FILED
01-29-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA,

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

MOTION TO RECUSE JUSTICE PROTASIEWICZ BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE, PETITIONERS BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN, AND INTERVENORS-PETITIONERS CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD

Counsel Listed on Following Page

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Suite 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

** Admitted pro hac vice*

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
RICHARD M. ESENBERG, SBN 1005622
LUCAS T. VEBBER, SBN 1067543
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
414.727.9455
Lucas@will-law.org

TROUTMAN PEPPER HAMILTON SANDERS LLP
MISHA TSEYTLIN, SBN 1102199
KEVIN M. LEROY, SBN 1105053
227 W. Monroe, Suite 3900
Chicago, IL 60606
608.999.1240
misha.tseytlin@troutman.com

Intervenor-Respondent the Wisconsin Legislature; Petitioners Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn; and Intervenors-Petitioners Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald hereby move to recuse Justice Janet Protasiewicz. For the reasons stated in the accompanying memorandum of law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Wis. Stat. §§757.19(2)(f)-(g) require recusal.

1. Hunter Intervenors have asked this Court to reopen this case and redraw congressional district lines. They ask the Court to "resume the congressional remedial process" and draw districts less "favorable to the Republican Party," Memo. ISO Mot. Relief J. 21-22, 33, "in time for the 2024 congressional elections," Mot. Relief J. 3.

2. The existing congressional district boundaries were adopted by this Court as part of a mandatory injunction entered in 2022. *See Johnson v. Wis. Elections Comm'n* (*Johnson II*), 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402. The Governor proposed that remedy,

and Hunter Intervenors said it complied with state and federal law and asked the Court to adopt it. *See* Hunter Br. 13 (Dec. 30, 2021).

3. During her campaign for a seat on the Wisconsin Supreme Court, Justice Protasiewicz publicly declared Wisconsin's districts "rigged" in favor of Republicans.[1] She criticized the Court's "least change" approach as "totally unfair."[2] As to the congressional maps, she stated, "You look at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So, we know something's wrong."[3] Justice Protasiewicz "welcome[d] the opportunity to have a fresh look at our maps."[4] She said that she agreed with the dissenters in this case.[5] And she promised supporters and

[1] Zac Schultz, *Candidates tangle over political issues, judicial perspectives at first 2023 Wisconsin Supreme Court forum*, PBS Wis. (Jan. 10, 2023), https://perma.cc/HC4L-NFUS (App.10); WisPolitics State Supreme Court Election Forum Tr. 45:25-46:7 (Jan. 9, 2023) (App.24-25); *see* Corrinne Hess, *Wisconsin Supreme Court candidate Janet Protasiewicz assails state's election maps as 'rigged,'* Milwaukee J. Sentinel (Jan. 9, 2023), https://perma.cc/8T33-Z5M6 (App.33).

[2] Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:20-30:10, YouTube, https://bit.ly/3HAtZtv [hereinafter *Supreme Court Debate*].

[3] *Id.*

[4] Shawn Johnson, *In a supreme court race like no other, Wisconsin's political future is up for grabs*, NPR (Apr. 2, 2023), https://perma.cc/W2YA-WPA2 (App.46).

[5] Henry Redman, *Supreme Court candidates accuse each other of lying, extremism in sole debate*, Wis. Exam'r (Mar. 21, 2023), https://perma.cc/5KLA-S2FV (App.51).

donors that electoral districts could be redrawn to change "the outcome of the 2024 election."[6]

4. Moreover, the Democratic Party of Wisconsin contributed nearly $10 million to Janet Protasiewicz's campaign—more than all other donors to her campaign combined, and more than three times the size of the campaign contribution that triggered the due process violation in *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868 (2009).

5. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires recusal. A justice cannot decide a case she has prejudged or when her participation otherwise creates a serious risk of actual bias. Justice Protasiewicz's public campaign statements establish a constitutionally intolerable risk that she has prejudged the merits of this case. She has already said, "If you look at the dissent in that maps case"—*this case*—"that dissent is what I will tell you I agree with."[7] And she has already said that "something's wrong" with the existing 6-2 Republican congressional

[6] @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), https://perma.cc/YAL9-JR8R (App.53); Janet for Justice, Facebook (Apr. 3, 2023), https://perma.cc/HVD7-PXD5 (App.54).

[7] Redman, *supra* n.5, https://perma.cc/5KLA-S2FV (App.51).

delegation.[8] In addition, the risk of actual bias exists here because the Democratic Party of Wisconsin—the primary and intended beneficiary of Hunter Intervenors' motion to reopen this case to obtain redrawn congressional district lines more favorable to Democrats—was the main contributor to Justice Protasiewicz's campaign for a seat on this Court, providing almost $10 million of the $16.7 million spent by her campaign.

6. Wisconsin law also requires Justice Protasiewicz to recuse from these proceedings because "she cannot, or it appears . . . she cannot, act in an impartial manner" and because "she has a significant . . . personal interest in the outcome of the matter." Wis. Stat. §757.19(2)(f)-(g).

WHEREFORE, movants request that Justice Protasiewicz recuse from all aspects of these proceedings, including Hunter Intervenors' pending motion for relief from judgment.

[8] *Supreme Court Debate*, *supra* n.2, https://bit.ly/3HAtZtv.

Dated this 29th day of January, 2024.

Respectfully submitted,

Electronically Signed by
Kevin M. St. John
BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Ste. 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC
TAYLOR A.R. MEEHAN*
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC
ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Ste. 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

Counsel for Wisconsin Legislature

* *Admitted pro hac vice*

Electronically Signed by
Lucas T. Vebber
WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
RICHARD M. ESENBERG, SBN 1005622
LUCAS T. VEBBER, SBN 1067543
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
414.727.9455
Lucas@will-law.org

Counsel for Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn

Electronically Signed by
Misha Tseytlin
TROUTMAN PEPPER HAMILTON SANDERS LLP
MISHA TSEYTLIN, SBN 1102199
KEVIN M. LEROY, SBN 1105053
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
608.999.1240
misha.tseytlin@troutman.com

Counsel for Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald