(a)(4)

8. Paragraphs 1-7 above are incorporated by reference as if fully set forth herein.

9. Admitted. By way of further response, Petitioners allege that Governor Wolf, along with the other individual Respondents named, are "named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek." (Pet. at ¶ 34.)

10. Denied. Paragraph 35 of the Petition is not the "sole averment that mentions Governor Wolf." In fact, Paragraph 34 of the Petition makes clear that Governor Wolf, along with the other individual Respondents, are

named "as parties who would be responsible for implementing the relief Petitioners seek." (Pet. at ¶ 34.) Likewise, in the Prayer for Relief, Petitioners "request that this Honorable Court enter judgment in their favor and against Respondents"—including Governor Wolf. (*Id.* at Prayer for Relief.) Moreover, Petitioners ask the Court to enjoin Respondents—including Governor Wolf—from "administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. house members using the 2011 Plan." (*Id.* at Prayer for Relief at (b).) And, perhaps most importantly, Petitioners want Respondents—including Governor Wolf—"to enact a new congressional districting plan comporting with the Pennsylvania Constitution . . . ." (*Id.* at Prayer for Relief at (c).) By way of further response, any such "enact[ment]" would necessarily involve the Governor.

11. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. It is irrelevant that the Governor may not be "administering" the 2011 Plan, and that he did not sign it. What is critical is his involvement in the process of enactment of the new plan that Petitioners are seeking to have the Court mandate. The Governor's office has many rights and duties that would be implicated by the relief sought in the Petition. The Petition speaks for itself

and any characterization thereof is strictly denied.

12. Denied. It is specifically denied that the Petition states—or can be read to imply—that only the "General Assembly, rather than the Governor . . . would be responsible for implementing the relief Petitioners seek." While the Petition is a writing that speaks for itself, it clearly shows that the Respondents collectively named in their official capacities—including Governor Wolf—would be so responsible. Specifically, the Petition states: "34. . . . Most of the Respondents named below were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek. 35. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity only. As Governor, Respondent Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan." (Pet. at ¶¶ 34-35.) Any characterization of the Petition is strictly denied.

13. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the Petition states that Governor Wolf is responsible for the "faithful execution of the 2011 Plan." Furthermore, the Governor (albeit then-Governor Corbett) was involved in the process of enacting the

2011 Plan. (*See also* Pet. at ¶ 76 ("Pennsylvania's Republican Governor, Tom Corbett, signed the bill into law . . . .").) So too would Governor Wolf be required to participate in the enactment of any new plan ordered by the Court—relief which is specifically sought in the Petition. Under Pennsylvania constitutional law, the Governor would have to approve and sign any new plan, veto it, or review and consider it and choose to do nothing, in which case the plan could become law as if he had signed it.

14. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the Petition clearly states a cause of action against the Governor. The Petition specifically requests that this Court "[e]stablish a new congressional districting plan that complies with the Pennsylvania Constitution, if Respondents fail to enact a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner[.]" (Pet. at Prayer for Relief at (c).) The Petition speaks for itself and any characterization thereof is strictly denied.

15. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. The Governor is a proper respondent and indispensable party. By way of further response, the cases cited in Paragraph 15 are writings that speak for

themselves and any characterization thereof is strictly denied.

16. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the Governor is a proper respondent.

17. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the focus on whether Petitioners have levied substantive allegations "against" the Governor of some wrongdoing is not appropriate here. The case cited in Paragraph 17 is a writing that speaks for itself and any characterization thereof is strictly denied.

18. Denied for the reasons set forth in Paragraph 17 above.

19. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the cases cited in Paragraph 19 are writings that speak for themselves and any characterization thereof is strictly denied.

20. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. By way of further response, the case cited in Paragraph 20 is a writing that speaks for itself and any characterization thereof is strictly denied.

21. Denied as either disputed issues of fact, for which strict proof is demanded, or as conclusions of law to which no response is required. In the Commonwealth of Pennsylvania, the Governor plays a critical role—as the final say—in the enactment of congressional redistricting legislation, which has been expressly requested by Petitioners. He is therefore a proper and interested party in this Petition, because of his political role and because of the declaratory relief sought.

WHEREFORE, Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III respectfully request that Governor Thomas W. Wolf's Preliminary Objections to the Petition for Review filed by Petitioners League of Women Voters of Pennsylvania, *et al.* be overruled.

Dated: September 11, 2017

Respectfully Submitted,

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Jason A. Snyderman, Esquire
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CIPRIANI & WERNER, P.C.

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al. **v.** **THE COMMONWEALTH OF PENNSYLVANIA, et al.**	**CIVIL ACTION** **NO. 17-5137** **DATE OF NOTICE: November 16, 2017**

NOTICE

Please be advised that a **HEARING** on Plaintiffs' Emergency Motion to Remand (ECF 2) will be held today, **Thursday, November 16, 2017 at 2:00 p.m.**, before the Honorable Michael M. Baylson in Courtroom 3A (3rd Floor), U.S. Courthouse, 601 Market Street, Philadelphia. Any out-of-town counsel may participate by phone by calling 267-299-7520 at the time of the hearing.

/s/ Lori K. DiSanti
_____
Lori K. DiSanti
Deputy Clerk to Judge Baylson
267-299-7520

cc: Mary McKenzie, Esq. (mmckenzie@pubintlaw.org)
Matthew Haverstick, Esq. (mhaverstick@kleinbard.com)

O:\CIVIL 17\17-5137 League of Women Voters v Commw of PA\17cv5137 hearing notice 11162017.doc

AO 458 (Rev. 06/09) Appearance of Counsel

UNITED STATES DISTRICT COURT

for the

Eastern District of Pennsylvania

League of Women Voters of Pennsylvania et al.
Plaintiff
v.
The Commonwealth of Pennsylvania et al.
Defendant

Case No. 17-cv-5137

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

all Plaintiffs .

Date: 11/16/2017

/s/ Benjamin D. Geffen
Attorney's signature

Benjamin D. Geffen, PA Bar No. 310134
Printed name and bar number

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Address

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(267) 546-1308
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FAX number

CERTIFICATE OF SERVICE

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

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/s/ Benjamin D. Geffen
Benjamin D. Geffen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al., Plaintiffs, v. THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	:	CIVIL ACTION No. 2:17-cv-5137-MMB

CERTIFICATE OF CONCURRENCE AND NONCONCURRENCE

Defendants Thomas Wolf, Governor of the Commonwealth of Pennsylvania, Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities (together, the "Executive Branch Defendants"), state their concurrence and nonconcurrence to the Notice of Removal by Joseph B. Scarnati, III, ECF No. 1; to Plaintiffs' Emergency Motion to Remand, ECF No. 2 ("Plaintiffs' Motion to Remand"); and to Defendant Michael J. Stack, III's Motion for Expedited Remand, ECF No. 5 ("Stack's Motion to Remand"), as follows.

The Executive Branch Defendants do not concur with the Notice of Removal. They state as follows:

- Defendant Scarnati did not seek consent to removal from the Executive Branch Defendants before removing the case;
- The Executive Branch Defendants did not, and do not, consent to removal of the case;
- Contrary to the statement in Paragraph 9 of the Notice of Removal, Defendant Marks and then-Defendant Secretary of the Commonwealth Pedro Cortés (since succeeded by Defendant Torres) filed an Answer and New Matter to the Petition for Review, as did Defendant Stack.

The Executive Branch Defendants concur that this Court should immediately remand this case. The Executive Branch Defendants further concur with the argument set forth on pages 6-7

of Plaintiffs' Motion to Remand, that the notice of removal is untimely, and the argument set forth on pages 7-11 of Plaintiffs' Motion to Remand, that this Court lacks subject matter jurisdiction.

The Executive Branch Defendants concur with the relief sought in Stack's Motion to Remand.

The Executive Branch Defendants reserve the right to further respond to the Notice of Removal and/or to the Petition for Review should further response be required, and, in the case of Governor Wolf, to answer or otherwise respond to Plaintiffs' Petition for Review under F.R. Civ. P. 81.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: November 16, 2017

By: */s/ Michele D. Hangley*

Mark A. Aronchick
Michele D. Hangley
Claudia De Palma
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Attorney for Defendants Thomas Wolf, Governor of the Commonwealth of Pennsylvania, Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2017, I caused the foregoing Certificate of Concurrence and Nonconcurrence to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties of record.

/s/ Michele D. Hangley
Michele D. Hangley

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

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

EMERGENCY MOTION TO WITHDRAW NOTICE OF REMOVAL

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

Repsectfully submitted,

s/ Matthew H. Haverstick
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Mark E. Seiberling (No. 91256)
KLEINBARD LLC
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1650 Market Street
Philadelphia, PA 19103
Ph: (215) 568-2000/Fax: (215) 568-0140

Joshua J. Voss (No. 306853)
KLEINBARD LLC
115 State Street, 2nd Floor
Harrisburg, PA 17101
Ph: (717) 836-7492/Fax: (215) 568-0140
Attorneys for Defendant Sen. Joseph B. Scarnati, II

CERTIFICATE OF SERVICE

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

Repsectfully submitted,

s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
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Ph: (215) 568-2000/Fax: (215) 568-0140
Attorneys for Defendant Sen. Joseph B. Scarnati, II

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

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

ORDER

Upon consideration of Defendant Senator Joseph B. Scarnati, III's Emergency Motion to Withdraw Notice of Removal, the MOTION is hereby GRANTED and it is further ORDERED that this matter is REMANDED back to the Pennsylvania Supreme Court, all parties to bear their own costs.

BY THE COURT:

Hon. Michael Baylson

MB

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

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al. **v.** **THE COMMONWEALTH OF PENNSYLVANIA, et al.**	**CIVIL ACTION** **NO. 17-5137**

FILED
NOV 16 2017
KATE BARKMAN, Clerk
By _____ Dep. Clerk

ORDER

AND NOW this 16th day of November, 2017, upon consideration of Defendant Senator Joseph B. Scarnati, III's Emergency Motion to Withdraw Notice of Removal (ECF 9), the Motion it hereby **GRANTED** and it is further **ORDERED** that this matter is **REMANDED** back to the Pennsylvania Supreme Court with prejudice. Any request for fees or costs should be filed within fourteen (14) days.

BY THE COURT:

MICHAEL M. BAYLSON
United States District Court Judge

CLERK OF COURT

O:\CIVIL_17\17-5137 League of Women Voters v Commw of PA\17cv5137 Order re Withdrawal of Notice of Removal 11162017.docx

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

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

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

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

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

2. This representation is false.

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: November 16, 2017

Respectfully submitted,

CIPRIANI & WERNER PC

/s/ Kathleen A. Gallagher

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

CERTIFICATE OF SERVICE

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

CIPRIANI & WERNER PC

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher

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

Matt:

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

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

I anticipate your prompt cooperation in this regard.

Best regards,

KATHLEEN GALLAGHER | ATTORNEY

CIPRIANI & WERNER PC

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TRANSCRIPT of held on 11/16/17, before Judge BAYLSON. Court Reporter/Transcriber ESR. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restr iction. After that date it may be obtained through PACER.. Redaction Request due 12/12/2017. Redacted Transcript Deadline set for 12/22/2017. Release of Transcript Restriction set for 2/19/2018. HEARING(jl,)

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

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

PLAINTIFFS' MOTION FOR FEES AND COSTS

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Counsel for Plaintiffs

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INTRODUCTION

On November 14, in the midst of expedited pre-trial proceedings for a trial set to begin December 11 in Pennsylvania state court, Senator Scarnati removed this case. Let there be no mistake: the notice of removal was frivolous. On its face, 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, Speaker Turzai, now claims the 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 this one allows a litigant the opportunity to throw a wrench in expedited state court proceedings. In this regard, Scarnati's gambit had some success. In light of the removal, the state court canceled a previously scheduled pre-trial conference, and Scarnati and Turzai were permitted to ignore a state court deadline to file a brief on their assertions of legislative and other purported privileges.

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 before this Court. Further delay was avoided only by this Court's alacrity in reviewing the parties' submissions and scheduling the emergency hearing.

What happened next is almost beyond belief. Less than 30 minutes before the emergency hearing, Scarnati moved to withdraw his notice of removal and remand the case on the ground that Turzai had initially consented to the removal, but then notified Scarnati's counsel that he no longer consented. This Court promptly remanded the case to state court, where it belongs.

But it gets even worse. After this Court's remand order, Speaker 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 *never* consented to this removal.

There's even more. Just yesterday Scarnati's counsel sent Plaintiffs' counsel a letter and sworn affidavit accusing *Turzai* of being the one making the "'false' allegation." It is remarkable that the Speaker of the Pennsylvania House and the President Pro Tempore of the Pennsylvania Senate are accusing each other of lying to a federal court. It is even more remarkable given that they are represented by the same counsel in the state court in this case.

Equally remarkable, Scarnati and Turzai jointly asked this Court to abstain from hearing the federal gerrymandering case in favor of this state court case (*Agre v. Wolf*, ECF No. 45-2), and they right now are asking the U.S. Supreme Court to issue a writ of mandamus *ordering* this Court to abstain. Yet while asking the Supreme Court to mandate this Court's abstention in favor of the state court case, Scarnati attempted to remove the same state court case *to this Court*. Scarnati has offered no explanation for this bizarre behavior, and it seems clear that at least Scarnati (and possibly Turzai) simply wanted to stall the proceedings in state court.

This Court should not countenance Scarnati's vexatious tactics. For the reasons set forth below, the Court should award fees and costs to Plaintiffs in the amount of $52,736.52 under 28 U.S.C. § 1447(c). Additionally, though the Court need not reach the issue, sanctions also are warranted under Federal Rule of Civil Procedure 11 and the Court's inherent authority.

BACKGROUND

Plaintiffs are eighteen Pennsylvania voters, one from each congressional district in the Commonwealth.[1] They filed this action in the Pennsylvania Commonwealth Court on June 15, 2017. Their Petition for Review asserts that Act 131, the Pennsylvania statute establishing Pennsylvania's 2011 congressional districting plan (the "2011 Plan"), violates the Pennsylvania Constitution—in particular, its Free Expression and Association Clauses, Art I, §§ 7, 20, Equal Protection guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5. ECF No. 1-3.

In line with prior redistricting challenges in Pennsylvania state courts, Plaintiffs have named as defendants several legislative parties (including Senator Scarnati and Speaker Turzai) 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.[2] Plaintiffs seek an injunction prohibiting Defendants from using the 2011 Plan and requiring them to enact a new plan that comports with the Pennsylvania Constitution.

On October 16, 2017, the Commonwealth Court stayed the case, with the exception of briefing related to assertions of legislative and other purported privileges by the legislative defendants, including Senator Scarnati and Speaker Turzai. In light of the stay, Plaintiffs asked the Pennsylvania Supreme Court to assume "extraordinary jurisdiction" and implement expedited proceedings to decide this case in time for the May 2018 congressional primaries.

On November 9, 2017, the Pennsylvania Supreme Court granted Plaintiffs' request for extraordinary relief. ECF No. 1-6 at 67-69. It vacated the stay and directed the Commonwealth

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

[2] The Petition for Review initially named the Commonwealth of Pennsylvania, but the Commonwealth Court dismissed the Commonwealth from the case.

Court to conduct discovery, pre-trial, and trial proceedings, and to submit findings of fact and conclusions of law to the state high court no later than December 31, 2017.

On Monday, November 13, 2017, the Commonwealth Court issued an order scheduling trial to begin December 11 at 9:30 a.m. and a pre-trial conference for November 16 at 1:00 p.m. ECF No. 2-1. The order confirmed that Defendants' brief regarding their assertions of legislative and other purported privileges was due November 15.

A day later, on November 14, Scarnati removed the case to this Court, despite having no legal or factual basis to do so. Scarnati served the notice of removal via U.S. mail and did not email Plaintiffs' counsel a courtesy copy (although he apparently did so for Turzai's counsel). Plaintiffs first learned of the removal the following afternoon, when Scarnati notified the Pennsylvania Supreme Court. The Commonwealth Court appropriately canceled the November 16 pre-trial conference. Scarnati and Turzai did not file their privilege brief in this Court on November 15 as previously ordered by the state court, despite the fact that existing state court orders remain "in full force and effect" after a removal. 28 U.S.C. § 1450.

As a consequence of Scarnati's baseless removal, Plaintiffs' lawyers were forced to set aside their intensive trial preparation efforts and spend approximately twelve hours preparing the emergency motion to remand that they filed with this Court around 2:30 a.m. on November 16. ECF No. 2. As Plaintiffs' emergency remand motion explained, Scarnati had not obtained the requisite consent of all properly joined defendants; missed the statutory 30-day deadline to remove by three months; and failed to establish any non-frivolous basis for federal jurisdiction.

Around 9:00 a.m. on November 16, this Court scheduled an emergency hearing on Plaintiffs' motion to remand for 2:00 p.m. the same day. Plaintiffs' counsel from Arnold & Porter Kaye Scholer LLP immediately got on a train to Philadelphia for the emergency hearing,

where they were joined by Plaintiffs' counsel from the Public Interest Law Center. Before the hearing, Lieutenant Governor Stack moved for expedited remand, and 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. ECF No. 5, 7.

Then, less than 30 minutes before the emergency hearing began, Scarnati filed an emergency motion to withdraw his notice of removal and remand the case to state court. According to this motion and a supporting affidavit, Turzai had originally consented to removal, but just that afternoon Turzai's counsel advised Scarnati's counsel that Turzai "does not now consent to the notice as filed." ECF No. 9. 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." ECF No. 22 at 7.

Shortly after the hearing, this Court remanded the case to state court with prejudice and permitted Plaintiffs to file a motion for fees and costs within 14 days. ECF No. 15.

After the case was remanded, Speaker Turzai filed a response to Senator Scarnati's motion to withdraw the notice of removal. ECF No. 21. There, Turzai accused Scarnati of "false[ly] represent[ing]" to this Court that Turzai had consented to the removal pursuant to 28 U.S.C. § 1441. ECF No. 21. Turzai emphasized that "at no point in time did [his] counsel or anyone else acting on [his] behalf" consent to the removal. *Id.*

Scarnati's alleged false representation about Turzai's consent is all the more puzzling given that both legislators are represented by the same law firm—Holtzman Vogel Josefiak Torchinsky PLLC—in state court. Equally strange is the fact that neither that law firm nor the other firms representing Senator Scarnati and Speaker Turzai in state court signed the notice of

removal. It was signed instead by Kleinbard LLC, which entered its appearance in state court at the same time the Pennsylvania Supreme Court was notified of removal.

There are also serious questions about Turzai's conduct. According to Turzai, Scarnati advised Turzai's counsel of the possibility of removal on November 13 and emailed Turzai's counsel a copy of the as-filed notice of removal on November 15, the same day their privilege brief was due and *before* the state court had canceled the November 16 pre-trial conference. ECF No. 21 ¶ 8. But Turzai did not ask Scarnati to withdraw the notice or otherwise correct its purportedly false representation at that time. Nor did Turzai inform this Court of his objection. Instead, Turzai's counsel waited until 12:39 p.m. the next day to request that Scarnati withdraw the notice of removal—after the state court canceled its pre-trial conference, after Scarnati and Turzai's deadline to file their privilege brief, after Plaintiffs filed their emergency motion to remand, and after this Court scheduled an emergency remand hearing. ECF No. 21 ¶ 10 & exhibit thereto.

As if that weren't enough, just yesterday Senator Scarnati's counsel sent Plaintiffs' counsel a letter and sworn affidavit rejecting Turzai's account and accused Turzai's counsel of lying about the issue of the consent to the removal. *See* Letter from M. Haverstick to R.S. Jones (Nov. 29, 2017) (attached as **Exhibit A**). 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 state court counsel] on November 13, 2017, . . . the consent was unconditional." *Id.* Scarnati's counsel further asserted that Turzai's claim that Turzai did not consent to the removal "is, in fact, itself a 'false' allegation." *Id.*

Plaintiffs do not know who is telling the truth and who is not, but regardless Plaintiffs are entitled to fees and costs because the notice of removal was utterly baseless either way.

ARGUMENT

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

Under 28 U.S.C. § 1447(c), "[a]n order remanding a case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."[3] In exercising their discretion whether to award fees and costs, courts aim to "deter removals intended to prolong litigation and impose costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* Here, Scarnati's notice of removal had no objectively reasonable basis in law or in fact. It was nothing more than a transparent attempt to delay the expedited proceedings in state court and derail the December 11 trial.

A. There Was No Objectively Reasonable Basis for Removal

For three separate and independent reasons, Scarnati had no objectively reasonable basis to remove this case.

1. Scarnati Did Not Obtain Consent of All Properly Joined Defendants

Under 28 U.S.C. § 1446(b)(2)(A), "all defendants who have been properly joined and served must join in or consent to the removal of the action." The Third Circuit has affirmed an award of costs under § 1447(c) where the only defect in removal was the failure to obtain consent from all defendants, a "well-established" requirement. *Hammer v. Scott*, No. 04-2243, 2005 WL 1414395 *2 (3d Cir. June 17, 2005).

[3] This Court retains jurisdiction to award such fees and costs even though the case has been remanded to state court. *See Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1257-58 (3d Cir. 1996).

Scarnati has now conceded that he lacked the consent of at least one "properly joined" defendant—Speaker Turzai. In his motion to withdraw the notice of removal, Scarnati rightly acknowledged that Turzai's consent was a prerequisite to removal. If Turzai's account is correct, "at no point in time" did Turzai consent to this removal. ECF No. 21. If Scarnati's view is correct, then perhaps Scarnati should demand that Turzai pay Plaintiffs' fees and costs. Ex. A. In any event, the statutory consent requirement was not satisfied even under Scarnati's view.

But even if, contrary to Turzai's account, Scarnati did have Turzai's consent at the time of the removal, Scarnati still did not have the consent of all other properly joined defendants. The notice of removal acknowledges that the executive branch defendants—Governor Wolf, Lieutenant Governor Stack, the Acting Secretary of the Commonwealth, or the Commissioner of BCEL—had not consented. And Scarnati's assertion that he did not need their consent because they are "nominal" defendants, ECF No. 1 at 6, is absurd.

In the removal context, "[a] nominal party is defined as one neither necessary nor indispensable to the suit. A party is necessary and indispensable to the suit if the plaintiff states a cause of action against the party, and seeks relief from the party." *Dietz v. Avco Corp.*, 168 F. Supp. 3d 747, 759 (E.D. Pa. 2016). The Governor is an indispensable party, and this Court need not take Plaintiffs' word for it. In the state court proceedings in this case, Scarnati himself asserted that "it is clear—and indeed undisputed—that the Governor is both a ***legally and practically indispensable party in this matter*** as his signature would be required to implement the relief sought by [Plaintiffs]." ECF No. 2-2 at 2 (emphasis added). Scarnati criticized the Governor's request to be dismissed from the case as "curious," because the Governor "is actually responsible for implementing the relief that [Plaintiffs] seek." *Id.* at 1. And then: "the Governor is indispensable to this Petition, because the nature of the claim and relief sought here require his

direct participation." *Id.* And again: "The simple fact remains that Petitioners cannot possibly achieve their requested relief without direct participation from the Governor." *Id.* at 2-3. Once more: "The Governor is indispensable; his interests here are unique and implicated." *Id.* at 3. To remove any conceivable doubt as to his view on this matter, Scarnati declared: "There could be no clearer example of an indispensable party." *Id.*

Scarnati's about-face on this issue alone warrants an award of fees and costs. In *Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366 (E.D. Pa. 1995), this Court awarded fees and costs to defendants under § 1447(c) because one plaintiff's "misleading description" of a co-plaintiff had led defendants to believe removal was appropriate. *Id.* at 367. After describing the co-plaintiff as a "nominal defendant" in her state court complaint, she argued in her federal court briefs seeking remand that the co-plaintiff was an indispensable party and therefore removal was improper. *Id.* Such conduct, this Court found, was "intolerable" because the plaintiff "changed her position after removal to suit the tactical advantage that she must have seen in remand." *Id.* at 370. Likewise, here, Senator Scarnati has reversed his position about the importance of his co-defendant the Governor to gain a tactical advantage at various points in this litigation.[4]

In sum, Senator Scarnati's removal of this case without the consent of any co-defendant other than the General Assembly was objectively unreasonable and warrants a fee award.

2. The Notice of Removal Was Obviously Untimely

If that weren't enough, Scarnati filed the notice of removal *three months* past the 30-day deadline under § 1446(b)(2)(B). Plaintiffs filed this action in state court on June 15, 2017, and

[4] The executive branch defendants also are indispensable parties, including because any injunction or order that requires adjusting election deadlines would have to apply to the Acting Secretary of the Commonwealth and the Commissioner of BCEL who are responsible for the administration of Pennsylvania's elections. *See* ECF No. 2 at 5.

the parties stipulated to an effective service date of July 14. Any notice of removal should have been filed within 30 days thereafter—no later than August 13.

To attempt to circumvent this time-bar, Scarnati relied on § 1446(b)(3), which provides that if a case is not removable based on the initial pleading, a defendant may file a notice of removal within 30 days after receiving "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Scarnati asserted that Governor Wolf's October 23, 2017 Writ of Election scheduling a special election for March 2018 was an "order or other paper" that triggered a new 30-day deadline to remove. ECF No. 1 at 5-6.

Had Senator Scarnati done any research on this issue, he would quickly have learned that the Writ of Election did not conceivably make this case removable. As the leading treatise of civil procedure explains, it is well-recognized that "documents not generated within the state litigation generally are not recognized as 'other papers,' receipt of which can start a 30-day removal period under Section 1446(b)." 14C Fed. Prac. & Proc. Juris. § 3731 (4th ed.). Indeed, this Court has held that the phrase "order or other paper" did not even include a U.S. Supreme Court decision in another case. *See Pennsylvania v. Tap Pharm. Prods., Inc.*, 415 F. Supp. 2d 516, 526-27 (E.D. Pa. 2005). If a court document from another case is not an "order or other paper" under § 1446(b)(3), *a fortiori* neither is a document not arising from any judicial proceeding at all. Other federal courts likewise have held that "order or other paper" includes only documents directly related to the pending case. *See, e.g.*, *Gibson v. Clean Harbors Env. Servs. Inc.*, 840 F.3d 515, 521 (8th Cir. 2016); *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 78 (1st Cir. 2014); *McCormick v. Excel Corp.*, 413 F. Supp. 2d 967, 971 (E.D. Wis. 2006). Unsurprisingly, Senator Scarnati did not cite a single case supporting his position.

In general, in considering requests for fees and costs under § 1447(c), district courts have shown little tolerance for legal justifications for removal that "even a minimal amount of research" would have debunked. *Neshaminy Mall v. Sports Favorites, Inc.*, No. 07-4789, 2008 WL 2019126 *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.

The same is true here. Scarnati had no colorable argument or excuse for filing a notice of removal three months after the statutory deadline, and he knew or should have known it.

3. This Court Obviously 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 v. Educ. Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996). Here, Scarnati's assertion of federal jurisdiction was worse than insubstantial—it was frivolous.

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

In his notice of appeal, Scarnati argued that the upcoming special election somehow created federal question jurisdiction because the relief Plaintiffs seek raises 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." ECF No. ¶ 18 (citing U.S. Const. art. I, § 2, and "the United States Code"). That was both factually and legally baseless.

Plaintiffs do not seek any relief with respect to the March 13, 2018 special election, a point that Plaintiffs would have confirmed had Scarnati asked before removing the case. Scarnati's failure even to ask this question of Plaintiffs before removing demonstrates the extent to which the stated basis for removal was utterly pretextual.

But even if Plaintiffs were seeking to affect the March 2018 special election (which they are not), Scarnati's argument would still have been frivolous. Scarnati claimed that Article I, § 2 of the U.S. Constitution provides a federal *defense* to Plaintiffs' state constitutional claims. Scarnati did not suggest that construing the relevant provisions of the Pennsylvania Constitution would require a court to construe Article I, § 2 or any federal law. It obviously would not. "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).

Scarnati's argument suffered a second fatal flaw: the purported federal law issue that he identified did 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 does not *create* any cause of action in this case. His theory was instead that Plaintiffs' state law causes of action require resolution of a "substantial question of federal law," ECF No. 1 ¶ 18, the category described in *Grable*. But only a "slim category" of cases qualify for federal jurisdiction under *Grable*, *see Gunn v. Minton*, 568 U.S. 251, 258 (2013), and the claims here do not. Where

federal law does not create the cause of action, "federal jurisdiction over a state law claim will [only] lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258.

First, no federal claim is "necessarily raised" by this case. That standard requires that the federal question be an "essential element" of the plaintiff's "*claim*," not a hypothetical part of the defendant's *defense*. *Grable*, 545 U.S. at 315 (emphasis added). Second, the issue was not "actually disputed" because, again, Plaintiffs do not seek any 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." As Scarnati acknowledged, once Governor Wolf issued the Writ of Election, the "mandate of Article I, Section 2 was completed." ECF No. ¶ 16. Nothing in Article I, § 2 plausibly suggests that the U.S. Constitution would bar a change in the timing of that election. Finally, any issue about what Article I, § 2 means in this context is not "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." This action is solely about state constitutional challenges to a state statute.

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

Mandamus at 6-7, No. 17-631 (U.S. Oct. 30, 2017). Scarnati expressly referenced the special election as part of his argument that the U.S. Supreme Court should order the *federal court* to defer to the *state court*:

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

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

In short, Scarnati had no objectively reasonable basis for believing that this Court had federal question jurisdiction over Plaintiffs' exclusively state law claims.

B. The Removal Was Pursued in Bad Faith and Was Prejudicial to Plaintiffs

A party seeking fees and costs under § 1447(c) need not establish that the notice of removal was filed in bad faith. *See Mints*, 99 F.3d at 1260; *Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 368 (E.D. Pa. 1995). But in considering a motion for fees and costs, "[a]n opponent's bad faith may strengthen the position of a party that obtained a remand." *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000); *see also HSBC Bank USA, N.A. v. Ruffolo*, No. 15-2891, 2015 WL 9460560, at *4 (D.N.J. Dec. 23, 2015) (awarding fees and costs where defendants "acted in bad faith to prolong this litigation"); *A Forever Recovery, Inc. v. Township of Pennfield*, 606 F. App'x 279, 284 (6th Cir. 2015) (holding that bad faith motive alone warrants award under § 1447(c) even where removal had "objectively reasonable basis").

Scaranti acted in bad faith in removing this case, transparently seeking to delay this litigation by making contrary arguments to different courts to suit his needs. In addition to flip-flopping on whether the Governor is a "nominal" or "indispensable" party, Scarnati has talked out of both sides of his mouth on the question of whether this case should proceed in state court. After insisting in the "emergency" mandamus petition in *Agre v. Wolf* that this Court be ordered to abstain in favor of "the Pennsylvania appellate courts' decision on important questions of Pennsylvania constitutional law," Pet. for Mandamus at 20, Senator Scarnati then removed this case to federal court. He cannot plausibly argue that state court is the proper forum for "addressing Pennsylvania's [federal] congressional apportionment plan," Pet. for Mandamus at 3, *and* that the federal court is the proper forum for addressing "whether a state court under state law can strike down a Federal congressional district" in which the state has set a special election, ECF No. 1 ¶18.

Scarnati's removal was also prejudicial to Plaintiffs, further justifying an award of fees and costs. The state court canceled a pre-trial conference set for November 16. Plaintiffs' counsel spent twelve hours drafting an emergency motion to remand and additional time preparing for and traveling to the emergency hearing in Philadelphia. Scarnati and Turzai exploited the situation to obtain an extension to file their brief on assertions of privilege, which were originally due on November 15—the day after the removal. After this Court remanded the case, the state court gave Scarnati and Turzai two additional days—a not insignificant amount of time given the expedited schedule here—to file their brief. 11/16/17 Order ¶ 2 (attached as **Exhibit B**). The extension further delayed Defendants' responses to a first set of requests for production and interrogatories served on July 14, 2017 and a second set of requests for production served on November 14, 2017. Further delay was avoided only due to this Court's

prompt action in scheduling an emergency hearing on plaintiffs' remand motion notwithstanding that the Court was then in trial. Had it not been for the Court's speed in resolving this matter, the December 11 trial in state court might have been derailed.

In granting Plaintiffs' application for extraordinary relief, the Pennsylvania Supreme Court determined that this case "involves issues of immediate public importance" and therefore must "proceed expeditiously forthwith." ECF No. 1-6 at 67-69. In these circumstances, an award of attorneys' fees is warranted both to shift the cost of this sideshow to Scarnati and to deter others from engaging in procedural gamesmanship in the future.

C. Accounting of Fees and Costs

Courts in this Circuit calculate attorneys' fees 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 Brotherhood of Elec. Workers v. Okonite Co.*, 358 F.3d 278, 287 (3d Cir. 2004) (internal quotation marks omitted); *see also Regional Emp'rs Assurance Leagues Voluntary Emps. Beneficiary Ass'n Trust v. Castellano*, 164 F. Supp. 3d 705, 713 (E.D. Pa. 2016); *Adolph Coors Co. v. Truck Ins. Exchange*, 383 F. Supp. 2d 93, 95 (D.D.C. 2005) (applying lodestar analysis where court granted plaintiff's motion to remand).

The Court must determine "how many hours were spent, by which attorneys, and in what manner," as well as the value of each attorney's time, which "generally is reflected in his normal billing rate." *Waldner v. Shulman*, No. 86-7381, 1989 WL 100184, at *3 (E.D. Pa. Aug. 28, 1989). The following charts, which are supported by the affidavits of R. Stanton Jones and Jennifer Clarke, attached as **Exhibit C** and **D**, show how many hours were spent, by which attorneys, at what normal billing rate. Detailed breakdowns of the tasks that each attorney performed are attached to those exhibits.

Arnold & Porter Kaye Scholer LLP

Name	Position	Hours	Billing Rate	Total
Stanton Jones	Partner	13	$835	$10,855
David Gersch	Senior Counsel	5	$1,135	$5,675
John Freedman	Partner	3.5	$985	$3,447.50
Elisabeth Theodore	Associate	6.5	$745	$4,842.50
Daniel Jacobson	Associate	8	$695	$5,560
Sara Murphy	Associate	21.5	$445	$9,567.50
Grand Total		**57.5**		**$39,947.50**

Public Interest Law Center

Name	Position	Hours	Billing Rate	Total
Mary McKenzie	Legal Director	6.5	$590	$3,835
Michael Churchill	Of Counsel	1.9	$650	$1,235
Benjamin Geffen	Staff Attorney	12.9	$310	$3,999
George Donnelly	Staff Attorney	3	$200	$600
Grand Total		**24.3**		**$9,669**

Next, the Court must determine whether it was reasonable for the attorneys to spend the number of hours for which fees are claimed on the associated tasks. *See id.* Plaintiffs' counsel devoted 81.8 hours on work directly responsive to Scarnati's removal of the case and in drafting this motion for fees and costs. *See Hernandez v. Kalinowski*, 146 F.3d 196 (3d Cir. 1998). Within twelve hours of learning of the removal, Plaintiffs' counsel had researched, drafted, and filed an emergency motion to remand identified multiple fatal deficiencies in the notice of

removal as well as justifying expedited treatment. The next day, Plaintiffs' counsel prepared for and traveled to the emergency hearing in this Court. All of this was eminently reasonable and absolutely necessary in this important case. The Court thus should award Plaintiffs $49,616.50 in attorneys' fees.

As for costs, Westlaw/Lexis charges are routinely passed on to the client. As such, this Court should award those reasonable costs as well. *See Adolph Coors*, 383 F. Supp. 2d at 97. Plaintiffs incurred $2,185 in Westlaw costs and do not seek reimbursement for printing and duplication costs. Plaintiffs' counsel also traveled to Philadelphia for the emergency hearing before this Court, costing $935.02. All of this was reasonable, and the Court should award Plaintiffs a total of $3,120.02 in costs.

II. Sanctions Are Warranted Under Rule 11 and the Court's Inherent Authority

This Court can and should award fees and costs under § 1447(c) without any need to consider other grounds for sanctions. Nonetheless, as the Court stated at the emergency remand hearing, the removal statute "specifically incorporates Rule 11." If the Court reaches the issue, sanctions are warranted here under both Rule 11 and the Court's inherent authority.

Rule 11 provides that an attorney's signature on a court filing constitutes a certification that, to the best of his or her knowledge, the filing is "not being presented for any improper purpose, such as to harass[or] cause unnecessary delay," that its legal contentions are either "warranted by existing law" or non-frivolous extensions of the law, and that factual contentions have evidentiary support. Fed. R. Civ. P. 11(b). If a court determines that Rule 11 has been violated, it may impose an appropriate sanction "on any attorney, law firm, or party that violated the rule or is responsible for its violation" and may award to the moving party "the reasonable expenses, including attorney's fees, incurred for the motion." Fed. R. Civ. P. 11(c)(1) & (2).

Because their primary purpose is to deter abuse of the legal system, Rule 11 sanctions are appropriate when a claim or motion is "patently unmeritorious or frivolous." *Gov't Emps. Ins. Co. v. Nealey*, No. 17-807, 2017 WL 2572519, at *14 (E.D. Pa. June 13, 2017) (quoting *Ario v. Underwriting Members of Syndicate 53 at Lloyd's for 1998 Year Acct.*, 618 F.3d 277, 297 (3d Cir. 2010)). Courts should impose Rule 11 sanctions when an attorney's conduct was objectively unreasonable under the circumstances at the time. *See Wolfington v. Reconstructive Orthopaedic Assocs. II, P.C.*, No. 16-4935, 2017 WL 4349242, at *5 (E.D. Pa. Sept. 29, 2017). "Reasonableness has been defined as an objective knowledge or belief at the time of filing . . . that the claim was well-grounded in law and fact." *Id.* (internal quotation marks omitted). To comply with Rule 11, an attorney must "conduct a reasonable investigation of the facts and a normally competent level of legal research to support the presentation." *Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988) (internal quotation marks omitted). "Separate and apart from Rule 11, federal courts possess inherent authority to sanction a party or attorney" who has acted in bad faith or abused the judicial process. *Nealey*, 2017 WL 2572519, at *14.

Here, sanctions are warranted in the extraordinary circumstances of Scarnati's frivolous—and allegedly dishonest—removal. The notice of removal was not objectively reasonable at the time. Scarnati failed to obtain consent for removal from any defendant other than the General Assembly, he missed the statutory removal deadline by more than three months, and there was obviously no conceivable basis for federal subject matter jurisdiction. Even the slightest research on any of these issues would have revealed that any attempt to remove this case was doomed. Every non-consenting defendant argued in this Court that the removal was improper for the same reasons identified by Plaintiffs. Scarnati's motive to filed the notice of removal were clear as day. He did not remove this case because he believed that doing so was

legally or factually justifiable; he removed the case to delay or derail the expedited proceedings in state court. This is exactly the kind of gamesmanship that Rule 11 should deter.[5]

CONCLUSION

The Court should award fees and costs to Plaintiffs in the amount of $52,736.52. To avoid placing the burden for such fees and costs on Pennsylvania taxpayers, Senator Scarnati and his counsel from Kleinbard LLC should be held jointly and severally liable for the award. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 960 (E.D. Wis. 2017) (ordering legislature's attorneys—"those ultimately responsible for the sandbagging, hide-the-ball trial tactics that continue to be employed"—to pay award of fees and costs).

[5] Rule 11(c)(2) ordinarily requires that a Rule 11 motion be served 21 days before filing in order to allow time for the offending party to "withdraw[] or appropriately correct[]" its wrongful act. That procedure does not apply here. First, Scarnati's wrongful act cannot be "withdrawn or appropriately corrected" now because the case has already been remanded. The harm has been done by delay to the state court proceeding and unnecessary expenditure of Plaintiffs' time and resources in responding to Scarnati's frivolous notice of removal. In these circumstances, there would be no reason to afford Scarnati time to cure a harm that is already completed and cannot be reversed. Second, even if the 21-day service requirement otherwise applied, this Court's November 16, 2017 remand order provided that "[a]ny request for fees or costs should be filed within fourteen (14) days," ECF No. 15—by November 30. There was not enough time to prepare this motion and serve it on Scarnati 21 days before filing it on November 30, as ordered. In addition, given this Court's statement at the hearing that the removal statute "specifically incorporates Rule 11," Scarnati was sufficiently on notice of a potential Rule 11 motion.

DATED: November 30, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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

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

PLAINTIFFS' MOTION FOR LEAVE TO FILE A CORRESPONDENCE

In accordance with Section I.4 of this Court's January 5, 2016 Notice to Counsel regarding Pretrial and Trial Procedures, Plaintiffs respectfully submit this Motion for Leave to file a short, one-page correspondence with the Court. Last night, in *Agre et al. v. Wolf et al.*, Speaker Turzai filed a Memorandum in Support of His Motion For Protective Order Regarding Documents Produced in Discovery. Case No. 17-cv-4392, ECF No. 171-1. This memorandum contains a misrepresentation regarding Plaintiffs in this action (who are the Petitioners in *League of Women Voters of Pennsylvania et al. v. Commonwealth of Pennsylvania*, *et al.*, Commonwealth Court Case No. 261 MD 2017). The proposed correspondence, attached hereto as Exhibit A, directs the Court to this misrepresentation and clarifies the record regarding Plaintiffs' conduct.

Accordingly, Plaintiffs respectfully request that this Court grant this Motion for Leave to file the proposed correspondence attached hereto as Exhibit A.

DATED: December 4, 2017

Respectfully submitted,

/s/ Benjamin D. Geffen

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EXHIBIT A

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ARNOLD & PORTER KAYE SCHOLER

DECEMBER 4, 2017

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Michael Baylson
Senior United States District Judge

Re: *Agre et al. v. Wolf et al.*, No. 17-cv-4392, ECF No. 171-1

To the Court:

As counsel for the Petitioners in *League of Women Voters of Pennsylvania et al. v. Commonwealth of Pennsylvania et al.*, Commonwealth Court case number 261 MD 2017 (the "Pennsylvania Action"), I write to correct a misrepresentation made regarding Petitioners to the Court by Speaker Turzai last night in *Agre et al. v. Wolf et al.*, case number 17-cv-4392, ECF No. 171-1 (Legislative Defendant Michael C. Turzai's Memorandum In Support of His Motion For Protective Order Regarding Documents Produced in Discovery).

In that memorandum, Speaker Turzai states that the proposed factual stipulations that Petitioners sent on Saturday in the Pennsylvania Action "include express references to information obtained by Plaintiffs in this matter through document production *and the Speaker's deposition.*" Mem. at 3 (emphasis added). Speaker Turzai's assertion that the proposed stipulations contain references to information obtained "through . . . the Speaker's deposition" is false. Speaker Turzai then suggests in a footnote, Mem. at 3 n.2, that Petitioners have obtained his deposition in violation of this Court's order. That assertion is also false. Petitioners in the Pennsylvania Action have never obtained or even seen the Speaker's deposition.

By email yesterday evening, we asked counsel for the Speaker, Jason Torchinsky and Kathleen Gallagher, to immediately and without delay withdraw their misrepresentation. Instead, counsel for the Speaker (Jason Torchinsky) replied last night: "Am in transit to the Agre trial as is ms Gallagher. Will respond to you tomorrow when I can as the trial schedule in Agre allows." Accordingly, we have no choice but to bring this matter directly to the Court's attention.

Respectfully,

/s/ David P. Gersch
David P. Gersch

cc: The Honorable D. Brooks Smith
The Honorable Patty Shwartz

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

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

[PROPOSED] ORDER

AND NOW this _____ day of December, 2017, upon consideration of Plaintiffs' Motion for Leave to File a Correspondence, the Motion is hereby **GRANTED**. The Clerk of Court is directed to mark as filed the proposed correspondence attached as Exhibit A to Plaintiffs' Motion.

BY THE COURT:

_____
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this date, December 4, 2017, I caused the foregoing Motion for Leave to File a Correspondence to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania. I further certify that simultaneously with this filing via CM/ECF, I served the foregoing Motion for Leave to File a Correspondence by electronic mail on all counsel of record for all Respondents and Intervenors in the Commonwealth Court case:

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DATED: December 4, 2017.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

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

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

DEFENDANT SENATOR JOSEPH B. SCARNATI, III'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR FEES AND COSTS

The core question for a district court in deciding whether to assess fees and costs under 28 U.S.C. § 1447(c) is simply this: Did the removing party have an "objectively reasonable basis for removal"? *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). In providing this standard, the Supreme Court made clear that a mere unsuccessful attempt at removal does *not* result in the *presumption* of an award in favor of the plaintiff. *See id.* at 138-39. Indeed, in reviewing Section 1447(c), the Supreme Court was persuaded that Congress did *not* intend to permit only "obvious cases" to be removed; the Court perceived instead that Congress understood certain non-obvious cases would be removed and yet later be deemed inappropriate for a federal court. *See id.* at 140. The Supreme Court divined that Congress did not intend to mete out punishment in those cases where a party, acting reasonably, attempted to extend the law. *See id.* In other words, *Martin* sets forth what is a rather mundane proposition in both the Third Circuit and this Court in particular; namely, a good faith or even novel legal argument, though unsuccessful, is not the fodder for a fee award. *See Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 70 (3d Cir. 1988) (holding "novel and unsuccessful" argument was "not plainly unreasonable" and thus did not warrant Rule 11 sanctions); *Queen v. Columbia Sussex Corp.*, No. 10-cv-2675, 2010 WL 3169605, at *3 (E.D. Pa. Aug. 10, 2010)

(Baylson, J.; denying fee award under Section 1447(c) where defendant unsuccessfully argued non-diverse defendant was fraudulently joined, finding "it was objectively reasonable for defense counsel to seek removal to federal court").

As is set forth fully below, Plaintiffs' Motion for Fees and Costs (doc. 24) should be denied. Defendant Senator Joseph B. Scarnati, III, while ultimately unsuccessful in his removal attempt—not because of a ruling on the merits, but because of a later-revealed procedural defect—had an objectively reasonable basis for removal. In fact, existing caselaw supported each of his arguments or, at a minimum, supported an extension of the law under the unique circumstances of this case. Further, even if the Court were inclined to grant fees, Plaintiffs' request is unreasonable, for a number of reasons, and should be denied as petitioned.

Finally, Senator Scarnati feels compelled to make an additional overarching point that applies to all of his actions in this matter. Senator Scarnati is not a defendant in this case in his capacity as a private citizen. He is named in his capacity as an elected public official and leader of the Pennsylvania Senate. In that capacity, he has a duty to the Pennsylvania public—all of it, including the Plaintiffs—to ensure the reasonable expenditure of taxpayer dollars. As the Court is well aware, the above case is but one of *three* cases challenging the 2011 congressional map. Pennsylvania taxpayers are on the hook in all three cases to pay the defense. Accordingly, if there were even a possibility to combine, coordinate, or streamline the three, Senator Scarnati had a duty to pursue it, if reasonable. That is precisely what happened here: he and his counsel fashioned good faith—reasonable—arguments under law to attempt to bring all three cases to the same court and the same judge. While Plaintiffs believe this was an act of malice or delay or obfuscation, it was not. Above all else, it was a pragmatic act, though one that ultimately failed

and one for which Senator Scarnati offered to reimburse Plaintiffs for the reasonably incurred travel costs. This, Senator Scarnati submits, is not the stuff of sanctions.

I. SUPPLEMENTAL FACTS AND PROCEDURAL HISTORY

On June 15, 2017, Plaintiffs, a group of Pennsylvania voters, filed a Petition for Review in the Commonwealth Court of Pennsylvania, challenging Pennsylvania's 2011 federal congressional map on various state law grounds. *See* Notice of Removal, Exhibit A (doc. 1-3). By application dated October 11, 2017, Plaintiffs filed an application with the Pennsylvania Supreme Court, asking it to assume plenary jurisdiction over the Commonwealth Court case. *See* Notice, Exhibit B (doc. 1-4). The Supreme Court granted that request by Order dated November 9, 2017. *See* Notice, Exhibit D (doc. 1-6). In meantime, Governor Thomas Wolf, on October 23, 2017, issued a Writ of Election, setting a special election for March 13, 2018 for the 18th Congressional District. *See* Notice, Exhibit C (doc. 1-6).

In response to the Writ of Election, Senator Joseph B. Scarnati, III, the President Pro Tempore of the Pennsylvania Senate who was named in the state court suit in his official capacity, removed the state court litigation to this Court. The Court's first electronic notice of the opening of the matter was sent via the CM/ECF system at 3:39 P.M. on November 15, 2017. After various filings, including an emergency motion to remand by Senator Scarnati himself, the Court at 2:55 P.M. on November 16, 2017 entered an order remanding the case back to state court. Thus, the case was "live" in this Court for just under 24 hours. This 24-hour case was staffed by Plaintiffs with 10 attorneys who billed in excess of 80 attorney hours, purportedly generating some nearly $50,000 in attorneys' fees and $3000 in costs. The 80 hours includes some nearly 20 hours, approximately 25% of the total hours, spent just on drafting the present Motion for Fees and Costs. For all attorneys, Plaintiffs seek over $600 per hour spent on this

case. Before Plaintiffs filed the Motion, Senator Scarnati offered to resolve the dispute for $9650, chiefly to reimburse Plaintiffs' counsel for the inconvenience of traveling to an emergency hearing that proved largely unnecessary. Plaintiffs declined the offer.

II. ARGUMENT

Plaintiffs are not entitled to their fees and costs under 28 U.S.C. § 1447(c) or any other rule or law. Further, even if the Court were inclined to grant them fees and costs, the amount requested is unreasonable.

A. Plaintiffs are not entitled to fees and costs under 28 U.S.C. § 1447(c) because Senator Scarnati had an objectively reasonable basis for removal.

Plaintiffs offer three grounds on which they perceive Senator Scarnati's Notice of Removal is subject to attack as unreasonable, *see* Motion at 7-14, but upon review of the relevant law and the facts, Plaintiffs' attacks are groundless.

1. Senator Scarnati obtained consent from all relevant defendants under Section 1446(b) and his argument that consent was not required from the remaining parties was objectively reasonable.

Senator Scarnati had an objectively reasonable basis for removing the action without obtaining consent from the Commonwealth of Pennsylvania, Governor Tom Wolf, Lieutenant Governor Mike Stack, Acting Secretary of the Commonwealth Robert Torres, and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan Marks (the "Executive Branch Defendants"). Although Plaintiffs are correct that, generally, an action may not be removed to federal court unless all properly joined defendants have consented, *see* 28 U.S.C. § 1446(b)(2), failure to obtain consent from "nominal" parties does not render removal improper. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 358 (3d Cir. 2013) (explaining that "a federal court must disregard nominal or formal parties" in determining whether removal was effective). Nominal defendants are those without a material interest in the litigation and "against

whom no real relief is sought," *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002), such that, it is "it is of no moment to them whether the one or the other side in [the] controversy succeed[s]." *S.E.C. v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (brackets omitted) (quoting *Bacon v. Rives*, 106 U.S. 99, 104 (1882)); *accord Bumberger v. Ins. Co. of N. Am.*, 952 F.2d 764, 767 (3d Cir. 1991) ("Nominal parties are generally those without a real interest in the litigation."). Furthermore, defendants that are joined "'only as the designated performer of a ministerial act,' or have no 'control of, impact on, or stake in the controversy[,]'" are nominal parties whose consent is unnecessary. *Busby v. Capital One, N.A.*, 932 F. Supp. 2d 114, 130 (D.D.C. 2013) (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92 (2005)).

Applying these principles, it becomes apparent that Senator Scarnati had an objectively reasonable belief for believing the Executive Branch Defendants were nominal parties, whose consent to removal was unnecessary. Critically, the substantive thrust of Plaintiffs' underlying state court claims were directed at Senator Scarnati and the Legislative Defendants: they were alleged to have violated the Pennsylvania Constitution in devising the congressional districts and it was their conduct that Plaintiffs sought to control in future redistricting matters. Conversely, no significant allegations were made against the Executive Branch Defendants—either in their individual or official capacities—and to the extent any relief was requested against them, it was to compel the performance of a ministerial act.

Plaintiffs' overarching contention in the Motion for Fees and Costs in this regard is that because the Executive Branch Defendants were "indispensable," they could not be "nominal" parties.[1] Disputing, specifically, Governor Wolf's status as a nominal party, Plaintiffs quote

[1] Plaintiffs' allegations questioning whether Senator Scarnati obtained Speaker Turzai's consent prior to filing the Notice of Removal—or had otherwise acted improperly—are immaterial and little more than a smokescreen designed to suggest enmity between Senator Scarnati and

extensively from Senator Scarnati's filing in state court, where he argued the Governor was an indispensable party and on that basis opposed the Governor's request to be dismissed form the state court action. Relying on this purported inconsistency, Plaintiffs contend removal without the consent of the Executive Branch Defendants was objectively unreasonable.

Plaintiffs' argument, however, is unavailing, as it conflates two discrete concepts. Certainly, the ordinary dictionary definition of these words would suggest that something, or someone, that is "indispensable" cannot simultaneously be "nominal." However, Plaintiffs fail to recognize that these are terms of art, having specific meanings and implicating diverging legal principles. Whether a party is real in the removal context turns on whether it "has a vital interest," without reference to any "state pleading rules[.]" *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 92 (2005). Conversely, while a federal court's assessment of "nominal party status is a practical inquiry" that analyzes the actual interests at stake, *see Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 260 (4th Cir. 2013), Pennsylvania state courts employ a different and far more technical standard in determining whether a party is indispensable. In an action such as this, an officer of the Commonwealth is indispensable where the ultimate relief requested cannot be effectuated without that officer's action. *See, e.g., Vill. Charter Sch. v. Chester Upland Sch. Dist.*, 813 A.2d 20, 26 (Pa. Cmwlth. 2002). *Cf. Broyles v. Bayless*, 878 F.2d 1400, 1402 (11th Cir. 1989) (explaining that, in determining whether "an individual, although a party to the lawsuit, is a real and substantial party to the litigation," federal courts "do not consider the controlling state's procedural law as to who must be a party to any given action," but rather look to the substance of the complaint). Thus, whether a party is "indispensable," such

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Speaker Turzai. Senator Scarnati obtained consent for removal from Speaker Turzai's counsel, and thus acted properly and with the reasonable belief that, because of counsel's representations, such consent had been given before removing. *See* Plaintiffs' Motion, Ex. A (doc. 24-1).

that its joinder was required in the state court action is a wholly separate inquiry from whether it is "nominal" in the context of removal.

Indeed, this is not a novel distinction. As the United States Supreme Court has expressly recognized, a party may be necessary to ensure that an action is procedurally sound, but may, nevertheless, be "nominal," such that failure to obtain its consent will not defeat removal. *See Bacon*, 106 U.S. at 104 (holding that a party was nominal despite being indispensable because their relation to the suit was "merely incidental, arising from the necessity of preserving the means whereby complainants might, if successful in this suit, obtain satisfaction of their demands against [Plaintiff].").[2] As such, with respect to Plaintiffs' principal contention, Senator Scarnati's position in federal court that the Governor was a nominal party for purposes of removal was not incongruent with his earlier position in state court that the Governor was indispensable to the state court action.

Against this backdrop, Senator Scarnati addresses each of the Executive Branch Defendants in turn, beginning with Governor Wolf. Initially, Plaintiffs are correct that Governor Wolf clearly was (and still is) an indispensable party in the state court action, since the ultimate relief that Plaintiffs seek cannot be implemented without his signature enacting the legislation. *See Vill. Charter Sch.*, 813 A.2d at 26 (holding that, because the relief requested would require the Secretary of Education to deduct certain funds from the respondent for the benefit of the petitioner, he was an indispensable party, despite the fact that the controversy, at its core, did not

[2] Notably, as well, this construct is consistent with the equitable principles underlying the "nominal party exception," which are intended to ensure that, on the one hand, all parties with a genuine interest agree on removal, but to prevent, on the other hand, parties with no actual interest in the outcome from impeding removal. *See Hartford Fire Ins. Co.*, 736 F.3d at 259. (observing "[t]his exception helps to prevent a party from overriding congressionally prescribed bases for removal through strategic pleading").

implicate the Secretary's interests). It does not follow, however, that Governor Wolf is a "real" party who has any "control of, impact on, or stake in the controversy." *Lincoln Prop. Co.*, 456 U.S. at 92. Here, two factors in particular evince the nominal nature of the Governor's role: (a) the unique nature of Plaintiffs' state court claim; and (b) the Governor's conduct during this action.

First, Plaintiffs' allegations do not implicate the Governor's traditional executive authority relative to legislation. While it may be true that, generally, the Governor's authority to sign or veto legislative enactments is more than a ministerial power, Plaintiffs' state constitutional challenge is predicated on the General Assembly's subjective intent in devising the congressional districts and it is that process that Plaintiffs argue should be judicially supervised. *Second*, the fact that the Governor has remained deliberately disengaged in the state court action confirms he is merely a nominal party. The decision in *Norman v. Cuomo*, 796 F. Supp. 654 (N.D.N.Y. 1992) is directly on point. There, an action was initiated in state court challenging New York State's legislative districts. Four of the eight named defendants participated in the removal of that case. However, the remaining four defendants, which included the Governor, Lieutenant Governor, and two members of the New York General Assembly, withheld their consent and, in fact, filed affidavits expressing their opposition to removal. A three-judge panel denied Plaintiffs' motion to remand, holding that the failure of the four non-consenting defendants to actively participate in the case rendered them "nominal" parties, whose consent was unnecessary. The *Norman* court reasoned that, "[w]hen one . . . considers that the non-consenting defendants have not taken steps that conflict with plaintiffs' position, . . . their nominal status becomes abundantly clear." *Id.* at 658. The panel further explained that:

> The nominal role of the non-consenting defendants in this suit becomes especially clear when contrasted to the role played by the removing defendants . . .. Unlike

> the non-consenting defendants, [the removing defendants have] formally asserted a legal position adverse to these plaintiffs and, through the companion suit, has taken affirmative steps to [block the relief sought by the plaintiffs].

Id. at 659.

Just like the Governor of New York in *Norman*, Governor Wolf has remained largely disinterested in the outcome of the state court dispute and, aside from seeking to be dismissed from the suit, has not assumed a legal position generally characteristic of a defendant whose interest are threatened. Furthermore, similar to *Norman*, Governor Wolf's nominal role is further underscored when compared to the role that the Legislative Defendants have played in the state court action. In light of the foregoing, Senator Scarnati plainly had an objectively reasonable basis for believing that Governor Wolf was a nominal party, whose consent was not necessary for effective removal.

The nominal role of the remaining Executive Defendants is even clearer. Similar to Governor Wolf, Lieutenant Governor Stack is not involved in evaluating or developing congressional redistricting litigation. Although in certain unusual circumstances, the Lieutenant Governor may be called upon to cast a tie-breaking vote in the Senate, the remote possibility of such a minimal function does not elevate him to a "real party." *See Norman*, 796 F. Supp. at 659 (finding a party "nominal" despite the possibility that it may develop a cognizable interest in the action in the future). Indeed, Lieutenant Governor Stack himself has previously emphasized his limited role in the legislative process in successfully seeking to be dismissed from an action challenging the constitutionality of legislation. *See Leach v. Commonwealth*, 118 A.3d 1271, 1277 n.4 (Pa. Cmwlth. 2015). Moreover, even if the Lieutenant Governor's potential for casting a tie-breaking vote were somehow sufficient to find him a "real" party in an action contesting the constitutionality of legislation, as outlined above, Plaintiffs' state court claims are highly

unusual, in that the constitutional infirmities that they allege relate to the subjective intent of legislators in conceiving the redistricting legislation. Lieutenant Governor Stack's role in that process is no greater than that of any ordinary Pennsylvania citizen.

Finally, turning to the Secretary Torres, and Commissioner Marks, these officers are precisely the type of "designated performer[s] of a ministerial act," with "no control of, impact on, or stake in the controversy" that courts have characterized as nominal for purposes of removal. These defendants have virtually no power in the decennial redistricting process and perform the purely ministerial task of administering and overseeing elections within the congressional districts, as formulated by the General Assembly. Furthermore neither the named officials, nor the Pennsylvania Department of State as a whole stand to suffer any institutional damage from the relief requested by the Plaintiffs.

In sum, Senator Scarnati had an objectively reasonable basis to believe he had consent to removal from all relevant parties.

2. Senator Scarnati's good faith argument under the "other papers" provision of Section 1446(b)(3) was objectively reasonable.

Under 28 U.S.C. § 1446, when a state court matter is not initially removable, the matter may nevertheless later be removed within 30 days "after receipt by the defendant, through service or otherwise, of a copy of 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." 28 U.S.C. § 1446(b)(3) (emphasis added). In this matter, all parties, Senator Scarnati included, agree that the initial state court petition for review was not removable. *See* Motion at 13. However, as stated in the Notice of Removal, Senator Scarnati reasonably believed the state court matter became removable on October 23, 2017 when Governor Thomas Wolf, a defendant below and here, issued a Writ of Election under Article I, Section 2, Clause 4 of the United

States Constitution to fill the recently vacated 18th Congressional District seat by special election. *See* Notice at ¶ 16.[3] That Writ of Election, according to Senator Scarnati, then caused the state court matter to suddenly, and for the first time, pose a substantial federal question (explained in the following section). *See* Notice at ¶ 18.

Plaintiffs challenge that the Writ of Election could possibly be an "other paper" within the meaning of Section 1446(b)(3) because, they argue, it was "not generated within the state litigation" but rather is a non-judicial document, un-related to the case. *See* Motion at 10. Yet Plaintiffs' argument ignores Third Circuit precedent and the unique circumstances of this case. To illuminate, the Third Circuit has *already* recognized one exception to the "general" intra-judicial-paper rule described by Plaintiffs. Indeed, in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), the Third Circuit carved out an admittedly "narrow" rule that an order from the Supreme Court in a different case to the one before a removal court can subject the case to removal under Section 1446(b)(3) where the order gives specific direction on removal. *See id.* at 201-02; *see also A.S. ex rel. Miller v. SmithKine Beecham Corp.*, 769 F.3d 204, 210 (3d Cir. 2014) (noting the Third Circuit "has recognized a narrow exception to the general rule" under Section 1446(b)(3), citing *Doe*). Here, to be clear, Senator Scarnati is not arguing the Writ of Election fits within the specific *Doe* exception.

Instead, Senator Scarnati's argument is that the Writ of Election here warranted another "narrow" exception to the Third Circuit's "general" rule. In fact, as the Third Circuit itself just recognized in *A.S.* in 2014, the exception in *Doe* was borne out of "unique circumstances," which, seemingly, gave the Circuit Court comfort that the rule would not become an exception to

[3] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. Const. art. I, § 2, cl. 4.

swallow the whole. *See id.* at 211. In this matter, had the case not been remanded, Senator Scarnati intended to argue, in good faith, that a narrow exception was warranted under the equally unique circumstances here. Those circumstances are, in the main, a state-court challenge by to federal congressional maps where in the midst of the litigation, a named-party-defendant issues a federal writ that locks in the extant federal districts and makes them immune from state court challenge for a period of time. *See infra*. These circumstances, Senator Scarnati believed—then and now—warranted a good faith extension of the law under Section 1446(b)(3), especially given that (1) the Supreme Court has not yet weighed in to foreclose such an argument (indeed, Plaintiffs cited no such Supreme Court precedent in their Motion); and (2) the Third Circuit *has* weighed in and *has recognized* at least one exception (i.e., it has opened the door for potential additional exceptions). Even if Senator Scarnati's argument would not have succeeded, just because it was not an "obvious" success does not mean it warrants sanctions. *See Martin*, 546 U.S. at 140.

Thus, Senator Scarnati had an objective reasonable basis to seek removal under the belief that the Writ of Election was an appropriate "other paper" under Section 1446(b)(3) that made removal timely.

3. Senator Scarnati's argument that federal question jurisdiction existed was objectively reasonable.

Senator Scarnati's theory of federal question jurisdiction, while not "obvious," *see Martin*, 546 U.S. at 140, was and remains one that he nevertheless believes is fully supported by existing federal law as applied to the unique circumstances of this case. To make that theory as clear as possible, Senator Scarnati believed that once Governor Wolf issued the Writ of Election on October 23, 2017, setting a special election for March 13, 2018 for the 18th Congressional District, review of all of the districts under *state* law could not be had without answering a

threshold *federal* constitutional question, namely: Does a writ issued under Article I, Section 2, Clause 4 of the United States Constitution preclude review of a federal congressional map under state law until the special election set by the writ is completed and the congressional seat filled?

Senator Scarnati's theory of jurisdiction was objectively reasonable because the Supreme Court has long recognized that federal question jurisdiction exists in cases that do not involve federal law claims but implicate significant federal issues. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005) ("There is, however, another longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues."). In *Grable*, the Court identified the following factors that should be utilized to determine if federal jurisdiction exists:

(1) the state law claim necessarily raises a federal issue;

(2) the federal issue is actually disputed by the parties;

(3) the federal issue is substantial; and

(4) a federal forum can resolve the federal issue without disturbing or disrupting any congressionally approved balance of federal and state judicial responsibilities.

Id. at 314; *see also Gunn v. Minton*, 568 U.S. 251, 258 (2013). The substantiality inquiry does not focus on the importance of the issue to the parties in the case but "looks instead to the importance of the issue to the federal system as a whole." *See Gunn*, 568 U.S. at 258.

Applied here, Senator Scarnati reasonably believed as follows regarding the four *Grable* factors.

First, Plaintiffs' claims necessarily implicated the question under the United States Constitution identified by Senator Scarnati above. As Plaintiffs admitted in a filing to the Pennsylvania Supreme Court, they seek to resolve their case before March 6, 2018 (the due date

for nomination petitions for the 2018 election). *See* Notice of Removal, Exhibit B at 24 of 66. Further, in their prayer for relief in state court, they asked that the respondents be enjoined "from administering, preparing for, or moving forward with *any future* primary or general elections of Pennsylvania's U.S. house members using the 2011 Plan[.]" *See* Notice of Removal, Exhibit A at 57 of 60 (emphasis added). If their case is resolved by March 6, 2018, as they requested, and the existing districts are struck down, it will affect the special election that Governor Wolf scheduled for March 13, 2018—a mere 7 days after the date Plaintiffs admit they want the state court case resolved by. Thus, Plaintiffs' claims necessarily raise the federal issue of whether a federal congressional district can be struck down where the Governor already has scheduled a special election under his authority under the U.S. Constitution in that district. As a notable aside, moreover, this issue is not a defense to Plaintiffs' claims, as argued by Plaintiffs, *see* Motion at 12; it is an issue that was and is embedded in Plaintiffs' current claims to strike down Pennsylvania's congressional districts by March 6, 2018.

Second, the federal issue was disputed in this case. As discussed immediately above, Plaintiffs plainly seek to impact the special election in potential contravention of the Governor's authority under Article I, Section 2, Clause 4 of the U.S. Constitution.

Third, the federal issue is substantial because it is important to the federal system. The issue involves the interpretation and effect of a provision of the U.S. Constitution that impacts special election in all 50 states. Plaintiffs, whether they admit it or not,[4] effectively seek to stop a special election that the Governor has exercised his power to order. Furthermore, the issue is one

[4] In their Motion, Plaintiffs claim they purportedly "do not seek any relief with respect to the March 13, 2018 special election[.]" *See* Motion at 12. Yet given what they actually seek by way of relief in their petition for review and in their application to the Pennsylvania Supreme Court—i.e., striking down of the 2011 congressional maps before the date set for special election—they plainly *do* seek relief with respect to the special election.

that a federal court should have decided because allowing a state court to decide it may undermine the development of a uniform body of law interpreting the U.S. Constitution. *See Gunn*, 568 U.S. at 261-62 (recognizing interest in uniform development of federal law).

Fourth and finally, this Court could have resolved the federal issue without disturbing the balance between federal and state courts. Indeed, the fact that state constitutional issues are involved in this case would not have prevented this Court from exercising jurisdiction and deciding the federal issue raised by Senator Scarnati as well as related state issues concerning the validity of Pennsylvania's congressional districts.[5]

In sum, against all of the above, Senator Scarnati reasonably believed that this Court had federal question jurisdiction under the unremarkable application of existing precedent to the absolutely unique circumstances of this case. This does not warrant the award of fees and costs.

B. Plaintiffs' assertion that Senator Scarnati acted in bad faith is groundless.

At its core, Plaintiffs' allegation that Senator Scarnati acted in bad faith is premised on baseless accusations that are coupled with a distorted exposition of certain carefully chosen procedural facts. Plaintiffs maintain that Senator Scarnati "transparently [sought] to delay this

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[5] In their Motion, Plaintiffs attempt to argue Senator Scarnati is taking inconsistent positions in this Court and in the United States Supreme Court on which matters should proceed in which courts. *See* Motion at 13-14. To provide the context that Plaintiffs do not, Senator Scarnati asked the Supreme Court to stay the *Agre* matter, in relevant part, for the same reason he removed the state court matter to this Court: he did not want the already ongoing March 2018 special election interfered with. *See* Emergency Application for Stay Pending Disposition of Applicants' Emergency Application for a Writ of Mandamus, No. 17-631, at 23-28 (U.S. Nov. 1, 2017). Notably, as well, at the time the Writ of Mandamus was filed, the state court action was before the Commonwealth Court, which had expressly precluded the possibility of deciding the case in time for the May 2018 primary (and, thus, the March 2018 special election as well). It was not until November 9, 2017, when the Pennsylvania Supreme Court issued its order granting extraordinary relief and indicating that its decision may affect the March 2018 special election, that the federal question came to the fore. As such, contrary to Plaintiffs' representations, Senator Scarnati has, in fact consistently sought to ensure that the special election is not adversely impacted.

litigation by making contrary arguments to different courts to suit his needs." Motion at 15. Preliminarily, reiterating their position with respect to the Governor's role in the dispute, Plaintiffs argue that Senator Scarnati acted in bad faith because he "flip-flopp[ed] on whether the Governor is a 'nominal' or 'indispensable' party[.]" Motion at 15. Plaintiffs also renew their argument that Senator Scarnati's mandamus petition in *Agre v. Wolf* cannot be reconciled with removal. Of course, as outlined above, both claims lack merit and need not be seriously entertained. As such, Plaintiffs' claims regarding "bad faith" find no support.

C. Plaintiffs' accounting of attorneys' fees and costs is erroneous, excessive, and unreasonable.

Section 1447(c) of the removal statute provides for the payment of "just" attorneys' fees and costs incurred as the result of an unsuccessful removal. *See* 28 U.S.C. § 1447(c). Plaintiffs, applying the "lodestar method," have calculated their "just" attorneys' fees to be $49,616.50 and their "just" costs to be $3,120.02.[6] *See* Motion at 16-18. Plaintiffs' calculations, however, are legally and factually erroneous, excessive and unreasonable for a number of reasons, so as to warrant a significant reduction, if not the outright denial, of the requested fees and costs.

1. Plaintiffs are not entitled to any attorneys' fees for drafting this fee petition.

First, Plaintiffs' calculation of attorneys' fees erroneously includes "fees on fees" for drafting their Motion. Specifically, Plaintiffs are seeking approximately $9,341.00 in attorneys' fees for having Arnold & Porter Associate Sara Murphy spend approximately 16.3 hours (at a rate of $445/hr.) drafting the Motion for Fees and Costs, and Partner Stanton Jones spend

[6] Plaintiffs advocate for the application of the "lodestar method" in calculating their attorneys' fees, yet no cite no cases from this Circuit applying the "lodestar method" to a Section 1447(c) fee application. *See* Motion at 16. Nonetheless, Senator Scarnati does not dispute the application of the underlying premise of the "lodestar method" that the calculation should be one based on reasonableness and, specifically, the number of hours *reasonably* worked multiplied by a *reasonable* hourly rate. *See id.*

approximately 2.5 hours (at a rate of $835/hr.) reviewing and revising the Motion. *See* Motion, Ex. C at 5 (doc. 24-3). Plaintiffs, however, are not entitled to "fees on fees" as a matter of law.

Nothing in the plain language of Section 1447(c) of the removal statute authorizes an award for "fees on fees." *See* 28 U.S.C. § 1447(c). Yet, in light of this lack of express statutory authority, Plaintiffs generally cite *Hernandez v. Kalinowski*, 146 F.3d 196 (3d Cir. 1998), to support an award of "fees on fees" in this case. *See* Motion at 17. *Hernandez*, however, is inapposite. In *Hernandez*, the Third Circuit was presented with the question of whether an attorney in a prisoner *civil rights* action was entitled to "fees on fees" under the Prison Litigation Reform Act (PLRA). 146 F.3d at 198. In holding that "fees on fees" were allowable under the PLRA, the Third Circuit compared the PLRA to the Civil Rights Attorney's Fees Awards Act of 1976, and explained that attorneys should be fully compensated for their work on *civil rights* claims for prisoners too. *See id.* at 200. Thus, *Hernandez* stands for nothing more than the proposition that an award of "fees on fees" may be appropriate in the context of *civil rights* cases to ensure adequate access of litigants to courts to seek redress from *civil rights* claims. *See id.* at 199-200.

Here, unlike *Hernandez*, Plaintiffs are not seeking to vindicate their *civil rights*. Nor are Plaintiffs acting as a "private attorney general" helping to "to ensure compliance with civil rights laws and benefiting the public by 'vindicating a policy that Congress considered of the highest priority.'" *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). This is not a *civil rights* case, nor is it even in the nature of a *civil rights* case so as to warrant a potential award of "fees on fees." *See*

id. Therefore, *Hernandez* is entirely inapplicable.[7] Other than *Hernandez*, Plaintiffs offer no additional caselaw or authority for why they should be entitled to "fees on fees."

Accordingly, because Plaintiffs are not entitled to "fees on fees" as a matter of law, Plaintiffs' proposed fee calculation must be immediately reduced to $40,275.50 at the outset, before even considering the reasonableness of their fee request.

2. The number of hours allegedly worked by ten attorneys from two firms over less than a twenty-four hour period is unreasonable.

Second, the number of hours allegedly expended by ***10 attorneys*** to research, draft and file a 13-page motion to remand and attend a brief 15-minute hearing over, at most, a 24-hour period is excessive, redundant and unreasonable. *See* Motion at 17. Indeed, ***10 attorneys***—six from Arnold & Porter and four from the Public Interest Law Center—allegedly spent 63 hours in less than one day to research, draft and file the motion to remand and then to attend a brief hearing on that motion. *See id.* That averages to almost 5 hours of attorney time being billed per page of the motion. Such hours are clearly excessive and redundant and must be excluded.

The first step in determining the reasonableness of a fee request is assessing whether the time spent was reasonable. *See Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). In calculating the number of hours reasonably expended, a court should review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described, and then exclude those that are excessive, redundant, or otherwise unnecessary. *Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185 (3d Cir.1995). It does not follow that the amount of time actually expended is the amount of time *reasonably* expended.

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[7] Notably, if this case was a *civil rights* case, Senator Scarnati would have removed this case under Section 1443, which would have *not* required the consent of any other defendant to the action. *See* 28 U.S.C. § 1443.

Arc of New Jersey, Inc. v. Twp. of Voorhees, 986 F. Supp. 261, 268 (D.N.J. 1997). Indeed, hours that would not generally be billed to one's own client are not properly billed to an adversary. *Public Interest Research Group*, 51 F.3d at 1188. As such, where three attorneys are present at a hearing when one would suffice, fees should be denied for the excess time. *Arc of New Jersey*, 986 F. Supp. at 268.

Here, 6 attorneys from Arnold & Porter—3 associates, 2 partners, and 1 senior counsel—allegedly spent 38.7 hours in a 24-hour time period working on the motion to remand and preparing for a hearing on that motion. *See* Motion, Ex. C at 4-6 (doc. 24-3). On top of that, another 4 attorneys from the Public Interest Law Center—2 staff attorneys, the legal director and an of counsel—allegedly spent another 24.3 hours over that same 24-hour time period also working on the same motion to remand and also preparing for the same hearing. *See* Motion, Ex. D at 10-13 (doc. 24-4). That amounts to an astounding ***10 attorneys*** working 63 hours over a 24-hour period on what ultimately became a 13-page motion to remand and a brief 15-minute hearing before this Court.

Clearly, the 63 hours of work allegedly performed by these ***10 attorneys*** over a 24-hour period was duplicative and redundant. Indeed, it would strain credulity to argue that ***10 attorneys*** from two different law firms was necessary to research, draft and file a 13-page motion to remand. *See* Motion, Ex. C & D. Moreover, it would strain credulity to argue that ***10 attorneys*** needed to prepare for a hearing on that motion and that no less than ***6 attorneys*** needed to be present for the hearing on that motion to remand. *See id.* Counsel for Plaintiffs would never bill their own clients for such an excessive number of attorneys and hours over a 24-hour period, nor should such an excessive number of attorneys and hours reasonably be billed to the Pennsylvania taxpayers in this case.

Accordingly, at the very least, the 63 hours of time spent by ***10 attorneys*** from two law firms to work on Plaintiffs' motion to remand and prepare for a brief hearing on that motion must be reduced significantly to exclude redundant and excess time. *See Reg'l Employers' Assurance Leagues Voluntary Employees' Beneficiary Ass'n Tr. v. Castellano*, 164 F. Supp. 3d 705, 715 (E.D. Pa. 2016) (concluding that 62.4 hours for five attorneys to work on 18-page response to motion for summary judgment was excessive and should be reduced by half); *Styers v. Pennsylvania*, 621 F. Supp. 2d 239, 244 (M.D. Pa. 2008) (concluding that 71.99 hours for attorney to work on 13-page response to motion for summary judgment was excessive and should be reduced).

3. Arnold & Porter's proposed hourly billing rates are unreasonable for this market.

Third, the hourly rates submitted by Plaintiffs for Arnold & Porter attorneys are excessive and unreasonable and do not reflect the prevailing market rates for this district. *See* Motion at 17. Indeed, the rates proposed by Arnold & Porter of Washington, DC are more than double and almost three times the prevailing rates for this district as established by Community Legal Services of Philadelphia (CLS). *See* CLS Attorney Fees, attached as Exhibit 1. Moreover, the affidavit submitted by Arnold & Porter to support these out-of-market rates is so woefully deficient that no fees should be awarded for those attorneys' work at all. *See* Motion, Ex. C. At the very least, the exorbitant rates submitted by Arnold & Porter must be significantly reduced.

The second step in determining the reasonableness of a fee request is assessing whether the attorneys' hourly rates are reasonable. *See Maldonado*, 256 F.3d at 184. A reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant legal community. *Id.* In determining a reasonable hourly rate, the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for

similar services by lawyers of reasonably comparable skill, experience, and reputation. *Id.* This "forum rate rule" dictates that generally an out-of-town lawyer would not receive the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged. *Interfaith Cmty. Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 704 (3d Cir. 2005). The prevailing party bears the burden of establishing by way of satisfactory evidence, in addition to the attorneys' own affidavits, that the requested hourly rates meet this standard. *Maldonado*, 256 F.3d at 184.

Here, the affidavit submitted by Arnold & Porter to support the requested hourly rates of its attorneys is woefully deficient and unsatisfactory in meeting the Plaintiffs' burden of reasonableness. *See* Motion, Ex. C. As noted previously, Plaintiffs have the burden of establishing that their proposed rates are reasonable. *See Maldonado*, 256 F.3d at 184. Unlike the thorough and comprehensive affidavit submitted by the Public Interest Law Center to support its proposed hourly rates, the affidavit submitted by Arnold & Porter consists of six general paragraphs and offers no detail as to the skill, experience, or reputation of *any* of the attorneys who allegedly worked on this matter. *Compare* Motion, Ex. D, *with* Motion, Ex. C.

As for the reasonableness of the attorneys' rates proposed by Arnold & Porter, the affidavit merely relies on the notion that, because these are the "standard billing rates" currently charged for the identified attorneys in Washington, DC, they must be reasonable in this market. *See* Motion, Ex. C at ¶ 3. This is clearly insufficient, however, as Arnold & Porter has the burden of showing that its rates are commensurate with the market rates in Philadelphia. *See Schofield v. Trustees of Univ. of Pennsylvania*, 919 F. Supp. 821, 830 (E.D. Pa. 1996). Accordingly, Arnold & Porter's defective affidavit should be stricken by this Court and the entirety of its fee request denied.

Even assuming *arguendo* that the affidavit submitted by Arnold & Porter is not so defective to warrant the complete denial of fees, the hourly rates proposed for the out-of-town Arnold & Porter attorneys are grossly excessive, unreasonable and not reflective of the rates charged in the Philadelphia market. Although the proposed hourly rates may be representative of what Arnold & Porter charges in the Washington, DC market, those rates are not representative of Philadelphia market rates. Indeed, courts of this Circuit have routinely found the fee schedule established by CLS to be a fair reflection of the prevailing market rates in Philadelphia. *See Maldonado*, 256 F.3d at 187; *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir. 1987) ("there nevertheless comes a point where a lawyer's historic rate, which private clients are willing to pay, cannot be imposed on his or her adversaries"). And the CLS fee schedule is very similar and in-line with the fee schedule of the Public Interest Law Center. *Compare* Motion, Ex. D at 9, *with* CLS Attorney Fees, Exhibit 1. Not surprisingly, the CLS and Public Interest Law Center rates are approximately one-half to one-third of the hourly rates currently being proposed by Arnold & Porter. *See* Motion at 17.

In order to exemplify how excessive and unreasonable Arnold & Porter's proposed rates are, one needs to look no further than the blended hourly rate for the fees that Arnold & Porter is seeking. If you divide the total amount of fees requested by Arnold & Porter ($39,947.50) by the total number of hours allegedly worked (57.5), the blended hourly rate for Arnold & Porter to draft the motion to remand and attend a hearing regarding that motion was approximately ***$695/hr***., regardless of the experience level of the attorney. *See* Motion at 17. According to the fee schedules for both CLS and the Public Interest Law Center, an attorney billing at that high of an hourly rate would have needed in excess of 25 years of experience. *See* Motion, Ex. D at 9;

CLS Attorney Fees, Exhibit 1. But only one of the six attorneys from Arnold & Porter billing on this case (Senior Counsel David Gersch) would even meet that criteria.

Arnold & Porter has offered no evidence that any special skill, experience or reputation warrants a higher rate than those rates established by CLS or the Public Interest Law Center, nor could they. *See Interfaith*, 426 F.3d at 705. Indeed, the motion to remand researched and drafted by the Washington, DC-based Arnold & Porter concerned discrete issues of *Pennsylvania* constitutional law, to which no out-of-state attorney could reasonably argue any special skill or expertise, particularly attorneys that had to seek *pro hac vice* admittance into this jurisdiction in the first place. Moreover, the highest number of hours (21.5) were allegedly billed by a newly-barred associate at Arnold & Porter (Associate Sara Murphy) with an alleged rate of $445/hr., which is more than double the market rate established by CLS and the Public Interest Law Center for an attorney with that level of experience.[8] *See* Motion, Ex. D at 9; CLS Attorney Fees, Exhibit 1.

Given the objective unreasonableness of the hourly rates submitted by Arnold & Porter, this Court, at a minimum, should reduce those rates to be aligned with the hourly rates submitted by the Public Interest Law Center. *See* Motion, Ex. D at 9. To that end, based on the Public Interest Law Center fee schedule, the following new hourly rates should be adopted for the following Arnold & Porter attorneys:

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[8] Associate Sara Murphy is neither mentioned nor identified in the affidavit submitted by Arnold & Porter. *See* Motion, Ex. C. That alone is sufficient grounds to deny an award of her fees. *See Maldonado*, 256 F.3d at 184.

Name	Years of Experience	Hourly Rate
Stanton Jones	6-10 Years	$335
David Gersch	Greater Than 25 Years	$650
John Freedman	21-25 Years	$530
Elisabeth Theodore	6-10 Years	$300
Daniel Jacobson	6-10 Years	$265
Sara Murphy	Graduation to 2 Years	$190

See Motion, Ex. D at 9.

Applying these market rates as established by the Public Interest Law Center would result, at the very least, in a nearly 80% reduction in the total amount of fees requested by Arnold & Porter. Indeed, if the $9,341.00 in erroneous "fees on fees" is deducted from Arnold & Porter's fee calculation, Arnold & Porter would, at most, be entitled to a little more than $8,000 in total attorneys' fees, compared to the $39,947.50 in attorneys' fees that it originally requested in its fee application. *See* Motion at 17. And that, of course, is assuming no deduction in the number of hours allegedly worked, which, as detailed above, is warranted and required here.

4. Computer research costs are not recoverable.

Fourth, Plaintiffs are not entitled to recover their requested costs for Westlaw computer research. *See* Motion at 18. Specifically, Plaintiffs seek payment for $2,185.73 in costs allegedly incurred by Arnold & Porter Associate Sara Murphy to conduct "Westlaw Computer Research." *See* Motion, Ex. C at 6. Yet, the documentation provided by Arnold & Porter does not adequately describe the research performed, nor is it even evident from the documentation that the alleged research had anything to do with preparing the motion to remand. *See id.* Absent sufficient explanation or detail, the request for computer research costs should be denied on this ground

alone. *See Borrell v. Bloomsburg Univ.*, 207 F. Supp. 3d 454 (M.D. Pa. 2016) (prevailing parties are generally entitled to recover any reasonable costs associated with litigating their claims, provided that the costs are necessary and properly documented).

Moreover, Plaintiffs do not cite a single case or authority from this Circuit, let alone one from this District, to support their claim of reimbursement for computer research costs. Indeed, the only case cited by Plaintiffs to support their request for reimbursement is a non-precedential case from the U.S. District Court for the District of Columbia, which is not binding on this Court. *See* Motion at 18 (citing *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 97 (D.D.C. 2005)). But, in the *Adolph Coors* case, the District Court specifically noted that it was the practice of the attorneys involved in that case to pass along computer research costs to their clients. *See* 383 F. Supp. 2d at 97.

Here, Arnold & Porter has presented no evidence that it is typical for Arnold & Porter attorneys to pass along the costs of Westlaw computer research to their clients. Absent such evidence, it can be assumed that computer research costs are simply an item of overhead built into an attorney's fee. *See Nugget Distributors Co-op. of Am., Inc. v. Mr. Nugget, Inc.*, 145 F.R.D. 54, 59 (E.D. Pa. 1992) (holding that cost of computer assisted legal research could not be recovered by prevailing parties since cost of legal research, whether manual or computerized, was facet of attorney fee). This is particularly true, where, as here, Arnold & Porter is allegedly billing out a newly-licensed associate at a staggering rate of $445/hr. *See BD v. DeBuono*, 177 F. Supp. 2d 201, 209 (S.D.N.Y. 2001) ("Westlaw fees are simply an item of overhead, and as such should be built into the fees charged, rather than unbundled and reimbursed separately.").

Accordingly, Plaintiffs request for $2,185.73 in Westlaw computer research costs must be denied.[9]

5. Joint and several liability is inapplicable.

Fifth, and finally, Plaintiffs' assertion that Senator Scarnati and his counsel from Kleinbard LLC should be held jointly and severally liable for any award of fees and costs is wholly without merit. *See* Motion at 20. Once again, Plaintiffs do not cite a single case or authority from this Circuit to support their bald assertion, nor do they even cite a single removal or remand case to support their argument.

Rather, the only case cited by Plaintiffs for this absurd proposition is *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 843 F. Supp. 2d 955 (E.D. Wis. 2012). *See* Motion at 20. *Baldus*, however, concerned the repeated failure of attorneys to comply with multiple orders from the District Court regarding discovery disputes. 843 F. Supp. 2d at 960. As such, the District Court imposed sanctions for the attorneys' repeated failure to obey its discovery orders pursuant to Fed.R.Civ.P. 37(b)(2)(C), which expressly provides for the payment of reasonable expenses, including attorneys' fees, from "*the disobedient party, the attorney advising that party, or both*[.]" Fed.R.Civ.P. 37(b)(2)(C) (emphasis added).

Here, unlike *Baldus*, there has been no brazen rejection or non-compliance of any orders from this Court, let alone multiple orders. More importantly, unlike Fed.R.Civ.P. 37(b)(2)(C), Section 1447(c) of the removal statute does not expressly provide for any type of joint or several liability. Indeed, Section 1447(c) merely provides that: "An order remanding the case may

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[9] Plaintiffs also seek to recover the costs for *three* attorneys from Arnold & Porter to travel by train from Washington, DC to Philadelphia to attend the hearing on their motion to remand. *See* Motion, Ex. C at 6. Senator Scarnati does not dispute whether train travel may be reimbursable, but instead disputes how the fares for each of the three attorneys varies from $290 to $246 to $212, respectively. *See id.* Presumably, all three attorneys from the same law firm and same location traveled together and the three fares should be identical.

require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447. Nothing in the plain language of Section 1447(c) can be construed as providing for joint and several liability, and Plaintiffs have not pointed to a single case construing it that way. Accordingly, Plaintiffs' request for joint and several liability must be rejected.

D. Plaintiffs' remaining arguments for sanctions are procedurally and substantively defective.

Plaintiffs' recourse to Rule 11 sanctions is clearly unsustainable, even upon a cursory review of the arguments offered in support. As a preliminary matter, Plaintiffs' request is procedurally deficient since they failed to serve a Rule 11 motion on Senator Scarnati at least 21 days before filing the present Motion. *See* Fed.R.Civ.P. 11(c)(2). The purpose of this "safe harbor provision" is to provide a "twenty-one day grace period," during which time the offending party can correct its errors. *Barley v. Fox Chase Cancer Ctr.*, 54 F. Supp. 3d 396, 401 (E.D. Pa. 2014). Plaintiffs acknowledge this defect, but baldly declare that the 21-day service requirement is presently inapplicable because the procedural posture of the case made it impossible for them to comply with that directive. Plaintiffs' position, however, is belied by settled caselaw, which unmistakably provides that compliance with the safe-harbor provision is mandatory. *See, e.g., In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 99 (3d Cir. 2008) ("If the twenty-one day period is not provided, the motion *must* be denied." (emphasis added)); *accord Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170, 175 (2d Cir. 2012) ("The safe-harbor provision is a strict procedural requirement."); *Gordon v. Unifund CCR Partners*, 345 F.3d 1028, 1030 (8th Cir.2003) (holding that issuance of sanctions

in the absence of a party's compliance with Rule 11's procedural requirements amounted to an abuse of discretion).[10]

Insofar as Plaintiffs appear to propose an exception to this general rule, most circuits have declined similar invitations to dispense with the 21-day requirement, despite the fact that the alleged harm could not be undone and the progression of the action made compliance with the 21-day prerequisite impossible.[11] It is perhaps unsurprising, therefore, that Plaintiffs do not offer any authority for the proposition that the Rule 11(c)(2)'s safe harbor provision "does not apply here." Motion at 20 n.5. Accordingly, this Court should refuse to depart from its settled precedent to craft an exception at odds with the prevailing view among other federal circuits.

Moreover, even if this Court were inclined to overlook the essential procedural infirmity and reach the merits of Plaintiffs' Rule 11 claim, their arguments fail. As this Court has noted, Rule 11 sanctions are appropriate only upon "a showing of objectively unreasonable conduct."

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[10] Parenthetically, while courts have occasionally excused technical noncompliance with respect to the "service" requirement of the safe harbor provision, explaining that the key inquiry is whether the offending party had adequate notice of its allegedly sanctionable conduct, courts have expressly declined to modify the 21-day *time period* in the safe harbor provision. *In re Miller*, 730 F.3d 198, 204 (3d Cir. 2013) (distinguishing case-law finding "substantial compliance" with the safe harbor provision to be sufficient, as they "involved not the period of the safe harbor but rather the form of notice—*i.e.*, a 'notification letter' sent in lieu of formal service of the . . . motion").

[11] *See Ridder v. City of Springfield*, 109 F.3d 288, 296 (6th Cir. 1997) (recognizing that, given the procedural posture of the case compliance with the safe-harbor provision may seem futile, but nevertheless, refusing to overlook that rule); *accord Steinlage v. Mayo Clinic Rochester*, 235 F.R.D. 668, 671 (D. Minn. 2006) ("The court will not impose Rule 11 sanctions when the opposing party has been deprived of its 21–day safe harbor due to the progression of the lawsuit and ultimate rejection of the allegedly offending contention."); *see also In re Walker*, 532 F.3d 1304, 1308 (11th Cir. 2008)("[T]he Second, Fourth, and Sixth Circuits have concluded that a motion under Federal Rule of Civil Procedure 11 . . . cannot be filed '[i]f the court disposes of the offending contention before the twenty-one day safe harbor period expires.'" (citing *Ridder*, 109 F.3d at 296; *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389-90 (4th Cir.2004) (*en banc*); *In re Pennie & Edmonds LLP*, 323 F.3d 86, 89 & n.1-2 (2d Cir.2003))).

Wolfington v. Reconstructive Orthopaedic Assocs. II, P.C., No. 16-cv-4935, 2017 WL 4349242, at *5 (E.D. Pa. Sept. 29, 2017) (citing *Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995)). This standard is substantially identical to the "objectively reasonable basis" rubric that courts use in assessing a request for fees under 28 U.S.C. § 1447(c). Accordingly, for the same reasons outlined in response to Plaintiffs' claim under Section 1447 of the removal statute, sanctions are not presently warranted.

Finally, Plaintiffs' contention that this Court should exercise its "inherent power" to impose sanctions is similarly devoid of merit. First, "a prerequisite for the exercise of the district court's inherent power to sanction is a finding of bad faith conduct." *Gillette Foods Inc. v. Bayernwald-Fruchteverwertung, GmbH*, 977 F.2d 809, 813-14 (3d Cir. 1992) (internal citations and quotation marks omitted). For all the reasons set forth above, particularly in Section II.B, Plaintiffs have not—and, indeed, cannot—establish bad faith. Moreover, Plaintiffs do not offer any reason for concluding that the present case warrants the invocation of a court's inherent power, which "must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). This relief is not available in the ordinary course and is reserved for extraordinary circumstances. Thus, Plaintiffs' entreaties to use Rule 11 or the Court's inherent powers must fail.

III. CONCLUSION

For the foregoing reasons, Senator Scarnati respectfully requests that the Court deny the pending Motion for Fees and Costs (doc. 24).

Repsectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief in Opposition to Motion for Fees and Costs to be served on counsel via the Court's CM/ECF system.

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

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

ORDER

Upon consideration of Plaintiff's Motion for Fees and Costs (doc. 24), and the response thereto, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

_____
Hon. Michael Baylson

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

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR FEES AND COSTS

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REPLY

Plaintiffs submit this reply to briefly address the following points from Senator Scarnati's Opposition to Plaintiffs' Motion for Fees and Costs ("Opp'n").

First, Scarnati's opposition confirms that his removal petition was entirely without merit. Senator Scarnati offers no reasonable explanation for his failure to obtain the consent of all defendants who were properly joined. Speaker Turzai represented to this Court that "at no point in time did [he] or anyone else acting on [his] behalf . . . consent[] to removal pursuant to 28 U.S.C. § 1441." ECF No. 21 ¶ 14. Scarnati responds to this extraordinary charge in a *footnote*, dismissing the issue as "immaterial" and "little more than a smokescreen." Opp'n at 5 n.1. To be clear, whether Turzai consented to removal is a critical point for Scarnati's assertion that he had an objectively reasonable basis for removal, since Scarnati himself agrees that Turzai's consent was required.

Moreover, regardless of what happened with Speaker Turzai, Senator Scarnati has not offered any objectively reasonable explanation for his failure to obtain the consent of the Executive Defendants. *See* Pls.' Mot. for Fees and Costs 8–11 ("Mot."), ECF No. 24. Scarnati offers no authority to support his view that the Governor of Pennsylvania—the only government official charged with deciding whether to sign a remedial districting plan into law—and the other Executive Defendants are mere "nominal" parties for whom consent is not required. Instead, Scarnati cites obviously distinguishable cases involving nominal parties such as a defunct corporation, *see Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 358–59 & n.27 (3d Cir. 2013), an international union with no possible liability in the suit, *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002), and a "recorder of deeds" whose only relation to the case was that she had recorded certain documents at issue, *Busby v. Capital One, N.A.*, 932 F.

Supp. 2d 114, 131 (D.D.C. 2013). Scarnati cites no authority even remotely suggesting that the Chief Executive of a state is merely a "nominal" defendant with "no real interest in the litigation." Scarnati's lengthy attempt at explaining how the Governor is simultaneously "indispensable" and "nominal," Opp'n at 5-8, ignores case law holding that for the purposes of removal, a "nominal party is defined as one neither necessary nor indispensable." *Dietz v. Avco Corp.*, 168 F. Supp. 3d 747, 759 (E.D. Pa. 2016); *see also, e.g., Steel Valley Auth. V. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987) ("while nominal . . . parties may be disregarded [in considering remand], indispensable parties may not"); *Ramara, Inc. v. Westfield Ins. Co.*, 2014 WL 12607757 *6 (E.D. Pa. Jan. 2, 2014) ("jurisprudence in our Circuit suggests that a party is not nominal if it is indispensable").

Likewise, Senator Scarnati cites no authority for the proposition that his notice of removal was timely. *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), on which Scarnati relies, involved 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. But Scarnati does not contend that Governor Wolf's Writ of Election was an "order." He contends that it was an "other paper." Opp'n at 10-12. To this day, Scarnati has not cited a single legal authority to support that view.

Finally, even though Article I, § 2 of the Constitution was the entire basis for the purported "federal question" here, Scarnati notably does not dispute that Article I, § 2 is actually irrelevant to the timing of special elections. Mot. at 13.

Second, Scarnati's position on the appropriateness of Plaintiffs' request for attorney fees is without merit. Scarnati incorrectly asserts that Plaintiffs are not entitled to recover "fees-on-fees" because while such fees are awarded in civil rights cases, this is not a civil rights case. Opp'n at 17-18. That distinction is irrelevant. "No matter what the purpose of an attorney's fee

provision . . . the availability of 'fees for fees' is essential to carrying out Congress's goal in including the provision in the first place." *Am. Fed'n of Gov't Emps. v. FLRA*, 994 F.2d 20, 22 (D.C. Cir. 1993). The reason is simple: if a party cannot recover fees-on-fees where, as here, he or she is entitled to statutory attorneys' fees, "the attorney fee to which he or she is entitled to by law is in fact diminished." *Hernandez v. Kalinowski*, 146 F.3d 196, 199 (3d Cir. 1998). This is just as true for prevailing parties seeking fees under the removal statute, 28 U.S.C. § 1447(c), as it is for prevailing parties seeking fees under the civil rights statutes. That is why in "statutory fee cases, federal courts . . . have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir. 2008). For these reasons, several courts have awarded fees-on-fees where a party seeks fees under 28 U.S.C. § 1447(c). *See, e.g.*, *MFC Twin Builders LLC v. Farjado*, 2012 WL 3862399, at *8 (E.D. Cal. 2012); *Yazdani v. Access ATM*, 474 F. Supp. 2d 134, 137-38 (D.D.C. 2007); *Albion Pacific Property Resources, LLC v. Seligman*, 329 F. Supp. 2d 1163, 1175 (N.D. Cal. 2004).

The attorney hours Plaintiffs requested are plainly justified. Scarnati's frivolous attempt to remove this case created an emergency that necessitated immediate coordinated efforts of a diligent team of counsel. 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. It was perfectly reasonable to have multiple members of the trial team divide the work and collaborate on the emergency motion to remand, and for some of those attorneys to prepare for and attend an emergency hearing.[1] Courts have

[1] Plaintiffs are seeking to recover costs for two attorneys, not three, to travel to Philadelphia for the emergency hearing. Mr. Jacobson purchased northbound tickets from Washington, D.C. to Philadelphia for Mr. Gersch and Mr. Jones. *See* Mot. Ex. C at 6.

awarded attorneys' fees for the hours necessary for teams of counsel 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 in response to plaintiff family's unlawful detention by Immigration and Customs Officials); *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 petitions in a legal challenge to South Carolina's ban on same-sex marriage).[2]

The law clearly provides that Plaintiffs' counsel should be awarded fees at their standard billing rates under the second exception to the "forum rate rule," which applies "when local counsel are unwilling to handle the case." *Interfaith Community Organization v. Honeywell Intern., Inc.*, 426 F.3d 694, 705 (3d Cir. 2005) (citations omitted). Plaintiffs' counsel learned of the removal mid-afternoon on Wednesday and filed the emergency motion to remand within 12 hours. It is obvious that it would have been impossible to secure the services of a local firm to research and brief the remand motion within that time period, much less to do it *pro bono*, like Arnold & Porter. Moreover, the immediate and extraordinary threat posed by the removal left Plaintiffs' counsel with no choice but to immediately respond with available resources.

Third, this court should hold Scarnati and his attorneys—not the taxpayers of Pennsylvania—liable for any award of fees and costs as a result of Scarnati's unreasonable

[2] Contrary to Scarnati's claims, the reasonable cost of computerized legal research is reimbursable in the Third Circuit. Indeed, in *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), the Third Circuit recognized that "[u]se of computer-aided legal research such as LEXIS, or WESTLAW, or similar systems, is certainly reasonable, if not essential, in contemporary legal practice." *Id.* Accordingly, the court reversed the district court's denial of these costs. *Id.*

Notice of Removal. Scarnati does not identify any law that would prevent this Court from holding him, and his attorneys, liable for any fees assessed. *Baldus v. Members of Wisconsin Government Accountability Bd.*, 843 F. Supp. 2d 955 (E.D. Wis. 2012), is directly relevant. In *Baldus*, the defendants stymied a redistricting challenge by filing frivolous motions, changing their positions to capitalize on new opportunities, and "flailing wildly in a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process." *Baldus*, 843 F. Supp. 2d at 257–59. The *Baldus* court then concluded that it would be unfair for the state's taxpayers to bear the costs of sanctions warranted by counsel's behavior. *Id.* at 960. Scarnati was likewise "flailing wildly" when he removed this case to federal court in a baseless effort to derail the expedited state court proceedings. Given the drastic consequences that result from removal—automatically divesting the state court of jurisdiction—there must be a disincentive to deter such vexatious litigation tactics.

For these reasons, as well the reasons set forth in Plaintiffs' motion for fees and costs, Plaintiffs respectfully request that this Court award fees and costs to Plaintiffs in the amount of $52,736.52 and hold Senator Scarnati and his counsel from Kleinbard LLC jointly and severally liable for the award.

DATED: December 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, December 21, 2017, I caused the foregoing Plaintiffs' Motion for Fees and costs to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of Pennsylvania. I further certify that simultaneously with this filing via CM/ECF, I served the foregoing Plaintiffs' Emergency Motion to Remand by electronic mail on all counsel of record for all Respondents and Intervenors in the Commonwealth Court case:

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