**Nos. 2021AP1321-LV, 2021AP1325**

# In the Supreme Court of Wisconsin

COUNTY OF DANE, COUNTY OF IOWA, TOWN OF WYOMING, AND CITY OF MONTFORT,
*PETITIONERS-RESPONDENTS,*

*V.*

PUBLIC SERVICE COMMISSION OF WISCONSIN,
*RESPONDENT-RESPONDENT*,

DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, CHRIS KLOPP, LEROY BELKEN, GLORIA BELKEN, S.O.U.L. OF WISCONSIN, CLEAN ENERGY ORGANIZATIONS, DAIRYLAND POWER COOPERATION, I.T.C. MIDWEST, LLC, AMERICAN TRANSMISSION COMPANY, MIDCONTINENT, INDEPENDENT SYSTEM OPERATIONS, INC. AND WEC ENERGY GROUP WISCONSIN,
*INTERVENORS-RESPONDENTS,*

MICHAEL HUEBSCH,
*OTHER PARTY-PETITIONER-PETITIONER.*

On Appeal from the Dane County Circuit Court,
the Honorable Jacob Frost, Presiding
Case No. 2019CV003418

## OPENING BRIEF OF PETITIONER MICHAEL HUEBSCH

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## INTRODUCTION

This suit purports to challenge the Public Service Commission's approval in 2019 of the Cardinal-Hickory Creek Transmission Line. The open secret, however, is that the challengers have very little chance of stopping the project on its merits. As the administrative record reflects, Cardinal-Hickory enjoys widespread support—from labor and industry, Republicans and Democrats, business groups and environmentalists alike. Its proponents have shown not only that it will improve energy reliability in Wisconsin but also that it will create "necessary clean-energy infrastructure" in our State, "enabling greater usage of renewables across the Midwest."[1] Without the line, environmentalists warn, the region will become "overly dependent" on "fossil fuels."[2] Hence the project is "critically needed for renewable energy to come online in the timeline we need to address climate change."[3] Echoing these concerns on a national scale, the chairman of the Federal Energy Regulatory Commission has made bolstering interstate transmission a principal goal of his tenure.[4] Presented with overwhelming evidence supporting this conclusion and numerous others later memorialized as its findings,

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[1] *Clean Grid Alliance, Fresh Energy, and Minnesota Center for Environmental Advocacy's Request to Intervene and Notice of Appearance*, PSC REF#: 353628 at 3 (Nov. 20, 2018), https://tinyurl.com/hc4xvy68.

[2] Clean Grid Alliance, *Cardinal-Hickory Transmission Line: Unlocking the Midwest's Clean Energy Transition*, https://tinyurl.com/2yc7zbeh.

[3] Petitioner's Appendix ("P-App.") 68 (comments of Vohs, A., staff member of Clean Energy Organizations).

[4] Energy Policy Institute, *Revitalizing the Grid to Achieve a Clean-Powered Economy: A Conversation with FERC Chair Richard Glick* (June 30, 2021), https://tinyurl.com/f2znuja8/.

the Commission approved Cardinal-Hickory unanimously and on a bipartisan basis. It was not close.

A few groups, however, were unhappy with this outcome. So, they sued the Commission under Chapter 227 and asked the circuit court to vacate its order. Such challenges are not uncommon. Ordinarily they contest whether the agency correctly applied the law or made appropriate findings of fact. The challengers in this Chapter 227 case, however, are also trying out a third line of attack, which has already inspired copycat challenges.[5] Their strategy can be summed up with a variation on a classic legal aphorism: "If the facts are on your side, pound the facts. If the law is on your side, pound the law. If neither is on your side, pound the judges."[6]

Michael Huebsch, a former Public Service Commissioner who voted to approve the project, has borne the brunt of this abuse, which the circuit court has blessed. Invoking a narrow exception to Chapter 227's "confined to the [administrative] record" rule, the trial court has converted Wisconsin's Administrative Procedure Act into a roving commission to probe whether, at *some* point, Huebsch did *something* that might have caused *someone* to think he "appeared" biased in favor of Cardinal-Hickory, in violation of the Fourteenth Amendment's Due Process Clause.

Leaving no rock unturned in its directionless search for some unseemly "appearance," the circuit court has proceeded as a one-

[5] *See infra* n.26 (describing attacks on Commissioner Huebner).

[6] This brief uses "judge" and "adjudicator" interchangeably, since due-process doctrine does not distinguish between them.

man grand jury of sorts, permitting any and all discovery that could possibly bear on the challengers' open-ended, constantly shifting suspicions of the sources of non-party Mr. Huebsch's supposed partiality. Many depositions, tens of thousands of pages of discovery documents, and a handful of hearings later, the two main challengers, Driftless Area Land Conservancy and Wisconsin Wildlife Foundation (collectively "Driftless"), have of late focused their efforts on Mr. Huebsch directly. They issued him a subpoena demanding that he sit for a deposition and give them his personal phone and password. They then issued a subpoena demanding that he testify at trial.

The only reason Driftless has been able to pursue these extraordinary demands, however, is that the circuit court has, repeatedly, misapplied black-letter due-process doctrine, stating time and time again that an adjudicator's mere "appearance of bias" is enough to invalidate an otherwise bona fide decision under the Constitution. But this Court unmistakably has rejected that standard, proclaiming that the "appearance of bias" standard and the *Caperton* test are materially different, and that the former is *not* the law.

Presented with the relevant passages from this Court's decision in *In re Paternity of B.J.M.*, 2020 WI 56, 392 Wis. 2d 49, 944 N.W. 2d 542, as well as from opinions in other recusal cases, the circuit court dismissed this Court's rejection of the "appearance" standard as dealing in mere "semantic[s]." P-App. 242. More candidly, the court conceded that while "the majority [of the Justices] said they weren't going to use that phrase,

'appearance[,]' *[t]hat's their choice." Id.* at 244 (emphasis added). The circuit court made a different choice: "I'm going to call [the controlling due process standard] [the] 'appearance [of bias' standard] because that really is what it is." *Id.*

The circuit court's orders threaten to revolutionize the law of "bias" in several other ways, too. And its overreach will have breathtaking implications for judges. Consider the conduct that the litigants in this case are claiming "appears" biased and is therefore unconstitutional: (1) that Huebsch sat on an advisory panel to a multi-state regional transmission organization—on which regulators from other states also served and that the federal government supervised—that sometimes filed papers in the Commission, including in this proceeding; (2) that Huebsch has long been friends with senior employees of utility companies that had matters before the Commission; and (3) that Huebsch, *after* he left the Commission, applied for the chief executive position at a utility company that had appeared before the Commission. According to the circuit court, these allegations (which are not even in dispute) are enough to make out a claim of constitutionally intolerable bias and entitle claimants to seek discovery of *anyone,* so long as that person was linked to both Huebsch and the project, however remotely.

Yet that, thankfully, is not the law. Courts instead apply presumptions of impartiality, honesty, and integrity to the decisions of adjudicators—presumptions that the circuit court and the claimants in this case have studiously ignored—and forbid burdensome fact-finding missions based on mere speculation. Just

as one's "disagreement" with a decision is not "evidence" of an adjudicator's bad faith or "dishonesty,"[7] it is also not a warrant for intrusive discovery. It takes a lot more to force a judge to hand over her phone or take the stand.

If the barriers to subpoenaing judges seem steep, that is because they are meant to be. "We should not, even by inadvertence, impute to judges a lack of firmness, wisdom, or honor." *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring). Under the circuit court's novel test, by contrast, pursuing discovery against adjudicators would be easy. All that it would take for a party to undercut a court's decision would be to make speculative allegations of connections between chambers and interested law firms, businesses, or other entities. Maybe even the judge's extracurricular involvement with former clerks, industry members, or working groups would also raise problematic "appearances." And if a judge left the bench and pursued employment at a firm that had a matter before her previously, perhaps that would even be grounds for vacating her previous decisions—or, at the very least, noticing a deposition of the judge to learn more.

One suspects that creating a credible threat that these tactics might be deployed again against the Commission, or any other adjudicators who might get in its way, is Driftless's ultimate goal. The remaining commissioners would be forgiven for thinking

[7] Hon. Patience Drake Roggensack, *The vote was about protecting state's voters,* Milwaukee Journal Sentinel (Dec. 5, 2009), https://tinyurl.com/6a3eje55.

twice before voting against these litigants on future projects. After all, who would want to oppose a group that might later subject you and your friends to intrusive discovery based merely on an allegation (damaging in its own right) of "appearing" biased? It would be much easier just to vote Driftless's way and avoid the headaches. Ironically, it is *this consequence,* and not anything Huebsch did, that will make our State's adjudicators "appear" biased, bringing their "integrity" into "undeserved disrepute." *B.J.M.*, 2020 WI 56, ¶ 125 (Hagedorn, J., dissenting).

This case must no longer serve as a beachhead for a new front in the dreaded "recusal wars." *Id.* ¶ 124 n.3. Because "the integrity of" our State's adjudicatory bodies is once again "at stake," *id.*, this Court should reverse.

## ISSUES PRESENTED

**1**. Whether an appeal challenging the lawfulness of a subpoena for testimony (that has been stayed pending appeal) is mooted when the subpoenaing party withdraws the subpoena while simultaneously stating that it will soon issue, and does issue, *yet another* subpoena for testimony to which the subpoenaed party objects on the same grounds?

The court of appeals answered yes.

**2.** Whether a circuit court commits a *per se* abuse of discretion on the "likelihood of success" prong of the *Gudenschwager* test by simply cross-referencing its merits decision in its denial of a motion for stay pending appeal? *See Waity v. LeMahieu*, No. 2021AP802 (July 15, 2021) (P-App. 1103).

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.

## ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that this case merits oral argument and publication.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. Michael Huebsch Serves in Public Office for Nearly Thirty Years, Including as Public Service Commissioner

**1.** Huebsch served the State of Wisconsin with distinction for nearly thirty years, including as speaker of the State Assembly and as secretary of the Wisconsin Department of Administration. In early 2015, the governor appointed him to the Public Service Commission of Wisconsin (the "Commission"). P-App. 604 ¶ 1. He served there until February 2020 when he resigned. *Id*.

At the beginning of his career, he became friends with Brian Rude and brothers Robert and John Garvin. Huebsch has remained friends with all three since the 1980s. *Id.* at 608–09 ¶¶ 17 (a)–(c). Although Huebsch has spoken with Rude occasionally and the Garvins frequently over the years, he never as a commissioner discussed pending matters with them—or with anyone else outside of the Commission. *See id.*; *see also id.* at 685:2–5, 757:10–14.[8]

Huebsch also has formed many professional relationships during his public career and while at the Commission. One such acquaintance is Barbara Nick, the former chief executive officer of Dairyland Power Cooperative. P-App. 609 ¶ 17 (d). In October

[8] As discussed further below, Driftless and others have filed lawsuits in state and federal courts challenging multiple decisions by the Commission based on the same unsubstantiated "appearance of bias" allegations. Huebsch, Rude, and Nick have been deposed in *Clean Wisconsin*, No. 20-cv-585. *See, e.g.*, P-App. 301. There was also testimony in open court in that case. *See, e.g.*, P-App. 626.

2019, Huebsch agreed to meet Rude and (then-CEO) Nick for lunch. Nick wanted to meet so she could get Huebsch's advice regarding her upcoming appointment to the board of directors of the Wisconsin Manufacturers and Commerce. *Id.* at 607–08 ¶ 15. She sought his "advice given [his] experience and knowledge of that organization from [his] time as a legislator." *Id.* at 609 ¶ 17 (d). The attendees have testified unanimously that they did not discuss Commission business at the lunch, and there is no evidence to the contrary.[9]

Huebsch has other acquaintances in the industry as well, including Melissa Seymour and John Bear, both of whom work for the Midcontinent Independent System Operator, Inc. ("MISO"). *Id.* at 609–10 ¶¶ 17 (e)–(f). Representing the Commission as an external stakeholder, Huebsch has discussed "professional activities" and "industry developments" with those two persons. *Id.* At no time, however, has he ever had an improper *ex parte* communication with either of them. *Id.*; *see* Wis. Stat. § 227.50 (describing *ex parte* communications). There is no evidence to the contrary.

**2.** While Huebsch served on the Commission, he also represented it on MISO, a role that Commissioners have filled for years in accordance with a federal mandate. P-App. 605 ¶ 5. The Commission routinely "coordinates" with MISO, a federally supervised "regional transmission organization that operates interstate electricity grids on behalf of its constituent utility

[9] *See* P-App. 319:8–20:17; 672:25–73:20; 755:16–57:19.

companies" spanning fifteen states, including Wisconsin. *Driftless Area Land Conservancy v. Valcq*, --- F.4th ---, 2021 WL 4901865, at *2 (7th Cir. Oct. 21, 2021) ("*Driftless II*"). Importantly, "MISO *must* involve the Commission in all grid-expansion activities." *Id.* (citing 18 C.F.R. § 35.34(k)(7)). Hence the Commission must, and does, "delegate[ ] to one commissioner the authority to represent it before MISO's Advisory Committee and the Board of the Organization of MISO States [OMS], a group that represents the interests of state regulators." *Id.* This duty fell to Huebsch during the relevant period. *Id.*[10] It has since passed to Commissioner Huebner.[11]

### B. The Commission Unanimously and on a Bipartisan Basis Approves the Cardinal-Hickory Creek Project and Rejects Driftless's Allegations of "Bias"

**1.** In September 2019, the Commission approved a new high-voltage Cardinal-Hickory Creek transmission line, at an estimated cost of $474 to $560 million. P-App. 873 ¶ 2. The proposed transmission line would run from Dubuque County, Iowa, through Grant and Iowa Counties in Wisconsin, and end in Dane County.

Because of the substantial environmental benefits that this green-energy project promised, the project enjoyed broad,

[10] The Federal Energy Regulatory Commission requires "[e]ach public utility transmission provider," including the Commission, "[to] participate" in these "regional transmission planning process[es]." FERC, Order No. 1000 – Transmission Planning and Cost Allocation, https://tinyurl.com/x8k6uve5.

[11] PSC of Wisconsin, *Our Commissioners* (last visited Oct. 27, 2021), https://tinyurl.com/392t4h22.

bipartisan support, including from environmental groups, unions, and citizens.[12] As clean energy organizations have emphasized, "[w]ithout Cardinal-Hickory Creek, wind projects in the Midwest risk curtailment, resulting in wasted generation of clean, carbon-free electricity" and a population "overly dependent" on "fossil fuels."[13] A coalition of those groups even intervened in the proceedings before the Commission to underscore that the project "will expand necessary clean-energy infrastructure, enabling greater usage of renewables across the Midwest."[14] Before the Iowa Utilities Board, another conservation group testified that the "Carinal-Hickory Creek project is one of a group of transmission lines proposed to provide new capacity for renewables while achieving other goals such as increased reliability and efficiency." P-App. 983.

The Cardinal-Hickory Creek docket opened in April 2018, when American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative (the "Transmission Companies") petitioned the Commission for a certificate of public convenience and necessity (CPCN) for the construction and operation of the transmission line. *Id.* at 991. The Commission held highly technical hearings with fact and expert witnesses throughout June 2019. *Id.* at 870–71.

"After extensive proceedings and submissions," on August

[12] *See, e.g.*, PSC, Dkt. 5-CE-146, https://tinyurl.com/4wj4smnw; *see, e.g.*, *id.* PSC REF#: 364209 (green energy groups); *id.* PSC REF#: 370310 (Utility Workers Coalition); *id.* PSC REF#: 353685 (Caton Roberts).

[13] *Supra* n.2.

[14] *Supra* n.1.

20, 2019, the Commission unanimously voted to conditionally grant the permit. *Driftless II*, 2021 WL 4901865, at *3. The Commission handed down its final written decision on September 26, 2019. Among other findings, the Commission determined that the Cardinal-Hickory Creek transmission line would provide "benefits to wholesale and retail customers." P-App. 874 ¶ 9. The Commission also determined that the project was critical to protecting the environment since it would promote the "interconnection of renewable resources." *Id*. at 899. Consequently, the "general public interest and public convenience and necessity require completion of the project." *Id*. at 997 ¶ 11.

**2.** After it lost, Driftless filed a motion for recusal, alleging that two commissioners' participation gave rise to an unconstitutional "appearance of bias and lack of impartiality." P-App. 1070. Driftless alleged that Chairperson Rebecca Valcq's "relationship with We Energies . . . create[d] an appearance of bias" given the legal work she did for that company in prior roles. *Id*. Driftless also alleged that Huebsch's work with MISO precluded his participation. *Id*. Driftless speculated that Huebsch must have "received *ex parte* communications" while at MISO events, and that "such interactions" raised "an impression of impropriety and appearance of bias." *Id*. Driftless therefore asked the Commission to "refrain from approving" the Cardinal-Hickory project given these allegations. *Id*. at 1070–71.

The Commission unanimously rejected those bias claims "as untimely, procedurally improper, and lacking a 'factual basis to support recusal.'" *Driftless II*, 2021 WL 4901865, at *3. It cited

Wisconsin law, which recognizes that, while public officials hold their "position as a public trust" and thus "any effort to realize substantial personal gain through official conduct is a violation of that trust," the law "does not prevent any state public official from . . . following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state." *See* P-App.1074 (citing Wis. Stat. § 19.45(1)). "[S]tate public officials may need to engage in . . . professional or business activities, other than official duties, . . . to maintain a continuity of professional or business activity." *Id.* Finally, the Commission observed, "[t]here is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings." P-App. 952. None of Driftless's allegations, the Commission concluded, overcame this presumption. Nor had Driftless "set forth any facts, verified or not, that [would] otherwise show any actual instances, statements, communications, or other substantiated events that show bias, prejudice, or improper contacts." *Id.* The Commission found that that Valcq and Huebsch had "complied with all applicable ethical and legal standards." *Id.* at 953.

### C. Huebsch Resigns From the Commission in February 2020 and, Later, Pursues Other Work

Sometime in Fall 2019, after the Commission approved the transmission line, Huebsch was approached by a prospective business partner about an opportunity to start a firm. P-App. 607 ¶ 12. The person—who has never lived in Wisconsin and was not a party to the Cardinal-Hickory Creek proceedings—planned on transitioning out of the work and was looking for someone who

could take it over. *Id.* ¶¶ 12–13. Given the person's exit timeline, Huebsch had to decide almost immediately whether to take up the offer. *Id.* Huebsch decided to accept. He resigned from the Commission in February 2020 to take on this work. *Id.*

Some months after leaving the Commission, and at the urging of Brian Rude, a Dairyland Power executive and "longtime friend and mentor," Huebsch half-heartedly applied to be chief executive officer of Dairyland. P-App. 608 ¶ 16. When he submitted his materials, in April 2020—months after he had left the Commission—he had already begun at his new firm. Huebsch did not take the Dairyland opportunity seriously. He knew he had no chance of getting it. *Id.*; *see also id.* at 378:5–381:24. He submitted his materials to an independent third-party search firm that walled off Dairyland from the executive search. The search firm many months later rejected his application in an obvious form letter. *Id.* ¶ 16; *see also id.* at 378:5–381:24.

## II. PROCEDURAL BACKGROUND

### A. Driftless Challenges the Approval of the Cardinal-Hickory Project in State and Federal Court, Raising a Due Process "Appearance of Bias" Theory

**1.** Certain parties who had opposed the Cardinal-Hickory Creek project filed state and federal lawsuits to vacate the decision. *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.). In December 2019, Driftless filed a petition for judicial review under Wisconsin Statutes Chapter 227

in Dane County Circuit Court. *See* P-App. 934. Chapter 227 permits narrow challenges to certain agency orders. It nonetheless imposes strict procedural requirements, limits available remedies, and confines review to the record except "in cases of alleged irregularities in procedure before the agency" when certain limited discovery may be permitted. Wis. Stat. § 227.57(1).

Driftless claimed that the Commission violated due process by approving the project despite Huebsch's "appearance of bias." P-App. 860–64 ¶¶ 102–21. His apparent "bias," according to Driftless, resulted from his "various roles for" MISO, including his "continued participation and extensive meetings" with MISO members that allegedly "were *ex parte* communications," creating a "risk of bias." *Id.* Driftless offered no details. *See id.* Still, Driftless insisted that "the *risk* or *appearance* of bias" in the PSC proceeding "[was] 'impermissibly high'" because of Huebsch's MISO-related activities. *Id.* at 863 ¶ 117.

Driftless appended two more sets of "bias" allegations to its case many months later, which allegations appear nowhere in its petition for review. *See Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297 ("If an issue is not raised in the petition for review . . . , 'the issue is not before [the court.]'"). In October 2020, Driftless moved to introduce non-record evidence under Wis. Stat. § 227.57(1). P-App. 618. Driftless claimed that it had "more information about the meetings, industry events, dinners, and other interactions" Huebsch had with members of MISO. *Id.* at 619. It also sought information concerning Huebsch's post-Commission job application to Dairyland. *Id.* Driftless next

included a request to enter into the administrative record "a series of text messages" between Huebsch and Rude. *Id.* "These new materials are relevant," it 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.* Driftless asserted 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 Section 227.57(1) that otherwise confines judicial review to the agency record. *Id.* at 620.

**2.** The circuit court held oral argument in January 2021 to determine whether Driftless was entitled to build a new record and engage in factfinding in its Chapter 227 proceeding. *See* P-App. 434:16–435:2. This required a determination of whether Section 227.57(1)'s "procedural irregularity" exception applied, which in turn called for an evaluation of whether Driftless had raised a cognizable due-process claim of "bias."

The court mostly agreed with Driftless. It began by holding that the Due Process Clause clearly is violated either by "actual bias *or* the inappropriate and improper appearance of bias." P-App. 502:22–503:1 (emphasis added). Turning to the allegations, the court rejected the MISO-related "facts" as insufficient, because it did not "see how being part of" MISO and the "process that's set out and anticipated under [federal] law . . . could ever . . . lead to a bias." *Id.* at 512:11–20. If it were otherwise, the court remarked, then it "would have to essentially find that [] all of those procedures and laws that allow and really call for MISO to exist . . .

shouldn't exist." *Id.* Even so, and quite remarkably, the court still permitted "investigation into and testimony on [] Huebsch's involvement" with MISO "from the moment that MISO became involved in the proceedings." *Id.* at 515:14–20.

The court next seized upon claims of Huebsch's "communications" with parties connected to the proceedings that supposedly "culminated in [Huebsch] applying for [a] job" at Dairyland. P-App. 502:1–10. These allegations were "enough," according to the court, "to allow further exploration under [§] 227.57(1) of exactly what happened." *Id.* at 503:2–5. The court conceded that it "[didn't] know what was discussed" between Huebsch and other parties. *Id.* at 504:4–9. And it omitted any analysis—or even mention—of the presumptions of impartiality, integrity, and honesty that protect adjudicators from discovery.

### B. The Circuit Court Denies Huebsch's Emergency Motion to Quash Driftless's Subpoena for Testimony and for Inspection of His Phone

**1.** Having secured permission to pursue discovery, Driftless fired off multiple subpoenas to Huebsch and other non-parties. It issued four subpoenas—one per month, between May and August 2021—to Huebsch alone. Two are especially relevant here: the July and August subpoenas. *See* P-App. 602, 613–14.

The July subpoena demanded that Huebsch sit for a deposition and turn over all documents related to his post-Commission employment decisions, his interactions with MISO, his current consulting business, his communications with his friends (such as Rude and Garvins), his communications with his

professional acquaintances (such as Nick), and more. *See id.* at 616–17. Driftless also demanded that Huebsch give it his personal smartphone and passwords. *Id.*

**2.** The subpoena of the phone in July came after Driftless learned that Huebsch has from time to time used a very popular messaging application called Signal. *See* P-App. 985–86. Signal "uses end-to-end encryption" to protect users' data.[15] Encrypted messaging applications, such as Zoom, WhatsApp, and Snapchat, are "increasingly used around the globe" by billions of people,[16] including by government employees. The benefits of these applications include "information governance," "privacy," "data security," "data minimization," and more.[17] In January 2021, Signal became "the No. 1 free app on both the [Apple] App Store and Google Play,"[18] with 40 million monthly active users.[19] By May 2021, Signal had already been downloaded over 105 million times.[20]

Like other encrypted messaging applications, including

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[15] Vivian McCall & Barbara Smith, Business Insider, *What to know about Signal, the secure messaging app that keeps all of your conversations private* (Jan. 12, 2021), https://tinyurl.com/4ey3n43b.

[16] Sedona Conference, Commentary on Ephemeral Messaging, at 1 (Jan. 2021), https://tinyurl.com/4ev7bmfn.

[17] *Id.* at 9–14.

[18] Audrey Conklin, FOX Business, *Signal becomes No. 1 app after reaching 1.3M downloads Monday* (Jan. 12, 2021), https://tinyurl.com/y6sabwwj.

[19] David Curry, Business of Apps, *Signal Revenue & Usage Statistics (2021)* (June 7, 2021), https://tinyurl.com/wvays3yv.

[20] *Id.* Courts and other institutions use encrypted applications, such as Zoom, and have suggested even that end-to-end encryption is a "best practice" for messaging applications. *See, e.g.*, *U.S. WeChat Users Alliance v. Trump*, 2020 WL 6891820, at *5, *8 (N.D. Cal. Nov. 24, 2020).

WhatsApp, Snapchat, or iMessage, Signal also permits users to set messages to clear automatically after a certain period of time.[21] It is widely recommended that people use these features to preserve space on their devices.[22] Notably, none of the most popular end-to-end encrypted video messaging applications, such as Zoom, stores conversations by default—if the application allows a user to store conversations at all.[23]

Huebsch used Signal with a small group of friends to manage data usage, share non-compressed pictures and videos more easily with devices whose operating systems differ (*e.g.*, iPhone to Android), and to protect his communications from commercial third parties. *See* P-App. 620–22 ¶¶ 20–23. But he never used Signal, or any other application, to communicate about state business. *Id*.

**3**. Huebsch promptly moved to quash the July subpoena days after receiving it. He argued that Driftless had failed to allege a cognizable due-process claim entitling it to pursue discovery from him under Section 227.57(1) in the first place. He also moved to stay the proceedings.

The circuit court held a hearing on July 30 on those motions. The court commenced its colloquy by explaining that Huebsch's

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[21] *See, e.g.*, WhatsApp, *About disappearing messages* (last visited Aug. 27, 2021), https://tinyurl.com/v8yctymb.

[22] *See, e.g.*, Senior Tech Club, *How to Reduce the Storage Consumed by Text Messages* (last visited Aug. 27, 2021), https://tinyurl.com/e3p8x5np (recommending "automatically delet[ing] old [iPhone] messages" to save phone storage space).

[23] *See, e.g.*, Drew Harwell, Wash. Post, *Thousands of Zoom video calls left exposed on open Web* (Apr. 3, 2020), https://tinyurl.com/2pu7aheb ("Zoom calls are not recorded by default.").

arguments "raise[d] concerns that [it has] already addressed; and [it is] not undoing [its prior] decisions." P-App. 239:22–24. The court therefore declined to address the arguments made in his motion to quash concerning, for example, the court's failure to analyze (at all) the presumptions of regularity and honesty when seeking discovery on a bias claim. *See id.* at 240:18–241:7.

The circuit court reiterated its position that an adjudicator's "appearance of bias" alone violates due process. Addressing this Court's decision in *In re Paternity of B.J.M.*, the circuit court stated that the justices' separate opinions in that case "didn't disagree on the substance" of the due-process claim, and that their written differences about the viability of the "appearance of bias" standard are nothing more than "semantic[s]." *Id.* at 242:5–243:2. The circuit court nevertheless acknowledged that "the majority [of justices] said [that] they weren't going to use that phrase, 'appearance.'" *Id.* at 244:10–11. But "[t]hat's their choice," the court remarked. *Id.* at 244:12. The circuit court made a different choice: "to call it 'appearance [of bias' standard] because that really is what it is." *Id.* at 244:12–13.

The circuit court denied Huebsch's motion to quash and motion to stay. The court then commanded Huebsch to turn over his personal phone for unlimited inspection and give deposition testimony three days later. *Id.* at 277:21–286:9. In denying Huebsch's motion for a stay, the court simply cross-referenced its previous decision on the merits, without any analysis of Huebsch's likelihood of success on appeal. *Id.* at 290:23–295:21; *see supra* Statement of Case II.B. (describing January and May decisions).

### C. The Court of Appeals Temporarily Stays the Subpoena, Which Driftless Then "Withdraws" to Moot the Appeal

On August 2, days after the circuit court orally denied the motions to quash and stay, Presiding Judge Stark temporarily stayed the court's order and the subpoena. P-App. 22. The next week, Driftless strategically withdrew its subpoena. *Id.* at 580. Driftless simultaneously filed a motion to dismiss the appeal as moot. *Id.* at 577. The next day, Huebsch's counsel inquired whether Driftless planned to issue or serve any additional subpoenas, including for testimony. Driftless responded by suggesting that it would issue yet another subpoena for testimony commanding Huebsch to testify at trial. *See id.* at 16–17.

### D. The Court of Appeals Lifts the Stay and Dismisses the Appeal as Moot, But Then, Two Business Days Later, Driftless Issues Huebsch Yet Another Subpoena for Testimony

On August 20, at the urging of Driftless and without the benefit of a response from Huebsch, the circuit court vacated its appealed-from orders denying Huebsch's motion to quash and ordering him to turn over his phone. The same day, the court of appeals dismissed Huebsch's appeals as moot. *See* P-App. 12, 18.

Later, on August 24 and just shy of two full business days after successfully mooting his appeal, Driftless issued Huebsch yet another subpoena. *Id.* at 602. This August subpoena "commanded" Huebsch "to appear . . . at the Dane County Courthouse . . . to give evidence" in this case. *Id.* "Failure to appear," Driftless warned, "may result in punishment for contempt, which may include . . .

imprisonment and other sanctions." *Id*.

Huebsch swiftly petitioned this Court, within one week of having received his *fourth* subpoena in as many months, to resolve whether a subpoena (or any discovery) may be enforced against him and, in the interim, to stay the August subpoena. He asked for a supervisory writ in the alternative.

### E. This Court Issues a Stay and Grants Review

This Court granted Huebsch's petition for review and his motion to stay the August subpoena along with "any other discovery or trial-related demands directed" at him. P-App. 2.

After receiving this Court's order staying "discovery or trial-related demands directed" at Huebsch, the circuit court noticed a hearing "to discuss whether the Supreme Court order precludes the parties from compelling Mr. Huebsch from testifying and, if so, whether the hearing can proceed at all." *Id.* at 600 (cleaned up). The circuit court decided to stay the trial proceedings related to claims of bias. *Id.* at 209:22–211:3; *id.* at 25–26.

Less than a month later the circuit court held another hearing to decide whether to grant Driftless's motion for an injunction. P-App. 638. Ignoring this Court's stay, Driftless argued that it had "a strong probability of success on [its] bias claim" and, consequently, the circuit court should "halt construction" of the roughly half-billion dollar transmission line. *Id.* at 581, 591. The circuit court agreed, concluding (notwithstanding this Court's order to the contrary) there was "a reasonable likelihood of [Driftless] succeeding in finding . . . a due process

violation . . . because of an improper appearance of bias that offends due process principles." *Id.* at 111:2–7. The court went on to explain that this "appearance of bias" standard, and its orders "incorporat[ing]" it, remain "ever present in [its] mind when [it's] deciding things in this case." *Id.* at 111:8–15. The court therefore enjoined construction of the Cardinal-Hickory Creek transmission line and set the bond at $32 million. *Id.* at 122:10–12; *id.* at 23–24.

### F. The Seventh Circuit Orders the Federal District Court to Abstain From Deciding Parallel Litigation Raising an Identical "Bias" Claim Until This Court "Resolves" That Claim in This Appeal

On October 21, in related federal proceedings, the Seventh Circuit ordered the district court to stay a parallel lawsuit "pending dispositive developments in [this] state litigation." *Driftless II*, 2021 WL 4901865, at *13. In the federal case, Driftless raises the same due-process claim as it does here. *Id.* at *9. The Seventh Circuit has stayed the federal case because of "deference to parallel state proceedings." *Id.* at *10–11 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). Expressing confidence in this Court to "apply[] *Caperton*" in the instant appeal, the court concluded that "the use of federal judicial resources to decide the same questions" raised in Huebsch's "petition for review" to this Court "cannot be justified." *Id.* at *12 (citing earlier *B.J.M.*, 2020 WI 56).

## STANDARD OF REVIEW

A circuit court's denial of a motion to quash is reviewed for an erroneous exercise of discretion. *See Lane v. Sharp Packaging*

*Sys., Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W. 2d 788. A circuit court abuses its discretion if it fails to use a "rational process," fails to "appl[y] a proper standard of law," or fails to "reach[] a conclusion that a reasonable judge [would] reach." *Id.* "Whether the circuit court utilized the proper legal standard, however, is a question of law [that this Court] review[s] independently of the circuit court." *Id.* Finally, this Court considers de novo all issues of statutory interpretation, including as to Section 227.57. *See Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 14, 342 Wis. 2d 576, 819 N.W.2d 240.

## ARGUMENT

### I. THE ISSUES RAISED BY HUEBSCH'S PETITION ARE NOT MOOT

**A.** "An issue is moot when its resolution will have no practical effect on the underlying controversy." *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927 N.W.2d 509. But a court "may"—indeed, "should"[24]—"overlook mootness" if "the issue is of great public importance," "the issue is likely to recur and must be resolved to avoid uncertainty," or "the issue is likely of repetition and evades review." *Matter of D.K.*, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901. An issue is likely of repetition and evades review when an actor purports to cease his challenged conduct but "continu[es] to assert the power" to resume the challenged conduct. *James v. Heinrich*, 2021 WI 58,

[24] *State ex rel. Milwaukee Cnty. Pers. Rev. Bd. v. Clarke*, 2006 WI App 186, ¶ 30, 296 Wis. 2d 210, 723 N.W.2d 141 ("should").

¶ 14 n.10, 960 N.W.2d 350 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring)). Applying similar logic, courts have routinely held that the "voluntary cessation of a challenged practice" does not remove the need for a court 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).[25]

**B.** This dispute is not moot because Huebsch is still subject to a subpoena that has been stayed only temporarily by this Court. He objects to this most recent subpoena on the same grounds that he objected to its predecessor. Since a ruling by this Court "in favor of [Huebsch] . . . [will] afford him some relief which he has not already achieved," this controversy is live. *State ex rel. Renner v. Dep't of Health & Soc. Servs., Corr. Div.*, 71 Wis. 2d 112, 116, 237 N.W.2d 699 (1976). Put differently, resolving whether the claim upon which Driftless's subpoenas have been predicated is even cognizable will have an obvious "practical effect on the underlying controversy." *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 11. This explains why the circuit court is expecting that this Court will give it "guidance" on due-process doctrine. P-App. 207:10–18, 225:19–25.

Even if this Court were to find Huebsch's appeal moot, several mootness exceptions would apply. *First*, this appeal

[25] Although this Court has not explicitly adopted the "voluntary cessation" doctrine, it has effectively adopted its reasoning. *See, e.g.*, *Heinrich*, 2021 WI 58, ¶ 14 n.10.

presents issues of great public importance. *Next*, the issues presented here not only are "*likely* to recur"—they already *have* recurred. The circuit court will plainly enforce the most recent subpoena unless this Court rules that it cannot.[26] *Third*, and for the same reasons, the issues presented are likely of repetition and will evade review if parties like Driftless can simply issue unlawful subpoenas, "stop when sued to have the case declared moot, then pick up where [they] left off, repeating this cycle until [they] achieve all [their] unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

**C.** Driftless will contend that this appeal is moot because it challenges the August subpoena for testimony whereas this dispute previously centered on the July subpoena for testimony, which also demanded that Huebsch turn over things, such as his phone. *See State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982). But there is no relevant distinction between those two subpoenas. Huebsch raises the same objections to both subpoenas. Indeed, *any* subpoena issued to him in this case would be oppressive and burdensome, because it would seek information to support a plainly meritless constitutional claim.

*State v. Gilbert* does not hold otherwise. *Gilbert* merely reversed an order quashing a criminal subpoena *ad testificandum*

[26] More, the issue is recurring in other cases, as parties in other proceedings are now following Driftless's playbook. In August, a party alleged that Commissioner Huebner must recuse lest he violate due process based on an alleged "appearance of partiality." *In re Application for CPCN of Koshkonong Solar Energy Ctr., LLC*, Motion for Recusal, Dkt. 9811-CE-100, PSC REF#: 418682 at 4 (Aug. 12, 2021), https://tinyurl.com/ybyfk9pp.

based on the "witness's claim of emotional harm," where a child-victim-witness had been ordered to testify against her allegedly abusive mother. 109 Wis.2d at 502 n.1, 512. *Gilbert* does not remotely leave subpoenaed persons helpless in the face of improper subpoenas *ad testificandum*. *See id*. at 511–12. Rather, *Gilbert* reasons that the scope of relief under Section 805.07(3), which grants circuit courts authority to quash subpoenas, was analogous to Federal Rule of Criminal Procedure 17, which, at the time, had been interpreted as permitting quashal only of subpoenas *duces tecum*. *Id.* at 509–11.

This case, though, is a *civil* action. The closest Federal Rule of *Civil* Procedure analogue is Rule 45(d)(3)(A)(iv), which *requires* a court to quash or modify on timely motion *any* subpoena that "subjects a person to undue burden." Subpoenaed persons may also seek relief under Section 804.01(3)(a), which *Gilbert* did not address, but which permits courts to "make any order which justice requires to protect a party or person from . . . oppression[] or undue burden."[27] This provision is nearly identical to Federal Rule of Civil Procedure 26(c), which also permits parties to receive relief from subpoenas to testify. *See, e.g.*, *Fonner v. Fairfax Cnty*., 415 F.3d 325, 331–32 (4th Cir. 2005). Thus, under the very logic of *Gilbert*, the "federal analogue[s]" make clear that targeted parties may be relieved from burdensome subpoenas *ad testificandum*, 109 Wis. 2d at 509, as even Driftless acknowledges, P-App. 543

[27] Huebsch sought relief under this statute as well. *See, e.g.,* P-App. 264 (recognizing "motion for protective order"); *id.* at 20 (addressing "petition for leave to appeal . . . ruling denying his motion for a protective order").

("That's not to say that nonparties are categorially barred from contesting trial subpoenas.").

The law accords with history. The subpoena *duces tecum* grew out of the subpoena *ad testificandum* and, at common law, a subpoenaed person could "demur" to *any* subpoena, including "for want of sufficient matter of equity" or "where [the issuing party], upon his own showing, *appears to have no right*." 3 Blackstone, *Commentaries on the Laws of England* *382, *443, *446 (emphasis added). Hence, in the years since *Gilbert*, Wisconsin courts repeatedly have quashed subpoenas *ad testificandum*. *See, e.g.*, *White v. Rasner*, 2015 WI App 43, ¶¶ 52–54, 362 Wis. 2d 539, 865 N.W.2d 885 (unpublished) (P-App. 1155); *State v. Baye*, 191 Wis. 2d 334, 337 n.2, 528 N.W.2d 81 (Ct. App. 1995); *Matter of Estate of Berth*, 157 Wis. 2d 717, 718, 460 N.W.2d 436 (Ct. App. 1990).

## II. THE CIRCUIT COURT'S CROSS-REFERENCING ITS PREVIOUS MERITS DETERMINATION WHEN DENYING HUEBSCH'S MOTION TO STAY WAS A PLAIN ABUSE OF DISCRETION

Courts apply the *Gudenschwager* test to determine whether to issue a stay pending appeal. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W. 2d 225 (1995). On the first factor, "where an appeal [] rest[s] on review of a legal question . . . , it is an error of law for a circuit court to proclaim that because it has decided the legal issue against the appellant . . . , the appellant must therefore have 'no likelihood of success on the merits' on appeal." *League of Women Voters of Wis. v. Evers*, No. 2019AP559 at P-App. 1137 n.8. It is simply "not the correct legal analysis" to refer to a prior

decision without independent analysis of what an appellate court would hold. *Waity v. LeMahieu*, No. 2021AP802 (July 15, 2021) (P-App. 1110).

That is precisely what the circuit court did here. "For all of the reasons that [it had] said already," the court concluded in denying Huebsch's motion to stay, "there is not a strong showing of likelihood to succeed on the merits. In fact, [the court] disagreed with Mr. Huebsch as to the arguments on the merits; so [it] can't find that that factor favors a stay pending appeal." P-App. 291. This was a plain "error of law." *League of Women Voters*, No. 2019AP559 at P-App. 1137 n.8.

## III. DRIFTLESS'S DUE-PROCESS CLAIM TARGETING HUEBSCH FAILS AS A MATTER OF LAW AND THUS DOES NOT JUSTIFY ANY FACTFINDING UNDER SECTION 227.57(1)'S "PROCEDURAL IRREGULARITIES" EXCEPTION

Driftless's bias claim is meritless on its face for several reasons, and, therefore, Driftless is powerless to subpoena or otherwise seek any trial-related demands or compulsory discovery from Huebsch in this matter.

### A. The Normal Discovery Rules, Section 227.57, and the Adjudicator Presumptions All Independently Bar Subpoenas Seeking Information to Support a Non-Cognizable Claim of Bias

If a party's claim is not cognizable, then any sought-after evidence relating to that claim is not relevant and any subpoena for such evidence is improper and should be quashed. It is axiomatic that, in order to obtain discovery, a party must have a cognizable claim. *See McLaughlin v. Copeland*, 455 F. Supp. 749,

753 (D. Del. 1978) (party who fails to state claim is "not entitled to discovery"). Discovery is limited to "matter that is relevant to a[ ] party's claim." Wis. Stat. § 804.01(2)(a). If there is no "claim[ ]," then there can be no matter relevant to that claim. A party cannot, therefore, issue a subpoena for evidence of a non-cognizable claim. Such a subpoena would, "by definition," impose an "undue" burden on the recipient, *see Compaq Comput. Corp. v. Packard Bell Elecs., Inc.,* 163 F.R.D. 329, 335–36 (N.D. Cal. 1995) ("if the sought-after" testimony is neither "relevant nor calculated to lead to the discovery of admissible evidence, then *any burden whatsoever* imposed upon [the subpoenaed person] would be by definition 'undue'"), and should therefore be quashed. *See* Wis. Stat. §§ 804.01(3)(a), 805.07(3); Fed. R. Civ. P. 26(c), 45(d)(3) (analogous).

A litigant wishing to pursue discovery in a Chapter 227 proceeding faces additional hurdles. Beyond the usual limitations on discovery, she must overcome the rule that judicial review of administrative decisions "shall be confined to the [agency] record" except in rare cases of "alleged irregularities in procedure before the agency," where factfinding "may" be undertaken. Wis. Stat. § 227.57(1). But not just any set of allegations will unlock Section 227.57's narrow door to discovery. The allegations, however detailed, still must amount to an "irregularity." So, if bias is the claimed "irregularity," as here, the allegations must state a real, "cognizable" claim of bias. *See Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶ 42, 254 Wis. 2d 538, 648 N.W.2d 878 (party must make "prima facie showing of bias" in order to expand

the record); *see also State v. Allen*, 2010 WI 10, ¶ 199, 322 Wis. 2d 372, 778 N.W.2d 863 (separate opinion of Roggensack, J.) (voting to deny motion that was "legally insufficient to state a [bias] claim cognizable under the due process clauses").

The well-established presumptions of legitimacy that attach to adjudicators' decisions, meant to protect against the "use [of] the discovery process as a fishing expedition to uncover evidence of bias," *Sills*, 2002 WI App 111, ¶ 43, and to prevent "harassment [of judges] based upon mere suspicion," *Wright v. Indus. Comm'n*, 10 Wis. 2d 653, 661–62, 103 N.W.2d 531 (1960), further add to a Chapter 227 petitioner's initial burden. Such presumptions include "regularity" in proceedings before a tribunal, *id.*; "that [the adjudicator] acted fairly, impartially, and without bias," *B.J.M.*, 2020 WI 56, ¶ 16; and "that administrative adjudicators are able to maintain their professional and ethical responsibility to remain impartial and to conduct themselves appropriately." *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 34, 286 Wis. 2d 252, 706 N.W.2d 110. Critically, "Wisconsin appellate courts have applied [these presumptions] in cases of administrative adjudication in which professional relationships and dual roles linked [interested parties] and adjudicators and *required a strong showing to rebut the presumption that administrative agents act with integrity*." *Id.* ¶ 32 (emphasis added; collecting cases). Rebutting any of these presumptions is a "heavy" and "high burden." *Id.* ¶¶ 31, 34.

### B. An Adjudicator's Mere "Appearance of Bias" Does Not Violate the Due Process Clause

The constitutional law of adjudicator bias is well settled. All agree that a fair hearing before a fair and unbiased adjudicator, whether in a judicial or administrative setting, is a basic requirement of due process under the Fourteenth Amendment. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This requirement is violated in only one of two scenarios: where the adjudicator is biased in fact ("actual bias") and where there is, viewed objectively, "a particularly high probability of bias." *Alston v. Smith*, 840 F.3d 363, 368 (7th Cir. 2016). Elaborating on the second test, the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868 (2009), explained that it looks for a "serious risk of actual bias—based on objective and reasonable perceptions"—and clarified that "[a]pplication of the constitutional standard . . . will thus be confined to rare instances." *B.J.M.*, 2020 WI 56, ¶ 24 (quoting *Caperton*, 556 U.S. at 884). "In other words, *Caperton* concludes that" due process is violated only if a "reasonable, well-informed person, knowledgeable about judicial ethical standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know, would reasonably question the judge's ability to be impartial because of actual bias or the probability of a serious risk of actual bias." *State v. Herrmann*, 2015 WI 84, ¶ 115, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., joined by Roggensack, C.J.). Nothing in this test looks to "appearances."

Two other elements of the "serious risk of actual bias" test

are important. *First*, because it is objective, it looks not to the particular adjudicator whose decision is at issue but considers "whether the average judge in his position"—who is presumed to act with "honesty and integrity," *Withrow*, 421 U.S. at 47—"is likely to be neutral, or whether there is an unconstitutional potential for bias," *Caperton*, 556 U.S. at 881, because the practice creates "a possible temptation so severe that" courts should "presume an actual, substantial incentive to be biased," *United States v. Williams*, 949 F.3d 1056, 1061 (7th Cir. 2020). *Second*, the test is forward-looking rather than retrospective. It asks *not* whether the particular conduct challenged, in hindsight, presented a "serious risk of actual bias" in light of the particular circumstances of the case but whether, on a broader view, "*the practice*" at issue should be prospectively and categorically "forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883–84. This inquiry calls for "a realistic appraisal of psychological tendencies and human weakness" of the average judge, *id*. at 883, "*not* on the observations of the public, which [inquiry] is consistent with a probability-based disqualification standard." Dmitry Bam, *Understanding* Caperton: *Judicial Disqualification Under the Due Process Clause,* 42 McGeorge L. Rev. 65, 75 (2010) (emphasis added).

For these reasons and others, the objective "serious risk of actual bias" standard does *not* forbid the mere "appearance of bias." Indeed, it is not an "appearance" based standard at all. *See 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."). In *B.J.M.*, six of the seven then-sitting justices of this Court put this point beyond debate, unambiguously concluding that "appearance of bias" is not the standard for a due-process bias claim but is merely a relic of "pre-*Caperton*" case law. *B.J.M.*, 2020 WI 56, ¶ 25 n.18 (lead opinion of Dallet, J., joined by Roggensack, C.J., and Ziegler, J.) (declining to adopt the "appearance of bias" standard favored by Justice A.W. Bradley). Critically, this footnote was an explicit condition of Chief Justice Ziegler's vote to join the opinion. *Id.* ¶ 65 (Ziegler, J., concurring). As she explained, 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," so she "join[ed] the majority because it does *not* adopt the standard suggested in Justice Ann Walsh Bradley's concurrence." *Id.* ¶¶ 65, 69 (emphasis added). The three dissenting justices agreed with Justice Ziegler that "appearance of bias" is not the standard. *Id.* ¶ 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."). Likewise, Justice Roggensack has previously joined opinions setting forth in detail why "appearance of bias" is not the measure. *Herrmann*, 2015 WI 84, ¶ 114 (Ziegler, J., concurring) ("Much more [than appearance of bias] is required."); *State v. Harris*, 2010 WI 79, ¶ 25 n.7, 326 Wis. 2d 685, 786 N.W. 2d 409 (declining to adopt "appearance of bias" standard advocated by Justice A.W. Bradley in related context).

This all follows from *Caperton*, whose test does not turn on "appearances" at all. In fact, although *Caperton* notes that many states have gone *further* by statute—forbidding even the "appearance of bias"— it makes clear that the Constitution does not adopt this standard. *Caperton*, 556 U.S. at 888. Rather, the states' appearance-based codes "provide *more* protection than due process requires." *Id.* at 889–90 (emphasis added). Consistent with *Caperton*, Courts across the country likewise agree that establishing a "mere appearance of bias" does not violate due process. *See, e.g.*, *State v. LaCaze*, 239 So. 3d 807, 815 (La. 2018) (same)); *People v. Freeman*, 47 Cal. 4th 993, 996 (2010) (same); *Davenport Pastures, LP v. Morris Cnty. Bd. of Cnty. Comm'rs*, 291 Kan. 132, 145–46 (2010) (same).

Meanwhile, the circuit court has stated in so many words that it prefers—and, remarkably, has continued to apply, notwithstanding this Court's stay[28]—the position adopted by Justice A.W. Bradley in *B.J.M.*: namely, that the Due Process Clause's objective bias standard forbids the mere appearance of bias. This is not surprising, given that Driftless has repeatedly pushed for an "appearance of impartiality" standard since the start of the case. *See, e.g.*, *Driftless Area Land Conservancy v. Pub. Serv. Comm'n*, No. 2019-cv-144, Dkt. 2 at ¶ 117 (Dec. 13, 2019) (P-App. 863); P-App. 434–35 (same). Perhaps worse, neither Driftless nor the circuit court has ever analyzed, let alone even acknowledged,

[28] *See* P-App. 111:2–7 (concluding "a reasonable likelihood of the challengers succeeding in finding that there was a due process violation, at the very least because of an improper appearance of bias that offends due process principles."); *id.* at 211:4–9 ("I got it right the first time.").

the role that the presumptions play in evaluating bias claims.

Driftless will respond that the circuit court's adoption of the "appearance" standard is at most harmless error, since, Driftless will insist, the circuit court understood its standard and the governing "serious risk of actual bias" standard to be one and the same, differing in mere "semantic[s]." P-App. 242:5–9. Not so. In fact, they are substantively different standards, as the justices of this Court have been careful to explain. *See supra*. Indeed, the "serious risk of actual bias" test is not an *appearance*-based standard at all. Conflating the two, therefore, is clear error, just as it would be error to apply intermediate scrutiny to a claim triggering strict scrutiny because the court mistakenly thinks that the two standards are functionally identical. *See Hannemann v. Boyson*, 2005 WI 94, ¶¶ 66–67, 282 Wis. 2d 664, 698 N.W.2d 714 (reversing because circuit court "conflated [two legal] standards," making it impossible to tell whether jury's erroneous application of law to facts was "harmless").

### C. Even if Evaluated Under the (Correct) "Serious Risk of Actual Bias" Standard, Driftless's Allegations Do Not Make Out a Claim of Unconstitutional Bias

Under *Caperton* and *B.J.M.*, courts must ask whether there is "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883–84. For example, adjudicating a case in which one previously participated violates due process, not because of any "appearance of impropriety," but

because the practice itself creates a constitutionally impermissible risk of bias. *Guthrie v. Wis. Emp. Rels. Comm'n*, 111 Wis. 2d 447, 457–58, 331 N.W.2d 331 (1983). Having a pecuniary interest in the outcome of a case is another practice that is *per se* forbidden for this reason. *See Caperton*, 556 U.S. at 876. "[M]ost matters relating to judicial disqualification," however, "[do] not rise to a constitutional level." *Id.* That is why novel *Caperton* claims are only "rare[ly]" successful. *B.J.M.*, 2020 WI 56, ¶ 22.

### 1. Neither Huebsch's work with MISO nor his personal relationships violate due process.

**a.** The only "practice" properly raised by Driftless in its petition for review is its speculation of improper "*ex parte* communications" between Huebsch and MISO. *See* P-App. 860–64 ¶¶ 102–21. Driftless alleges that his "continued participation[,] extensive meetings[,] and discussions with MISO" both "created . . . a 'risk of bias'" and an "'appearance of bias' that is intolerably high[] even when there is no reason 'to question the agency's good faith.'" *Id.* ¶¶ 113, 117. Driftless also suspects that Huebsch had improper *ex parte* communications with MISO.[29] These allegations are meritless.

To begin with, federal law requires collaboration between the Commission and MISO. As the Seventh Circuit just explained, "MISO must involve the Commission in all grid-expansion

[29] An improper *ex parte* communication is a "communication between counsel or a party and the court when opposing counsel or party is not present" and which communication goes to the subject matter of the proceedings. *B.J.M.*, 2020 WI 56, ¶ 34 n.22; *see also* Wis. Stat. § 227.50.

activities" and, "[i]n order to coordinate with MISO, the Commission delegates to one commissioner the authority to represent it before MISO's Advisory Committee." *Driftless II*, 2021 WL 4901865, at *2 (citing 18 C.F.R. § 35.34(k)(7)). "Commissioner Huebsch was the Commission's designated MISO representative during the relevant period." *Id.* State law, surely *more* protective against bias than the Constitution, further confirms the legitimacy of these practices, as it recognizes that "state public officials may need to engage in . . . professional or business activities, other than official duties, . . . to maintain a continuity of professional . . . activity." Wis. Stat. § 19.45(1).

Driftless will respond that, even if Huebsch's MISO activities were not unlawful on their face, it should be permitted to discover what kinds of conversations were had as a result of them. But simply identifying "professional relationship[s]" between adjudicators and others clearly cannot "constitute [the] 'strong showing' necessary to overcome the presumption[s] of honesty and integrity" and justify discovery into the details. *Nu-Roc Nursing Home, Inc. v. State Dep't of Health & Soc. Servs.*, 200 Wis. 2d 405, 420–21, 546 N.W.2d 562 (Ct. App. 1996) (affirming denial of due-process claim based on "professional relationship[s]" and alleged "*ex parte* communications"); *accord Jenson v. Fisher*, 1996 WL 606505, at *2 (10th Cir. Oct. 23, 1996) (unpublished) ("Professional associations alone are insufficient to establish judicial bias.").

This Court's decision in *Marder* reaffirms this basic point. In *Marder*, a member of a tribunal traveled with a professional

associate who had recommended terminating a faculty member. 2005 WI 159, ¶ 33. That faculty member alleged that the two of them had spent "suspicious" time together "on the same day" that the board voted to terminate him, speculating that they must have engaged in forbidden *ex parte* communications. *Id*. This Court rejected the claim, holding that mere suspicion of *ex parte* communications cannot overcome "the legal presumption that administrative adjudicators are able to maintain their professional and ethical responsibilit[ies] to remain impartial." *Id*. ¶ 34. This Court therefore upheld the decision not to permit testimony of those two parties to explore whether *ex parte* communications in fact occurred between them. *Id*. ¶ 41; *see also Sills*, 2002 WI App 111, ¶ 44 (holding that, even if group alleging bias "had actual evidence of ex parte communications" between tribunal members and lobbyist, it "would still fail to make a prima facie showing of a procedural due process violation"). Driftless's allegations are precisely the sort of "general complaints" based on mere "suspicio[n]" that *Marder* held are categorically insufficient to warrant discovery or state a claim. 2005 WI 159, ¶¶ 33–34. Huebsch's highly visible work with MISO is no different from the many above-board collaborations that take place in the legal industry among judges, academics, and practitioners.[30]

[30] *See, e.g.*, *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1117–18 (4th Cir. 1988) (judge formerly a member of Sierra Club not required to recuse from case involving Sierra Club); *UCO Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213, 1215 (S.D.N.Y. 1984) (arbitrator's participation in professional associations was "in the ordinary course of his business").

**b**. The two other sets of "bias" allegations come not from Driftless's petition but from its motion to accept non-record evidence under Section 227.57(1). *See* P-App. 618.[31] Driftless claims that Huebsch's "interactions" with other persons connected to parties to the Cardinal-Hickory Creek proceedings, *i.e.,* his friends and professional acquaintances, "contribut[ed] to a disqualifying appearance of impropriety and serious risk of bias." *Id.* at 618–19. Yet, not only does Driftless fail to make a *prima facie* showing, "in light of the facts as they exist[ ] and not as they [are] surmised," to support its claim, *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 914 (2004) (Scalia, J., in chambers), but Driftless fails to cite any authority suggesting that friendships in a regulated industry create a serious risk of actual bias. Probably because courts have held the opposite.

Courts around the country agree that "a judge need not disqualify himself just because a friend—even a close friend—appears [before him]." *United States. v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985) (citing cases). Adjudicators, after all, "are humans and will bring their experiences to the bench," and, although a friendship with a person connected to an interested party could of course conceivably cause prejudice, "not all temptations are created equal." *Williams*, 949 F.3d at 1062. Our system "expect[s]—even demand[s]—that judges rise above [the]

[31] Driftless failed to level these two sets of allegations concerning "interactions" and post-Commission employment in its petition for review, and thus they are not properly part of this case. *See Jankee*, 2000 WI 64, ¶ 7 ("If an issue is not raised in the petition for review . . . , 'the issue is not before [the court.]'"). In any event, they, too, are meritless.

potential biasing influences [flowing from friendships], and in most cases we presume judges do." *Id.* Indeed, it is typical even for adjudicators to maintain relationships with "*named part[ies]*." *Cheney*, 541 U.S. at 917 (Scalia, J., in chambers). A contrary "rule that required [judges] to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling." *Id.* at 916–17, 924–26. As it happens, judges often reach their posts "precisely because" of their relationships with people who might be involved with proceedings before them, including, for example, Justice White and Robert Kennedy, Justice Jackson and Franklin Roosevelt, and more. *Id.* Hence "[e]vidence of prior familiarity with the" party "is not adequate by itself to overcome" the presumptions accorded to adjudicators. *Head v. Chi. Sch. Reform Bd. of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000).

Making and maintaining professional acquaintances is, in fact, routine for government officials, just as it is routine for judges to keep in touch with former law clerks or get to know new attorneys at professional events, whether or not the attorneys might from time to time argue cases before them. *See Olmstead v. CCA of Tenn., LLC*, 2008 WL 5216018, at *2 (S.D. Ind. Dec. 11, 2008) (Hamilton, J.) ("Like most judges, I know many lawyers in a blend of professional relationships and personal acquaintances and friendships. I often know lawyers on both sides of cases; I rule in favor of and against the clients of lawyers who have been friends. There is nothing unusual about that."); *TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1079 (D. Colo. 1991); *Clayton v. Sklodowski*, 1987 WL 11834, at *1 (N.D. Ill. May

29, 1987); *see also Hardy Indus. Techs., LLC v. BJB LLC*, 2016 WL 7325152, at *4 (N.D. Ohio Dec. 16, 2016).

**2. Applying for a job after leaving government does not violate due process.**

Driftless also alleges a due-process violation arising from Huebsch's application for the chief-executive position at Dairyland, submitted months after he left the Commission. But there is no allegation that Huebsch had any communications about this position during his time on the Commission. Nor is there any suggestion of a *quid pro quo* associated with the application. Instead, Driftless is concerned merely that Huebsch's post-Commission "employment application" to Dairyland "contribute[d] to an appearance of impropriety and [a] serious risk of bias." P-App. 618–19.

But there is nothing problematic about a former state official, having developed expertise in an industry, applying for a job in that industry. Indeed, doing so even while he was still a commissioner would have been lawful, since the statutes do "not prevent any state public official from accepting other employment or following any pursuit." Wis. Stat. § 19.45(1). Judges have refused to disqualify themselves from cases when they sought employment from an interested party before the party came before the court. *See, e.g.*, *Mass. v. McClenahan*, 1995 WL 106106, at *1, 3 (S.D.N.Y. Mar. 9, 1995) (rejecting defendants' argument that judge should recuse himself even though judge previously had contacted "of counsel" for plaintiff to discuss possibility of teaching

at said counsel's law school).

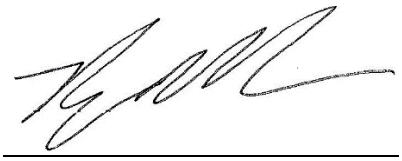
Huebsch applied half-heartedly to Dairyland at the urging of his mentor *months* after he left the Commission. P-App. 608 ¶ 16; *id.* at 344–45. There is no evidence whatsoever that he pursued employment opportunities with parties before him while he served on the Commission. *Id.* at 607–08 ¶¶ 14–16. Nor is it "objectively" reasonable to ban public officials from pursuing work with parties who had appeared before them, because such everyday "practices" cannot be said to create an overwhelming risk that judges presumed honest and impartial would act inappropriately. *See Caperton*, 556 U.S. at 886.

## CONCLUSION

This Court should reverse the August 3, 2021, order denying Huebsch's motion to quash, P-App. 1194, and vacate the August 24, 2021, subpoena for testimony, P-App. 602, on the ground that Driftless's bias claim is not constitutionally cognizable and therefore fails as a matter of law.

Dated: October 28, 2021

Respectfully submitted,



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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,984 words.

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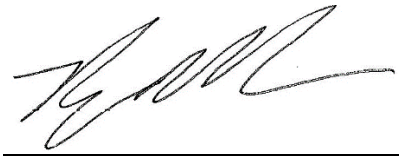

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## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(F)

I hereby certify that:

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

I further certify that:

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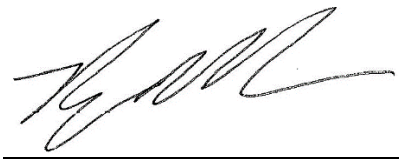

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## CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, I caused true and correct paper copies of this brief to be delivered to counsel of record, addressed as follows:

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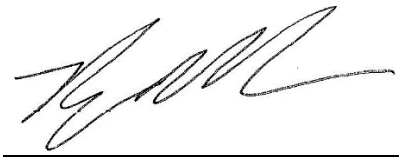

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