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SUPREME COURT



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Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

August 15, 2023

To:

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Electronic Notice

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Electronic Notice

Douglas M. Poland
Electronic Notice

Elizabeth M. Pierson
Electronic Notice

Jeffrey A. Mandell
Electronic Notice

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You are hereby notified that the Court has entered the following order:

No. 2023AP1399-OA Clarke v. Wisconsin Elections Commission

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, an appendix to the petition, a supporting legal memorandum, and a motion for a scheduling order having been filed on behalf of petitioners, Rebecca Clarke, et al.;

IT IS ORDERED that respondents, Wisconsin Elections Commission, et al., shall file one or more responses to the petition by 4:00 p.m. on August 22, 2023; and

IT IS FURTHER ORDERED that any non-party that wishes to file a non-party brief amicus curiae in support of or in opposition to the petition must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on August 22, 2023. Any submission by a non-party that does not comply with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court; and

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IT IS FURTHER ORDERED that all Wisconsin attorneys participating in this case must each opt in to this case in the appellate court electronic filing system. All Wisconsin attorneys who are not already opted in for this case are hereby ordered to do so as soon as possible and no later than August 21, 2023.

BRIAN HAGEDORN, J. (*concurring*). Our standard approach when receiving a petition for original action is to allow the parties an opportunity to be heard. Doing so here should give us a fuller picture of the issues in this case and from there we can determine how best to proceed.

REBECCA GRASSL BRADLEY, J. (*dissenting*). The outcome of this original action has been predetermined. Nevertheless, the majority forces the parties to expend considerable resources—including taxpayer money—to respond to a petition everyone knows will be granted by Ann Walsh Bradley, Rebecca Dallet, Jill Karofsky, and Janet Protasiewicz. Despite receiving nearly \$10 million from the Democrat Party of Wisconsin¹ and declaring the maps "rigged,"² Protasiewicz has not recused herself from the case. These four justices will adopt new maps to shift power away from Republicans and bestow an electoral advantage for Democrat candidates, fulfilling one of Protasiewicz's many promises to the principal funder of her campaign.

In Caperton v. Massey, the United States Supreme Court decided due process required a state supreme court justice's recusal from a case because "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" based solely on the justice's receipt of \$3 million dollars in campaign contributions from the chairman and principal officer of a party to the action. 556 U.S. 868, 876, 884 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). Consistent with universal judicial ethics, the justice in Caperton had not made any statements during his campaign suggesting he had prejudged the case. This court adopted the Caperton test, holding that a circuit court judge's repeated social media interactions with a litigant in a contested paternity case pending before the judge constituted a due process violation. Miller v. Carroll, 2020 WI 56, 392 Wis. 2d 49, 944 N.W.2d 542. "To assess whether the probability of actual bias rises to the level of a due process violation, we apply, verbatim, the standard from Caperton." Id., ¶24.

The court should deny this petition without ordering a response because it relitigates claims this court only recently decided in Johnson v. Wis. Elections Comm'n, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 (Johnson I), Johnson v. Wis. Elections Comm'n, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (Johnson II), Johnson v. Wis. Elections Comm'n, 2022 WI 19, 401

¹ WisPolitics Tracks \$56 Million in Spending on Wisconsin Supreme Court Race, WisPolitics (July 19, 2023), <https://www.wispolitics.com/2023/wispolitics-tracks-56-million-in-spending-on-wisconsin-supreme-court-race/>.

² Corrinne Hess, Wisconsin Supreme Court Candidate Janet Protasiewicz Assails State's Election Maps as 'Rigged', Milwaukee J. Sentinel, Jan. 9, 2023.

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Wis. 2d 198, 972 N.W.2d 559 (Johnson III), and asserts claims that could have been brought in 2021. Only a change in court membership makes a do-over possible, as the litigants recognized by announcing their plan to file an original action just two days after Protasiewicz's election³ and filing this petition one day after her ceremonial investiture. Entertaining these claims makes a mockery of our justice system, degrades this court as an institution, and showcases that justice is now for sale in Wisconsin. "Rigged" is indeed an apt description—for this case.

Samuel A. Christensen
Clerk of Supreme Court

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³ Jack Kelly, Liberal Law Firm to Argue Gerrymandering Violates Wisconsin Constitution, Cap Times, (Apr. 6, 2023), https://captimes.com/news/government/liberal-law-firm-to-argue-gerrymandering-violates-wisconsin-constitution/article_2dfb9757-6d2d-58ba-9461-10b3d20d5f00.html.