Nos. 2021AP1321-LV, 2021AP1325

In the Supreme Court of Wisconsin

COUNTY OF DANE *ET AL.*,
PETITIONERS,

V.

PUBLIC SERVICE COMMISSION
OF WISCONSIN *ET AL.*,
RESPONDENTS.

On Appeal from The Dane County Circuit Court,
the Honorable Jacob Frost, Presiding.

MICHAEL HUEBSCH'S PETITION FOR EXPEDITED REVIEW

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a party who withdraws a subpoena for testimony, after the court of appeals stays that subpoena pending appeal, may moot the appeal notwithstanding that the party states that it will imminently issue, and does issue, another subpoena for testimony after the stay is lifted and appeal dismissed; and, if yes, do any mootness exceptions apply?

The court of appeals answered yes and no.

2. Whether a circuit court commits a *per se* abuse of discretion on the "likelihood of success" prong when denying a stay motion by simply cross-referencing its merits decision? *See Waity v. LeMahieu*, No. 2021AP802 (July 15, 2021) (Appendix ("App.") 514).

The court of appeals did not reach this issue.

3. Whether conduct by an adjudicator that creates a mere "appearance of bias" violates the Due Process Clause?

The circuit court answered yes. The court of appeals did not reach this issue.

4. Whether an adjudicator's personal connections to individuals linked to parties appearing before the adjudicator, whether those individuals are close friends or mere professional acquaintances, give rise to a "serious risk of actual bias" under the Due Process Clause, notwithstanding the presumptions of regularity, integrity, honesty, and impartiality that attach to the adjudicator's decisions?

The circuit court answered yes. The court of appeals did not reach this issue.

5. Whether the practice of applying for employment, after leaving public office, with an entity that had previously appeared before the adjudicator creates a "serious risk" that the adjudicator, when the entity appeared before him, had been actually biased?

The circuit court answered yes. The court of appeals did not reach this issue.

CRITERIA FOR REVIEW

A decision by this Court is needed to clarify, develop, and harmonize the law on the issues presented for review and to resolve multiple conflicts between the lower courts' decisions and

settled case law. Wis. Stat. § (Rule) 809.62(1r)(c), (d). Any one of the questions presented here alone warrants review.

First, the court of appeals' opinions disregard this Court's mootness doctrine by holding that a voluntarily "withdrawn" subpoena for testimony moots a challenge to that subpoena notwithstanding the subpoenaing party's stated intention to reissue yet another subpoena for testimony if and when the appeal is dismissed (on which intention it then acts). Here, the subpoenaing party issued its most recent subpoena for testimony two business days after the court dismissed the appeal as moot. This Court should grant the petition to correct and deter such procedural gamesmanship. At the very least, this Court should clarify that the well-established "voluntary cessation" doctrine to mootness squarely applies in this case. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000). No court in Wisconsin has cited the "voluntary cessation" doctrine, despite the fact that almost every other jurisdiction in the nation applies it routinely.

Second, this Court's intervention is again unfortunately necessary to remind the Dane County Circuit Court of this Court's

string of recent precedents clarifying the *Gudenschwager* test for motions for stay pending appeal. This Court has repeatedly instructed all circuit courts, and particularly the Dane County Circuit Court, that a court erroneously exercises its discretion when it decides the likelihood of success portion of a stay analysis by simply cross-referencing its merits decision. *See, e.g.*, *Waity*, No. 2021AP802 (App. 514). The court below violated this clear rule, and the court of appeals did not correct it.

Third, the circuit court has permitted oppressive discovery and ordered a burdensome and costly trial solely on the basis of a constitutional theory of adjudicator bias that this Court's precedents foreclose. Specifically, the circuit court has concluded that the challengers' allegations support a claim that Huebsch's conduct gave rise to an "appearance of bias," but "appearance of bias" is not the standard. *See In re Paternity of B.J.M.*, 2020 WI 56, 392 Wis. 2d 49, 944 N.W.2d 542.

When confronted with controlling case law from this Court declining to adopt the "appearance of bias" standard, the circuit court dismissed this Court's iteration of the binding standard as this Court's mere "choice" and then made a contrary "choice" of its

own. The circuit court concluded that the majority of justices who rejected the "appearance of bias" standard in *B.J.M.* did so based on simple "semantic[s]," despite those justices making clear that "appearance of bias" and *Caperton*'s standard materially differ. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). The court then proceeded to apply the "appearance of bias" standard that this Court has considered and rejected.

Compounding this error, the circuit court failed to apply the well-established presumptions of impartiality and honesty that attach to adjudicators' decisions and which protect adjudicators from baseless discovery and factfinding. Consequently, Huebsch (along with his friends and acquaintances) has been subjected to months of intrusive discovery demands and subpoenas regarding decisions he made while in public office, merely because a dissatisfied party has alleged that he "appeared biased." Threatening to reignite the "recusal wars" of old, *B.J.M.*, 392 Wis. 2d 49, ¶ 124 n.3 (Hagedorn, J., dissenting), the challengers here have unsheathed the very "sword" that Justice Roggensack warned unhappy parties would wield on quests to "disqualify" independent decisionmakers. Hon. Patience Drake Roggensack,

Milwaukee Journal Sentinel, *The vote was about protecting state's voters* (Dec. 5, 2009), https://tinyurl.com/6a3eje55.

Fourth, this Court's review is necessary to remind lower courts that an adjudicator's personal and professional associations with individuals connected to entities that appear before him—especially when the adjudicator and individual are "not prohibited from talking to one another," so long as they do not engage in improper *ex parte* communications, *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 34, 286 Wis. 2d 252, 706 N.W.2d 110—do not give rise to a "serious risk of actual bias" under the Due Process Clause.

***Fifth*,** and relatedly, this Court's review is necessary to confirm that the practice of applying for employment after leaving public office at an entity that had previously appeared before the adjudicator does not create a retroactive "serious risk of actual bias." The circuit court held that it does and permitted discovery into, and testimony regarding, Huebsch's post-Commission employment decisions. But it is routine for public officials, including judges, to contemplate private sector employment with

parties who had once appeared before them after retirement from public office.

STATEMENT OF THE CASE

A. Michael Huebsch is a career public servant. He served on the Public Service Commission of Wisconsin ("PSC" or "Commission") from 2015 to 2020. App. 224. Until recently, he also represented Wisconsin's interests as a member of an advisory board to the Midcontinent Independent System Operators ("MISO"). App. 225. MISO is a regional transmission organization under the supervision of the Federal Energy Regulatory Commission that manages the power grid across fifteen U.S. states, including Wisconsin. MISO, *About MISO*, https://www.misoenergy.org/about/. Throughout his decades of public service, Huebsch has formed many relationships, including with people affiliated with entities that appeared before the Commission during his tenure. App. 228–30; *see also* Mem. at Statement of Case I.A (describing relationships).

B. In September 2019, after more than a year of adversarial proceedings and public comment, the Commission unanimously approved a new high-voltage Cardinal-Hickory Creek

transmission line. *See* Mem. at Statement of Case I.B (describing project and proceedings).[1] This line, at an estimated cost of $474 to $560 million, would bring reliable and affordable energy, along with jobs, to Wisconsin residents. App. 407, 415.

Groups opposing that decision moved to recuse two commissioners: Huebsch and Rebecca Cameron Valcq. The Driftless Area Land Conservancy and Wisconsin Wildlife Federation (collectively "DALC") argued that Huebsch and Valcq's conduct had created an unconstitutional "appearance of bias and lack of impartiality." App. 481. As to Huebsch, DALC speculated that he must have engaged in improper *ex parte* communications while participating in MISO. App. 481–82. The Commission, however, denied the requests for recusal. It concluded that none of DALC's insinuations overcame the presumptions of honesty and integrity to which public adjudicators are entitled. App. 486–87. It also held that DALC had presented no evidence of improper

[1] Huebsch has contemporaneously filed (1) an Emergency Motion for Administrative Stay and Stay Pending Appeal, (2) a Memorandum in Support of Emergency Motion for Stay Pending Appeal and Emergency Petition for Supervisory Writ or Exercise of Superintending Authority ("Mem."), and (3) an Emergency Petition for Supervisory Writ or Exercise of Superintending Authority.

communications. *Id.*; *see also* Mem. at Statement of Case I.B (describing decision).

In February 2020, long after the Commission had approved the project, Huebsch resigned his post to start a private consulting group. App. 227. After leaving the Commission, and after receiving "persistent requests" from his "decades-long friend and mentor," he half-heartedly submitted an employment application (through an independent, third-party search firm) to be chief executive officer of Dairyland, which had appeared before him while he served on the Commission. App. 228. The search firm eventually rejected his application in a form letter.

C. DALC filed lawsuits in federal and state court in December 2019 continuing to claim, among other things, that Huebsch had exhibited an improper "appearance of bias" while he sat on the Commission in violation of the Due Process Clause. *See Cnty. of Dane v. Pub. Serv. Comm'n*, No. 19-cv-3418 (Dane Cnty. Cir. Ct.); *Driftless Area Land Conservancy v. Huebsch*, No. 19-cv-1007 (W.D. Wis.); *see also* Mem. at Statement of Case II (discussing lawsuits and pleadings). DALC filed a petition for judicial review under Wisconsin Statutes Chapter 227—which permits narrow

challenges to certain agency orders—to invalidate the Commission's approval of the Cardinal-Hickory Creek transmission line. Wis. Stat. § 227(1).

DALC alleged that Huebsch's "various roles for" MISO, including his "continued participation and extensive meetings" with MISO members, "were *ex parte* communications" that created a "risk of bias." App. 275–76. DALC never identified, let alone described in any detail, the allegedly problematic conversations, meetings, or engagements that Huebsch had in his legally permissible and public work with MISO. App. 274–78. DALC instead alleged that "the *risk* or *appearance* of bias in an administrative proceeding [was] 'impermissibly high'" because of Huebsch's engagement with MISO. App. 277.

DALC attempted to append another set of "bias" allegations to its case months later. In October 2020, DALC moved the circuit court to accept non-record evidence under Wis. Stat. § 227.57(1) in support of its ongoing effort to vacate the Commission's decision. App. 240–46. DALC alleged that it had "more information about the meetings, industry events, dinners, and other interactions" Huebsch had with members of MISO. App. 241. DALC also sought

information concerning Huebsch's job application to Dairyland as described above. *Id*. DALC further included a request to enter into the administrative record "a series of text messages" between Huebsch and his longtime friend and mentor, Brian Rude. *Id*.; *see also* App. 228–30 (describing relationship with Rude and others). "These new materials are relevant," DALC said, because the information "contribute[d] to an appearance of impropriety and serious risk of bias that require reversal of" the Commission's decision. *Id*. DALC then argued that the "'appearance of impropriety on the part of the administrative judge' is one of the irregularities that justif[ies] the admission of non-record evidence" pursuant to the exception in § 227.57(1) that otherwise confines judicial review to the agency record. App. 242.

In January 2021, the circuit court held oral argument on the § 227.57(1) request. The court held that due process is violated by either "actual bias or the inappropriate and improper appearance of bias." App. 180–81. The circuit court also concluded that DALC had made a *prima facie* showing of an appearance of bias sufficient to accept non-record evidence, *i.e.*, to permit discovery on Huebsch and his close associations. App. 179, 181. The court conceded that

it "[didn't] know what was discussed" as it related to the allegations. App. 182. Nor did the court discuss the presumptions accorded to public adjudicators and proceedings under Wisconsin law. *Id.* The court memorialized its decision and reasoning in a written order a few months later in May 2021. App. 20–30.

D. DALC subsequently subpoenaed Huebsch. The version of the subpoena prompting this appeal, issued on July 12, 2021, demanded that Huebsch turn over his personal smartphone and any other phone he had "used" between April 2018 and the present for limitless copying and inspection. App. 233–37. DALC further ordered him to produce "[d]ocuments sufficient to identify the password, passcode, or other method of unlocking" the phones he "used." App. 237.

DALC issued this subpoena in response to reports that Huebsch had used a popular messaging application called Signal. Signal is a free, open-source messaging application used by tens of millions of people and that—like other popular communications platforms such as Zoom, WhatsApp, FaceTime, and iMessage—uses encryption to protect users' data. *See* Mem. at Statement of Case II.B. (describing Signal).

Huebsch promptly moved to quash this subpoena. He nonetheless agreed to preserve all documents relevant to the proceedings. App. 222; App. 238–39. Huebsch also moved for a stay pending appeal in the event that the circuit court denied the motion to quash.

In response to his motion to quash, DALC proposed what it styled a "compromise," which would force Huebsch to "turn his phone over" to a third party. *See also* App. 62, 64. The third party would then extract data from the smartphone and produce a report showing (a) the history and usage of messaging apps and email services on the smartphone, (b) contacts lists, (c) communications with numerous identified individuals, and (d) documents and messages that include dozens of keywords that DALC devised. *Id*. Among other things, the "compromise" broadened the universe of persons from six names listed in the subpoena to 28 different individuals whom DALC sought to drag into this dispute.

About a month ago, on July 30, 2021, the circuit court held a hearing on Huebsch's motion to quash. The court commenced its colloquy explaining that Huebsch's arguments "raise concerns that I've already addressed; and I'm not undoing my decisions." App.

41. The court therefore declined to address the presumptions of regularity, honesty, integrity, and impartiality accorded to public adjudicators and proceedings. App. 42–43.

Importantly, the circuit court went on to analyze this Court's decision in *B.J.M.*, 392 Wis. 2d 49. The circuit court disagreed that *B.J.M.* explicitly rejected an "appearance of bias" standard for due-process "bias" claims. Instead, the circuit court determined that the justices' separate opinions in *B.J.M.* "didn't disagree on the substance" of the defunct "appearance of bias" standard, and that any differences in those opinions were nothing more than "semantic." App. 44. The circuit court nevertheless acknowledged that "the majority [of justices] said they weren't going to use that phrase, 'appearance.'" App. 46. But "[t]hat's their choice," the court said. *Id.* The circuit court decided "to call it 'appearance' [of bias] because that really is what it is." *Id.*

The circuit court thereafter denied Huebsch's motion to quash and commanded that he turn over his phones for inspection and appear for a deposition three business days later. App. 79–88. The court also denied Huebsch's motion for a stay and cross-

referenced its reasons already given for denying the motion to quash. App. 92–97.

E. Huebsch then sought relief in the court of appeals. The court of appeals first stayed enforcement of the circuit court's order pending resolution of Huebsch's appeal on the merits.

Notwithstanding this stay decision, DALC asked the circuit court to enter a proposed order—with only an unsigned signature block from Huebsch's counsel—"establishing a protocol for turning over Mr. Huebsch's phone." App. 17–19. The order required Huebsch to "deliver his phone" to a "third party" for "a forensic extraction" of data. App. 17–18. Moreover, instead of permitting Huebsch's counsel to review and produce relevant, non-privileged documents as is standard in discovery, the order specified that the "third party will analyze the extracted data and produce a report covering" certain topics, such as "[t]he history and usage of the Signal and other messaging applications" along with "email services on the phone." App. 18. The contents of the reports or documents produced by the third party were not covered by a protective order. The court signed and entered it.

F. The following week, on August 12, 2021, *after* the court of appeals had stayed the subpoena, DALC withdrew "all subpoenas for testimony and documents which have been issued to Mr. Huebsch." App. 210. DALC simultaneously filed a motion to dismiss the appeals and dissolve the stay, arguing mootness. App. 207–09. The next day, Huebsch's counsel inquired whether DALC planned to issue or serve any additional subpoena for testimony to replace the suspiciously timed withdrawn one. DALC hinted that it would. *See* App. 4–5.

A few days thereafter, on August 20, 2021, the court of appeals dismissed the case as moot. App. 2–5; App. 7–11. The court held that "there is nothing for this court to resolve that could have any practical effect on the underlying controversy." App. 4; App. 9.

Not even two business days had passed after this decision before DALC then served Huebsch with *yet another* subpoena for testimony. App. 205–06. On August 24, DALC "commanded" Huebsch to "appear in person" for trial testimony on September 29, 2021. App. 205. Having exhausted his options below, Huebsch promptly sought relief from this Court.

ARGUMENT

I. THE COURT OF APPEALS' MOOTNESS DECISION UPENDS THIS COURT'S BINDING CASE LAW AND INVITES GAMESMANSHIP DESIGNED TO INSULATE ORDERS FROM APPELLATE REVIEW

A. "An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy." *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 766 N.W.2d 559; *In re Sheila W.*, 2013 WI 63, ¶ 4, 348 Wis. 2d 674, 835 N.W.2d 148 (observing that this Court has "consistently adhered" to that rule).

But mootness doctrine is not implicated here. In this case, DALC strategically withdrew its July 12 subpoena in a thinly veiled attempt to scuttle this appeal and dissolve the stay issued by the court of appeals. App. 210; *see* Mem. at Statement of Case II.D, E. DALC then simultaneously moved to dismiss Huebsch's appeal as moot. *Id.*; *see also* App. 207–09. After that—just shy of two business days after the court of appeals granted DALC's motion and dissolved its stay of enforcement of the previous subpoena for testimony—DALC served Huebsch *with another subpoena* for testimony under Wis. Stat. § 805.07, this one demanding trial testimony. App. 205–06. For these reasons, and

since a "ruling in favor of [Huebsch] on the issues raised, might afford him some relief which he has not already achieved," the issues presented here are not moot. *State ex rel. Renner v. Dep't of Health & Soc. Servs., Corr. Div.*, 71 Wis. 2d 112, 116, 237 N.W.2d 699 (1976). They could not be less "academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425.

B. Although this Court need look no further than its own precedent to conclude that the issues here are not moot, it is a bedrock principle that courts do not allow parties to manufacture mootness simply to insulate their conduct from judicial review. The "'voluntary cessation of a challenged practice'" does not remove the need to "determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Otherwise, the challenged actor would be "'free to return to his old ways.'" *Id.*; *see United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). This rule sensibly "prevent[s] gamesmanship," requiring courts to "view voluntary cessation 'with a critical eye,' lest defendants manipulate jurisdiction to 'insulate' their conduct from judicial review." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016). Only if "subsequent events

make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur" is dismissal for mootness appropriate. *Friends of the Earth*, 528 U.S. at 170 (emphasis added). The "heavy burden of persua[ding]" the court "that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Id*.

Every single federal court of appeals applies the "voluntary cessation" doctrine.[2] And nationwide nearly every state does the same.[3] Wisconsin has not yet adopted it, at least not formally. Our

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[2] *See, e.g.*, *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 48-49 (1st Cir. 2010); *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 624 (2d Cir. 2016); *Fields v. Speaker of Penn. House of Reps.* 936 F.3d 142, 161-62 (3d Cir. 2019); *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 191–92 (4th Cir. 2018); *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769–70 (6th Cir. 2019); *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1050-53 (7th Cir. 2018); *Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012); *Butler v. WinCo Foods, LLC*, 613 Fed. Appx. 584, 585–86 (9th Cir. 2015); *Equal Emp. Opportunity Comm'n v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173-74 (10th Cir. 2017); *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1355–58 (11th Cir. 2019); *Aref v. Lynch*, 833 F.3d 242, 250-51 (D.C. Cir. 2016); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1332–33 (Fed. Cir. 2005).

[3] *See, e.g.*, *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 71 (Ala. 2009); *Slade v. State, Dep't of Transp. & Pub. Facilities*, 336 P.3d 699, 700 (Alaska 2014); *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 626 P.2d 1115, 1118 (Ariz. Ct. App. 1981); *Rogers v. Cnty. of Riverside*, 44 Cal. App. 5th 510, 530 (Cal. Ct. App. 2020); *United Air Lines, Inc. v. City and Cnty. of Denver*, 973 P.2d 647, 652 (Colo. Ct. App. 1998); *Windels v. Envtl. Prot. Comm'n of Darien*, 933 A.2d 256, 265-66 (Conn. 2007); *Welsh v. McNeil*, 162 A.3d 135, 154 (D.C. 2017) (Glickman, J., concurring); *Clark v. St. Farm Mut. Auto. Ins. Co.*,

courts nonetheless look to federal cases for guidance in the application of state mootness principles. *See*, *e.g., Matter of D.K.*, 2020 WI 8, ¶¶ 23–25, 390 Wis. 2d 50, 937 N.W.2d 901 (citing

131 A.3d 806, 812 n.14 (Del. 2016); *Sarasota Beverage Co. v. Johnson*, 551 So.2d 503, 509 (Fla. Dist. Ct. App. 1989); *WMW, Inc. v. Am. Honda Motor Co.*, 733 S.E.2d 269, 273 (Ga. 2012); *Wiginton v. Pac. Credit Corp.*, 634 P.2d 111, 119 (Haw. Ct. App. 1981); *Gem State Roofing, Inc. v. United Components, Inc.*, 488 P.3d 488, 502 (Idaho 2021); *Fisch v. Loews Cineplex Theatres, Inc.*, 850 N.E.2d 815, 818 (Ill. Ct. App. 2005); *State ex rel. Ind. State Bar Ass'n v. Northouse*, 848 N.E.2d 668, 673-74 (Ind. 2006); *Stano v. Pryor*, 372 P.3d 427, 430-31 (Kan. Ct. App. 2016); *Morgan v. Getter*, 441 S.W.3d 94, 99–100 (Ky. 2014); *Cat's Meow, Inc. v. City of New Orleans ex rel. Dept of Fin.*, 720 So.2d 1186, 1194 (La. 1998); *LeGrand v. York Cnty. Judge of Probate*, 168 A.3d 783, 792 n.10 (Me. 2017); *State v. Neiswanger Mgmt. Servs., LLC*, 179 A.3d 941, 950 (Md. Ct. App. 2018); *Fed. Concrete, Inc. v. Exec. Off. for Admin. & Fin.*, 2018 WL 1995551, at *4 (Mass. Super. Ct. Feb. 27, 2018); *Educ. Subscription Serv., Inc. v. Am. Educ. Servs., Inc.*, 320 N.W.2d 684, 692-93 (Mich. App. Ct. 1982); *Bratton v. Mitchell*, 979 S.W.2d 232, 235–36 (Mo. Ct. App. 1998); *Heringer v. Barnegat Dev. Grp., LLC*, 485 P.3d 731, 736–38 (Mont. 2021); *Stewart v. Heineman*, 892 N.W.2d 542, 565 (Neb. 2017); *Delanoy v. Township of Ocean*, 246 A.3d 188, 198 n.5 (N.J. 2021); *Matter of Puerto v. Doar*, 142 A.D.3d 34, 43–44 (N.Y. Sup. Ct. 2016); *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 517 S.E.2d 401, 405 (N.C. Ct. App. 1999); *Tibert v. City of Minto*, 679 N.W.2d 440, 444 (N.D. 2004); *Nissan of N. Olmstead, LLC v. Nissan N. Am., Inc.*, 38 N.E.3d 500, 507–08 (Oh. Ct. App. 2015); *State ex rel. Okla. Firefighters Pension and Ret. Sys. v. City of Spencer*, 237 P.3d 125, 129 & n.16 (Okla. 2009); *Safeway, Inc. v. Ore. Pub. Emps. Union*, 954 P.2d 196, 200 (Ore. Ct. App. 1998); *Temple Univ. of Com. Sys. of Higher Ed. v. Dep't of Pub. Welfare*, 374 A.2d 991, 995 (Penn. Commw. Ct. 1977); *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1080-81 (R.I. 2013); *Norma Faye Pyles Lunch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 205–08 (Tenn. 2009); *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex. Ct. App. 2008); *Teamsters Local 222 v. Utah Transit Auth.*, 424 P.3d 892, 895–96 (Utah 2018); *All Cycle, Inc. v. Chittenden Solid Waste Dist.*, 670 A.2d 800, 803 (Vt. 1995); *Dep't of St. Police v. Elliott*, 633 S.E.2d 551, 555 (Va. Ct. App. 2006); *Fam. of Butts v. Constantine*, 491 P.3d 132, 141 (Wash. 2021); *State ex rel. J.D.W. v. Harris*, 319 S.E.2d 815, 819–20 (W. Va. 1984).

federal case law in determining that the issue is "not [] moot" because a ruling would have a "'practical effect'" in the case and the circuit court order subjected the person to "collateral consequence[s]"). Indeed, federal mootness principles are thought to be stricter than their Wisconsin-law analogues, meaning that if an issue were to meet a federal mootness exception, it would also satisfy a Wisconsin mootness exception *a fortiori. See, e.g., Watkins v. Dep't of Indus., Lab. & Hum. Rels.,* 69 Wis. 2d 782, 795–96, 233 N.W.2d 360 (1975) (recognizing that Wisconsin courts' "standards of mootness" are less strict than those of federal courts).

In sum, even though it need not do so to resolve this appeal in Huebsch's favor, this Court should develop the law of mootness by adopting the voluntary cessation doctrine that virtually every other jurisdiction in this nation applies. Doing so would avoid the gamesmanship seemingly deployed here.

Here, because the new subpoena was served shortly after the court of appeals deemed Huebsch's subpoena challenge moot, it is "'absolutely clear'" that the challenged conduct has recurred. *Friends of the Earth,* 528 U.S. at 189. The "'legality of the [subpoena]'" should therefore be determined now, *id.*, in the

"interest of judicial economy," *State ex rel. La Crosse Trib. v. Cir. Ct. for La Crosse Cnty.*, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983). Otherwise, DALC—as well as all future litigants—can simply "pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

C. It is also no answer to Huebsch's mootness arguments (as the court of appeals held without analysis) that the "trial subpoena" presents "different issues" than a "discovery subpoena." App. 4–5; App. 10. Such flawed reasoning affords yet an additional reason to grant this petition so that this Court can clarify the law on subpoenas. *See* Mem. Argument I.A.1. (discussing "trial" and "discovery" subpoenas).

II. THE DANE COUNTY CIRCUIT COURT'S DECISION TO CROSS-REFERENCE ITS PREVIOUS MERITS DETERMINATION WHEN DENYING MOTION TO STAY PENDING APPEAL WAS A PLAIN ABUSE OF DISCRETION

This Court has repeatedly reminded all circuit courts in recent years, and particularly the Dane County Circuit Court, that a court erroneously exercises its discretion when it decides the likelihood of success portion of a stay by simply cross-referencing

its merits decision. *See, e.g.*, *Waity*, No. 2021AP802 (App. 514); *SEIU, Local 1 v. Vos*., No. 2019AP622 (June 11, 2019) (App. 530); *League of Women Voters v. Evers*, No. 2019AP559 (Apr. 30, 2019) (App. 533). The Dane County Circuit Court repeated the same mistake here, ignoring *Waity*, which Huebsch had cited. *See* Mem. at Argument I.A.2. This Court should grant the petition to prevent lower courts from further flouting precedent.

III. THE CIRCUIT COURT'S HOLDING THAT AN ADJUDICATOR'S "APPEARANCE OF BIAS" VIOLATES DUE PROCESS FLATLY CONTRADICTS THIS COURT'S PRECEDENTS AND INVITES BURDENSOME LITIGATION AGAINST ADJUDICATORS, REIGNITING THE "RECUSAL WARS"

The only reason that extensive discovery is occurring and that a multi-day trial has been set in this Chapter 227 proceeding is that the circuit court has adopted a squarely foreclosed standard to evaluate DALC's bias claims, notwithstanding this Court's decision in *B.J.M.*, 392 Wis. 2d 49. Relatedly, the court has also studiously ignored the presumptions of regularity and honesty accorded to public adjudicators as required in *Marder*, 286 Wis. 2d 252.

A. In *B.J.M.*, six of the seven justices of this Court unambiguously concluded that "appearance of bias" is not the

standard, suggesting that it was merely a relic of "pre-*Caperton*" case law. *B.J.M.*, 392 Wis. 2d 49, ¶ 25 n.18 (declining to apply the "appearance of bias" standard) (lead opinion of Dallet, J., joined by Roggensack, C.J., and Ziegler, J.); *id.* at ¶¶ 65–69 (Ziegler, J., concurring) (explaining that, under settled law, the "mere appearance or allegation of bias alone will not rebut the presumption that [an adjudicator] is impartial and will not constitute a due process violation" and that she "join[ed] the majority because it does not adopt the standard suggested in Justice Ann Walsh Bradley's concurrence"); *id.* at ¶ 113 (Hagedorn, J., dissenting, joined by Kelly, J., and R.G. Bradley, J.) ("[A]ppearance of bias is not enough to trigger a constitutional problem.").[4] Chief Justice Ziegler has explained at length why the "appearance of bias" is not the constitutional standard, including in an opinion joined by Justice Roggensack. *State v. Herrmann*,

[4] *Accord State v. Hollingsworth*, 160 Wis. 2d 883, 894, 467 N.W.2d 555 (Ct. App. 1991) ("A litigant is not deprived of fundamental fairness guaranteed by the constitution either by the appearance of a judge's partiality or by circumstances which might lead one to speculate as to his or her partiality.").

2015 WI 84, ¶¶ 112–62, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring).

The circuit court disagreed that *B.J.M.* explicitly rejected an "appearance of bias" standard. In particular, the court stated that the justices' separate opinions in *B.J.M.* "didn't disagree on the substance" and that any differences in those opinions about the appearance of bias standard are nothing more than "semantic." App. 44. The court nevertheless acknowledged that "a majority [of justices] said they weren't going to use that phrase 'appearance.'" App. 46. But "[t]hat's their choice," the court stated, and "I'm going to call it 'appearance' [of bias standard] because that really is what it is." *Id*.

This most recent decision follows previous conclusions by the circuit court that "a due process violation can occur by the appearance of impropriety as well as actual bias." App. 30; *see also* App. 180–81 ("[Y]ou can either prove actual bias or the inappropriate and improper appearance of bias and either one is sufficient for a due process violation."). The circuit court stated that it has "applied the exact[] correct standard" and will continue to apply that standard "as we go toward the hearing[.]" App. 46.

The court's application of this standard has enabled DALC—which likewise advocates for an "appearance of bias" standard—to engage in extensive discovery of parties and non-parties, including Huebsch's friends. *See* Mem. at Statement of the Case II.A–B. The standard may also permit DALC to undo the Commission's decision in the Cardinal-Hickory Creek proceedings.

The circuit court's operative orders conflict not only with this Court's precedents but also with a post-*Caperton* nationwide consensus that the mere "appearance of bias" is insufficient to establish a due process violation. *See* Mem. at Argument I.A.3.

B. The circuit court also declined to apply the presumptions of regularity, integrity, honesty, and impartiality accorded to public adjudicators. That error conflicts with this Court's requirement that, before a plaintiff may compel discovery, the plaintiff must first make a "strong showing to rebut the presumption that administrative agents act with integrity." *Marder,* 286 Wis. 2d 252, ¶ 32; *see* Mem. at Argument I.A.3.

Courts "presume that a judge has acted fairly, impartially, and without bias." *B.J.M.*, 392 Wis. 2d 49, ¶ 16. "To overcome that presumption, the burden is on the party asserting judicial bias."

Id. In *Marder*, for example, a member of a tribunal traveled with the chancellor of a university who had recommended terminating a faculty member. 286 Wis. 2d 252, ¶ 33. The party to the termination proceeding alleged that they had spent "suspicious" time together "on the same day" the board had voted to terminate him, speculating that they must have engaged in forbidden *ex parte* communications in violation of due process. *Id*. This Court rejected the claim, holding that unsubstantiated "general complaints" of *ex parte* communications do not overcome "the legal presumption that administrative adjudicators are able to maintain their professional and ethical responsibility to remain impartial." *Id*. at ¶ 34; *see also Sills v. Walworth*, 2002 WI App 111, ¶ 43, 254 Wis. 2d 538, 648 N.W.2d 878 (holding that the "presumption of honesty and integrity" precluded discovery process into adjudicator's decision based on mere suspicions of *ex parte* communications).

The presumptions here are longstanding black-letter law: "As early as the 19th century, there was 'no principle of law better settled' than the presumption of regularity." *United States v. Locke*, 932 F.3d 196, 200 (4th Cir. 2019) (quoting *Voorhees v.*

Jackson, 35 U.S. (10 Pet.) 449, 472 (1836)). Yet this bedrock principle was—and remains—wholly disregarded by the circuit court as this case proceeds to trial.

Importantly, the presumptions of regularity and integrity preserve finality and efficiency in our adjudicatory processes. If universally accepted, the circuit court's orders provide dissatisfied parties with a readymade tool to derail any proceeding merely on an allegation of bias or partiality. In fact, this is happening now in a different case. Just this month, parties are challenging a separate decision by the Commission based on the same flawed precepts as here. *See infra* IV (describing pending recusal motion against Commissioner Tyler Huebner based on "appearance of bias" in violation of due process). Such a rule makes "[i]nroads on the concept of finality" that "tend to undermine confidence in the integrity of our procedures." *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979). "[I]nevitably" such inroads "impair[] and delay[] the orderly administration of justice." *Id.*

In sum, absent intervention by this Court, DALC—and future litigants, as has already been seen, *infra* IV—will continue

weaponizing the Due Process Clause to deter adjudicators from ruling against them. This practice must end.

IV. THIS COURT'S INTERVENTION IS NECESSARY TO CONFIRM THAT AN ADJUDICATOR'S PERSONAL AND PROFESSIONAL ASSOCIATIONS NOT INVOLVING IMPROPER *EX PARTE* COMMUNICATIONS DO NOT GIVE RISE TO A "SERIOUS RISK OF ACTUAL BIAS"

The circuit court found that DALC's allegations against Huebsch stated a viable claim, in part because he has maintained personal and professional relationships with certain individuals affiliated with entities that had appeared before him during his tenure on the Commission. *See* Mem. at Statement of the Case I.A (describing relationships). The court relied on *B.J.M.*, and this Court's discussion of Facebook friendships, as support for its analysis: "It seems to me that the allegations and then the requests for documents that are going to Mr. Huebsch essentially go to a very similar set of circumstances [as in *B.J.M.*], if not, a more concerning sounding set of circumstances where" Huebsch had "communications" with friends and acquaintances "who are part of the organizations that were in front of him." App. 48; *see also* App. 136–39 (citing the "standard" in *B.J.M.* (*i.e.,* the "Facebook" case) to "investigate" the "communications" among friends and

acquaintances with Huebsch); App. 21–24 (same). As a result, Huebsch—and those he maintains relationships with—have been subjected to intrusive discovery requests concerning their relationships and Huebsch's decisions as an adjudicator, even though DALC has not pointed to a single *ex parte* communication.

This proceeding might be the first in Wisconsin after *B.J.M.* to demonstrate the perils of an "appearance of bias" standard, but unless the law is clarified, it will not be the last. As noted, just this month, parties moved for recusal in another case before the Commission because of Commissioner Tyler Huebner's relationships. *See In re Application for CPCN of Koshkonong Solar Energy Ctr, LLC et al.*, Motion for Recusal – PSC REF#: 418682, PSC Dkt.# 9811-CE-100 (Aug. 12, 2021), https://tinyurl.com/ybyfk9pp. Citing *B.J.M.* and drawing from this case's playbook, the parties (including one of the same law firms involved in this litigation) alleged that the "appearance of partiality can [] offend due process" when, as in that case, the public official has "social, political, and work relationships" with a party appearing before him. *Id*. at 2, 4. As another example, in this very case, DALC sought to disqualify Chairperson Rebecca

Cameron Valcq based on her connections to one of the entities behind the Cardinal-Hickory Creek Line, alleging due process violations. App. 481.

In reality, judges and other public adjudicators tend to reach their posts "precisely because they were friends" with people or parties that might appear before them. *See Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 916 (2004) (Scalia, J., in chambers) (dismissing motion for recusal based on relationships and citing historical examples). To transform these relationships into constitutional violations would revolutionize the law of adjudicator bias.

V. THIS COURT SHOULD CONFIRM THAT APPLYING FOR EMPLOYMENT AFTER LEAVING PUBLIC OFFICE WITH AN ENTITY THAT HAD PREVIOUSLY APPEARED BEFORE THE ADJUDICATOR DOES NOT CREATE A "SERIOUS RISK OF ACTUAL BIAS"

In the same vein, this Court should grant the petition to determine whether post-public office job applications to parties that have appeared before the adjudicator create a "serious risk of actual bias" under *B.J.M.*, 392 Wis. 2d 49, ¶ 22. The urgency of granting the petition on this question is all the more important since state law expressly permits "any state public official [to]

accept[] other employment or [to] follow[] any pursuit." Wis. Stat. § 19.45(1); *see also* Mem. at Argument I.A.3 (discussing state law). Undersigned counsel is not aware of a single case that has concluded, or even hinted, that applying to a job after public office to an entity that appeared before the adjudicator, such as a law firm, violates the Due Process Clause. Courts, in fact, have uniformly rejected such allegations. *See* Mem. at Argument I.A.3 (discussing cases). The circuit court apparently thinks otherwise and has permitted discovery and testimony on Huebsch's post-Commission job application to Dairyland.

Critically, though, there is no allegation here of some type of *quid pro quo*, *i.e.*, a job in exchange for a vote. *See* App. 274–78 (DALC's due process allegations based on "appearance"); App. 240–41 (detailing reasons to accept non-record evidence based on "appearance"). Rather, the concern is that by applying to a job after public office in this manner, Huebsch had merely created an "appearance of bias" in contravention of the Due Process Clause. *See* App 240–41 (requesting discovery into job application that "contribute[d] to a disqualifying appearance of impropriety); *see*

Mem. at Statement of Case II.A, C (describing allegations and the circuit court decisions).

Of course, adjudicators having relationships with past and potential employers is routine. This is particularly true in regulated industries. Presidents and governors habitually look to industry leaders and specialists to make decisions on important appointments to positions involving the adjudication of rights and disputes. Examples are legion. Just this year, Governor Evers appointed Commissioner Huebner to replace Huebsch on the Commission.[5] Commissioner Huebner was previously employed by a party that now appears before him. And because of that employment, and the precedent that the circuit court here has created, Commissioner Huebner is accused of violating due process since he "appear[s]" biased given his prior employment—even though no allegations of actual bias have been made against him. *See supra* IV.

In reality, judges often come from government posts or law firms that appear before them, or leave the bench to practice at

[5] Off. of the Gov., *Gov. Evers Reappoints PSC Chairperson Valcq and Commissioner Huebner* (Feb. 26, 2021), https://tinyurl.com/2mpnhvj6.

law firms or the government. Recently, former judge Merrick Garland left the U.S. Court of Appeals for the D.C. Circuit to become the U.S. Attorney General. He did so after communicating with then President-elect Biden while he sat on the bench. But no one would seriously argue that Garland, while a judge, "appeared" biased in favor of the government in the cases before him because he later accepted employment with the government. *See* N.Y. Times, *Biden Is Said to Pick Merrick Garland as Attorney General* (Jan. 6, 2021), https://tinyurl.com/cu77ed7n.

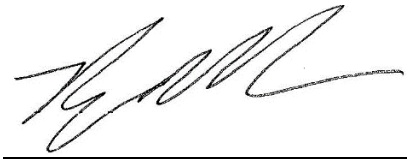
In all events, there is not a shred of evidence in this case that Huebsch even discussed employment with the parties that appeared before him while he was a commissioner. *See* Mem at Argument.I.A.3. To the contrary, Huebsch has sworn that he did not. App. 227–28. All DALC alleges is that his post-Commission application to Dairyland created an unconstitutional "appearance of bias" under this Court's decision in *B.J.M.*, warranting reversal of the Commission's Cardinal-Hickory Creek decision. It does not.

CONCLUSION

Michael Huebsch respectfully requests that this Court grant his petition for review.

Dated: August 27, 2021

Respectfully submitted,



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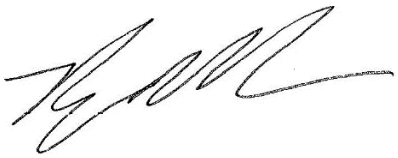
FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.62(4) and 809.19 (8) (b), (bm), and (c) for a petition produced with a proportional serif font. The length of this petition is 6,885 words.

Dated: August 27, 2021.



RYAN J. WALSH

CERTIFICATE OF COMPLIANCE WITH § 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19 (12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 27, 2021.

RYAN J. WALSH

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I hereby certify that:

I have submitted an electronic copy of this petition's appendix, which complies with the requirements of § 809.19 (13).

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This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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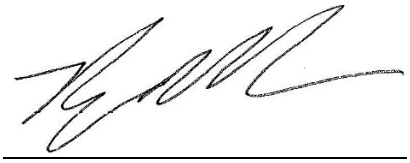

RYAN J. WALSH

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under Wis. Stat. § 809.23 (3) (a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full

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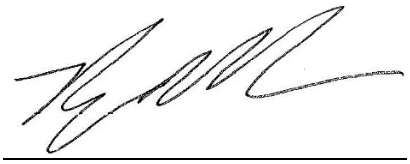
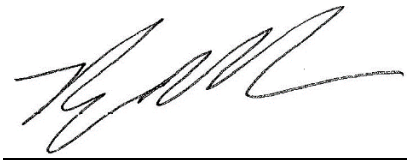


RYAN J. WALSH

THIRD-PARTY DELIVERY CERTIFICATION

Per Wis. Stat. § 809.80(4), I certify that on August 27, 2021, this petition for review and appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Dated: August 27, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I caused true and correct paper copies of the foregoing petition and separate appendix to be delivered to counsel of record, addressed as follows:

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