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IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

*Petitioners,*

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

*Respondents.*

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**PETITIONERS' SUPPLEMENTAL RESPONSE TO MOTION TO  
RECUSE JUSTICE PROTASIEWICZ**

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The Wisconsin Judicial Commission (“WJC”) performs a unique function—investigating “any possible misconduct or disability of a judge.” Wis. Stat. § 757.85(1)(a). WJC fulfills the constitutional mandate that “Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law.” Wis. Const. art. VII, § 11; Wis. Stat. § 757.85(1)(a). WJC is the sole entity the Legislature and this Court have entrusted to address issues of alleged judicial misconduct.

As the exclusive authority in investigating and enforcing violations of the Code of Judicial Ethics, WJC's determinations should be respected as an accurate statement of Wisconsin law. WJC's decision is consistent with Petitioners' arguments that there are no state- or federal-law grounds that require recusal. Without such grounds, each Justice has a duty to hear this case. SCR 60.04(1)(a), *Cf. Moore v. United States*, No. 22-800, Order at \*1 (U.S. Sept. 8, 2023) (Alito, J.) (“Recusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit.”).

**I. WJC's determination confirms that Wisconsin law does not require recusal.**

The dismissed complaint was based on the same comments Respondents reference in their motion—Justice Protasiewicz's acknowledgment, consistent with the decisions of two federal courts and countless analysts, that Wisconsin's legislative maps are “rigged” or “unfair.” Resp. Br. 7-8; Sept. 5 Order 1; Pet'rs' Br.

in Resp. to Mtn. to Recuse 39-40. And, like Respondents, the complainants alleged that such comments violated the Code.

The Code sets “basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.” SCR Ch. 60, Preamble. It represents the most exacting standard to which Wisconsin holds its judiciary.<sup>1</sup> WJC’s dismissal makes clear that it considered these comments under Supreme Court Rule 60.06 and related provisions—those most applicable to comments that a judicial candidate may make—and found no violation. Sept. 5, 2023 Order 7-8. That Rule governs “Campaign Conduct and Rhetoric,” and includes: “A ... candidate for judicial office shall not make ... with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” SCR 60.06(3)(b).<sup>2</sup>

SCR 60.06(3)(b) is not implicated here. It “requires an actual commitment to rule a certain way on a case, controversy or issue likely to come before the court.” *Duwe*, 490 F. Supp. 2d at 975. Justice Protasiewicz made no such comment. Instead,

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<sup>1</sup> Derek Clinger & Robert Yablon, *Explainer: Judicial Recusal in Wisconsin and Beyond*, State Democracy Research Initiative, \*13 (Sept. 5, 2023), <https://statedemocracy.law.wisc.edu/featured/2023/explainer-judicial-recusal-in-wisconsin-and-beyond/> (“[The Code] identifies further grounds for recusal that overlap with but go beyond the statutory recusal rules.”).

<sup>2</sup> Even if it were to apply, this Rule does not require recusal. A federal district court enjoined SCR 60.04(4)(f), the recusal requirement on which Respondents rely. Resp. Br. 41; *Duwe v. Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007).

Justice Protasiewicz “made very clear” that any decision she delivers “will be made based solely on the law and the Constitution.”<sup>3</sup> *See also* Pet’rs’ Br. in Resp. to Mtn. to Recuse 16-17. The Code does not prohibit a candidate from expressing their views, or even their predisposition, regarding any issue. *Duwe*, 490 F. Supp. 2d at 975. These are the type of comments expected from judicial candidates—they must communicate with the voters who bear the constitutional responsibility of choosing judges. Wis. art. VII, § 4(1); *Minn. Rep. Party v. White*, 536 U.S. 765, 774-75 (2002). WJC’s dismissal confirms Justice Protasiewicz did not violate the Code.

## **II. WJC’s dismissal emphasizes how hollow Respondents’ due-process arguments are.**

WJC’s determination demonstrates how meritless the Respondents’ due-process arguments have *always* been. “No Supreme Court case has ever held that due process required a judge to recuse because of the judge’s expression of views, whether on the campaign trail or elsewhere. In fact, the Court has rejected several such claims.”<sup>4</sup> The *Caperton* Court held, “Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889-90 (2009). WJC’s dismissal shows that Justice Protasiewicz’s comments do not implicate Wisconsin’s Judicial Code. Accordingly,

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<sup>3</sup> Henry Redman, *Supreme Court candidates accused each other of lying, extremism in sole debate*, Wis. Examiner (Mar. 21, 2023), <https://wisconsinexaminer.com/2023/03/21/supreme-court-candidates-accuse-each-other-of-lying-extremism-in-sole-debate/>. Pet. App. 164-165.

<sup>4</sup> Clinger & Yablon, *supra* n.1, \*10.

there is no due-process issue presented here. Imposing a brand-new standard governing campaign comments would create endless strategic challenges. *See Cnty. of Dane v. Pub. Serv. Comm'n of Wis.*, 2022 WI 61, ¶98, 403 Wis. 2d 306, 976 N.W.2d 790 (Hagedorn, J., concurring) (“Recusal and bias claims must not become another missile to be deployed.”).

### **CONCLUSION**

Petitioners filed their petition for an original action 47 days ago, raising serious constitutional deficiencies with the legislative maps that harm Petitioners’ fundamental rights. Timely resolution is critical. The Court, as elected, must be permitted to fulfill its duty and decide these claims. Respondents’ Motion to Recuse Justice Protasiewicz should be denied.

Respectfully submitted this 18th day of September, 2023.

By *Electronically signed by Daniel S. Lenz*

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### **CERTIFICATION REGARDING LENGTH**

I certify that this brief conforms to the requirements set forth in Justice Protasiewicz's September 5, 2023 Order. Excluding those portions of the brief that are not to be included in the word count, the length of this brief is 998 words.

Dated this 18th day of September, 2023.

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