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IN THE SUPREME COURT OF PENNSYLVANIA

No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

PETITIONERS' ANSWER TO LEGISLATIVE RESPONDENTS' APPLICATION FOR DISQUALIFICATION OF JUSTICE WECHT AND FOR FULL DISCLOSURE BY JUSTICE DONOHUE

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INTRODUCTION

Legislative Respondents will seemingly stop at nothing to hold on to the unconstitutional 2011 congressional map. They apparently will say anything, to any court, at any time, no matter how baseless or disingenuous. This time, they have selectively and deceptively excerpted comments of a Justice of this Court to impugn the integrity of both the Justice individually and this Court as a whole.

Legislative Respondents' pattern of desperation and deception is unmistakable. It started when Senator Scarnati frivolously removed this case to federal court, and he and Speaker Turzai are now accusing each other of lying to the federal court in connection with the removal.[1] Speaker Turzai and Senator Scarnati then falsely accused Petitioners of misconduct, only to withdraw the false accusation when Petitioners called out their deception.[2] And Legislative Respondents have taken diametrically opposite legal positions in this Court, the U.S. Supreme Court, and federal district courts—without ever informing any of those courts of the inconsistent positions they were taking.[3] Legislative

[1] Speaker Turzai's Resp. to Emergency Mot. to Withdraw Notice of Removal ¶¶ 2, 10, 11, 13, No. 17-cv-5137 (E.D. Pa. Nov. 16, 2017), ECF No. 21.

[2] *Compare* Legs. Resps.' Mot. *In Limine* to Exclude Certain Testimony by Jowei Chen, 261 MD 2017 (Dec. 10, 2017), *with* Legs. Resps.' Opp. to Pets.' Mot. *In Limine* to Admit Evidence Produced by Speaker Turzai in *Agre* Litigation and Properly Obtained by Pets., 261 MD 2017 (Dec. 11, 2017).

[3] *Compare* Leg. Resps.' Emergency Appl. for Stay, No. 17A795 (U.S. Jan. 26, 2018) (asserting that, under Elections Clause, state courts cannot review

Respondents' conduct in defending the 2011 map has been unbecoming of any litigant, much less of public officials sworn to uphold the public trust.

In their latest maneuver, Speaker Turzai and Senator Scarnati seek the extraordinary relief of disqualifying a Justice of this Court by waiting until after they lost and then egregiously misrepresenting the Justice's remarks to suggest non-existent impropriety. This latest gambit must be denied for two reasons.

First, Legislative Respondents waived any disqualification objection by waiting until *after* this Court entered judgment against them. The statements of which Legislative Respondents now complain have been publicly available on the Internet and indeed widely reported in the media since *2015*. Yet Legislative Respondents first sought disqualification 113 days after Petitioners asked this Court to exercise extraordinary jurisdiction, 85 days after this Court accepted jurisdiction, 53 days after the start of trial, and 11 days after this Court entered judgment. Pennsylvania law requires litigants to seek disqualification at the "earliest possible moment"—as soon as they knew *or should have known* of the purported basis. Even if Legislative Respondents did not actually know of Justice Wecht's statements earlier—and that is hard to believe—they unquestionably should have known because the statements are readily accessible online. And this

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legislature's congressional districting plan), *with* Leg. Resps.' Mot. to Intervene, Agre v. Wolf, No. 17-4392 (E.D. Pa. Oct. 2, 2017), ECF No. 45-2 (arguing that under "long-accepted and well-settled principles of abstention," federal courts are "required" to defer to state courts on congressional redistricting).

Court has expressed special concern about "the unconscionable and reprehensible tactic of laying in the grass, waiting until the decision and then raising the disqualification issue only if they los[e]." Yet Legislative Respondents waited until they lost to seek disqualification. This is exactly the kind of gamesmanship that the waiver doctrine is designed to prevent.

Second, there is nothing even remotely improper about what Justice Wecht said. Justice Wecht's remarks—which Legislative Respondents selectively and misleadingly excerpted—related to this Court's unique role under the Pennsylvania Constitution in appointing a member to the Legislative Reapportionment Commission that draws state legislative districts. There was nothing inappropriate about Justice Wecht describing the qualities he would consider in appointing a person to the Commission. Justice Wecht did not offer any view on the constitutionality of the congressional districts; to the contrary, he specifically said he did not know how he would rule if any given case regarding redistricting came before him. In these circumstances, his comments could not possibly be viewed as a "commit[ment]" to reach a "particular result or rule in a particular way in [a] proceeding or controversy." 207 Pa. Code Judicial Conduct Rule 2.11(A)(5).

"Partisan gerrymanders are incompatible with democratic principles." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015)

(alterations omitted). It is inconceivable to think that expressing such a widely shared sentiment as this one could somehow require judicial disqualification.

Indeed, the fact that Senator Scarnati and Speaker Turzai brought seek disqualification only now, after losing on the merits, suggests not any sudden discovery of statements that have been publicly available for years, but instead a nationally-driven campaign to preserve unconstitutional districts by attacking this Court as an institution—and now by attacking individual Justices. With the procedural bag of tricks nearly empty, Legislative Respondents appear to be coordinating with national groups on yet another strategy to undermine this Court.[4]

There is zero basis for Legislative Respondents' belated recusal request. It is procedurally barred, substantively baseless, and should be denied without delay.

ARGUMENT

I. Legislative Respondents Have Waived Their Disqualification Challenge

Speaker Turzai and Senator Scarnati have waived their request for disqualification as a matter of settled Pennsylvania law. "[T]he law is clear. In this Commonwealth, a party must seek recusal of a jurist at the earliest possible moment." *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017). This occurs when "the facts suggesting the disqualification were known or should have been known." *Goodheart v. Casey*, 565 A.2d 757, 764 (Pa. 1989). "If the party fails to present a

[4] *See, e.g.*, Amicus Brief for State of Arizona et al. in Support of Motion for Stay at 13-14, *In re Michael C. Turzai*, No. 17A795 (U.S.), *at* https://goo.gl/cPQaaY.

motion to recuse at that time, then the party's recusal is time-barred and waived." *Lomas*, 170 A.3d at 390; *see also Goodheart*, 565 A.2d at 763; *In re Lokuta*, 11 A.3d 427, 437 (Pa. 2011) (holding that litigant "waived" disqualification arguments by failing to raise them at "the earliest possible opportunity").

Pennsylvania courts are especially wary of disqualification motions brought *after* judgment has been entered. This Court has made clear that a litigant cannot "cho[o]se to remain silent, resorting to the unconscionable and reprehensible tactic of laying in the grass, waiting until the decision and then raising the disqualification issue only if they los[e]." *Goodheart*, 565 A.2d at 763; *see also Reilly by Reilly v. Se. Pa. Transp. Auth.*, 479 A.2d 973, 988 (Pa. 1984) (similar).

After a court has rendered judgment, "different considerations come into play" in considering a motion to disqualify. *Reilly by Reilly v. Se. Pa. Transp. Auth.*, 489 A.2d 1291, 1301 (Pa. 1985). As this Court explained in *Reilly*:

> Charges of prejudice or unfairness made after [judgment] expose the [court] to ridicule and litigants to uncertain collateral attack of adjudications upon which they have placed their reliance. One of the strengths of our system of justice is that once decisions are made by our tribunals, they are left undisturbed. Litigants are given their opportunity to present their cause and once that opportunity has passed, we are loathe to reopen the controversy for another airing, save for the greatest of need. This must be so for the security of the bench and the successful administration of justice.

Id.[5]

At a minimum, Speaker Turzai and Senator Scarnati "should have known" the facts underlying their disqualification application months ago. *See Goodheart*, 565 A.2d at 764. By October 12, 2017, when Petitioners asked this Court to exercise extraordinary jurisdiction, the statements by Justices Wecht and Donohue had long been part of the public record. Leg. Resps. Br. ("Br.") 17. Then-candidates Wecht and Donohue spoke frequently about the issues of legislative redistricting throughout their 2015 campaigns—it was a major election issue given this Court's role in appointing a member to the Legislative Reapportionment Commission.[6] *See* Pa. Const. Art. II, § 17(b). Even a casual observer of those elections would have known the Justices' views on the issue.[7] After the election,

[5] In addition to seeking disqualification, Legislative Respondents demand that this Court's Orders of November 9, 2017, January 22, 2018, and January 26, 2018 must be vacated. Their collateral attack on the final orders of this Court should not be tolerated, particularly when they failed to show that the purported basis for disqualification was unavailable in the exercise of due diligence or would have compelled a different outcome in this case. *Reilly*, 489 A.2d at 1302.

[6] *E.g.*, Chris Porter, *Seven Candidates in the Running for Three Pennsylvania Supreme Court Seats*, PITTSBURGH POST GAZETTE, Oct. 25, 2015 (noting that Justice Wecht was "often a fiery voice speaking on issues like gerrymandering"), http://goo.gl/eHMLTz; Nathan Kanuch, POLITICS PA, Jan. 26, 2015 ("[G]errymandering was deemed an 'abomination' by Judge Wecht."); *see also* Leg. Resps. Br. 6-12.

[7] *See, e.g.*, John Baer, *It's Time to Judge the Judges*, PHILADELPHIA DAILY NEWS, Oct. 14, 2015, http://goo.gl/5jrM6n; Patrick Kerkstra, *6 Reasons Why Tuesday's Pennsylvania Supreme Court Election is Absolutely Critical: The stakes? School*

news outlets from every corner of the Commonwealth described how the newly elected Justices could affect legislative redistricting. Indeed, even if Speaker Turzai and Senator Scarnati had paid no attention to the 2015 Pennsylvania Supreme Court elections at the time, they would have quickly and easily found the Justices' public statements had they done any research.

Legislative Respondents assert, without citation to any affidavit or verification, that they did not in fact learn of the statements until "after January 17, 2018," when they purportedly decided to "investigate" Justice Wecht after his "adversarial tone and questioning" at oral argument. Br. 16-17. This assertion is entirely inadequate under the Pennsylvania Rules to demonstrate timeliness of the application to disqualify. Pennsylvania Rule of Appellate Procedure 123 requires that "[a]n application . . . which sets forth facts which do not already appear of record *shall* be verified by some person having knowledge of the facts." Pa. R.A.P. 123(c) (emphasis added). Legislative Respondents have provided no verification explaining when they first learned of the statements.

Their failure to do so is telling because Legislative Respondents did submit an affidavit with their application, but that affidavit noticeably does not attest that Legislative Respondents first learned of the facts underlying their application after

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Funding. Gun control. Redistricting. And so much more., PHILADELPHIA MAGAZINE, Oct. 30, 2015, http://goo.gl/VYEU4y.

January 17, 2018. Instead, the affidavit, from a "Senior Litigation Support Coordinator at BakerHostetler," states only that this affiant accessed and copied certain web pages on January 31, 2018 and February 2, 2018. The affidavit says nothing about when Legislative Respondents or their counsel first became aware of these web pages, or when they first became aware of Justice Wecht's statements. The fact that Legislative Respondents failed to provide the required verification belies the unsworn claim in their brief that they did not know about the statements until "after January 17, 2018."

In any event, even if Legislative Respondents somehow did not know anything until last month, they clearly *should have known* of the statements and the Justices' views on legislative redistricting, which were widely reported in Pennsylvania media during the 2015 election, well before the January 17, 2018 oral argument in this case. Because Legislative Respondents did not raise their disqualification challenge at the "earliest possible time," the challenge is waived.[8]

[8] This Court should be troubled by Legislative Respondents' clear disregard for settled principles of finality and their palpable disrespect for this Court as a co-equal branch of government with ultimate authority to say what the law is. Just days after Senator Scarnati defied this Court's January 26, 2018 Order on the ground that he views the Court's order as "unconstitutional," Legislative Respondents filed this application. Aside from impugning two Justices in particular, the application accuses all five justices in the majority of "overrul[ing] Judge Brobson's thoughtful and well-reasoned decision" "along partisan lines." Br. 14. It is a sad day when any litigant engages in such smear tactics against judicial officers. It is especially sad when the Speaker of the Pennsylvania House of Representatives and the Pennsylvania Senate President Pro Tempore attempt to

II. Legislative Respondents' Disqualification Challenge Has No Merit

Beyond their obvious untimeliness, Legislative Respondents' accusations of bias have no merit. "The party who asserts [that] a . . . judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal." *Commonwealth v. Druce*, 848 A.2d 104, 108 (Pa. 2004). The Pennsylvania Code of Judicial Conduct "creates no right of recusal on behalf of litigants, but merely prescribes standards by which judges should exercise their discretion in ruling upon questions of recusal." *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999). "The ultimate decision is vested within the sound discretion of the jurist whose recusal is sought." *Id.* Legislative Respondents come nowhere close to meeting their heavy burden here.

A. Judicial Candidates May Comment on Political and Legal Issues

Like many states today, Pennsylvania selects its judges through elections. In Pennsylvania, those elections are partisan, with candidates running as Democrats or Republicans. As in any partisan election, candidates for judicial office in Pennsylvania often receive questions from the media and voters on a range of political and legal issues, such as abortion, gun control, and criminal justice

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delegitimize this Court in the eyes of the public. *See, e.g.*, Press Release, *Scarnati Issues Statement on PA Supreme Court Justices Wecht & Donohue*, Feb. 2, 2018, http://goo.gl/TEUE4Z. "Adverse rulings alone do not, however establish the requisite bias warranting recusal, especially where the rulings are legally proper." *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 90 (Pa. 1998).

reform. And sometimes candidates get questions related to the integrity of elections, from campaign finance reform to voter identification to redistricting.

The point of judicial elections is to provide voters with an opportunity to hear from candidates about their views on issues. The Pennsylvania Code of Judicial Conduct accordingly allows judicial candidates to express their views on disputed legal and political issues. Rule 4.1(A)(12) prohibits candidates only from making "pledges, promises, or commitments" in connection with "cases, controversies, or issues that are likely to come before the court." 207 Pa. Code Judicial Conduct Rule 4.1(A)(12). The comments to this rule observe that it imposes "narrowly tailored" restrictions on political and campaign activities, and specifically states that "announcements of personal views on legal, political, or other issues . . . *are not prohibited*." *Id.* Comments 1, 9 (emphasis added).

Not only does the Pennsylvania Code of Judicial Conduct protect judicial candidates' right to express their views on legal and policy issues, but fundamental principles of free expression do as well. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002), the U.S. Supreme Court struck down a Minnesota rule of judicial conduct that prohibited any judicial candidate from "announc[ing] his or her views on disputed legal or political issues." *Id.* at 768. The state defended the rule on the ground that it promoted "impartiality," but the Court disagreed. The "root meaning" and "traditional sense" of impartiality, the

Court explained, is the lack of bias "for or against either *party* to the proceeding." *Id.* at 776. Because Minnesota's rule went further by restricting not only speech "for or against particular parties" but also "speech for or against particular issues," the rule violated the First Amendment. *Id.* at 776-77. Here, as shown below, Justice Wecht's comments did not relate in any way to a party or proceeding, but rather to an issue for which the Pennsylvania Supreme Court maintains unique responsibility under Pennsylvania's constitutional structure.

B. Justice Wecht's Comments Suggest No Partiality or Bias

Justice Wecht's comments were entirely appropriate, consistent with the Pennsylvania Rules, and provide no basis for recusal. Legislative Respondents suggest some impropriety only by grossly misrepresenting those comments.

Justice Wecht's comments were clearly aimed at this Court's role, under the Pennsylvania Constitution, in appointing the fifth member of the Legislative Reapportionment Commission that draws state legislative districts. Legislative Respondents' application misleadingly removes this critical context in excerpting the comments. Below are the full passages of several of the statements at issue; the passages in bold are those that Legislative Respondents crop out:

> Let me be very clear: Gerrymandering is an absolute abomination. It is a travesty. It is deeply wrong. The Supreme Court has a critical role to play. **The Supreme Court appoints the fifth member and exists at the end of the process to determine the constitutionality**

and lawfulness of these districts. These districts have been drawn to disenfranchise the majority of Pennsylvanians.[9]

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Stop this insane gerrymandering. **The Supreme Court appoints the fifth member of the reapportionment commission that convenes every ten years after the decennial [census], in order to redraw the lines**. And we are one of the most gerrymandered states in the nation. And people who are disenfranchised by this gerrymandering abomination eventually lose faith and grow more apathetic, why, because their voting power has been vastly diluted and they tend to figure "well, I can't make a difference, I'll just stay home."[10]

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The particular maps that will evolve in the future, are, number one, beyond my ken, and number two, not something about which I could opine. But I can tell you that extreme gerrymandering is an abomination, and antithetical to the concept of one person, one vote. **The constitution contemplates that legislative districts are to be contiguous and compact and generally not to fracture municipalities or neighborhoods; and the deliberate disenfranchisement of people, the deliberate disenfranchisement of one party or the other for political reasons is deeply problematic. It is not the role of the court to draw legislative districts in a partisan fashion, but it is the role of the court to appoint the fifth member, the tie-breaker member, to the commission, that will be set up after the 2020 census, and it then will be the job of that 5 member commission to draw the state legislative maps, and the Supreme Court of course will rule on any challenges to those maps, and it is my hope and I'm sure the hope of the other justices to see districts that comport with our**

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[9] Spring 2015 Judge Candidate Forum, Neighborhood Networks and MoveOn Philly, *at* https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be, at 18:00-29.

[10] LNP Editorial Board, Our Choices for State Supreme Court in Tuesday's Election, Lancaster Online, *at* http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html ("LNP Interview"), at 36:02-15.

constitution and that do not violate the principle of one person one vote.[11]

On their face, these remarks unambiguously related to this Court's role in appointing a member to the Legislative Reapportionment Commission, which is responsible for drawing state legislative districts, not congressional districts. Legislative Respondents' intentional omission of the express text that is contrary to their interpretation is indefensible.

Legislative Respondents also omit statements where Justice Wecht explicitly stated that he would not pre-judge any case that might come before this Court. In the same video from which Legislative Respondents take excerpts, Justice Wecht stated: "I can't tell you what the map would be, and it's not for me to say, and *I don't know how I would rule on any given matter*."[12] Justice Wecht also said that "[t]he particular maps that will evolve in the future, are, number one, beyond my ken, and number two, *not something about which I could opine.*"[13] Elsewhere he noted: "I don't have a judicial philosophy on drawing legislative districts. What I have is a fidelity to the constitution and the precedents of our courts that have

[11] Sean Ray, *Newly Elected Judge David Wecht on His Plans for the State Supreme Court*, 90.5 WESA FM, *at* http://wesa.fm/post/newly-elected-judge-david-wecht-his-plans-state-supreme-court#stream/0 ("WESA Interview"), at 32:17-34:00.

[12] LNP Interview at 39:58-40:14.

[13] WESA Interview at 32:17-34:00 (emphasis added).

interpreted our constitution, including the principle, above all, of one person, one vote."[14]

Thus, Legislative Respondents' assertion that Justice Wecht made a "promise" regarding a substantive issue that would come before the Court is simply false. Indeed, when Justice Wecht made the comments in question, there was no case or controversy regarding gerrymandering pending at all in the Pennsylvania courts. And the comments were generalized statements supported by existing law. *See, e.g.*, *Ariz. State Legis.*, 135 S. Ct. at 2658. Legislative Respondents have provided no quotation or other evidence that Justice Wecht ever stated how he would rule in this or any other redistricting challenge. Instead, it is clear that his comments were directed at the Pennsylvania Supreme Court's unique role in appointing a member to the Legislative Reapportionment Commission.[15]

C. Justice Donohue's Comments Do Not Warrant Additional Disclosures

Legislative Respondents do not seek to disqualify Justice Donohue, but request that she "disclose all information she believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification." Br.

[14] LNP Interview at 38:23.

[15] Legislative Respondents contend that the making of these statements at a forum hosted by the League of Women Voters of Pennsylvania somehow "makes matters worst." Br. 1. That is nonsense. The League's mission is to help educate voters about government issues and candidates, and the League routinely hosts forums with candidates from both parties. *See* https://www.palwv.org/about-us.

3. While the decision whether to make any disclosures is ultimately Justice Donohue's alone, the two statements referenced by Legislative Respondents do not violate any Pennsylvania rule or suggest grounds for any further disclosures.

In the first statement, Justice Donohue noted that gerrymandering "disenfranchises the people," Br. Ex. 10, a fact that is unequivocally true and has been recognized as such by the U.S. Supreme Court. *See, e.g.*, *Ariz. State Legis.*, 135 S. Ct. at 2658; *id.* at 2677 (In passing an initiative to "curb the practice of gerrymandering," Arizona voters "sought to restore the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." (quotations omitted)). In the second statement, Justice Donohue, like Justice Wecht, was clearly discussing gerrymandering in the context of *state legislative* redistricting and this Court's role in appointing the fifth member of the Legislative Reapportionment Commission. Br. Ex. 4.

Neither of these statements "raise doubts about [Justice Donohue's] impartiality in this matter." Br. 15. Indeed, Justice Donohue has been scrupulous in disclosing even the most remote potential conflicts of interest. *See* Notice of Disclosure of Justice Christine Donohue, 159 MM 2017 (Pa. Jan. 11, 2018) (disclosing that one of the attorneys for Lieutenant Governor Stack served as an intern in her chambers during law school). Despite the fact that Justice Donohue stated that she would "of course [be] willing to consider any timely" motion for

disqualification, *id.*, Legislative Respondents took no action until after they lost, despite these statements having been publicly available for years. There is no basis for additional disclosures on behalf of Justice Donohue.

CONCLUSION

For the foregoing reasons, this Court should deny the application for disqualification and for full disclosure.

Dated: February 5, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Record of the Appellate and Trial Courts that require filing confidential information and documents differently than confidential information and documents.

I certify that this Answer does not contain confidential information.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: February 5, 2018