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IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1412-OA

STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY,
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; AND MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION,
Respondents.

RESPONSE TO MOTION TO RECUSE BY PROPOSED INTERVENOR-RESPONDENT THE WISCONSIN LEGISLATURE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Wisconsin Legislature has moved to recuse Justice Janet C. Protasiewicz from this original-action proceeding based on reported campaign contributions by the Democratic Party of Wisconsin and several statements the Justice reportedly made during her campaign. But federal due-process precedents and state law erect an intentionally high bar for recusal—an extraordinary remedy that courts have reserved for the most extreme facts. This case does not meet those strict standards.

BACKGROUND

During the post-2010 redistricting cycle, Wisconsin's Republican-controlled Legislature passed, and its Republican Governor signed, one of the most extreme partisan gerrymanders in American history. According to the three-judge federal district court that reviewed those maps, the 2011 legislative plans were "highly successful" in their efforts "to achieve a substantial, if not maximal, partisan advantage." *Whitford v. Gill*, 218 F. Supp. 3d 837, 923 (W.D. Wis. 2016) (three-judge court), *vacated on other grounds and remanded*, 138 S. Ct. 1916 (2018). A decade later, after taking original jurisdiction of a malapportionment action following a legislative impasse in redistricting, this Court ordered into place senate and assembly maps drawn by the Legislature. *See Johnson v. Wis. Elections Comm'n*,

2022 WI 19, ¶ 73, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*). Those maps, which remain in place today, were based on a "least change" approach to the 2011 legislative plans and created even greater partisan skew in favor of Republicans.

After the conclusion of that action, when Justice Patience Drake Roggensack announced that she would not seek reelection in 2023, now-Justice Protasiewicz joined the race for that open seat. The judicial election resulted in heavy spending on behalf of both candidates. According to one estimate, "more than $56 million" was spent by the candidates and the groups supporting them, though "it's likely the final tab was significantly higher."[1] The Democratic Party of Wisconsin reportedly spent about $10 million.[2] During the campaign, Justice Protasiewicz, like other candidates, participated in debates and interviews, during which she was asked about and therefore commented on a number of issues, including the issue of the State's legislative maps. With respect to the maps, Justice Protasiewicz explained she could not say "[w]hat [she] would do on a particular case," but she could talk about her "values."[3] And she pledged not to allow outside

[1] *WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race* (July 19, 2023) (Memo App. 076).
[2] *Id.* (Memo App. 077).
[3] Zac Schultz, *Candidates Tangle Over Political Issues, Judicial Perspectives at First 2023 Wisconsin Supreme Court Forum*, Wis. PBS (Jan. 10, 2023) (Memo App. 016).

funding to influence her consideration of any case, including by recusing from any case in which the Democratic Party of Wisconsin is a petitioner or respondent. Justice Protasiewicz won the election by 11 points.

On August 4, 2023, Petitioners petitioned to commence an original action to review the gerrymandered maps adopted by this Court in 2022. Petitioners are not officers or employees of the Democratic Party of Wisconsin. They include some of Wisconsin's leading professors and research scientists in mathematics, statistics, and computer science. *See* Pet. ¶ 3. Though Petitioners allege they are injured by the current maps because their votes for Democratic candidates are unlawfully diluted, *see id.* ¶¶ 2, 6, 8, 10, 12, 14, 16, 18, Petitioners' aim is to ensure "*fair maps*" that "would allow Wisconsin's voters, *Democratic and Republican alike*, to translate their voting strength into representation." *Id.* ¶ 51 (emphasis added).

On August 22, the Wisconsin Legislature moved to intervene in this proceeding and simultaneously moved to recuse Justice Protasiewicz. Petitioners file this response pursuant to the August 23 Order inviting parties to respond to that recusal motion. *See Wright v. Wis. Elections Comm'n*, No. 2023AP1412-OA (Wis. Aug. 23, 2023) (Order of Protasiewicz, J.).

ARGUMENT

I. Federal Constitutional Due Process Does Not Require Recusal.

The Legislature argues that recusal is required because certain campaign contributions and statements from the campaign trail give rise to judicial bias and prejudgment that violate federal constitutional due-process guarantees. But the constitutional standard for recusal is extraordinarily high and is not met here.

A. The Alleged Campaign Contributions Do Not Give Rise to a Constitutionally Intolerable Probability of Actual Bias.

Courts must consider recusal against a backdrop that is critical to the functioning of our government: the "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also*, *e.g.*, *State v. Herrmann*, 2015 WI 84, ¶ 24, 364 Wis. 2d 336, 867 N.W.2d 772. The United States Supreme Court has been clear that mere allegations of bias or prejudgment rarely implicate due process. *See*, *e.g.*, *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (recognizing the "constitutional floor" that operates in this context). Indeed, the "traditional common-law rule was that disqualification for bias or prejudice was not permitted" at all. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986).

The U.S. Supreme Court has thus found a due-process violation stemming from allegations of judicial bias only in the most "exceptional" and "extreme" circumstances. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884, 886 (2009). Prior to *Caperton*, these circumstances were limited to (1) certain cases where the "judge had a financial interest in the outcome of a case" and (2) certain cases arising in the "criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding." *Id.* at 877, 880. Those tests have been found met, for example, in a case where the judge's salary was based on the fines he could assess in office, *see, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 520 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); or where the judge cast the deciding vote in a case while serving as the lead plaintiff in a nearly identical case for money damages, *see Aetna Life*, 475 U.S. at 823–24; or where the judge, a former district attorney, had a "direct, personal role in the defendant's prosecution," *Williams v. Pennsylvania*, 579 U.S. 1, 10 (2016).

The Legislature's allegations regarding Justice Protasiewicz's reported campaign contributions and policy statements come nowhere close to satisfying these standards, as courts across the country have repeatedly recognized by rejecting recusal motions in similar redistricting challenges.

For example, a Justice of the Pennsylvania Supreme Court denied a recusal motion in a redistricting case based on the Justice's "position regarding the 2011 Plan" and statements that "gerrymandering is an absolute abomination," "a travesty," "insane," and "deeply wrong," explaining that such statements do not give rise to a due-process problem under existing U.S. Supreme Court precedent. *League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080, 1084, 1092 (Pa. 2018).

Similarly, a Justice of the North Carolina Supreme Court denied a recusal motion premised on the allegation that her "campaign for election to the Court was financially supported by the North Carolina Democratic Party," and "in various speeches or public statements before becoming a Justice [she] made statements expressing views about redistricting." *Harper v. Hall*, 867 S.E.2d 326, 329–30 (N.C. 2022). With respect to the constitutional due-process challenge, the Justice reasoned that the "entities contributing to my . . . campaign are not parties to this lawsuit," and that "in North Carolina, it is common for political parties to contribute to judicial campaigns." *Id.* at 331. Another Justice of the North Carolina Supreme Court declined to recuse even though his father was a named defendant and his father's district was among the challenged districts. *See Harper v. Hall*, 867 S.E.2d 320, 321 (N.C. 2022). And a third Justice of that court denied a

recusal motion that alleged bias because the Justice would be up for reelection later the same year. *See Harper v. Hall*, 867 S.E.2d 322, 326 (N.C. 2022). Moreover, the North Carolina Supreme Court twice denied motions to recuse a Justice in a post-2010 redistricting challenge based on allegations that the Republican State Leadership Committee, the Justice's largest contributor, had a significant stake in the outcome of the case. *See Dickson v. Rucho*, 749 S.E.2d 897 (N.C. 2013); *Dickson v. Rucho*, 735 S.E.2d 193 (N.C. 2012).

Ignoring this directly on-point precedent, the Legislature relies almost entirely on the U.S. Supreme Court's fact-bound decision in *Caperton*. There, the Court found a "serious risk of actual bias" where the CEO of a company "with a personal stake in a particular case" sought to overturn a significant jury award and had a "significant and disproportionate influence in placing the judge on th[at] case" during its pendency. 556 U.S. at 884. To reach that conclusion, the Court relied on a perfect storm of factual irregularities. This case, like other redistricting cases where recusal has been denied, differs from *Caperton* in several fundamental respects.

First, in *Caperton*, the source of the campaign contributions was the president and CEO of a corporation seeking to reverse a $50 million jury

verdict against it. Here, the source of the contributions is the Democratic Party of Wisconsin, which is not a party to this litigation. Moreover, the risk of intolerable bias is far higher where the source of the contributions is a single high-ranking executive of a single corporation that has been directly financially harmed by a specific case under review than it is when the source of the contributions is a diffuse political-party organization that aggregates thousands of contributions from individual donors who coalesce around a broad range of public-policy concerns.

In any event, campaign contributions to a judge, standing alone, have never been enough to warrant recusal under the Federal Constitution. Were it otherwise, courts would invite a "flood of postelection recusal motions," "'erode public confidence in judicial impartiality[,]' and thereby exacerbate the very appearance problem the State is trying to solve." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454–55 (2015) (quoting *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting)); *see also* Wis. SCR 60.04(7) ("A judge shall not be required to recuse himself or herself in a proceeding based solely on . . . 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.").

Second, the timing here is not analogous to *Caperton*. In *Caperton*, the CEO began funding the judicial candidate *after* the jury had rendered the $50 million verdict against his company—and did so "[k]nowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case." 556 U.S. at 873. By contrast, this case was not pending during the campaign. And even assuming this case could be considered "imminent" for *Caperton* purposes, *see id.* at 884, any risk of bias is greatly reduced by the fact that this suit has been filed independently by Petitioners who are not the entity that contributed the funds in question and are not officers or employees of that entity.

Third, even were contributions by an unrelated non-litigant relevant, 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" are far less extreme here than in *Caperton*. 556 U.S. at 884. The Legislature attempts to draw a parallel by comparing in a vacuum the absolute dollar figures of the challenged contributions. *See, e.g.*, Memo at 21. But *Caperton* makes clear that this is the wrong inquiry: The contribution must be assessed based on its "relative size," to understand its "apparent effect." 556 U.S. at 884. The Wisconsin Democratic Party spent $10 million of the

$56 million (or more) reportedly spent in the most expensive judicial election in American history—not a comparably low-profile race from twenty years ago.

In light of these differences, the Legislature cannot establish recusal under *Caperton*. The *Caperton* Court emphasized that it was an "exceptional case" with "extreme facts." *Id.* at 884, 886–87. Indeed, the Court stated that it was unaware of any other case posing similar concerns, and that "[a]pplication of the constitutional standard implicated in this case will . . . be confined to rare instances." *Id.* at 887, 890. In a dissent joined by Justices Scalia, Thomas, and Alito, Chief Justice Roberts found the fact pattern so "extreme" that *Caperton* would exemplify "the legal aphorism: 'Hard cases make bad law.'" *Id.* at 899 (Roberts, C.J., dissenting).

This Court, too, has repeatedly recognized that *Caperton* "is based on extraordinary and extreme facts." *State v. Henley*, 2011 WI 67 ¶ 33, 338 Wis. 2d 610, 802 N.W.2d 175; *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 24, 392 Wis. 2d 49, 944 N.W.2d 542 (similar); *Herrmann*, 2015 WI 84, ¶ 36 (similar); *see also Cnty. of Dane v. Pub. Serv. Comm'n of Wis.*, 2022 WI 61, ¶ 97, 403 Wis. 2d 306, 976 N.W.2d 790 (Hagedorn, J., concurring) (the "constitutional standard underlying a *Caperton* due process claim is extraordinarily high" and requires "serious risk of bias so extreme and unusual that it occurs …

in only the rarest of circumstances"); *B.J.M.*, 2020 WI 56, ¶ 116 (Hagedorn, J., dissenting) ("*Caperton* opened the door to constitutional claims alleging something less than actual bias," but the "opening was more crevice than canyon").

Indeed, the Legislature has not cited a single case from this Court requiring recusal as a matter of due process under *Caperton*.[4] As this Court has warned, "were *Caperton* expanded[,] … a party could attempt to affect the outcome of his case by filing disqualification motions against certain justices and not against other justices." *Henley*, 2011 WI 67, ¶ 35; *see also State v. Allen*, 2010 WI 10, ¶ 269, 322 Wis. 2d 372, 778 N.W.2d 863 (Ziegler, J., concurring). To keep *Caperton* within its appropriately narrow limits, the recusal motion should be denied.

[4] The only such case appears to be *B.J.M.*, which the Legislature does not even cite. That case involved "extreme facts" and is readily distinguishable. 2020 WI 56, ¶ 35. There, a circuit-court judge "accepted a Facebook 'friend request'" from a litigant "after a contested hearing, but before rendering a decision"; the litigant "'liked' 16 of the judge's Facebook posts, 'loved' two of his posts, commented on two of his posts, and 'shared' and 'liked' several third-party posts related to an issue that was contested at the hearing"; the judge "never disclosed the Facebook friendship or the communications"; and the judge "ultimately ruled entirely in the [litigant's] favor." *Id.* ¶ 2.

In finding an intolerable risk of bias, the Court relied on several considerations, including: (1) "that Judge Bitney took the *affirmative* step of accepting [the litigant's] 'friend request,'" which gave him "access to off-the-record facts that were relevant to the dispute" and "caused an improper asymmetry of access"; (2) the "context and nature of the pending litigation," especially the fact that Judge Bitney "was the sole factfinder regarding the character and parental fitness" of the litigants; and (3) Judge Bitney's "lack of disclosure, at any point, in any way or form," of his relationship with the litigant. *Id.* ¶¶ 27, 30, 33. None of these factors appears in this case.

B. The Alleged Statements Do Not Evince Prejudgment.

The Legislature's suggestions of prejudgment also fail. The Legislature cites a handful of statements reportedly made by Justice Protasiewicz on the campaign trail. *See* Memo at 14, 25–32. But the U.S. Supreme Court has held that candidates for judicial office are entitled to speak on "disputed legal and political issues." *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). Indeed, Justice Kennedy, the author of *Caperton*, made clear that what States "may not do . . . is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer." *Id.* at 794 (Kennedy, J., concurring).

In any event, the comments alleged here do not evince prejudgment. As Justice Protasiewicz explained at the time, her statements reflect her "values," not a commitment to vote a particular way in a particular case—and certainly not a fixed view on the justiciability, merits, and remedial questions in this case. Such value statements on matters of public concern are par for the course in a judicial election. "Quite obviously," the "'disputed legal or political issues' raised in the course of a state judicial campaign … will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts." *Id.*

at 772 (majority opinion). In Wisconsin, that includes the status of senate and assembly maps that have been the subject of iterative litigation.

What's more, even assuming that the alleged statements could be understood to suggest any predisposition on issues related to this case, that, too, would not pose a due-process problem. "[A] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice." *Id.* at 777. For good reason. "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) (mem. op.). "Before they arrive on the bench (whether by election or otherwise)[,] judges have often committed themselves on legal issues that they must later rule upon," as when they "confront[] a legal issue on which [they have] expressed an opinion while on the bench." *White*, 536 U.S. at 779. Thus, the U.S. Supreme Court has explained, "[w]e doubt[] … that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion." *Id.* at 780–81.

Given this clear precedent, the Legislature cannot rely on Justice Protasiewicz's isolated campaign statements to clear the high bar for a due-process violation.

II. Wisconsin's Ethics Laws Do Not Require Recusal.

Nor do Wisconsin ethics laws require recusal. The Legislature points to provisions of the ethics statute providing that a judge must disqualify herself either when she has a "significant financial or personal interest in the outcome of the matter" or when she "determines that, for any reason, … she cannot, or it appears … she cannot, act in an impartial manner," Wis. Stat. § 757.19(2)(f), (g), as well as to Wisconsin Supreme Court Rules. As the Legislature acknowledges, *see* Memo at 38, these inquiries dovetail with the due-process analysis above. For similar reasons, neither test is met here.

A. There Is No Suggestion of a Significant Personal Interest.

The Legislature claims that Justice Protasiewicz must recuse under § 757.19(2)(f) due to a "significant … personal interest in the outcome of the matter." The Legislature points to statements reportedly made by Justice Protasiewicz that she would take "a fresh look at [the] maps." Memo at 45. It attempts to cast those statements as "tantamount to campaign promises,"

creating a personal "interest in keeping her word and preserving her reputation among voters by invaliding the maps." *Id.* at 44.

These facts do not meet the strict standard to show a disqualifying "personal interest." Under Wisconsin law, like federal law, the party seeking recusal must overcome a "presum[ption] that the judge [i]s unbiased." *State v. Pinno*, 2014 WI 74, ¶ 92, 356 Wis. 2d 106, 850 N.W.2d 207. As the Legislature concedes, the personal interest must be "substantial" rather than "remote." Memo at 44 (quoting *Goodman v. Wis. Elec. Power Co.*, 248 Wis. 52, 58, 20 N.W.2d 553 (1945)); *see also Goodman*, 248 Wis. at 58 (stating that the interest must be "direct, real and certain," and not "merely indirect, or incidental, or remote, or contingent, or possible" (citation omitted)). Under that strict standard, Wisconsin courts have been loath to find disqualification. *See Storms v. Action Wisconsin Inc.*, 2008 WI 110, ¶ 16, 314 Wis. 2d 510, 754 N.W.2d 480 ("[i]n the present case, as in the … prior cases," considering and rejecting claims of bias "without the need for further briefing"). Indeed, the Legislature has not cited a single case finding the test satisfied. This case should not break new ground.

B. The Record Does Not Establish Partiality.

Finally, the record does not suggest that Justice Protasiewicz "cannot" or "it appears … she cannot, act in an impartial manner" under the

ethics statute, Wis. Stat. § 757.19(2)(g), or under Supreme Court Rule 60, *see* Wis. SCR 60.04(4) ("[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.").

By statute, this test is subjective and strict. 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." *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989). Wisconsin "does not require disqualification … in a situation in which the judge's impartiality 'can reasonably be questioned' by someone other than the judge." *Id.* As this Court has put it: "To imply that the judges or justices of this state are not able to make such a determination [about their own recusal] honestly, openly and fairly is a great disservice to the quality men and women who serve this state in a judicial capacity." *State v. Harrell*, 199 Wis. 2d 654, 665, 546 N.W.2d 115 (1996). The Legislature has not identified a single case requiring recusal under this test, either.

And the record here reveals no disqualifying partiality. As the Legislature's own cited cases make clear, the statute and Rule 60.04 *permit*

"[j]udges and candidates for judicial office [to] announce their views on political and legal issues"—the line is crossed only by "pledges or promises to decide cases in a certain way." *Storms*, 2008 WI 110, ¶ 21 (quotation marks omitted) (Justice's recusal not required by campaign contributions from defendant's attorney and its board members, attendance at defendant's fundraiser, or reelection endorsement by defendant's attorney).

The record here is devoid of any such pledges or promises. By the Legislature's own lights, its complaint focuses on Justice Protasiewicz's statements about "this Court's past precedent." Memo at 41. But, as discussed, expressing views about past cases does not evince bias regarding, or prejudgment of, a new action any more than a judge's or justice's opinion in a past case suggests that he or she has prejudged a future one.

CONCLUSION

For the foregoing reasons, the motion to recuse should be denied.

Dated: August 29, 2023

Respectfully submitted,

Electronically signed by Sarah A. Zylstra

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