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09-05-2023

CLERK OF WISCONSIN

SUPREME COURT

September 5, 2023

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*Distribution List Continued on Page 2

You are hereby notified that Janet C. Protasiewicz, J., has issued the following order:

No. 2023AP1399-OA Clarke v. Wisconsin Elections Commission

On August 22, 2023, the Republican Senator Respondents and the proposed intervenor, the Wisconsin Legislature, filed a motion requesting me to recuse from participating in this action. On August 23, 2023, I ordered the other parties to this action to file responses to the recusal motion or a statement that no response will be filed. They complied with my order.

I attach a complaint filed with the Wisconsin Judicial Commission and the Commission's May 31, 2023, decision.

IT IS ORDERED that on or before September 18, 2023, the parties and proposed intervenor to this action shall file supplemental briefs addressing how the attached complaint and decision affect their positions on the pending recusal motion or a statement that no supplemental brief will be filed.

IT IS FURTHER ORDERED that supplemental briefs shall not exceed 1,000 words.

Samuel A. Christensen
Clerk of Supreme Court

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September 5, 2023

No. 2023AP1399-OA Clarke v. Wisconsin Elections Commission

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JUDICIAL COMMISSION COMPLAINT AGAINST JUDGE JANET PROTASIEWICZ

The undersigned brings this complaint against Judge Janet Protasiewicz for violating multiple provisions of the Code of Judicial Conduct, SCR Chapter 60. In her campaign for a seat on the Wisconsin Supreme Court, Judge Protasiewicz has announced how she will rule on issues that will likely come before the supreme court, such as abortion and the constitutionality of Wisconsin's legislative maps. Such pronouncements are prohibited under the ethics code governing Wisconsin judges. I therefore respectfully request that the Judicial Commission open an investigation into Judge Protasiewicz's conduct.

JUDGE PROTASIEWICZ'S COMMENTS

Gerrymandering

At a supreme court candidates forum on January 9, 2022, Judge Protasiewicz was asked whether a recent Wisconsin Supreme Court decision¹ adopting a "least change" approach to redistricting of legislative maps was correctly decided, Judge Protasiewicz responded,

So let's be clear here, the maps are rigged. Bottom line. Absolutely, positively rigged. They do not reflect the people in this state. They do not reflect accurately representation in either the State Assembly or the State Senate. They are rigged. Period. I'm coming right out and saying it. I don't think you could sell to any reasonable person that the maps are fair.

She later tried to soft-peddle saying that, "I can't ever tell you what I am going to do on a particular case, but I can tell you my values and common sense tells you that its wrong."² But her signals to voters were quite clear.

¹ *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469.

² The question and answer are available at the link below starting at roughly the 51:40 mark:
<https://www.wispolitics.com/2023/wispolitics-supreme-court-forum>

Abortion

As all of you know, the United States Supreme Court overturned *Roe v. Wade* last year in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Shortly after that decision came out, Attorney General Josh Kaul filed a lawsuit seeking to invalidate Wisconsin's abortion ban. That case is currently pending before the Dane County Circuit Court. *See Kaul et al. v. Urmanski, et al.*, Dane County Case No. 2022CV1594. It stands a very good chance of ending up before the Wisconsin Supreme Court in the near future.

In a recent television interview when asked how she would analyze this case if it were to come before her on the Wisconsin Supreme Court, Judge Protasiewicz stated, "I cannot, obviously, tell anybody how I would rule on any type of case, but I can tell you what my values are." Earlier in the interview, she described her values as follows: "In regard to the progressive label, I embrace that when it comes to issues such as gerrymandering, when we talk about the maps, when we talk about marriage equality, when we talk about women's rights and ***women's rights to choose***." And when asked her opinion on the *Dobbs* decision, she stated, "Well, let's talk about the *Dobbs* case, and let's talk about judicial activism in that case. Women have, for the last 50 years . . . relied on the *Roe v. Wade* case. They've relied on it to be able to make their own decisions ***regarding bodily autonomy***, and in my opinion, our Supreme Court in *Dobbs* decided that case incorrectly."³

SCR VIOLATIONS

The Preamble the Code of Judicial Conduct, SCR 60, states that judges "must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our

³ The full interview can be found here: https://www.wkow.com/news/capital-city-sunday-scowis-candidate-embraces-progressive-label-tiffany-defends-panel-investigating-doj/article_47dd0074-93b1-11ed-bc7d-93e78ee13e23.html

legal system.” Further, judges are required to “uphold the integrity and independence of the judiciary” in “every aspect of judicial behavior except purely legal decisions.” SCR 60.02.

The Code of Judicial Conduct imposes ethical obligations on judges during campaigns. “A judge, candidate for judicial office, or judge-elect should not manifest bias or prejudice inappropriate to the judicial office.” SCR 60.06(3)(a). As such, a judge cannot make promises or commitments as to how he or she would rule on a case:

A judge, judge-elect, or candidate for judicial office shall not make or permit or authorize others to make on his or her behalf, 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(b). The Comment section to this rule is quite clear that judges cannot tell the public how they will decide future cases:

This section prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. A judge or candidate for judicial office may not, while a proceeding is pending or impending in the court to which selection is sought, make any public comment that may reasonably be viewed as committing the judge, judge-elect or candidate to a particular case outcome.

By pledging to voters that she will invalidate Wisconsin’s current legislative maps (which were in place for 2022 elections) and that she will invalidate Wisconsin’s law on abortion, Judge Protasiewicz has violated all of the above provisions. Put simply Judge Protasiewicz is promising her vote on certain cases as way to win over voters. This is completely unethical and cannot be condoned. As a result of her statements, there is no way Judge Protasiewicz can impartially participate in any future case involving Wisconsin’s current legislative maps or any legal challenge involving abortion law.

Moreover, by referring to court-approved maps as “rigged,” Judge Protasiewicz has disparaged the Wisconsin Supreme Court. It is inappropriate for lower court judges to criticize judicial decisions of higher court judges. Such comments are out-of-bounds and undermine the

public's confidence in the judiciary. *See, e.g., State v. Brown*, 2020 WI 63, ¶38, 392 Wis. 2d 454, 945 N.W.2d 584 (Noting that a Court of Appeals judge may have violated judicial ethics by “intentionally inciting racial tensions while demeaning the integrity of Wisconsin’s highest court” and that such comments “erode[] public confidence in the judiciary and damage[] the institution of the court.”) (R.G. Bradley, J., concurring). As Chief Justice Roggensack noted in a 2017 speech at Marquette University Law School, “It is a privilege to be a member of the judiciary, but with that privilege comes considerable responsibility. When we speak, ... we need to choose language that expresses our concerns about court opinions However, we can do so by choosing language that maintains the institutional legitimacy of our courts[.]” Chief Justice Patience Roggensack, *Tough Talk and the Institutional Legitimacy of Our Courts*, Hallows Lecture (Mar. 7, 2017), in *MARQUETTE LAWYER*, Fall 2017, at 51.

Although Judge Protasiewicz may find such comments to be helpful to her current campaign, she cannot violate her oath of office in the search of electoral advantage.

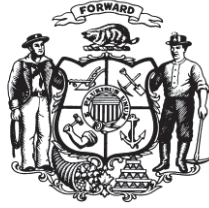
CONCLUSION

I respectfully request that the Judicial Commission investigate Judge Protasiewicz's comments and campaign conduct.

Sincerely,

A large black rectangular redaction box covering the signature area.

**STATE OF WISCONSIN
JUDICIAL COMMISSION**



Jeremiah C. Van Hecke
Executive Director

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Suite 700, Tenney Building
110 East Main Street
Madison, Wisconsin 53703-3328

May 31, 2023

CONFIDENTIAL
AND SENT VIA EMAIL

Honorable Janet Protasiewicz
Milwaukee County Circuit Court
janet.protasiewicz@wicourts.gov

Dear Judge Protasiewicz:

At its recent meeting, the Commission considered several complaints alleging that you 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, by making statements of your personal views concerning several contentious political issues during your campaign, including those you made at a January 9, 2023 candidate forum and during several interviews you gave in December 2022 and January 2023. It also considered claims that you “knowingly or with reckless disregard for the statement’s truth or falsity misrepresent[ed] the identity, qualifications, present position, or other fact concerning [...] an opponent,” in violation of Supreme Court Rule 60.06(3)(c), based upon your campaign video ads entitled, “Choices,” and “Predator,” and various Twitter posts.

Please be advised that the Commission dismissed these complaints without action and that Commission proceedings are confidential pursuant to state law.¹ The matter is now closed.

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, including Supreme Court Rule 60.06(3)(a) and Supreme Court Rule 60.06(3)(c);² (3) the U.S. Supreme Court’s

¹ Commissioners Brash and Ziewacz did not participate in this decision.

² The Commission notes that Supreme Court Rule 60.06(3)(a) states:

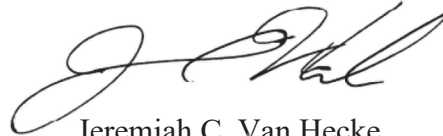
While holding the office of judge or while a candidate for judicial office or a judge-elect, every judge, candidate for judicial office, or judge-elect *should* maintain, in campaign conduct, the dignity appropriate to judicial office and the integrity and independence of the judiciary. A judge, candidate for judicial office, or judge-elect *should not* manifest bias or prejudice inappropriate to the judicial office. Every judge, candidate for judicial office, or judge-elect *should* always bear in mind the need for scrupulous adherence to the rules of fair play while engaged in a campaign for judicial office. *Emphasis added.*

decision in Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002) (which held that a restriction on an announcement by a candidate for judicial office of his or her views on disputed legal and political issues during a campaign violates the First Amendment); (4) the opinion in Duwe v. Alexander, 490 F. Supp. 2d 968, 976 (W.D. Wis. 2007) (which outlines the distinction between: (a) a promise, pledge or commitment; and (b) an announcement of personal views made during a campaign); and (5) the opinions in In re Gableman, 325 Wis.2d 631, 784 N.W.2d 631 (2010) (Prosser Opinion) and In re Gableman, 325 Wis.2d 579, 784 N.W.2d 605 (2010) (Abrahamson Opinion) (in which the Judicial Conduct Panel and a plurality of the justices held that, although the statements made by the judicial official about his campaign opponent were misleading and implied that past representation of a criminal defendant made that opponent less qualified, the judicial official did not clearly make any factual misrepresentations, and, thus, the statements could not form the basis for discipline).

The Commission also noted that it has not conducted any prior investigations of your conduct or filed any public judicial disciplinary cases against you.

Should you have any questions, please contact me.

Very truly yours,



Jeremiah C. Van Hecke
Executive Director

Supreme Court Rule 60.06(3)(c) states, in part, “A candidate for judicial office *should not* knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.” *Emphasis added.*

Given their use of the word “should,” neither of these cited Code provisions amounts to “a binding rule under which a judge may be disciplined.” “The use of ‘should’ or ‘should not’ in the rules is intended to encourage or discourage specific conduct and as a statement of what is or is not appropriate conduct.” *See Preamble to Code.*