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No. 2023AP1412-OA

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,
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; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

SUPPLEMENTAL BRIEF OPPOSING PROPOSED INTERVENOR THE WISCONSIN LEGISLATURE'S MOTION TO RECUSE

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INTRODUCTION

The Wisconsin Judicial Commission's May 31, 2023 decision to dismiss complaints against Justice Protasiewicz further confirms that no basis for recusal exists in this matter under either federal or state law. The Commission's dismissal supplies an additional ground, beyond those set forth in Petitioners' August 29 filing, to deny the Legislature's recusal motion.

BACKGROUND

On August 22, 2023, the Wisconsin Legislature conditionally moved to intervene in this proceeding and simultaneously moved to recuse Justice Protasiewicz. On August 23, Justice Protasiewicz invited the parties to respond to that motion. On August 29, Petitioners filed a response explaining why the high standards for recusal under federal and state law are not met here.

On September 5, Justice Protasiewicz issued an Order asking the parties to file supplemental briefs addressing "a complaint filed with the Wisconsin Judicial Commission and the Commission's May 31, 2023, decision." *Wright v. Wis. Elections Comm'n*, No. 2023AP1412-OA, slip op. at 1 (Wis. Sept. 5, 2023) (Order of Protasiewicz, J.) ("Sept. 5 Order").

The September 5 Order appended a complaint filed with the Judicial Commission against Justice Protasiewicz alleging that she had "violat[ed] multiple provisions of the Code of Judicial Conduct" via supposed statements on the campaign trail. *Id.* at 3. Those statements are alleged to have included comments criticizing the Court's "approach to redistricting of legislative maps." *Id.* The complaint argues that such statements "are prohibited under the ethics code governing Wisconsin judges" and violate the Code of Judicial Conduct by "manifest[ing] bias or prejudice." *Id.* at 3, 5 (internal quotation marks omitted). The complaint "request[ed] that the Judicial Commission open an investigation into Judge Protasiewicz's conduct." *Id.* at 3.

The Order also attached the Judicial Commission's May 31, 2023 decision dismissing this complaint and "several" other complaints "alleging that [Justice Protasiewicz] violated Supreme Court Rule 60.06(3)(b) and other related provisions of the Code of Judicial Conduct as a candidate for Supreme Court justice." *Id.* at 7. The Commission "dismissed these complaints without action" and "closed" the matter. *Id.* "In reaching its decision, the Commission carefully considered: (1) the statements at issue; (2) the Code of Judicial Conduct's Preamble and relevant Code provisions"; and (3) relevant Supreme Court and state-law precedents. *Id.* at 7–8. The

Commission also "noted that it ha[d] not conducted any prior investigations of [then-Judge Protasiewicz's] conduct or filed any public judicial disciplinary cases against [her]." *Id.* at 8.

Pursuant to Justice Protasiewicz's September 5 Order, Petitioners file this supplemental brief to address the effect of the Commission's decision on the recusal motion in this matter.

ARGUMENT

The Commission's decision to dismiss several complaints against Justice Protasiewicz alleging wrongdoing based on supposed comments on the campaign trail confirms that the high standard for recusal is not met in this case.

The dismissal represents an authoritative interpretation of the Code of Judicial Conduct, set forth in Supreme Court Rules Chapter 60. Wisconsin law vests in the Judicial Commission the important constitutional function to interpret and enforce ethics rules applicable to Wisconsin's judges, including the Code of Judicial Conduct. *See* Wis. Const. art. VII, § 11 ("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. Stat. § 757.85(1)(a) (vesting that authority in the Judicial Commission). By statute, the

Legislature has instructed the Commission to "investigate any possible misconduct … of a judge." Wis. Stat. § 757.85(1)(a). Regulations likewise authorize the Commission to "consider any allegation of misconduct … on the part of a judge or court commissioner." Wis. Admin. Code JC § 4.01.

Here, the Commission held that dismissal was proper based on the requirements of Supreme Court Rule 60, applicable federal law holding that a candidate for judicial office has a First Amendment right to "announce[] . . . his or her views on disputed legal and political issues," *see* Sept. 5 Order at 8 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)), and state law recognizing a "distinction between: (a) a promise, pledge or commitment; and (b) an announcement of personal views made during a campaign," *id.* (citing *Duwe v. Alexander*, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007)).

The Commission's conclusion confirms that the high standard for recusal under state law is unsatisfied here. The Commission dismissed complaints against Justice Protasiewicz based on the same alleged comments that form the basis of the Legislature's recusal motion. And that

dismissal represents an interpretation of state ethics rules by the entity vested with constitutional authority to make that determination.

The decision also provides further support that recusal is unwarranted under federal law. "Because the [States'] codes of judicial conduct provide more protection than due process requires," the standard to establish a violation of state ethics rules is necessarily easier for a challenger to satisfy than the federal Due Process floor. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009); *see* Petitioners' Response to Motion to Recuse at 4–6, 12–14, *Wright v. Wis. Elections Comm'n*, No. 2023AP1412-OA (Wis. Aug. 29, 2023) (discussing stringent test to establish federal Due Process violation). Thus, the Commission's decision that no ethical violation has occurred under Wisconsin's Code of Judicial Conduct provides an additional ground to conclude that, *a fortiori*, the federal Due Process standard for recusal is likewise not met.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' August 29, 2023 filing, the Wisconsin Legislature's motion to recuse should be denied.

Dated: September 18, 2023

Respectfully submitted,

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