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IN THE SUPREME COURT OF WISCONSIN
NO. 2023AP1399-OA

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 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 Election Commission; Meagan Wolfe, in her official capacity as the Administrator of the Wisconsin Elections Commission; Andre Jacque, Tim Carpenter, Rob Hutton, Chris Larson, Devin LeMahieu, Stephen L. Nass, John Jagler, Mark Spreitzer, Howard Marklein, Rachael Cabral-Guevara, Van H. Wanggaard, Jesse L. James, Romaine Robert Quinn, Dianne H. Hesselbein, Cory Tomczyk, Jeff Smith, and Chris Kapenga, in their official capacities as Members of the Wisconsin Senate,

Respondents.

RESPONSE BRIEF OF SENATORS CARPENTER, LARSON, SPREITZER, HESSELBEIN AND SMITH TO MOTION FOR RECUSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INTRODUCTION 6

ARGUMENT 8

I. Wisconsin law and the Code of Judicial Conduct do not call for recusal. 8

A. There is no evidence that Candidate Protasiewicz has prejudged the *Clarke* claims. 9

1. The maps *are* rigged, unfair, and gerrymandered. That is a summation of political fact, not a legal conclusion. 10

2. Agreement with one or more aspects of the *Johnson I* dissent does not reflect prejudgment of this case. 12

B. There is no evidence that Justice Protasiewicz has a "personal interest" in the outcome of the Petition. 14

II. Due Process considerations do not require recusal. 16

A. Wisconsin's Judicial Code confirms there is no due process issue here. 16

B. *Caperton* has no bearing on this case. 19

1. DPW's campaign contributions did not have a disproportionate influence creating an impermissible risk of bias. 20

2. The timing of DPW's campaign donations raises no legitimate concern. 22

C. There is no evidence that Justice Protasiewicz has prejudged the issues presented in the Petition. 23

III. The call for involuntary recusal based upon protected speech raises First Amendment concerns. 24

CONCLUSION 27

FORM AND LENGTH CERTIFICATION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009) ..... *passim*

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 21, 24

In re Jud. Disciplinary Proc. Against Gableman,
2010 WI 62, 325 Wis. 2d 631, 784 N.W.2d 631 25

Johnson v. Wisconsin Election Commission,
2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ..... *passim*

Laird v. Tatum,
409 U.S. 824 (1972) 27

Mayberry v. Pennsylvania,
400 U.S. 455 (1971) 24

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 15, 25, 26, 27

Siefert v. Alexander,
608 F.3d 974 (7th Cir. 2010) 26

State v. Am. TV & Appliance of Madison, Inc.,
151 Wis. 2d 175, 443 N.W.2d 662 (1989) 9, 14

State v. Herrmann,
2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) ..... *passim*

State v. Pinno,
2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207 8

Storms v. Action Wisconsin Inc.,
2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480 (per curiam) 17

Tumey v. Ohio,
273 U.S. 510 (1927) 24

Statutes

Wis. Stat. § 11.1104(5) 21, 24

Wis. Stat. § 757.19(2)(f) 14

Wis. Stat. § 757.19(2)(f) and (g).....8

Wis. Stat. § 757.19(2)(g) 9, 10

Other Authorities

In re rule for recusal when a party or lawyer has made a larger campaign contribution, No. 17-01 (Wis., June 30, 2017) 18

SCR 60.03(1)-(2) 8

SCR 60.04(1)(hm).....8

SCR 60.04(4) 8, 24

SCR 60.04(7) 16, 17

SCR 60.06(3) 10

SCR Ch. 60.....8

INTRODUCTION

Respondents Senator Tim Carpenter, Senator Chris Larson, Senator Mark Spreitzer, Senator Dianne H. Hesselbein, and Senator Jeff Smith, sued in their official capacities as members of the Wisconsin Senate and collectively referred to as "the Democratic Senator Respondents," by and through their attorneys, Pines Bach LLP, submit this Response to the Motion for Recusal of Justice Janet Protasiewicz ("Recusal Motion"), filed by Respondents Senator André Jacque, Senator Rob Hutton, Senator Devin LeMahieu, Senator Stephen L. Nass, Senator John Jagler, Senator Howard L. Marklein, Senator Rachel Cabral-Guevara, Senator Van H. Wanggaard, Senator Jesse L. James, Senator Romaine Robert Quinn, Senator Cory Tomczyk, and Senator Chris Kapenga, sued in their official capacities as members of the Wisconsin Senate and collectively referred to as "the Republican Senator Respondents" or "the moving parties."[1]

The materials included in the moving parties' Appendix supporting their Recusal Motion ("App.") include relevant direct quotes of statements made by Supreme Court Justice Candidate Janet Protasiewicz ("Candidate Protasiewicz") during her campaign for election to the Supreme Court about the state legislative districts imposed by this Court in 2022, and the series of rulings that resulted in such maps.[2] There can be no dispute that Candidate Protasiewicz repeatedly observed that these maps are unfair,

[1] Those Respondents refer to themselves as "the Respondent Senators" but to be clear, they are not ***all*** of the Respondents who are Senators. Rather, they are only the Respondent Senators who are Republicans. The Democratic Senator Respondents also note that the Recusal Motion was joined by a proposed intervenor calling itself the Wisconsin Legislature, who has not to date been given permission to participate in this case.

[2] Those materials, unnecessarily voluminous and repetitive, also include many irrelevant statements by others, including characterization of and commentary about the meaning of Candidate Protasiewicz's statements. That irrelevant content should be disregarded.

rigged, wrong, and gerrymandered; that she agreed with the *Johnson* court dissent,[3] and that she would enjoy an opportunity to take a fresh look at the gerrymandering question. Nor is there any dispute that the Democratic Party of Wisconsin ("DPW"), which is not a party in this case, made significant financial contributions to Candidate Protasiewicz's campaign. There is no shame in these things. There is nothing inappropriate about these things. And there is nothing about these things that requires Justice Protasiewicz to recuse herself from participating in this case.

The Recusal Motion and Memorandum of Law in Support ("Br.") are replete with misrepresentations of the filings in this case and the law regarding recusal. The Democratic Senator Respondents aim in this Response to set the record straight and provide the Court with a reliable discussion of the law on recusal as it applies here.

[3] It is not clear from her public statements which dissenting opinion from the *Johnson* court, or what parts of those opinions, Candidate Protasiewicz was expressing agreement with. However, the moving parties state in their motion that they take issue with what they perceive to be her agreement with the dissent in *Johnson v. Wisconsin Election Commission,* 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"). (Recusal Motion, ¶ 4) We therefore confine our discussion on that point to that dissenting opinion. *See id.* at ¶¶ 88-115 (Dallet, J., dissenting).

ARGUMENT

I. Wisconsin law and the Code of Judicial Conduct do not call for recusal.

Wisconsin's Code of Judicial Conduct[4] appears in Chapter 60 of the Supreme Court Rules ("the Judicial Code"). The Judicial Code requires a judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge may not let any relationship "influence the judge's judicial conduct or judgment." SCR 60.03(1)-(2). The presumption is that a judge is unbiased. *State v. Pinno,* 2014 WI 74, ¶ 92, 356 Wis. 2d 106, 850 N.W.2d 207. The Judicial Code requires judges to perform their duties "fairly and impartially," SCR 60.04(1)(hm), and to recuse themselves from a case when:

> [R]easonable, 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).

The moving parties claim that Wis. Stat. § 757.19(2)(f) and (g) require Justice Protasiewicz to recuse herself from participating in this case. They argue that (1) statements she made during her election campaign demonstrate that she has prejudged the issues in this case and therefore cannot, or apparently cannot, participate in this case impartially (Br. at 40-44)[5], and (2) those same statements amount to campaign promises that she

[4] Also called the "code of judicial ethics," it governs the members of Wisconsin's judiciary. Its rules are authoritative and binding. SCR Ch. 60, Judicial Council Committee's Note, 1979 and Preamble.

[5] The moving parties failed to follow Wis. Stat. § 809.19(8)(bm), which calls for briefs to be paginated beginning with "1" on the cover. References in this brief to pages of the moving parties' Brief are to the roman numerals indicated at the bottom of the page.

must fulfill, creating a "personal interest" in the outcome of the case. (Br. at 44-46) As shown below, Justice Protasiewicz and this Court should reasonably conclude that (1) it both appears and is true that Justice Protasiewicz can act impartially in this case, and (2) she has no disqualifying personal interest in the issues presented in the Petition.

A. There is no evidence that Candidate Protasiewicz has prejudged the *Clarke* claims.

Wis. Stat. § 757.19(2)(g) requires a judge to disqualify herself from an action "when a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This section "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind." *State v. Am. TV & Appliance of Madison, Inc.,* 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989). It "mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification…in a situation in which the judge's impartiality 'can reasonably be questioned' by someone other than the judge." *Id.* at 183. The basis for disqualification under this section is subjective. *Id.*

Thus, Justice Protasiewicz's obligation under this section is to determine whether she cannot act impartially on the *Clarke* claims, and whether it appears that she cannot act impartially on those claims.

The moving parties claim that Justice Protasiewicz cannot act impartially in this case, or it appears she cannot, because she has already prejudged it. They cannot overcome the presumption of impartiality. The

question of impartiality posed by Wis. Stat. § 757.19(2)(g) in light of the moving parties' accusations is informed by aspects of the Judicial Code. SCR 60.06(3) governs "Campaign Conduct and Rhetoric." Specifically, SCR 60.06(3)(b), "Promises and Commitments," forbids a candidate or others on their behalf from making "pledges, promises, or commitments" with respect to any "cases, controversies, or issues that are likely to come before the court." The Comment to SCR 60.06(3)(b) further explains that a candidate must refrain from "any public comment that may reasonably be viewed as committing the…candidate to a particular case outcome." Neither Candidate Protasiewicz nor anyone on her behalf made such promises or comments. The moving parties' impartiality challenge must fail.

1. The maps *are* rigged, unfair, and gerrymandered. That is a summation of political fact, not a legal conclusion.

The moving parties contend that Justice Protasiewicz has pre-judged the matters presented in the Petition because during her campaign she described the state legislative districts imposed by the *Johnson* court as rigged, unfair, and gerrymandered. They conclude that Justice Protasiewicz must therefore recuse herself from participating in this case. The moving parties start from a false premise. Justice Protasiewicz has not prejudged the legal issues presented and has made no promises to rule in anyone's favor; she's offered no legal conclusions whatsoever.

The Petition in this case goes into considerable detail about the facts of the creation of the 2011 maps—designed to provide "aggressive" Republican advantage—and how the 2021 maps imposed by the *Johnson* court demonstrate consistency with that design. These facts can hardly be disputed. As shown by the materials submitted with the Recusal Motion,

these facts were also well known among Wisconsin voters during the judicial campaign at issue. Based on these facts, the current maps are fairly characterized as rigged, unfair, wrong, and gerrymandered. That is not a legal conclusion, it is a political one. Indeed, the lead opinion in *Johnson v. Wisconsin Elections Commission,* 2021 WI 87, ¶ 8, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"), acknowledged that the maps had a "partisan makeup" but declined to consider that makeup, stating that "[c]laims of political unfairness in the maps present political questions, **not legal ones**" and therefore declined to address such concerns. *Id.* at ¶ 4 (emphasis added); *see also id.* at ¶ 39 (noting that the parties did not identify a right under the Wisconsin Constitution that made partisan gerrymandering illegal, and therefore concluding "partisan fairness presents a purely political question").[6]

Candidate Protasiewicz expressed interest in determining whether extreme partisan gerrymandering, i.e., rigged and unfair state legislative districts, amounts to a legal violation, while never expressing an opinion on the legal question itself. Saying that the current maps are unfair, rigged, and gerrymandered is commenting on the political reality. It is like saying that a billionaire who pays no taxes is not paying his fair share. Such a statement offers no perspective on whether that particular billionaire's grift is legal or illegal--whether under the facts and law it is legal "tax avoidance" or illegal "tax evasion." Three of the legal questions raised in the Petition ask whether the political fact that the current maps are rigged,

[6] As discussed by the Petitioners in their Petition and supporting Memorandum of Law, the parties in *Johnson* did not argue that the Wisconsin Constitution made partisan gerrymandering illegal, and certainly did not claim that the present maps violate the Wisconsin Constitution due to the partisan makeup of the districts. The *Clarke* Petition is the first time those questions are properly presented to the Wisconsin Supreme Court.

unfair, and extremely politically gerrymandered violates the Wisconsin Constitution.

While Candidate Protasiewicz commented on an issue that all agree is a political one, neither Candidate Protasiewicz nor Justice Protasiewicz has offered any commitment, promise, or even perspective on the legal questions posed in the Petition, including by that political reality. She left for another day whether such gerrymandering is also a violation of the Wisconsin Constitution, while expressing interest in considering that question.

2. Agreement with one or more aspects of the *Johnson I* dissent does not reflect prejudgment of this case.

The Petition now pending before the Court challenges the state legislative districts imposed by the *Johnson* court based on five different legal theories. Those maps were not **challenged** in *Johnson;* they were the **result** of that litigation. The legal claims presented here were not presented in *Johnson*; no one there argued that the Court should strike down any map because it was an extreme partisan gerrymander, because its selection violated separation of powers, or because legislative districts were noncontiguous. Consequently, stating agreement with the dissenting opinion in *Johnson I*, in whole or in part, does not indicate that Justice Protasiewicz has prejudged the legal issues presented in the pending Petition.

Indeed, while the lead *Johnson I* opinion, supported by three of the seven justices, offered dicta on three of the five legal claims presented here,[7] the parties in that case neither pled nor argued those claims. As the

[7] *See Johnson I*, 2021 WI 87, ¶¶ 53-62 (lead opinion). Dicta like that is not uncommon, however, if there is evidence that anyone has "prejudged" a legal issue now presented in this case, it is found

dissent noted, those claims were not properly raised or decided there. *Johnson I,* 2021 WI 87, ¶¶ 102-103 (Dallet, J., dissenting) (noting that the lead opinion gratuitously discusses "whether claims of extreme partisan gerrymandering are cognizable under the Wisconsin Constitution", culminating in an "advisory opinion" on "a constitutional question that we never asked, that the parties did not brief, and that is immaterial to this case.")

Agreeing that three justices offered an inappropriate advisory opinion on issues never presented to the Court is hardly evidence that Justice Protasiewicz has determined that the Wisconsin Constitution prohibits extreme partisan gerrymandering, and that the current maps violate that prohibition. It should be noted that unlike the justices in the lead opinion, who do appear to have prejudged the question of justiciability of partisan gerrymandering under the Wisconsin Constitution, without the benefit of adversarial briefing, the *Johnson* dissent did not do so. Instead, the three dissenting justices demonstrated an open mind to considering the question, as other state supreme courts have done, while not expressing an opinion without the benefit of full briefing from parties involved in arguing for and against such a claim. *Johnson I*, 2021 WI 67, ¶¶ 104-105 (Dallet, J., dissenting). They also acknowledged the political problems that come from extreme partisan gerrymandering and criticized the majority for turning a blind eye to those problems. *Id.* at ¶¶ 106-115 (Dallet, J., dissenting). And they objected to the

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here. Yet no one is calling for the recusal of any Justice on the basis of that dicta, nor would it be appropriate due to the presumption of impartiality. Parties rely on Justices to *sua sponte* identify and address any inability to fairly judge a case on the facts and arguments presented, consistent with their legal and ethical obligations. If those Justices feel that they can hear the facts and arguments presented in this case with an open mind, despite their dicta in *Johnson*, parties should accept—and expect—that.

"least change" mapmaking approach chosen by the majority because given the partisan makeup of the 2011 maps, it did not align with a court's obligation to remain "neutral and nonpartisan" and to adopt maps that are "the 'best that c[an] be managed' under all relevant criteria." *Id.* at ¶¶ 88, 98 (Dallet, J., dissenting); *see also* ¶¶ 89-97; 99-101 (Dallet, J., dissenting).

If during her campaign Candidate Protasiewicz recognized partisan gerrymandering to be politically problematic, agreed with keeping an open mind on whether it is also illegal until the claim is properly put before the Court and briefed by the parties, and agreed, as many courts have found, that the Court should avoid choosing a map that benefits one political party over all others but instead should aim for neutral and nonpartisan maps, we should praise her for that, not ask her to recuse herself from this case.

B. There is no evidence that Justice Protasiewicz has a "personal interest" in the outcome of the Petition.

The moving parties also claim, citing Wis. Stat. § 757.19(2)(f), that Justice Protasiewicz must recuse because her campaign statements, discussed in Section I.A. above, amount to campaign promises which she has a personal interest in keeping. Wis. Stat. § 757.19(2)(f) requires recusal "[w]hen a judge has a significant financial or personal interest in the outcome of the matter." This is objectively measurable. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 186, 443 N.W.2d 662 (1989).

As shown above, Candidate Protasiewicz made no campaign promises for any specific outcome should a case like this one come before the Court. She did not announce how she would rule on the legal questions presented in this case. Rather, she acknowledged a troubling political situation, expressed interest in evaluating whether that situation

runs afoul of the law if presented to the Court, and agreed that judges should aim to be fair and nonpartisan when called upon to draw state legislative maps.

Even if, as the moving parties contend, Candidate Protasiewicz's statements created a "personal interest" for her to keep her "word" (Br. at 45), there would still be no risk of bias or prejudgment. Rejecting Justice Ginsburg's contention that "ruling consistently with previously announced view" created a "personal interest," Justice Scalia, writing for the majority, noted that "elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench." *Republican Party of Minnesota v. White,* 536 U.S. 765, 782 (2002) (emphasis original). Thus, failure to live up to a campaign statement hardly rises to the level of an improper influence: "the [elected] judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue." *Id.*

Candidate Protasiewicz's campaign "promises" and resulting "personal interest" were no different from those of any judge running for office in Wisconsin: to treat all parties with respect, to evaluate each case on its merits and without prejudice, and to resolve cases fairly and in line with the law. None of that requires recusal.

II. Due Process considerations do not require recusal.

As shown in Section I above, the moving parties cannot demonstrate that the Wisconsin recusal standards are met. They fare no better under their Due Process arguments.

A. Wisconsin's Judicial Code confirms there is no due process issue here.

"[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (citing *FTC v. Cement Institute,* 333 U.S. 683, 702 (1948)). Further, "[b]ecause the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *State v. Herrmann*, 2015 WI 84, ¶ 120, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) (citing *Caperton*, 556 U.S. at 890).

The Judicial Code should resolve the moving parties' due process challenge based on DPW's contributions to Candidate Protasiewicz's campaign. It expressly provides that campaign contributions do not require recusal:

> Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.

SCR 60.04(7).

For better or worse, Wisconsin judges are elected, and have been since the founding of the State. An elective judiciary—and all that a campaign for elective office entails—was "vigorously debated" during the formation and adoption of the Wisconsin Constitution in 1848. "An

elective judiciary was selected and has been part of the Wisconsin democratic tradition for more than 160 years." SCR 60.04(7) (Comment) The Comment further recognizes, "[c]ampaign contributions to judicial candidates are a fundamental component of judicial elections." Even when a party to an action before the judge has made a contribution to the judge's campaign, this does not, by itself, "require the candidate to recuse himself or herself as a judge" from that proceeding. *Id.* It goes on to recognize that there is potential for unique harm to the interests of the citizenry in general caused by involuntary recusal of Justices:

> Disqualifying a judge from participating in a proceeding solely because the judge's campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs the judge's integrity. It would have the effect of discouraging 'the broadest possible participation in financing campaigns by all citizens of the state' through voluntary contributions, see Wis. Stat. § 11.001, because it would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect.
>
> Involuntary recusal of judges has greater policy implications in the supreme court than in the circuit court and court of appeals. Litigants have broad right to substitution of a judge in circuit court. When a judge withdraws following the filing of a substitution request, a new judge will be assigned. When a judge on the court of appeals withdraws from a case, a new judge also is assigned. **When a justice of the supreme court withdraws from the case, however, the justice is not replaced.** Thus, the recusal of a supreme court justice alters the number of justices reviewing a case as well as the composition of the court. **These recusals affect the interests of non-litigants as well as non-contributors**, inasmuch as supreme court decisions almost invariably have repercussions beyond the parties.

Id. (emphasis added).

Recusal of a justice has been found unnecessary in light of campaign donations and other candidate support. *See e.g.*, *Storms v. Action Wisconsin Inc.*, 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480 (per curiam) (refusing recusal when attorneys representing a party organization and others

related to the party had donated to one of the Justice's campaigns, and endorsed the Justice). Indeed, this Court declined to impose specific recusal standards when a party or lawyer for a party has made a campaign donation. *In re rule for recusal when a party or lawyer has made a larger campaign contribution*, No. 17-01 (Wis., June 30, 2017) (Order).

While there is no question that the DPW donated nearly $10 million to Candidate Protasiewicz's campaign, there is nothing to support that the donation creates an impartiality problem here. The DPW is not a party. That fact alone should end this discussion. The moving parties attempt to skirt that fact by describing the DPW as the "direct and intended beneficiary of Petitioners' claims" (Br. at 16) To the contrary, the Petitioners are voters, and it is voters who are the direct and intended beneficiaries of their claims, not just today and not just as to the current maps, but for all time and as to all state legislative districts to be drawn in the future.

The moving parties attempt to fortify their characterization of the Petitioners and the interests they represent by mischaracterizing the relief Petitioners request. They do not ask the Court to draw maps that "achieve a Democratic majority in the state legislature." (Recusal Motion ¶ 5; Br. at 2, 25, citing Petition ¶ 5) Rather, paragraph 5 of the Petition states: "In addition to facing harm from having the strength of their votes diluted on a district-by-district basis, Petitioners are harmed by the inability to achieve a Democratic majority in the state legislature. This harms their ability to see laws and policies they favor enacted." In other words, the Petitioners, voters, wish to have the opportunity to choose their representatives in the Wisconsin statehouse. It is hardly disputable that under the current maps, they cannot. Today, under these maps, only

voters who prefer democratic policies and representatives are so harmed, hence, it is no surprise that the voters who have standing to object to the current maps are voters who tend to support Democratic policies and candidates. In contrast, voters who prefer Republican policies and representatives have an outsized opportunity to secure them under the current maps. Nevertheless, as noted above, an outcome in this litigation favoring fair maps would benefit all voters, regardless of party alignment, by allowing them to select their representatives, not the other way around.

B. *Caperton* has no bearing on this case.

Both the United States Supreme Court and the Wisconsin Supreme Court have made it clear that it is a "rare instance" where a judicial officer is required to recuse as a matter of due process. *Caperton*, 556 U.S. at 890; *State v. Herrmann*, 2015 WI 84, ¶ 121, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) (interpreting *Caperton*). The *Caperton* holding is "very limited." *Id.* at ¶ 116 (Ziegler, J., concurring).

In a due process recusal challenge, Courts apply "objective standards" to determine whether the facts of a case "pose such a risk of actual bias or prejudgment" that recusal is required under the Due Process Clause of the Fourteenth Amendment. *Caperton*, 556 U.S. at 883-84. "It is not sufficient to show that there is an appearance of bias or that circumstance might lead one to speculate that the judge is biased." *Id.* at ¶ 118 (Ziegler, J., concurring) (citing *State v. O'Neill*, 2003 WI App 73, ¶ 12, 261 Wis. 2d 534, 663 N.W.2d 292). "When such a challenge is made, the burden is to show a 'rare' or an 'extraordinary situation' with 'extreme' facts that create a 'serious, objective risk of actual bias,' such that it is the limited situation where recusal is required, as was demonstrated under the unique facts of *Caperton.*" *Id.* at ¶ 121 (Ziegler, J., concurring).

This is not such a case. Under the "influences" identified in *Caperton*, this case is not a "rare" or "extraordinary situation" with "extreme facts" that creates a "serious, objective risk of actual bias."

1. DPW's campaign contributions did not have a disproportionate influence creating an impermissible risk of bias.

As the *Caperton* court identified, campaign contributions may be a potential source of "serious risk of actual bias." *Caperton*, 556 U.S. at 885. The moving parties claim such a risk is present here. However, the *Caperton* court also noted that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal." *Id.*; *accord Herrmann*, 2015 WI 84, ¶ 124 (Ziegler, J., concurring) ("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."). A reviewing court examines whether,

> **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. The inquiry centers on the contribution's relative size in comparison to **the total amount of money contributed to the campaign**, the **total amount spent in the election**, and **the apparent effect such contribution had on the outcome of the election.**

Caperton, 556 U.S. at 884 (emphasis added).

Under the facts here, there is no objective risk of bias. First, when it made its contributions, DPW did not have a "personal stake in a *particular case*." *Id.* (emphasis added). Unlike the facts presented in *Caperton*, this litigation was not pending during Candidate Protasiewicz's campaign. Moreover, DPW is not a party to this action. As shown above, this case is about voters, and the harm that voters face.

The moving parties also misleadingly characterize and fail to contextualize DPW's contribution to Candidate Protasiewicz's campaign. While the moving parties try to make hay by comparing DPW's donation to the donations at issue in *Caperton*, the comparison is apples to oranges. The 2023 Wisconsin Supreme Court race was the most expensive judicial race in the history of Wisconsin, with total spending topping over $56 million between candidate expenditures and expenditures by outside groups. (App. 076) By comparison, the $3 million in contributions at issue in *Caperton* were more than the total amount donated by other supporters of the candidate, and three times the amount spent by the candidate's own campaign committee. *Caperton,* 556 U.S. at 873.

The moving parties also cry foul that DPW's donation to Candidate Protasiewicz gave her a spending edge over her opponent's total campaign expenditures. (Br. at 22) There is nothing improper about that, either. In 2016, the Wisconsin Legislature enacted legislation *expressly permitting* political parties to make unlimited contributions to a candidate committee. *See* Wis. Stat. § 11.1104(5). DPW's donations are also protected by the First Amendment as political speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *accord Herrmann*, 2015 WI 84, ¶¶ 126-127 (Ziegler, J., concurring). Indeed, the *Caperton* 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." *Herrmann*, 2015 WI 84, ¶ 124 (Ziegler, J., concurring).

The moving parties gloss over the fact that Candidate Protasiewicz's opponent had a single donor spend nearly $6 million to assist him. (App. 073) Indeed, over the final week of the campaign, Candidate Kelly enjoyed a $1 million advantage in spending over Candidate Protasiewicz. (App.

077) It is a fact that Candidate Kelly decided not to accept money from the Wisconsin Republican Party. (App. 077) Yet a decision like that by one candidate is not a sign of "bias" on the part of the other candidate.

The *Caperton* court also noted that one of the "extreme facts" suggesting a "significant and disproportionate influence" was the closeness of the race at issue. *Caperton*, 556 U.S. at 886; *accord Herrmann*, 2015 WI 84, ¶ 139 (Ziegler, J., concurring). In *Caperton,* the election was decided by 50,000 votes and the winning candidate won with the narrow margin of 53% of the vote. *Caperton*, 556 U.S. at 886. Here, there was not a close race, especially by Wisconsin standards. Candidate Protasiewicz won in a "landslide victory" of approximately 200,000 votes and carried approximately 56% of the vote. (App. 011-012)

With the proper context, it is apparent that DPW's contribution did not have a "significant and disproportionate" influence creating an impermissible risk of bias.

2. The timing of DPW's campaign donations raises no legitimate concern.

The other factor that the *Caperton* court examined was the "temporal relationship" between the campaign contributions, the justice's election, and the pendency of the case. *Caperton*, 556 U.S. at 886. In *Caperton*, a company was subject to a $50 million adverse jury verdict that was entered before the judicial election at issue. *Id.* at 872. Before the appeals process was set to play out, the chairman of the company subject to the jury verdict made significant financial contributions to support the candidate challenging an incumbent member of the Supreme Court of Appeals of West Virgina. *Id.* at 873. Following the election of the challenger candidate, the company facing the $50 million judgment sought review from the

Supreme Court of Appeals of West Virgina. *Id.* The *Caperton* court concluded it was "reasonably foreseeable" at the time the contributions were made that the appeal would be in front of the newly elected justice, and found recusal was required. *Id.* at 886.

Here, there is no such "temporal relationship" between the campaign contributions, the election, and the pendency of the case. To be clear: DPW is not a party to this action, nor was it a party in the *Johnson* litigation. The pending Petition for Original Action was filed in the Wisconsin Supreme Court less than one month ago—it was not pending in any court during the election. The moving parties rely on campaign statements by the judicial candidate to suggest it was "reasonably foreseeable" that this new case would be filed, but that is vastly different than an *actual pending case* in the court system that was set to be reviewed on appeal in *Caperton*. Nothing about DPW's contribution—its size, its timing, or otherwise—suggests it creates a risk of bias.

C. There is no evidence that Justice Protasiewicz has prejudged the issues presented in the Petition.

For the same reasons outlined in Section I, *supra,* demonstrating no violation of Wisconsin law or the Judicial Code, nothing about Candidate Protasiewicz's statements suggest that she has prejudged the issues in the case in violation of the Due Process Clause, either. Undeterred, the moving parties attempt to shoehorn those arguments into a *Caperton* due process claim. Nothing in *Caperton* suggests that its holding could be applied to statements made by a judicial candidate.

Caperton was premised solely on the "significant and disproportionate influence" of a single donor's campaign contributions. *See Caperton*, 556 U.S. at 884. Prior to *Caperton*, the United States Supreme

Court found only two situations where the Due Process Clause required disqualification—neither concerned a judicial candidate's speech. *See e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that a judge may not preside over a case in which he has a 'direct, personal, substantial, pecuniary interest"); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (holding that judges who are the targets of disgruntled criminal defendants may not preside over their criminal contempt proceedings). Given the repeated cautions in *Caperton* to limit its analysis to only "extreme facts" and "rare instances," *Caperton*, 868 U.S. at 887, 890, Justice Protasiewicz should not recuse herself on the moving parties' novel and expansive interpretations of *Caperton*.

III. The call for involuntary recusal based upon protected speech raises First Amendment concerns.

DPW's donations—donations that Candidate Protasiewicz did not solicit, *see* SCR 60.04(4)—were lawful campaign donations. *See* Wis. Stat. § 11.1104(5). DPW had the right to make them as a form of political speech protected by the First Amendment. *Citizens United*, 558 U.S. at 343; *accord Herrmann*, 2015 WI 84, ¶¶ 126-127 (Ziegler, J. concurring). Moreover, while nothing Candidate Protasiewicz said during her campaign suggests prejudgment, her statements also all fall squarely within the bounds of protected political speech under the First Amendment. It is indeed troubling that the moving parties appear to be seeking Justice Protasiewicz's recusal for her decision to engage in political speech that is protected under the First Amendment to the United States Constitution.

A judicial candidate's ability to speak freely on important legal and political issues has long been recognized. Since the 19th century, many States, not just Wisconsin, have provided for judicial elections, a

development consistent with Jacksonian democracy. *Republican Party of Minnesota v. White*, 536 U.S. 765, 785-86 (2002). Undergirding this proliferation of judicial elections in the states was the understanding that state judicial officials play a crucial role in state "representative government," wielding immense power to shape state common law and States' constitutions. *Id.* at 784. Throughout the 19th and early 20th century, "judicial candidates (including judges) [were] discussing disputed legal and political issues on the campaign trail." *Id.* at 786.

This remains true today. *See e.g., White*, 536 U.S. at 782 ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.") (citing *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). These First Amendment protections are at their "fullest and most robust application during a campaign for political office." *In re Jud. Disciplinary Proc. Against Gableman*, 2010 WI 62, ¶ 11, 325 Wis. 2d 631, 784 N.W.2d 631.[8] Yet, the moving parties fault Candidate Protasiewicz for criticizing the partisan nature of the *Johnson* maps and her disagreement with the *Johnson* court's approach. (Br. at 37-43) Such statements are clearly protected First Amendment political speech, and to punish such speech with involuntary recusal would be an improper infringement on Judge Protasiewicz's speech.

As described in Section I above, Candidate Protasiewicz's statements made during the campaign do not suggest prejudgment. Further, as political speech, they are well within the bounds of the First

[8] In that decision, a judicial candidate's campaign advertisement was rejected as a basis for discipline under the Judicial Code because, while "distasteful," it was found to be constitutionally protected campaign speech.

Amendment and do not suggest bias. As for Candidate Protasiewicz's comments concerning the *Johnson* maps themselves, there can really be no dispute that the maps contain an extreme partisan gerrymander. Voicing such an opinion was certainly "a matter of current public importance" on which Candidate Protasiewicz was permitted to "freely express" herself. *White*, 536 U.S. at 782. Indeed, the voters were entitled to hear such opinions. *See id.* ("[The United States Supreme Court has] never allowed the government to prohibit candidates from communicating relevant information to voters during an election.").

What's more, the idea that commenting on the gerrymander reflected in the maps imposed by the *Johnson* court somehow demonstrated bias for or against any party or outcome in this litigation is unfounded. Not only have courts rejected that "party membership" is an accurate proxy for a candidate's views; courts have further found that "the affiliation between a judge who is a member of a political party and other members of that political party is simply too diffuse to make it reasonable to assume that the judge will exhibit bias in favor of his fellow party members." *Siefert v. Alexander*, 608 F.3d 974, 983 (7th Cir. 2010). Candidate Protasiewicz's comments on the *Johnson* maps do not demonstrate bias requiring recusal.

The moving parties further raise issue with Candidate Protasiewicz voicing her agreement with the *Johnson I* dissent. In other words, they fault a judge, who was seeking a position for the highest court in the State, for having a legal opinion.

Expressing a legal opinion does not amount to bias. Indeed, as Justice Scalia wrote for the majority, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a

necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." *White*, 536 U.S. at 777. Indeed, "avoiding judicial preconceptions on legal issues is neither possible nor desirable." *Id.* at 782.

For Candidate Protasiewicz to not articulate her views on hot political topics of the day would "be not merely unusual, but extraordinary…. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

Candidate Protasiewicz had a constitutionally protected right to comment on issues of the day during her campaign, including the exceedingly unfair state legislative districts imposed by the *Johnson* court last year. She refrained from any promises of outcome in any case that could come before the Court, but rather spoke in favor of fairness and nonpartisan behavior by the Court. There is nothing that calls for recusal.

CONCLUSION

For the reasons set forth herein, the Recusal Motion should be denied.

Respectfully submitted this 29th day of August 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,340 words.

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