

FILED
01-29-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

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, in her official capacity as a member of the Wisconsin Elections Commission, JULIE GLANCEY, in her official capacity as a member of the Wisconsin Elections Commission, ANN JACOBS, in her official capacity as a member of the Wisconsin Elections Commission, DEAN KNUDSON, in his official capacity as a member of the Wisconsin Elections Commission, ROBERT SPINDELL, JR., in his official capacity as a member of the Wisconsin Elections Commission, AND MARK THOMSEN, in his official capacity as a member of the Wisconsin Elections Commission,

Respondents,

THE WISCONSIN LEGISLATURE, GOVERNOR TONY EVERS, in his official capacity, AND JANET BEWLEY SENATE DEMOCRATIC MINORITY LEADER, on behalf of the Senate Democratic Caucus,

Intervenors-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECUSE JUSTICE PROTASIEWICZ BY INTERVENOR-RESPONDENT WISCONSIN LEGISLATURE, PETITIONERS BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, AND RONALD ZAHN, AND INTERVENORS-PETITIONERS CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD

Counsel Listed on Following Page

BELL GIFTOS ST. JOHN LLC

KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC

TAYLOR A.R. MEEHAN*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
taylor@consovoymccarthy.com

LAWFAIR LLC

ADAM K. MORTARA, SBN 1038391
40 Burton Hills Blvd., Suite 200
Nashville, TN 37215
773.750.7154
mortara@lawfairllc.com

WISCONSIN INSTITUTE**FOR LAW & LIBERTY, INC.**

RICHARD M. ESENBERG, SBN 1005622
LUCAS T. VEBBER, SBN 1067543
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
414.727.9455
Lucas@will-law.org

**TROUTMAN PEPPER HAMILTON
SANDERS LLP**

MISHA TSEYTLIN, SBN 1102199
KEVIN M. LEROY, SBN 1105053
227 W. Monroe, Suite 3900
Chicago, IL 60606
608.999.1240
misha.tseytlin@troutman.com

* *Admitted pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
INTRODUCTION	7
BACKGROUND	9
ARGUMENT.....	21
I. Due Process Requires Justice Protasiewicz’s Recusal	21
A. Due process requires recusal so that the case is not unconstitutionally pre-decided	22
1. Justice Protasiewicz’s public statements indicate that Hunter Intervenors’ motion has been prejudged	23
2. The context of Justice Protasiewicz’s public statements underscores the risk of prejudgment	28
B. The serious risk of prejudgment and bias cannot be downplayed	29
C. Recusal is required to prevent a constitutionally intolerable probability of actual bias given enormous Democratic Party campaign contributions.....	34
II. Wisconsin Law Requires Recusal.....	42
A. It appears this case cannot be reopened in an impartial manner.....	43
B. Justice Protasiewicz has a significant personal interest in the outcome of this matter	46
CONCLUSION	48
CERTIFICATION REGARDING LENGTH AND FORM	49

TABLE OF AUTHORITIES

Cases

<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986).....	27
<i>Baldus v. Members of Wis. Gov't Accountability Bd.</i> , 849 F. Supp. 2d 840 (E.D. Wis. 2012)	24
<i>Caperton v. A.T. Massey Coal. Co.</i> , 556 U.S. 868 (2009).....	passim
<i>Clarke v. Wis. Elections Comm'n</i> , 2023 WI 66, --- Wis. 2d ---, 995 N.W.2d 735	18, 34
<i>Clarke v. Wis. Elections Comm'n</i> , 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779	19
<i>Clarke v. Wis. Elections Comm'n</i> , 2023 WI 79, --- Wis. 2d ---, 998 N.W.2d 370	19, 20, 31, 34
<i>Franklin v. McCaughtry</i> , 398 F.3d 955 (7th Cir. 2005).....	23, 27, 32
<i>Goodman v. Wis. Elec. Power Co.</i> , 248 Wis. 52, 20 N.W.2d 553 (1945)	46
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	35
<i>Johnson v. Mississippi</i> , 403 U.S. 212 (1971).....	35
<i>Johnson v. Wis. Elections Comm'n</i> , 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469	10, 11, 31, 42
<i>Johnson v. Wis. Elections Comm'n</i> , 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559	11
<i>Johnson v. Wisconsin Elections Commission</i> , 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402	12
<i>Laird v. Tatum</i> , 409 U.S. 824 (1972).....	32, 45

<i>Papa v. New Haven Fed'n of Teachers</i> , 444 A.2d 196 (Conn. 1982).....	30
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019).....	41
<i>State ex rel. Dressler v. Cir. Ct. for Racine Cnty.</i> , 163 Wis. 2d 622, 472 N.W.2d 532 (Ct. App. 1991).....	46
<i>State ex rel. La Russa v. Himes</i> , 197 So. 762 (Fla. 1940)	45
<i>State v. Allen</i> , 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863	42
<i>State v. Am. TV & Appliance of Madison, Inc.</i> , 151 Wis. 2d 175, 443 N.W.2d 662 (1989).....	46
<i>State v. Harrell</i> , 199 Wis. 2d 654, 546 N.W.2d 115 (1996).....	46
<i>State v. Herrmann</i> , 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772	41, 44
<i>Storms v. Action Wis. Inc.</i> , 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480	44
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	26
<i>Ward v. Village of Monroeville</i> , 409 U.S. 57 (1972).....	26, 35
<i>Williams v. Pennsylvania</i> , 579 U.S. 1 (2016).....	passim
<i>Williams-Yulee v. Fla. Bar</i> , 575 U.S. 433 (2015).....	45
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	36

Constitutional Provisions

U.S. Const. art. I, §4, cl.1.....	11
Wis. Const. art. IV, §4.....	19
Wis. Const. art. IV, §5.....	19

Statutes

Wis. Stat. §757.19.....	passim
-------------------------	--------

Other Authorities

Caprice L. Roberts, <i>The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort</i> , 57 Rutgers L. Rev. 107 (2004).....	26
Note, <i>Disqualification of Judges and Justices in the Federal Courts</i> , 86 Harv. L. Rev. 736 (1973)	32
Wis. Supreme Court Rule 60.01	44
Wis. Supreme Court Rule 60.04	43, 45

INTRODUCTION

The Democratic Party of Wisconsin contributed nearly \$10 million to Justice Janet Protasiewicz’s campaign for a seat on the Wisconsin Supreme Court—more than all other donors to her campaign combined, and more than three times the size of the campaign contribution in *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868 (2009). During her campaign, Justice Protasiewicz declared Wisconsin’s districts “rigged” in favor of Republicans.¹ “I don’t think you could sell to any rational person that the maps are fair,” she said.² She disavowed this case specifically. She said *Johnson’s* “least change” approach was “totally unfair.”³ As to the congressional maps, she said “we know something’s wrong” when “we have eight seats—six are red, two are blue,

¹ Zac Schultz, *Candidates tangle over political issues, judicial perspectives at first 2023 Wisconsin Supreme Court forum*, PBS Wis. (Jan. 10, 2023), <https://perma.cc/HC4L-NFUS> (App.10); WisPolitics State Supreme Court Election Forum Tr. 45:25-46:7 (Jan. 9, 2023) [hereinafter *Supreme Court Forum*] (App.24-25); see Corrinne Hess, *Wisconsin Supreme Court candidate Janet Protasiewicz assails state’s election maps as ‘rigged,’* Milwaukee J. Sentinel (Jan. 9, 2023), <https://perma.cc/8T33-Z5M6> (App.33).

² Jonah Beleckis, *Janet Protasiewicz thinks judicial candidates should be open about their values*, Wis. Pub. Radio (Feb. 14, 2023), <https://perma.cc/2QWV-69Q5> (App.38).

³ Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:20-30:10, YouTube, <https://bit.ly/3HAAtZtv> [hereinafter *Supreme Court Debate*].

in a battleground state.”⁴ She “welcome[d] the opportunity to have a fresh look at our maps.”⁵ And she pledged how she would rule: “If you look at the dissent in that maps case” — *this case* — “that dissent is what I will tell you I agree with.”⁶ Electoral districts could be redrawn to change “the outcome of the 2024 election,” she promised.⁷

And lo and behold, with Justice Protasiewicz now on this Court, the “Democratic law firm” representing Hunter Intervenors has now asked for new maps drawn by the newly constituted Court, “upend[ing] Wisconsin’s congressional races months before the 2024 election.”⁸ Hunter intervenors want new congressional districts in less than 7 weeks’ time.⁹

⁴ *Id.*

⁵ Shawn Johnson, *In a supreme court race like no other, Wisconsin’s political future is up for grabs*, NPR (Apr. 2, 2023), <https://perma.cc/W2YA-WPA2> (App.46).

⁶ Henry Redman, *Supreme Court candidates accuse each other of lying, extremism in sole debate*, Wis. Exam’r (Mar. 21, 2023), <https://perma.cc/5KLA-S2FV> (App.51).

⁷ @janetforjustice, Twitter (Mar. 27, 2023, 12:47 PM), <https://perma.cc/YAL9-JR8R> (App.53); Janet for Justice, Facebook (Apr. 3, 2023), <https://perma.cc/HVD7-PXD5> (App.54).

⁸ Anya Van Wagtendonk, *Democratic law firm files challenge to Wisconsin’s congressional maps*, Wis. Public Radio (Jan. 17, 2024), <https://perma.cc/TX2L-C6SG> (App.55); see also Marc Elias, *Opinion, Early Victories in the Fight for Democracy in Wisconsin*, Democracy Docket (Jan. 26, 2024), <https://perma.cc/6F9N-P8QF> (App.58).

⁹ In the legislative redistricting case, the Wisconsin Elections Commission said modifications to district lines must be in place by March 15, 2024. See Response of

The Due Process Clause of the Fourteenth Amendment and state law demand Justice Protasiewicz's recusal. Just as a judicial candidate could not declare, "John Smith is guilty" and then, once elected, hear his appeal, Justice Protasiewicz cannot decide to re-open *this case* after she has declared that she agreed with the dissenters in *this case* and that "something's wrong" with the congressional districts already adopted in *this case*. See *Caperton*, 556 U.S. at 886; Wis. Stat. §757.19(2)(f)-(g). Should she participate, these entire proceedings will be tainted with structural error. See *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016).

BACKGROUND

A. Hunter Intervenors seek "relief from judgment" entered nearly two years ago in this case. This case began when it appeared that the Legislature and Governor would not be able to agree on new redistricting legislation. See *Johnson v. Wis. Elections Comm'n* (*Johnson*

the Wis. Elections Comm'n 3, *Clarke v. Wis. Elections Comm'n*, No. 2023AP1399-OA (Oct. 16, 2023). Candidates for both state legislative office and federal office have the same initial filing deadline of June 3, 2024. See *State Candidates*, Wis. Elections Comm'n, <https://perma.cc/M2Q2-VCGE> (Form ELIS-9, 2024 Ballot Access Checklist for Legislative Office Candidates) (App.61); *Federal Candidates*, Wis. Elections Comm'n, <https://perma.cc/4YPC-NN3D> (Form ELIS-14, 2024 Ballot Access Checklist for Federal Candidates in Wisconsin) (App.62).

I), 2021 WI 87, ¶2, 399 Wis. 2d 623, 967 N.W.2d 469. Voters initiated this original action. *Id.* ¶5. They claimed the existing congressional and state legislative districts, enacted in 2011, were malapportioned. *Id.* The parties agreed, and this Court proceeded to the remedial phase. *Id.* ¶7.

Parties proposed remedies that equalized population across all districts and complied with other state and federal constitutional and statutory requirements. *See id.* ¶¶24-37; *see also* Order (Nov. 17, 2021). The Court emphasized that it could not do more than remedy the malapportionment claims. *Johnson I*, 2021 WI 87, ¶¶64-68. “[D]oing anything more than securing legal rights would be profoundly incompatible with Wisconsin’s commitment to a nonpartisan judiciary.” *Id.* ¶75. Accordingly, the Court instructed the parties to take “a ‘least-change’ approach” to the existing lines. *Id.* ¶81. As Justice Hagedorn explained in his concurring opinion, “our role is appropriately limited to altering current district boundaries only as needed to comply with legal requirements.” *Id.* ¶82 (Hagedorn, J., concurring). The Court could not “simply ignore the law on the books”—here, 2011 Act 44—

“and draft a new one more to its liking.” *Id.* ¶84. Rather, the Court had to begin with that last-enacted redistricting statute. *Id.* ¶64 (majority op.). For the congressional districts, the Court recognized that the federal Elections Clause gives “state legislature’s discretion to decide how congressional elections are conducted,” and the Court could not “unsettle th[at] constitutional allocation of power” by “[t]reading further than necessary” to remedy the malapportionment claim. *Id.* ¶12, 64 (emphasis added); see U.S. Const. art. I, §4, cl.1.

Three justices dissented from that remedial approach. They argued that “applying that approach to 2011’s maps affirmatively perpetuates the partisan agenda of politicians no longer in power.” *Johnson I*, 2021 WI 87, ¶93 (Dallet, J., dissenting, joined by Walsh Bradley and Karofsky, JJ.); see also *Johnson v. Wis. Elections Comm’n (Johnson III)*, 2022 WI 19, ¶¶159, 184, 401 Wis. 2d 198, 972 N.W.2d 559 (Karofsky, J., dissenting, joined by Walsh Bradley and Dallet, JJ.) (stating that the maps have “glaring partisan motivations” and that “the court wandered astray following the sirens’ call of ‘least change’”).

Clarifying and then applying the least-change approach in *Johnson II*, this Court chose the Governor's proposed remedy for Wisconsin's congressional districts. See *Johnson v. Wisconsin Elections Commission (Johnson II)*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402. The Court held that the Governor's proposed adjustments met all state and federal constitutional requirements. *Johnson II*, 2022 WI 14, ¶¶7, 20-25, 52. That remains true today, as Hunter Intervenors' "motion for relief from judgment" implicitly concedes.

B. After the *Johnson* litigation ended—or so everyone thought—Justice Patience Drake Roggensack announced her retirement, creating a vacancy on this Court to be filled by the 2023 election.¹⁰ Among the candidates was now-Justice Protasiewicz.

Criticism of *this case* became a central part of the campaign. Detailed below, she repeatedly and emphatically expressed her views that Wisconsin's districts are "gerrymandered," "rigged," "unfair,"

¹⁰ Associated Press, *Milwaukee County Judge Janet Protasiewicz announces candidacy for state Supreme Court*, Wis. Pub. Radio (May 25, 2022), <https://perma.cc/RMK5-G34R> (App.63-64).

and “wrong.” She invited an opportunity to give Wisconsin’s districts a “fresh look,” stating she would “agree with the dissent” in *Johnson*.

On January 9, before the primary election, Justice Protasiewicz participated in a candidate forum.¹¹ Asked about this case, Justice Protasiewicz said, “I believe the gerrymandering decision was wrong.”¹² She chastised the districts adjusted in *Johnson*: “So let’s be clear here: The maps are rigged, bottom line, absolutely positively rigged. They do not reflect the people in this state.”¹³

Justice Protasiewicz gave several public interviews echoing the same statements. On Wisconsin Public Radio’s *Central Time*, she stated, “I don’t think you could sell to any rational person that the maps are fair.”¹⁴ On the *Cap Times*’s *Wedge Issues*, she stated, “I would anticipate that I would enjoy taking a fresh look at the

¹¹ Schultz, *supra* n.1, <https://perma.cc/HC4L-NFUS> (App.8).

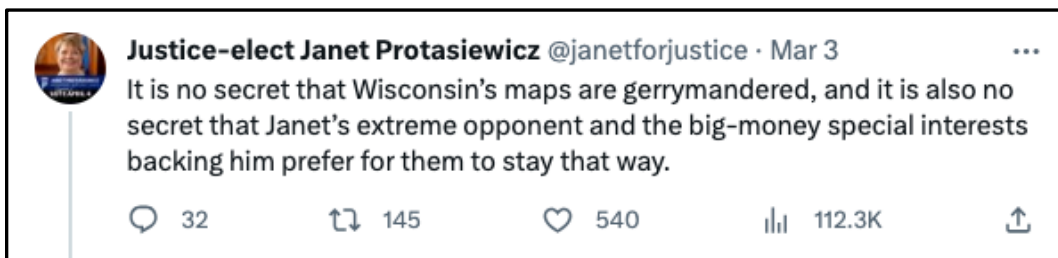
¹² *Supreme Court Forum*, *supra* n.1, at 46:17-18 (App.25); see Alexander Shur, *Candidate Q&A: Wisconsin Supreme Court*, Wis. State J. (Jan. 30, 2023), <https://perma.cc/J4V6-E5RQ> (App.71) (reporting that Justice Protasiewicz made “clear that [she] believe[s] the court’s decision last year regarding legislative maps [in *Johnson*] was wrong”).

¹³ *Supreme Court Forum*, *supra* n.1, at 45:25-46:3 (App.24-25); see also Hess, *supra* n.1, <https://perma.cc/8T33-Z5M6> (App.33).

¹⁴ Beleckis, *supra* n.2, <https://perma.cc/2QWV-69Q5> (App.38).

gerrymandering question.”¹⁵ She said Wisconsin’s maps are “amongst the most gerrymandered maps in the entire country.”¹⁶ In an interview on PBS, when asked about this case’s “least change” remedial approach, she responded, “There’s no legal precedent. There’s nothing in the Constitution. There’s nothing in case law.”¹⁷ And in a live interview for NPR’s *Pod Save America*, she proclaimed, “Our maps are rigged in this state.”¹⁸ And she “welcome[d] the opportunity to have a fresh look at our maps.”¹⁹

Justice Protasiewicz also decried the maps on her campaign’s social media accounts.²⁰



¹⁵ Jessie Opoien & Jack Kelly, *Protasiewicz would 'enjoy taking a fresh look' at Wisconsin voting maps*, Cap Times (Mar. 2, 2023), <https://perma.cc/THH2-VH3Q> (App.72).

¹⁶ *Id.*

¹⁷ Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin redistricting*, PBS Wis. (Mar. 9, 2023), <https://perma.cc/R45C-RDPV> (App.76).

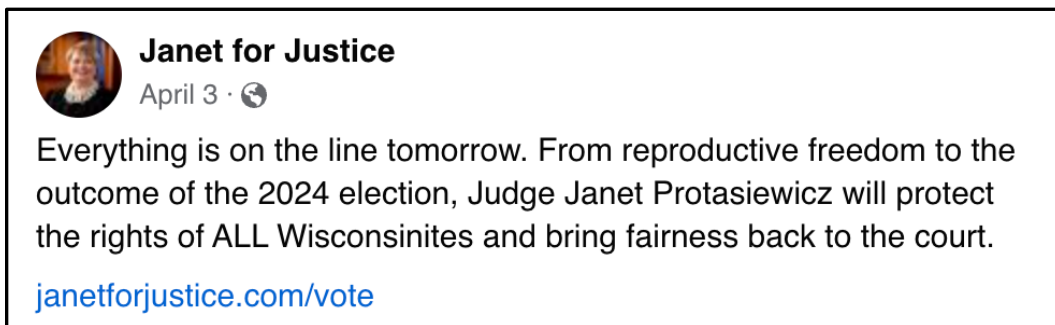
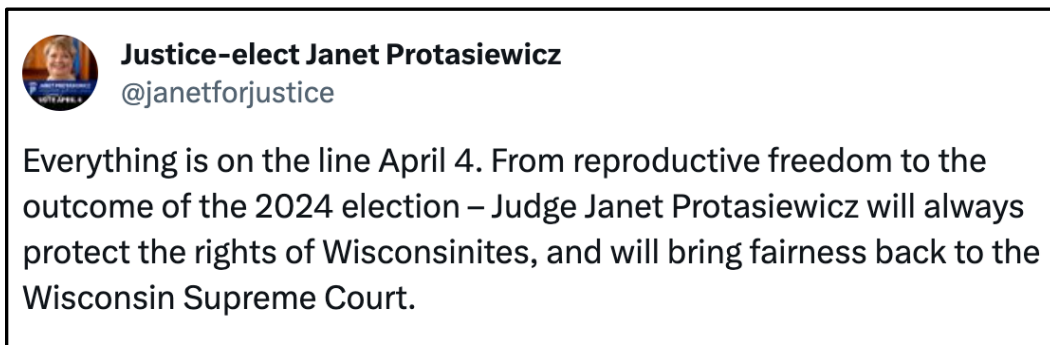
¹⁸ Johnson, *supra* n.5, <https://perma.cc/W2YA-WPA2> (App.46).

¹⁹ *Id.*

²⁰ @janetforjustice, Twitter (Mar. 3, 2023, 6:31 PM), <https://perma.cc/75S9-A772> (App.78); @janetforjustice, Twitter (Mar. 7, 2023, 2:15 PM), <https://perma.cc/E3F8-HU8G> (App.79).



She assured voters that her election to the Wisconsin Supreme Court would change “the outcome of the 2024 election.”²¹



On March 21, 2023, before the general election, Justice Protasiewicz debated her opponent, former Justice Dan Kelly. The validity

²¹ @janetforjustice, *supra* n.7, <https://perma.cc/YAL9-JR8R> (App.53); Janet for Justice, *supra* n.7, <https://perma.cc/HVD7-PXD5> (App.54).

of the maps was one of the main topics. “The map issue is really kind of easy,” Justice Protasiewicz said.²² “If you look at the dissent in that maps case, that dissent is what I will tell you I agree with.”²³ “We know the maps are not fair,” she said. “We have battleground elections. We know they are not fair.”²⁴ “You look at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So, we know something’s wrong.”²⁵ Justice Protasiewicz described the least-change approach as “totally unfair.”²⁶ She continued, “We know that this least-change rule certainly inhibits people’s ability to cast a vote and a vote that counts. . . . Everybody’s vote should count and with this least-change rule, everybody’s vote is not counting.”²⁷

²² Scott Bauer, *Wisconsin Supreme Court candidates clash over abortion, maps in only 2023 debate*, PBS Wis. (Mar. 21, 2023), <https://perma.cc/SE77-ED4Z> (App.82).

²³ Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

²⁴ A.J. Bayatpour, *In only state Supreme Court debate, candidates trade accusations of partisan ties*, CBS 58 (Mar. 21, 2023), <https://perma.cc/87BY-66CB> (App.86).

²⁵ *Supreme Court Debate*, *supra* n.3, at 29:40-29:49, <https://bit.ly/3HAtZtv>.

²⁶ *Id.* at 29:21-29:28.

²⁷ *Id.* at 29:39-30:10.

In April, Justice Protasiewicz won the election. It was the most expensive state supreme court race in U.S. history.²⁸ The Protasiewicz campaign spent more than \$16 million dollars, more than four times her opponent's total campaign spending.²⁹ The Democratic Party of Wisconsin contributed \$9.9 million of that total, including \$8.3 million in direct transfers.³⁰

The day after Justice Protasiewicz was elected, the executive director of liberal Law Forward announced that the group would file a new redistricting lawsuit.³¹ As for when, Law Forward promised that the suit would come "in the weeks or months after Justice-elect Janet

²⁸ Patrick Marley, *Liberals win control of Wisconsin Supreme Court ahead of abortion case*, Wash. Post (Apr. 4, 2023), <https://perma.cc/ZA99-QR5D> (App.88); see *WisPolitics tracks \$56 Million in spending on Wisconsin Supreme Court race*, WisPolitics (July 19, 2023), <https://perma.cc/8A97-2JHC> (App.93) (reporting total spending of more than \$56 million).

²⁹ *WisPolitics*, *supra* n.28, <https://perma.cc/8A97-2JHC> (App.94); see Janet for Justice, Campaign Finance Report, Form CF-2 (July 2023), <https://perma.cc/X6FA-QTSL> (App.96) (reporting \$16.54 million in campaign disbursements); Friends of Justice Daniel Kelly, Campaign Finance Report, Form CF-2 (July 2023), <https://perma.cc/P2EW-D9KU> (App.98) (reporting \$3.66 million in campaign disbursements).

³⁰ See *WisPolitics*, *supra* n.28, <https://perma.cc/8A97-2JHC> (App.94); *Campaign contributions: PAC and Political Committee Contributors to: Janet C Protasiewicz (NP) – Supreme Court*, Wis. Democracy Campaign, <https://perma.cc/9EZD-V69A> (App.101).

³¹ Jack Kelly, *Liberal law firm to argue gerrymandering violates Wisconsin Constitution*, Cap Times (Apr. 6, 2023), <https://perma.cc/5TCG-4EQF> (App.103-04).

Protasiewicz is sworn in on Aug. 1.”³² They made good on that promise, filing an original action the day after Justice Protasiewicz’s investiture to challenge the State’s assembly and senate districts. *See Pet., Clarke v. Wis. Elections Comm’n*, No. 2023AP1399-OA (Aug. 2, 2023). Absent from Law Forward’s petition was a claim that *congressional* districts should be redrawn, even though they’d foreshadowed one such possible challenge months earlier. *See* Brief of Amici Curiae Law Forward et al. at 37, *Moore v. Harper* (U.S. No. 21-1271) (“The law is developing in Wisconsin,” and “state courts could soon be tasked with applying statutory limits on partisan gerrymandering of congressional districts.”).

C. In *Clarke*, the Legislature and Republican Senators named as Respondents moved for Justice Protasiewicz’s recusal. She denied the motion. *Clarke v. Wis. Elections Comm’n*, 2023 WI 66, --- Wis. 2d ---, 995 N.W.2d 735 (Protasiewicz, J.). The same day, the Court refused to take up the petitioners’ claims that legislative districts were “partisan gerrymanders.” The Court explained that there was not enough time

³² *Id.*

before the 2024 elections to address partisan-gerrymandering claims given “the need for extensive fact-finding (if not a full-scale trial).” *Clarke v. Wis. Elections Comm’n*, 2023 WI 70, --- Wis. 2d ---, 995 N.W.2d 779, 781. The case was reduced to a dispute about Wisconsin’s constitutional contiguity requirement for state legislative districts, Wis. Const. art. IV, §§4-5, an issue both factually absent for *Johnson II*’s congressional lines and legally irrelevant to Wisconsin congressional districts.

In December, this Court held that the state legislative districts were unconstitutionally noncontiguous and invited parties to propose remedies redrawing assembly and senate districts statewide “in time for the 2024 election.” *Clarke v. Wis. Elections Comm’n*, 2023 WI 79, ¶¶4, 75, --- Wis. 2d ---, 998 N.W.2d 370. For those proposed assembly and senate districts, the Court “overrule[d] any portions of *Johnson I*, *Johnson II*, and *Johnson III* that mandate a least change approach.” *Id.* ¶63. That overruling did not purport to extend to the congressional districts—not at issue in *Clarke*—nor did it address the federal Elections Clause in any way.

On January 12, 2024, parties in *Clarke* proposed sweeping statewide redraws designed to “shrink” Republican majorities in the state senate and assembly.³³

D. On January 16, 2024—presumably after seeing parties’ proposed remedies in *Clarke*—Hunter Intervenors moved for relief from this Court’s earlier decision and judgment adopting the Governor’s proposed congressional districts as the current congressional district lines. They argue that *Clarke*’s overruling of *Johnson I*’s “mandate” of “a least change approach,” 2023 WI 79, ¶63, leaves the current congressional map with “no basis in Wisconsin law,” Memo. ISO Mot. Relief J. 17-18, even though they nowhere allege that the Governor’s congressional districts violate any actual state or federal constitutional provision. Then they say what they really want: a statewide redraw of the congressional map less favorable to Republicans. *Id.* at 8.

³³ Scott Bauer, *Wisconsin Republicans’ large majorities expected to shrink under new legislative maps*, AP (Jan. 15, 2024), <https://bit.ly/4b5S1dk> (App.107).

ARGUMENT

I. Due Process Requires Justice Protasiewicz's Recusal.

The Due Process Clause of the Fourteenth Amendment “guarantees ‘an absence of actual bias’ on the part of a judge.” *Williams*, 579 U.S. at 8. Recusal thus is necessary when a judge’s participation in a case creates a “serious risk,” “based on objective and reasonable perceptions,” of “actual bias or prejudgment.” *Caperton*, 556 U.S. at 884.

There is a serious risk of prejudgment here because Justice Protasiewicz’s statements during her campaign show that she has prejudged this case. *See Williams*, 579 U.S. at 12. Campaign statements that “something’s wrong” with the 6-2 Republican majority in Wisconsin’s congressional delegation, that maps are “rigged,” that least-changes is “totally unfair,” and that the *Johnson* dissenters were right might be good and well on the campaign trail, but they are not without consequences in the courtroom.

There also is a serious risk of actual bias here. The “Democratic law firm” that asks this Court to reopen this case boasts that they are “the nation’s largest law firm focused on representing the Democratic Party” and “Democratic campaigns,” and its attorneys “have

collectively represented hundreds of Democratic campaigns, organizations, and PACs—including every national Democratic Party organization.”³⁴ Coincidentally, they are back in this Court after the Democratic Party of Wisconsin contributed \$10 million to Justice Protasiewicz’s campaign, marking “a significant and disproportionate influence” on her election. *Caperton*, 556 U.S. at 884. And they are asking the Court for new districts to reduce what they call “partisan unfairness.” Memo. ISO Mot. Relief J. 8.

A. Due process requires recusal so that the case is not unconstitutionally pre-decided.

Hunter Intervenors’ motion requires this Court to decide whether the *Johnson II* districts “suffer[] from serious partisan unfairness” and must be redrawn. Memo. ISO Mot. Relief J. 17. That question was pre-decided on the campaign trail: “something’s wrong” with the congressional districts adjusted by this Court in this case—specifically, the politics.³⁵ And Justice Protasiewicz said she agreed

³⁴ See *About, Elias Law Grp.*, <https://perma.cc/DGA3-GU52> (App.111) (“Elias Law Group is the nation’s largest law firm focused on representing the Democratic Party, Democratic campaigns, nonprofit organizations, and individuals committed to securing a progressive future.”); see also *Van Wagtendonk*, *supra* n.8, <https://perma.cc/TX2L-C6SG> (App.55).

³⁵ *Supreme Court Debate*, *supra* n.3, at 29:20-30:10, <https://bit.ly/3HAAtZtv>.

with the dissenters *in this very case*.³⁶ Such campaign statements evince at least a “serious risk” of “prejudgment.” *Caperton*, 556 U.S. at 884. And a due process “problem arises when the judge has prejudged the facts or the outcome of the dispute before her.” *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).

1. Justice Protasiewicz’s public statements indicate that Hunter Intervenors’ motion has been prejudged.

Hunter Intervenors’ motion argues that the congressional map, adopted using a least-change approach, “has a profoundly unfair partisan impact.” Memo. ISO Mot. Relief J. 21. Justice Protasiewicz already said she agrees: “that [least-change] methodology is totally unfair.”³⁷ “I see no basis for it in the Constitution, no basis in caselaw.”³⁸ “There’s no legal precedent.”³⁹ “You look at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So,

³⁶ Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

³⁷ *Supreme Court Debate*, *supra* n.3, at 29:21-29:28, <https://bit.ly/3HAtZtv>.

³⁸ Shawn Johnson, *Wisconsin Supreme Court candidates discuss abortion, redistricting at Madison forum*, Wis. Pub. Radio (Jan. 9, 2023), <https://perma.cc/NF68-NQ35> (App.114).

³⁹ Schultz, *supra* n.17, <https://perma.cc/R45C-RDPV> (App.76).

we know something's wrong."⁴⁰ "We know the maps are not fair. . . .

We have battleground elections. We know they are not fair."⁴¹

Hunter Intervenors assert that the current congressional map "suffers from serious partisan unfairness" and "is 'extremely favorable to the Republican Party' — . . . more skewed than the vast majority of congressional plans from comparable states over the past three re-districting cycles." Mem. ISO Mot. Relief J. 17, 21-22. That's not even true—the map was drawn by Governor Evers, and based upon the bipartisan 2011 map, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853-54 (E.D. Wis. 2012) (three-judge court). And yet, Justice Protasiewicz already said she agrees with Hunter Intervenors: "something's wrong" with the congressional map.⁴² The least-changes approach is "totally unfair."⁴³ And "[i]f you look at the dissent in that maps case" — this case — "that dissent is what I will tell you I agree with."⁴⁴ "I believe the gerrymandering decision" — this case —

⁴⁰ *Supreme Court Debate*, *supra* n.3, at 29:40-29:49, <https://bit.ly/3HAtZtv>.

⁴¹ Bayatpour, *supra* n.24, <https://perma.cc/87BY-66CB> (App.86).

⁴² *Supreme Court Debate*, *supra* n.3, at 29:40-29:49, <https://bit.ly/3HAtZtv>.

⁴³ *Id.* at 29:21-29:28.

⁴⁴ Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

“was wrong. . . . I can tell you my values and common sense tell you that it’s wrong.”⁴⁵ “[T]he maps”—adopted in this case—“are wrong.”⁴⁶ Based on her repeatedly publicly stated view that *Johnson’s* remedy was “gerrymandered,” “rigged,” “unfair,” and “wrong,” Justice Protasiewicz invited an opportunity “to have a fresh look at our maps”⁴⁷ and “a fresh look at the gerrymandering question.”⁴⁸ And she promised a fresh outcome: “Precedent changes when things need to change to be fair.”⁴⁹ Electing her could change “the outcome of the 2024 election,” she promised.⁵⁰

While these statements might be permissible speech on the campaign trail, they require recusal in the courtroom. Justice Protasiewicz cannot now decide this case that she has publicly prejudged. *See Williams*, 579 U.S. 1 (holding state supreme court justice had to recuse from prisoner’s post-conviction petition where justice gave

⁴⁵ Schultz, *supra* n.1, <https://perma.cc/HC4L-NFUS> (App.10).

⁴⁶ Hess, *supra* n.1, <https://perma.cc/8T33-Z5M6> (App.33).

⁴⁷ Johnson, *supra* n.5, <https://perma.cc/W2YA-WPA2> (App.46).

⁴⁸ Opoien & Kelly, *supra* n.15, <https://perma.cc/THH2-VH3Q> (App.72).

⁴⁹ Matt Mencarini, *How could the 2023 Wisconsin Supreme Court election impact medical malpractice lawsuits?*, PBS Wis. (Mar. 31, 2023), <https://perma.cc/V87K-LC4C> (App.119).

⁵⁰ @janetforjustice, *supra* n.7, <https://perma.cc/YAL9-JR8R> (App.53); Janet for Justice, *supra* n.7, <https://perma.cc/HVD7-PXD5> (App.54).

approval to seek death penalty in prisoner's case as district attorney nearly 30 years earlier). For example, U.S. Supreme Court Justice Antonin Scalia—whom Justice Protasiewicz invoked repeatedly in her *Clarke* opinion refusing to recuse—recused in *Elk Grove Unified School District v. Newdow*, a case concerning the constitutionality of the phrase “under God” in the Pledge of Allegiance, after he publicly criticized the case he was asked to review.⁵¹

Due process entitles every litigant “to ‘a proceeding in which he may present his case with assurance’ that no member of the court is ‘predisposed to find against him.’” *Id.* at 16. The prejudgment shown on the campaign trail is not “neutral” as required by the Due Process Clause. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). “[T]he balance” is not “nice, clear and true” as due process requires; it has already tipped. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see*

⁵¹ See Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 Rutgers L. Rev. 107, 122-25 (2004); *see also* Jacqueline L. Salmon, *Scalia Defends Public Expression of Faith*, Wash. Post. (Jan. 13, 2003), <https://perma.cc/VRV2-TU3F> (App.123) (“In a short speech to about 150 people gathered in a small park in Fredericksburg . . . , Scalia criticized court decisions in recent years that have outlawed expressions of religious faith in public events. He cited as an example a California federal court ruling last summer that the words ‘under God’ in the Pledge of Allegiance were a violation of the separation of church and state.”).

Williams, 579 U.S. at 9 (describing “risk that the judge ‘would be so psychologically wedded’ to . . . her previous position . . . that [she] ‘would consciously or unconsciously avoid the appearance of having erred or changed position’”). Justice Protasiewicz has already said the map Hunter Intervenors want redrawn is “gerrymandered,” “rigged,” “unfair,” and “wrong.” *See supra* pp.12-16. She expressly stated that she “agree[s]” with “the dissent” in this very case⁵² and that the majority was “totally unfair.”⁵³ These statements are a promise to “ma[k]e new law” in this case, to achieve a desired outcome. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). They “mean she has clearly prejudged the case”⁵⁴ in a way irreconcilable with due process. The 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*, 398 F.3d at 962.

⁵² Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

⁵³ *Supreme Court Debate*, *supra* n.3, at 29:21-29:28, <https://bit.ly/3HAtZtv>.

⁵⁴ Editorial Board, Opinion, *Judicial Ethics at Work in Wisconsin*, Wall St. J. (Aug. 2, 2023) <https://perma.cc/8Q6T-CHL6> (App.125).

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

The context of Justice Protasiewicz's campaign statements further confirms the serious risk of prejudgment. *Caperton*, 556 U.S. at 884. Justice Protasiewicz's public criticism of the electoral maps no doubt had a "significant . . . influence in placing [her] on this case." *Id.* at 884. It was a focal point of her successful campaign. As one commentator put it, Justice Protasiewicz "campaign[ed] against the gerrymandered maps and then won her election in a landslide."⁵⁵

The central "influence" Justice Protasiewicz's criticism of the maps played on her "election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead [her] not to hold the balance nice, clear and true.'" *Caperton*, 556 U.S. at 885. Justice Protasiewicz publicly staked out her position on the maps. The logical

⁵⁵ Ian Millhiser, *America's worst gerrymander may soon finally die*, Vox (Aug. 3, 2023), <https://perma.cc/E4U7-GMF6> (App.128); see also Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. Times (Apr. 4, 2023), <https://perma.cc/A6NP-S4TC> (App.133) ("Judge Protasiewicz made a calculation from the start of the race that Wisconsin voters would reward her for making clear her positions on abortion rights and the state's maps—issues most likely to animate and energize the base of the Democratic Party."); Shawn Johnson, *Justice Janet Protasiewicz is sworn in, giving liberals control of Wisconsin Supreme Court*, Wis. Pub. Radio (Aug. 1, 2023), <https://perma.cc/8KVV-MQDN> (App.136) (observing that Justice Protasiewicz's criticism of the maps "helped her mobilize Democratic voters in her high-turnout, double-digit victory").

inference is that she did so to appeal to major donors and voters. And she promised them that her victory would change “the outcome of the 2024 election.”⁵⁶ As one newspaper put it during her campaign, “No one believes she won’t overturn the maps in a future case.”⁵⁷ “The real question,” according to one commentator, “is not *if* the new majority will strike down these maps, but *when*.”⁵⁸ There is a significant risk Justice Protasiewicz “would consciously or unconsciously avoid the appearance of having erred or changed position.” *Williams*, 579 U.S. at 9.

B. The serious risk of prejudgment and bias cannot be downplayed.

Efforts to temper these statements do not erase them. Justice Protasiewicz described her views on the maps as statements about “values.” She explained that her “values and common sense tell you that [*Johnson is*] wrong.”⁵⁹ Whatever the label, her statements go

⁵⁶ @janetforjustice, *supra* n.7, <https://perma.cc/YAL9-JR8R> (App.53); Janet for Justice, *supra* n.7, <https://perma.cc/HVD7-PXD5> (App.54).

⁵⁷ Editorial Board, Opinion, *Wisconsin’s Judicial Election Donnybrook*, Wall St. J. (Feb. 26, 2023), <https://perma.cc/25X6-XD3X> (App.142).

⁵⁸ Mark Joseph Stern, *The Rule of Janet Is Here. Wisconsin Republicans Should Be Afraid.*, Slate (Aug. 3, 2023), <https://perma.cc/MK6M-EBHR> (App.143).

⁵⁹ Schultz, *supra* n.1, <https://perma.cc/HC4L-NFUS> (App.10).

directly to the merits of a specific case now before the Court. Justice Protasiewicz drew the connection herself: “I can’t tell you what I would do on a particular case, but I can tell you my values, and the maps are wrong.”⁶⁰ Justice Protasiewicz has said what she would do on this case: “that dissent is what I will tell you I agree with.”⁶¹

At times, Justice Protasiewicz followed her express declaration that the “maps are rigged” with assurances that “all of my decisions are going to be rooted in the law.”⁶² But pairing an express statement of prejudgment with general assurances does not somehow negate the appearance of prejudgment. *See, e.g., Papa v. New Haven Fed’n of Teachers*, 444 A.2d 196, 208-09 (Conn. 1982) (recusal required under Connecticut law where judge expressed prejudgment of a case in the newspaper, even though he “emphasized he was expressing his own opinions, separate from his actions in the courtroom”).

Justice Protasiewicz’s references to “values” and “common sense” are particularly problematic in the context of redistricting and

⁶⁰ Hess, *supra* n.1, <https://perma.cc/8T33-Z5M6> (App.33).

⁶¹ Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

⁶² Beleckis, *supra* n.2, <https://perma.cc/2QWV-69Q5> (App.38).

claims of partisan advantage. This Court already held in this very case that the Wisconsin Constitution provides no standards by which to judge whether an electoral map has “‘too much’ partisanship.” *Johnson I*, 2021 WI 87, ¶52; *see also Clarke*, 2023 WI 79, ¶71 (“consideration of partisan impact will not supersede constitutionally mandated criteria such as equal apportionment or contiguity”). Without any legal standards, Hunter Intervenors’ request for a new congressional map can be resolved only by political ones. *See Johnson I*, 2021 WI 87, ¶¶40-52. Indeed, *Clarke*’s “partisan impact” standard—left entirely undefined—effectively boils down to the “values” and “common sense” of a majority of justices. *See id.* ¶44 (“what constitutes a ‘fair’ map poses an entirely subjective question”). Accordingly, statements on the campaign trail about so-called “values” and “common sense,” leading to the conclusion that “something’s wrong” with a 6-2 Republican congressional delegation, are very much an indication of how a judge, without any legal standards to deploy, would resolve the policy question Hunter Intervenors would put before the Court.

Nor can Justice Protasiewicz's campaign statements be excused as mere "general observation[s] about the law." *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (mem. of Rehnquist, J.). She expressly stated how she would apply the law in this case (the "Constitution" and "caselaw"⁶³) to the facts (the "rigged"⁶⁴ and "gerrymandered"⁶⁵ maps this Court adopted in *Johnson*). See *Franklin*, 398 F.3d at 962 (unlike "general opinion[s] regarding a law," statements evincing "the judge has prejudged the facts or the outcome of the dispute" are constitutionally disqualifying); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 758 (1973) ("Prejudgment of the merits of a case gives rise to a much greater danger of partiality or its appearance than do preexisting views on legal issues which may be involved in the case."). And she has announced that her mind is firmly made up on the outcome: "we know something's wrong" with the 6-2 Republican congressional delegation.⁶⁶ "The map issue is

⁶³ *Johnson*, *supra* n.38, <https://perma.cc/NF68-NQ35> (App.114).

⁶⁴ *Schultz*, *supra* n.1, <https://perma.cc/HC4L-NFUS> (App.10).

⁶⁵ *Opoien & Kelly*, *supra* n.15, <https://perma.cc/THH2-VH3Q> (App.73).

⁶⁶ *Supreme Court Debate*, *supra* n.3, at 29:40-29:49, <https://bit.ly/3HAtZtv>.

really kind of easy, actually.”⁶⁷ The maps are “[a]bsolutely, positively rigged.”⁶⁸

These statements also go far beyond garden-variety campaign rhetoric. As observers recognized, Justice Protasiewicz spoke with an unprecedented candor about her predetermined views on the *Johnson* maps. The campaign “featured comment . . . that went beyond the norm for judicial candidates.”⁶⁹ Justice Protasiewicz “pushed the envelope for a judicial candidate by offering voters explicit declarations of her views.”⁷⁰ And in doing so, she “shattered long-held notions of how judicial candidates should conduct themselves by making her political priorities central to her campaign.”⁷¹ The statements are “rare” and “exceptional.” *Caperton*, 556 U.S. at 884, 890.

Even by Justice Protasiewicz’s own logic in *Clarke*, recusal would be warranted here. In *Clarke*, Justice Protasiewicz described that case as “an unrelated civil case that involves different parties”

⁶⁷ Bauer, *supra* n.22, <https://perma.cc/SE77-ED4Z> (App.82).

⁶⁸ Schultz, *supra* n.1, <https://perma.cc/HC4L-NFUS> (App.10).

⁶⁹ Ruth Marcus, Opinion, *Wisconsin notwithstanding, electing judges is a terrible idea*, Wash. Post (Apr. 6, 2023), <https://perma.cc/ESK7-MNQK> (App.149).

⁷⁰ Ronald Brownstein, *The First Electoral Test of Trump’s Indictment*, Atlantic (Mar. 31, 2023), <https://perma.cc/CL5C-W5QY> (App.154).

⁷¹ Epstein, *supra* n.55, <https://perma.cc/A6NP-S4TC> (App.131).

and distinguished it from the “pending” case in *Caperton. Clarke*, 2023 WI 66, ¶¶12-15 (cleaned up). Even assuming *Clarke* were “an unrelated civil case” with “different parties” —it is not, *see Clarke*, 2023 WI 79, ¶¶93, 95, 123, 143-46 (Ziegler, C.J., dissenting)—here, Hunter Intervenors participated in *Johnson* and have filed a motion to reopen in *Johnson*. There is no writing around the fact that Justice Protasiewicz is being asked to cast a vote to reopen the very case that she said was wrongly decided, “unfair,” and “rigged.” That separates this case from merely “expressing an opinion on an issue.” *Contra Clarke*, 2023 WI 66, ¶62. Justice Protasiewicz has expressed an opinion *on this case*: inviting this motion to reopen to take a “fresh look” and stating her agreement with the *Johnson* dissenters. The only “judge shopping,” *id.* ¶74, is by Hunter Intervenors. Nearly two years after the Court entered the *Johnson II* injunction, they want the newly constituted Court to reopen the same case in accordance with their Democrat priorities and Democrat promises.

C. Recusal is required to prevent a constitutionally intolerable probability of actual bias given enormous Democratic Party campaign contributions.

The Due Process Clause guarantees a “fair trial in a fair tribunal.” *In re Murchison*, 349 U.S. 133, 136 (1955). A fair tribunal requires an “unbiased judge.” *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). Consistent with due process, “no judge ‘can . . . try cases where he has an interest in the outcome.’” *Lavoie*, 475 U.S. at 822. A judge must be “wholly disinterested,” *Williams*, 579 U.S. at 9, and “detached,” *Ward*, 409 U.S. at 62. A biased judge is thus constitutionally disqualified from hearing a case.

Due process “do[es] not require proof of actual bias.” *Caperton*, 556 U.S. at 883. Courts must determine whether the “situation is one which would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.” *Lavoie*, 475 U.S. at 822 (cleaned up). Courts assess whether “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 872. They consider “all the circumstances of th[e] case,” *id.* “under a realistic appraisal of psychological tendencies and human weakness,” *id.* at 883. The question is “whether, as an objective matter, the average judge in his position is

likely to be neutral, or whether there is an unconstitutional potential for bias.” *Williams*, 579 U.S. at 8 (cleaned up). Even the appearance of bias can be constitutionally disqualifying. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (“Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”).

In the context of judicial elections, the U.S. Supreme Court has held:

there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.

Caperton, 556 U.S. at 884. The Court identified three guiding considerations: (1) “the contribution’s relative size in comparison to the total amount of money contributed to the campaign”; (2) “the total amount spent in the election”; and (3) “the apparent effect such contribution had on the outcome of the election.” *Id.*

The due process claim in *Caperton* centered on a contribution of \$3 million to a campaign for the West Virginia Supreme Court by Don

Blankenship, the chairman, president, and CEO of A.T. Massey Coal Company. *Id.* at 873. His total contributions exceeded all other supporters. *Id.* So far so good, except that at the time of the campaign, the West Virginia Supreme Court was expected to hear the appeal of a \$50 million verdict against Massey. *Id.* The plaintiff in that suit moved to disqualify the new justice, which the justice denied. *Id.* And the West Virginia Supreme Court ultimately reversed the jury verdict against Massey. *Id.* at 874-75.

The U.S. Supreme Court reversed, holding that the justice's failure to recuse violated due process for two primary reasons. First, Blankenship had "a significant and disproportionate influence in placing [the new justice] on the case." *Id.* at 884. His \$3 million contribution "eclipsed the total amount spent by all other . . . supporters and exceeded by 300% the amount spent by [the new justice's] campaign committee." *Id.* The Court emphasized that "[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances would offer a possible

temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* at 885 (cleaned up).

Second, "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case" increased the "serious, objective risk of actual bias" because it was "apparent" that the target of the campaign contributions would "review a judgment that cost his biggest donor's company \$50 million." *Id.* at 886. Based on "these extreme facts," the Court held that "the probability of actual bias rises to an unconstitutional level." *Id.* at 886-87.

As it was in *Caperton*, here Justice Protasiewicz received "disproportionate" support in her campaign from a single donor that had a vested interest in the outcome of further proceedings in this case. *Caperton*, 556 U.S. at 884. The Democratic Party of Wisconsin's contribution of nearly \$10 million is more than three times the size of the problematic contribution in *Caperton*. It accounts for 59% of the total amount spent by Justice Protasiewicz in the campaign, and it dwarfed

her opponent's total campaign expenditures of \$3.66 million.⁷² She has thus committed to recuse from all cases involving the Democratic Party of Wisconsin to preserve the perception that "she's fair."⁷³ And for good reason, for the Democratic Party's contribution gave her "a significant advantage over [her opponent] and his allies on TV ahead of the April election" and "was a big factor in the disparity in points on TV."⁷⁴ The Democratic Party of Wisconsin's contribution unquestionably had a "significant and disproportionate influence" on her election. *Caperton*, 556 U.S. at 884.

Moreover, as in *Caperton*, the "temporal relationship" between the Democratic Party's contributions, Justice Protasiewicz's election, and Hunter Intervenors' motion creates a "serious, objective risk of actual bias." *Id.* at 886. While the Democratic Party was contributing millions of dollars to Justice Protasiewicz's campaign, Justice

⁷² *WisPolitics*, *supra* n.28, <https://perma.cc/8A97-2JHC> (App.93-94) (reporting total spending of more than \$56 million); Janet for Justice, *supra* n.29, <https://perma.cc/X6FA-QTSL> (App.96) (reporting \$16.54 million in campaign disbursements); Friends of Justice Daniel Kelly, *supra* n.29, <https://perma.cc/P2EW-D9KU> (App.98) (reporting \$3.66 million in campaign disbursements).

⁷³ Scott Bauer, *Protasiewicz pledges to recuse in lawsuits from Democrats, while Kelly declines to pledge for Republican cases*, PBS Wis. (Mar. 1, 2023), <https://perma.cc/NFX2-37GZ> (App.161).

⁷⁴ *WisPolitics*, *supra* n.28, <https://perma.cc/8A97-2JHC> (App.94).

Protasiewicz was on the campaign trail declaring Wisconsin's districts to be "rigged" and welcoming an opportunity to revisit them. It was not only "reasonably foreseeable" that her election would lead to a new challenge to Wisconsin's congressional districts; she invited it herself. *Id.* When Justice Protasiewicz was elected, "it became at once apparent that, absent recusal," she would revisit *Johnson*—the alleged obstacle to her biggest donor's control of the Wisconsin congressional delegation. *See id.* (noting that the newly elected justice "would review a judgment that cost his biggest donor's company \$50 million").

If the Democratic Party were trying to reopen this case in its own name, Justice Protasiewicz would recuse.⁷⁵ There is no basis for drawing a different line for Hunter Intervenors, who seek new districts more favorable to Democrats. Memo. ISO Mot. Relief J. 8. They allege no constitutional violation in the congressional districts; they ask only for a do-over to obtain a map less "favorable to the Republican Party." *Id.* at 21-22. Their motion turns on assertions of "a marked *partisan* skew," "*partisan* gerrymandering by the Legislature," and

⁷⁵ Bauer, *supra* n.73, <https://perma.cc/NFX2-37GZ> (App.161).

“intolerable *partisan* unfairness.” *Id.* (emphasis added). Their very aim is to “reall[oc]at[e] power and influence between political parties.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019). Any suggestion that the motion does not sufficiently implicate the Democratic Party of Wisconsin is willfully blind to the facts. Recusal from this case should be automatic. The motion is simply another attempt by the Democratic Party’s leading law firm⁷⁶ to “cash in” after “[p]rogres-sives spent big to elect Justice Janet Protasiewicz.”⁷⁷ *Cf. State v. Herrmann*, 2015 WI 84, ¶40, 364 Wis. 2d 336, 867 N.W.2d 772 (Walsh Bradley, J.) (“judges must be perceived as beyond price”).

The nature of Hunter Intervenors’ motion heightens both the risk of actual bias and the resulting harm. Redistricting is “one of the most intensely partisan aspects of American political life.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Hunter Intervenors’ request for a court-drawn map is a request for this Court to “recast itself as a redistricting commission in order to make its own political

⁷⁶ See *Vendor/Recipient Profile: Elias Law Group*, Open Secrets, <https://perma.cc/ZS8U-Z2V7> (App.163) (reporting nearly \$13 million from Democratic Congressional Campaign Committee for 2022 election cycle).

⁷⁷ Editorial Board, *supra* n.54, <https://perma.cc/8Q6T-CHL6> (App.124).

judgment about how much representation particular political parties *deserve.*" *Johnson I*, 2021 WI 87, ¶45 (cleaned up). A court engaging in this enterprise looks like "a policymaking body rather than a law-declaring one." *Id.* ¶52. Concerns of bias are at their zenith.

* * *

With a campaign message so clear and Democrat donations at record levels,⁷⁸ "all the circumstances of this case" require recusal to avoid "a risk of actual bias or prejudgment" that the guarantee of due process will not tolerate. *Caperton*, 556 U.S. at 872, 884.

II. Wisconsin Law Requires Recusal.

Wisconsin state law also "creates a mandatory duty for judges to disqualify themselves in certain circumstances." *State v. Allen*, 2010 WI 10, ¶43 n.17, 322 Wis. 2d 372, 778 N.W.2d 863 (per curiam). Relevant here, "[a]ny judge"—including any "supreme court justice[]"—"shall disqualify" herself from any case where "she cannot, or it appears . . . she cannot, act in an impartial manner" or she "has a

⁷⁸ Reid J. Epstein, *Costly Court Race Points to a Politicized Future for Judicial Elections*, N.Y. Times (Mar. 28, 2023), <https://perma.cc/8ZN2-QKXU> (App.165-67); see Brownstein, *supra* n.70, <https://perma.cc/K8X3-JBBV> (App.154) ("The juxtaposition of those two assertions can be head-spinning.").

significant . . . personal interest in the outcome of the matter.” Wis. Stat. §757.19(1), (2)(f)-(g). In either of these circumstances, recusal “must occur.” *Id.* §757.19(4).

A. This case cannot be reopened in an impartial manner.

Wisconsin’s mandatory disqualification statute requires recusal when “a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” Wis. Stat. § 757.19(2)(g). This Court’s rules likewise require recusal where a judge is not impartial or appears not to be impartial. Supreme Court Rule 60.04(4) provides that “a judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.” SCR 60.04(4). The rule further provides for recusal when “[t]he judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to . . . [a]n issue in the proceeding” or “[t]he controversy in the proceeding.” SCR 60.04(4)(f). This rule recognizes the simple reality

that campaign statements—like any other statements—can evince a judge’s partiality. *Cf. Storms v. Action Wis. Inc.*, 2008 WI 110, ¶21, 314 Wis. 2d 510, 754 N.W.2d 480 (“[J]udges and candidates for judicial office can announce their views on political and legal issues as long as they are not pledges or promises to decide cases in a certain way.”).

A judge who has predetermined the merits of a case is not impartial. “‘Impartiality’ means the absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.” SCR 60.01(7m). A judge who has prejudged a case does not have an open mind. Under the judicial ethics laws, then, “prejudgment can require recusal.” *Herrmann*, 364 Wis. 2d at 397 n.14 (Ziegler, J., concurring). No Wisconsin judge can prejudge a case. Wis. Stat. §757.19(2)(g).

Campaign statements specific to this case preclude Justice Protasiewicz from participating here. *See id.* Having campaigned on the idea that maps are “rigged,” “something’s wrong” with the

congressional maps, and *Johnson* was wrongly decided, Justice Protasiewicz cannot now cast a vote as to whether to reopen *Johnson*.

At the very least, because of Justice Protasiewicz's campaign statements, it "appears . . . she cannot[] act in an impartial manner." *Id.*; see SCR 60.04(4)(f). A judicial candidate's campaign statements of prejudgment can give the impression that, "in order to obtain [victory], he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird*, 409 U.S. at 836 n.5 (mem. of Rehnquist, J.). "Judges are not politicians, even when they come to the bench by way of the ballot." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015). When judicial candidates campaign like politicians by proclaiming how they intend to vote on particular matters, it creates the perception that they will not "apply the law without fear or favor." *Id.* at 438; see *State ex rel. La Russa v. Himes*, 197 So. 762, 763 (Fla. 1940) (a judge's "oath of office limits his declarations from the stump").

B. Justice Protasiewicz has a significant personal interest in the outcome of this matter.

Wisconsin's mandatory disqualification statute also requires recusal when "a judge has a significant financial or personal interest in the outcome of the matter." Wis. Stat. §757.19(2)(f). Disqualification under this provision is "fact specific" and "determined objectively." *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). The "very existence" of a significant personal interest in the outcome of a case "creates a disqualification by law," *id.*, regardless whether the judge is actually "ab[le] to act impartially in a case," *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989).

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

Applied here, Justice Protasiewicz repeatedly declared to voters how she would vote on the merits of this case. *See supra* pp.12-16.

They were a centerpiece of her successful campaign. *See supra* pp.12-17. She assured voters that her election would change the “outcome of the 2024 election.” *Supra* p.15. And she scored nearly \$10 million in Democratic Party campaign contributions. *Supra* p.17.

Hunter Intervenors now offer Justice Protasiewicz exactly the opportunity she had asked for—a “fresh look”—with respect to the congressional maps. They do so in the very same case that Justice Protasiewicz already stated how she would rule: “that dissent is what I will tell you I agree with.”⁷⁹ Having invited this opportunity and campaigned on it, Justice Protasiewicz plainly has a personal interest in its outcome that requires her recusal.

* * *

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

⁷⁹ Redman, *supra* n.6, <https://perma.cc/5KLA-S2FV> (App.51).

CONCLUSION

For the foregoing reasons, Movants' request that Justice Protasiewicz recuse from all aspects of this case.

Dated this 29th day of January, 2024.

Respectfully submitted,

Electronically Signed by

Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
 KEVIN M. ST. JOHN, SBN 1054815
 5325 Wall Street, Ste. 2200
 Madison, WI 53718
 608.216.7995
 kstjohn@bellgiftos.com

CONSOVOY MCCARTHY PLLC

TAYLOR A.R. MEEHAN*
 1600 Wilson Blvd., Ste. 700
 Arlington, VA 22209
 703.243.9423
 taylor@consovoymccarthy.com

LAWFAIR LLC

ADAM K. MORTARA, SBN 1038391
 40 Burton Hills Blvd., Ste. 200
 Nashville, TN 37215
 773.750.7154
 mortara@lawfairllc.com

Counsel for Wisconsin Legislature

* Admitted pro hac vice

Electronically Signed by

Lucas T. Vebber

**WISCONSIN INSTITUTE
 FOR LAW & LIBERTY, INC.**
 RICHARD M. ESENBERG, SBN 1005622
 LUCAS T. VEBBER, SBN 1067543
 330 East Kilbourn Avenue, Suite 725
 Milwaukee, WI 53202
 414.727.9455
 Lucas@will-law.org

*Counsel for Billie Johnson, Eric
 O'Keefe, Ed Perkins, and Ronald Zahn*

Electronically Signed by

Misha Tseytlin

**TROUTMAN PEPPER HAMILTON
 SANDERS LLP**
 MISHA TSEYTLIN, SBN 1102199
 KEVIN M. LEROY, SBN 1105053
 227 W. Monroe, Suite 3900
 Chicago, Illinois 60606
 608.999.1240
 misha.tseytlin@troutman.com

*Counsel for Congressmen Glenn
 Grothman, Mike Gallagher,
 Bryan Steil, Tom Tiffany,
 and Scott Fitzgerald*

CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief 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 brief is 7,836 words as calculated by Microsoft Word.

Dated this 29th day of January, 2024

Respectfully submitted,

Electronically Signed by
Kevin M. St. John

BELL GIFTOS ST. JOHN LLC
KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com