

FILED
09-18-2023
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP1412-OA

IN THE SUPREME COURT OF WISCONSIN

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 IN SUPPORT OF MOTION TO RECUSE
JUSTICE PROTASIEWICZ BY PROPOSED INTERVENOR-
RESPONDENT THE WISCONSIN LEGISLATURE**

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
RACHAEL C. TUCKER*
DANIEL M. VITAGLIANO*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LEHOTSKY KELLER COHN LLP
SCOTT A. KELLER**
SHANNON GRAMMEL**
GABRIELA GONZALEZ-ARAIZA**
200 Massachusetts Avenue, NW
Suite 700
Washington, DC 20001
512.693.8350
scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP
MATTHEW H. FREDERICK**
408 West 11th St., Fifth Floor
Austin, TX 78701

Additional Counsel Listed on Following Page

LAWFAIR LLC

ADAM K. MORTARA, SBN 1038391

40 Burton Hills Blvd., Suite 200

Nashville, TN 37215

773.750.7154

mortara@lawfairllc.com

** Admitted pro hac vice*

*** Pro hac vice motions forthcoming*

A judicial candidate might end most stump speeches with “Justice for Judy!” The First Amendment leaves her free to do so. But if she is elected and Judy’s appeal comes before her, she’ll face the question of recusal. So too here. The Judicial Commission declined to sanction Justice Protasiewicz’s campaign statements that Wisconsin’s electoral maps are “rigged” and “unfair.” But the Court faces a different question: whether the U.S. Constitution’s Due Process Clause and state law require Justice Protasiewicz’s recusal from cases challenging those very maps. They do.

A. The Commission addressed Supreme Court Rule 60.06(3) as part of its power to monitor campaign speech. *See* Wis. Stat. § 757.85(1)(a). The First Amendment limits that power. The Commission’s decision not to sanction the campaign speech was expressly guided by those limits, citing *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

The pending question of recusal concerns something different: assuring impartiality in the courtroom. The Commission had no occasion to consider the effect of that campaign conduct for these particular cases. The Commission had no occasion to address a sitting justice’s obligation to administer justice “without fear or favor,” *Williams-Yulee v. Florida Bar*, 575

U.S. 433, 438 (2015), as required by the Fourteenth Amendment and Wisconsin's judicial ethics law. Nor did it have any reason to consider the Wisconsin Democratic Party's contribution of nearly \$10 million to Justice Protasiewicz's campaign. The petitions were not yet filed. The Commission's decision, in short, could not possibly have addressed "the specific circumstances presented by th[is] case." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

B. Since the Commission's decision, Petitioners have accepted Justice Protasiewicz's invitation to reconsider *Johnson*. They filed their petition within days after her investiture. The same week, internal operating procedures for original actions changed. *See* Supreme Court Internal Operating Procedures, <https://perma.cc/4GMY-9MFQ>. And this month, the Democratic Party—the expressly named beneficiary of Petitioners' claims—has committed another \$4 million to ensure that Justice Protasiewicz hears this case. *Wisconsin Democrats pledge a \$4 million-plus blitz to counter GOP on impeaching Protasiewicz*, Milwaukee Journal Sentinel (Sept. 6, 2023), <https://perma.cc/E8LK-EQEL>.

Campaign conduct has consequences for cases later coming before the Court. Justice Protasiewicz's pledge to recuse from the Democratic Party's cases is itself an acknowledgement that campaign conduct may require recusal. And this Court has recognized that a judge's conduct may require recusal even if it does not warrant "disciplinary action." See *In re Disciplinary Proc. Against Ziegler*, 2008 WI 47, ¶¶2-7, 309 Wis. 2d 253, 750 N.W.2d 710 (per curiam). With these petitions now before this Court, against the backdrop of the campaign conduct, recusal is required given the "serious risk," "based on objective and reasonable perceptions," of "actual bias or prejudgment." *Caperton*, 556 U.S. at 884; see Wis. Stat. § 757.19(2)(f)-(g).

C. These cases present the very "issue[s]" and "controvers[ies]" on which Justice Protasiewicz made several "public statement[s] that commit[], or appear[] to commit," her to a particular outcome. SCR 60.04(4)(f). Justice Protasiewicz said the maps are "gerrymandered," "absolutely positively rigged," and no "rational person" thinks they "are fair." Recusal Br.25-32. As for revisiting *Johnson*, Justice Protasiewicz invited "the opportunity to have a fresh look at [the] maps," said she "agree[s] with" the *Johnson I*

“dissent,” and warned that “[p]recedent changes when things need to change to be fair.” Recusal Br.7-10, 29.

Perhaps those statements were permissible on the campaign trail, as judged by the Judicial Commission, but Justice Protasiewicz cannot hear a case she has prejudged. When a case presents the very issues on which a judge opined during a campaign, “the potential for due process violations is grave and manifest” “because of the judge’s personal interest in resolving an issue a certain way.” *White*, 536 U.S. at 815-16 & n.3 (Ginsburg, J., dissenting); accord *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-25 (1988). Here, Justice Protasiewicz’s statements show that she has “prejudged the facts or the outcome of the dispute before her”; thus, she “cannot render a decision that comports with due process.” *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005). Her campaign statements pose a “serious risk” of “actual bias [and] prejudgment” and so require recusal. *Caperton*, 556 U.S. at 884.

D. Other cases, cited by some Petitioners, do not present the same extraordinary circumstances. *League of Women Voters of Pennsylvania v. Commonwealth* involved only “a handful of comments,” “distinct from a

clear commitment to rule in a certain way.” 179 A.3d 1080, 1084 (Pa. 2018). Similarly, in *Harper v. Hall*, 867 S.E.2d 326 (N.C. 2022), the disputed campaign statement—that “partisan gerrymandered districts do not serve our democracy”—was an isolated, general comment. See Motion for Recusal of Justice Anita S. Earls 9-10, *Harper*, 867 S.E.2d 326 (No.413P21). The statements here were repeated and unequivocal. Recusal Br.7-10, 25-32.

As to expenditures—an issue the Commission did not consider—the Democratic Party contributed “roughly 13% of [the Justice’s] overall total committee spending” in *Harper*. 867 S.E.2d at 331. Here, the Democratic Party contributed \$10 million, or nearly 60% of the candidate committee’s campaign expenditures, and it will now spend another \$4 million—multiple times the contribution in *Caperton*. Recusal Br.21-22. Justice Protasiewicz’s commitment to recuse from the Democratic Party’s cases must extend here, too. *Id.* at 23-24. “A fundamental principle of our democracy is that judges must be perceived as beyond price.” *State v. Herrmann*, 2015 WI 84, ¶40, 364 Wis. 2d 336, 867 N.W.2d 772 (Ann Walsh Bradley, J.).

* * *

This Court already has a “difficult relationship” with recusal, especially “in the context of the appearance of bias.” *Id.* ¶42; see *State v. Allen*, 2010 WI 10, ¶89, 322 Wis. 2d 372, 778 N.W.2d 863 (Abrahamson, C.J.) (colleagues dismissive of *Caperton* “just don’t seem to get it”). The failure to recuse here will worsen it. These “specific circumstances” are rife with “objective risk of actual bias.” *Caperton*, 556 U.S. at 881, 886. The Fourteenth Amendment and Wisconsin’s judicial ethics law demand recusal.

Dated this 18th day of September, 2023.

Respectfully submitted,

Electronically Signed By

Kevin M. St. John

LEHOTSKY KELLER COHN LLP

SCOTT A. KELLER**

SHANNON GRAMMEL**

GABRIELA GONZALEZ-ARAIZA**

200 Massachusetts Avenue, NW
Suite 700

Washington, DC 20001

512.693.8350

scott@lkcfirm.com

LEHOTSKY KELLER COHN LLP

MATTHEW H. FREDERICK**

408 West 11th St., Fifth Floor
Austin, TX 78701

BELL GIFTOS ST. JOHN LLC

KEVIN M. ST. JOHN, SBN 1054815

5325 Wall Street, Suite 2200

Madison, WI 53718

608.216.7995

kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC

TAYLOR A.R. MEEHAN*

RACHAEL C. TUCKER*

DANIEL M. VITAGLIANO*

1600 Wilson Blvd., Suite 700

Arlington, VA 22209

703.243.9423

taylor@consovoymccarthy.com

LAWFAIR LLC

ADAM K. MORTARA, SBN 1038391

40 Burton Hills Blvd., Suite 200

Nashville, TN 37215

773.750.7154

mortara@lawfairllc.com

Counsel for the Wisconsin Legislature

* *Admitted pro hac vice*

** *Pro hac vice motions forthcoming*

CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) and §809.81(4), as modified by the Order of this Court. Excluding the portions of this brief that may be excluded, the length of this brief is 995 words as calculated by Microsoft Word.

Dated this 18th day of September, 2023.

Respectfully submitted,

Electronically Signed by

Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com