

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

<b>Louis Agre <i>et al.</i>,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Civil Action No. 2:17-cv-4392</b>
	:	
v.	:	
	:	
<b>Thomas W. Wolf <i>et al.</i>,</b>	:	
	:	
<b>Defendants.</b>	:	

**MEMORANDUM OF LAW REGARDING SENATOR SCARNATI’S AUTHORITY**

Legislative Defendant Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore, hereby submits this memorandum of law regarding the extent of his authority as President Pro Tempore.

**I. PLAINTIFFS’ DISCOVERY REQUESTS TO SENATOR SCARNATI**

Plaintiffs served their first and only set of discovery requests—including Interrogatories, Requests for Production of Documents, and Requests for Admissions—on October 13, 2017. (True and correct copies are attached hereto as **Exhibits A, B, and C**, respectively.) All three sets of requests were addressed “To: Joseph B. Scarnati, III, in your official capacity as Pennsylvania Senate President Pro Tempore.” That is, they were addressed to Senator Scarnati individually. While many of the requests used the term, “you” or “your,” those terms were not defined. Accordingly, Senator Scarnati ascribed the ordinary, dictionary definition of these terms. *See Aleynikov v. Goldman Sachs Group, Inc.*, 765 F.3d 350, 360 (3d Cir. 2014). Thus, Senator Scarnati understood the terms “you” and “your” to refer to him, not the entire General Assembly or the majority party (in 2011 or today) of the Pennsylvania Senate.

To be sure, Senator Scarnati specifically objected to any Instruction or Definition in the discovery requests that appeared to imply or require otherwise.

For example, with respect to Definition A in the Requests for Production of Documents, which referenced documents “which are in the possession, custody or control of your present or former agents, representatives or attorneys, or any and all persons acting on your behalf, including documents at any time in the possession, custody or control of such individuals or entities known by Plaintiff(s) to exist,” (Ex. B at Definition A), Senator Scarnati objected as follows: “Senator Scarnati objects to Definition A to the extent that it seeks to impose upon him an obligation to produce documents outside his possession, custody or control. For example, Senator Scarnati will not embark upon a search to locate potentially responsive documents that were ‘at any time in the possession, custody or control’ of various individuals other than Senator Scarnati.” (Copies of Senator Scarnati’s Original and Amended Objections and Responses to Plaintiffs’ Request for Production of Documents are attached hereto as **Exhibits D** and **E**, respectively).

With respect to Plaintiffs’ Definition of “all documents” as “every document as defined above, whether an original or draft or a copy of either, which is in Plaintiff(s)’s possession, custody or control, and every document that is known to Plaintiff(s) and can be located or discovered by reasonably diligent efforts, even if it is not presently in Plaintiff(s)'s possession,” Senator Scarnati objected as follows: “Senator Scarnati objects to Definition B as vague and ambiguous in that it purposes to seek documents within ‘Plaintiffs’” possession, custody or control, known to Plaintiffs and/or that Plaintiffs can ‘locate[] or discover[] by reasonable diligence efforts ...’” (*Id.* at Objection to Definition B.)

Likewise, in response to Plaintiffs’ Instruction that Senator Scarnati describe in detail the efforts made to locate records, and identify who has custody or control, Senator Scarnati objected “on the basis that it imposes upon him an obligation to provide information concerning

documents outside his possession or control. Senator Scarnati therefore will not provide the information sought in Instructions' paragraph 6." (*Id.* at Objection at Instruction No. 6.)

It was therefore clear to all parties that Senator Scarnati was only producing his own documents. And despite several meet and confers in this case, this clear understanding was never challenged. Plaintiffs never served any deficiency letter. And they never filed a motion to compel additional documents. Instead, they limited their discovery and chose *not* to pursue documents from the General Assembly or the Republican Caucus. Plaintiffs were not unaware of their ability to seek discovery from third parties, including the Republican State Leadership Committee and the State Government Leadership Foundation (who possessed no responsive documents to the request as stated) and Thomas Hofeller (whose deposition they notified they were cancelling). If Plaintiffs sought documents from the Majority Caucus, there is plenty of publicly available information regarding individuals to whom discovery may have been directed, including the Majority Caucus Administrator, Majority Caucus Secretary, and Majority Caucus Chairman. (*See, e.g.*, [http://www.pasenategop.com/senate-leadership/.](http://www.pasenategop.com/senate-leadership/))

## **II. THE SCOPE OF SENATOR SCARNATI'S SEARCH FOR DOCUMENTS**

In searching for documents responsive to Plaintiffs' discovery request, Senator Scarnati conducted an extensive electronic search, examining his two government email accounts, as well as documents he had stored on the government's S and F drives. The search terms used were as follows:

- (1249) OR (apportion) OR (assign) OR (block) OR (census) OR (city AND splits) OR (communities AND of AND interest) OR (community AND of AND interest) OR (compact) OR (conflate) OR (conflation) OR (congress) OR (contiguity) OR (contiguous) OR (core) OR (county AND splits) OR (crack) OR (dbf) OR (deviation) OR (dilution) OR (discontiguity) OR (discontiguous) OR (discontinuity) OR (discontinuous) OR (district AND shape) OR (district AND splits) OR (districting) OR (draft AND map) OR (gerrymander) OR (house AND

map) OR (incumbent) OR (majority-minority) OR (mcd) OR (merge) OR (minority) OR (municipal) OR (pack) OR (partisan) OR (plan) OR (population AND deviation) OR (precinct) OR (reapportionment) OR (re-apportionment) OR (redistricting) OR (retention) OR (senate AND map) OR (shape) OR (shp) OR (split) OR (tcp) OR (test AND congressional AND plan) OR (test AND plan) OR (VAP) OR (variance) OR (voter AND tabulation AND district AND splits) OR (voting AND age) OR (VTD) OR (ward) OR (Washington)

The date range of the emails search was January 1, 2010 through December 31, 2012.

Senator Scarnati made two separate document productions, and served a privilege log on November 17, 2017. Again, those productions were not challenged as deficient at any time: no deficiency letter; no motion to compel.

### **III. SENATOR SCARNATI'S DEPOSITION**

*When Senator Scarnati sat for a deposition, there were no questions asked of him relating to how or where he collected documents, or for whom. And with respect to the lone citation to the Senator's deposition transcript identified in Plaintiffs' Motion for Sanctions, the question was ultimately answered. (Dep. Tr. at 66:9-22.)*

Moreover, the other limited instances where the qualified privilege was invoked did not upset any of the questioning about documents. (*See, e.g., id.* at 40:10-41:7 (question answered after Plaintiffs' counsel's "clarif[ication]").) There were four references to the privilege during questioning, and one was simply a caution. Ultimately, Plaintiffs' counsel offered no pushback or challenges. The Court was never contacted, and counsel never asked to leave the deposition open. Counsel for Plaintiffs never sent any follow up correspondence about any document production concerns.

### **IV. SENATOR SCARNATI'S ROLE IN THE PENNSYLVANIA SENATE**

Notwithstanding the clear and un-challenged position that Senator Scarnati would produce only his documents, Plaintiffs' failure to engage in any other relevant third party

discovery, and Plaintiffs' ability to depose Senator Scarnati concerning his document accumulation and production, Plaintiffs now apparently believe that the Senator is somehow in control of the entire Republican Caucus. That is simply not correct. He does not control other individual Senators or their documents. His position as President Pro Tempore (PPT) is an institutional role – he was elected by the full Senate and serves both Democrats and Republicans. He is not the elected leader of the Republican Caucus; the Majority Leader is. In 2011, The Majority Leader was Dominic Pileggi (who is currently a state court judge in Delaware County).

#### **A. The PPT in the Pennsylvania Constitution**

The Pennsylvania Constitution specifically mentions the President Pro Tempore of the Senate in three sections:

- Article II, Section 9, Election of Officers: “The Senate shall, at the beginning and close of each regular session and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor, in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant. [...]”
- Article II, Section 17(b), Legislative Reapportionment Commission: “[...] No later than 60 days following the official reporting of the Federal decennial census as required by Federal law, the four members shall be certified by the President pro tempore of the Senate and the Speaker of the House of Representatives to the elections officer of the Commonwealth who under law shall have supervision over elections. [...]”
- Article IV, Section 14, Vacancy in office of Lieutenant Governor: “In case of the death, conviction on impeachment, failure to qualify or resignation of the Lieutenant Governor, or in case he should become Governor under section 13 of this article, the President pro tempore of the Senate shall become Lieutenant Governor for the remainder of the term. In case of the disability of the Lieutenant Governor, the powers, duties and emoluments of the office shall devolve upon the President pro tempore of the Senate until the disability is removed. Should there be no Lieutenant Governor, the President pro tempore of the Senate shall become Governor if a vacancy shall occur in the office of Governor and in case of the disability of the Governor, the powers, duties and emoluments of the office shall devolve upon the President pro tempore of the Senate until the disability is removed. His seat as Senator shall become vacant whenever he shall become Governor and shall be filled by election as any other vacancy in the Senate.”

None of these provisions establish that the Senator has unilateral control over all Senators and employees of the Republican Caucus.

**B. Rules of the Senate of Pennsylvania**

The Rules of the Senate set forth the duties and authority of the President Pro tempore:

- Rule 3 (2): The PPT must concur in the President's recess of the Senate in the event of extreme disturbance or emergency.
- Rule 4: The PPT is elected by the Senate at the beginning and close of each session and at other times as necessary, and shall perform the duties of the Lieutenant Governor in cases of absence or disability of the Lieutenant Governor, or when that office is vacant.
- Rule 5: The PPT must:
  - Appoint the Chair, Vice Chair and members of standing committees of the Senate.
  - Appoint members to special committees when authorized.
  - Fill vacancies on standing and special committees.
  - Refer every bill and joint resolution introduced in the Senate or received from the House to the appropriate standing committee.
  - Appoint and have under the PPT's direction such Senate employees as are authorized by law.
  - Vote last on all questions when occupying the Chair.
  - The PPT may name any Senator to preside in the absence of the President.
- Rule 6: The PPT provides direction to the Secretary-Parliamentarian of the Senate.
- Rule 7: The PPT provides direction to the Chief Clerk of the Senate.
- Rule 12: The PPT refers all prefiled measures to the appropriate standing committee within 14 days of convening of a First Regular Session. The PPT receives notice from the Secretary-Parliamentarian of the filing of all bills, joint resolutions, and resolutions. The PPT refers every bill, joint resolution and resolution introduced by a Senator or received from the House to the appropriate standing committee within 14 days.
- Rule 14: The PPT appoints members of the standing committees. The PPT is an ex-officio voting member of all standing committees and any subcommittees, but shall not be an ex-officio member of the Committee on Ethics and Official Conduct. The PPT must approve payment of reporting and transcription services of committee hearings if payment for such services is expected from a source other than committee funds.
- Rule 15: Upon the death of a committee chair, the vice chair of a committee shall perform the duties of chair until the PPT appoints a successor.

- Rule 19: The PPT appoints the three Senate members of a Conference Committee (two from the majority party and one from the minority party).
- Rule 21: The PPT determines which members of the press are admitted to the Senate Press Gallery, and authorizes photographers to take still photographs in the Senate.
- Rule 23: The PPT designates appropriations for funding the implementation and operation of the Senate broadcasting system. The PPT is prohibited from ordering, without the consent of the Senate, that any segment of a Floor session not be broadcast or recorded, or from editing any portion of a video or audio feed.
- Rule 29.1: The PPT may approve citation requests and sign citations on behalf of the Senate.
- Rule 34: The PPT appoints members of the Senate Committee on Ethics, and appoints the Chair and Vice Chair of the Committee.

The Senate Rules may only be dispensed with by a majority vote of the Senate, and may only be altered, changed or amended by resolution. In other words, the PPT is not authorized to unilaterally dispense with, or amend the Senate Rules. *See* Rule 25.

These Rules do not provide for Senator Scarnati's control over individual Senators or the Republican Caucus.

### **C. The Legislative Officers and Employes [sic] Law**

Article III, Section 17 of the Pennsylvania Constitution directs that the "General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House." In order to effectuate that constitutional language, the General Assembly has enacted the Legislative Officers and Employes Law, Act of Jan. 10, (1968) 1967, P.L. 925, No. 417.

Provisions relating to the PPT are addressed below:

- Section 1.1: The PPT is on and is chairman of the Senate Committee on Management Operations ("COMO"), which also includes the Majority Leader, the Minority Leader, the Majority Whip, the Minority Whip, the Chairman of the Appropriations Committee, the Minority Chairman of the Appropriations Committee, the Majority Caucus Administrator and the Minority Caucus Administrator.
- Section 2.1: COMO is authorized to adopt rules and regulations for uniform personnel policies and procedures, job classification and pay plans including periodic increments

for Senate employees and officers. Rules and regulations must be approved by the Senate. All actions of COMO require the approval of a majority of the Committee members present and voting.

- Section 2.2: The PPT shall select a staff administrator for the majority caucus, who shall administer the fiscal and personnel matters of the caucus in conjunction with the Chief Clerk.
- Section 2.3: The PPT, as well as the President, Majority Leader, Minority Leader, each Legislative Management Committee, the Appropriations Committee and the Minority Appropriations Committee and each other committee or officer to which funds may be authorized and appropriated for the hiring of staff, shall submit to the Chief Clerk a plan of organization for all employees under such committee's or officer's jurisdiction.
- Section 2.4: The Chief Clerk is chief fiscal officer for the Senate, and is responsible for the day-to-day financial functions of the Senate and such related duties as shall be assigned by the Pro temp or COMO.
- Section 2.5: The Secretary-Parliamentarian is responsible for the supervision of legislative affairs of the Senate and shall carry out the duties provided by law, the Senate Rules, or such other matters as may be assigned by the PPT.
- Section 2.6: The Chief Clerk of the House and the Chief Clerk of the Senate, with the concurrence of the Pro temp, may appoint joint employees of the House and Senate as deemed necessary to provide joint services, security and emergency medical care. They shall set the compensation of such employees with the concurrence of the PPT.
- Section 17: All employees appointed by the PPT shall be under the direction and control of the PPT. All other employees of the Senate shall be under the direction and control of the officer by whom they were appointed.
- Section 41: The PPT may direct any per diem employee of the Senate to report for duty at times when the Senate is not in session.
- Section 44: The PPT acting jointly with the Chief Clerk of the House shall appoint security officers.
- Section 46: The Pro temp may fill by appointment vacancies in the Senate elective officers or employees under the Act which occur during a recess of the Senate.
- Section 49.1: The Pro temp, along with the Senate Minority Leader, Speaker of the House, and Minority Leader in the House jointly determine the salary of the Director of the Legislative Reference Bureau.

Again, none of these provisions address who controls the computer systems used.

The Legislative Officers and Employees [sic] Law also provides as follows with respect to the caucus:



- Section 21.3: The Majority and principal Minority Party Caucuses shall each establish a Legislative Management Committee which shall be composed of the Floor Leader, who shall be chairman, and so many additional caucus members as may be determined by each caucus. Each such committee shall select a staff administrator who shall, under supervision of the committee, administer the fiscal and personnel affairs of the caucus and perform such other duties as may be assigned.
- Section 2.3. (a) The President, the President pro tempore, the Majority Leader, the Minority Leader, each Legislative Management Committee, the Appropriations Committee and the Minority Appropriations Committee and each other committee or officer to which funds may be authorized and appropriated for the hiring of staff shall submit to the Chief Clerk a plan of organization for all employees under such committee's or officer's jurisdiction and such modifications thereof as may be necessary from time to time. . . . (d) The Majority and Minority Leaders shall when they submit their respective plans of organization for employees under their jurisdiction include within such plan the employees for the officers of their respective caucuses. Such caucus officers shall be entitled to, and the plans submitted by the respective floor leaders shall include as a minimum, the same number of employees as were heretofore authorized to such caucus officers by this act whose authorized salaries shall not be less than the salaries authorized for those positions had the sections authorizing those appointments not been repealed. (emphasis added).

V. **CONCLUSION**

For the reasons set forth above, Senator Scarnati has fully complied with his discovery obligations in this matter. Although Senator Scarnati is the President Pro Tempore of the Pennsylvania Senate, he does not control the other Senators of his party in all facets of their legislative service.

Dated: December 6, 2017

Respectfully submitted,

**BLANK ROME LLP**

**HOLTZMAN VOGEL JOSEFIAK  
TORCHINSKY PLLC**

/s/ Brian S. Paszamant  
BRIAN S. PASZAMANT  
JASON A. SNYDERMAN  
JOHN P. WIXTED  
One Logan Square  
130 N. 18<sup>th</sup> Street  
Philadelphia, Pennsylvania 19103

/s/ Jason Torchinsky  
JASON TORCHINSKY (admitted *Pro Hac Vice*)  
SHAWN SHEEHY (admitted *Pro Hac Vice*)  
45 North Hill Drive, Suite 100  
Warrenton, Virginia 20186

Phone: 215-569-5791  
Facsimile: 215-832-5791  
Email: [Paszamant@blankrome.com](mailto:Paszamant@blankrome.com)  
[Snyderman@blankrome.com](mailto:Snyderman@blankrome.com)  
[JWixted@blankrome.com](mailto:JWixted@blankrome.com)

*Attorneys for Legislative Defendant  
Senator Joseph Scarnati, III*

Phone: 540-341-8808  
Facsimile: 540-341-8809  
Email: [JTorchinsky@hvjt.law](mailto:JTorchinsky@hvjt.law)  
[ssheehy@hvjt.law](mailto:ssheehy@hvjt.law)

*Attorneys for Legislative Defendants  
Senator Joseph Scarnati, III and  
Representative Michael Turzai*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 6, 2017, the foregoing was served upon the following Counsel of Record via the Court's ECF system:

Alice W. Ballard, Esquire  
Law Office of Alice W. Ballard, PC  
123 S. Broad Street, Suite 2135  
Philadelphia, Pennsylvania 19109  
*Attorneys for Plaintiffs*

Michael Persoon, Esquire  
Sean Morales-Doyle, Esquire  
Thomas H. Geoghegan, Esquire  
Despres Schwartz & Geoghegan, Ltd.  
77 W. Washington Street, Suite 711  
Chicago, Illinois 60602  
*Attorneys for Plaintiffs*

Brian A. Gordon, Esquire  
Gordon & Ashworth PC  
One Belmont Avenue, Suite 519  
Bala Cynwyd, Pennsylvania 19004  
*Attorneys for Plaintiffs*

Timothy E. Gates, Esquire  
Pennsylvania Department of State  
Office of Chief Counsel  
306 North Office Building  
Harrisburg, Pennsylvania 17120  
*Attorneys for Defendant, Pedro Cortes, Secretary of State of Pennsylvania*

Mark A. Aronchick, Esquire  
Claudia DePalma, Esquire  
Michele D. Hangle, Esquire  
Hangle Aronchick Segal & Pudlin  
One Logan Square, 27<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19103  
*Attorneys for Defendants, Thomas W. Wolf, Governor of Pennsylvania; Pedro A. Cortés, Secretary of State of Pennsylvania; and Jonathan M. Marks, Commissioner for the Bureau of Commissions, Elections, and Legislation, in their official capacities*

Gregory George Schwab, Esquire  
Governor's Office of General Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, Pennsylvania 17101  
*Attorneys for Defendant, Governor Thomas Wolf*

Dated: December 6, 2017

*/s/ Brian S. Paszamant*  
\_\_\_\_\_  
BRIAN S. PASZAMANT