No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW and STEPHANIE McCLEARY et al.,

Plaintiffs/Respondents.

MOTION FOR LIMITED INTERVENTION AND MOTION TO RECUSE BY STATE LEGISLATORS

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I. Introduction

Movants are legislators who desire fair and unbiased judges to decide this important case. They seek to intervene for the limited purpose of asking for the recusal of Justice Mary Yu. They do so because while this case was pending and being briefed, Justice Yu delivered a speech to WEA-PAC, the political action committee of the Washington Education Association ("WEA"), a member of the Network for Excellence in

Washington Schools, one of the plaintiff-respondents. "Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the confidence can be debilitating." *In re Disciplinary Proceedings Against Sanders*, 145 P. 3d 1208, 1212 (Wash. 2006).

II. Name and designation of movants

Movants are Representatives Matt Manweller, David Taylor, Joe Schmick, Mary Dye, Mike Volz, Brandon Vick, Jacquelin Maycumber and Cary Condotta and Senators Michael Baumgartner and Doug Erickson.

Movants have a substantial stake in the outcome of this case. They are among the legislators who have negotiated and passed state budgets since this case was filed that have dramatically increased K-12 education funding. *See generally* 2018 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation, April 3, 2018 (filed April 9, 2018). Combined, they represent more than one million Washingtonians whose lives, schools, and pocketbooks are all deeply affected by this case.

Movants also have a personal stake in this matter. The State has been held in contempt and fined while this case has been pending. During the pendency of the case, the litigants themselves, and even the Court at times, have discussed certain degrees of personal liability for legislators, including withholding salaries and other financial sanctions, until this case is resolved.

Movants make no secret of their support for an amply-funded program of basic education as a policy matter. Each endeavors to support only legislation which meets the burden of constitutionality. Of course, the Court is entitled to its judicial review of questions of constitutionality, and movants recognize that they will sometimes reach a different conclusion than the Court. Yet movants, as inherently political actors elected by voters to pursue articulated policy goals (as opposed to members of the Court, who are elected to interpret and apply legal standards to questions of facts and law[1]), have a special interest in ensuring that such judicial review is both actually unbiased and appears to the public as unbiased.

III. Relief sought

Movants seek to intervene for the limited purpose of moving to recuse Justice Mary Yu. Due to the serious issues raised, movants also request oral argument on this motion.

IV. Parts of the record relevant to the motion

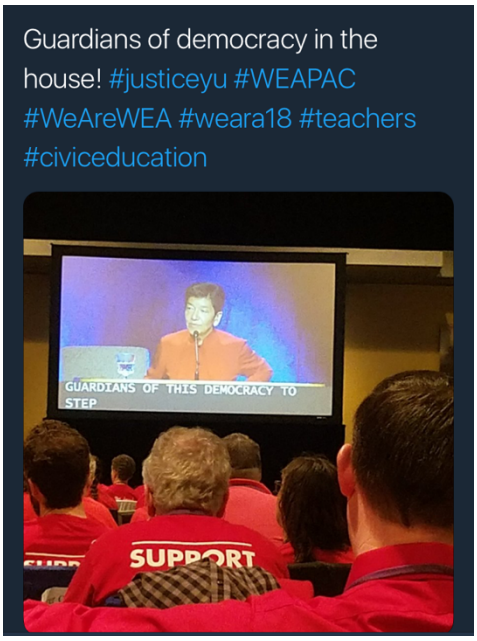
The record relevant to the motion to intervene consists of the elected positions as state legislators held by movants and their roles crafting the legislation now under consideration by the Court.

[1] *See* Code Jud. Conduct 4.1, cmt. 1 ("Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case.")

The record relevant to the motion to recuse is publicly available. The WEA is a party to this case as one of the plaintiffs, the Network for Excellence in Washington Schools, includes the WEA as a member. *See* https://waschoolexcellence.org/about/news-members/.

On Saturday, April 21, WEA-PAC, the political action committee of the WEA, held a conference in Spokane. *See Washington Supreme Court Justice Criticized for Speech to Powerful Teachers Union*, Walker Orenstein, Tacoma News Tribune, Apr. 26, 2018, *available at* http://www.thenewstribune.com/news/politics-government/article209855729.html ("*Orenstein Article*"). Here is a picture from the event, with closed captioning explaining the crowd's reaction and a social media comment from the official twitter account of the Tacoma Education Association:

Here is a sampling of additional posts about the speech made to social media website by WEA members in attendance:



Justice Yu and the WEA declined to provide a video or audio recording of the speech to the news media. *Orenstein Article.* According to Justice Yu, "[t]here was no question I had an agenda and that was I want (teachers) to invite judges into the classroom." *Id.* A spokesman for the WEA claimed she also spoke about "her path to becoming a Supreme Court Justice and the role that education played in her life." *Id.* Neither Justice Yu nor the spokesman provided any additional information about how long Justice Yu stayed at the event, whom she spoke with, or what they talked about. Yet posts made to social media websites by attendees indicate that Justice Yu met personally with WEA members. Here are a few such posts:

V. Argument

1. Motion to intervene for a limited purpose

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

CR 24(a)(2); *see generally Westerman v. Cary*, 892 P.2d 1067, 1088 (Wash. 1994). There is no question movants have timely applied for intervention; this motion is filed two weeks after the events that require recusal.

The other factors favor limited intervention as well. Movants each have a compelling interest in the proper resolution of this case. They negotiated and passed budgets that have provided dramatic increases in K-12 funding, and some of them were among the principal negotiators of those budgets. Even more than that, each movant is a member of an institution that has been held in contempt and been fined in this case, and each face the prospect of seeing their salaries withheld or other personal financial sanctions. Each deserves a fair tribunal to decide the constitutionality of the Legislature's work.

Moreover, as a practical matter, the resolution of this case without movants' intervention may impair and impede their ability to protect their interests, and no current party will adequately represent those interests. Movants are reliably informed that no current party to this matter will seek recusal. Movants deserve the opportunity to argue for recusal before their interests in the matter are decided.

2. Movants have standing

To the extent the Court may have questions about movants' standing, separate from the merits of their motion to intervene, the answer is that they do. "The basic test for standing is whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in

question." *Seattle v. State*, 694 P. 2d 641, 668 (Wash. 1985) (citation omitted). Moreover, "[w]here a controversy is of serious public importance the requirements for standing are applied more liberally." *Id.*

Movants have standing in two primary ways. First, and most concretely, the outcome of this case could affect their salaries. The litigants, and the Court itself at oral argument, have considered whether individual legislators should have their pay reduced or deferred until this case is resolved. *See State ex rel. O'Connell v. Dubuque*, 413 P. 2d 972, 976 (Wash. 1966) (granting standing on whether legislators who voted for pay raises could run for re-election; "[q]uestions of salary, tenure, and eligibility to stand for public office, all being matters directly affecting the freedom of choice in the election process are of as much moment to the voters as they are to the candidates, and make this controversy one of public importance"). Movants deserve a fair panel to decide issues directly affecting their wages.

Second, movants are members of an institution which the constitution invests with the sole authority, subject only to gubernatorial veto, to write state budgets. *See generally Legislature v. Lowry*, 931 P.2d 885 (Wash. 1997). The final resolution of this case before this Court is a critical step in restoring legislative authority over the state budget. Movants have standing to ensure that any decision about such a resolution is made by an unbiased panel of judges.

3. Motion to recuse

Under a number of canons of the Code of Judicial Conduct ("CJC"), Justice Yu's actions require recusal in this case. The fundamental, overarching rule is that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." CJC 1.2. While Justice Yu defended her speech to a party in this case by noting that "she attends public events between 10 and 15 times a month, and that any one of those could be interpreted as political," *Orenstein Article*, the canons impose a higher standard on judges than other elected officials—"[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code." CJC 1.2 cmt. 2. The purpose of that rule, and the primary reason movants are seeking recusal, the enduring need for an independent and *trusted* judiciary in our tripartite form of government—as comment 3 to CJC Rule 1.2 explains, "[c]onduct that compromises the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."

Justice Yu also violated a number of rules of Canon 2 of the CJC, that "a judge should perform the duties of judicial office impartially, competently, and diligently."

- Under CJC Rule 2.1, the "duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities."
- Under CJC Rule 2.2, a "judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."
- Under CJC Rule 2.4(B) and (C), a judge shall not "permit . . . political . . . or other interests or relationships to influence the judge's judicial conduct or judgment" or "convey or authorize others to convey the impression that any person or organization is in a position to influence the judge."
- Under CJC Rule 2.9(A), a "judge shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending matter[.]"
- Under CJC Rule 2.10(A), a "judge shall not make any public statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court[.]"

As for extrajudicial political activities in particular, Canon 4 CJC spells out specific restrictions for judges in their capacity as political candidates, but Justice Yu's conduct does not find a safe harbor in these

rules. Most importantly, a judge may not "make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," CJC 4.1(A)(11), and must "[a]ct at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary," CJC 4.2(A)(1). Those rules exist because "[e]ven when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case." CJC 4.1 cmt. 1. *Compare with* Justice Yu's Comments to news media, *Orenstein Article* ("Yu also said she attends public events between 10 and 15 times a month, and that any one of those could be interpreted as political.").

To be sure, CJC Rule 3.7 allows judges to speak at meetings of organizations, but only subject to CJC Rule 3.1, which prohibits a judge from "participating in activities that would undermine the judge's independence, integrity, or impartiality," which has unfortunately occurred in this instance.

The CJC is also quite clear that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]" CJC 2.11. Actual impartiality is not necessary, for when

a "judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Sherman v. State*, 905 P.2d 355, 378 (Wash. 1995). Indeed, when it comes to *ex parte* communications, even "inadvertently obtain[ing] information critical to a central issue" requires recusal. *Id.* at 379.

The most relevantly similar case is *In re Disciplinary Proceedings Against Sanders*, 145 P.3d 1208 (Wash. 2006). There, Justice Sanders visited a facility for sexually violent predators while a case pending at the Court involving the sexually violent predator law. Justice Sanders spoke with the residents, knowing that the issues they discussed might have bearing on the case before the Court. He was admonished by the Commission on Judicial Conduct, which this Court (with nine Court of Appeals' Judges presiding) affirmed: the "Commission justifiably found that Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour and met with litigants who had pending cases before the court." *Id.* at 1211. He "created a situation that clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality." *Id.*

Perhaps most notably, the question in *Sanders* was whether to uphold an admonishment; Justice Sanders himself saw the clear violation and voluntarily recused himself in the case. *Id.* at 1212, n.11.

Recusal is similarly required here. Justice Yu both spoke at the annual political event of one of the plaintiffs here and spent time with individual members of the organization. No recording has been publicly disclosed, and what facts have been made available creates far more than the "mere suspicion of partiality" that required recusal in *Sherman*.[2]

It is hard to square Justice Yu's claim that she only discussed her journey to becoming a judge and encouraged teachers to invite judges to classrooms with the fawning social media posts from attendees. Conversely, it is easy to understand why the movants, the general public, and other parties in this case might take Justice Yu's assertion with a heavy dose of skepticism. Indeed this dichotomy illustrates why recusal is necessary—even if the speech itself were entirely innocuous, the discussions Justice Yu had with attendees before and after the speech raise the suspicion of improper communications. Justice Yu has thus, at minimum, created the appearance of impropriety. If Justice Yu fails to recuse, "the effect on the

[2] *Sanders* arose from the appeal of a decision by the Commission on Judicial Conduct following a complaint at that body, which conducted a fact-finding hearing. There may well be a similar complaint filed with respect to this situation, but even with only the facts currently known, recusal is required.

public's confidence in our judicial system can be debilitating." *Sherman*, 905 P.2d at 378.

Recusal is the only method available to ensure the public and the parties that this case will be decided fairly by an impartial panel.

VI. Conclusion

It is the sincere hope of movants that Justice Yu makes the same decision that Justice Sanders made and moots this motion by voluntarily recusing herself in this case. But if she does not, movants request that they be permitted to intervene, and, respectfully, request that she be recused.

RESPECTFULLY SUBMITTED, this 8th day of May, 2018.

Stokesbary PLLC

/s/ Andrew R. Stokesbary
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Representative Brandon Vick
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Representative Cary Condotta
Senator Michael Baumgartner
Senator Doug Erickson

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Comments:

Motion for limited intervention and motion to recuse by state legislators

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