

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.

**ANSWER OF RESPONDENTS GOVERNOR THOMAS W. WOLF,
ACTING SECRETARY ROBERT TORRES, AND COMMISSIONER
JONATHAN MARKS TO APPLICATION OF RESPONDENTS MICHAEL
C. TURZAI AND JOSEPH B. SCARNATI, III, IN THEIR OFFICIAL
CAPACITIES, FOR DISQUALIFICATION OF JUSTICE DAVID WECHT
AND FOR FULL DISCLOSURE BY JUSTICE CHRISTINE DONOHUE**

On Review of the Commonwealth Court's Recommended Findings of Fact and
Conclusions of Law, No. 261 M.D. 2017 (Dec. 29, 2017)

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INTRODUCTION

Having failed in their defense of this matter, Legislative Respondents¹ seek to impugn the reputation of this Honorable Court in their Application for Disqualification of Justice David Wecht and for Full Disclosure by Justice Christine Donohue (the “Application”). The Application relies exclusively on 2015 quotations from and news articles about then-candidates Wecht and Donohue. Legislative Respondents gloss over the fact that these comments were made nearly 18 months before this action, or any similar action, was instituted in Commonwealth Court, and nearly two years before this matter was presented to this Court,² and therefore could not have constituted impermissible statements on an outstanding matter. Legislative Respondents also carefully excise the phrases and context that make it clear that then-candidate Wecht was not questioning the constitutionality of the U.S. congressional districts laid out in the 2011 Plan, but was referring expressly to the Supreme Court’s role in appointing the fifth member of the Legislative Reapportionment Commission (“LRC”), which has

¹ Capitalized terms used in this Answer have the meanings given to them in the Brief of Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks (Jan. 10, 2018).

² In June, 2017, Petitioners instituted this action challenging the constitutionality of the 2011 Congressional Redistricting Plan; in October, 2017, Petitioners sought this Court’s expedited review.

responsibility for state redistricting plans. Legislative Respondents present Justice Donohue's statements in a similarly misleading way.

The Application was filed late on a Friday, and received significant press over the weekend. Legislative Respondents' cynical approach appears to presume that many or most of the people who read, or read about, Legislative Respondents' Application, will not understand that a different kind of redistricting—state legislative, not federal congressional—was the subject of discourse during the 2015 election, and will not take the trouble to review the videotapes and other sources that show what then-candidates Wecht and Donohue actually said. Such misleading attacks on two Supreme Court Justices, posited merely to score political points or, perhaps, to gain an advantage in the U.S. Supreme Court,³ should not withstand this Court's scrutiny. Legislative Respondents' unsupportable, spurious attacks should be dismissed, and their Application denied.⁴

³ In what was likely not a coincidence, the Application was filed within 61 minutes of the time that responses were due to Legislative Respondents' Application for Stay in the United States Supreme Court.

⁴ Executive Branch Respondents join in the arguments of Parts I and II of Petitioners' Answer to the Application.

ARGUMENT

I. Legislative Respondents' Edited, Selective Quotations of Candidates' Statements Misrepresent the Actual Record of Those Statements

The records of the interviews, debates, and forums quoted in the Application do not support the Legislative Respondents' allegations that now-Justice Wecht harbored "strongly held" views "regarding the very issue at the core of this case" or that now-Justice Donohue made an "explicit promise" to end gerrymandering that calls into question her impartiality. On the contrary, the sources the Legislative Respondents cite show that the then-candidates were responding to questions about *state* legislative redistricting. State redistricting was a major issue in the Supreme Court race, because of the Supreme Court's critical role in appointing the fifth member of the Pennsylvania Legislative Reapportionment Commission ("LRC").⁵ The then-candidates' responses reveal their clear understanding of the appropriate

⁵ See Patrick Kerkstra, *6 Reasons Why Tuesday's Pennsylvania Supreme Court Election is Absolutely Critical*, Philadelphia Magazine (Oct. 30, 2015) ("The State Supreme Court really only has a redistricting role in state House and Senate districts, not U.S. Congressional districts. But its redistricting role at the state-level is positively pivotal. The party that controls the Supreme Court gets to appoint the chair of the state's five member redistricting commission."), available at <http://www.phillymag.com/citifed/2015/10/30/pennsylvania-supreme-court-election/#IRKtQIKfgyXwPwbV.99>; Anna Orso, *The new state Supreme Court could change Pennsylvania's future, but how?*, BillyPenn.com (Nov. 5, 2015) ("The process of redistricting is voted on by the legislature, but it's run by a commission of five people: Two Democrats, two Republicans and the chair of the committee who serves as the tie-breaking vote. This person is usually selected by the state Supreme Court."), available at <https://billypenn.com/2015/11/05/the-new-state-supreme-court-could-change-pennsylvanias-future-but-how/>.

role that the Pennsylvania Supreme Court has to play in the *state* legislative redistricting process; they provide no insight whatsoever into how they intended to rule on any future matter concerning the *congressional* redistricting map created by the 2011 Plan.

Notwithstanding the Legislative Respondents' strenuous efforts to wring innuendo from the now-Justices' limited commentary by selectively quoting and carefully editing their statements, the quotations in the Application reveal nothing about how they expected to rule in the instant case.

A review of the recordings that Legislative Respondents cite reveals that each and every time they quote then-candidate Wecht, Legislative Respondents carefully cut out those portions of the quotations that made clear he was in fact discussing *state legislative* redistricting and the Supreme Court's non-judicial role in it. Perhaps more egregiously, the Application also wholly omits quotations in which then-candidate Wecht *expressly stated* that he had not prejudged any particular redistricting map.

First, Legislative Respondents point to an April 2015 forum and debate for state judicial candidates, and assert that there, then-candidate Wecht discussed "the constitutionality of Pennsylvania's existing Congressional districting map" when he said:

- “Gerrymandering is an absolute abomination. It is a travesty. It is deeply wrong ... These [Congressional] districts have been drawn to disenfranchise the majority of Pennsylvanians. And they have been drawn by skilled political operatives, and it needs to stop.”⁶

App. at 1; *see also* App. at 6-7 (different version of same quote). However, the actual, unaltered statement was as follows:

- “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. And they have been drawn by skilled political operatives, and it needs to stop.”⁷

In the highlighted material, which the Legislative Respondents deleted and replaced with ellipses, then-candidate Wecht referred to the Pennsylvania Supreme Court’s responsibility to appoint the “fifth member” of the “LRC, which is tasked with redrawing Pennsylvania’s *state* legislative district map every ten years. The LRC has no involvement whatsoever with congressional redistricting, so the “districts” that then-candidate Wecht went on to discuss were plainly not those established by the 2011 Plan and challenged in this litigation, but rather the state legislative districts. Legislative Respondents also failed to mention that then-

⁶ App. at 6, quoting Spring 2015 Judge Candidate Forum, Neighborhood Networks and MoveOn Philly (“Forum”), at <https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be>, at 18:00 (alteration in original).

⁷ Forum, at 18:00-29.

candidate Wecht made the quoted statement in response to a debate question that asked about the Pennsylvania Supreme Court’s role in the 2020 redistricting process, not about any existing map. Forum, at 14:32-14:44.

The Legislative Respondents indulged in the same kind of misleading editing when discussing then-candidate Wecht’s comments during an October 2015 interview with the editorial board of the *LNP* newspaper. The Application quotes him as follows:

- Stop this insane gerrymandering. . . . 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.”⁸

But then-candidate Wecht’s complete statement, which came in response to a question about potential solutions to the problem of low voter turnout in off-year elections, was:

- “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

⁸ App. at 7, quoting *Get to Know the Candidates for State Supreme Court*, LANCASTER ONLINE, at http://lancasteronline.com/news/local/get-to-know-the-candidates-forstate-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html (“LNP Interview”) at 35:57-36:25.

power has been vastly diluted and they tend to figure “well, I can't make a difference, I'll just stay home.”⁹

Yet again, the Legislative Respondents carefully excised a reference to the LRC in order to obscure the fact that then-candidate Wecht’s comments concerned the Supreme Court’s role in the *state* legislative redistricting process, and not in assessing the 2011 Plan.

In the same interview, then-candidate Wecht was asked, “What would be your judicial philosophy on drawing legislative districts?” LNP Interview at 37:40-

44. Legislative Respondents quoted only the following portion of his response:

- “. . . [I]n 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

⁹ LNP Interview at 36:02-15.

given map. But I can tell you the Constitution says ‘one person, one vote,’ and it does not allow for unconstitutional gerrymandering.”¹⁰

His full and unedited answer, however, was as follows:

- **“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 interpreted our constitution, including the principle, above all, of one person, one vote. So if you are a voter in the middle of the city of Pittsburgh or the middle of the city of Philadelphia, you have far less voting power than a rural voter sitting somewhere in central Pennsylvania. It’s just a fact, it’s a fact of life.** [QUESTION: How do you explain that?] Ok, so last – 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**

¹⁰ App. at 7-9, quoting LNP Interview at 38:23-40:14.

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.¹¹

Here again, the Application relies upon a heavily edited version of then-candidate Wecht's comments to support the claim that his "mind was made up" that the 2011 Plan "was unlawfully 'gerrymandered[,]' " and carefully omits content that states the exact opposite, rushing past his clear statement that he lacked any formed "philosophy" on how to evaluate the constitutionality of any particular redistricting map, and leaving out his express reference to the LRC.

Legislative Respondents stuck to the same playbook when quoting then Justice-elect Wecht's statement from a November 2015 radio interview. There, in response to a caller's question about "the *next* redistricting" (a question the Application omits), Legislative Respondents quote him as stating flatly:

- "Extreme gerrymandering is an abomination, and antithetical to the concept of one person, one vote."¹²

In fact, he said:

- **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**

¹¹ LNP Interview at 37:45-40:41.

¹² App. at 7, quoting 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-plansstate-supreme-court#stream/0> ("WESA Interview"), at 32:28-34.

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 constitution and that do not violate the principle of one person one vote. Our system is not supposed to disenfranchise people, nor is it supposed to be set up to try to enshrine permanently a temporal majority.¹³

Legislative Respondents omitted the overwhelming majority of then Justice-elect Wecht's answer to obscure that he was discussing the *2020 state legislative* redistricting process, and in fact expressed no "biased views"—or any views at all—regarding the 2011 Plan. *See* App. at 8.

Turning to now-Justice Donohue, Legislative Respondents point to a pair of news articles to support their claim that, as a candidate, she made comments indicative of bias. Again, the Legislative Respondents resort to creative quotation techniques to create the appearance of impropriety. In the first instance, the Application purports to cite a direct quote from then-candidate Donohue:

- “In addition, she openly stated that ‘gerrymandering disenfranchises the people.’”

¹³ WESA Interview at 32:17-34:00

App. at 15. The cited news article, however, was paraphrasing the words of then-candidate Donohue *and another candidate*, and in fact does not directly quote her on the subject of gerrymandering. It simply states:

- “Foradora and Donohue argued that gerrymandering disenfranchises the people.”¹⁴

Legislative Respondents next contend that, at a public forum for judicial candidates, then-candidate Donohue made an “explicit promise” to end gerrymandering. App. at 14. For this assertion, the Application relies upon a single sentence fragment in a single article.¹⁵ The Application also points to the article as another example of then-candidate Wecht’s supposed bias. App. at 8. But the same article notes that during the forum’s discussion of gerrymandering:

“Wecht and Donohue explained how the Pennsylvania Supreme Court appoints the fifth and final member to 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. The state Supreme Court also reviews any challenges to the district lines drawn by the commission[.]”¹⁶

That context strongly suggests that any comments by the then-candidates concerned *state* legislative redistricting rather than congressional.

¹⁴ See Nathan Kanuch, *Democratic Supreme Court Candidates Attend Forum*, POLITICSPA, available at <https://davidwecht.ngpvanhost.com/newsclips/democratic-supreme-court-candidates-attend-forum>.

¹⁵ See App. at 14-15, quoting Eric Holmberg, *Forums Put Spotlight on PA Supreme Court Candidates*, PUBLICSOURCE (Oct. 22, 2015), at www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates.

¹⁶ *Id.*

Finally, not content to selectively alter only the Justices' comments, the Legislative Respondents also selectively quoted the *LNP* Editorial Board to provide their sole example of public concern about then-candidate Wecht's remarks. The Application claims that the *LNP* Editorial Board wrote:

- “We are concerned when he veered near partisan territory in condemning ... what he called Pennsylvania's 'insane gerrymandering' of legislative districts.”¹⁷

In fact, that editorial reads as follows:

- We were concerned when he veered near partisan territory in condemning **the voter ID law that was struck down last year, and** what he called Pennsylvania's “insane gerrymandering” of legislative districts. **The 14th Amendment's equal protection clause guarantees the right to one-person, one-vote, so Wecht is probably on solid ground in discussing how gerrymandering compromises that guarantee. But voter ID may come before the Pennsylvania Supreme Court again, so we think he should have held his fire on that issue.**¹⁸

The Legislative Respondents resorted to misleading editing not only to manufacture the appearance of impropriety, but also the *appearance of public concern* about the wholly imaginary impropriety with which the Application takes issue.

¹⁷ App. at 10, quoting The *LNP* Editorial Board, *Our Choices for State Supreme Court in Tuesday's Election*, LANCASTER ONLINE, at http://lancasteronline.com/opinion/editorials/ourchoices-for-state-supreme-court-in-tuesday-s-election/article_08e9810c-7ea2-11e5-a10c-9ba2a8da9aa0.html.

¹⁸ *Id.*

II. Even if the Legislative Respondents' Descriptions of the Candidates' Comments Were Accurate, These Generic Statements Would Not Merit Disqualification.

Even if then-candidates Wecht's and Donohue's generalized comments about gerrymandering had related to the 2011 Plan rather than the state legislative redistricting process, none of the public statements cited by the Legislative Respondents would have risen to the level required to merit disqualification. The Code of Judicial Conduct states that a "judge's impartiality *might* reasonably be questioned" where "[t]he judge, while a judge or a judicial candidate, has made a public statement . . . that *commits* the judge to *reach a particular result or rule in a particular way* in the proceeding or controversy" at issue. PA ST CJC Rule 2.11(A)(5) (emphasis added). No such commitments existed here.

The candidates' statements regarding gerrymandering were nothing more than brief responses to general questions from the public, and did not include anything resembling a pledge or guarantee regarding the outcome of this case or any other. As such, their comments were wholly in accordance with the law. The Pennsylvania Constitution provides for partisan elections of Supreme Court Justices, and as such necessarily implies that judicial candidates will make public statements in the course of their campaigns. *See* Pa. Const. art. V, § 13. The Pennsylvania Code of Judicial Conduct recognizes as much, and thus does not ban judicial candidates from making any comments whatsoever on matters of public

concern. See PA ST CJC Rule 4.1, *Political and Campaign Activities of Judges and Judicial Candidates in General*. Instead, the Code recognizes that candidates may “respond to media and other inquiries,” and simply indicates that in such public statements, candidates should “give assurances that they will keep an open mind” and must refrain from making any “pledges, promises, or commitments that are inconsistent with the impartial performance of” judicial duties. *Id.* at Rule 4.1(A)(12) and Comment 11. Then-candidate Wecht’s and Donohue’s comments fell precisely within the zone of appropriate statements contemplated by the Code.

Not once did either candidate provide their thoughts on whether the existing congressional plan violated the Pennsylvania Constitution, whether they believed that there existed a judicially manageable standard for assessing a partisan gerrymander, or what evidence might be sufficient to find a constitutional violation. As discussed above, at the time the statements at issue were made, there was no basis for either Justice to make any promise or pledge regarding how they would decide a case of this nature, because the nature of this case was not revealed until Petitioners filed this case in 2017.

But in their rush to accuse now-Justice Wecht of harboring a “defined and cemented” position on the 2011 Plan and of making “campaign promises” regarding the map, App. at 6, 8, Legislative Respondents ignored then-candidate Wecht’s clear statement in 2015: “I don’t know how I would rule on any given

map[.]” LNP Interview at 40:09-11. The extremely limited comments by now-Justice Donohue provide even less basis for any assertion that either judge committed themselves to finding the 2011 Plan unconstitutional. Absent any indication that Justice Wecht or Justice Donohue’s public statements presaged a commitment to a specific ruling or outcome here, there is no cause whatsoever for either Justice to be disqualified from adjudicating this matter.

Ultimately, their statements amounted to nothing more substantial than the uncontroversial proposition that gerrymandering—as a general matter—is bad. Presumably the Legislative Respondents cannot fault comments in the vein of then-candidate Wecht’s self-evident observation that the “constitution . . . does not allow for *unconstitutional* gerrymandering[.]” *Id.* at 40:12-14. There can be no serious argument that commenting generally on a subject, without more, demonstrates disqualifying bias for the purposes of an actual proceeding that was neither discussed nor contemplated by the comments.

Despite Legislative Respondents’ efforts to fabricate the appearance of impropriety from scraps of unremarkable campaign commentary, it is clear that the Application for Disqualification and Full Disclosure is nothing more than an 11th hour attempt to muddy the waters in order to avoid compliance with this Court’s order to replace the unconstitutionally gerrymandered 2011 Plan with a lawful map. The kind of deliberate distortion of the record that the Application presents

should never be countenanced by any court; the maneuver is particularly pernicious here because it is done to tarnish and bring disrepute to the Judiciary itself. Executive Branch Respondents ask this Honorable Court not only to reject this Application in no uncertain terms but also to consider what more may be done to remedy the harm that the Application has caused.

CONCLUSION

For the foregoing reasons, Executive Branch Respondents respectfully request that the Application be denied.

Respectfully submitted,

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Dated: February 5, 2018

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CERTIFICATION

This 5th day of February, 2018, I certify that:

Electronic version. The electronic version of this brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks.

Public Access Policy. 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.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Brief does not contain confidential information.

Service. I am this day serving this Brief in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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