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SUPREME COURT

No. 2023AP001399-OA

IN THE SUPREME COURT OF WISCONSIN

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

Petitioners,

v.

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

Respondents.

SUPPLEMENTAL BRIEF 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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A judicial candidate might end most stump speeches with "Justice for Judy!" The First Amendment leaves her free to do so. But if she is elected and Judy's appeal comes before her, she'll face the question of recusal. So too here. The Judicial Commission declined to sanction Justice Protasiewicz's campaign statements that Wisconsin's electoral maps are "rigged" and "unfair." But the Court faces a different question: whether the U.S. Constitution's Due Process Clause and state law require Justice Protasiewicz's recusal from cases challenging those very maps. They do.

A. The Commission addressed Supreme Court Rule 60.06(3) as part of its power to monitor campaign speech. *See* Wis. Stat. § 757.85(1)(a). The First Amendment limits that power. The Commission's decision not to sanction the campaign speech was expressly guided by those limits, citing *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

The pending question of recusal concerns something different: assuring impartiality in the courtroom. The Commission had no occasion to consider the effect of that campaign conduct for these particular cases. The Commission had no occasion to address a sitting justice's obligation to administer justice "without fear or favor," *Williams-Yulee v. Florida Bar*, 575 U.S.

433, 438 (2015), as required by the Fourteenth Amendment and Wisconsin's judicial ethics law. Nor did it have any reason to consider the Wisconsin Democratic Party's contribution of nearly $10 million to Justice Protasiewicz's campaign. The petitions were not yet filed. The Commission's decision, in short, could not possibly have addressed "the specific circumstances presented by th[is] case." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

B. Since the Commission's decision, Petitioners have accepted Justice Protasiewicz's invitation to reconsider *Johnson*. They filed their petition one day after her investiture. The same week, internal operating procedures for original actions changed. *See* Supreme Court Internal Operating Procedures, https://perma.cc/4GMY-9MFQ. And this month, the Democratic Party—the expressly named beneficiary of Petitioners' claims—has committed another $4 million to ensure that Justice Protasiewicz hears this case. *Wisconsin Democrats pledge a $4 million-plus blitz to counter GOP on impeaching Protasiewicz*, Milwaukee Journal Sentinel (Sept. 6, 2023), https://perma.cc/E8LK-EQEL.

Campaign conduct has consequences for cases later coming before the Court. Justice Protasiewicz's pledge to recuse from the Democratic Party's

cases is itself an acknowledgement that campaign conduct may require recusal. And this Court has recognized that a judge's conduct may require recusal even if it does not warrant "disciplinary action." *See In re Disciplinary Proc. Against Ziegler*, 2008 WI 47, ¶¶2-7, 309 Wis. 2d 253, 750 N.W.2d 710 (per curiam). With these petitions now before this Court, against the backdrop of the campaign conduct, recusal is required given the "serious risk," "based on objective and reasonable perceptions," of "actual bias or prejudgment." *Caperton*, 556 U.S. at 884; *see* Wis. Stat. § 757.19(2)(f)-(g).

C. These cases present the very "issue[s]" and "controvers[ies]" on which Justice Protasiewicz made several "public statement[s] that commit[], or appear[] to commit," her to a particular outcome. SCR 60.04(4)(f). Justice Protasiewicz said the maps are "gerrymandered," "absolutely positively rigged," and no "rational person" thinks they "are fair." Recusal Br.27-33. As for revisiting *Johnson*, Justice Protasiewicz invited "the opportunity to have a fresh look at [the] maps," said she "agree[s] with" the *Johnson I* "dissent," and warned that "[p]recedent changes when things need to change to be fair." Recusal Br.7-10, 30.

Perhaps those statements were permissible on the campaign trail, as judged by the Judicial Commission, but Justice Protasiewicz cannot hear a case she has prejudged. When a case presents the very issues on which a judge opined during a campaign, "the potential for due process violations is grave and manifest" "because of the judge's personal interest in resolving an issue a certain way." *White*, 536 U.S. at 815-16 & n.3 (Ginsburg, J., dissenting); *accord Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-25 (1988). Here, Justice Protasiewicz's statements show that she has "prejudged the facts or the outcome of the dispute before her"; thus, she "cannot render a decision that comports with due process." *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005). Her campaign statements pose a "serious risk" of "actual bias [and] prejudgment" and so require recusal. *Caperton*, 556 U.S. at 884.

D. Other cases, cited by some Petitioners, do not present the same extraordinary circumstances. *League of Women Voters of Pennsylvania v. Commonwealth* involved only "a handful of comments," "distinct from a clear commitment to rule in a certain way." 179 A.3d 1080, 1084 (Pa. 2018). Similarly, in *Harper v. Hall*, 867 S.E.2d 326 (N.C. 2022), the disputed campaign statement—that "partisan gerrymandered districts do not serve our

democracy"—was an isolated, general comment. *See* Motion for Recusal of Justice Anita S. Earls 9-10, *Harper*, 867 S.E.2d 326 (No.413P21). The statements here were repeated and unequivocal. Recusal Br.7-10, 27-33.

As to expenditures—an issue the Commission did not consider—the Democratic Party contributed "roughly 13% of [the Justice's] overall total committee spending" in *Harper*. 867 S.E.2d at 331. Here, the Democratic Party contributed $10 million, or nearly 60% of the candidate committee's campaign expenditures, and it will now spend another $4 million—multiple times the contribution in *Caperton*. Recusal Br.22-23. Justice Protasiewicz's commitment to recuse from the Democratic Party's cases must extend here, too. *Id.* at 24-25. "A fundamental principle of our democracy is that judges must be perceived as beyond price." *State v. Herrmann*, 2015 WI 84, ¶40, 364 Wis. 2d 336, 867 N.W.2d 772 (Ann Walsh Bradley, J.).

* * *

This Court already has a "difficult relationship" with recusal, especially "in the context of the appearance of bias." *Id.* ¶42; *see State v. Allen*, 2010 WI 10, ¶89, 322 Wis. 2d 372, 778 N.W.2d 863 (Abrahamson, C.J.) (colleagues dismissive of *Caperton* "just don't seem to get it"). The failure to

recuse here will worsen it. These "specific circumstances" are rife with "objective risk of actual bias." *Caperton*, 556 U.S. at 881, 886. The Fourteenth Amendment and Wisconsin's judicial ethics law demand recusal.

Dated this 18th day of September, 2023.

Respectfully submitted,

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CERTIFICATION REGARDING LENGTH AND FORM

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) and §809.81(4), as modified by the Order of this Court. Excluding the portions of this brief that may be excluded, the length of this brief is 995 words as calculated by Microsoft Word.

Dated this 18th day of September, 2023

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