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NO. 2023AP1399-OA

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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  
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.  
Czarnecki, in their official capacities as  
Members of the Wisconsin Election  
Commission; Meagan Wolfe, in her official  
capacity as the Administrator of the  
Wisconsin Elections Commission; Andre  
Jacque, Tim Carpenter, Rob Hutton, Chris  
Larson, Devin LeMahieu, Stephen L. Nass,  
John Jagler, Mark Spreitzer, Howard  
Marklein, Rachael Cabral-Guevara, Van H.  
Wanggaard, Jesse L. James, Romaine Robert  
Quinn, Dianne H. Hesselbein, Cory Tomczyk,  
Jeff Smith, and Chris Kapenga, in their  
official capacities as Members of the  
Wisconsin Senate,  
Respondents.

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**SUPPLEMENTAL RESPONSE BRIEF OF SENATORS CARPENTER,  
LARSON, SPREITZER, HESSELBEIN AND SMITH TO MOTION FOR  
RECUSAL**

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## INTRODUCTION

On September 5, 2023, the Court issued an order with attachments (“Order”) directing the parties to file supplemental briefs addressing how a complaint filed with the Wisconsin Judicial Commission (“Commission”), and the Commission’s dismissal of that and other complaints, affect their positions on the pending recusal motion.

Respondent Senators Tim Carpenter, Chris Larson, Mark Spreitzer, Dianne H. Hesselbein, and Jeff Smith, sued in their official capacities as members of the Wisconsin Senate (“the Democratic Senator Respondents”), by and through their attorneys, Pines Bach LLP, submit this Supplemental Response Brief.

There is significant overlap of fact allegations between the complaint to the Commission, alleging violations of the Code of Judicial Conduct, SCR Chapter 60 (“the Judicial Code”), and the portion of the pending recusal motion based on Wis. Stat. § 757.19(2)(f) and (g).<sup>1</sup> The Judicial Code and the Commission’s application of it and other law to the facts alleged in the complaints before it offer persuasive authority to support the conclusion that Justice Protasiewicz is not required to recuse from participation in this case pursuant to Wis. Stat. § 757.19(2)(f) and (g), and should not so recuse.

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<sup>1</sup> The recusal motion also seeks recusal based on federal Due Process concerns. The factual basis for that argument was neither raised in the complaints to the Commission nor addressed in the Commission’s dismissal. Order at 3-8. The Commission’s ruling therefore has no bearing on that portion of the recusal motion or the Democratic Senator Respondents’ response to it.

## ARGUMENT

### **I. A justice's ethical obligations align with her statutory recusal obligations.**

The Judicial Code was enacted pursuant to the Wisconsin Supreme Court's superintending authority. Justices may be disciplined by the Court for violations of it. *State v. Henley*, 2011 WI 67, ¶21, 338 Wis. 2d 610, 802 N.W.2d 175. The Judicial Code requires recusal under some circumstances, but a party may not seek recusal pursuant to it. Rather, a party may seek recusal pursuant to Wis. Stat. § 757.19.

As discussed in Section I of the Democratic Senator Respondents' August 29, 2023 brief, a justice's obligations under the Judicial Code, particularly the obligations of fairness, impartiality, the appearance of impartiality, and the prohibition on making promises with respect to outcomes of cases likely to come before the Court; along with accompanying obligations to recuse; align with the recusal obligations in Wis. Stat. §757.19(2)(f) and (g). *See also State v. Herrmann*, 2015 WI 84, ¶120, 364 Wis. 2d 336, 867 N.W. 2d 772 (Ziegler, J. concurring) (both the Judicial Code and the disqualification statute "aim to prevent the appearance of bias by requiring recusal" in certain circumstances). This Court has found that where recusal for allegations of bias was not required pursuant to the Judicial Code, Wis. Stat. § 757.19(2)(g) also did not require recusal. *State v. Pinno*, 2014 WI 74, ¶¶93-96, 356 Wis. 2d 106, 850 N.W.2d 207 (utilizing SCR 60.04(4) to analyze a recusal claim under Wis. Stat. § 757.19(2)(g)); *see also Henley*, 2010 WI 12, ¶¶26-27 (noting the similarity of the recusal for bias requirements in SCR 60.04(4) and Wis. Stat. § 757.19(2)(g)).

If any difference exists between the recusal obligations in the Judicial Code and Wis. Stat. § 757.19(2)(f) and (g), the Judicial Code limits

judges more than the statute does: “[the Judicial Code] governs the ethical conduct of judges...it has no effect on their legal qualification or disqualification to act **and a judge may be disciplined for conduct that would not have required disqualification under sec. 757.19.**” *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 185, 443 N.W.2d 662 (1989) (emphasis added). Thus, a Commission decision to dismiss an ethics complaint alleging bias suggests that the same allegations would not support disqualification under Wis. Stat. §757.19. *See Pinno*, 2014 WI 74, ¶¶93-96; *see also Storms v. Action Wisconsin*, 2008 WI 110, ¶18, 314 Wis. 2d 510, 754 N.W.2d 480 (considering SCR 60 and Commission dismissal of ethics complaint in determining justice not disqualified under Wis. Stat. § 757.19).

**II. The Commission’s dismissal supports a determination that recusal is not required.**

Here, the Commission dismissed complaints that Candidate Protasiewicz violated the Judicial Code for expressing her “personal views concerning several contentious political issues,” including the politically gerrymandered state legislative maps, during her campaign. Order at 7. The complaint alleged those remarks violated the Preamble to the Judicial Code, SCR 60.02, and SCR 60.06(3)(a) and (b), which call for independence and the absence of bias and prohibit making statements committing to particular case outcomes. Order at 4-5. Applying those and other sections of the Judicial Code, prior opinions applying the Judicial Code, and a judicial candidate’s First Amendment rights recognized in *Republican Party*

of *Minnesota v. White*, 536 U.S. 765 (2002),<sup>2</sup> the Commission dismissed the complaints against Candidate Protasiewicz. Order at 7-8.

The Court created the Commission to enforce the Judicial Code. *In re Kading*, 70 Wis. 2d 508, 516, 235 N.W.2d 409, 412 (1975), *supplemented*, 70 Wis. 2d 508, 239 N.W.2d 297 (1976). The Commission is an independent agency within the judicial branch. *Id.*; Wis. Stat. § 757.83. Its stated mission is “to hold Wisconsin judges and court commissioners accountable for violations of the Wisconsin Code of Judicial Conduct while maintaining the independence of the judiciary so necessary to the proper functioning of a democracy.”<sup>3</sup> Its duty is to investigate and prosecute judicial misconduct. Wis. Stat. § 757.83, *et seq.* While the Commission’s decision has no binding legal effect here, it has persuasive value given the Commission’s non-partisanship, independence, mission, and expertise; and the parallel considerations to be made between complaints of bias and promises prohibited by the Judicial Code and motions for recusal under Wis. Stat. § 757.19(2)(f) and (g).

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<sup>2</sup> This and other First Amendment jurisprudence is discussed in Section III of the Democratic Senator Respondents’ August 29, 2023 response brief, which also supports denial of the recusal motion.

<sup>3</sup> <https://www.wicourts.gov/courts/committees/judicialcommission/index.htm>



## CONCLUSION

For the reasons set forth in the Democratic Senator Respondents' August 29, 2023 brief and this supplemental brief, the recusal motion should be denied.

Respectfully submitted this 18<sup>th</sup> day of September 2023.

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By: Electronically signed by Tamara B. Packard

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. I further certify that this brief conforms to the length requirement stated in the Court's September 5, 2023 Order. The length of this brief is 999 words.

Electronically signed by: Tamara B. Packard  
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