FILED
08-22-2023
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP001399-OA

IN THE SUPREME COURT OF WISCONSIN

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION; MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents.

MOTION TO RECUSE JUSTICE PROTASIEWICZ BY PROPOSED INTERVENOR-RESPONDENT THE WISCONSIN LEGISLATURE AND RESPONDENTS SENATORS CABRAL-GUEVARA, HUTTON, JACQUE, JAGLER, JAMES, KAPENGA, LEMAHIEU, MARKLEIN, NASS, QUINN, TOMCZYK, AND WANGGAARD

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** pro hac vice motions forthcoming*

Proposed Intervenor-Respondent the Wisconsin Legislature, through its counsel, and Respondents Senator Rachael Cabral-Guevara, Senator Rob Hutton, Senator Andre Jacque, Senator John Jagler, Senator Jesse L. James, Senator Chris Kapenga, Senator Devin LeMahieu, Senator Howard L. Marklein, Senator Stephen L. Nass, Senator Romaine Robert Quinn, Senator Cory Tomczyk, and Senator Van H. Wanggaard (the Respondent Senators), through their counsel, hereby move to recuse Justice Janet Protasiewicz pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Wis. Stat. §§757.19(2)(f), (g). For the reasons stated in the accompanying memorandum filed in support of this motion, the Legislature and the Respondent Senators respectfully move to recuse Justice Protasiewicz from these proceedings.

1. This action challenges the constitutionality of Wisconsin's existing state legislative district boundaries and asks the Court to declare the existing boundaries unconstitutional, draw new boundaries, and order special elections. Pet. at 43-44.

2. The existing state legislative district boundaries were adopted by this Court in 2022, after being proposed by the Legislature. *See*

Johnson v. Wis. Elections Comm'n, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559.

3. The Democratic Party of Wisconsin contributed nearly $10 million to Justice Janet Protasiewicz's campaign for a seat on this Court—more than all other donors to her campaign combined, and more than three times the size of the campaign contribution that triggered due process problems in *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868 (2009).

4. During that campaign, Justice Protasiewicz publicly declared the current legislative maps "unfair" and "rigged" in favor of Republicans. She publicly stated that she would like to take "a fresh look at the gerrymandering question." And she publicly stated that she agreed with the dissenting opinion in *Johnson. v. Wisconsin Elections Commission*, 2021 WI 87, ¶52, 399 Wis. 2d 623, 967 N.W.2d 469.

5. One day after Justice Protasiewicz joined the Court, Petitioners filed a petition asking this Court to exercise original jurisdiction over partisan gerrymandering claims and draw its own maps designed "to achieve a Democratic majority in the state legislature," Pet. ¶ 5, thereby overruling this Court's decision that "[t]he Wisconsin Constitution contains

no plausible grant of authority to the judiciary to determine whether maps are fair to the major parties," *Johnson v. Wisconsin Elections Commission*, 2021 WI 87, ¶52, 399 Wis. 2d 623, 967 N.W.2d 469.

6. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires Justice Protasiewicz to recuse. The Due Process Clause does not allow a judge to sit on a case when her participation creates a serious risk of actual bias or prejudgment of the merits, either of which is sufficient to violate the Constitution. The risk of actual bias exists here because the Democratic Party of Wisconsin, the primary and intended beneficiary of Petitioners' claims, 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. Moreover, Justice Protasiewicz's public campaign statements reveal that she has prejudged the merits of this case. She has publicly stated, for instance, that the legislative maps Petitioners challenge are "rigged" and that the *Johnson* dissent was right.

7. Wisconsin's mandatory recusal statute 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, the Wisconsin Legislature and the Senate Respondents request that Justice Protasiewicz recuse from these proceedings.

Dated this 22nd day of August, 2023.

Respectfully submitted,

Electronically Signed By
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