IN THE SUPREME COURT OF WISCONSIN

No. _____

REVEREND ELAINE HANSON-HYSELL AND DEBORAH ANDERSON,

Petitioners,

v.

THE WISCONSIN STATE ASSEMBLY AND REPRESENTATIVE ROBIN VOS, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE WISCONSIN STATE ASSEMBLY,

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONER'S EMERGENCY PETITION FOR ORIGINAL ACTION AND EX PARTE MOTION FOR TEMPORARY, EMERGENCY INJUNCTIVE RELIEF

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INTRODUCTION

The Wisconsin State Assembly (the "**Assembly**") returns to session tomorrow, September 12, 2023. Unless the Supreme Court grants the Ex Parte Motion today and enjoins the Assembly from conducting impeachment proceedings against members of this Court until further briefing and hearing on this matter, the Supreme Court is likely to find itself without power to do so tomorrow. After notice, full briefing, and hearing on this matter, this Court should also grant the Emergency Petition and enjoin the Wisconsin Assembly in the manner stated therein to preserve judicial independence in this state and the right of a historic majority, which includes Petitioners, to effect political change—the very essence of a democracy.

ARGUMENT

I. Petitioners Unquestionably Have Standing to Bring this Emergency Petition

Standing in Wisconsin is a matter of "sound judicial policy," not a constitutional requirement. *State ex rel. First Nat'l Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 308 n.5, 290 N.W.2d 321, 325 (1980) (quoting *Schmidt v. Local Affairs & Development Dept.*, 39 Wis.2d 46, 61, 158 N.W.2d 306 (1968)). When considering standing, Wisconsin courts construe it "liberally." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶38, 333 Wis. 2d 402, 797 N.W.2d 789.

For a plaintiff to have standing they must first show injury in fact, but that injury can be relatively minor, or even "trifling." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 (quoting *Fox v. Wis. Dep't of Health & Soc.*

Servs., 112 Wis. 2d 514, 334 N.W.2d 532 (1983)). Second, the injury must be to an interest "within the zone of interests to be protected or regulated by the . . . constitutional provision in question." 2011 WI 36, ¶51, 333 Wis. 2d 402, 797 N.W.2d 789 (quoting *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶15, 275 Wis. 2d 533, 658 N.W.2d 573). In the case of *McConkey v. Van Hollen*, a single voter was found to have standing even though his injury was "difficult to define." 326 Wis. 2d 1, ¶5.

The Petitioners advance a claim that is based upon a fundamental right and therefore confers standing. *State ex rel. Barber v. Circuit Court for Marathon Cty.*, 178 Wis. 468, 473, 190 N.W. 563 (1922). As such, the right cannot "be destroyed or substantially impaired." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 603, 37 N.W.2d 473 (1949); s*ee also State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N.W. 1041 ("Nothing can be clearer under our constitution and laws than that the right of a citizen to vote is a fundamental, inherent right.").

These Petitioners also advance a claim based upon a specific, articulable threatened violation of their fundamental constitutional right. The Petitioners exercised their constitutional right to vote for Janet Protasiewicz and she won the election. If Justice Protasiewicz now cannot hear cases due to an unconstitutional impeachment, their fundamental right will not be "substantially impaired," it will be "destroyed."

II. This Court Should Exercise Original Jurisdiction

Original jurisdiction is properly exercised when the case concerns "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42 (1938) (per curiam) (quoting *Attorney General* v. *Chicago & N.W. Ry. Co.*, 35 Wis. 425, 518 (1874)). It is the role of the Wisconsin Supreme Court to be "the final arbiter of questions arising" under the constitution. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶21, 399 Wis. 2d 623, 967 N.W.2d 469 (quoting *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, ¶25). Since the petition asserts a claim of potential unconstitutional legislative action that would directly impact fundamental rights and judicial independence, it requires the "speedy and authoritative determination" which this Court alone is capable of providing. *Heil*, 284 N.W. at 50.

Furthermore, this claim seeks relief based upon the law and does not involve contested facts. *Green v. State Elections Bd.*, 2006 WI 120, ¶1, 297 Wis. 2d 300, 723 N.W.2d 418 ("this court is not a fact-finding tribunal"). The issues presented in Petitioners' claims contain no disputed facts and instead involve only the interpretation of specific constitutional rights. *James v. Heinrich*, 2021 WI 58, ¶15, 397 Wis. 2d 516, 960 N.W.2d 350 ("Issues of constitutional interpretation also are questions of law.")

III. This Court Should Grant Petitioners' Ex Parte Motion for Temporary, Emergency Injunctive Relief

A. An emergency exists requiring this Court to act ex parte

Unconstitutional articles of impeachment could be introduced and passed by the Assembly in a matter of hours. According to the constitution, "[n]o judicial officer shall exercise his office, after he shall have been impeached." Wis. Const. art. 7, § 1. Therefore, once passed, Justice Protasiewicz would be rendered unable to preside over cases and controversies. Such a forced removal would cause irreparable harm both to the Court's independence and authority as well as to Petitioners' fundamental constitutional rights.

B. Petitioners are likely to prevail on the merits of the Petition

To receive injunctive relief, Petitioners must show a reasonable probability of success based on the merits of their claim. *Gahl v. Aurora Health Care*, 2023 WI 35, ¶17, 989 N.W.2d 561. Petitioners have identified serious constitutional concerns relating to the proposed impeachment of Wisconsin Supreme Court Justices. In the case of Justice Protasiewicz, there is no factual finding of any crime or corruption. There certainly is no basis to justify the permanent destruction of the vote of the Petitioners and over one million valid Wisconsin electors.

The United States Supreme Court decision in *Republican Party v. White* is instructive on this matter. 536 U.S. 765 (2002). With the majority opinion written by Justice Antonin Scalia, the Court provided relief from a Minnesota rule prohibiting judicial candidates from speaking their views on legal issues. *Id.* at 769–

71. The Court noted a "tension between" a "Constitution which provides that judges shall be elected" and a judicial rule that "places most subjects of interest to the voters off limits." *Id.* at 787. The Court held that if a State decides to grant the responsibility of selecting judicial officers to the electorate, it must not abridge the electorate's access to free speech rights. *Id.* at 788. Stated bluntly, "state-imposed voter ignorance" is constitutionally impermissible. *Id.* (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

C. Unless immediate injunctive relief is granted, Petitioners, this Court, and the public will be irreparably harmed

To issue an injunction, the harm caused to the Petitioners must be irreparable. *Werner v. A. L. Grootemaat & Sons, Inc*., 80 Wis. 2d 513, 521, 259 N.W.2d 310 (1977) ("[A] showing of irreparable injury and inadequate remedy at law is required for a temporary as well as for a permanent injunction."). In this instance, once the impeachment occurs, the harm to the Court and to the Petitioners is irreparable as it cannot be undone. *See State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals*, 2018 WI 25, ¶47, 380 Wis. 2d 354, 909 N.W.2d 114 ("Losing the right with no means to recover it makes the harm irreparable."). The Court will have no ability to rectify the matter as one justice will be precluded from operating in her duly elected position. Furthermore, the Petitioners who exercised their constitutional rights to select her will forever lose their right to her participation in key matters before the Court.

It is important to emphasize that the removal of a single justice creates irreparable harm. This Court in considering rules governing its own conduct has viewed the removal of a justice from a single case as inherently problematic because it undermines an elector's vote for that justice.

> We elect judges in Wisconsin; therefore, judicial recusal rules have the potential to impact the effectiveness of citizens' votes cast for judges. Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case.

In the matter of amendment of the Code of Judicial Conduct's rules on recusal; In the matter of amendment of Wis. Stat. § 757.19, S. Ct. Order, Nos. 08-16, 08-25, 09-10 & 09-11, 2010 WI 73, ¶11 (issued Jul. 7, 2010).

D. The equities favor immediate relief

The equities favor immediate relief for the Petitioners. The injury that will be suffered by the Petitioners cannot be addressed adequately through monetary damages. *Ferguson v. Kenosha*, 5 Wis. 2d 556, 561, 93 N.W.2d 460 (1958). Balancing that fact against the Assembly's interest in committing an unconstitutional act leads to a conclusion in the Petitioners favor.

IV. Following Notice to the Assembly, Full Briefing, and Argument on the Merits, This Court Should Permanently Enjoin the Assembly in the Manner Requested in the Petition

A. The Assembly's threatened conduct violates the Wisconsin Constitution

To determine the meaning of constitutional provisions, the Court looks to the text. *See Service Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶28, 393 Wis. 2d 38, 946 N.W.2d 35 ("The text of the constitution reflects the policy choices of the people, and therefore constitutional interpretation similarly focuses primarily on

the language of the constitution."); *see also Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶21, 407 Wis. 2d 87, 990 N.W.2d 122 ("We must similarly focus on the constitutional text, reading it reasonably, in context, and with a view of the provision's place within the constitutional structure."). The Court considers the text as paramount as, "[i]n short, our solemn duty in constitutional interpretation is to faithfully discern and apply the constitution as it is written." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶28, 407 Wis. 2d 87, 990 N.W.2d 122.

Turning to the text of the amendment creating the power of impeachment, it reads "The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment." Wis. Const. art. 7, § 1. The text clearly indicates that the power to impeach civil officers lies with the assembly. It provides equal precision in stating when the impeachment of civil officers can take place, as "for corrupt conduct in office, or for crimes and misdemeanors." *Id.*

This precise language invokes clear limitations. The grant of power to impeach for "civil officers of this state," is limited to cases where those officials have engaged in "corrupt conduct in office, or for crimes and misdemeanors[.]" *Id.* These words must be read to have meaning or they would not exist. *See James v. Heinrich*, 2021 WI 58, ¶23, 397 Wis. 2d 517, 960 N.W.2d 350 ("Or in the words of Thomas M. Cooley: '[T]he courts must . . . lean in favor of a construction which

will render *every word operative*, rather than one which may make some idle and nugatory.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (emphasis added) (alternation in original))). The question before the Court is what does "corrupt conduct in office, or for crimes and misdemeanors" mean.

Understanding the meaning of this section is of singular importance as the powers enumerated in the constitution are limited. Constitutional powers are "granted" by the people to the government and therefore, their invocation must carefully follow the contours of the parameters of that grant. *State ex rel. Postel v. Marcus*, 160 Wis. 354, 371–72, 152 N.W. 419 (1915). The legislature cannot wield these powers creatively or expansively, as the power granted to the legislature through the constitution is "independent of its inherent power to make law" and "measured as to the extent of the terms of the grant." *Id.* at 372. Accordingly, legislative action under the auspices of the constitution is has been described as "ministerial in character." *Id.* And if the power to impeach is not conferred by Article VII, Section 1, the legislature cannot draw upon other authority to impeach. *See In re Kading*, 70 Wis. 2d 508, 522, 235 N.W.2d 409 (1975) ("It is a well-established principle of constitutional law that, where . . . methods of removal are provided by the constitution, the constitution in those respects is exclusive, and it is beyond the power of the legislature . . . to provide for removal in other than the constitutional method." (quoting *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 907 (1930))).

To aide in understanding the meaning of text, the Court considers the "historical evidence including 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.'" *State v. Halverson*, 2021 WI 7, ¶22, 395 Wis. 2d 385, 953 N.W.2d 847 (quoting *Service Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶28 n.10, 393 Wis. 2d 38, 346 N.W.2d 35). However, the Court has found historical review to be unnecessary when the meaning of the constitutional text is clear. *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶18, 387 Wis. 2d 511, 929 N.W.2d 209.

From a historical perspective, the conduct and words for which Justice Protasiewicz has been targeted have not been viewed as warranting an impeachment. And, the prevailing practice of government for nearly two centuries supports this interpretation. Throughout Wisconsin history, the Assembly has not used the impeachment of judicial officers for political purposes. Rather, impeachment of a judicial official has been used in a solitary instance for a case involving bribery that occurring in the mid-19th century.[1] That instance was a clear case of corruption in office and a crime. Appropriately so, the legislature has "acquiesced" since that time, implicitly agreeing that the language of the impeachment clause of Article III, Section 1 is not applicable to word or conduct of Justice Protasiewicz. *See State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 611,

[1] *See Former justices, Justice Levi Hubbell*, Wisconsin Court System, https://www.wicourts.gov/courts/supreme/justices/retired/hubbell.htm.

37 N.W.2d 473 (1949) ("If that were not sufficient, the fact that that construction has been acquiesced in by the people and their representatives for sixty years must, in accordance with the established rules for the construction of constitutional provisions, be given great if not controlling weight.").[2]

As such, the conduct of Justice Protasiewicz cannot be in any sense historically deemed as "corrupt." Justices routinely do not recuse themselves from issues upon which they have expressed clear points of view or in the context of previous donors to their campaigns appearing before them as litigants. Thirteen years ago, this Court modified the Code of Judicial Conduct specifically to permit a Judge to not recuse herself from a case, even where a donation came from a litigant. SCR 60.04(7). Since, there were nine separate Wisconsin Supreme Court elections.[3] Today, six of the seven Supreme Justices have received contributions during the campaigns from party committees.[4] The Court is clear that statements by candidates on issues do not preclude their participation in hearing a case involving those issues.

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[2] *See also Dean v. Borchsenius*, 30 Wis. 236, 246 (1872) ("[T]he uninterrupted practice of a government prevailing through a long series of years and the acquiescence of all its departments, legislative, executive, and judicial, sometimes become imperative even on constitutional questions."); *State ex rel. Hudd v. Timm*e, 54 Wis. 318, 325, 11 N.W. 785, 785 (1882) ("This uniform construction and long acquiescence and practice ought to be conclusive.").

[3] *Wisconsin Supreme Court election*, Ballotpedia, https://ballotpedia.org/Wisconsin_Supreme_Court_elections (last visited Sept. 11, 2023).

[4] Scott Bauer & Harm Venhuizen, *Wisconsin GOP threatens to impeach Supreme Court justice over donations, but conservatives also took party cash*, PBS News Hour, https://www.pbs.org/newshour/politics/wisconsin-gop-threatens-to-impeach-supreme-court-justice-over-donations-but-conservatives-also-took-party-cash (last visited Sept. 11, 2023).

Without the proper basis for an impeachment, Speaker Vos and the Assembly lack the constitutional authority to impeach Justice Protasiewicz. Article 7, Section 3 has specific language that limits the power to impeach. "[T]he people meant just what they said in using the language" to delineate constitutional rights. *Postel v. Marcus*, 160 Wis. 354, 371, 152 N.W. 419 (1915). For the assembly to act without heeding the constitutional prerogative would be an unconstitutional act and therefore present no legal weight or effect. *See id.* ("The legislature, acting outside of the constitution, is without jurisdiction and its action null." (quoting *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, 6 (1912))).

In summary, the Assembly's authority to impeach under the Wisconsin Constitution is specific and has limits affecting its implementation. The textual prescriptions applying to the use of impeachment must be read to mean what they say. What they say is ultimately determinative as the legislature is prohibited from acting outside any specific constitutional grant of power. To act outside of a grant of power is to usurp the power of the people who granted the legislature such power. It is for this reason that the Court must act to protect these precious rights.

B. Petitioners, this Court, and the public shall be irreparably harmed absent an injunction

The damage inflicted by the Assembly's spurious use of impeachment in the case of a single justice will likely be only the beginning. Statements made by members of the legislature suggest that other civil officers of the judiciary could be impeached for political reasons as well. The result of such actions would be to

curtail the Court's constitutionally prescribed role as a separate independent branch of government to adjudicate cases and controversies and say what the Constitution means. Simultaneously, the right of the Wisconsin electors to select judicial officers through elections would be irreparably harmed. This harm would grow exponentially, irrevocably fracturing our government's constitutional framework, the balance of power and our citizens' right to vote. The harm to our state and our way of life cannot be overstated.

C. The equities favor Petitioners

The Petitioners have presented arguments to support that a successful unconstitutional impeachment will most likely lead to further acts, and thereby further harm, in the future. *See Pure Milk Prods. Coop. v. Nat'l Farmers Org*., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Weighing this likely harm against the Assembly's interest in rendering a constitutional impeachment suggests a resolution that would allow the Court to exercise its power to interpret the Constitution while also ensuring the Assembly can perform impeachments of civil officers. This can be accomplished by enjoining the Assembly from conducting impeachment proceedings against any member of this Court without a ruling by at least four members of this Court that the member's conduct meet Wisconsin's Constitutional standards for impeachment.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court grant Petitioners' Emergency Petition for Original Action and Ex Parte Motion for Temporary, Emergency Injunctive Relief.

DATED: September 11, 2023

Electronically signed by Timothy W. Burns

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