

IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

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DOCKET NO. 159 MM 2017

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LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,  
Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,  
Respondents.

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**ANSWER OF RESPONDENT, LT. GOVERNOR MICHAEL J. STACK, III  
TO APPLICATION FOR DISQUALIFICATION OF JUSTICE DAVID  
WECHT AND FOR FULL DISCLOSURE BY JUSTICE CHRISTINE  
DONOHUE**

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Clifford B. Levine  
Pa. Id. No. 33507  
Alex M. Lacey  
Pa. Id. No. 313538  
Alice B. Mitinger  
Pa. Id. No. 56781  
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*On behalf of Respondent Michael J.  
Stack III, in his Capacity as Lieutenant  
Governor of Pennsylvania and President  
of the Pennsylvania Senate*

## **I. INTRODUCTION**

With its majority decision, this Court has held that the 2011 Plan “plainly, clearly and palpably” violates the Pennsylvania Constitution. All parties, including the Legislative Respondents, exhaustively briefed the issues associated with a constitutional challenge to the gerrymandered congressional map, which was created with obvious partisan intent. This Court conducted an extraordinary session for oral argument, which lasted for over three hours, and thoroughly discussed the issues involved in the challenge. Now, after the Court has rendered its decision, the Legislative Respondents seek disqualification of Justice David Wecht and “full disclosure” from Justice Christine Donohue. Their demand is untimely and should be summarily dismissed. It impugns the integrity not just of the two targeted Justices, but of this entire Court.

With their less than credible claims of newly discovered information about the two Justices, the Legislative Respondents obfuscate this Court’s unique responsibility, as established in the Pennsylvania Constitution, to select the fifth member of the constitutionally-mandated Legislative Reapportionment Commission (the “Commission”). The Legislative Respondents cite incomplete quotations from Justices Wecht and Donohue, from which they have removed any contextual references to that Commission. Their apparent intent is to create a basis for challenging any Justice who has participated in public elections, as the

Pennsylvania Constitution mandates for all Justices. The Application of the Legislative Respondents must be rejected.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Constitutional Considerations Regarding Redistricting Play A Significant Role in Pennsylvania's Judicial Elections**

In 2015, the citizens of Pennsylvania elected Justices David Wecht, Christine Donohue and Kevin Dougherty to the Pennsylvania Supreme Court. The Pennsylvania Constitution provides for partisan elections of Pennsylvania Supreme Court Justices. Pa. Const. art. V, § 13. These three Justices ran against three Republican candidates and one independent candidate. Pennsylvania's Code of Judicial Conduct permits judicial candidates to campaign and comment on issues generally. *See* Code of Judicial Conduct, *generally*; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

In addition to its judicial function set forth in the Pennsylvania Constitution (*see* art. V, *generally*), the Pennsylvania Supreme Court performs a unique, non-judicial role. Every ten years, it must select the fifth member of the Pennsylvania Reapportionment Commission, which is otherwise evenly divided between

Democratic and Republican leaders from the Pennsylvania House and Senate. Pa. Const. art. II, § 17.<sup>1</sup>

Since its creation with the Pennsylvania Constitution of 1968, the Commission has executed a fundamental and distinctive power of the Commonwealth. Every ten years it must redraw the boundaries of the legislative districts of the Pennsylvania State Senate and the Pennsylvania House of Representatives to reflect population changes. *Id.* In *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 734-36 (Pa. 2011), this Court explained that the 1968 Pennsylvania Constitutional Convention chose to adopt a new method for the decennial redrawing of state legislative districts: redistricting for the General Assembly would be undertaken by the Commission, which would include a “neutral” fifth member, typically serving as the Chair. The Court characterized the Commission as a “hybrid body” and distinguished the Court’s role in selecting the “tie-breaking” member and its potential role in adjudicating any appeal from the determination of the Commission. The Court noted that the Court had a judicial role “if, and only if, a citizen or citizens file an appeal from the Final Plan.” *Id.* at 736, *citing* Pa. Const. art. II, § 17 (d)-(e).

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<sup>1</sup> The other four members of the Commission may agree on a Chair among themselves, without the Pennsylvania Supreme Court’s appointment. Pa. Const. art. II, § 17. However, since the promulgation of the 1968 Pennsylvania Constitution, this Court has selected the Chair for all reapportionments, except the 1981 reapportionment.

The *Holt* decision represented the first time since the creation of the Commission format in which this Court reversed the Final Plans that the Commission developed for both the House and Senate. This sparked additional litigation in both the federal and state courts,<sup>2</sup> and general public awareness as to the impact the chair could have in the process and the recognition that a final plan must adhere to constitutional standards.

**B. Legislative Respondents And Their Counsel Are Well Versed In The Redistricting Process, Generally, And Are, Specifically, Well Aware Of The Supreme Court’s Role In That Process**

Respondents Turzai and Scarnati have held their senior positions in Pennsylvania government and the Pennsylvania Republican Party since before 2015 and continue in those roles today. Their counsel, Kathleen Gallagher and Brian Paszamant, represented the Republican leaders in the *Holt* litigation and in the associated federal cases regarding the 2011 reapportionment of Pennsylvania’s state districts.<sup>3</sup>

**C. As Candidates, The Now Elected Supreme Court Justices Have Made Appropriate Comments About The Redistricting Process**

In the 2015 judicial elections, then-candidates Wecht and Donohue, spoke about how gerrymandering is problematic, but preventable, with the selection of an

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<sup>2</sup> See *Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211 (Pa. 2013) (“*Holt II*”); *Pileggi v. Aichele*, 843 F. Supp.2d 584 (E.D. Pa. 2012).

<sup>3</sup> Respondent Turzai served on the 2011 Commission and was a party in the ensuing litigation.

appropriate Chair for the Commission. *Their comments were made specifically in the context of the Pennsylvania Supreme Court's non-judicial role of appointing the Chair, and deciding vote, of the Commission.*

The Legislative Respondents point to several comments that Justice Wecht made during the campaign but failed to provide full quotations that demonstrate the context in which the comments were made. The Legislative Respondents obviously understand the Court's unique function with respect to the Commission, because they consistently omitted any reference to the Commission that would provide a context for the then-candidate's remarks, leaving misleading fragments of what the candidates actually said. Justice Wecht's quotations, including his references to the Pennsylvania Supreme Court's duty to appoint the fifth member of the Commission, are provided below, as highlighted to indicate the Legislative Respondents' blatant and obviously deliberate omissions:

- 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.*  
...
- 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." . . .

- ***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. . .***
- Ok, so least – in 2014, I believe, there were at least more than 200,000 votes for Democratic candidates for U.S. Congress than Republicans and yet we elected 13 Republicans and 5 Democrats, and there are more than 1,000,000 more Democrats... I'm not trying to be partisan, but I have to answer your question, frankly--. We have more than a million more democrats in Pennsylvania, we have a state senate and state house that are overwhelmingly Republican. You cannot explain this without partisan gerrymandering. So I don't have a philosophy other than fidelity to our Constitution, and fidelity to our Constitution does not include drawing lines down the middle of streets or separating neighbors from one another. It doesn't include carving up municipalities. Our Constitution and its jurisprudence say that we are not supposed to divide up municipalities except where absolutely necessary, we are supposed to have compact and contiguous, compact and contiguous districts. And I challenge anybody to look at the map of our districts and deem them to be compact and contiguous. Right nearby here, by way of just one example, Montgomery County, a county or two over here, is represented in pieces by I think 5 different members of Congress. That's unbelievable. So I don't know and 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 map. But I can tell you the Constitution says 'one person, one vote,' and it does not allow for unconstitutional gerrymandering. ***So it is a political process, but it's incumbent on the court and therefore incumbent on the majority vote of the court to appoint a fifth member of that commission who will not allow a lot of partisan nonsense and who will draw maps that will be faithful to our constitution and that will not dilute the vote of any voters in Pennsylvania. Everybody deserves a fair shot at the ballot box.***

(Respondents' Brief 6-7, with completed quotations in emphasis).<sup>4</sup>

Similarly, the Legislative Respondents failed to cite the full contextual references to the Commission in their selective quotation of Justice Donohue. For instance, when Justice Donohue said that gerrymandering will come to an end, it was in the context of a discussion about the Court's role with respect to the Reapportionment Commission. (App. at 15).<sup>5</sup>

All of the quotations from Justices Wecht and Donohue that the Legislative Respondents reference have been publicly available since 2015.

Like Justices Wecht and Donohue in the 2015 judicial election, in the most recent 2017 election for Pennsylvania Supreme Court Justice, Justice Mundy,

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<sup>4</sup> See Spring 2015 Judicial Candidate Forum, Neighborhood Networks and MoveOn Philly, <https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be> (last accessed Feb. 4, 2018); Getting to Know the Candidates for State Supreme Court, Lancaster Online, [http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article\\_65c426d4-6d45-11e5-b74f-6babb36c03bb.html](http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html) (last accessed Feb. 4, 2018); Newly Elected Judge David Wecht on His Plans for the State Supreme Court, <http://wesa.fm/post/newly-elected-judge-david-wecht-his-plans-state-supreme-court#stream/0> (last accessed Feb. 4, 2018).

<sup>5</sup> Again, Legislative Respondents omitted the following: "Wecht and Donohue explained how the Pennsylvania Supreme Court appoints the fifth and final member of the Legislative Reapportionment Commission, the group that draws the district lines, if the leaders of the state House and Senate can't agree on a selection."



responded to questions about the redistricting process.<sup>6</sup> At a forum that the League of Women Voters sponsored for the judicial candidates, Justice Mundy:

stressed that the Supreme Court’s role in redistricting and therefore gerrymandering, is quite limited. In addition to the possibility of appointing the redistricting commission chair, she noted that the Supreme Court reviews any constitutional challenge to the plan, but again stressed that the Supreme Court has no ability to order a particular districting plan or draw one itself.

See Supreme Court Candidates Forum: Summary of the Q and A, Pennsylvania Appellate Advocate, <https://paablog.com/supreme-court-candidates-forum-summary-of-the-q-a/> (last accessed Feb. 4, 2018). The forum at which she made these comments was held on October 25, 2017, while this case was pending before this Court.<sup>7</sup>

**D. Legislative Respondents Raise Their Challenge Against Justices Wecht And Donohue For The First Time After The Court’s Adverse Ruling, Months After The Current Action Was Filed And Years After The 2015 Judicial Election**

Petitioners brought this matter in the Commonwealth Court’s original jurisdiction on June 15, 2017. On October 11, 2017, Petitioners sought

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<sup>6</sup> During the campaign, Justice Mundy continued to serve as an appointed Justice on the Supreme Court. Justice Mundy’s campaign also received a \$25,000 campaign contribution from “Friends of Joe Scarnati” during her 2017 campaign. See 2nd Friday Pre-Primary Campaign Finance Report of Friends of Sallie Mundy, at 5, available at <http://www.campaignfinanceonline.pa.gov>.

<sup>7</sup> Petitioners filed the Application for Extraordinary Relief on October 11, 2017. This Court ruled on that Emergency Application on November 9, 2017.

extraordinary relief before this Court, which the Court granted on November 9, 2017. The Legislative Respondents did not raise any concerns about the conduct of Justice Wecht or Justice Donohue in the 2015 judicial elections, despite repeated opportunities to do so:

- After October 11, 2017 when the Pennsylvania Supreme Court considered that original application;
- Between the November 9, 2017 grant of extraordinary relief and the beginning of the hearing before Judge Brobson on December 11, 2017;
- After the hearing of Judge Brobson ended on December 15, 2017;
- When Judge Brobson transmitted his Proposed Findings of Fact and Conclusions of Law on December 29, 2017;
- When this Court set a briefing schedule and scheduled oral argument on December 29, 2017;
- When this Court heard oral argument on January 17, 2018;
- When this Court issued a judgment on January 22, 2018; and
- When this Court denied a request for reconsideration of that judgment on January 25, 2018.

The Legislative Respondents first insinuated judicial bias in their January 26, 2018 emergency stay request to the United States Supreme Court, where they implied that a Pennsylvania AFL-CIO amicus brief may have impermissibly swayed Justices Wecht, Donohue and Dougherty. See Emergency Application for

Stay Pending Resolution of Appeal of Legislative Respondents, pp.5-6 n. 1, filed in the United States Supreme Court on January 26, 2018.

Only now, nearly five months after this Court first reviewed this case, and after it rendered its decision, do the Legislative Respondents seek disqualification of only two Justices – based on comments made during the 2015 judicial elections, and without reference to the 2017 judicial elections or the propriety of judicial candidates addressing the Supreme Court’s role in the redistricting process.

### **ARGUMENT**

#### **A. Legislative Respondents’ Failure To Raise Their Putative Claim Of Bias Until Now, After The Court’s Order, Precludes The Relief They Demand.**

This Court has recently confirmed the clear Pennsylvania law on the timeliness requirements of a request for recusal or disqualification:

In this Commonwealth, a party must seek recusal of a jurist at the earliest possible moment, *i.e.*, when the party knows of the facts that form the basis for a motion to recuse. If the party fails to present a motion to recuse at that time, then the party’s recusal issue is time-barred and waived.

*Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017). Beyond actual knowledge, a party must also demonstrate that the evidence of possible bias “could not have been brought to the attention of the trial court in the exercise of due diligence.”

*Reilly by Reilly v. Southeastern Pennsylvania Transp. Auth.*, 489 A.2d 1291, 1301 (Pa. 1985). It is undisputed that the information the Legislative Respondents bring

to the Court’s attention now, after the Court has issued a definitive order, was publicly available throughout the pendency of this matter.

The Legislative Respondents acknowledge the applicable standard, as set forth in *Lomas*, in their Application (App. At 16). Yet, they argue that they should be able to rely upon publicly available information in their post-decision recusal request because: 1) this case was expedited;<sup>8</sup> and 2) they were somehow “unaware” that judicial candidates discussed redistricting in the 2015 judicial election campaign. (*Id.* at 16-17). The Legislative Respondents are unable to cite any case to support their untenable position that they should be able to use publicly available information from more than two years ago in now seeking recusal. Their demand here is particularly egregious where:

- The Legislative Respondents admit that their basis for recusal is public information that has been available since 2015. A single paralegal pulled the information in, at most two days. (Aff. ¶¶ 1-11).
- The Legislative Respondents are sophisticated Pennsylvania constitutional officers and the highest elected Republican Party members in the Commonwealth. They are expected to be aware of publicly available information about a campaign<sup>9</sup>

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<sup>8</sup> The Legislative Respondents set the beginning of the matter before the Supreme Court on November 9, 2017, despite the fact that this Court received Petitioners’ Emergency Application on October 11, 2017.

<sup>9</sup> Respondent Turzai was obviously interested in the 2015 Pennsylvania Supreme Court elections. The Mike Turzai Leadership Fund donated \$45,000 to a Republican Candidate, Judge Judith Olson, in that race. *See* PA Supreme Court

involving nearly half of the Pennsylvania Supreme Court's seats;

- Counsel for the Legislative Respondents have previously litigated redistricting cases, including cases involving decisions of the Legislative Reapportionment Commission, and represent some of the largest, best resourced firms in the United States. For these lawyers to argue that they were both unaware of comments the current Justices made during the 2015 judicial election and failed to find those comments until after oral argument simply lacks any shred of credibility; and
- The Legislative Respondents must simultaneously argue that: (1) “tough questioning” at oral argument motivated them to review the Justices’ previous comments on redistricting; and (2) that the Court’s rare grant of extraordinary relief and continuing jurisdiction, on November 9, 2017, never motivated them to review the Justices’ previous comments on redistricting.

The Legislative Respondents never raised any issues regarding commentary in the 2015 judicial elections until well after they received a judgment they did not like. Just as in *Lomas*, the Legislative Respondents were aware of “all of the facts underlying the recusal issue” before this Court considered this case. 170 A.3d at 391. This sudden effort to self-select a reduced and potentially more favorable Court, only after the Court rendered its decision, inappropriately frustrates the role of the judiciary and implicates the very integrity of this Court as a respected

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Voter Guide, Public Source, <https://www.publicsource.org/wp-content/uploads/2015/11/PA-Supreme-Court-2015-Voters-Guide.html> (last accessed Feb. 4, 2018).

judicial body. For these compelling reasons, this Court should apply its *Lomas* decision and rule that the Legislative Respondents' claims as to Justices Wecht and Donohue have been waived.<sup>10</sup> This Court simply should not afford the Legislative Respondents the relief they demand.

**B. Even If The Application Is Not Time-Barred, The Relief The Legislative Respondents Demand Is Inappropriate Because Judicial Candidates Can Properly Comment About The Reapportionment Commission In The Context Of Judicial Elections**

Justices of the Pennsylvania Supreme Court are elected on partisan ballots. Pa. Const. art. V, § 13. The United States Supreme Court has held that it is appropriate for judicial candidates to make comments on issues of importance during their campaigns. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). Indeed, Justice Scalia noted, it is not only appropriate, but beneficial:

Moreover the notion that the special context of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of

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<sup>10</sup> The Legislative Respondents should also be barred from seeking recusal on equitable grounds. As described in Section B, *infra*, nothing Justices Wecht or Donohue said during the 2015 judicial election warrants recusal. However, assuming, *arguendo*, that this Court held that any of that speech was problematic on a timely motion for recusal, other parties would have contemplated filing a recusal motion for Justice Mundy who, during the pendency of this actual case before this Court, commented on the limited powers of the Pennsylvania Supreme Court to address gerrymandering. *See* page 8 n. 6, *supra*. Respondent Stack does not believe that either Justice Mundy or those Justices who the Legislative Respondents have now suddenly attacked have any need to recuse themselves. A timely recusal motion, however, would have addressed these issues as to all parties if this Court somehow disagreed.

candidates is at the court of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of public importance.

*Id.* at 781-82 (emphasis in the original) (internal citations omitted). Here, in the instances that the Legislative Respondents selectively quote, then-candidates Wecht and Donohue were speaking about gerrymandering, generally, *in the context of how they would perform the non-judicial duty of a Justice of the Pennsylvania Supreme Court: the selection of the Chair of the Legislative Reapportionment Commission.*

As part of its Main Brief, the Legislative Respondents presented this Court with an argument that in Pennsylvania, built-in protections against partisan gerrymandering are in place. Main Brief of Legislative Respondents, January 10, 2018, at 57-58. Among those protections was the recognition that “the General Assembly’s districts are not drawn by a majority of the legislature, but by an equally divided bi-partisan Commission; this is therefore not a case of representatives holding gerrymandered seats who, in turn, gerrymander the Congressional districts.”<sup>11</sup>

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<sup>11</sup> The Legislative Respondents’ reference to the equally divided bi-partisan Commission is not entirely accurate. The four caucus heads constitute the equally divided bi-partisan members and this Court has the responsibility of appointing the fifth member, if the four caucus heads do not agree to a fifth member.

That assurance, of course, rings hollow if the fifth member of the Commission is unwilling to check the creation of partisan gerrymandered State House and State Senate districts. Where that occurs, there is no check on a state legislature that designs a highly partisan gerrymandered congressional map, like the 2011 Plan. Thus, it is entirely appropriate for a candidate for a position on this Court to inform the public of the significance of the Commission and the need to provide the very check that the Legislative Respondents emphasized to this Court.

This Court should not construe the Pennsylvania Constitution or laws in the manner the Legislative Respondents suggest. 1 Pa. C.S. § 1922. Justices Wecht and Donohue had the right, if not the obligation, to inform the citizens of Pennsylvania how they would address state redistricting as one of their required duties; separate and apart from their duty to review challenges to federal or state maps. *See Holt*, 38 A.3d at 736. A conclusion that the Pennsylvania Code of Judicial Conduct, or any other legal obligation, would necessarily render the citizenry's choice on that factor incapable of adjudicating *any* cases related to redistricting would be an absurd.

Further, the Pennsylvania Code of Judicial Conduct has only limited restrictions on campaigning statements. Judicial candidates cannot make statements expected to affect the outcome or impair the fairness of a matter *pending* in any court. Code 4.1(a)(10). In connection with issues that are likely to



come before the court, judicial candidates are not to “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Code 4.1(A)(12). The general comments to this section indicates that this rule is to be “narrowly tailored” so as not to overly restrict the “political and campaign activities of all judges and judicial candidates.” Respondents have not identified any “pledges, promises, or commitments” in their demand for recusal here.

Pennsylvania courts have been well able to enforce this “narrow tailoring,” and have been willing to let non-recusal decisions stand, even with a violation of the Code of Judicial Conduct. *See, e.g., Commonwealth v. Druce*, 848 A.2d 104, 106 (Pa. 2004) (upholding decision to not recuse despite the judge conducting interview with Associated Press expressing opinions about criminal defendant.). Further, nationwide, courts have recognized the right of judicial candidates to discuss issues generally. *See, e.g., In re Commitment of Winkle*, 434 S.W.3d 300, 310 (Tx. Ct. App. 2014) (recusal not required in a civil commitment of sexual predator case where judge had campaigned on slogan “A PROSECUTOR TO JUDGE THE PREDATORS.”); *Grievance Adm’r v. Fleger*, 719 N.W.2d 123, 146-47 (Mich. 2006) (campaign statements by state supreme court justices during 2000 campaign about head of state Democratic party did not require recusal in that individual’s attorney disciplinary action years later, noting natural adversarial

nature of elections); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 581 (5th Cir. 2005) (judge’s reference to party’s “campaign of terror” did not require recusal); *People v. Buck*, 838 N.E. 2d 187, 195 (Ill. Ct. App. 2005) (judge was not required to recuse himself in cop-killer case when he had indicated, years earlier, that he believed that the death penalty was an appropriate punishment for the killing of police officers); *Nevius v. Warden, Nevada State Prison*, 944 P.2d 858, 859 (Nev. 1997) (noting that “reasonable latitude must be given” to judges while campaigning and holding that recusal was not required in death penalty case when judge noted during his election that he had voted to uphold the death penalty 76 times while a member of the legislature).

No one in a civil society can reasonably deny that sexual predators and cop-killers are depraved. In the same way, no one can legitimately deny that partisan gerrymandering is harmful. Justice Alito of the United States Supreme Court recently called gerrymandering “distasteful.”<sup>12</sup> Judge Brobson, in this case, offered the restrained statement that: “a lot can be said about the 2011 Plan, much of which is unflattering and yet justified.” COL ¶ 63. The Legislative Respondents made no attempt at trial to defend the 2011 Plan as a beneficial plan. The issue before the Court in this matter is not whether the 2011 Plan is a bad map for democracy, as it is, but whether the 2011 Plan resulted in viewpoint

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<sup>12</sup> Transcript of Oral Argument at 42, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161).

discrimination, which the free speech clauses, the free and fair elections clause and the equal protection clauses of the Pennsylvania Constitution prohibit. *See* Petition for Review, *generally*. Respondents have not referenced any campaign statements from Justices Wecht or Donohue which might somehow indicate that they prejudged the issue.

The Legislative Respondents clearly are aware of the important role this Court plays with respect to the Commission, and its unique role in the context of a judicial election where the public considers general issues on ethics, integrity, court administration and the role of the Court in ensuring the very check on partisan gerrymandering that the Legislative Respondents endorsed in their Main Brief. That they were aware of this critical distinction between consideration of a pending case and the general role of appointing a member of the Commission in 2021 is nowhere more evident than in their deliberate omission of the portions of Justice Wecht's comments, which provide the context and clarity that he was addressing the Commission issue – and not a pending case. To distort Justice Wecht's actual meaning, the Legislative Respondents consciously omitted direct references to the Commission, as restored to the quotation with the bolded text:

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.”<sup>13</sup>

The Legislative Respondents’ willingness to conflate general matters of public interest with expressions of particular cases would create a dangerous precedent where seemingly innocent comments could be used in an adversarial manner. Indeed, Justice Sallie Mundy, while both a sitting member of this Court and running for a seat on this Court, spoke at a candidate’s forum at Widener Law School, in a manner very similar to other members of this Court who spoke in similar settings during their elections.

Instead, the Legislative Respondents attempt to manipulate the statements Justices Wecht and Donohue made, as judicial candidates, about the problems associated with gerrymandering generally, and how their 2021 choice for Chair of the Legislative Reapportionment Commission would form a check against partisan gerrymandering. Justices Wecht and Donohue are in no way required to recuse themselves here. In specifically discussing the unique role Pennsylvania Supreme Court Justices have in the Pennsylvania Constitutional system, Justices Wecht and Donohue made comments that were wholly appropriate.

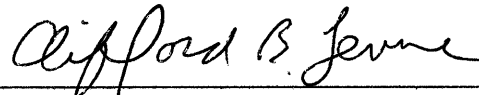
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<sup>13</sup> See page 5, *supra*.

**CONCLUSION**

For these reasons, the Legislative Respondents' Application should be denied.

Respectfully submitted,



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*On behalf of Respondent Michael J.  
Stack III, in his Capacity as Lieutenant  
Governor of Pennsylvania and President  
of the Pennsylvania Senate*

Dated: February 5, 2018

**CERTIFICATE OF SERVICE**

I certify that on February 5, 2018 a copy of the foregoing ANSWER was sent to all counsel of record electronically via the PACFile system, with a certificate of service to be generated thereby.

Clifford B. Jenne

**CERTIFICATE OF COMPLIANCE**

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

Clifford B. Jenne