IN THE 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, 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.

Original Action in the Wisconsin Supreme Court

RESPONSE OF INTERVENORS-PETITIONERS BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, AND REBECCA ALWIN TO MOTION TO RECUSE

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INTRODUCTION

As it has since the state's founding, Wisconsin elects its judges. Wis. Const. art. VII, §§ 4, 7 (1848); Wis. Const. art. VII, §§ 4(1), 5(2), 7. Having been duly elected by the people, a judge or justice has a duty to hear a case brought before them, absent some requirement in the law that they recuse. SCR 60.04(1)(a); *Moore v. United States*, No. 22-800, Order at *1 (U.S. Sept. 8, 2023) (Alito, J.) ("Recusal is a personal decision for each Justice, and when there is no sound reason for a Justice to recuse, the Justice has a duty to sit."); Wis. Stat. § 757.02(1).

The motion to recuse filed by the Wisconsin Legislature, Johnson Petitioners, and Intervenors-Petitioners Congressman Glenn Grothman *et al.* (collectively, the "Legislature") seeks to invert this basic proposition, and seeks recusal without support in federal or state law. While Intervenors-Petitioners Black Leaders Organizing for Communities, Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin (collectively, "BLOC") took no position on the selection of remedial congressional maps in this litigation and, therefore, take no position on the pending motion to reopen, they are parties to this action and oppose the Legislature's attempt to weaponize recusal to select a court of its choice.

ARGUMENT

Neither the federal Due Process Clause nor Wisconsin law requires a duly elected Wisconsin Supreme Court Justice to recuse herself under these circumstances, and the Legislature's contentions to the contrary are meritless.

I. The Due Process Clause does not require a duly elected Wisconsin Supreme Court Justice to recuse herself.

The Legislature's conception of due process represents the type of unwarranted expansion of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), that Justices on this Court and the federal courts have routinely rejected. Even the majority in *Caperton* emphasized that the Due Process Clause was implicated only in "extraordinary situation[s]" involving "extraordinary contributions" made by a litigant "at a time when [they] had a vested stake in the outcome" of a pending case. *Caperton*, 556 U.S. at 886-87. Nothing close to what occurred in that case has happened here.

A. Justice Protasiewicz's campaign comments do not create a federal due process issue.

As a function of Wisconsin's system of electing judges and justices, candidates for those offices must run and, therefore, make public statements surrounding the issues in the campaign. The Legislature does not, nor can it, point to a single case in which a candidate's

campaign statements later required recusal. *See* Derek Clinger & Robert Yablon, *Explainer: Judicial Recusal in Wisconsin and Beyond*, State Democracy Research Initiative, *10 (Sept. 5, 2023) https://uwmadison.app.box.com/s/k2bx0l2b9vwsgiqfl4sfoiwt8m3j43qc ("No [U.S.] Supreme Court case has ever held that due process required a judge to recuse because of the judge's expression of views, whether on the campaign trail or elsewhere."). To the contrary, the U.S. Supreme Court has long rejected attempts to disqualify judges based on prior comments or opinions. *See FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948) ("[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."); *see also Withrow v. Larkin*, 421 U.S. 35, 48-50 (1975). Instead, the Court has made clear that judicial candidates retain a First Amendment right to speak on issues relevant to the campaign. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 443, 476-77 (2015). Most directly, in *Republican Party of Minnesota v. White*, the U.S. Supreme Court expressly rejected the notion that a judge or justice's campaign remarks could result in a due process issue. 536 U.S. 765, 775-77 (2002). After reviewing various due process cases, the Court stated:

> To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

Id. at 776-77 (emphasis in original).

A review of the relevant statements confirms that there is no due process issue. While the Legislature relies on a handful of cherry-picked quotations, Justice Protasiewicz made it abundantly clear that her campaign statements were just that—the type of campaign statements about values and judicial philosophy that voters expect—and that should not (and cannot) be confused with promises about specific outcomes. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 66, ¶¶17-18, 52-53, __ Wis. 2d __, 995 N.W.2d 735 (Protasiewicz, J.).

Nor can Justice Protasiewicz's comments indicating agreement with a dissenting opinion in this case possibly create a due process problem. At issue is a motion to reopen. *Every* member of the Court *except* Justice Protasiewicz authored or joined an opinion in the underlying judgment. *See Johnson v. Wis. Elections Comm'n*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"). The same is true of the initial decision imposing "least change" without any defining criteria. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). But without explanation, the Legislature does not suggest

that the entire Court, or even just the justices who dissented from *Johnson II* and variously described the current congressional maps as "unconstitutional" or "unlawful," must recuse, although such comments also evince an opinion about the issues in this case. *See Johnson II*, 2022 WI 14, ¶78 (Ziegler, C.J., dissenting): *see also id.*, ¶218 (Grassl Bradley, J., dissenting). If the Legislature's strained reading of *Caperton* were correct, however, it is hard to see why general comments agreeing with a dissenting opinion (or any other judicial opinion) would be disqualifying, but the opinion itself would not be. As with the rest of the Legislature's arguments, this admits of few limiting principles.

B. The Democratic Party of Wisconsin's contribution to Justice Protasiewicz's campaign does not create a due process issue.

The donations to Justice Protasiewicz's campaign do not come close to the high standard set by *Caperton* for a due process violation. "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Caperton*, 556 U.S. at 884. Federal due process jurisprudence recognizes "a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47; *see also State v. Herrmann*, 2015 WI 84, ¶117, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) ("We presume that judges are impartial and someone who

challenges a judge's impartiality bears a heavy burden to rebut that presumption." (internal quotation omitted)); *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005) ("The general presumption is that judges are honest, upright individuals and thus that they rise above biasing influences."). Only when "a person with a *personal stake in a particular case* had a *significant and disproportionate influence* in placing the judge on the case by raising funds" is there a due process issue. *Caperton*, 556 U.S. at 884 (emphases added). The contributions at issue in this case, which are the same as those at issue in *Clarke*, raise no such concern.

First, the Democratic Party of Wisconsin ("DPW") is not a "litigant," "attorney," or "person with a personal stake," in the outcome of this case or the motion to reopen. DPW is not a party to this case. And while BLOC is affiliated with neither the Hunter Petitioners nor DPW, it is evident from the face of the Legislature's papers that it cannot show that any party or attorney[1] participating in the action made any donation that would prompt a *Caperton* analysis. The Legislature's attempt to

[1] The Legislature attempts to connect DPW to the Hunter Petitioners through their attorneys. Memorandum of Law in Support of Motion to Recuse Justice Protasiewicz ("Mem.") 21-22, 41. But the Legislature provides no authority in either state or federal law for the idea that a judge or justice must recuse because a party's lawyer may have a specific, public, political bent, absent a showing that the lawyer themselves made the specific types of contributions at issue in *Caperton*.

read *Caperton* to extend so far as to cover contributions by a political party (or its counterpart) would result in endless recusals in Wisconsin,[2] where spending by political parties in judicial races is the rule, not the exception. *See Clarke*, 2023 WI 66, ¶39. Not only do political parties frequently contribute to judicial campaigns, but they take stances on a wide range of issues, any number of which may come before a court. *See California Dem. Party v. Jones*, 530 U.S. 567, 574-75 (2000). Under the rule the Legislature suggests, recusal would be required by any judge or justice who received a donation from a party in any case in which that party had an arguable interest, which likely would implicate dozens of cases in Wisconsin courts every year.[3]

Second, the nature of DPW's contributions is fundamentally different from those at issue in *Caperton*. The contributions at issue in that case swamped all other spending in the race, and "exceeded by 300% the amount spent by Benjamin's campaign committee." *Caperton*, 556

[2] Unlike Wisconsin and Minnesota, a number of states elect judges or justices in *partisan* elections. Presumably *every* judge and justice elected in a partisan election would be subject to all sorts of recusal motions. *See Caperton*, 556 U.S. 868 at 902-03 (Scalia, J., dissenting) (lamenting that "the principal consequence of [the majority] decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges").

[3] To the extent that the Legislature argues that this case, or cases about legislative or congressional districts, are *sui generis*, they have no answer for why their proposed recusal rule does not apply to the other justices on this Court who received large contributions or significant support from political parties, or how that rule might apply in states with partisan judicial elections.

U.S. at 884. This outsized contribution was critical in finding that the spending "had a significant and disproportionate influence in placing" the judge on the case." *Id.*; *see also Herrmann*, 2015 WI 84, ¶124 (Ziegler, J., concurring) ("Even the large expenditure in *Caperton* was but one of many factors that, collectively, were fundamental to the Court's decision. In *Caperton* the Court did not conclude that, standing alone, a lawful contribution, large expenditure, or other significant support in a campaign would require a judge to recuse."). DPW's contributions in the 2023 Supreme Court race, on the other hand, represented only a portion of Justice Protasiewicz's campaign spending, consistent with spending by both parties in other Supreme Court races. *Clarke*, 2023 WI 66, ¶43. Moreover, DPW's expenditures were even smaller when compared to total spending in what the Legislature agrees was the "most expensive state supreme court race in U.S. history." Mem. 17. Not only did DPW's contributions not swamp the other spending in the race—they were only a small part of an expensive election.

Third and finally, despite the Legislature's gymnastic attempts, there is no temporal connection when a non-party makes a campaign contribution in an election that takes place a *year after a case is decided* and a motion to reopen filed *nine months after that election takes place*. The Court filed its *Johnson II* opinion on March 3, 2022. *Johnson II*, 2022

WI 14. This Court disposed of the remaining motions over the congressional map on April 15, 2022. Order, *Johnson v. Wis, Elections Comm'n*, No. 2021AP1450-OA (Wis. Apr. 15, 2022). Justice Protasiewicz did not announce that she was running until May 25, 2022[4] and the election took place on April 4, 2023, with Justice Protasiewicz winning by a considerable margin.[5] In other words, throughout the entire campaign and for nine months *after* the election, nothing occurred (or seemed likely to occur) in this case. Again, this stands in stark contrast to the "extraordinary" facts in *Caperton*, where the election took place during active litigation, after the jury had returned its verdict but before the appeal. 556 U.S. at 873.

None of the factors giving rise to the *Caperton* decision are present here, and the Legislature's attempts to expand the narrow rule from that case would be disastrous. The Motion should be denied.

II. There is no basis for recusal under Wisconsin state law.

The Legislature's motion also includes a grab-bag of meritless state law arguments. Mem. 42-47. Were this a proper motion, these

[4] *Milwaukee County judge announces candidacy for Supreme Court*, Associated Press (May 25, 2022), https://apnews.com/article/biden-wisconsin-supreme-court-government-and-politics-473cf2b52f12e2b1b9932751288798d7.

[5] Wisconsin Elections Commission, WEC Canvass Reporting System County by County Report 2023 Spring Election Justice of the Supreme Court (Apr. 17, 2023), https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_SCOWIS.pdf

arguments would have come first: "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Caperton*, 556 U.S. at 890. The Legislature's decision to address state law last is consistent with its transparent attempt to inject a federal question into this case. There is, however, nothing in state law that would require recusal in this case.

The Legislature's first argument is based on Wis. Stat. § 757.19(2)(g), which requires disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." The test is subjective, and it is left entirely to the individual judge or justice. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989). There is a presumption that a Justice will "try each case on its merits," and the fact that the judge may have prior knowledge relevant to the case is not disqualifying. *Voigt v. State*, 61 Wis. 2d 17, 22, 211 N.W.2d 445 (1973) (quoting *Milburn v. State*, 50 Wis. 2d 53, 62, 183 N.W.2d 70 (1971)). The Legislature has presented no reason to believe Justice Protasiewicz has made such a determination. To the contrary, in *Clarke*, on a related issue, Justice Protasiewicz specifically found no basis for her recusal under § 757.19(2)(g). 2023 WI 66, ¶86.

The Legislature also relies on Supreme Court Rule 60.04(4)(f), the text of which purportedly requires recusal when:

> (f) The judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following:
>
> 1. An issue in the proceeding.
> 2. The controversy in the proceeding.

SCR 60.04(4)(f), Mem. 43, 45. As a factual matter, this rule is not implicated here. The Legislature cannot point to any statements about re-opening, and Justice Protasiewicz made very clear throughout the campaign that her decisions would be guided by the law.

Even more troubling, however, is that the Legislature fails to acknowledge that a federal district court found SCR 60.04(4)(f) to be facially unconstitutional and enjoined its enforcement over 16 years ago. *Duwe v. Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007). The Legislature should certainly be aware of this—the Wisconsin Judicial Commission cited *Duwe* in dismissing a complaint against Justice Protasiewicz based on the precise comments the Legislature seeks to relitigate, Justice Protasiewicz discussed *Duwe* in a previous order on recusal, and SCR 60.04(4)(f)'s unenforceability was specifically addressed in briefing in *Clarke*.[6] *See* Order, *Clarke v. Wis. Elections*

[6] The Legislature itself, as well as Petitioners Johnson, O'Keefe, Perkins, and Zahn are all parties in *Clarke*.

Comm'n, No. 2023AP1399-OA, *8 (Sep. 5, 2023) (Protasiewicz, J.); *Clarke* 2023 WI 66, ¶65; Pet. Supp. Br., *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA, *4 n.2 (Sep. 18, 2023).

The Legislature's final argument is that Justice Protasiewicz has a "significant financial or personal interest in the outcome of the matter," and is therefore required to recuse under Wis. Stat. § 757.19(2)(f). Mem. 46-47. Again, the Legislature grossly overstates the issue. Justice Protasiewicz made neither assurances nor promises as to how she would rule on the merits of any case, let alone an unforeseen procedural motion to reopen. *Clarke*, 2023 WI 66, ¶90. And a judicial candidate's statements about issues in a campaign, even specific issues that might come before them, are plainly protected. *Republican Party v. White*, 536 U.S. at 780; *Duwe*, 490 F. Supp. 2d at 977.

CONCLUSION

Nothing in state or federal law requires Justice Protasiewicz to recuse. The Legislature's motion should be denied.

Dated: February 9, 2024.

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