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Supreme Court of Wisconsin

No. 2021AP1450-OA

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, DON MILLIS IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, ANN JACOBS IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN ELECTIONS COMMISSION, CARRIE RIEPL IN HER 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 DIANNE HESSELBEIN, SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

**INTERVENORS-PETITIONERS LISA HUNTER,
JACOB ZABEL, AND JOHN PERSA'S RESPONSE TO
MOTION TO RECUSE JUSTICE PROTASIEWICZ**

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TABLE OF CONTENTS

INTRODUCTION	5
BACKGROUND	6
ARGUMENT	10
I. There is no indication that Hunter Intervenors- Petitioners' motion for relief from judgment has been pre-judged.....	10
A. Movants misrepresent Justice Protasiewicz's campaign comments regarding Wisconsin's congressional map.	11
B. Justice Protasiewicz has not pre-judged whether Hunter Intervenors-Petitioners are entitled to relief from judgment	14
II. Movants' nearly identical recusal motion was denied in <i>Clarke</i> for reasons that apply with equal force here.	17
A. Due process does not require Justice Protasiewicz's recusal.	17
B. Wisconsin law does not require Justice Protasiewicz's recusal.	20
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009)	18
<i>Clarke v. Wisconsin Elections Commission</i> , 2023 WI 66, 995 N.W.2d 735	<i>passim</i>
<i>Clarke v. Wisconsin Elections Commission</i> , 2023 WI 79, 998 N.W.2d 370	14, 15
<i>Clarke v. Wisconsin Elections Commission</i> , No. 2023AP1399-OA (Wis. Sept. 5, 2023)	8
<i>Duwe v. Alexander</i> , 490 F. Supp. 2d 968 (W.D. Wis. 2007)	13
<i>Johnson v. Wisconsin Elections Commission</i> , 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559	9
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002)	15
Statutes	
Wis. Stat. § 757.19(2)(f)	20, 21
Wis. Stat. § 757.19(2)(g)	20
Wis. Stat. § 806.07(1)(g)	14
Wis. Stat. § 806.07(1)(h)	14

INTRODUCTION

The instant motion to recuse presents a virtual carbon copy of the failed motion that Justice Protasiewicz denied just four months ago. The previous motion, in litigation over Wisconsin's legislative maps, complained that federal and state law require Justice Protasiewicz's recusal from redistricting matters because her recent campaign was funded in part by the Democratic Party of Wisconsin, and because that campaign featured public discussion of issues that voters deemed important, including some related to redistricting. As Justice Protasiewicz explained at length in her October order, these arguments misread the law, which has never been applied to require recusal in a case like this one; they mischaracterize the facts, as the highlighted campaign statements explicitly refrained from committing to any legal outcome; and they misapply recusal principles in a way that would prove entirely unworkable if ever adopted. The motion does not identify *any* party to this case as a major funder of judicial elections, and *every* Justice has expressed views about redistricting principles—including through opinions in this very

case authored or joined by every Justice *except* Justice Protasiewicz.

All the reasons that Justice Protasiewicz identified in rejecting the previous motion to recuse still apply. And the instant motion is weaker still. The legal issues presented by Hunter Intervenors-Petitioners' pending motion to reopen judgment concern the application of this Court's December 2023 adjudication of redistricting criteria. Obviously, the implications of this Court's December decision could not possibly have been pre-judged in a campaign that ended the previous April. The motion to recuse should be denied.

BACKGROUND

On April 4, 2023, now-Justice Protasiewicz won the election for an open Wisconsin Supreme Court seat by 11 percentage points and over 200,000 votes.¹ The election turned out nearly two million voters and set new records for total campaign spending by

¹ Wis. Elections Comm'n, WEC Canvass Reporting System County by County Report, 2023 Spring Election (Apr. 17, 2023), https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_SCOWIS.pdf.

candidates and interest groups.² Justice Protasiewicz and her opponent, former Justice Daniel Kelly, each received contributions from the Democratic Party of Wisconsin and the Republican Party of Wisconsin, respectively.³

Throughout the campaign, the candidates participated in events where they were asked about issues of public concern. *See, e.g.*, App. 38 (candidate Q&A question: “How would you handle the ongoing legal conflict around the state’s 1849 abortion ban?”); App. 24 (candidate forum question: “Was the Court correct to require a least change approach [to redistricting]?”); App. 21 (candidate forum question: “What’s the worst ruling you’ve seen in the last few decades in Wisconsin or U.S. Supreme Courts?”); App. 22

² *Wisconsin Supreme Court Race Cost Record \$51M*, Wisconsin Democracy Campaign, (July 18, 2023), <https://www.wisdc.org/news/press-releases/139-press-release-2023/7390-wisconsin-supreme-court-race-cost-record-51m>.

³ Molly Beck & Corrinne Hess, *5 takeaways from the only Supreme Court election debate. Daniel Kelly and Janet Protasiewicz take the gloves off*, Milwaukee Journal Sentinel (Mar. 22, 2023), <https://www.jsonline.com/story/news/politics/elections/2023/03/21/5-takeaways-from-the-only-wisconsin-supreme-court-election-debate/70029701007/>.

(candidate forum question: “What ruling has most shaped your judicial philosophy?”).⁴ Justice Protasiewicz answered these questions carefully by providing voters insights into her judicial philosophy while, as the Wisconsin Judicial Commission confirmed, always adhering to Supreme Court rules and the Code of Judicial Conduct. *See* Attach. to Unpublished Order, *Clarke v. Wis. Elections Comm’n*, No. 2023AP1399-OA, (Wis. Sept. 5, 2023). She also assured voters, on many occasions, that her personal views would not control her legal opinions. *See, e.g.*, App. 50 (“I have been very clear about my values to the electorate . . . I’ve also been very clear that any decision that I render will be made based solely on the law and the Constitution.”); App. 71 (“I’ll always be an impartial justice who upholds [Wisconsin’s] Constitution.”); App. 38 (“[A]ll of my decisions are going to be rooted in the law.”).

On August 2, 2023, a group of Wisconsin voters filed a petition for original action in this Court, challenging the state legislative redistricting maps, which were drawn by the

⁴“App.” refers to Movants’ Appendix.

Legislature and adopted by this Court in *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”). See Petition, *Clarke v. Wis. Elections Comm’n*, No. 2023AP1399-OA (August 2, 2023). The Wisconsin Legislature filed a motion to intervene and a motion to recuse Justice Protasiewicz. See Motion to Recuse Justice Protasiewicz, *Clarke v. Wis. Elections Comm’n*, No. 2023AP1399-OA (August 22, 2023) (“*Clarke Recusal Motion*”). The *Clarke Recusal Motion* asserted that Justice Protasiewicz’s recusal was required under the Due Process Clause of the Fourteenth Amendment and Wisconsin law because (1) the Democratic Party of Wisconsin (“DPW”) donated to Justice Protasiewicz’s campaign for Wisconsin Supreme Court, and (2) Justice Protasiewicz made certain statements about redistricting during her campaign. See *id.*

Justice Protasiewicz denied the *Clarke Recusal Motion*. See *Clarke v. Wis. Elections Comm’n*, 2023 WI 66, 995 N.W.2d 735 (Protasiewicz, J.). In a thoughtful and comprehensive opinion issued just four months ago, she rejected the Legislature’s

arguments that her campaign statements demonstrated that she had “pre-judged” the case, *id.* ¶¶ 52–74, that the DPW’s contributions biased her toward petitioners, *id.* ¶¶ 25–51, that she could not act impartially, *id.* ¶¶ 80–86, and that she had a personal interest in the outcome of the case, *id.* ¶¶ 87–93.

Undeterred, the Legislature—now joined by the Johnson Petitioners and several of Wisconsin’s Republican members of Congress (together, “Movants”)—have filed a nearly identical recusal motion in this case. Movants reprise the same claims based on the same facts and the same settled law.

ARGUMENT

I. There is no indication that Hunter Intervenors-Petitioners’ motion for relief from judgment has been pre-judged.

Justice Protasiewicz’s comments on the campaign trail do not establish that she pre-judged Hunter Intervenors-Petitioners’ motion in this case. Movants’ arguments to the contrary suffer from two factual flaws. First, Movants misrepresent the extent to which Justice Protasiewicz remarked on the congressional map—the only map at issue here. Second, Movants erroneously focus on

statements that do not bear on the issues presented at this stage of the litigation.

A. Movants misrepresent Justice Protasiewicz’s campaign comments regarding Wisconsin’s congressional map.

Movants invoke the exact same remarks they cited in their last recusal motion, and once again repeatedly mischaracterize Justice Protasiewicz’s campaign statements. Over and over, Movants cite a handful cherry-picked quotes to suggest that Justice Protasiewicz called Wisconsin’s congressional maps “gerrymandered,” “rigged,” “unfair,” and “wrong” throughout her campaign. *See, e.g.*, Mem. at 7, 12, 13, 25, 27, 30, 32, 34, 44.⁵ Although Movants refer to them relentlessly, these comments were both limited in number and overwhelmingly about the state legislative maps, which are not at issue here. *See, e.g.*, App. 25 (“I think those maps . . . do not reflect accurately representation in [either the state assembly or the state senate]”); App. 38

⁵ “Mem.” refers to Movants’ Memorandum of Law in Support of Motion to Recuse Justice Protasiewicz.

(responding to a question about “the state’s election maps” and pointing to numbers “in the Wisconsin State Senate (and) the Wisconsin State Assembly.”); App. 73 (article reporting on Justice Protasiewicz’s views about “the state’s legislative boundaries”); App. 71 (similar); App. 46 (similar)).⁶

Movants identify only one occasion on which Justice Protasiewicz publicly discussed her views on Wisconsin’s congressional map. But that statement—made during a candidate debate—was an uncontested observation that Wisconsin is a state with “very close statewide elections,” yet “six [congressional seats] are red, [and] two are blue.”⁷ Justice Protasiewicz’s further assessment that “something’s wrong” with these figures merely expresses her recognition that there is a gap between the parties’ vote share and their seat share—a far cry from a pledge to decide

⁶ Movants also cite four tweets from Justice Protasiewicz’s campaign, only two of which refer to Wisconsin’s districts, and none of which refers to the congressional map with any specificity. *See* Mem. at 14–15.

⁷ Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, YouTube, at 29:20–30:10, (Mar. 21, 2023) <https://bit.ly/3HAtZtv> (“Candidate Debate”).

this (or any) case a certain way. *See Duwe v. Alexander*, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007) (“There is a very real distinction between a judge committing to an outcome before the case begins, . . . and a judge disclosing an opinion and predisposition before the case.”); *Clarke*, 2023 WI 66, ¶¶ 64–65.

Indeed, on the same occasion, Justice Protasiewicz said:

But the question is am I able to fairly make a decision on a case. Of course I am. That’s what I spent my entire career doing. I follow laws I don’t always necessarily like or agree with. You follow the law. That’s what you do. I can assure you that every single case that I will ever handle will be rooted in the law. One hundred percent.⁸

Just as in *Clarke*, this assurance (and many others like it) “express[es] [Justice Protasiewicz’s] fundamental commitments as a judge” to “set aside [her] opinions and decide cases based on the law.” 2023 WI 66, ¶ 61. Movants are once again wrong to suggest Justice Protasiewicz shirked these commitments.

⁸ Candidate Debate at 26:47–27:10.

B. Justice Protasiewicz has not pre-judged whether Hunter Intervenors-Petitioners are entitled to relief from judgment.

Although Movants make a hullabaloo over Justice Protasiewicz's campaign comments about prior proceedings in this case, those remarks plainly do not pre-judge Hunter Intervenors-Petitioners' motion for relief from judgment under Wis. Stat. § 806.07(1)(g) and (h). That motion is based on events that occurred *after* Justice Protasiewicz was elected.

Hunter Intervenors-Petitioners' motion for relief from judgment invokes this Court's December 2023 adjudication of redistricting criteria, which overruled the "least change" approach and reaffirmed the Court's commitment to "take care to avoid selecting remedial maps designed to advantage one political party over another." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶¶ 63, 71, 998 N.W.2d 370. The Court must therefore decide whether it would be equitable to continue enforcing a congressional map created under the now-abolished "least change" approach to redistricting, in willful ignorance of partisan impact, and in direct contravention of *Clarke's* command. The motion thus calls for a

prospective inquiry, and one Justice Protasiewicz could not have pre-judged during her campaign, which ended well before this Court issued its decision in *Clarke*.⁹

And although no justice—least of all Justice Protasiewicz—has yet expressed any view about the application of Section 806.07 to this case, *every* justice has explained their views about the propriety of a least-change approach to redistricting. *See Clarke*, 2023 WI 79, ¶¶ 60–63 (overruling use of least-change approach and cataloging views of other justices); *see also Clarke*, 2023 WI 66, ¶ 22 (“If issuing an opinion does not disqualify a judge from hearing future cases that involve similar issues, then neither does expressing agreement with an opinion or describing [one’s] values about political issues.”); *Republican Party of Minn. v. White*, 536 U.S. 765, 780–81 (2002) (“We doubt . . . that a mere statement of position enunciated during the pendency of an election will be

⁹ The same goes for Justice Protasiewicz’s comment that she agreed with “the dissent in [the] maps case.” App. 51. This vague remark does not prove that she pre-judged how she would rule on Hunter Intervenors-Petitioners’ pending motion, which raises fresh issues that could not have been addressed in a dissent before *Clarke* was decided.

regarded by a judge as more binding . . . than a carefully considered holding that the judge set forth in an earlier opinion.”).

Movants likewise contort two isolated comments to suggest that Justice Protasiewicz “invited” Hunter Intervenors-Petitioners’ motion and “promised a fresh outcome” in this case. See Mem. at 25, 27. These comments are no more relevant this time around than they were four months ago. See *Clarke*, 2023 WI 66 ¶ 77–78. One statement—that “[p]recedent changes when things need to change to be fair”—was referring to *Plessy v. Ferguson*, not this case. See App. 119. The other was a general statement that Justice Protasiewicz might “enjoy taking a fresh look” at Wisconsin’s districts, see App. 72, while qualifying that “how and if it would come to the court is a completely different question.”¹⁰ If these statements, in proper context, reveal

¹⁰ Wedge Issues, *Janet Protasiewicz, ‘common sense’ and the Wisconsin Supreme Court*, Cap Times, at 7:28–7:42 (Mar. 2, 2023), <https://omny.fm/shows/wedge-issues/ Janet-protasiewicz-common-sense-and-the-wisconsin-s>.

anything, it is that Movants are indefatigable when it comes to misrepresenting facts.

II. Movants' nearly identical recusal motion was denied in *Clarke* for reasons that apply with equal force here.

Movants repeat the same legal arguments that were rejected just last year in their *Clarke* Recusal Motion. Because they fail to offer any new reason for Justice Protasiewicz's recusal, Movants' attempt at a second bite at the apple must be denied.

A. Due process does not require Justice Protasiewicz's recusal.

For the same reasons Movants were wrong in *Clarke*, the Due Process Clause does not require Justice Protasiewicz's recusal here. As discussed above in Section I, Justice Protasiewicz's campaign statements do not demonstrate that she predetermined resolution of the issues presented in Hunter Intervenors-Petitioners' motion. *See Clarke*, 2023 WI 66, ¶¶ 60–69. And due process “does not prohibit a judge from sitting on a case after expressing an opinion on an issue.” *Id.* ¶ 62. Moreover, the Wisconsin Judicial Commission “rejected claims that [Justice Protasiewicz's] campaign statements undermined the integrity

and independence of the judiciary; demonstrated bias or prejudice; or committed [her] to a decision on a case, controversy, or issue that was likely to come before [her],” thereby “dispos[ing] of [Movants’] claims that [Justice Protasiewicz’s] campaign statements violate due process.” *Id.* ¶ 76. Nor can Movants rely on *Caperton* any more effectively than they did in their last recusal motion. It is still the case that no court has ever applied *Caperton* to “require[] a judge to recuse based on her campaign statements.” *Id.* ¶ 70 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)).

Likewise, Movants’ recycled due-process argument with respect to the DPW’s contributions to Justice Protasiewicz’s campaign is squarely foreclosed by *Clarke*. See 2023 WI 66, ¶¶ 25–51 (applying *Caperton* and holding that the DPW’s contributions did not require recusal because the DPW was not involved in the litigation and its contributions did not exert undue influence in getting Justice Protasiewicz elected). Movants present no facts or arguments that would require a different analysis here.

Movants’ only attempt to maneuver around this precedent is to assert that, despite the DPW’s status as a non-party, Hunter Intervenors-Petitioners are essentially its proxies. *See* Mem. at 40–41 (asserting that Hunter Intervenors-Petitioners “seek new districts more favorable to Democrats”). But the fact that the Hunter Intervenors-Petitioners seek a new map that eliminates the partisan skew in favor of Republicans does not make them “stand-ins for the DPW.” *Id.* Like the petitioners in *Clarke*, Hunter Intervenors-Petitioners are “citizens who allege violations of their own individual rights.” 2023 WI 66, ¶ 38. And for Justice Protasiewicz to “recuse [herself] based on campaign contributions from the DPW—a non-party to this case—would be unprecedented.” *Id.* ¶ 39.¹¹

¹¹ Most outlandish of all is Movants’ assertion that recusal is warranted because Hunter Intervenors-Petitioners are represented by counsel who have represented other clients outside of Wisconsin who may take interest in this litigation, without even alleging any ties between those other clients and Justice Protasiewicz. *See* Mem. at 21–22.

B. Wisconsin law does not require Justice Protasiewicz's recusal.

Movants' only remaining argument—that Justice Protasiewicz's recusal is required under Wis. Stat. § 757.19(2)(f) and (g)—is just as meritless as it was in *Clarke*. Whether a judge must recuse under Section 757.19(2)(g) is—still—a “purely subjective” determination. *Clarke*, 2023 WI 66, ¶ 81. And just four months ago, Justice Protasiewicz “considered all of the facts and legal authorities presented for and against recusal” in a redistricting case, and determined that she could, “in fact and appearance, act in an impartial manner.” *Id.* ¶ 86 (explaining that she has “decided many difficult cases,” “approached them with an open mind and decided them based on the facts and the law,” and swore to “faithfully and impartially discharge the duties of the office” (internal quotation marks omitted)). Movants offer no reason for Justice Protasiewicz to reconsider this determination.

Finally, Movants try again to suggest Justice Protasiewicz should recuse under Section 757.19(2)(f) by alleging that her campaign statements gave her a “personal interest in the outcome

of the matter.” *See* Mem. at 46. But just like last time, Movants “offer[] no facts establishing or creating a reasonable inference” that her campaign statements had such an effect; nor do they “cite any case to support that argument.” *See Clarke*, 2023 WI 66 ¶ 92. Consequently, Movants fail to provide any basis to conclude that Justice Protasiewicz has a significant personal interest in the outcome of this case. *See* Wis. Stat. § 757.19(2)(f).

CONCLUSION

For the foregoing reasons, the motion to recuse should be denied.

Dated: February 5, 2024

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CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 2024, I caused a copy of this motion to be served upon counsel for each of the parties via email.

Dated: February 5, 2024

By: Electronically signed by
Diane M. Welsh