IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399

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

Petitioners,

v.

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

Respondents.

PETITIONERS' RESPONSE TO MOTION TO RECUSE JUSTICE PROTASIEWICZ

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INTRODUCTION

Consistent with our Constitution's guarantee that "governments are instituted, deriving their powers from the consent of the governed[,]" Wisconsin elects its judges, including its Supreme Court Justices. Wis. Const. Art. I, § 1; Wis. Const. Art. VII, § 4. In 2023, Justice Janet Protasiewicz ran against former Justice Daniel Kelly, winning with a sweeping margin of over 200,000 votes statewide. Upon being sworn into office, Justice Protasiewicz vowed to "apply[] justice fairly [] [a]nd equally" and that she was committed to "fairness and impartiality in our justice system."[1] Unhappy with this electoral result, which they could not prevent through gerrymandering, Respondents Senators Cabral-Guevara, Hutton, Jacque, Jagler, James, Kapenga, LeMahieu, Marklein, Nass, Quinn, Tomczyk, and Wanggaard, and Proposed Intervenor the Wisconsin State Legislature (collectively, "Respondents") now seek to nullify the election and pick their judges. That is the most "extraordinary" part of this motion. Memorandum of Law in Support of Mtn. to Recuse ("Resp. Br.") 1.

Respondents' arguments in support of recusal are without merit, and this motion should be denied. There is not, and cannot be, a federal due process issue in a case brought in *state* court by *individual voters* alleging solely claims based in

[1] *See, e.g.*, Raymond Neupert, *State Supreme Court Justice Janet Protasiewicz sworn in at Capitol* Rotunda, Wisconsin Radio Network (August 2, 2023), https://www.wrn.com/2023/08/state-supreme-court-justice-janet-protasiewicz-sworn-in-at-capitol-rotunda/. Petitioners' Supplemental Appendix ("Pet. App.") 7; Chuck Quirmbach, *What's Ahead for Janet Protasiewicz, now that she's a Wisconsin Supreme Court justice?*, WUWM (August 2, 2023), https://www.wuwm.com/2023-08-02/whats-ahead-for-janet-protasiewicz-now-that-shes-a-wisconsin-supreme-court-justice/. Pet. App. 8.

state law because a political party made contributions to a judicial candidate (which is the norm in Wisconsin); nor is there any basis under the Federal Constitution's Due Process Clause to disqualify Justice Janet Protasiewicz based on campaign comments she made about prominent state law issues in the election. Respondents' argument, untethered from due process jurisprudence, would result in untold due process challenges in Wisconsin, and indeed, in any state which elects its judges. The applicable state laws and principles, far from requiring recusal based on those same arguments, overwhelmingly support the conclusion that there is no legal or ethical basis compelling Justice Protasiewicz's recusal from this case.

BACKGROUND

In May 2022, Chief Justice Patience Drake Roggensack announced her retirement after serving on the Wisconsin Supreme Court for 20 years. Former Justice Daniel Kelly and current Justice Protasiewicz declared their candidacies for the open seat. On Tuesday, April 4, 2023 Justice Protasiewicz won the election by over 200,000 votes, an 11-point margin, defeating her opponent in his second unsuccessful bid for the Wisconsin Supreme Court.[2]

Spending in the 2023 Wisconsin Supreme Court judicial race smashed state and national records. Campaigns and outside groups spent over $51 million,[3]

[2] Wisconsin Elections Commission, WEC Canvass Reporting System County by County Report 2023 Spring Election Justice of the Supreme Court (Apr. 17, 2023), https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_SCOWIS.pdf. Pet. App. 11.

[3] *Wisconsin Supreme Court Race Cost Record $51M*, Wisconsin Democracy Campaign (July 18, 2023), https://www.wisdc.org/news/press-releases/139-press-release-2023/7390-wisconsin-supreme-court-race-cost-record-51m. Pet. App. 12.

shattering the $10 million record set in 2020[4]—which itself broke Wisconsin's previous record of $8.2 million, set just one year before in 2019.[5] The candidates spent $22 million in the race.[6] Outside groups were estimated to have spent nearly $29 million: $11.7 million supporting Justice Protasiewicz and $16.8 million supporting Kelly.[7]

The increased spending in the Wisconsin judicial races was "less of an aberration than an escalation."[8] Several states, including Montana[9] and North Carolina,[10] set spending records in 2022. Partisan spending has contributed to the increased expenditures as political parties have focused on state judicial elections in

[4] *2020 Supreme Court Race Cost Record-Shattering $10M*, Wisconsin Democracy Campaign (Apr. 19, 2021), https://www.wisdc.org/news/press-releases/131-press-release-2020/6658-2020-supreme-court-race-cost-record-shattering-10m#tbl. Pet. App. 19.
[5] *2019 Supreme Court Race Cost Record $8.2 Million+*, Wisconsin Democracy Campaign (July 17, 2019), https://www.wisdc.org/news/press-releases/126-press-release-2019/6380-2019-supreme-court-race-cost-record-8-2-million. Pet. App. 24.
[6] *Wisconsin Supreme Court Race Cost Record $51M*, *supra* n.3. Pet. App. 12.
[7] *Id.*
[8] Douglas Keith & Eric Velasco, *The Politics of Judicial Elections, 2019–20*, Brennan Center for Justice 1 (Jan. 25, 2022), https://www.brennancenter.org/media/8878/download. Pet. App. 28.
[9] Mara Silvers, *State Supreme Court race draws $2.9 million in outside spending in last month of campaign*, MTFP (Nov. 4, 2022), https://montanafreepress.org/2022/11/04/montana-supreme-court-race-2-9-million-third-party-spending-last-month-of-campaign/. Pet. App. 40-42.
[10] Associated Press, *Republicans Retake Control of North Carolina Supreme Court*, *U.S. News & World Report* (Nov. 9, 2022), https://www.usnews.com/news/best-states/north-carolina/articles/2022-11-08/2-races-to-set-partisan-control-of-north-carolina-high-court. Pet. App. 46.

recent years.[11] According to one report, political parties accounted for 18 percent of contributions to judicial campaigns in the 2019–2020 election cycle.[12]

Both the Democratic and Republican Parties regularly contribute to Wisconsin Supreme Court races. In 2023 both Justice Protasiewicz and Kelly received contributions from the Wisconsin Democratic and Wisconsin Republican parties respectively.[13]

Expenditures by political parties in the 2023 Wisconsin Supreme Court race followed a similar trajectory as in recent years. In 2020, Justice Karofsky unseated former Justice Kelly by a nearly 11-point margin, marking only the second time in the past fifty years that an incumbent lost reelection.[14] Kelly's largest single contribution in that election was from the Republican Party of Wisconsin.[15] He also accepted contributions from 13 local Republican party organizations: the 1st District Republican Party of Wisconsin, Republican Party of 6th Congressional District of Wisconsin, Polk County Republican Party, Republican Party of Portage County,

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[11] Reid Wilson, *Republican group will focus on judicial races*, Washington Post (Apr. 29, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/04/29/republican-group-will-focus-on-judicial-races/. Pet. App. 48-49; *accord* Nathaniel Rakich, *How Did State Supreme Court Races Get So Expensive?*, FiveThirtyEight (Mar. 16, 2023), https://fivethirtyeight.com/features/wisconsin-state-supreme-court-spending/ ("[O]utside groups like the Republican State Leadership Committee started spending serious money on judicial elections[.]"). Pet. App. 54.

[12] Keith & Velasco, *supra* n.8. Pet. App. 33.

[13] Molly Beck & Corrinne Hess, *5 takeaways from the only Supreme Court election debate. Daniel Kelly and Janet Protasiewcz take the gloves off*, Milwaukee Journal Sentinel (Mar. 22, 2023), https://www.jsonline.com/story/news/politics/elections/2023/03/21/5-takeaways-from-the-only-wisconsin-supreme-court-election-debate/70029701007/. Pet. App. 57-59.

[14] *See* Charles Franklin, *The Increasing Correlation of Wisconsin Supreme Court Elections with Partisanship: A Statistical Analysis*, [Fall 2018] MARQ. LAW. 24, 25. Pet. App. 61.

[15] *See* Friends of Justice Daniel Kelly, July Continuing 2020 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 66-69.

Racine County Republican Party, Republican Party of Sheboygan County, Republican Party of Vilas County, Republican Party of Walworth County, Republican Party of Dane County, Republican Party of Octonto County, Door County Republican Party, Monroe County Republican Party, and Waukesha County Republican Party.[16]

In 2019, the Republican State Leadership Committee's Judicial Fairness Initiative spent over $1 million in support of Justice Hagedorn,[17] and conducted a "full-scale, micro-targeted voter education project."[18] The group claimed the project "helped carry [the Justice] to victory[.]"[19] Justice Hagedorn also accepted contributions from the Republican Party of Wisconsin and 19 local Republican Party organizations: 1st District Republican Party of Wisconsin, Outagamie County Republican Party, Jefferson County Republican Party, Burnett County Republican Party, Republican Party of Vilas County, Waupaca County Republican Party, Waukesha County Republican Party, Republican Party of Manitowoc County, Republican Party of Kenosha County, Barron County Republican Party, Republican Party of Portage County, Republican Party of Dodge County, Republican Party of

[16] *Id.*
[17] Patrick Marley, *Republican group spending more than $1 million to help Brian Hagedorn in Wisconsin court race*, Milwaukee Journal Sentinel (Mar. 26, 2019), https://www.jsonline.com/story/news/politics/2019/03/26/wisconsin-supreme-court-gop-group-spending-1-m-help-brian-hagedorn/3275973002/. Pet. App. 70-71.
[18] Email from David Kanesvky, Vice President of Political Affairs, and Andrew Wynne, Vice President of Judicial Fairness Initiative, Republican State Leadership Committee, to Interested Parties (Apr. 4, 2019), https://www.wpr.org/sites/default/files/rslc_-_20190404.pdf. Pet. App. 73-75.
[19] *Id.*

Pierce County, Republican Women's Club of Waukesha County, Republican Party of Walworth County, Racine County Republican Party, Polk County Republican Party, Republican Party of Milwaukee, and Washington County Republican Party.[20] Justice Hagedorn was not requested to, nor did he, recuse himself from the *Johnson* proceedings or other elections cases involving partisan interests.

In 2016, the Republican State Leadership Committee supported Justice Rebecca Grassl Bradley's campaign with over $100,000 in outside spending.[21] Wisconsin Republican Party Chairman Brad Courtney also emailed supporters to encourage them to collect twenty signatures each to put Justice Bradley on the ballot.[22] "[W]e have the opportunity to elect a . . . conservative jurist," he wrote.[23] Justice Bradley was not requested to, nor did she, recuse herself from the *Johnson* proceedings or other elections cases involving partisan interests.

Justices receiving support from political parties in other state supreme court races have likewise declined to recuse themselves from redistricting litigation with indirect benefits to partisan interests. In the 2016 Ohio Supreme Court judicial elections, then-Chief Justice Maureen O'Connor and Justices Pat DeWine and Pat Fischer received over $200,000 in outside spending support from the Republican

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[20] Friends of Brian Hagedorn, July Continuing 2019 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 76-78.

[21] *Wisconsin Supreme Court Finance Summaries*, Wisconsin Democracy Campaign (Apr. 26, 2021), https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries. Pet. App. 82.

[22] Molly Beck, *GOP seeking signatures on behalf of Rebecca Bradley*, Wisconsin State Journal (Dec. 2, 2015), https://madison.com/news/local/govt-and-politics/gop-seeking-signatures-on-behalf-of-rebecca-bradley/article_f6f4408d-f377-548b-bae5-109baf688e57.html. Pet. App. 90.

[23] *Id.*

State Leadership Committee's Judicial Fairness Initiative.[24] When redistricting litigation landed on the Ohio Supreme Court's docket, Justice DeWine said recusal "[was]n't even a close call."[25] He observed that each Ohio Supreme Court Justice is a member of a political party and would need to set aside partisan association to hear the case. Justice DeWine, notably, also needed to set aside familial association. His father, Governor Mike DeWine, helped draw the maps.[26]

Judicial candidates frequently make statements on the law while campaigning, and sitting Justices also express their views on the law—indeed, that's the very essence of a judicial opinion. In *Johnson I*, for instance, Justices Grassl Brady and Zeigler declared—in dicta, with no partisan gerrymandering claim before the court—that "the partisan makeup districts does not implicate and justiciable or cognizable right [under the Wisconsin Constitution]" 2021 WI 87, ¶8. Neither Justice has been called upon to, nor have they, recused themselves from the present litigation for "prejudg[ing]" the case in this dicta pronouncement on questions not actually at issue in that case. Resp. Br. 1.

Throughout her campaign, Justice Protasiewicz "made very clear" that any decision she would deliver "will be made based solely on the law and the

[24] Alicia Bannon et al., *Who Pays for Judicial Races?*, Brennan Center for Justice 49 (2016), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf. Pet. App. 146.
[25] Jessie Balmert, *Justice Pat DeWine won't recuse himself from lawsuits over maps approved by father Gov. Mike DeWine*, Columbus Dispatch (Sept. 30, 2021), https://www.dispatch.com/story/news/politics/2021/09/30/justice-pat-dewine-wont-recuse-himself-redistricting-lawsuits/5932977001/. Pet. App. 162-163.
[26] *Id.*

Constitution."[27] "I have told everyone I am making no promises to you."[28] Justice Protasiewicz emphasized, "[a]m I able to carefully make a decision on a case? Of course I am. It's what I've spent my entire career doing, follow laws I don't always necessarily like or agree with, you follow the law, that's what you do. I can assure you that every single case that I will ever handle will be rooted in the law 100 percent."[29]

Petitioners filed this case on August 2, 2023 and raise five challenges to the state legislative redistricting plans, drawn by the Wisconsin State Legislature and ultimately adopted by this Court in *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559 ("*Johnson III*"): the current legislative maps are unconstitutionally noncontiguous; they violate the separation of powers by imposing redistricting maps vetoed by the Governor; they are extreme partisan gerrymanders in violation of the Wisconsin Constitution's guarantee of equal protection, free speech and associational rights, and Maintenance of Free Government provision. Pet. ¶¶93-132. On August 22, the Wisconsin Legislature filed a motion to intervene in this case, along with a motion to recuse Justice Protasiewicz.

[27] Henry Redman, *Supreme Court candidates accused each other of lying, extremism in sole debate*, Wis. Examiner (Mar. 21, 2023), https://wisconsinexaminer.com/2023/03/21/supreme-court-candidates-accuse-each-other-of-lying-extremism-in-sole-debate/. Pet. App. 164-165.
[28] *Id.*
[29] *Id.*

ARGUMENT

I. The Due Process Clause does not require a duly elected Wisconsin Supreme Court Justice to recuse herself.

The federal Due Process Clause does not require Justice Protasiewicz to recuse in this case. Respondents' due process argument rests on a fundamental misreading of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), which articulated a standard for when the "risk of actual bias" can rise to the level of a constitutional violation. Resp. Br. 17-19. But federal due process jurisprudence recognizes a "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also State v. Herrmann*, 2015 WI 84, ¶117, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) ("We presume that judges are impartial and someone who challenges a judge's impartiality bears a heavy burden to rebut that presumption.") (internal quotation omitted)).

Respondents ignore that the *Caperton* Court emphasized that the rule is extraordinarily narrow, meant only to apply to the type of extreme facts of corruption presented in that case, where a litigant, after receiving an adverse jury verdict in a pending case, spent an outsized amount of money in a campaign that had a "significant and disproportionate influence" on placing an appellate judge on the case. *See, e.g.*, *Caperton*, 556 U.S. at 884, 889-890 ("Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application

of the constitutional standard implicated in this case will thus be confined to rare instances.")[30]; *id.* at 899 (Roberts, C.J., dissenting) (noting that the majority opinion's repeated references to the "extreme," "extraordinary," or "exceptional" facts in that case); *Herrmann*, 2015 WI 84, ¶116 (Ziegler, J., concurring) ("[I]t is important to recognize that *Caperton's* holding is very limited.").

Litigants shoulder a heavy burden when they seek recusal under the Fourteenth Amendment. Before *Caperton*, the due process clause compelled disqualification in only two situations: "when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings." *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting). And writing for the majority, Justice Kennedy similarly emphasized that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Id*. at 889-890 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

Caperton therefore requires recusal based on "a serious risk of actual bias… 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." *Id.* at 884 (emphases added). In addition to emphasizing the "personal stake" of the campaign donor in a particular case, the Court provided additional factors to analyze

[30] As explained in Section II, *infra*, the Wisconsin Statutes and Code of Judicial Conduct do not require recusal. Respondents' foregrounding of their meritless federal constitutional claim should be viewed as a transparent attempt to insert a federal issue into a case solely about the Wisconsin Constitution, on which this Court has the final say. *Arizona v. Evans*, 514 U.S. 1, 7-8 (1995).

in determining whether campaign spending by such a person meets this standard: "the contribution's relative size in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome." *Id.* Finally, the Court analyzed the "temporal" relationship between the relevant contribution and the "pendency of the case." *Id.* at 886. Wisconsin courts, including this Court, apply the standard from *Caperton* "verbatim" and acknowledge "that it is the exceptional case with 'extreme facts' which rises to the level of a 'serious risk of actual bias.'" *In re Paternity of B.J.M.*, 2020 WI 56, ¶24, 392 Wis. 2d 49, 944 N.W.2d 542 (quoting *Caperton*, 556 U.S. at 886-887); *id.* at ¶51 (A.W. Bradley, J., concurring) ("The upshot of the analysis is that when appearance of bias is part of a due process challenge, it comes with an exacting standard.").

Respondents come nowhere close to meeting this standard. Spending by political parties (a norm in Wisconsin Supreme Court elections as it is in much of the country) is fundamentally different from the kind of spending at issue in *Caperton*: spending by an individual litigant with specific financial interests pending before the court. The beneficiaries of this litigation are the voters of Wisconsin, including the Petitioners, who have been denied their constitutional rights to advance their political interests. These facts do not create a due process issue, and applying *Caperton* would mean that any case which touched on an issue or policy a political party sought to influence would require widespread recusals—precisely the concern voiced by Chief Justice Roberts in his dissent. *Caperton*, 556

U.S. at 902. Moreover, Respondents' novel argument that *Caperton* may be extended to apply to *comments* by a judicial candidate are contrary to long-standing due process jurisprudence. Were *Caperton* to be stretched to apply here, there would be no end to recusal motions in Wisconsin and across the country. There is no cognizable due process issue and the motion should be denied.

A. A political party's routine campaign contributions do not create a due process issue.

The Democratic Party of Wisconsin ("DPW") is not a party in this case, and its decision to support Justice Protasiewicz's campaign does not create a "probability of actual bias." *Id.* at 877 (quoting *Withrow*, 421 U.S. at 47). As the *Caperton* Court explained, "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* at 884. Only 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" is there a due process issue. *Id.* (emphases added). Properly considered, none of the relevant factors required for application of the *Caperton* rule are present in this case.

1. Respondents do not identify any contribution by a litigant or attorney in this case.

By its own terms, the *Caperton* rule applies only to campaign spending "by a litigant or an attorney," i.e., a "person with a personal stake in a particular case." *Id.* The rule does not apply here, where neither Petitioners nor their counsel are alleged to have made any sizable contribution, and certainly not one that "had a

significant and disproportionate influence in placing the judge on the case." *Id.* Respondents seek to rewrite and dramatically expand the *Caperton* rule by contending that the rule extends to contributions by a non-party, such as DPW, that might "receive a benefit should the Petitioner's claims succeed." Resp. Br. 24-26. That position has no support in *Caperton*, which made clear that the Due Process Clause was only implicated in "extraordinary situation[s]" involving "extraordinary contributions" made by a litigant "at a time when [they] had a vested stake in the outcome" of a pending case. *Caperton*, 556 U.S. at 886-87.

Even addressing their argument directly, it fails. Respondents provide no support for the claim that such an indirect benefit can constitute a "personal stake" under *Caperton*, and their argument misstates the nature of the Petitioners' claims and relief. While the Petitioners are all voters who support Democrats, they are not stand-ins for the Democratic Party. Instead, each Petitioner seeks to vindicate their individual rights to equal protection of the law, freedom of speech and association, and to a free government, as well as to elect representatives from constitutionally compliant districts that do not run afoul of the express requirement that districts be contiguous and do not violate Wisconsin's separation of powers doctrine. Pet. ¶¶93-132. These are constitutional rights that are afforded to the Petitioners as citizens of the state and are the bases of the Petitioners' request that this Court exercise its original jurisdiction. Pet. Mem. of Law 27 ("This Court has historically been 'unequivocal' in asserting its 'institutional interest in vindicating the state

constitutional rights of Wisconsin citizens in redistricting matters.'" (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶9, 249 Wis. 2d 706, 639 N.W.2d 537)).

While the Petition requests that the Court enjoin the existing gerrymandered legislative districts and establish a process to determine remedial maps, the Petitioners are not seeking to maximize Democratic party advantage.[31] Although Respondents, based on their past experience of partisan manipulation, see redistricting as only a zero-sum game of a gerrymander favoring one party or another, *un*gerrymandering the map favors voters, not parties. The Petitioners have specifically requested that this Court "assure itself that it does not inadvertently impose another judicially sanctioned partisan gerrymander." Pet. Mem. of Law 16. While the current Republican gerrymander harms the Petitioners because they vote for Democrats, their arguments would also apply to foreclose a Democratic gerrymander in the future.

Finally, Respondents' position that a political party's campaign contributions prevent a judge or justice from hearing a case in which that political party has a

[31] Notwithstanding Respondents' use of scare quotes, Petitioners' counsel include avowedly non-partisan organizations. Resp. Br. 2; *See Recent Updates*, Law Forward, https://www.lawforward.org/recent-updates/ (last visited Aug. 28, 2023) ("Law Forward is a nonpartisan, nonprofit impact litigation firm committed to protecting and advancing democracy."); *About CLC*, Campaign Legal Center, https://campaignlegal.org/about (last visited Aug. 28, 2023) ("Our commitment will always be to democracy, not to political parties or electoral results."); *About*, Election Law Clinic Harvard Law School, https://www.hlselectionlaw.org/ (last visited Aug. 28, 2023) ("The mission of the Election Law Clinic at Harvard Law School is to train the next generation of election lawyers through litigation and advocacy that bring novel academic ideas to the practice of election law. It aims to build power for voters, not politicians, and recognizes that the struggle for voting rights is a struggle for racial justice.").

"stake"—even when they are not a party in the case—has no discernible limiting principle. *See Caperton*, 556 U.S. at 893-94 (Roberts, C.J., dissenting). Political parties exist to influence public policy and decision-making. *See California Dem. Party v. Jones*, 530 U.S. 567, 574 ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."). They take stances on wide ranges of issues, any number of which may be affected by litigation. If Respondents' position were correct, any political party would have a sufficient "personal stake" in any litigation affecting those issues sufficient to create a due process question. This would presumably involve not only questions about elections, but also taxes, the environment, criminal justice, education, tort reform, reproductive rights, among many other issues of public policy. This is not what the Court in *Caperton* sought to remedy, which is why the rule only applies to contributions made by a "litigant or attorney" with "a personal stake in a particular case." *Id.* at 884. A political party has organizational and diffuse interests in any number of issues and cases, unlike the coal company's chief executive in *Caperton* who had a direct, personal, financial stake in the litigation outcome. Similarly, political parties of all persuasions raise money from thousands of individuals.

Respondents' efforts to rewrite and dramatically expand the *Caperton* rule would open the floodgates to allegations of judicial bias. Given that both the Democratic and Republican Parties regularly make significant contributions in Wisconsin Supreme Court cases, such an expanded rule would lead to routine

recusal motions in any case touching on public policy. And although Respondents focus exclusively on DPW's 2023 contributions, both the Democratic and Republican Party regularly contribute to Wisconsin Supreme Court races.[32] In recent years, the Republican Party supported Justices Hagedorn and Rebecca Grassl Bradley through large donations or expenditures in support of their candidacies.[33] The Democratic Party supported Justices Karofsky and Dallet.[34] And the Republican Party donated large sums directly to Justice Protasiewicz's opponent.[35] Partisan spending is a normal part of Wisconsin Supreme Court races.

Applying Respondents' significantly expanded version of the *Caperton* rule in this case would not only be contrary to the language in *Caperton* but would also leave any number of decisions by this Court open to challenge whenever a political party contributed to a judicial race. *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting). In Wisconsin, this would result in disqualification motions in every case

[32] *See*, Marley, *supra n.*17. Pet. App. 70-71. *See also*, Email from Kanesvky and Wynne, *supra* n.18 (noting $1.3 million in independent expenditures from the Republican State Leadership Committee's Judicial Fairness initiative). Pet. App. 73-75.

[33] Citizens for Justice Rebecca Bradley, Spring Pre-Primary 2016 Campaign Finance Report GAB-2, Schedule 1-B. Pet. App. 166-167; Citizens for Justice Rebecca Bradley, Spring Pre-Election 2016 Campaign Finance Report GAB-2, Schedule 1-B. Pet. App. 168-169; Friends of Brian Hagedorn, Spring Pre-Election 2019 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 170-171; Friends of Brian Hagedorn, July Continuing 2019 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 76-78.

[34] *See, e.g.*, Jill for Justice, Spring Pre-Election 2020 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 173-175; Jill for Justice, July Continuing 2020 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 176-177; Dallet for Justice, Spring Pre-Election 2018 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 178-180; Dallet for Justice, July Continuing 2018 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 181-183.

[35] Friends of Justice Daniel Kelly, Spring Pre-Election 2023 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 184-187; Friends of Justice Daniel Kelly, July Continuing 2023 Campaign Finance Report CF-2, Schedule 1-B. Pet. App. 66-69.

that affects a political party's interests, since parties frequently donate large sums to judicial candidates. And it would artificially inject a federal constitutional issue in a range of cases, undermining Wisconsin's sovereignty and independence within our system of federalism. But no such spending, which is publicly available for review, has prevented a justice of this Court from adjudicating a case involving *other* parties, including cases involving redistricting. *See, e.g.*, *Johnson v. Wis. Elections Comm.*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469 ("*Johnson I*"); *Johnson v. Wis. Elections Comm.*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402; *Johnson III*, 2022 WI 19. Nor has it prevented members of the Court from hearing election cases involving other partisan interests. *See Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423;[36] *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568; *Teigen v. Wis. Elec. Comm.*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.

If it were correct, Respondents' interpretation of *Caperton* would upend the process of judicial elections in the majority of states that select their judges this way. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015). States including Ohio, North Carolina, Texas, and Illinois have *partisan* judicial elections.[37] Presumably

[36] The Republican National Committee and Republican Party of Wisconsin intervened in this case.
[37] *See* Ethan E. Horton and Eliza Benbow, *Two Republicans win seats on the NC Supreme Court, flipping majority*, The Daily Tar Heel (Nov. 9, 2022), https://www.dailytarheel.com/article/2022/11/city-nc-supreme-court-2022-election-results. Pet. App. 188-191; Marty Schladen, *Republicans take all three Ohio Supreme Court elections*, Ohio Capital Journal (Nov. 9, 2022), https://ohiocapitaljournal.com/2022/11/09/republicans-headed-for-sweep-of-ohio-supreme-court-elections/. Pet. App. 192-193; Roxanna Asgarian, *Republican dominance continues for the two highest courts in Texas*, The Texas Tribune (Nov. 9, 2022),

every judge and justice elected in a partisan election would be subject to all sorts of recusal motions. *See Caperton*, 556 U.S. 868 at 902-03 (lamenting that "the principal consequence of [the majority] decision is to create vast undertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges") (Scalia, J., dissenting). In states with partisan or nonpartisan elections, not only would candidates, campaigns, and supporters all be limited in how they could speak about the campaign, but supporters would need to consider that their (constitutionally protected) donation may prevent a court from hearing a case *in which they are not a party*. *Williams-Yulee*, 575 U.S. at 443 ("[S]peech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection."). This all stands in contrast to the extraordinary facts that gave rise to *Caperton*, in which an individual with specific financial interests—the chief executive and chairman of an existing litigant who knew his case would be before the West Virginia Supreme Court of Appeals—made outsized expenditures. *Caperton*, 556 U.S. at 872-73. The same individual vacationed with another justice of the West Virginia Supreme Court. A third member of that court characterized the situation thusly: "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." *Id.* at 875. The Court was emphatic that it was

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https://www.texastribune.org/2022/11/09/texas-supreme-court-criminal-election/. Pet. App. 194-196; John Garcia, *Illinois Supreme Court balance of power likely to remain Democratic, party may expand majority* ABC 7 Chicago, (Nov. 8, 2022), https://abc7chicago.com/illinois-supreme-court-justices-ballot-judges/12431270/. Pet. App. 197-199.

those facts that required its narrow decision. *Id.* at 887. Because DPW is neither a party nor does it have a sufficient personal stake in this case, *Caperton* does not apply.

2. The Democratic Party of Wisconsin's contribution was not disproportionate and Respondents do not establish any impact it had on the outcome of the race.

Even if the contribution at issue had been made by a "litigant or attorney" in this case, Respondents' due process arguments fail under the other *Caperton* factors. DPW's contribution was not disproportionate to either Justice Protasiewicz's other campaign spending or the total spending in Wisconsin 2023 Spring Election for Supreme Court Justice, and Respondents show no impact the spending had on the decisive outcome of the election.

In *Caperton*,[38] the relevant campaign spending "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. . . . Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined." *Id.* at 884. Nothing remotely similar occurred in Wisconsin's 2023 Spring Election. DPW's contribution represented a fraction of Justice Protasiewicz's total campaign receipts—unlike in *Caperton*, it neither met nor

[38] Respondents make much of the fact that DPW's contribution of approximately $10 million is three times larger than the $3 million at issue in *Caperton*. Resp. Br. 1, 22. But the relevant inquiry is not to compare the 2004 West Virginia judicial election to Wisconsin's 2023 election. It is to compare the contributions to the other spending in the same election. *See Caperton*, 556 U.S. at 884.

exceeded her total campaign receipts or spending.[39] Also unlike *Caperton*, Respondents conveniently address only to the money donated *directly* to Justice Protasiewicz's campaign, not outside spending. Resp. Br. 22. According to media reports, the combined total of those numbers is approximately $32 million.[40] Instead of spending that *exceeded* the campaign's own efforts by 300%, DPW's contribution represented *less* than a third of what was spent in support of Justice Protasiewicz's successful campaign. In addition, other donors and supporters made comparable contributions and outside expenditures in support of Justice Protasiewicz's opponent.[41] Outside spending in support of Justice Kelly's campaign exceeded the outside spending in support of Justice Protasiewicz.[42] This included $5.2 million in spending by Wisconsin Manufacturers and Commerce,[43] a frequent litigant before this Court and in the Court of Appeals. *See Wisconsin Mfrs. and Com. v. Evers*, 2022 WI 38, 401 Wis. 2d 699, 977 N.W.2d 374; *Wis. Prop. Tax Consultants v. Wis. Dept. of Rev.*, No. 2023AP899 (Wis. Ct. App.); *Wis. Mfrs. and Com. v. Village of*

[39] Janet for Justice, July Continuing 2023 Campaign Finance Report CF-2, Schedule 1-B. Resp. App. 78-81; Janet for Justice, Spring 2023 Campaign Finance Report CF-2, Schedule 1-B. Resp. App. 84-87.

[40] *WisPolitics tracks $56 million in spending on Wisconsin Supreme Court race*, WisPolitics (July 19, 2023), https://www.wispolitics.com/2023/wispolitics-tracks-56-million-in-spending-on-wisconsin-supreme-court-race/. Resp. App. 76.

[41] 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. ("Conservatives were badly outspent in the early stages of the race but have closed the funding gap recently."). Resp. App. 64.

[42] Scott Bauer, *Spending in 2023 Wisconsin Supreme Court race tops $42 million*, Associated Press (Apr. 4, 2023), https://apnews.com/article/wisconsin-supreme-court-abortion-spending-82a3481a75665110e6d4b3d503ee2a24#:~:text=April%203%2C%202023-,MADISON%2C%20Wis.,Monday%20just%20before%20polls%20opened. ("Special interest groups backing Kelly have spent nearly $15.4 million, compared with $11.3 million for Protasiewicz, according to the Democracy Campaign"). Pet. App. 202.

[43] *Wisconsin Supreme Court Race Cost Record $51M*, *supra* n.3.

Pewaukee, No. 2023AP690 (Wis. Ct. App.). Justice Protasiewicz's opponent also received significant outside support, including a $6 million expenditure by Richard Uihlein—which also exceeded candidate Kelly's own total campaign spending.[44] Under Respondents' logic, recusal would have been required for any case touching on the interest of an individual or entity who made such expenditures.

DPW's contribution is even smaller when compared to the total spending in the election. *Caperton*, 556 U.S. at 884. As was widely reported, Wisconsin's 2023 Spring Election for Supreme Court Justice set nationwide records for spending.[45]

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[44] Patrick Marley, *Liberals win control of Wisconsin Supreme Court ahead of abortion case*, The Washington Post (Apr. 4, 2023), https://www.washingtonpost.com/politics/2023/04/04/wisconsin-supreme-court-election-abortion/. Resp. App. 73; Friends of Justice Daniel Kelly, July Continuing 2023 Campaign Finance Report CF-2. Resp. App. 82 (reporting $3.66 million in Kelly campaign disbursements). Outside spending from just two groups, one of which is funded by a single individual, totaled $10 million. Johnson, *supra* n.41 ("The state's largest business lobby, Wisconsin Manufacturers and Commerce, and a group funded by GOP megadonor Richard Uihlein, have spent more than $10 million on ads attacking Protasiewicz as soft on crime."). Resp. App. 64. This type of large expenditure is not unusual in Wisconsin Supreme Court elections. *See* Madeline Behr, *Bradley benefits from outside spending*, Post Crescent (Apr. 6, 2016), https://www.postcrescent.com/story/news/politics/elections/2016/04/06/bradley-benefits-outside-spending/82666576/ ("[Justice Rebecca Grassl] Bradley benefited from more outside spending from conservative groups like Wisconsin Alliance for Reform. The group spent $3 million in support of [Justice] Bradley . . . ."). Pet. App. 204. Justice Rebecca Grassl Bradley also received a donation of $20,000 from Jeré Fabick, the largest donation that campaign received from an individual. Citizens for Justice Rebecca Bradley, Spring Pre-Election 2016 Campaign Finance Report GAB-2, Schedule 1-A (excerpt). Pet. App. 207-209. Mr. Fabick subsequently brought three petitions for original action to this Court. *Fabick v. Palm*, No. 2020AP828-OA (Wis. 2020); *Fabick v. Evers*, No. 2020AP1718-OA (Wis. 2020); *Fabick v. Wis. Elections Comm.*, No. 2021AP428-OA (Wis. 2021). Justice Rebecca Grassl Bradley was neither requested to, nor did she, recuse in any of those cases.

[45] Scott Bauer, *Wisconsin Supreme Court candidates clash over abortion, maps in only 2023 debate*, Associated Press (Mar. 21, 2023), https://apnews.com/article/wisconsin-supreme-court-election-abortion-trump-81e311c9d0416d4a04489ad7a38c134d#:~:text=(AP)%20%E2%80%94%20The%20liberal%20candidate,and%20paid%20for%E2%80%9D%20by%20Democrats. Resp. App. 21; *Johnson*, supra n.41, Resp. App. 60-61; Marley, *supra* n.44. Resp. App. 73; *WisPolitics tracks $56 million in spending on Wisconsin Supreme Court race*, *supra* n.40. Resp. App. 76.

Campaigns and outside groups spent over $51 million.[46] DPW's contribution is a fraction of this total spending, and a far cry from the situation in *Caperton* in which the interested party's spending exceeded the total spending in the race. *Cf.* 556 U.S. at 884. The total spent opposing Justice Protasiewicz's campaign also exceeded DPW's contribution.[47] Far from swamping both campaigns, DPW's contribution was part of a race in which the candidates and their supporters spent considerable resources.[48]

Even if a "disproportionate" donation had been made by a "litigant or attorney" in this case, Respondents have not shown that the DPW donation "had a significant and disproportionate influence in placing the judge on the case." *Caperton*, 556 U.S. at 88; *see also Herrmann*, 2015 WI 84, ¶124 (Ziegler, J., concurring) ("Even the large expenditure in *Caperton* was but one of many factors that, collectively, were fundamental to the Court's decision. In *Caperton* the Court did not conclude that, standing alone, a lawful contribution, large expenditure, or other significant support in a campaign would require a judge to recuse."). Given the record spending in the election, as well as the many issues that voters had to consider, Respondents cannot establish this point. Indeed, Respondents neglect to address this *Caperton* factor, which is fatal to their motion. The "apparent effect" of the spending on the outcome of the election is decisive, as the analysis ultimately

[46] *Wisconsin Supreme Court Race Cost Record $51M*, *supra* n.3. Pet. App. 12. Another media report tracked $56 million in total spending. *WisPolitics tracks $56 million in spending on Wisconsin Supreme Court race*, *supra* n.40. Resp. App. 76.
[47] *Id.*
[48] Johnson, *supra* n.41. Resp. App. 64.

seeks to determine whether the contributing party "had a significant and disproportionate influence in placing the judge on the case." *Caperton*, 556 U.S. at 884. The majority in *Caperton* focused on how close the outcome of that election was—decided by fewer than 50,000 votes. *Id.* at 885. In the Spring 2023 Election, Justice Protasiewicz won by 11 percentage points, or about 200,000 votes.[49] This victory is remarkable in Wisconsin, in which statewide races are frequently decided by razor-thin margins.[50] If these decisive results somehow still allowed a finding that one entity's contribution had a "significant and disproportion influence," it is hard to fathom any judidical election that would not result in endless due process challenges. Respondents, however, draw no connection between DPW's contribution and the outcome of the race. Moreover, Respondents ignore missteps by Justice Protasiewicz's opponent, former Justice Kelly, which likely had a

[49] Marley, *supra* n.44. Resp. App. 73; Jack Kelly, *Liberal law firm to argue gerrymandering violates Wisconsin Constitution*, Cap Times (Apr. 6, 2023), https://captimes.com/news/government/liberal-law-firm-to-argue-gerrymandering-violates-wisconsin-constitution/article_2dfb9757-6d2d-58ba-9461-10b3d20d5f00.html. Resp. App. 12; Wisconsin Elections Commission, WEC Canvass Reporting System County by County Report 2023 Spring Election Justice of the Supreme Court (Apr. 17, 2023), https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_SCOWIS.pdf. Pet. App. 11.

[50] *See* Wisconsin Elections Commission, WEC Canvass Reporting System County by County Report 2019 Spring Election Justice of the Supreme Court https://elections.wi.gov/sites/default/files/legacy/Spring%2520Election%25204.2.19-CxC%2520Report-Supeme%2520Court%2520.pdf (difference of 5,981 votes). Pet. App. 206; Wisconsin Elections Commission, WEC Canvass Reporting System County by County Report 2022 General Election Secretary of State, https://elections.wi.gov/sites/default/files/documents/County%20by%20County%20Report_Secretary%20of%20State_0.pdf (difference of 7,442 votes). Pet. App. 209.

decisive role on the election,[51] as well as the fact that Kelly had fairly recently lost another Supreme Court race decisively. Thus, this factor does not favor recusal.

3. There is no temporal connection between DPW's contribution and this case.

Finally, Respondents fail to establish a temporal relationship between the DPW contribution and a *pending* case. *Cf. Caperton*, 556 U.S. at 886 ("The temporal relationship between the campaign contributions, the justice's election, and the *pendency of the case* is also critical." (emphasis added)). At the time of the election at issue in *Caperton*, the litigation at issue had been pending for years. *Id.* at 872. The Petitioners, by contrast, filed this case well after the election was over; accordingly, there is no "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case." *Id.* at 886.

At the time of the election, there was no pending case, nor was there an existing outcome that Justice Protasiewicz or any other justice could overturn. *Cf. id.* Although gerrymandering was, generally, an issue in the campaign,[52]

[51] Among other things, Kelly had previously run for a seat on the state supreme court and lost in 2020, and advised the state republican party on the fake elector scheme. *See, e.g.*, *Wisconsin Supreme Court candidate Kelly worked for Republican Party in 2020*, PBS Wisconsin (Feb. 20, 2023), https://pbswisconsin.org/news-item/wisconsin-supreme-court-candidate-kelly-worked-for-republican-party-in-2020/. Pet. App. 216-218; Redman, *supra* n.27. Pet. App. 164-165.

[52] Legislative gerrymandering has impacted Wisconsin for twelve years. *See* Craig Gilbert, *New election data highlights the ongoing impact of 2011 GOP redistricting in Wisconsin*, Milwaukee Journal Sentinel (Dec. 6, 2018), https://www.jsonline.com/story/news/blogs/wisconsin-voter/2018/12/06/wisconsin-gerrymandering-data-shows-stark-impact-redistricting/2219092002/. Pet. App. 219-223. Unsurprisingly, it arises as an issue in elections. *See* Natasha Korecki, *Democrats flood Wisconsin to take down Scott Walker*, Politico (Oct. 26, 2018), https://www.politico.com/story/2018/10/26/democrats-tackle-scott-walker-942428 ("Whoever wins the governor's race will head up the 2020 round of redistricting and get a key role in shaping the makeup of the state's congressional map."). Pet. App. 226.

Respondents produce nothing to show that the nature of the Petitioners' claims, the identity of the Petitioners, or the relief sought was known to either DPW or any candidate at the time of the donations.

Again, the actual analysis from *Caperton* is instructive. The *Caperton* affair was a years-long saga. The underlying complaint was filed on October 29, 1998. *Caperton v. A.T. Massey Coal Co*., 679 S.E.2d 223, 233 (W. Va. 2008), *rev'd and remanded*, 556 U.S. 868 (2009). Nearly four years later (in 2002), a jury returned a verdict in excess of $50 million against A.T. Massey Coal. Two years after that, post-verdict motions were resolved against Massey's interest. Post-verdict, but pre-appeal, the infamous judicial election took place. *Caperton*, 556 U.S. at 873. With trial court procedure exhausted, an appeal was the only and obvious next step in the litigation process. *Id*. at 886. Thus, judicial review by the target of the underlying recusal motion was "imminent," as the Supreme Court recognized. *Id*. at 884-86.

These differences matter. The *Caperton* court recognized that the rule it was adopting represented a departure from normal due process jurisprudence and that the due process clause requires recusal only in "extraordinary situations" such as the "extreme" facts in that case. *Id.* at 887. Here too, Respondents' position would result in no end of recusal motions in any case filed at any time following a judge or justice's campaign or election, by any party. Such motions would become routine, not exceptional. The extreme facts from *Caperton*, both in terms of the disproportionate size of the campaign spending and the temporal relationship

between the election and the pendency of the case, are absent here. The present circumstances do not justify, let alone require, recusal under the due process clause.

B. Justice Protasiewicz's previous comments do not create a due process issue.

Respondents next argue that Justice Protasiewicz's comments on the campaign trail require recusal. But there is no recognized basis to require recusal based on campaign remarks. "The general presumption is that judges are honest, upright individuals and thus that they rise above biasing influences." *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005). Due process jurisprudence acknowledges that "[a] person could find something in the background of most judges which in many cases would lead that person to conclude that the judge has a possible temptation to be biased. But not all temptations are created equal." *Id.* at 959-60 (quoting *Del Vecchio v. Ill. Dep't of Corr.,* 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc)). Tellingly, Respondents do not identify a test that a judge or justice could use to determine whether a case has been "prejudged" based on comments they made as a candidate. Instead, they attempt to graft the narrow *Caperton* campaign spending analysis onto comments made by a judicial candidate, contrary to the plain language of that decision: "We conclude there is a serious risk of actual bias . . . 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* . . . ." *Caperton*, 556 U.S. at 884 (emphasis added).

The U.S. Supreme Court has long rejected attempts to disqualify judges based on prior comments or opinions they may have formed about an issue. *FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948) ("[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."); *see also Withrow v. Larkin*, 421 U.S. 35, 48-50 (1975). In *Republican Party of Minnesota v. White*, the U.S. Supreme Court expressly rejected the notion that a judge or justice's campaign remarks could result in a due process issue. 536 U.S. 765, 775-77 (2002). *White* was a challenge to Minnesota's prohibition on a candidate for judicial office, "announc[ing] his or her views on disputed legal or political issues." *Id.* at 768. A candidate for the state supreme court challenged the restriction under the First Amendment. *Id*. at 769-70. One defense of the restriction was that it promoted impartiality and thereby protected the due process rights of litigants. *Id.* at 775. After reviewing various due process cases, the Court stated:

> To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

Id. at 776-777 (emphasis in original). The Court noted that "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason." *Id.* at 777. The U.S. Supreme Court has repeatedly recognized that judicial candidates have a First

Amendment right to speak on issues in the campaign. *See Williams-Yulee v. Fla. Bar*, 575 U.S. at 447.

The cases that Respondents cite establish that much more than campaign statements are required for a finding of a constitutional violation. In *Franklin v. McCaughtry*, a circuit court judge took the "highly unusual step of filing a memorandum with the state court of appeals" in a separate criminal case related to release pending appeal. 398 F.3d at 957. In that filing, the judge discussed Franklin's pending criminal case. *Id.* The judge stated that Franklin had been, while on release, "taken into custody in a tavern where it is alleged, according to the current file, that he stabbed one man four times and another twice, during an armed robbery." *Id.* Franklin's case was subsequently discussed in a news article. *Id.* In addressing the issue, the Seventh Circuit explained that a due process problem occurred because the facts, including the fact that the judge was later reluctant to admit that he wrote the memorandum, created an "irresistible" inference "that the judge was pointing to Franklin as the latest such incorrigible criminal, even though Franklin's trial had not yet taken place." *Id.* at 961. This was sufficient to find actual bias. *Id.* at 962.

Williams v. Pennsylvania, decided after *Caperton*, addressed a similarly exceptional situation in which a district attorney, who had taken part in the decision to seek the death penalty against Williams, later became Chief Justice of the Supreme Court of Pennsylvania. 579 U.S. 1, 5-7 (2016). Chief Justice Castille declined to recuse himself from Williams' post-conviction proceeding, which included an allegation that the prosecutor had procured false testimony from a

witness and suppressed evidence. *Id.* at 6-7. The U.S. Supreme Court, with Justice Kennedy writing for the majority, found that this was a violation of Williams' due process rights, relying on the special relationship that a prosecutor has toward a given case, as well as such a judge's particular "knowledge and impression" of the case. *Id.* at 10. To make a finding of an "unacceptable risk of actual bias," the Court first had to find that the Chief Justice had "significant, personal involvement in a critical decision in Williams's case." *Id.* at 14. There is no allegation of a such a significant, personal relationship here, and the nature, timing, and context of Justice Protasiewicz's comments on the campaign trail do not establish a due process violation. If this Court were to accept, contrary to precedent, that general comments by a judge not directly involved in a pending case about high-profile legal issues in a judicial campaign were subject to a *Caperton*-style analysis, then any number of elected judges and justices would be subject to this type of motion. Moreover, such a rule would seriously impede the ability of voters to evalute candidates, who would necessarily stop speaking on any issue of importance in a race.

1. The nature of Justice Protasiewicz's comments does not create a due process issue.

None of the statements about which Respondents complain establish a due process issue. Judges and judicial candidates make statements about the law, including the law as it relates to cases that may come before them. *Franklin*, 398 F.3d at 962 ("We are not saying that due process would be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case

before him or her."). Indeed, there is no due process issue even when the same person or party who investigated a claim and made certain findings later adjudicates that claim. *Withrow*, 421 U.S. at 48-50.

Respondents point to general comments that the state legislative maps are "gerrymandered," "rigged," and "unfair," and Justice Protasiewicz's general statements regarding previous redistricting decisions. Resp. Br. 27-30. But the notion that Wisconsin's legislative maps represent a partisan gerrymander—or are "rigged" or "unfair"—is widely shared by Wisconsinites, backed by independent research, and hardly disputable.[53] In fact, the fact that the maps are extreme partisan gerrymanders has been thoroughly established in a series of cases. As a three-judge federal court put it in evaluating whether partisanship influenced the precursor 2011 districts, any claim that the maps are not extremely partisan biased is "almost laughable." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 851 (E.D. Wis. 2012). And seven years ago, a three-judge federal court reviewed the 2011 legislative maps that form the basis of the existing maps[54] and held that they were "intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats," and, therefore, constituted "an unconstitutional political

[53] *See, e.g.,* Joy Powers, *Report: Wisconsin Legislature maps have the worst partisan-bias of any court-drawn map in the nation*, WUWM (May 9, 2022), https://www.wuwm.com/2022-05-09/report-wisconsin-legislature-maps-have-the-worst-partisan-bias-of-any-court-drawn-map-in-the-nation. Pet. App. 233; Ian Millhiser*, America's worst gerrymander may soon finally die*, Vox (Aug. 3, 2023), https://www.vox.com/voting-rights/2023/8/3/23818858/wisconsin-gerrymander-clarke-wisconsin-election-commision-supreme-court-janet-protasiewicz. Resp. App. 69-72.

[54] *See generally* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985 (2022).

gerrymander." *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *vacated on standing grounds*, 138 S. Ct. 1916 (2018). That court went on to state: "[T]he electoral influence of plaintiffs and other Democratic voters statewide has been unfairly [and] disproportionately . . . reduced." *Id.* at 863. Even the decisions by this Court in the *Johnson* litigation do not actually dispute that the maps are highly biased in favor of one political party; the dicta merely question whether claims challenging such maps are justiciable. Thus, Justice Protasiewicz's comments, far from prejudging the case, merely acknowledge widely held views.

Next, Respondents attempt, at length, to equate certain statements with claims in the Petition or supporting documents, but they are unable to point to any comment or statement in which Justice Protasiewicz promised any outcome, or discussed the application of any constitutional provision to the existing legislative maps.[55] Nor do Justice Protasiewicz's comments in any way address Petitioners' distinct arguments that the existing legislative maps are unconstitutional because they violate Wisconsin's separation of powers principle and because they contain non-contiguous districts. Respondents would require judicial candidates to speak only with a type of "gullibility" or "child-like innocence" that the U.S. Supreme Court has plainly said is not required even by recusal statutes, let alone the outer

[55] Justice Protasiewicz's opponent in the race, during the same panel from which Respondents picked many of their quotes, did opine on how this Court should determine a political gerrymandering question. WisPolitics State Supreme Court Election Forum (Jan. 9, 2023), Tr. 49:7-11 ("How districts get apportioned according to political considerations must have no purchase in the courts."). Resp. App. 36.

boundary established by the due process clause. *See Liteky v. United States*, 510 U.S. 540, 550-551 (1994); *Caperton*, 556 U.S. at 889-890.

Respondents' attack on Justice Protasiewicz's comments regarding dissenting opinions is even stranger. Dissenting opinions, of course, articulate how and why a judge or justice disagrees with a decision. They are sometimes joined by other judges or justices. Far from being nefarious, this is a basic expectation of our judicial system—judges and justices will sometimes express their thoughts through dissent. This can lead to development in the law. The same may be said of majority or concurring opinions—no one would ever expect that, simply because a judge or justice authored or agreed with an opinion in one case, that they would be constitutionally foreclosed for hearing or adjudicating subsequent cases on the same issue. As one U.S. Supreme Court Justice put it:

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.

Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., in chambers).

Respondents have no support for their extraordinary proposition that agreeing (or disagreeing) with a judicial opinion in one case disqualifies a jurist from hearing a separate case, brought by separate parties, raising distinct issues. Such a rule would be bizarre and contrary to our common law system. Would a justice be constitutionally required to recuse on *every* case in which they had authored an opinion? Or agreed with another justice's opinion? Or cited an opinion

approvingly? Or had written a related article or law review note? All these actions demonstrate some level of agreement with the legal propositions described in those opinions, and all would therefore require recusal under Respondents' theory. For example, in a prior case involving legislative districts, other Justices of this Court announced in an advisory opinion how they view certain of the Petitioners' claims (which were not before the Court). *See Johnson I*, 2021 WI 87, ¶8; *see also id*. ¶¶102-03 (Dallet, J. dissenting) (noting that the lead opinion's discussion of such claims was "gratuitous" and "an advisory opinion" as no "excessive partisan gerrymandering claim [is] before us"). Such dicta is non-binding. *Wis. Just. Initiative v. Wis. Elections Comm'n*, 2023 WI 38, ¶142, 407 Wis.2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring). However, under Respondents' theory, that type of "prejudgment" should necessarily lead to disqualification. Such a rule would lead to endless recusal motions in this and every other case that came before the Court.

2. The timing of Justice Protasiewicz's remarks does not create a due process issue.

The comments at issue in Respondents' motion all predate the filing of the Petition by months. This timeline undermines their argument, as one cannot prejudge a petition from parties who have yet to be identified and who bring claims which have yet to be asserted. Nevertheless, Respondents assert that Justice Protasiewicz prejudged the merits of a non-existent Petition before she saw it. Logic dictates that this cannot be.

The extreme facts from *Caperton* (see Section I.A.3, *infra*) simply do not exist here. During Justice Protasiewicz's campaign, there was no underlying lawsuit to render appellate review "imminent" or even likely. And there was no $50 million verdict hanging in the balance when the expenditures were made. Such was the "temporal" concern at issue in *Caperton*, and it is absent here.

Another case on which Respondents rely, *Papa v. New Haven Fed'n of Teachers*, 444 A.2d 196 (Conn. 1982), is also persuasive on this point. *Papa* analyzed two recusal motions aimed at the same judge—Judge Saden—based on comments criticizing the labor tactics of Connecticut teachers. *Id.* at 199-200. The relevant comments came both before and during litigation involving striking teachers. *Id.* In October 1975, Judge Saden publicly criticized ongoing teacher strikes in Connecticut, as "in defiance of the law" and "without intelligence." *Id.* at 204 n.13.. A month later, Judge Saden jailed dozens of Connecticut teachers for striking in violation of an injunction order. *Id*. at 199. The teachers moved for recusal, citing his October speech. *Id.* at 204. The motion was denied. *Id.* at 199. On review, the Supreme Court of Connecticut cautioned that judicial opinions offered before a "pending or impending" case do not raise the prejudgment concerns identified by Respondents. *Id.* at 206. "[J]udges frequently express opinions about specific laws, the obligation to obey and the consequences of disobedience . . . . [Thus] it is difficult to perceive why judges' general, extra-judicial comments

concerning legal issues disqualify them from hearing later cases involving those issues." *Id*. at 206.[56]

The same was not true for the comments Judge Saden made *while* the dispute over the striking teachers was pending before him. In a newspaper interview published weeks after the teachers were jailed, Judge Saden expressed that he was "ready to jail more" teachers, that the strike was only about money, and that "it would be a goddam big mistake" to alter the state law forbidding teacher strikes. Judge Saden's subsequent attempt to divorce these "personal" beliefs was unavailing. These comments during the *pending* matter were disqualifying. *Id*. at 208-209.[57]

Justice Protasiewicz has offered no public comments during the pendency of this matter (it is only four weeks old). To the contrary, Justice Protasiewicz's recent remarks confirm that she will apply the law impartially and fairly. Nor have Respondents identified anything which suggests that Justice Protasiewicz knew the individual petitioners during her campaign, let alone that these petitioners would be filing an original action petition. It seems Respondents' primary concern is not the

[56] The *Papa* decision acknowledges that comments from a judge which precede "impending" litigation could trigger the need for recusal. 444 A.2d at 205. But it did not equate ongoing issues with imminent litigation. Indeed, Judge Saden's comments were about teachers' strikes that had already happened in Connecticut. *Id.* at 204 n.13.

[57] As Respondents admit, *Papa* applied the Connecticut standards for recusal, which are not applicable here. *Id.* at 206-207. *Papa* rejected the various due process clause arguments in that case, including an argument regarding how recusal motions should be handled. *Id.* at 202 ("The defendants' due process rights were not violated in this case."); *see also id.* at 207 n.16.

comments of Justice Protasiewicz, but the timing of Plaintiffs' filing, over which Justice Protasiewicz (and DPW) has no control.

3. Respondents' arguments regarding the context of Justice Protasiewicz's comments fail.

As a final effort to contrive a federal due process issue where there is none, Respondents point vaguely to the "context" of Justice Protasiewicz's comments about the maps. Resp. Br. 35-38. Like their previous arguments regarding the nature and timing of Justice Protasiewicz's comments, this is another effort to misapply *Caperton* to campaign speech. The thrust of Respondents' argument seems to be that because these comments may have appealed to voters, Justice Protasiewicz is now foreclosed from doing the job she was elected to perform. *Id.* In addition to a lack of legal support, Respondents' arguments about "context" fail because they cannot point to any comment in which Justice Protasiewicz announced or predetermined the outcome of any claim or case. As Respondents acknowledge, Justice Protasiewicz did the opposite, refusing to make any such promises. Resp. Br. 36. During the candidates' debate, she stated clearly: "I have told everyone I am making no promises to you."[58] She further emphasized, ""I can assure you that every single case that I will ever handle will be rooted in the law 100 percent."[59]

Moreover, any comments about legislative maps took place during a statewide election in which the candidates addressed many other issues of state law

[58] *Redman*, *supra* n.27. Pet. App. 164-165.
[59] *Id.*

significant to voters. *See Caperton*, 556 U.S. at 885 ("[P]roving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion."). As Respondents' appendix reflects, each of these comments was widely reported as part of the campaign. Justice Protasiewicz's remarks, as well as those of her opponent, were the subject of public reporting and were available for consideration by the voters, who elected Justice Protasiewicz by a significant margin. There is no basis in existing law or fact for the Court or any individual justice to entertain Respondents' due process arguments. Their motion should be denied.

II. Wisconsin Law does not require recusal.

A Wisconsin judge or justice should consider recusal when a well-informed person, knowledgeable about judicial ethics standards and the justice system, and aware of facts and circumstances that the Justice knows or reasonably should know, would reasonably question the Justice's ability to be impartial; moreover, that Justice *must only* recuse if they deem themselves incapable of impartiality or appearing impartial, not simply where others might think them incapable. Wis. Stat. § 757.19(2)(g); SCR 60.04(4); *Wis. Judicial Comm'n v. Prosser*, 2012 WI 69, 341 Wis. 2d 656, 817 N.W.2d 830 (memorandum opinion by Crooks, J. explaining his decision not to disqualify himself); *State v. Henley*, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853 (memorandum opinion by Roggensack, J. explaining her decision not to disqualify herself); *Donohoo v. Action Wis. Inc.*, 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480 (per curiam). The disqualification statute establishes that it is the

judge or justice who must determine whether "he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 757.19(2)(g).

Justice Protasiewicz was a circuit court judge in the State of Wisconsin for nearly a decade prior to her investiture in the Wisconsin Supreme Court and before that spent 26 years serving the people of Wisconsin as a prosecutor in the District Attorney's office.[60] There is no basis to find that Justice Protasiewicz meets the standard for disqualification under the relevant statutes or Supreme Court Rules.

A. Respondents do not establish that Justice Protasiewicz cannot act impartially.

Wisconsin statutes require a judge or justice to recuse herself under certain limited circumstances. Wis. Stat. § 757.19(2).[61] Respondents point to Wis. Stat. § 757.19(2)(g), which requires disqualification "[w]hen 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). "The focus of paragraph (2)(g), when applied to an appellate judge, is that the judge should determine whether some circumstance causes the judge to conclude that he or she cannot, or that it appears to the judge that he or she cannot, act in an impartial manner in an appeal." *Henley*, 2010 WI 12, ¶24 (Roggensack, J., addressing a motion to disqualify). Because questions related

[60] Wisconsin Supreme Court, *Justice Janet C. Protasiewicz* (last updated July 26, 2023), https://www.wicourts.gov/courts/supreme/justices/protasiewicz.htm.

[61] Wis. Stat. § 757.19(2)(g) mandates a judge's disqualification only when *that judge decides* that, in fact or in appearance, he or she cannot act in an impartial manner. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989). Respondents repeatedly misquote the statute in their brief, conveniently omitting the controlling language regarding the judge's determination of their inability to act impartially six out of the seven times they cite the statute. Resp. Br. 4, 15, 39, 40, 42, 46.

to disqualification under Wis. Stat. § 757.19(2)(g) require the judge to consider their own mental processes, the test is subjective. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d at 182.

> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification, as the State contends, in a situation in which the judge's impartiality 'can reasonably be questioned' by someone other than the judge.

Id.; *see also Donohoo*, 2008 WI 110, ¶24.

Members of this Court have considered this test in various contexts.[62] In *Wisconsin Judicial Commission v. Prosser*, Justice Crooks denied a motion to disqualify in a case in which he had witnessed some of the alleged misconduct at issue. 2012 WI 69, 1-2. Having considered disqualification under Wis. Stat. § 757.19(2)(g), Justice Crooks concluded that he could be fair in judging the allegations against a fellow Justice and "would act in an impartial manner." *Id.* at 5. Justice Roggensack considered a similar motion in *State v. Henley*, in which a litigant sought disqualification based on the Justice's prior consideration of the appeal of his co-defendant in the underlying trial. 2010 WI 12, ¶2. The litigant

[62] Justice Protasiewicz's campaign opponent discussed this issue at length in a candidate forum during the 2020 Supreme Court Election. Former Justice Kelly said: "Well, the responsibility of a supreme court justice is to judge a case fairly, impartially, and according to the law. He should recuse himself any time that he is unable to do that. Now that's going to be different for different justices, and each one of them has to individually make the determination of when that's appropriate." Wisconsin Supreme Court Candidates' Forum (Nov. 19, 2019), https://wiseye.org/2019/11/19/wisconsin-supreme-court-candidates-forum/, beginning at 17:03.

sought disqualification on several grounds, including Wis. Stat. § 757.19(2)(g). Justice Roggensack denied the motion, stating:

> That I may have considered issues similar to those involved in Henley's appeal before the Wisconsin Court of Appeals is too broad a category to cause me to conclude that I will not address the issues in the State's appeal that is now before us in a fair and impartial manner. I have considered thousands of issues since I became an appellate judge in 1996. Some issues I probably have considered many times. Such is the nature of appellate judging, but that is no basis from which I can conclude that I am disqualified by law from participation in the certification of the State's appeal.

Id. ¶25. Ultimately, a determination under Wis. Stat. § 757.19(2)(g) is for the judge or justice to make. However, these cases illustrate that even direct knowledge of the facts at issue, or prior consideration of a case addressing those facts, are not disqualifying. As is the case with their brand-new due process arguments, Respondents provide no basis to hold that disqualification is required simply because a candidate has considered (or even opined on) issues of public importance based on widely available information. There is a presumption that a Justice will "try each case on its merits," and the fact that the judge may have prior knowledge is not disqualifying. *Voigt v. State*, 61 Wis. 2d 17, 22, 211 N.W.2d 445 (1973) (quoting *Milburn v. State*, 50 Wis. 2d 53, 62, 183 N.W.2d 70 (1971)). Justice Protasewicz is afforded this same confidence.

B. The Supreme Court's ethics rules do not require Justice Protasiewicz's recusal.

The statutes, particularly Wis. Stat § 757.19, set forth the circumstances in which a party may request disqualification. The Code of Judicial Conduct contained in Chapter 60 of the Supreme Court Rules provides the rules governing the judiciary,

which are enforced when appropriate through disciplinary proceedings. The Code provides "guidance" and "structure" and is not intended as a basis for liability. SCR Ch. 60, Preamble. "Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers or litigants for mere tactical advantage in a proceedings." *Id.*; *see also Herrmann*, 2015 WI 84, ¶141 (Ziegler, J., concurring) ("If a judge were required to recuse whenever a person could conjure a reason to question a judge's impartiality, a judge could be attacked without a standard on which to evaluate the attack. We have rejected a loose and standardless test, as the Supreme Court in *Caperton* did, in no small part because it would invite mischief and judge shopping."). Heedless of this admonition, Respondents argue that SCR 60.04(4) requires recusal in this case. It does not.

In relevant part, the Supreme Court Rule states:

> A judge shall perform the duties of judicial office impartially and diligently
>
> (1) (a) A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under section 757.19 of the statutes and except when judge substitution is requested and granted.

SCR 60.04 (1)(a).

> [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); Resp. Br. 40.

The rules define impartiality as "the absence of bias or prejudice in favor of, or against ... classes of parties, as well as maintaining an open mind in considering

issues that may come before the judge." SCR 60.01(7m). They also require judges and justices to, when able, perform the duties of the office to which they have been elected. SCR 60.04 ("The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law."). Judges are expressly required to decide matters assigned to them where recusal is not required. SCR 60.04(1)(a). The rules also provides that judges "may speak . . . [on] the law, the legal system, the administration of justice and nonlegal subjects . . . ." SCR 60.05(2). Moreover, the Code specifically provides that "[a] judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding." SCR 60.04(7).

The Wisconsin Judicial Committee, which enforces the Code, has determined that a judge has the obligation to assess their own impartiality when making an assessment under SCR 60.04(4) under the applicable "well-informed persons" standard. Judicial Conduct Advisory Committee, Opinion 08-2 (Dec. 30, 2008).[63] In that case, the judge was a member of the same fraternal organization as a party's attorney. The attorney had, as president of that organization, signed the judge's daughter's application for a scholarship. *Id.* at *1. The judge had also picked the attorney to serve as a supplemental court commissioner. *Id.* at **1-2. Even the

[63] Available at https://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=35148. Formal advisory opinions from the Committee are not binding. *Id.* at *5.

substantial connection between the judge and the attorney this was not enough to evince a violation SCR 60.04(4). *Id.* at *2. The Committee determined that even when this attorney appears before the judge, it is not a violation because the individual aspects of their relationship would not lead a well-informed person to "question the judge's impartiality." *Id.* at *4. In making this determination, the Committee specifically noted that another section of the Code, SCR 60.03, addresses *public* perception of a judge's conduct, but that rule does not provide a basis for recusal. *Id.* at *3 n.1.

Justice Protasiewicz's comments on the campaign trail were well within the requirements of the Code of Judicial Conduct. As a candidate, Justice Protasiewicz had every right to speak on "political and legal issues" involved in the race. *Donohoo*, 2008 WI 110, ¶21; *accord* SCR 60.05(2). As noted previously, Justice Protasiewicz specifically declined to commit to any specific outcome. *Cf.* SCR 60.04(4)(f). This is what both the Code of Judicial Conduct and the voters expect from a candidate for judicial office.

C. Justice Protasiewicz has no significant personal or financial interest in the outcome of this matter.

Respondents have not demonstrated that Justice Protasiewicz has "a significant financial or personal interest in the outcome of the matter" necessitating recusal. Wis. Stat. § 757.19(2)(f). They are correct that, unlike subsection (2)(g) this subsection of the statute is applied objectively: "It must be established by evidence and reasonable inferences that the judge does have a financial or personal interest."

State ex rel. Dressler v. Cir. Ct. for Racine Cnty., Branch 1, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991). But Respondents present no evidence or reasonable inferences suggesting that Justice Protasiewicz has a financial or personal interest in the outcome of this case, so they do not meet the standard for her to recuse.

1. Justice Protasiewicz has no financial interest in the outcome of this case.

Respondents present no evidence that Justice Protasiewicz has a financial interest in the outcome of this case. All they can do is point to campaign contributions from DPW, which is not a party to this case.[64] Just as importantly, Respondents cite no case in which a sitting judge or justice has been required to recuse based on financial contributions to their campaign—a telling omission, given that judges at all levels of the Wisconsin judicial system run electoral campaigns and solicit contributions. This Court has specifically recognized that: "[t]here is no case in Wisconsin or elsewhere that requires recusal of a judge or justice based solely on a contribution to a judicial campaign." *Donohoo*, 2008 WI 110, ¶19 (per curiam) (quoting Appendix C, letter from Judicial Commission).[65] In that case, an

[64] Respondents do not specifically argue that Justice Protasiewicz must recuse herself under Wis. Stat. § 757.19(2)(f) because of financial interests, focusing that portion of their brief instead on an alleged "significant personal interest." Resp. Br. 44-46. However, Respondents' brief is replete with suggestions that campaign donations from the Democratic party have some bearing on this case. Resp. Br. 1, 10, 11, 15, 16, 22, 24, 38. In the interest of completeness, the Petitioners address both financial and personal interest arguments.

[65] Respondents cite the *Donohoo* case for a general legal proposition about judicial candidates' ability to discuss their views on issues without promising to rule a certain way, but give no hint that the case directly contradicts their argument. Resp. Br. 41.

attorney for the plaintiff in a defamation lawsuit against an LGBTQ+ rights organization argued that Justice Louis Butler should have recused himself because his judicial campaign received contributions from two board members and an attorney *for that organization*. *Id.* ¶¶5, 19. The Court rejected the argument. *Id.* ¶¶19-20, 31. In this case, the connection between the alleged campaign contributions and the parties is even more tenuous: DPW is not a party to this case, nor are any of its officers.

Nor is the *Donohoo* case an outlier—justices have consistently chosen not to recuse from cases involving donors to their campaigns. In the *John Doe II* case regarding an investigation into Governor Scott Walker's campaign finances, several justices participated in the Court's decisions without ever formally responding to the Special Prosecutor's motion for their recusal. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶378, 363 Wis. 2d 1, 866 N.W.2d 165, *decision clarified on denial of reconsideration sub nom. State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49. The four justices who voted to end the Special Prosecutor's investigation into alleged illegal coordination between Governor Walker's gubernatorial campaign, and supposedly independent groups, had all received significant campaign donations themselves from those groups.[66] More recently, two justices participated

[66] *Wisconsin Supreme Court Ends Walker Investigation, Eviscerating State's Campaign Finance Limits and Raising Questions about Judicial Impartiality*, Brennan Center for Justice (July 16, 2015), https://www.brennancenter.org/our-work/analysis-opinion/wisconsin-supreme-court-ends-walker-investigation-eviscerating-states. Pet. App. 235-236.

in a case brought by one of their largest campaign donors, Wisconsin Manufacturers and Commerce, ultimately casting dissenting votes in favor of WMC's position. *Wis. Mfrs. & Com. v. Evers*, 2022 WI 38, ¶23, 977 N.W.2d 374, *reh'g denied*, 2023 WI 5, ¶3, 405 Wis. 2d 478, 984 N.W.2d 402.[67] These are just a few illustrative examples. Precedent does not require Justice Protasiewicz to recuse herself from this case.

In the last 15 years, the Supreme Court has twice been asked, and twice declined, to tighten the recusal rules for Justices based on campaign contributions. *See In re Rule Petition No. 17-01* (June 30, 2017);[68] *In the matter of amendment of the Code of Judicial Conduct's rules on recusal,* 2010 WI 73.[69] Petitioners do not concede that even these proposed (and rejected) rules would have required Justice Protasiewicz's recusal—DPW is not a party to this case—but it is notable that this Court has repeatedly declined to establish recusal rules based on campaign contributions.

2. Justice Protasiewicz has no "personal interest" in the outcome of this case.

Respondents' primary theory under Wis. Stat. § 757.19(2)(f) is that if a justice has made statements while campaigning that suggest any viewpoint on a

[67] Sarah O'Brien, *Ziegler and Roggensack should have recused from WMC case*, Cap Times (June 15, 2022), https://captimes.com/opinion/guest-columns/opinion-ziegler-roggensack-should-have-recused-from-wmc-case/article_80679add-1a34-52b5-b890-04dae6a13e2b.html.

[68] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=192530.

[69] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874.

matter that may come before the court, the justice must recuse from that matter. This theory, untethered from fact or law, would upend the administration of justice in Wisconsin. Respondents begin by mischaracterizing Justice Protasiewicz's statements during the campaign, saying she "repeatedly declared to voters how she would vote on the merits of this case" and calling her statements "tantamount to campaign promises." Resp. Br. 45. But as previously explained (Section I.B.1, *supra*), Justice Protasiewicz simply referenced a widely accepted objective fact about Wisconsin's skewed political maps, and she made no "promises" about how she would rule on a new challenge to the gerrymander. She did say she would be open to hearing a case—a basic requirement of the job of a sitting Supreme Court Justice. Respondents gesture at "[t]he evidence in this case and the reasonable inferences therefrom" but do not cite any specific evidence that Justice Protasiewicz has a personal interest. (Resp. Br. 45.) Moreover, there are whole aspects of Petitioners' claims—the contiguity and separation of powers arguments—that are not implicated in Justice Protasiewicz's campaign comments. It can hardly be said that she has a "personal interest" in such claims. There is no factual basis for Respondents' argument, even if it were legally sound.

And Respondents' argument about personal interest is *not* legally sound. Their brief does not cite a single case to support its theory that statements on the campaign trail can disqualify a justice from hearing cases on the bench. Indeed, Respondents cite cases only to establish the standard under Wis. Stat. § 757.28(2)(f), and not to support its application to this case, because none of the cases support such

an application. Two of the cited cases do not discuss subsection (f) with any specificity. *State v. Harrell*, 199 Wis. 2d 654, 546 N.W.2d 115 (1996); *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175. Another case, from 1945, discusses and rejects the argument that a Judge should recuse because his wife held stock in a subsidiary corporation of one of the parties. *Goodman v. Wis. Elec. Power Co.*, 248 Wis. 52, 58, 20 N.W.2d 553 (1945). And in a fourth case, a party and law firm sought unsuccessfully to have a judge prohibited from presiding at trial because he had denied the law firm's motion for expert witness fees, with a statement that he did not think the people of Racine County should have to pay the fees. *State ex rel. Dressler*, 163 Wis. 2d at 643. Not only do none of these cases have any bearing on *this* case, but Respondents have cited no case where a court found that a judge should have recused themselves because of their personal or financial interest in a case.

This makes sense, because judges make statements all the time, on the campaign trail and from the bench, that hint at or reveal their values and opinions. In recent years, judicial candidates have routinely released campaign ads and footage that communicate their values in ways that foreshadow their rulings on important cases. For example, during her campaign in 2016, Justice Grassl Bradley posted B-roll footage on YouTube that opened with 40 seconds of her speaking with law enforcement officers.[70] A viewer could easily infer from this footage that she

[70] *Rebecca Bradley: A Day in the Life*, Justice Rebecca Bradley on YouTube (Jan. 16, 2016), https://www.youtube.com/watch?v=qsnNr-5Rp-o.

holds close ties to the law enforcement community and has pro-law-enforcement values. A few months later, Justice Grassl Bradley voted in favor of the Milwaukee police union's request to strike down an ordinance that required police officers to live in Milwaukee. *Black v. City of Milwaukee,* 2016 WI 47, 369 Wis. 2d 272, 882 N.W.2d 333. Similarly, during her election campaign in 2018, Justice Dallet released B-roll footage in which she repeatedly referenced her experience as a prosecutor and judge, emphasizing her commitment to victims' rights.[71] In 2023, Justice Dallet joined the majority in *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission* to uphold Marsy's Law, a constitutional amendment that purported to expand victims' rights. 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122. According to Respondents' logic, Justices Grassl Bradley and Dallet should have recused from these cases, but that would be patently absurd. Voters chose them at least in part because of the values they conveyed in their judicial campaigns, including support for law enforcement, and support for victims' rights. To prevent them from hearing cases relevant to areas in which they had expressed interest and expertise would negate the entire purpose of judicial elections. Even more to the point, a justice's general values do not preclude her from giving an individual case a fair hearing.

Indeed, judges and justices enjoy a strong presumption of impartiality. *State v. Conger*, 2010 WI 56, ¶45, 325 Wis. 2d 664, 797 N.W.2d 341 (citing *State v. Santana,* 220 Wis. 2d 674, 684, 584 N.W.2d 151 (Ct. App. 1998)). When similar

[71] *Dallet B Roll*, Rebecca Dallet for Justice on YouTube (Mar. 19, 2017), https://www.youtube.com/watch?v=QtMGlEpXhT4&t=17s.

issues have come to Wisconsin courts' attention, they have ruled against recusal. In *Conger*, the defendant argued that by rejecting his plea agreement, the circuit court judge revealed a "significant personal interest" in the outcome of his case. *Id*. The Supreme Court firmly rejected this argument, in part because "given that the circuit court has a duty under the law to supervise plea agreements, it would put courts in an untenable position to create a rule that rejecting a plea automatically creates grounds for recusal." *Id.* at 697; *see also State ex rel. Dressler*, 163 Wis. 2d at 643 ("Other than this snippet from the record, we are presented with no evidence that Judge Ptacek has any interest, other than the interest of a presiding judge, in the outcome of this case."). Similarly, all Supreme Court justices (and judges throughout the state) run for election, and they cannot, realistically, remain silent while doing so. If a judicial candidate's general statements about issues relevant to Wisconsinites can later be used to disqualify the elected justice from hearing a case, then judicial candidates, too, will be placed in an "untenable position."

What little caselaw exists on what *does* constitute an impermissible "significant personal interest" in the outcome of a case does not help Respondents. In *McAdams v. Marquette University*, the Supreme Court concluded that a Marquette University faculty member should not have participated in disciplinary proceedings against a colleague, where she had signed an open letter criticizing, in strong language, the colleague's precise actions that were under investigation. 2018 WI 88, ¶ 42, 383 Wis. 2d 358, 914 N.W.2d 708 ("Under any reasonable standard of impartiality, Dr. Turner would be disqualified. She publicly inserted herself into the

dispute and expressed a personal interest in its outcome."). *McAdams* is of only limited relevance, both because university faculty members do not enjoy the same presumption of impartiality as members of the judiciary, and because the case did not concern Wis. Stat. § 757.19(2)(f). Nevertheless, this case highlights the high bar for finding that a decisionmaker has a "personal interest" in the outcome of a matter. And the common-law conception of a disqualifying personal interest in a case, preceding the enactment of Wis. Stat. § 757.19(2)(f) was very narrow, encompassing only "real direct personal interest of some nature in the result, or kinship to some one of the parties," with "direct personal interest defined as "direct pecuniary interest." *State v. Houser*, 122 Wis. 534, 100 N.W. 964, 978 (1904); s*ee also State v. Holmes*, 106 Wis. 2d 31, 47 n.13, 315 N.W.2d 703 (1982). Respondents come nowhere close to meeting this high bar, and recusal is not warranted.

CONCLUSION

Respondents' demand that Justice Protasiewicz recuse herself is not only unsupported by fact or law, it would be contrary to her duties as a sitting justice on the Supreme Court. When Justice Protasiewicz was sworn into her current office, she swore to "support the constitution of the United States and the constitution of the state of Wisconsin . . . administer justice without respect to persons and . . . faithfully and impartially discharge the duties of said office to the best of [her] ability." Wis. Stat. § 757.02(1). Respondents asks her to abdicate her responsibility to administer justice in this case, and to discharge her duties as a member of this Court elected by the people of the state of Wisconsin. Granting Respondents' motion

would be a violation of her oath of office and would render meaningless Wisconsin voters' constitutional right to elect the justice of their choice. Wis. Const. art. VII, § 4.

For the reasons stated herein, Respondents' Motion to Recuse Justice Protasiewicz should be DENIED.

Respectfully submitted this 29th day of August, 2023.

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