HALLING & CAYO
ATTORNEYS AT LAW
320 EAST BUFFALO STREET, SUITE 700 • MILWAUKEE, WI 53202

November 12, 2021

Via Email Only
Attorney Jeremiah Van Hecke
State of Wisconsin
Judicial Commission
110 E. Main Street, Suite 700
Madison, WI 53703

Re: Justice Kill Karofsky

Dear Attorney Van Hecke:

Please take notice that I represent Justice Jill Karofsky with regard to the above inquiry. Please direct all correspondence to my attention.

Background Information

The November 3, 2020 presidential election and its aftermath laid bare the shaky foundations of our democracy. Even before the election, then-President Trump declared that he would not accept an election loss as valid, and would not commit to a peaceful transfer of power.[1]

> With Universal Mail-In Voting (not Absentee Voting, which is good), 2020 will be the most INACCURATE & FRAUDULENT Election in history. It will be a great embarrassment to the USA. Delay the Election until people can properly, securely and safely vote???

Donald J. Trump @realDonaldTrump (July 30, 2020).[2]

> If Sleepy Joe Biden is actually elected President, the 4 Justices (plus1) that helped make such a ridiculous win possible would be relegated to sitting on not only a heavily PACKED COURT, but probably a REVOLVING COURT as well.

[1] https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html
[2] Tweets from the @realDonaldTrump account are now inaccessible as the account was permanently suspended.

Donald J. Trump, @realDonaldTrump (October 30, 2020).

Amid these declarations as well as the COVID-19 pandemic and the fight for racial justice, record numbers of people voted— particularly by absentee ballot. Within days, it was clear that Joseph Biden and Kamala Harris won the election nationally by 7 million popular votes and 74 electoral votes.

These substantial margins, however, did not arrest President Trump and his supporters' continued claims, without any evidence, that the election was "stolen" and that "voter fraud" was rampant. Their baseless claims became the fodder for several lawsuits, making this the most heavily litigated election in U.S. history. By last count, more than 60 lawsuits had been filed trying to overturn the election, but judges and justices were not swayed, and over and over again, courts rejected the Trump Campaign's arguments as "harm[ing] the public interest in countless ways, particularly in the environment in which this election occurred" (Georgia, Nov. 19, 2020); a "fundamental and obvious misreading of the Constitution" (*Wisconsin Voters Alliance v. Pence*, 20-3791, D.D.C., Jan. 4, 2021); and a "historic and profound abuse of the judicial process" (*King v. Whitmer*, 20-13134, Michigan, Aug. 25, 2021 sanctions hearing).

In an attempt to curb judges and justices from following the law, President Trump, and those acting on his behalf, publicly abused the judiciary in the press and on social media.[3] Everything came to a head on January 6, 2021, as insurrectionists swarmed the Capitol during the Electoral Vote count.

The Wisconsin Election and Aftermath

In November, 2020, the Biden-Harris ticket won the election in Wisconsin by a margin of 20,427 votes following the official post-election canvass. Wisconsin's statewide elections are historically close, and 2020 was no exception. While this margin was not close enough to require taxpayers to pay municipalities' costs for a recount, it was within the 1% that permits an aggrieved candidate to request a recount at his or her expense. See Wis. Stat. § 9.01(1)(a)1.

The Trump campaign timely requested and paid for recounts of only Milwaukee and Dane Counties. These are the state's two largest counties, and both are highly urban and diverse.

The arguments made at the recounts did not center on whether the ballots themselves were accurately tabulated, but on whether broad classes of ballots were cast according to law. The Dane and Milwaukee County Boards of Canvassers, respectively, rejected these arguments, and no ballots were disqualified as a result of these legal challenges. Nonetheless, President Trump continued to falsely beat the voter fraud drum:

[3] This complaint is itself an attempt to intimidate a member of the judiciary.

> The Wisconsin recount is not about finding mistakes in the count, it is about finding people who have voted illegally, and that case will be brought after the recount is over, on Monday or Tuesday.

Donald J. Trump, @realDonaldTrump (November 28, 2020).

Following the recounts, President Biden's margin of victory increased to 20,682, and the state's election was certified by the chair of the Wisconsin Election Commission on December 1, 2020. Wisconsin would send 10 Electors to vote in Madison for President Biden and Vice President Harris on December 14, 2020, the date required by federal law.

However, the Trump campaign appealed the determinations of the Milwaukee and Dane County Elections Commissions to circuit court on December 3, 2020.[4] Hon. Stephen Simanek, sitting by appointment, affirmed the determinations on December 11, 2020. The Trump campaign then filed a Petition to Bypass, which the Supreme Court accepted that same day.

Due to the impending Electoral College vote, the case proceeded with paramount speed. Supplemental briefs were due at 10 pm December 11, 2020, and the oral argument giving rise to this complaint occurred at 10 am on Saturday, December 12, 2020, a mere 48 hours before the Electoral College was set to meet and 12 hours after the briefs were filed.

A Saturday morning argument is by itself unusual, if not unprecedented. (Additionally, it is important to note that no other state Supreme Court held oral arguments in response to the Trump campaign's myriad legal filings.) As can be plainly seen on the video recording, the proceedings were tense, and tough questions were posed by several Justices to all three counsels. As is customary during active oral arguments, interruptions of counsel by Justices were frequent. It was a "hot bench," which is not abnormal.

Several arguments were advanced by the Trump campaign, both at the recounts and during argument, to invalidate certain classes of votes from Dane and Milwaukee counties. Relevant here is an argument concerning the application and envelope used by absentee voters to cast their ballots, which will be discussed below with its corresponding Incident. However, the remedies sought would have invalidated the votes of approximately 227,000 Dane and Milwaukee County voters who voted according to guidance provided by their local clerks and on forms provided by their government. People voting in similar fashion in other counties would not have been similarly affected.

[4] The Trump campaign, by Attorney Troupis and others, petitioned for Original Action pursuant to Wis. Stat. § 809.70 on December 1, 2020, seeking immediate review of the recount determinations. That petition was denied on December 3, 2020.

Prior to receiving the case, Justice Karofsky had not formed any opinion on the merits of the parties' arguments. However, once the filing was received and she read the briefs, prior to oral argument, Justice Karofsky became alarmed by Attorney Troupis' position because it seemed clear to her that rather than a reasonable attempt to ensure that votes were counted properly, the case was a brazen and cynical attempt to overturn the clear will of the voters.

To be clear, there is no rule suggesting that once a case is briefed but prior to oral arguments that a Justice must approach the oral argument with a completely open mind. In fact, in most cases, most if not all Justices form an initial opinion based on the briefings and the record. The oral argument is close to the final step in the process, and is often used by justices to examine issues they are not sure about, to enter queries that may persuade undecided colleagues, or to confirm their own initial expectations.

This entire complaint is predicated upon the idea that despite the case being fully briefed, that Justice Karofsky should have formed no opinion about the merits of the case, which evidences a complete misunderstanding of the order of events in a lawsuit by the complainant.

The Court issued its opinion affirming the determination of the respective Elections Commissions on December 14, 2020, the day the 10 Wisconsin Electors cast their votes for Joseph R. Biden and Kamala D. Harris.

The Judicial Commission Inquiry

We will now turn our attention to the substance of the Judicial Commission's inquiry, both generally and specifically. In general, the complaint suffers from two defects.

First, this complaint seems to be premised on a fallacy—i.e. that justices go into an argument without having formed any preliminary impressions of a case's merits. This is not and has never been the usual practice. To adequately prepare for a hearing or argument, justices will have read the briefs, and often the cases cited and other parts of the record.[5] Because the arguments of counsel have already been presented in writing, justices will usually form initial opinions based on those arguments, and then use the hearing to obtain clarification and confirm a position.

Second, the inquiry takes issue with Justice Karofsky's alleged commentary from the

[5] Some judges rely on bench memoranda from their law clerks, which often recommend to the judge how the matter should be decided. In other words, it is standard for appellate judges to go into a hearing not only with their own mental impressions but a recommendation from a law clerk as to whether a lower decision should be affirmed. Justice Karofsky typically does not rely on bench memoranda and will read the briefs and cases herself, as she did in this matter.

bench. It is perfectly reasonable for justices to speak aloud their impressions of a case during a hearing. They may be doing so in order to persuade other justices, or to clarify their own impressions. For example, at oral arguments in May, 2020, Justice Rebecca Bradley prepared a comparison between Wisconsin Health Secretary Andrea Palm's safer-at-home order and the internment of Japanese-Americans during World War II, invoking the infamous *Korematsu* decision. No other Justice has publicly suggested that Justice Bradley should not have employed such a comparison, no matter how suspect. Justices have the right to speak freely. The general tenor of the Court bench has been this way since long before Justice Karofsky was sworn in.

The specific incidents are addressed in order, below.

Incident 1

Context is important when analyzing the first allegation. While the transcript accurately reflects the quoted dialogue, the allegation ignores Attorney Troupis' comment just prior to this exchange. Attorney Troupis began his argument by stating that "big cases depend on big principles," including the principles that every vote should count and the will of the voter is of paramount concern. He then contrasted that with the principle that the legislature "embodies the will of the people," and that in a nation of laws, the laws take precedence.

Justice Karofsky then questioned Attorney Troupis, and pushed back on the premise of the appeal as set forth in his introduction. She acknowledged specifically that the recount and appeal were targeted only at Milwaukee and Dane Counties. She accurately noted that these counties are quite diverse and Attorney Troupis was seeking to disenfranchise the majority of Wisconsin's African American voters.[6] She stands by her remark that the lawsuit "smacks of racism," because it did. And that fact undermined their case.[7] She had a duty not to let the blatant selection of two of Wisconsin's two most diverse counties (and the absence of less diverse counties such as Waukesha that would have been far more likely to yield additional ballots for Trump-Pence) go unchecked.

In addition, Justice Karofsky did ask a question of Attorney Troupis during the latter part of the exchange: "I'm very interested in knowing of one person in Dane County, or one person in Milwaukee County, who engaged in election fraud on November 3, 2020."

---

[6] See, e.g., "African Americans in Wisconsin: Overview" which states that 69.4% of Wisconsin's African American population lives in Milwaukee County, with Milwaukee, Dane, and four other counties constituting 90%. Available at: https://www.dhs.wisconsin.gov/minority-health/population/afriamer-pop.htm.

[7] It is important to distinguish between respect for lawyers and litigants, as the Code requires, and respect for their arguments, which are afforded no deference. Justice Karofsky did not call Attorney Troupis shameful or racist; she described the lawsuit as such.

As for allegations that Justice Karofsky "repeatedly glanced below [her] camera and/or computer screen at prepared notes or remarks," these are absurd complaints, verging on harassment. Of course Justice Karofsky had paper, including printouts of the parties' briefs with her notes, in front of her, as did every other justice.

Incident 2

Context remains important for this incident. Prior to the quoted dialogue, Attorney Troupis claimed that state statute required an absentee ballot *application* separate from the *envelope* used to return the ballot.

By way of background, in Wisconsin, voters can vote absentee by one of two methods—in person or by mail. If they vote absentee by mail, they can fill out an application online or provide one to their municipal clerk's office, and then a ballot is mailed to them. Voters can then return the ballot by Election Day.

"In-person absentee" is the second method by which Wisconsin voters may vote ahead of Election Day. Wisconsin does not permit true "early" voting where votes are cast and processed immediately. Instead, it permits "in-person absentee" voting by which electors present at designated locations during specified times, apply for an absentee ballot, immediately receive it, cast their vote, and then deposit the ballot in an envelope. The sealed envelope and ballot is then processed as any other absentee ballot on Election Day.

More than a decade ago, the Wisconsin Elections Commission (WEC) developed Form EL-122. This form is titled "Official Absentee Ballot Application/Certification" and the form had been printed on the absentee ballot envelopes for every Wisconsin election held since 2010 according to WEC guidance. Voters fill out the application section, receive and fill out their ballot and insert it into the envelope, and then complete the certification (which is witnessed by sworn elections officials). Prior to 2020, this form had been used for a decade without incident, and in 2020, had been used by Attorney Troupis and his wife to request their own absentee ballots.

Nonetheless, Attorney Troupis took the position at the recount and at oral argument that this form was insufficient to comply with Wis. Stat. § 6.86(1)(ar), which allows an absentee ballot to be issued only after a clerk receives "a written application therefor from a qualified elector of the municipality." He argued that the "application" had to be a separate form, despite that requirement appearing nowhere in statute (as he conceded in response to Justice Dallet's question preceding the exchange with Justice Karofsky). The remedy requested was a drawdown of approximately 170,000 ballots cast using Form EL-122 in Dane and Milwaukee Counties (including the ballots of Attorney Troupis and his wife); it should be noted that EL-122 was used statewide but the Trump campaign requested recounts and therefore drawdowns of only Dane and Milwaukee ballots.

The effects of this remedy, had it been imposed, would have been profound: 170,000 otherwise qualified electors of Milwaukee County and Dane County—and *only* those counties—would have been disenfranchised; electors in the rest of the state who utilized EL-122 would not have been affected. The margin of victory was 20,682; this remedy would likely have shifted the outcome of the election and possibly provided a model for other states to follow suit.

Accordingly, it was clear to Justice Karofsky that such a drastic remedy required absolutely solid factual and legal underpinnings. She was skeptical from the briefing and challenged Attorney Troupis accordingly.

The exchange as recited in the inquiry letter is accurate, though we note that Justice Karofsky referenced "EL-122" and not "the L-122" as transcribed. While the Commission is concerned with the bolded portion in particular, context remains ever important. In this exchange Attorney Troupis was speaking extremely quickly (as is evident in the video recording) and appeared to gloss over the word "application" that was plainly on the form. Attorney Troupis was apparently trying to avoid the truism that the form said what it said, and Justice Karofsky was pushing back. Justice Karofsky spelled out "application" (in contrast with Attorney Troupis' near-avoidance of the word) for the sake of clarity.

Regarding the allegation that during this exchange, Justice Karofsky "made a facial expression that could be characterized as a slight smile or smirk," this is ridiculous and also verges on harassment. Justice Karofsky made no extreme or overt gestures or facial expressions. Rule SCR 60.04(e) does not require Justices to refrain entirely from reacting nonverbally to arguments. A review of just about any recorded argument, chosen at random, will show similar muted-but-visible reactions to arguments.

It is also important to note that Justice Karofsky was attending the hearing from her office at the Capitol, while armed protesters stood outside and were visible and audible from her window. At times during the argument, she was visibly surprised or reacting to events she was hearing or seeing outside her office. Although the video recording captures Justice Karofsky's reactions, it does not capture the events she was reacting to.

Incident 3

This incident occurred at the very end of the argument, and Justice Karofsky's remarks accurately summarize Attorney Troupis's position. There was absolutely no evidence of voter fraud in the record, despite Attorney Troupis's statements and arguments that there were. America is not a monarchy and self-governance is a foundation of democracy. In Federalist Paper 69 Alexander Hamilton contrasted the authority of the president to King George:

That magistrate is to be elected for FOUR years; and is to be re-eligible as often as the

> people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between HIM and a king of Great Britain, who is an HEREDITARY monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between HIM and a governor of New York, who is elected for THREE years, and is re-eligible without limitation or intermission."

(Emphasis in original.) The proponents of the instant lawsuit were asking the Supreme Court to overturn the results of the election so that President Trump could stay in power despite the will of the voters. These statements were completely accurate.

Moreover, Justice Karofsky's statements were not unique. Just recently, in her order denying an injunction to block the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol's requests for the former president's records, United States District Judge Tanya S. Chutkan pointed out that "Presidents are not kings[.]" *Trump v. Thompson*, Civil Action No. 21-cv-2769 (TSC), 2021 U.S. Dist. LEXIS 216812, at *26 (D.D.C. Nov. 9, 2021).

The instant case was not ordinary litigation over interpretation of a lien statute or an affirmative defense to a contract. This was quite literally a fate-of-the-republic lawsuit. Attorney Troupis had a national platform (as the argument was streamed on YouTube and well-publicized) to spread misinformation that numerous other courts had already rejected, and would continue to reject, as fallacious and dangerous. Justice Karofsky was doing exactly what the voters of Wisconsin elected her to do—fiercely guard our democracy and the rule of law.

Allegations and the Code of Judicial Conduct

The Judicial Code requires judges to act with impartiality towards the parties, but it does not require a judge to turn a blind eye to dangerous, bad-faith conduct by a lawyer or litigant. It is beyond reason to read the Code to require judges to be mouse-like quiet when parties are arguing in favor of a slow-motion coup.

The Code does not prohibit judges or Justices from speaking from the bench about arguments or positions they find abhorrent, frivolous, or even contrary to law in more mundane ways. That is what happened here. Justice Karofsky chose not to let the Court be used to spread falsehoods laced with racial animus to a national audience champing at the bit for confrontation. She maintained high standards of conduct in order to promote public confidence in the integrity of the judiciary.

The Code and the Commission should not be weaponized to silence judges who rightfully

push back against threats to our democracy. Nor should the Commission be part of a concerted campaign to intimidate judges and justices. Accordingly, this investigation should be closed without further proceedings.

Very truly yours,

HALLING & CAYO, S.C.

/s/ Stacie H. Rosenzweig

Stacie H. Rosenzweig
shr@hallingcayo.com