IN THE SUPREME COURT OF WISCONSIN

No. 2021AP1450-OA

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN,

Petitioners,

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, CONGRESSMAN GLENN GROTHMAN, CONGRESSMAN MIKE GALLAGHER, CONGRESSMAN BRYAN STEIL, CONGRESSMAN TOM TIFFANY, CONGRESSMAN SCOTT FITZGERALD, LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, KATHLEEN QUALHEIM, GARY KRENZ, SARAH J. HAMILTON, STEPHEN JOSEPH WRIGHT, JEAN-LUC THIFFEAULT, AND SOMESH JHA

Intervenors-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, DON MILLIS, ANN JACOBS, CARRIE RIEPL, ROBERT F. SPINDELL, JR., AND MARK L. THOMSEN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION,

Respondents,

THE WISCONSIN LEGISLATURE; GOVERNOR TONY EVERS, IN HIS OFFICIAL CAPACITY, AND DIANE HESSELBEIN, SENATE DEMOCRATIC MINORITY LEADER, ON BEHALF OF THE SENATE DEMOCRATIC CAUCUS,

Intervenors-Respondents.

CITIZEN MATHEMATICIANS AND SCIENTISTS' RESPONSE TO MOTION FOR RECUSAL

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INTRODUCTION

The Wisconsin Legislature and its allies once again move to recuse Justice Janet C. Protasiewicz 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, like *Clarke v. Wisconsin Elections Commission*, does not meet those strict standards. The motion should be denied.

BACKGROUND

1. 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. A decade later, following a legislative impasse, this Court adopted a new congressional map and a new state legislative map. *See Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶52, 400 Wis. 2d 626, 971 N.W.2d 402 (*Johnson II*) (congressional map), *summarily rev'd on other grounds*, *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022); *Johnson v. Wis. Elections Comm'n*, 2022 WI 19, ¶73, 401 Wis. 2d 198, 972 N.W.2d 559 (*Johnson III*) (state legislative maps). Both the congressional and state legislative maps were based on a "least-change" approach from the 2011 plans. *See Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶81, 399 Wis. 2d 623, 967 N.W.2d 469 (*Johnson I*).

2. After judgment was entered in this case, 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 all sides. 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 ("DPW") 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 commented on a number of issues, including the issue of the State's legislative and congressional maps. With respect to the maps, Justice Protasiewicz explained she could not say "what [she] would do on a particular case," but she could talk about her "values."[3] And she pledged not to allow outside funding to influence her consideration of any case, including by recusing from any case in which DPW is a petitioner or respondent. Justice Protasiewicz won the election by 11 percentage points.

3. In August 2023, a group of voters commenced an original action in this Court to review the state legislative maps adopted in *Johnson III*. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶7, 998 N.W.2d 370. The Wisconsin Legislature moved to intervene in that proceeding and simultaneously moved to recuse Justice Protasiewicz. After ordering responsive briefing from the other parties, Justice Protasiewicz denied the recusal motion and issued a thorough decision comprehensively addressing the Legislature's arguments. *See Clarke v. Wis. Elections Comm'n*, 2023 WI 66, 995 N.W.2d 735 (Protasiewicz, J.). The Court then granted the petition to commence an original action in part and, on December 22, 2023, issued a merits decision holding that the state legislative maps adopted in 2022

[1] *WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race*, WisPolitics (July 19, 2023) (Movants App. 093–94).
[2] *Id.* (Movants App. 094).
[3] Editorial, *Judicial Ethics at Work in Wisconsin*, Wall St. J. (Aug. 2, 2023) (Movants App. 125).

violated the Wisconsin Constitution's contiguity requirements. *Id.* ¶34. As relevant here, the Court also "overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate[d] a least change approach." 2023 WI 79, ¶63.

4. Three weeks later, the Hunter Intervenors-Petitioners filed a motion for relief from judgment in this case, seeking to reopen the Court's judgment in *Johnson II*. *See* Hunter Intervenors-Petitioners' Mot. for Relief from Judgment. They argued that the congressional map adopted in *Johnson II* "lacks any basis in Wisconsin redistricting law or precedent" because the "'least change' approach that justified the map's adoption" had been "overruled." *Id.* at 8. The Wisconsin Legislature, the Johnson Petitioners, and the Intervenors-Petitioners Congressmen (collectively, "Movants") then moved to recuse Justice Protasiewicz, presenting arguments nearly identical to the arguments previously raised and rejected in *Clarke*. Intervenors-Petitioners Citizen Mathematicians and Scientists file this response to the recusal motion.

ARGUMENT

Neither the Federal Constitution nor Wisconsin ethics laws require Justice Protasiewicz to recuse.

I. Federal Constitutional Due Process Does Not Require Recusal.

Movants argue that due process requires Justice Protasiewicz's recusal because DPW's financial contributions to the Justice's election campaign create a serious risk of actual bias and because certain statements she made during her campaign purportedly show that she has prejudged this case. Mot. at 21–42. But neither the campaign contributions nor the campaign statements satisfy the extraordinarily high constitutional standard for recusal on due-process grounds.

A. The DPW's 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).

As a result, the U.S. Supreme Court has 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, 887 (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); 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).

Movants' allegations regarding Justice Protasiewicz come nowhere close to satisfying these standards. They rely almost entirely on the U.S. Supreme Court's fact-bound decision in *Caperton*. *See* Mot. at 34–42. 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. *Caperton*, 556 U.S. at 884. As Justice Protasiewicz explained in denying the recusal motion in *Clarke*, *Caperton* is a cabined decision that bears no resemblance to the circumstances here. 2023 WI 66, ¶¶12–15, 31–47 (Protasiewicz, J.). That is true for three primary reasons.

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 DPW, which is not a party to this litigation. *See Clarke*, 2023 WI 66, ¶37 (Protasiewicz, J.). Moreover, the risk of intolerable bias is far higher where the source of financial contributions is a single high-ranking executive of a single corporation that has been directly financially harmed by a specific case under review, as was the case in *Caperton*, than 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 Clarke*, 2023 WI 66, ¶10 n.11 (Protasiewicz, J.) (noting that "cases involving campaign contributions from a political party are an especially weak fit" for extension of *Caperton* because "many states have partisan judicial elections, and it has not been suggested that party-backed judges must recuse from all cases where the outcome could matter to their party").

Movants' contrary position boils down to the view that a Justice must recuse any time a case "sufficiently implicate[s] the Democratic Party of Wisconsin." Mot. at 41. But if the attenuated connection to the Democratic Party at issue here suffices to require recusal, then Wisconsin Justices would have to "recuse whenever their involvement in a case might somehow indirectly benefit groups that provided substantial support for their campaigns." *Clarke*, 2023 WI 66, ¶40 (Protasiewicz, J.). If that were the rule, litigants would "seek recusal of 'conservative' or 'liberal' justices whenever a case involved issues of great social, political, or commercial importance to any major campaign funder," and the Wisconsin Supreme Court would "grind to [a] halt." *Id.* ¶¶40–41.

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 but before the case had concluded—and he 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 or imminent" during the campaign. *Id.* at 884. It had already concluded, and *Clarke* had not even begun.

Movants argue that it was "'reasonably foreseeable' that [Justice Protasiewicz's] election would lead to a new challenge to Wisconsin's congressional districts." Mot. at 40 (citation omitted). But Justice Protasiewicz had no way of knowing that *Clarke* would adopt a holding regarding "least change" that bears on this case; nor that this holding would in turn prompt a motion for relief from judgment by the Hunter Intervenors-Petitioners. Even assuming this chain of events could be considered "imminent" for *Caperton* purposes, 556 U.S. at 884, any risk of bias is greatly reduced by the fact that the motion for relief from judgment in this case has been filed by individuals who are not the entity that contributed the funds in question nor officers or employees of that entity.

Third, even if contributions by an unrelated non-litigant were somehow relevant, here 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 not comparable to *Caperton*. *Id.* In *Caperton*, the CEO contributed $3 million to the judge's campaign, which was 300% more than the total amount contributed by all the judge's other supporters and $1 million more than the total amount spent by the campaign committees of both candidates combined. *Id.*

In this case, by contrast, DPW's contribution was about a third of Justice Protasiewicz's campaign's total spending and less than a fifth of all candidate spending in the race. *See Clarke*, 2023 WI 66, ¶44 (Protasiewicz, J.). Unlike *Caperton*, DPW's contribution did not exceed the spending of Justice Protasiewicz's campaign committee; rather, DPW's contribution here was equal to about 57% of campaign-committee spending—comparable to the relative size of contributions by political parties in other Justices'

campaigns. *Id.* ¶43. And while the judge in *Caperton* won by fewer than 50,000 votes, 556 U.S. at 885, Justice Protasiewicz defeated Justice Kelly by 11 percentage points and more than 200,000 votes, *Clarke*, 2023 WI 66, ¶45 (Protasiewicz, J.).

Movants ignore these inconvenient facts by comparing in a vacuum the absolute dollar figures of the challenged contributions here and in *Caperton*. *See, e.g.*, Mot. at 38. But that is the incorrect inquiry. Rather, the contribution must be assessed based on its "relative size" to understand its "apparent effect." *Caperton*, 556 U.S. at 884. Here, DPW's contribution was a fraction of Justice Protasiewicz's campaign-committee spending—not multiple times the campaign committee's spending as in *Caperton*. *See id.* And as Justice Protasiewicz concluded, 2023 WI 66, ¶¶48–51 (Protasiewicz, J.), DPW's contribution was also far less significant than contributions found by other Justices not to require recusal. *See State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49 (Prosser, J.) (concluding that recusal was not required where the contribution in question was nearly *eight times* the amount spent by his campaign committee).

Given these critical distinctions, the standard for recusal under *Caperton* plainly is not met.[4] The U.S. Supreme Court emphasized that *Caperton* was an "exceptional case" with "extreme facts," stated that it was

[4] Indeed, Movants do not even acknowledge the directly on-point precedent from other states rejecting recusal motions in redistricting challenges. *See, e.g.*, *Harper v. Hall*, 867 S.E.2d 326, 329–31 (N.C. 2022) (Earls, J.) (denying a recusal motion premised on allegation that Justice's "campaign for election to the Court was financially supported by the North Carolina Democratic Party" because the "entities contributing to [the Justice's] … campaign [were] not parties to [the] lawsuit"); *Dickson v. Rucho*, 749 S.E.2d 897, 897 (N.C. 2013) (mem.) (denying motion to recuse a Justice based on allegations that the Republican State Leadership Committee, the Justice's largest contributor, had a significant stake in the case's outcome); *Dickson v. Rucho*, 735 S.E.2d 193, 425 (N.C. 2012) (mem.) (same).

unaware of any other case posing similar concerns, and cautioned that "[a]pplication of the constitutional standard implicated in this case will … be confined to rare instances." *Caperton*, 556 U.S. at 884, 886–87, 890. This Court, too, has confirmed repeatedly 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; *see 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, ¶¶36–37 (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"). Given the numerous factual distinctions between this case and *Caperton*, the Court should adhere to precedent and deny the recusal motion.

B. The Alleged Statements Do Not Evince Prejudgment.

Movants also argue that certain statements Justice Protasiewicz made on the campaign trail prove that she has prejudged this case and therefore must recuse. Mot. at 23–34. The statements are essentially the same ones Justice Protasiewicz already addressed in *Clarke*. Moreover, only one of these statements even touches on Justice Protasiewicz's views on Wisconsin's congressional maps—the rest relate to her views on the state's legislative maps, which are not the subject of the motion for relief from judgment. *See* Mot. at 4. And, as Justice Protasiewicz explained, the Wisconsin Judicial Commission has already rejected "claims that [her]

campaign statements undermined the integrity and independence of the judiciary; demonstrated bias or prejudice; or committed [her] to a decision on a case, controversy, or issue that was likely to come before [her]." *Clarke*, 2023 WI 66, ¶76 (Protasiewicz, J.).

Movants mischaracterize Justice Protasiewicz's statements as promises to decide a particular case a certain way, *see* Mot. at 27, but they are in fact merely statements of Justice Protasiewicz's views on "disputed legal and political issues," which the U.S. Supreme Court has clearly held candidates for judicial office are entitled to make. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002); *see also Cement Inst.*, 333 U.S. at 702–03 ("[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.").

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 merits in this case in this procedural posture, particularly since all but one of the statements do not even implicate Justice Protasiewicz's views on the congressional map. *Clarke*, 2023 WI 66, ¶61 (Protasiewicz, J.). Moreover, Movants cherry-pick snippets of Justice Protasiewicz's statements, ignoring that she repeatedly "stressed" that she would "set aside [her] opinions and decide cases based on the law." *Id.* In any event, such value statements on matters of public concern are always part of a judicial election. "Quite obviously," the "'disputed legal or political issues' raised in the course of a state judicial election … 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."

White, 536 U.S. at 772 (majority opinion). In Wisconsin, that includes redistricting, which has been the subject of iterative litigation.

Movants also suggest that, uniquely in the redistricting context, statements of the Justice's "values" amount to prejudgments because there are no standards for judging whether an electoral map has too much partisanship. *See* Mot. at 30–31 (citing *Johnson I*, 2021 WI 87, ¶52). But Hunter Intervenors-Petitioners base their motion for relief from judgment on this Court's December 22 holding in *Clarke* that judicial neutrality requires the Court to select maps that minimize *partisan impact*—a remedial question distinct from merits questions presented by partisan-gerrymandering claims. 2023 WI 79, ¶70. There are certainly standards for evaluating the partisan impact of electoral maps. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 470 (Pa.) (discussing the "numerous metrics [that] have been developed to allow for objective evaluation of proposed districting plans to determine their partisan fairness"), *cert. denied*, 143 S. Ct. 102 (2022). The suggestion that "values" alone could suffice to resolve the Hunter Intervenors-Petitioners' motion and any subsequent proceedings in this case misunderstands the legal doctrines and standards involved.

The fact that this case predated Justice Protasiewicz's campaign statements (unlike in *Clarke*) does not change any of this analysis. In *Clarke*, the dispositive fact was that the Justice's statements reflected values and views on political issues rather than pledges or promises about how to adjudicate specific claims. That remains the case here. And the key event triggering Hunter Intervenors-Petitioners' motion for relief from judgment—this Court's December 22 decision overruling *Johnson*'s least-

change holding—had not yet occurred during the campaign, so the issues presented in the motion for relief from judgment had not yet been raised.

Even if the alleged statements could be understood to suggest predisposition on the issues in this case, that does not mean there is 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." *White*, 536 U.S. at 777. Indeed, "[p]roof 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.). "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," just as when they "confront[] a legal issue on which [they have] expressed an opinion while on the bench." *White*, 536 U.S. at 779.

Indeed, as Justice Protasiewicz noted in *Clarke*, "[m]any current justices on the Wisconsin Supreme Court have written opinions expressing strong views on the legality of the current … maps." 2023 WI 66, ¶68 (Protasiewicz, J.). "[I]f prejudgment is the concern, [these] opinions are just as relevant as … campaign remarks." *Id.*; *see also White*, 536 U.S. at 780–81 ("[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."). As Justice Protasiewicz put it, "[i]f issuing an opinion does not disqualify a judge from hearing future cases that involve similar issues, then neither does expressing agreement with an opinion or describing [one's] values about political issues." *Clarke*, 2023 WI 66, ¶69 (Protasiewicz, J.).

Precedents from other states in the redistricting context again confirm this reasoning and further foreclose Movants' argument. 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 did 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) (Wecht, J.) (internal quotation marks omitted). He explained that "express[ing] thoughts" on gerrymandering and the state's maps was "manifestly distinct from [making] a clear commitment to rule in a certain way if presented with a specific challenge based upon a well-developed factual record and the benefit of full and fair advocacy." *Id.* at 1084. And in North Carolina, a Justice similarly denied a recusal motion accusing her of bias based on "statements expressing views about redistricting" in "various speeches or public statements before becoming a Justice." *Harper v. Hall*, 867 S.E.2d 326, 329–30 (N.C. 2022) (Earls, J.).

Finally, to the extent Movants rely on *Caperton* to make a prejudgment argument, *see* Mot. at 28, 33–34, the attempt to import that case into an inapposite context should be rejected. As Justice Protasiewicz observed in *Clarke*, *Caperton* is not about campaign statements, and no court has ever applied it in that context. 2023 WI 66, ¶70 (Protasiewicz, J.); *see State v. Allen*, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863 (per curiam) (rejecting attempt to disqualify judge, based on *Caperton*, who had made pro-prosecution, anti-defendant campaign statements). The fact that Movants cannot cite a single case in which a court required recusal based on

campaign statements is telling. This Court should not be the first to reach such a conclusion.

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

Wisconsin's ethics laws also do not require recusal. Movants point to Wisconsin Supreme Court Rules and 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). 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.

Movants claim that Justice Protasiewicz must recuse under § 757.19(2)(f) due to a "significant … personal interest in the outcome of the matter." They point to statements reportedly made by Justice Protasiewicz that she would like to take "a fresh look" at the maps and attempt to cast those statements as "declar[ations] to voters [of] how she would vote on the merits of this case" that prove she "plainly has a personal interest in [this case's] outcome." Mot. at 46–47.

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 Movants concede, the personal interest must be "substantial" rather than "remote." Mot. at 46 (quoting *Goodman v. Wis. Elec. Power Co.*, 248 Wis. 52, 58, 20 N.W.2d 553, 555 (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" (quotation marks omitted)). Under that strict standard, Wisconsin courts have been loath to find disqualification. *See Storms v. Action Wis. 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, Movants have not cited a single case finding the test satisfied—especially not based on campaign statements. 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 that "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, as the Wisconsin Judicial Commission has already found, *see Clarke*, 2023 WI 66, ¶76 (Protasiewicz, J.); Wis. Sup. Ct. R. 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.").

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, 665 (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, 119 (1996). Movants have not identified a single case requiring recusal under this test, either.

And the record here reveals no disqualifying partiality. As Movants' own cited case makes 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, as explained above. Expressing views about a past case does not evince bias regarding, or prejudgment of, proceedings to reopen that case any more than a judge's or justice's written opinion in the past case suggests that he or she has prejudged a future one. *See Clarke*, 2023 WI 66, ¶¶68–69, 93 (Protasiewicz, J.).

CONCLUSION

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

Dated: February 7, 2024.

Electronically signed by Sarah A. Zylstra

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Response conforms to the rules contained in Wis. Stat. § 809.81, which governs the form of documents filed in this Court where Chapter 809 does not expressly provide for alternate formatting. The length of this Response is 4,688 words.

Dated: February 7, 2024.

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