In the Supreme Court of Pennsylvania
Middle District

No. 159 MM 2017

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

v.

THE COMMONWEALTH OF PENNSYLVANIA *et al.*,
Respondents.

Review of Recommended Findings of Fact and Conclusions of Law from the Commonwealth Court No. 261 M.D. 2017

APPLICATION OF RESPONDENTS MICHAEL C. TURZAI, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND JOSEPH B. SCARNATI, III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF THEIR APPLICATION FOR DISQUALIFICATION OF JUSTICE DAVID WECHT AND FOR FULL DISCLOSURE BY JUSTICE CHRISTINE DONOHUE

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Respondents, Michael C. Turzai and Joseph B. Scarnati, III ("Legislative Respondents"), by and through their undersigned counsel, respectfully request leave of the Court to file a Reply in response to Petitioners and remaining Respondents' Answers to Legislative Respondents' Application for Disqualification of Justice David Wecht, and for Full Disclosure by Justice Christine Donohue.

Legislative Respondents' proposed Reply is attached as **Exhibit A**. Legislative Respondents submit their Reply to concisely address the assertions made in the Answers.

Dated: February 5, 2018

Respectfully submitted,

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EXHIBIT A

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REPLY BRIEF IN SUPPORT OF APPLICATION OF RESPONDENTS MICHAEL C. TURZAI, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND JOSEPH B. SCARNATI, III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE FOR DISQUALIFICATION OF JUSTICE DAVID WECHT AND FOR FULL DISCLOSURE BY JUSTICE CHRISTINE DONAHUE

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Respondents, Michael C. Turzai and Joseph B. Scarnati, III ("Legislative Respondents"), by counsel, respectfully submit this Reply Brief in Support of Application for Disqualification of Justice David Wecht, and For Full Disclosure by Justice Christine Donahue, as more fully set forth below.

INTRODUCTION

This Court has a simple, straightforward choice to make. In doing so, it will define itself. The comments of Justice Wecht present an unmistakable prejudgment of the constitutionality of the 2011 Plan. Justice Wecht was not merely commenting on this Court's role of appointing a fifth member to the Legislative Reapportionment Commission, as Petitioners, Executive Respondents, and Lt. Gov. Stack contend. Rather, Justice Wecht made specific statements about the 2011 Plan and offered his opinion on legal injuries gerrymandering allegedly caused Pennsylvania voters. He went so far as to say that, in reference to the 2011 Plan, that political gerrymandering is an "abomination" and a "travesty" that "needs to stop," and then rhetorically asking voters if "we need a new Supreme Court?" (App. at 6). The context of those remarks, as shown in the Application, make those remarks akin to a campaign commitment to take action against the 2011 Plan if elected to office.

In briefs brimming with baseless *ad hominem* attacks on Legislative Respondents and their counsel,[1] Petitioners and their allies argue that this Court should disregard Judicial Conduct Rule 2.11 and find that Legislative Respondents waived the issue by failing to timely raise it. But this argument is a cynical dodge. Recusal and/or disclosure is required regardless of whether a recusal motion was filed, Rule 2.11 cmts. 2, 5. If the Court chooses to adopt the timeliness argument of Petitioners and their allies, it will send a chill across every courtroom in this Commonwealth. Such a decision would amount to an announcement of a judicial "caveat emptor" doctrine—let the litigant beware. Every litigant in Pennsylvania would then be required to investigate all sources of potential bias of a judge hearing the case before entering the courtroom. Such a ruling would deal a devastating blow to the public's trust in the integrity and fairness of the Judiciary. And such a devastating result is not required by this Court's recusal case law.

In the end, the case for disqualification of Justice Wecht is clear. There is time to afford Legislative Respondents and all voters of this Commonwealth relief by

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[1] Stack also seeks to muddy the waters by noting a campaign contribution made to Justice Mundy's campaign from Legislative Respondent Scarnati's campaign committee. However, Justices Wecht, Donohue, and Dougherty received significant undisclosed contributions from Governor Wolf's Political Action Committee, Rebuild Pennsylvania. Rebuild Pennsylvania spent approximately $155,000 to elect these Justices. Specifically, Justice Wecht received $49,250, Justice Donohue received $48,000, and Justice Dougherty received $51,750. Justice Donohue also received a $1,000 from the Committee to Elect Mike Stack.

disqualifying Justice Wecht. Full recusal, including nullification of votes taken by Justice Wecht in this case to-date, would afford complete relief. But even disqualification of Justice Wecht going forward in this case would offer at least some relief, as each formal action he takes in the case going forward compounds the prejudice.

It is never too late to do the right thing. Legislative Respondents respectfully request that their Application be granted.

ARGUMENT

I. The Comments Of Justices Wecht Apply To The 2011 Plan.

In their answers to Legislative Respondents' Application, the opposing parties incorrectly assert that Legislative Respondents selectively excerpted from Justice Wecht and Justice Donohue's respective statements and promises, all of which they contend were only related to the Court's unique role in appointing a member to the Legislative Reappointment Commission.

But with respect to Justice Wecht, Petitioners ignore several statements by Justice Wecht that manifest a clear, pre-existing bias against the ***Congressional*** districts, which are not within the purview of the Legislative Reapportionment Commission:

- "There are a million more Democrats in this Commonwealth—I want to let that sink in—a million more Democrats in this Commonwealth, but there's a Republican state house, there's Republican state senate, and ***there are only 5 Democrats in the Congress, as opposed to 13 Republicans***. *Think about it.* Do we need a new Supreme Court? I think you know the answer." *Spring 2015 Judge Candidate Forum*, Neighborhood Networks and MoveOn Philly, *at* https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be, at time code 18:00 (emphasis added). *See also* Calabretta Aff. at ¶ 2 and Ex. 1

- "…[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*. *Get to Know the Candidates for State Supreme Court*, LANCASTER ONLINE, at http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html, at 38:15 (emphasis added). *See also* Calabretta Aff. at ¶ 3 and Ex. 2.

- "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." *Get to Know the Candidates for State Supreme Court*, LANCASTER ONLINE, *at* http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html, at 39:30. *See also* Calabretta Aff. at ¶ 3 and Ex. 2.

Plainly, each of these statements has nothing to do with legislative districts, let alone the Court's authority to appoint the fifth member of the Legislative Reapportionment Commission. Thus, while Petitioners argue that Justice Wecht's

statements "did not offer any view on the constitutionality of the congressional districts," they noticeably fail to address these specific statements that reflect a clear and predetermined ideology that Pennsylvania's current Congressional districts are the result of partisan gerrymandering.

Moreover, Justice Wecht's following statements that he did not know how he would rule on a challenge to the 2011 Plan's constitutionality ring hollow. Justice Wecht's unequivocal statements establish that he had already adopted the position advanced by Petitioners regarding the alleged harm they suffered, making repeated references to the dilution of voting power as a result of how districts are drawn. *See* 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 (emphasis added) ("Understand, sitting here in the city of Pittsburgh, your vote is diluted. Your power is taken away from you"); *see also* Calabretta Aff. at ¶ 5 and Ex. 4.

That Justice Wecht also made campaign statements about this Court's role in legislative redistricting does nothing to diminish his clear, repeated, and public statements regarding his already-cemented views about Congressional redistricting, including, specifically, the 2011 Plan at issue here.

For his part, Respondent Stack misstates the governing law in contenting that judicial candidates are only barred from committing to specific positions as to matter "*pending*" in a court. Stack Opp. at 15. But, in fact, the Rules forbid "pledges, promises or commitments" as to "cases, controversies or issues that are *likely to come before the court.*" Rule 4.1(A)(12) (emphasis added). Stack suggests that this Rule is not tailored under the First Amendment, but *Republican Party of Minnesota v. White*, 536 U.S. 765, 776–77 (2002), specifies that an ethical rule targeted at "bias against particular *parties*" is constitutional. The rule against "pledges, promises or commitments" as to "cases, controversies or issues" is narrowly tailored to that bias because it does not merely prohibit speech on issues—such as making a policy argument that gerrymandering is inconsistent with democratic principles—but rather forbids *commitments to rule specific cases*. Justice Wecht here did not merely state a political or policy disagreement against gerrymandering. He stated that *specific congressional districts* drawn by Legislative Respondents are unconstitutional, and he campaigned on a pledge to strike them down. The same First Amendment argument has been rejected under similar circumstances. *See, e.g.*, *In re Watson*, 100 N.Y.2d 290, 297-305 (2003); *In re Kinsey*, 842 So.2d 77, 85-86 (Fla. 2003).

Respondent Stack also suggests that recusal is not required, even if the Rules are violated, citing *Commonwealth v. Druce*, 848 A.2d 104, 106 (Pa. 2004). But that case concerned Canon 3A(6), which is written in permissive language: "A judge *should* abstain from public comment about a pending proceeding..." *See Druce*, 848 A.2d at 109 (emphasis added). The basis of this motion is Rule 2.11(A), which states: "A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" (emphasis added). To read Rule 2.11(A) as *permitting* recusal on the basis of a differently worded rule is unsound.

II. The Disqualification Application Is Timely

"A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process." Neil A. Lewis, *The Supreme Court; Ginsburg Promises Judicial Restraint if She Joins Court*, NEW YORK TIMES (July 20, 1993), *available at* http://www. http://www.nytimes.com/1993/07/21/us/the-supreme-court-ginsburg-promises-judicial-restraint-if-she-joins-court.html (quoting Justice Ginsburg at her Senate confirmation hearing).

Rule 2.11 of the Pennsylvania Code of Judicial Conduct places no time restriction on a judge's obligation to disqualify himself or herself in any proceeding

in which the judge's impartiality might reasonably be questioned. And the duty imposed under Rule 2.11 is continuing. Thus, the duty of disqualification existed when Petitioners first sought relief from the Court via their application for extraordinary jurisdiction in November 2017. The duty existed when the parties appeared before the Court for oral argument in January 2018. And the duty exists now. At no time did Justice Wecht fulfill his duty.

As an initial matter, Petitioners misstate the governing waiver standard in asserting that the clock began to tick on Legislative Respondents when the "*should have known*" of the bias. Respondents' Opp. at 2 (emphasis in original). To the contrary, the Court recently clarified that "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*." *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017) (emphasis added). The Court proceeded to adjudicate whether a recusal motion was timely according to when the moving parties "were aware of all of the facts underlying the recusal issue." *Id.* at 391. Petitioners rely on *Goodheart v. Casey*, 565 A.2d 757, 764 (Pa. 1989), for their should-have-known standard, but, as the *Lomas* Court recognized, that case states that the clock begins to tick at the time "the asserted impediment [to a jurist deciding a case] is *known* to a party." *Lomas*, 170 A.3d at 309 (quoting *Goodheart*, 565 A.2d at 763) (emphasis added). *Goodheart* involved a

challenge to Pennsylvania's judicial compensation system, and the basis of the recusal motion—that Pennsylvania judges have a personal stake in the Pennsylvania judicial compensation system—was quite plainly within the actual knowledge of the party making the motion at the outset of the case. *See* 170 A.3d at 191–99. Similarly, in *Reilly by Reilly v. SEPTA*, 507 Pa. 204, 489 A.2d 1291, 1295-97 (1985), the recusal motion was made eight months after counsel for the movant made an oral recusal request, indicating that the facts were actually known to the movant at least eight months prior to the motion. *See Lomas*, 170 A.3d at 389-90. Thus, although Petitioners are correct that some of the earlier cases suggest a should-have-known standard, Petitioners' Opp. at 4, *Lomas* carefully reviewed the *holdings* of those cases before applying an actual-knowledge standard. 170 A.3d at 390.

The holding of *Lomas* stands to reason: a litigant should not be required to enter every case under a buyer-beware duty to dig up potential impartiality on the part of each judge the litigant encounters as the case proceeds. Litigants, instead, are entitled to presume impartiality absent indication to the contrary. *See Reilly*, 489 A.2d at 1300-01. Accordingly, the Code of Judicial Conduct requires recusal "regardless of whether a motion to disqualify is filed." Rule 2.11, Cmt. 2.

In this case, Legislative Respondents had no reason to question the impartiality of the Justices until oral argument, the first moment in the case where

counsel for Legislative Respondents encountered the Justices in person. And only a few days prior to filing the motion did Legislative Respondents possess the information forming the basis of a compelling recusal motion.[2] The Petitioners' aspersions that this is untrue, *see, e.g.*, Petitioners' Opp. at 2, lacks any factual support. At minimum, the Court must conduct a hearing if there is a question about when Legislative Respondents knew the facts pertaining to their recusal motion.

Regardless, the reason-to-know standard Petitioners advocate is also satisfied here. In the span of 45 days, Legislative Respondents were forced to try two separate cases regarding the 2011 Plan (while preparing for a third that was eventually stayed); a schedule only made possible as a result of Justice Wecht's vote to accept extraordinary jurisdiction in this case. To suggest that during that time, Legislative Respondents were dilatory in failing to also investigate Justice Wecht's campaign statements from three years ago is beyond the pale. Throughout the pendency of this quickly-moving litigation, Legislative Respondents had—perhaps naively—operated under the assumption that a justice in the highest court in the Commonwealth would uphold his independent obligation to disqualify himself

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[2] Petitioners criticize Legislative Respondents for not including an affidavit attesting to their lack of knowledge. (Petitioners' Opp. at 7). But counsel signed the Application, and that is sufficient here. There is no reason to believe that Legislative Respondents would hold an issue of disqualification in reserve, raising it only after losing, when the basis for disqualification is unfair prejudice *against them*.

without waiting for a party to discover his statements and move for his recusal. *See Reilly v. SEPTA*, 489 A.2d 1291, 1300-01 (Pa. 1985) ("[A]ll litigants have a right to believe that the jurist they are appearing before is impartial . . . our jurists are presumed unbiased and impartial and that they will promptly bring to the attention of the parties any latent biases or personal interests which might affect their judgment in the case."). Certainly, had Legislative Respondents known of these statements at an earlier stage in the litigation, Legislative Respondents would have sought Justice Wecht's disqualification then.

In a matter as significant as this, which directly affects every voter in Pennsylvania, the public's trust in the Court—and confidence that no justice's impartiality could reasonably be questioned—is of paramount importance. But if the Court were to rule Legislative Respondents' Application is untimely, it would send a disheartening message to all Pennsylvanians: that presumption of impartiality is dead, and that all litigants must now conduct "opposition research" on the judiciary early and often to determine whether they will have an impartial jurist presiding over their trial and appeal. Such a rule would overturn both the Rules of Judicial Conduct, this Court's precedents, *see Reilly*, *supra*, and our citizenry's collective expectation that our judges and justices will not have prejudged the matters that come before them, and certainly that they will not promise an outcome

before hearing any evidence. And, of course, such a rule would also ignore that regardless of the timing of Legislative Respondents' Application for Disqualification, Justice Wecht himself had an independent obligation *from the outset* to disclose his statements and recuse himself. *See* Rule 2.11 cmt. 2.

Moveover, the suggestion that Legislative Respondents' Application is untimely ignores the procedural posture of this claim. The Court has not relinquished jurisdiction. Indeed, at this time, the Court has not yet issued an opinion specifying how the 2011 Plan ran afoul of the Pennsylvania Constitution or even what particular provision of the Pennsylvania Constitution was violated. The deadline for the General Assembly to pass a congressional redistricting plan has not yet passed, nor has the deadline for parties to submit remedial maps. Even if Justice Wecht's prior votes in this matter are not vacated, he cannot be permitted to further participate in this ongoing matter.

Further participation by Justice Wecht would only compound the problem of a justice presiding over a matter in which his impartiality can be reasonably questioned. Indeed, Legislative Respondents are not the only ones questioning his impartiality. *See* Sam Levine, *Pennsylvania GOP Wants Gerrymander Order Tossed Over Democratic Justice's Words*, HUFFINGTON POST (Feb. 2, 2018), *at* https://www.huffingtonpost.com/entry/pennsylvania-gerrymandering-

justice_us_5a74f5c8e4b0905433b43c0b (quoting New York University law professor Stephen Gillers as indicating there was a "strong argument that one justice should not have sat because of his campaign statements, which read to me like a promise, not merely an announcement."). Now that Legislative Respondents, and indeed, the public, have been made aware of Justice Wecht's past statements regarding partisan "gerrymandering," his continued involvement in this matter would only create a heightened perception that the result reached by the Court is not the product of impartial deliberation.

Finally, Petitioners ignore that a rule on waiver concerns merely the enforceability of an ethical violation in this particular proceeding. But a waiver rule does not transform an improper act into a proper one. For a judge to sit on a case where that judge has announced a predetermined result is inappropriate under the rules. Rule 2.11(A)(5). For that judge to continue to sit and act in the case after being confronted with the biased statements advances the violation, and declining to address the violation through reasonable means, such as recusal and vacatur of orders in a live case tainted by the violation, consummates the violation. Accordingly, the concerns Legislative Respondents raise here illustrate an ongoing problem that the Court is empowered and duty-bound to address and cure.

Petitioners' argument therefore amounts to an assertion that waiver, if it occurred (which Legislative Respondents contest), justifies an improper course of conduct merely because (as they would have it) the rule cannot be enforced by Legislative Respondents in this case. But this case is not analogous to, say, a statute-of-limitations issue where only the interests of two private parties are at stake. Here, by contrast, the integrity of the judiciary is a matter of concern for all Pennsylvania citizens, and the Rules of Judicial Conduct apply by their own force, whether or not Legislative Respondents have power to enforce them in a recusal motion. The interests of the public and the integrity of this Court demand recusal irrespective of waiver.[3]

CONCLUSION

For the reasons explained herein, Legislative Respondents' Application is timely. Justice David Wecht must be disqualified retroactively, with his deciding votes in favor of the Court's Orders of November 9, 2017, January 22, 2018, January

[3] Even if no one had the ability to enforce the rules, recusal would be required because it is the right course of action. Nevertheless, the Pennsylvania Constitution provides for the public interest of enforcement independent of the Legislative Respondents' rights in this case. Pa. Const. art. V, Sec. 17(b) (providing "Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the [Pennsylvania] Supreme Court.").

26, 2018 stricken, and those Orders vacated. Even if Justice Wecht is not required to disqualify himself retroactively from this case, at a minimum, he must disqualify himself from further participation in this matter.

Dated: February 5, 2018

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