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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.

MEMORANDUM OF LAW IN SUPPORT OF 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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INTRODUCTION

This is an extraordinary case. 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 found to violate due process in *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868 (2009). During that campaign, Justice Protasiewicz declared the current legislative maps "unfair" and "rigged" in favor of Republicans. She invited a legal challenge to replace them, announcing that she "would enjoy taking a fresh look at the gerrymandering question."[1] And she revealed how she would decide it: "If you look at the dissent in that maps case, that dissent is what I will tell you I agree with."[2]

When she was sworn in, Justice Protasiewicz said, "[E]veryone should get a fair shot to demand justice and not feel like the thumb is on the

[1] Jessie Opoien & Jack Kelly, *Protasiewicz Would 'Enjoy Taking a Fresh Look' at Wisconsin Voting Maps*, The Cap Times (Mar. 2, 2023), https://perma.cc/THH2-VH3Q (App.001).

[2] Henry Redman, *Supreme Court Candidates Accuse Each Other of Lying, Extremism in Sole Debate*, Wis. Examiner (Mar. 21, 2023), https://perma.cc/5KLA-S2FV (App.006).

scale against them."[3] Yet Justice Protasiewicz's campaign statements reveal that her thumb is very much on the scale in this case. And Petitioners know it. As soon as Justice Protasiewicz was elected, the executive director of Law Forward—the "liberal law firm" that represents Petitioners here—vowed to file a lawsuit challenging the State's electoral districts "in the weeks or months after Justice-elect Janet Protasiewicz is sworn in on Aug. 1."[4] Just one day after Justice Protasiewicz took the bench, Law Forward filed a petition on behalf of self-described Democrats 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 (quotation marks and citation omitted).

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[3] Shawn Johnson, *Justice Janet Protasiewicz Is Sworn In, Giving Liberals Control of the Wisconsin Supreme Court*, Wis. Pub. Radio (Aug. 1, 2023), https://perma.cc/8KVV-MQDN (App.009).

[4] Jack Kelly, *Liberal Law Firm to Argue Gerrymandering Violates Wisconsin Constitution*, The Cap Times (Apr. 6, 2023), https://perma.cc/5TCG-4EQF (App.011).

This is no surprise to anyone, least of all the Democratic Party of Wisconsin. Redistricting became a dominant theme of the campaign. Then-candidate Protasiewicz said the current legislative maps were "rigged"[5] to the detriment of Democrats, and she invited another challenge to take a "fresh look."[6] All the while, the Democratic Party contributed record amounts to her campaign. By election day, it was apparent that, absent recusal, Justice Protasiewicz would be voting with the *Johnson* dissenters[7] to the benefit of Democrats. In her words, "The map issue is really kind of easy, actually."[8] "It is no secret that Wisconsin's maps are gerrymandered."[9] "I agree with" the *Johnson* dissent.[10]

As a matter of federal constitutional law, due process demands recusal, lest Justice Protasiewicz sit as a judge who has pre-decided the merits of a case brought to create a majority in the state legislature for her

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[5] 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.016).
[6] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.001).
[7] Redman, *supra* n.2, https://perma.cc/5KLA-S2FV (App.006).
[8] Scott Bauer, *Wisconsin Supreme Court Candidates Clash Over Abortion, Maps in Only 2023 Debate*, PBS Wis. (Mar. 21, 2023), https://perma.cc/SE77-ED4Z (App.020).
[9] @janetforjustice, Twitter (Mar. 3, 2023, 5:31 PM), https://twitter.com/janetforjustice/status/1631799609751117825 (App.022).
[10] Redman, *supra* n.2, https://perma.cc/5KLA-S2FV (App.006).

biggest donor. *See Caperton*, 556 U.S. at 886 (holding that due process required a justice to recuse rather than "review a judgment that cost his biggest donor's company $50 million"). The Democratic Party's "extraordinary contributions were made at a time when [it] had a vested stake in the outcome," *id.*, not only of the election but of the litigation that would follow if Justice Protasiewicz won. Without recusal—including from the decision whether to exercise original jurisdiction—these entire proceedings will be tainted with structural error. *See Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016) ("unconstitutional failure to recuse constitutes structural error").

Recusal is also required under Wisconsin judicial ethics laws, which mandate recusal when a judge "cannot, or it appears . . . she cannot, act in an impartial manner" or when a judge "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(2)(f), (g). Justice Protasiewicz's campaign statements, combined with the Democratic Party of Wisconsin's staggering contributions to her campaign, show that she cannot act in an impartial manner because she has prejudged the case. At the very least, those statements create the appearance that she cannot act

impartially. And Justice Protasiewicz's effective promise to rule in an anticipated gerrymandering lawsuit for the direct benefit of her primary campaign contributor gives her a significant personal interest in the outcome of Petitioners' case.

To prevent a violation of due process under the U.S. Constitution, to comply with Wisconsin's judicial ethics laws, and to promote the public's confidence in this Court, Justice Protasiewicz should recuse.

BACKGROUND

A. Petitioners challenge the state legislative district maps that this Court adopted as part of a mandatory injunction just over one year ago in *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶73, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*).

In that case, this Court held that "the partisan makeup of districts does not implicate any justiciable or cognizable right" under the Wisconsin Constitution. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶8, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*); *id.* ¶53 ("[A] right to partisan fairness" does "not exist" in "Article I, Sections 1, 3, 4, or 22 of the Wisconsin Constitution."). Cognizant of its role as a court and not a super-legislature, this Court also "adopted the 'least change approach'" for selecting remedial

maps "whereby the court would select maps that 'comport with relevant legal requirements' while 'reflect[ing] the least change necessary.'" *Johnson III*, 2022 WI 19, ¶8 (quoting *Johnson I*, 2021 WI 87, ¶72); *see Johnson I*, 2021 WI 87, ¶71. The Court determined that the maps it adopted satisfied Wisconsin's constitutional requirements, including compactness and contiguity. *Id.* ¶¶71, 73.

Three Justices dissented. They believed that partisan gerrymandering claims were viable under the Wisconsin Constitution and that the "least change" approach was wrong. *Johnson I*, 2021 WI 87, ¶¶89-101, 104 (Dallet, J., dissenting); *see Johnson III*, 2022 WI 19, ¶¶159, 184 (Karofsky, J., dissenting) (stating that the maps have "glaring partisan motivations" and that "the court wandered astray following the sirens' call of 'least change'").

B. After this Court adopted the maps in *Johnson*, Justice Patience Drake Roggensack announced her retirement, opening a vacancy on this Court to be filled by the 2023 election.[11] Among the candidates for that election was now-Justice Protasiewicz.

[11] Associated Press, *Milwaukee County Judge Janet Protasiewicz Announces Candidacy for State Supreme Court*, Wis. Pub. Radio (May 25, 2022), https://perma.cc/RMK5-G34R (App.023).

Criticism of the maps adopted in *Johnson* became a central part of Justice Protasiewicz's campaign. Detailed below, she repeatedly and emphatically expressed her views that the maps are "gerrymandered," "rigged," "unfair," and "wrong." And she invited an opportunity to give the validity of the maps a "fresh look," making clear that she would "agree with the dissent" in *Johnson*.

On January 9, before the primary election, Justice Protasiewicz participated in a candidate forum, where she stated the maps are "[a]bsolutely, positively rigged."[12] Asked about the *Johnson* litigation, Justice Protasiewicz chastised the maps:

> So let's be clear here. The maps are rigged, bottom line, absolutely positively rigged. They do not reflect the people in this state. They do not reflect accurately representation in neither the state assembly or the state senate; they are rigged, period. I'm coming right out and saying that.[13]

She claimed that the least-change principle took "meaningful votes away from people in large communities in Dane County and Milwaukee

[12] Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).

[13] WisPolitics State Supreme Court Election Forum (Jan. 9, 2023), Tr. 45:25-46:7 (App.0035-36); *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.044).

County."[14] And she took direct aim at the Court's decision in *Johnson*: "I believe the gerrymandering decision was wrong."[15]

Justice Protasiewicz gave several public interviews echoing the same statements. On Wisconsin Public Radio's *Central Time*, she stated, "I don't think you could sell to any rational person that the maps are fair."[16] On the Cap Times's *Wedge Issues*, she stated, "I would anticipate that I would enjoy taking a fresh look at the gerrymandering question."[17] She said Wisconsin's maps are "amongst the most gerrymandered maps in the entire country."[18] In an interview on PBS, when asked about *Johnson*'s "least change" remedial approach, she responded, "There's no legal precedent. There's nothing in the Constitution. There's nothing in case law."[19] And in a live interview for NPR's *Pod Save America*, she proclaimed, "Our maps are rigged in this

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[14] WisPolitics, *supra* n.13, Tr. 46:14-16 (App.036).
[15] *Id.* at 46:17-18 (App.036); *see* Alexander Shur, *Candidate Q&A: Wisconsin Supreme Court*, Wis. State J. (Jan. 30, 2023), https://perma.cc/J4V6-E5RQ (App.052) (reporting that Justice Protasiewicz made "clear that [she] believe[d] the court's decision last year regarding legislative maps [in *Johnson*] was wrong").
[16] Jonah Beleckis, *Janet Protasiewicz Thinks Judicial Candidates Should Be Open About Their Values*, Wis. Pub. Radio (Feb. 14, 2023), https://perma.cc/2QWV-69Q5 (App.054).
[17] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.001).
[18] *Id.*
[19] Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin Redistricting*, PBS Wis. (Mar. 9, 2023), https://perma.cc/R45C-RDPV (App.056).

state."[20] And she again "welcome[d] the opportunity to have a fresh look at our maps."[21]

Justice Protasiewicz also decried the maps on her campaign's Twitter account.[22]





On March 21, 2023, before the general election, Justice Protasiewicz debated her opponent, former Justice Dan Kelly. The validity of the maps was one of the main topics. "The map issue is really kind of easy," Justice

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[20] 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.064).
[21] *Id*.
[22] @janetforjustice (Mar. 3, 2023, 5:31 PM), https://twitter.com/janetforjustice/status/1631799609751117825 (App.022); @janetforjustice, Twitter (Mar. 7, 2023, 1:15 PM), https://twitter.com/janetforjustice/status/1633184736263696386 (App.065).

Protasiewicz said.[23] "If you look at the dissent in that maps case, that dissent is what I will tell you I agree with."[24] "We know the maps are not fair," she said. "We have battleground elections. We know they are not fair."[25]

After "openly campaign[ing] against . . . gerrymander[ing],"[26] Justice Protasiewicz won the election. It was the most expensive supreme court race in U.S. history.[27] The Protasiewicz campaign spent more than $16 million dollars, more than four times her opponent's total campaign spending.[28] The

[23] Bauer, *supra* n.8, https://perma.cc/SE77-ED4Z (App.020).
[24] Redman, *supra* n.2, https://perma.cc/5KLA-S2FV (App.006).
[25] A.J. Bayatpour, *In Only State Supreme Court Debate, Candidates Trade Accusations of Partisan Ties*, CBS 58 (Mar. 21, 2023), https://perma.cc/87BY-66CB (App.068).
[26] Ian Millhiser, *America's Worst Gerrymander May Soon Finally Die*, Vox (Aug. 3, 2023), https://perma.cc/E4U7-GMF6 (App.072).
[27] Patrick Marley, *Liberals Win Control of Wisconsin Supreme Court Ahead of Abortion Case*, Wash. Post (Apr. 4, 2023), https://perma.cc/ZA99-QR5D (App.073) (estimating $40 million in total spending); *see* WisPolitics, *WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race* (July 19, 2023), https://perma.cc/8A97-2JHC (App.076) (reporting total spending of more than $56 million).
[28] *Id.*; *see* Janet for Justice, July Continuing 2023 Campaign Finance Report CF-2, Schedule 1-B ("July 2023 Campaign Finance Report") (App.078) (reporting $16.54 million in spending as of June 30, 2023); *see* Friends of Justice Daniel Kelly, July Continuing 2023 Campaign Finance Report CF-2 ("Kelly Campaign Finance Report"), https://perma.cc/P2EW-D9KU (App.082) (reporting $3.66 million in Kelly campaign disbursements).

Democratic Party of Wisconsin contributed $9.9 million of that total, including $8.3 million in direct transfers.[29]

The day after Justice Protasiewicz was elected in April 2023, the executive director of Law Forward announced that the group would file a lawsuit challenging the State's electoral districts.[30] As for when, Law Forward promised that the suit would come "in the weeks or months after Justice-elect Janet Protasiewicz is sworn in on Aug. 1."[31]

Justice Protasiewicz was sworn in on August 1, 2023. At her investiture, she stated that "[w]e all want a Wisconsin with a fair and impartial Supreme Court."[32] "The Wisconsin Supreme Court's execution of our duties without favor to," among other things, "our own personal beliefs, is vital to giving the people of our state trust and confidence in our judicial

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[29] *See* Janet for Justice, Spring 2023 Campaign Finance Report CF-2, Schedule 1-B (App.085-87) ("Spring 2023 Campaign Finance Report"); July 2023 Campaign Finance Report, *supra* n.28 (App.079-80).

[30] Kelly, *supra* n.4, https://perma.cc/5TCG-4EQF (App.011).

[31] *Id*.

[32] Anthony Dabruzzi, *Newly Sworn-In Supreme Court Justice Janet Protasiewicz Vows 'Fairness and Impartiality' During Investiture Speech*, Spectrum News (Aug. 1, 2023), https://perma.cc/4Q8M-UMZQ (App.089).

system."[33] "[E]veryone should get a fair shot to demand justice and not feel like the thumb is on the scale against them."[34]

C. The day after Justice Protasiewicz's investiture, Petitioners filed their Petition asking this Court to take jurisdiction of an original action challenging the maps adopted as part of the mandatory injunctive relief in *Johnson*.

Petitioners describe themselves as former Democratic candidates and Democratic voters, including those who campaign for and donate to Democratic candidates. Pet. ¶¶6-24. They include members active in the Democratic Party of Wisconsin, the Brown County Democrats, Columbia County Democrats, the Douglas County Democratic Party, the Democratic Party of Outagamie County, Ozaukee County Democrats, Rock County Democrats, Sheboygan County Democrats, and Waukesha County Democrats. *Id.* ¶¶6, 8-14, 19, 22. Their harm, in their words, is their "inability to achieve a Democratic majority in the state legislature," and "see laws and policies they favor enacted." *Id.* ¶5.

[33] *Id.*

[34] Johnson, *supra* n.3, https://perma.cc/8KVV-MQDN (App.009).

The central issue in Petitioners' case is whether the *Johnson* injunction is a justiciable and cognizable "extreme partisan gerrymander[]" in violation of the Wisconsin Constitution. Pet. ¶¶55-77. Petitioners claim that the maps have a "partisan skew . . . in favor of Republicans," Mem. ISO Pet. at 23, and "treat[] Democrats unequally based on their political beliefs," Pet. ¶1. Petitioners argue that this Court's holding in *Johnson* that partisan gerrymandering claims are nonjusticiable was "wrong" and "unpersuasive." Mem. ISO Pet. at 19, 36. They suggest that this Court's adoption of the "least change" approach in *Johnson* was "flawed." Mem. ISO Pet. at 21. And they suggest that this Court violated the separation of powers in *Johnson* by adopting the maps. Pet. ¶¶129-32. Petitioners also challenge the maps as unconstitutionally noncontiguous, Pet. ¶¶122-28, despite this Court's contrary holding in *Johnson*. *See Johnson I*, 2021 WI 87, ¶36 (holding that when annexation results in municipal "island[s]," "the district containing detached portions of the municipality is legally contiguous even if the area around the island is part of a different district").

Petitioners accordingly intend to ask this Court to "declare the current assembly and senate plans unconstitutional in their entirety" and to redraw

them by "accept[ing] proposed remedial maps from the parties for either (a) review and selection by the Court or (b) review and recommendation to this Court by a referee or special master." Pet. at 43-44. Petitioners also intend to ask the Court to "declare that Petitioners' partisan gerrymandering claims are justiciable," declare that "Petitioners have stated causes of action for partisan gerrymandering," and "conduct an evidentiary hearing on Petitioners' partisan gerrymandering claims." *Id.* at 44-45. And Petitioners will ask the Court to grant the extraordinary relief of declaring the election of Senators in 2022 unlawful and ordering "special elections in November 2024 for all odd-numbered state senate districts." *Id.* at 44.

ARGUMENT

Justice Protasiewicz must recuse herself from all aspects of this case, including consideration of the Petition. Her continued participation violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Wisconsin judicial ethics laws. 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 because the Democratic Party of Wisconsin—the expressly named beneficiary of

Petitioners' claims—was the primary contributor to her campaign for a seat on this Court, providing nearly $10 million of the $16.7 million spent by Justice Protasiewicz. Independent of that, Justice Protasiewicz's campaign statements reveal that this case has been prejudged: the legislative district maps Petitioners challenge are "rigged," and the *Johnson* dissent was right, according to Justice Protasiewicz's own public statements.

Wisconsin's judicial ethics laws also require Justice Protasiewicz to recuse. Those laws mandate recusal when a judge "cannot, or it appears . . . she cannot, act in an impartial manner" or when a judge "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(2)(f), (g). Both grounds for recusal exist here. Justice Protasiewicz's campaign statements show that she cannot act in an impartial manner because she has prejudged the case. At the very least, those statements, combined with the Democratic Party of Wisconsin's staggering contributions to her campaign, create the appearance that she cannot act impartially. And Justice Protasiewicz's public statements inviting another gerrymandering suit and revealing how she would rule—all for the direct benefit of her largest

campaign contributor—gives her a significant personal interest in the outcome of Petitioners' case.

I. Due Process Requires Justice Protasiewicz's Recusal.

The Due Process Clause of the U.S. Constitution "guarantees 'an absence of actual bias' on the part of a judge" in American courts. *Williams*, 579 U.S. at 8 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). To effectuate this guarantee, judges must recuse when their participation in a case creates a "serious risk," "based on objective and reasonable perceptions," of "'actual bias or prejudgment.'" *Caperton*, 556 U.S. at 884 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This case presents a serious risk, at a minimum, of both actual bias and prejudgment. There is "a constitutionally intolerable probability of actual bias," *Caperton*, 566 U.S. at 882, because the Democratic Party of Wisconsin—the direct and intended beneficiary of Petitioners' claims as Democratic voters and former candidates hoping "to achieve a Democratic majority in the state legislature," Pet. ¶5—contributed $10 million to Justice Protasiewicz's campaign and "had a significant and disproportionate influence" on her election. *Caperton*, 556 U.S. at 884. There is also a serious risk of prejudgment because Justice Protasiewicz's

statements during her campaign strongly indicate that she has in fact prejudged this case. *See, e.g.*, *Williams*, 579 U.S. at 12.

A. Due process requires Justice Protasiewicz to recuse to prevent a constitutionally intolerable probability of actual bias given the Democratic Party's enormous contributions to her campaign.

A "basic requirement" of the Fourteenth Amendment's Due Process Clause is a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136. A fair tribunal requires an "unbiased judge." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). Consistent with due process, "no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Murchison*, 349 U.S. at 136). Judges must "hold the balance nice, clear, and true." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). They must be "wholly disinterested," *Williams*, 579 U.S. at 9 (quoting *Murchison*, 349 U.S. at 137), and "detached," *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). A biased judge is thus constitutionally disqualified from hearing a case.

Due process "do[es] not require proof of actual bias." *Caperton*, 556 U.S. at 883. "[A]ctual bias, if disclosed, no doubt would be grounds for appropriate relief." *Id.* But courts must determine whether the "situation is

one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna*, 475 U.S. at 822 (quoting *Ward,* 409 U.S. at 60). This is an objective inquiry: "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 872 (quoting *Withrow*, 421 U.S. at 47). Courts consider "all the circumstances of th[e] case" under a "'realistic appraisal of psychological tendencies and human weakness,'" *Caperton,* 556 U.S. at 872, 884 (quoting *Withrow*, 421 U.S. at 47). The question is "whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias'" *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881). Even the appearance of bias can be constitutionally disqualifying. *See Withrow,* 421 U.S. at 47 ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (citation omitted)); *see also, e.g.*, *Williams*, 579 U.S. at 12.

The Supreme Court considered the application of due process principles to judicial elections in *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868. It announced the following standard:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—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 or directing the judge's election campaign when the case was pending or imminent.

Id. at 884. The Court identified three considerations to guide the inquiry: (1) "the contribution's relative size in comparison to the total amount of money contributed to the campaign"; (2) "the total amount spent in the election"; and (3) "the apparent effect such contribution had on the outcome of the election." *Id.*

The due process claim in *Caperton* centered on a contribution of $3 million to a campaign for the West Virginia Supreme Court by Don Blankenship, the chairman, president, and CEO of the A.T. Massey Coal Company ("Massey"). 556 U.S. at 873. At the time of the campaign, the West Virginia Supreme Court was expected to hear the appeal of a $50 million verdict against Massey. *Id.* Blankenship contributed to the campaign of a future supreme court justice. *Id.* His direct donation was only $1,000, the

statutory maximum. *Id.* He also donated $2.5 million to a political organization formed to support the candidate. *Id.* And he made more than $500,000 in independent expenditures for mailing and advertising on the future justice's behalf. *Id.* Blankenship's total contributions exceeded the total amount spent by all other supporters. *Id.*

After the candidate was elected, the plaintiff in the suit against Massey moved three times to disqualify the new justice—once before the initial appeal, once before rehearing, and once after the court granted rehearing. The justice denied all three motions. The West Virginia Supreme Court ultimately reversed the jury verdict against Massey. *Id.* at 874-75.

The Supreme Court granted certiorari and reversed, holding that the justice's failure to recuse violated due process for two primary reasons. First, the Court held that Blankenship had "a significant and disproportionate influence in placing [the new justice] on the case." *Id.* at 884. Blankenship's $3 million contribution "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by [the new justice's] campaign committee." *Id.* The Court cautioned that the relevant due process inquiry was *not* whether the campaign contributions "were a

necessary and sufficient cause" of the candidate's victory. *Id.* at 885. Instead, "[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Id.* (quoting *Tumey* 273 U.S. at 532). Given the amount of Blankenship's contribution compared to other contributions and total campaign spending, the Court concluded that "the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* (quoting *Withrow*, 421 U.S. at 47).

Second, the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case" increased the "serious, objective risk of actual bias" because it was "reasonably foreseeable" at the time of the contribution that the "case would be before the newly elected justice." *Id.* at 886. So when the new justice was elected, "it became at once apparent that, absent recusal, [he] would review a judgment that cost his biggest donor's company $50 million." *Id.* Based on

"these extreme facts," the Court held that "the probability of actual bias rises to an unconstitutional level." *Id.*at 886-87.

Applied here, the risk of actual bias is all the more serious. Like the candidate in *Caperton*, Justice Protasiewicz received "disproportionate" support in her campaign from a single donor that had a vested interest in the outcome of any partisan gerrymandering claim. *Caperton*, 556 U.S. at 884. The Wisconsin Democratic Party's contribution of nearly $10 million is more than three times the size of the contribution that created a due process violation in *Caperton*. It also accounts for 59% of the total amount spent by Justice Protasiewicz in the campaign—3 out of every 5 dollars came from the Democratic Party's pockets. That contribution dwarfs her opponent's total campaign expenditures of $3.7 million.[35] Justice Protasiewicz's fundraising advantage gave her "a significant advantage over [her opponent] and his allies on TV ahead of the April election."[36] One observer commented that her opponent's "refusal to accept cash transfers from the state GOP was a big factor in the disparity in points on TV."[37] Whether or

[35] *See* Kelly Campaign Finance Report, *supra* n.28, https://perma.cc/P2EW-D9KU (App.082).
[36] WisPolitics, *supra* n.27, https://perma.cc/8A97-2JHC (App.077).
[37] *See id.*

not the Democratic Party of Wisconsin's contribution was necessary or sufficient to cause her victory, it had a "significant and disproportionate influence" on her election.

Moreover, as in *Caperton*, the "temporal relationship" between the Democratic Party's contributions, Justice Protasiewicz's election, and the filing of the Petition demonstrates a "serious, objective risk of actual bias." While the Democratic Party was contributing millions of dollars to Justice Protasiewicz's campaign, Justice Protasiewicz was on the campaign trail chastising the legislative maps as "rigged" and welcoming a new gerrymandering lawsuit. It was "reasonably foreseeable" that her election would lead to a new lawsuit challenging the partisan "fairness" of Wisconsin's state legislative districts. *See Caperton*, 556 U.S. at 886. When Justice Protasiewicz was elected, "it became at once apparent that, absent recusal," she would revisit this Court's decision in *Johnson*—the alleged obstacle to her biggest donor's control of the Wisconsin Legislature. *See id.* (noting that the newly elected justice "would review a judgment that cost his biggest donor's company $50 million").

Justice Protasiewicz has committed to recuse from all cases involving the Democratic Party of Wisconsin to preserve the perception that "she's fair."[38] Based on that commitment, recusal from this case should be automatic. Publicly, this case has already been decried as an attempt to "cash in" after "[p]rogressives spent big to elect Justice Janet Protasiewicz."[39] The perception that "she's fair" cannot survive if she fails to recuse from a case filed for the express purpose of electing more members of the Democratic Party of Wisconsin, the political party that contributed nearly $10 million—well over half of all contributions—to Justice Protasiewicz's campaign.

It makes no difference that the Democratic Party of Wisconsin is not formally a party to this action. The very basis for Petitioners' standing is their allegiance to the Democratic Party of Wisconsin. Pet. ¶¶5-23. The alleged injury they want redressed is their inability to achieve Democratic control of the Legislature. *Id.* ¶5. They are committed Democratic voters and

[38] Scott Bauer, *Protasiewicz Pledges to Recuse in Lawsuits from Democrats, While Kelly Declines to Pledge for Republican Cases*, PBS Wis. (Mar. 1, 2023), https://perma.cc/NFX2-37GZ (App.092).

[39] Editorial Board, Opinion, *Judicial Ethics at Work in Wisconsin*, Wall St. J. (Aug. 2, 2023), https://perma.cc/8Q6T-CHL6Editorial (App.094).

former Democratic candidates. Pet. ¶¶6-23. They are active members of state and local Democratic parties. *Id.* The very aim of their partisan gerrymandering claims is to "reallocat[e] power and influence between political parties." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019). Petitioners ask this Court to impose new legislative maps for the purpose of creating more "Democratic-performing districts," Pet. ¶2, and helping "achieve a Democratic majority in the state legislature," *id.* ¶5. Any suggestion that this case—turning on *partisan* gerrymandering claims by self-identified Democratic voters to get more Democrats elected—does not sufficiently implicate the Democratic Party of Wisconsin is willfully blind to the facts.

The nature of Petitioners' partisan gerrymandering claims heightens both the risk of actual bias and the resulting harm. Redistricting is "one of the most intensely partisan aspects of American political life." *See Rucho*, 139 S. Ct. at 2507. Redistricting claims like Petitioners' ask courts to "recast [themselves] as a redistricting commission in order 'to make [their] own political judgment[s] about how much representation particular political parties *deserve*." *Johnson I*, 2021 WI 87, ¶45 (quoting *Rucho*, 139 S. Ct. at 2499).

A court engaging in this enterprise looks like "a policymaking body rather than a law-declaring one." *Id.* ¶52. This, combined with Petitioners' openly partisan ends, guarantees the public will perceive that the Court is a political actor. And as such, it makes ensuring the absence of bias all the more critical.

B. Due process requires Justice Protasiewicz to recuse because she has prejudged this case.

The primary question in this case is whether Wisconsin's legislative district maps are "unconstitutional extreme partisan gerrymander[s]." Pet. ¶1. Justice Protasiewicz has already determined that the answer to that question is an unequivocal "Yes." A due process "problem arises when the judge has prejudged the facts or the outcome of the dispute before her." *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005) (Wood, J.); *accord Caperton*, 556 U.S. at 884 (citation omitted). Justice Protasiewicz's campaign statements—in their substance, timing, and context—evince at least a "serious risk" of "'prejudgment.'" *Caperton*, 556 U.S. at 884 (citation omitted). Prejudgment was not even an issue in the Supreme Court's finding of a due process violation in *Caperton.* Here, however, Justice Protasiewicz's prejudgment of the merits is a central concern and an additional reason why due process demands recusal.

1. Justice Protasiewicz's public statements show that she has already accepted Petitioners' arguments.

Justice Protasiewicz has made repeated public statements demonstrating her agreement with Petitioners that the legislative maps are invalid. For example, Petitioners claim that the maps are unconstitutional because they are "extreme partisan gerrymanders." Pet. at 3. Justice Protasiewicz has explicitly stated that she agrees: "It is no secret that Wisconsin's maps are gerrymandered."[40] The maps are part of "the trend of extreme gerrymandering" in Wisconsin.[41] "We have amongst the most gerrymandered maps in the entire country,"[42] if not "the worst gerrymandered maps in the country."[43] *Compare* Pet. ¶77 ("By every metric, Wisconsin's legislative plans score among the most—if not the most—skewed in the nation.").

Petitioners assert that the maps were drawn with "deliberate" and "partisan skew . . . in favor of Republicans." Mem. ISO Pet. at 23; *see* Pet. ¶57

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[40] @janetforjustice, Twitter (Mar. 3, 2023, 5:31 PM), https://twitter.com/janetforjustice/status/1631799609751117825 (App.022).
[41] @janetforjustice, Twitter (Mar. 7, 2023, 1:15 PM), https://twitter.com/janetforjustice/status/1633184736263696386 (App.064).
[42] Kelly, *supra* n.4, https://perma.cc/5TCG-4EQF (App.012).
[43] *WisEye Morning Minute: Campaign 2023 Supreme Court Race Debate*, La Crosse Trib. (Mar. 22, 2023), https://perma.cc/528G-D8UB (App.096).

(alleging that the maps were drawn to ensure "that Republicans would retain control of the Legislature regardless of any likely electoral scenario"). Justice Protasiewicz has likewise asserted that the maps are "rigged" in favor of Republicans: "[L]et's be clear here: the maps are rigged, bottom line. Absolutely, positively rigged. . . . [T]hey are rigged. Period."[44] "[Y]es, those maps are rigged."[45] "Our maps are rigged in this state."[46] "I think anybody with any sense knows our maps are rigged."[47] "I said the maps are rigged."[48]

Petitioners argue that the maps are unconstitutional because they "treat[] Democrats unequally based on their political beliefs." Pet. ¶1; *see* Mem. ISO Pet. at 17 (describing the maps as an "injustice"); *id.* at 63 ("extreme and inequitable"). Once again, Justice Protasiewicz has similarly decried the maps as "unfair": "The map issue is really kind of easy, actually. . . . I don't think anybody thinks those maps are fair. Anybody."[49] "I don't

[44] WisPolitics, *supra* n.13, Tr. 45:25-46:6 (App.035-36); Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).
[45] Schultz, *supra* n.19, https://perma.cc/R45C-RDPV (App.055).
[46] Johnson, *supra* n.20, https://perma.cc/W2YA-WPA2 (App.064).
[47] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.002).
[48] Beleckis, *supra* n.16, https://perma.cc/2QWV-69Q5 (App.054).
[49] Bauer, *supra* n.8, https://perma.cc/SE77-ED4Z (App.020).

think you can sell, to any rational person, that our maps are fair."[50] "We know the maps are not fair. . . . We have battleground elections. We know they are not fair."[51]

Petitioners suggest that this Court's holding in *Johnson* that partisan gerrymandering claims are nonjusticiable was "wrong" and "unpersuasive." Mem. ISO Pet. at 19, 36; *see id.* at 79 (*Johnson* "is wrong and should be overruled."); Pet. at 44 (asking the Court, contrary to *Johnson*, to hold that "partisan gerrymandering claims are justiciable"). Justice Protasiewicz is on record in agreement: "If you look at the dissent in that maps case, that dissent is what I will tell you I agree with."[52] "I've been clear that I believe the court's decision last year regarding legislative maps was wrong."[53] "I believe the gerrymandering decision was wrong. . . . I can tell you my values and common sense tell you that it's wrong."[54] "[T]he maps are wrong."[55]

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[50] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.002); *see* Beleckis, *supra* n.16, https://perma.cc/2QWV-69Q5 (App.054).
[51] Bayatpour, *supra* n.25, https://perma.cc/87BY-66CB (App.068).
[52] Redman, *supra* n.2, https://perma.cc/5KLA-S2FV (App.006).
[53] Shur, *supra* n.15, https://perma.cc/J4V6-E5RQ (App.052).
[54] Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).
[55] Hess, *supra* n.13, https://perma.cc/8T33-Z5M6 (App.044).

Petitioners also believe this court's adoption of a "least change" approach in *Johnson* was "flawed." Mem. ISO Pet. at 21; *id.* at 76-78 (arguing that the approach should be "categorically reject[ed]"). And again, Justice Protasiewicz has stated that she does too: "[T]hat methodology is totally unfair."[56] "I see no basis for it in the Constitution, no basis in caselaw."[57] "There's no legal precedent."[58]

Given her firm views that the maps are "gerrymandered," "rigged," "unfair," and "wrong," Justice Protasiewicz invited an opportunity "to have a fresh look at our maps"[59] and "a fresh look at the gerrymandering question" already decided in *Johnson*.[60] She also made clear that a fresh look would yield a fresh outcome: "[P]recedent changes when things need to change to be fair."[61]

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[56] News 3 Now, *Wisconsin Supreme Court Debate Presented by News 3 Now and WisPolitics*, at 29:20 (Mar. 21, 2023), https://www.youtube.com/watch?v=cUlapkeqyzI.

[57] Shawn Johnson, *Wisconsin Supreme Court Candidates Discuss Abortion, Redistricting at Madison Forum*, Wis. Pub. Radio (Jan. 9, 2023), https://perma.cc/NF68-NQ35 (App.098).

[58] Schultz, *supra* n.19, https://perma.cc/R45C-RDPV (App.056).

[59] Johnson, *supra* n.20, https://perma.cc/W2YA-WPA2 (App.064).

[60] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.001).

[61] Matt Mencarini, *How Could the 2023 Wisconsin Supreme Court Election Impact Medical Malpractice Lawsuits?*, PBS Wis. (Mar. 31, 2023), https://perma.cc/V87K-LC4C (App.101).

These statements require recusal. Due process entitles every litigant "to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Williams*, 579 U.S. at 16 (quoting *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980)). The prejudgment shown on the campaign trail is not "neutral" as required by the Due Process Clause. *Ward*, 409 U.S. at 62. "[T]he balance" had already tipped. *Tumey*, 273 U.S. at 532; *Williams*, 579 U.S. at 9 (describing "risk that the judge 'would be so psychologically wedded' to . . . her previous position . . . that [she] 'would consciously or unconsciously avoid the appearance of having erred or changed position'" (quoting *Withrow*, 421 U.S. at 57)). Justice Protasiewicz has already said the maps Petitioners intend to challenge are "gerrymandered," "rigged," "unfair," and "wrong." *See supra* pp. 7-10. She expressly stated that she "agree[s]" with "the dissent" in *Johnson* that the majority was "totally unfair."[62] And she stated that "[p]recedent changes when things need to change to be fair."[63] These statements are a promise to "ma[k]e new law" to achieve a desired outcome. *Aetna*, 475 U.S. at 822. They

[62] News 3 Now, *supra* n.56, at 29:20, https://www.youtube.com/watch?v=cUlapkeqyzI; Redman, *supra* n.2, https://perma.cc/5KLA-S2FV (App.006).
[63] Mencarini, *supra* n.61, https://perma.cc/V87K-LC4C (App.101).

"mean she has clearly prejudged the case"[64] in a way irreconcilable with the Due Process Clause.

Justice Protasiewicz's campaign statements cannot be excused as mere "general observation[s] about the law." *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (memorandum opinion of Rehnquist, J., on motion to disqualify). She expressly stated how she would apply the law in this case (the "Constitution"[65] and "caselaw"[66]) to the facts (the "rigged"[67] and "gerrymandered"[68] maps this Court adopted in *Johnson*). *See Franklin*, 398 F.3d at 962 (unlike "general opinion[s] regarding a law," statements evincing "prejudg[ment of] the facts or the outcome of the dispute" are constitutionally disqualifying); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 758 (1973). And she has announced that her mind is firmly made up on the outcome: "The map issue is really kind of easy, actually."[69] The maps are "[a]bsolutely, positively rigged."[70]

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[64] Editorial Board, *supra* n.39, https://perma.cc/8Q6T-CHL6Editorial (App.095).
[65] Johnson, *supra* n.57, https://perma.cc/NF68-NQ35 (App.098).
[66] *Id.*
[67] Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).
[68] @janetforjustice, Twitter (Mar. 3, 2023, 5:31 PM), https://twitter.com/janetforjustice/status/1631799609751117825 (App.022).
[69] Bauer, *supra* n.8, https://perma.cc/SE77-ED4Z (App.020).
[70] Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).

These statements also go far beyond garden-variety campaign rhetoric. As observers recognized, Justice Protasiewicz spoke with an unprecedented candor about her predetermined views on the maps. The campaign "featured comment . . . that went beyond the norm for judicial candidates."[71] Justice Protasiewicz "pushed the envelope for a judicial candidate by offering voters explicit declarations of her views."[72] And in doing so, she "shattered long-held notions of how judicial candidates should conduct themselves by making her political priorities central to her campaign."[73] Justice Protasiewicz's statements are "rare" and "exceptional." *Caperton*, 556 U.S. at 884, 890.

2. The timing of Justice Protasiewicz's public statements indicates prejudgment.

The "temporal relationship between the campaign [statements], the justice's election, and the pendency of the case" highlights the severe risk of "'actual bias or prejudgment.'" *Caperton*, 556 U.S. at 884, 886 (citation

[71] Ruth Marcus, Opinion, *Wisconsin Notwithstanding, Electing Judges Is a Terrible Idea*, Wash. Post (Apr. 6, 2023), https://perma.cc/QG7Z-MSRA (App.105).
[72] Ronald Brownstein, *The First Electoral Test of Trump's Indictment*, The Atlantic (Mar. 31, 2023), https://perma.cc/K8X3-JBBV (App.109).
[73] Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. Times (Apr. 4, 2023), https://perma.cc/A6NP-S4TC (App.114).

omitted). The statements were not only backward looking about *Johnson*. They were forward-looking, inviting a "fresh look" of *Johnson*. *See supra* p. 7-9. On the campaign trail, Justice Protasiewicz said she "anticipate[d] that at some point, [this Court will] be looking at those maps."[74] It was certainly "reasonably foreseeable, when the campaign [statements] were made" that partisan gerrymandering claims would be before her again—she invited them. *Caperton*, 556 U.S. at 886; *id.* at 884 (asking whether "the case was pending or imminent").

When Justice Protasiewicz declared her prejudgment of the maps, "it became at once apparent that, absent recusal," she would be deciding the validity of something she already believed to be invalid. *Id.* at 886. It is no mystery why Petitioners announced their plans to challenge the legislative maps as soon as Justice Protasiewicz was elected but waited to file their petition until the day after she was sworn in.[75] This unmistakable temporal connection is "critical." *Caperton*, 556 U.S. at 886.

[74] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.002).

[75] Millhiser, *supra* n.26, https://perma.cc/E4U7-GMF6 (App.070) ("Legally, not much has changed since the state Supreme Court imposed the Republican Party's preferred maps on the state in 2022. But politically, there has been one enormous change": Justice Protasiewicz's election.).

3. The context of Justice Protasiewicz's public statements underscores the risk of prejudgment.

The context of Justice Protasiewicz's campaign statements further confirms the serious risk of prejudgment. *Caperton*, 556 U.S. at 884. Justice Protasiewicz's public criticism of the maps no doubt had a "significant . . . influence in placing [her] on this case." *Id.* at 884. It was a focal point of her successful campaign. As one commentator put it, Justice Protasiewicz "campaigned against the gerrymandered maps and then won her election in a landslide."[76] The central role her criticism of the maps played in her "election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead [her] not to hold the balance nice, clear and true.'" *Caperton*, 556 U.S. at 885 (quoting *Tumey*, 273 U.S. at 532). Justice Protasiewicz clearly and publicly staked out her position on the maps. The logical inference is that she did so to appeal to voters—or donors. There is a significant risk she "would consciously or unconsciously avoid the

[76] Millhiser, *supra* n.26, https://perma.cc/E4U7-GMF6 (App.070); *see* Epstein, *supra* n.73, https://perma.cc/A6NP-S4TC (App.114) ("Judge Protasiewicz made a calculation from the start of the race that Wisconsin voters would reward her for making clear her positions on abortion rights and the state's maps—issues most likely to animate and energize the base of the Democratic Party."); Johnson, *supra* n.3, https://perma.cc/8KVV-MQDN (App.008) (Justice Protasiewicz's criticism of the maps "helped her mobilize Democratic voters in her high-turnout, double-digit victory.").

appearance of having erred or changed position." *Williams*, 579 U.S. at 9 (quoting *Withrow*, 421 U.S. at 57).

Efforts to temper these statements do not erase them. Justice Protasiewicz described her views on the maps as statements about her "values." Whatever the label, her statements go directly to the merits of an issue now before the Court. Justice Protasiewicz drew the connection herself: "I can't tell you what I would do on a particular case, but I can tell you my values, and the maps are wrong."[77] She also explained that her "values and common sense tell you that [*Johnson* is] wrong."[78]

At times, Justice Protasiewicz followed her express declaration that the "maps are rigged" with assurances that "all of my decisions are going to be rooted in the law."[79] But pairing an express statement of prejudgment with general assurances does not somehow negate the appearance of prejudgment. *See, e.g.*, *Papa v. New Haven Fed'n of Teachers*, 186 Conn. 725, 750 (1982) (recusal required under Connecticut law where judge expressed prejudgment of a case in the newspaper, even though he "emphasized he

[77] Hess, *supra* n.13, https://perma.cc/8T33-Z5M6 (App.044).
[78] Schultz, *supra* n.5, https://perma.cc/HC4L-NFUS (App.016).
[79] Beleckis, *supra* n.16, https://perma.cc/2QWV-69Q5 (App.054).

was expressing his own opinions, separate from his actions in the courtroom").

Justice Protasiewicz's references to "values" and "common sense" are particularly problematic in the context of partisan gerrymandering claims. The Wisconsin Constitution provides no standards by which to judge whether an electoral map is "excessively partisan." That is why this Court has already held that partisan gerrymandering claims are not justiciable as a matter of Wisconsin law. *Johnson I*, 2021 WI 87, ¶52. Because there is no legal standard to determine the partisan "fairness" of electoral districts, a partisan gerrymandering claim cannot be resolved by legal standards, only political ones. *See id.* ¶¶40-52. Accordingly, statements on the campaign trail about so-called "values" and "common sense" are very much an indication of how a judge would resolve the merits of a partisan gerrymandering claim.

The campaign message was clear.[80] There is no doubt in the minds of the public—and the parties and likely intervenors here—about how Justice

[80] Reid J. Epstein, *Costly Court Race Points to a Politicized Future for Judicial Elections*, N.Y. Times (Mar. 28, 2023), https://perma.cc/8ZN2-QKXU (App.116); *see* Brownstein, *supra* n.72, https://perma.cc/K8X3-JBBV (App.109) ("The juxtaposition of those two assertions can be head-spinning.").

Protasiewicz has decided to vote in this case. As one newspaper put it during her campaign, "No one believes she won't overturn the maps in a future case."[81] "The real question," according to one commentator, "is not *if* the new majority will strike down these maps, but *when*."[82]

* * *

In sum, given "all the circumstances of this case," Justice Protasiewicz's campaign statements and her receipt of nearly $10 million from the Democratic Party objectively evince "'such a risk of actual bias or prejudgment'" that her participation in this case "'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 872, 884 (citation omitted).

II. The Judicial Ethics Laws Require Justice Protasiewicz's Recusal.

Wisconsin has a "mandatory disqualification statute," *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 181, 443 N.W.2d 662 (1989), which "creates a mandatory duty for judges to disqualify themselves in certain circumstances," *State v. Allen*, 2010 WI 10, ¶43 n.17, 322 Wis. 2d 372,

[81] Editorial Board, Opinion, *Wisconsin's Judicial Election Donnybrook*, Wall St. J. (Feb. 26, 2023), https://perma.cc/25X6-XD3X (App.120).
[82] Mark Joseph Stern, *The Rule of Janet Is Here. Wisconsin Republicans Should Be Afraid*, Slate (Aug. 3, 2023), https://perma.cc/MK6M-EBHR (App.121).

778 N.W.2d 863 (opinion of Abrahamson, C.J.). As relevant here, "[a]ny judge"—including any "supreme court justice[]"—"shall disqualify . . . herself from any civil or criminal action or proceeding when" (1) "she cannot, or it appears . . . she cannot, act in an impartial manner" or (2) she "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(1), (2)(f), (g). If either of these circumstances exists, then recusal "must occur." *Id*. § 757.19(4).

Judicial conduct codes serve a "vital state interest." *Caperton*, 556 U.S. at 889. "A fair and impartial judge is the cornerstone of the integrity of the judicial system." *In re Jud. Disciplinary Proc. Against Laatsch,* 2007 WI 20, ¶13, 299 Wis. 2d 144, 727 N.W.2d 488. And "nothing tends to bring courts or the administration of justice into disrespect more than the spectacle of a prejudiced judge sitting in judgment upon the rights of litigants." *In re Kading*, 70 Wis. 2d 508, 524, 235 N.W.2d 409 (1975) (citation omitted). Wisconsin's mandatory recusal statute protects against that, serving to "maintain the integrity of the judiciary," "the rule of law," and "'public confidence in the fairness and integrity of [Wisconsin's] elected judges.'" *See Caperton*, 556 U.S. at 889 (citation omitted).

Wisconsin's mandatory recusal statute requires Justice Protasiewicz's recusal here both 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).

A. Justice Protasiewicz Cannot, or It Appears She Cannot, Act in an Impartial Manner.

Wisconsin's mandatory disqualification statute requires recusal when "a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 757.19(2)(g). A Justice must determine both "that he or she could act in an impartial manner *and* that it appear[s] that he or she could act in an impartial manner." *Ozanne v. Fitzgerald*, 2012 WI 82, ¶5, 822 N.W.2d 67 (Abrahamson, C.J.) (emphasis added).

This Court's rules likewise require recusal where a judge is not impartial or appears not to be impartial. Supreme Court Rule 60.04(4) provides that a "judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would

reasonably question the judge's ability to be impartial." SCR 60.04(4). Like the mandatory recusal statute, this rule requires recusal—even if the judge is not actually biased—where it appears the judge is biased.

A specific application of this broad principle is provided in Supreme Court Rule 60.04(4)(f), which requires that "a judge shall recuse himself or herself in a proceeding when . . . 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 . . . [a]n issue in the proceeding" or "[t]he controversy in the proceeding." SCR 60.04(4)(f). This rule recognizes the simple reality that campaign statements—like any other statements—can evince a judge's partiality. *Cf. Storms v. Action Wis. Inc.*, 2008 WI 110, ¶21, 314 Wis. 2d 510, 754 N.W.2d 480 ("[J]udges and candidates for judicial office can announce their views on political and legal issues as long as they are not pledges or promises to decide cases in a certain way.").

A judge who has predetermined the merits of a case is not impartial. "'Impartiality' means the absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." SCR 60.01(7m). A

judge who has prejudged a case does not have an open mind. Under the judicial ethics laws, then, "prejudgment can require recusal." *State v. Herrmann*, 364 Wis. 2d 336, 397 n.14, 867 N.W.2d 772 (2015) (Ziegler, J., concurring). No Wisconsin judge can prejudge a case. Wis. Stat. § 757.19(2)(g).

Justice Protasiewicz "cannot . . . act in an impartial manner" because statements on the campaign trail reveal she has prejudged the merits of this case. Wis. Stat. § 757.19(2)(g). The thrust of Petitioners' claims is that the maps this Court adopted in *Johnson* are invalid. Petitioners brought those claims one day after Justice Protasiewicz was sworn in—a surprise to no one given her statements on the campaign trail that she agrees with Petitioners. While those campaign statements about this Court's past precedent might have been fine absent a new suit, the new suit has come and recusal is required.

At the very least, because of Justice Protasiewicz's campaign statements, it "appears . . . she cannot[] act in an impartial manner." Wis. Stat. § 757.19(2)(g); *see* SCR 60.04(4). In the particular context of judicial campaigns, a judge's public statements of prejudgment can give the

impression that, "in order to obtain [victory], he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird,* 409 U.S. at 836 n.5 (memorandum opinion of Rehnquist. J., on motion to disqualify). "Judges are not politicians, even when they come to the bench by way of the ballot." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015). When judges campaign like politicians by proclaiming how they intend to vote on particular matters, it creates the perception that they will not "apply the law without fear or favor." *Id.*; *see State ex rel. La Russa v. Himes*, 144 Fla. 145, 148, 197 So. 762 (1940) (A judge's "oath of office limits his declarations from the stump.").

Media coverage confirms the appearance that "Justice Protasiewicz's statements on the legislative maps mean she has clearly prejudged the case."[83] She "all but sa[id] how she'd vote."[84] Justice Protasiewicz "has made clear she believes Wisconsin's legislative maps are gerrymandered in favor of Republicans,"[85] "spoken unambiguously about . . . her dislike for the

[83] Editorial Board, *supra* n.39, https://perma.cc/8Q6T-CHL6Editorial (App.095).
[84] Editorial Board, *supra* n.81, https://perma.cc/25X6-XD3X (App.119).
[85] Schultz, *supra* n.19, https://perma.cc/R45C-RDPV (App.055).

state's Republican-drawn legislative maps,"[86] and been "outspoken during the campaign about her desire to revisit the [maps] issue."[87] She "signaled" to progressives that she "would be sympathetic to claims that the state's voting maps . . . are unconstitutional."[88]

B. Justice Protasiewicz Has a Significant Personal Interest in the Outcome of this Matter.

Wisconsin's mandatory disqualification statute also requires recusal when "a judge has a significant financial or personal interest in the outcome of the matter." Wis. Stat. § 757.19(2)(f). In contrast with the "subjective determination" that Subsection (g) requires, *State v. Pinno*, 2014 WI 74, ¶93, 356 Wis. 2d 106, 850 N.W.2d 207, Subsection (f) is "fact specific" and "can be determined objectively," *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). The "very existence" of a significant personal interest in the outcome of a case "creates a disqualification by law," *id.* (citation omitted),

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[86] Shawn Johnson, *Janet Protasiewicz Has Campaigned on Democratic Issues. If She Wins, the Wisconsin Supreme Court Could Weigh in on Them.*, Wis. Pub. Radio (Mar. 30, 2023), https://perma.cc/PP6U-DMJN (App.126).

[87] Scott Bauer, *Wisconsin Lawsuit Asks New Liberal-Controlled Supreme Court to Toss Republican-Drawn Congressional Maps*, PBS NewsHour (Aug. 2, 2023), https://perma.cc/H425-VW8K (App.132).

[88] Rob Mentzer, *Wisconsin Democrats Rally Party Faithfully with an Eye on New Voting Maps in 2024*, Wis. Pub. Radio (June 10, 2023), https://perma.cc/4249-J86H (App.133).

regardless whether the judge is actually "ab[le] to act impartially," *Am. TV & Appliance of Madison*, 151 Wis. 2d at 182.

The types of interests requiring recusal include both "financial" and other "personal interest[s]." Wis. Stat. § 757.19(2)(f). The interest must be "substantial" rather than "remote." *Goodman v. Wis. Elec. Power Co.,* 248 Wis. 52, 58, 20 N.W.2d 553 (1945). And "[i]t must be established by evidence and reasonable inferences." *State ex rel. Dressler v. Cir. Ct. for Racine Cnty., Branch 1*, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991).

The evidence in this case and the reasonable inferences therefrom establish that Justice Protasiewicz has a substantial personal interest in the outcome of this matter. Justice Protasiewicz repeatedly declared to voters how she would vote on the merits of this case. *See supra* p. 10. Those proclamations are tantamount to campaign promises. And they were a centerpiece of her successful campaign. *See supra* p. 10. Justice Protasiewicz has a substantial interest in keeping her word and preserving her reputation among voters by invalidating the maps. Any failure to live up to her word would invite criticism—and serious electoral consequences down the road.

Cf. SCR 60.04(1)(b) ("A judge may not be swayed by partisan interests, public clamor or fear of criticism.").

The content of Justice Protasiewicz's campaign statements underscores her personal interest in the outcome of this litigation. Justice Protasiewicz expressly "welcome[d] the opportunity to have a fresh look at our maps"[89] and stated that she would "enjoy taking a fresh look at the gerrymandering question."[90] Petitioners gave Protasiewicz exactly the opportunity she had asked for, filing their Petition on her second day in office. Having invited this action and campaigned on it, Justice Protasiewicz plainly has a personal interest in its outcome that requires her recusal.

* * *

In sum, Justice Protasiewicz's campaign statements demonstrate that she "cannot, or it appears . . . she cannot, act in an impartial manner" and that she "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(2)(f), (g). She should therefore be recused under Wisconsin's judicial ethics laws.

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[89] Johnson, *supra* n.20, https://perma.cc/W2YA-WPA2 (App.064).
[90] Opoien & Kelly, *supra* n.1, https://perma.cc/THH2-VH3Q (App.001).

CONCLUSION

Justice Protasiewicz should be recused in this case.

Dated this 22nd day of August, 2023.

Respectfully submitted,

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FORM LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm), and (c) and § 809.81(4). The length of this brief is 9,266 words as calculated by Microsoft Word.

APPENDIX CERTIFICATION

I hereby certify that the appendix to this brief contains (1) a table of contents and (2) portions of the record essential to an understanding of the issues raised in the motion to recuse and this accompanying memorandum of law. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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