No.2026AP1168

In the Supreme Court of Wisconsin

ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS, CHARLENE GAEBLER-UHING, KATHLEEN GILMORE, PAUL HAYES, SALLY HUCK, THOMAS KLOOSTERBOER, ELIZABETH LUDEMAN, GREGORY ST. ONGE, *and* LINDA WEAVER,
PLAINTIFFS-APPELLANTS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, ANN S. JACOBS, DON M. MILLIS, ROBERT F. SPINDELL, JR., CARRIE RIEPL, MARK L. THOMPSON *and* MEAGAN WOLFE,
DEFENDANTS-RESPONDENTS,
GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN, TONY WIED, GREGORY HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, MIKE MOELLER, WISCONSIN STATE LEGISLATURE, BILLIE JOHNSON, CHRIS GOEBEL, AARON GUENTHER, CHARLES HANNA, TIM HIGGINS, LOU KOWIESKI, CHRIS MULLER, ERIC O'KEEFE, CRAIG ROSAND, RUTH STRECK, *and* RONALD ZAHN,
INTERVENORS-DEFENDANTS-RESPONDENTS.

On Appeal From The Dane County Circuit Court,
The Honorable Julie Genovese, Mark Sanders, and
Emily Lonergan, Presiding
Case No.2025CV2432

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MOTION OF INTERVENORS-DEFENDANTS-RESPONDENTS CONGRESSMEN GLENN GROTHMAN, BRYAN STEIL, TOM TIFFANY, SCOTT FITZGERALD, DERRICK VAN ORDEN, AND TONY WIED, AND INDIVIDUAL VOTERS GREGORY HUTCHESON, PATRICK KELLER, PATRICK MCCALVY, AND MIKE MOELLER TO RECUSE JUSTICE JANET C. PROTASIEWICZ

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INTRODUCTION[1]

In *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 ("*Johnson II*"), this Court adopted Governor Tony Evers's proposed congressional map—which was based on a bipartisan 2011 map—after concluding that the Governor's proposal complied with "all relevant state and federal laws." *Id.* ¶¶ 7, 13–25. One year later, certain petitioners, represented by the Elias Law Group, sought to reopen *Johnson II* and secure a new map, invoking the Court's rejection of the "least change" approach for state-legislative districts in *Clarke v. WEC*, 2023 WI 79, ¶¶ 63, 77, 410 Wis. 2d 1, 998 N.W.2d 370, and alleging partisan skew in

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[1] The Congressmen and Individual Voters have also moved for Justice Protasiewicz's recusal in *Wisconsin Business Leaders for Democracy v. Wisconsin Elections Commission ("WEC")*, No.2026AP1008 (Wis. Aug. 6, 2026), which similarly involves a challenge to Wisconsin's congressional map adopted by this Court. Given the similarity between these two cases, the Congressmen and Individual Voters submit here substantially the same Motion to Recuse, except for limited changes reflecting the differences between the two cases.

This Motion is also nearly identical to the Motion to Recuse Justice Protasiewicz that the Congressmen and Individual Voters filed at the panel-appointment stage of this case, *see* Proposed Mot. of Congressmen Glenn Grothman, Bryan Steil, Tom Tiffany, Scott Fitzgerald, Derrick Van Orden, and Tony Wied, and Individual Voters Gregory Hutcheson, Patrick Keller, Patrick McCalvy, and Mike Moeller to Recuse Justice Janet C. Protasiewicz, *Bothfeld v. WEC*, No.2025XX1438 (Wis. Oct. 9, 2025), which Justice Protasiewicz denied, R.57. The Congressmen and Individual Voters file this separate Motion out of an abundance of caution to ensure that there can be no dispute that the issue of Justice Protasiewicz's recusal is preserved for any future appeal to the U.S. Supreme Court. The Congressmen and Individual Voters make clear that their present Motion necessarily includes a request that Justice Protasiewicz overturn any aspects of her denial of their prior recusal motion when this case last came before this Court in the miscellaneous matter, for all the reasons articulated in this Motion.

the congressional map, *see* App.213–17.[2] In opposition, the Congressmen in *Johnson II*—joined by the Wisconsin State Legislature (the "Legislature") and certain individual voters—filed a Motion To Recuse Justice Janet C. Protasiewicz, App.267–73. Justice Protasiewicz declined to participate in the decision on whether to grant the motion to reopen in *Johnson II*, reasoning that she "was not a member of the court when" it decided *Johnson II*, and simultaneously denied the recusal motion as moot. App.343–45.

In May 2025, two sets of petitioners filed separate petitions for original action in this Court challenging the same *Johnson II* congressional district map. App.376–424. Eight of the nine Plaintiffs here were petitioners in one of those actions, App.376, arguing that the congressional map violates Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution as a partisan gerrymander, App.399–403, even though this Court in *Johnson v. WEC*, 2021 WI 87, ¶¶ 53–63, 399 Wis. 2d 623, 967 N.W.2d 469 (*"Johnson I"*) rejected those claims. As petitioners, Plaintiffs also argued that the Court's reliance on the "least change" approach to adopt the congressional map violated the separation of powers, App.403–04, despite the fact that the *Johnson I* Court adopted

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[2] Citations to "App." refer to the Appendix that the Congressmen and the Individual Voters have filed to support this Motion.

that approach out of respect for the Legislature's core power to redistrict. *Johnson I*, 2021 WI 87, ¶¶ 64–79. Further, they claimed that, to remedy the *Johnson II* map's alleged unconstitutionality, this Court must "replace the adopted congressional map with a lawful alternative" without regard to the least-change approach, App.382, 396, and do so on an "expedited" basis, before the "2026 congressional elections," App.405. The Congressmen and the Individual Voters moved to intervene in both actions and sought Justice Protasiewicz's recusal. *See* App.425–60, 489–535, 536–71, 600–48. This Court denied the original-action petitions, App.719–20, 723–24, and Justice Protasiewicz denied the recusal motions and decided to participate in the case, App.721–22, 725–26.

Plaintiffs, again represented by the Elias Law Group, then filed a Complaint in the Dane County Circuit Court that again challenges the *Johnson II* congressional map on the same grounds as the petition this Court rejected. Plaintiffs claim that the congressional map is an "unlawful partisan gerrymand[er]" that violates Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution and that the Court's reliance on the "least change" approach to adopt the congressional map violates the separation of powers. R.9. ¶¶ 76–97 (citation modified) ("Compl."). Even their requested remedy mirrors their prior petition: they ask for "the

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adoption of a lawful congressional map in time for the 2026 congressional elections." Compl. at 26; *see* App.382, 396, 405.

As this most recent challenge to this Court's *Johnson II* congressional map is yet another not-so-thinly-veiled effort to reopen *Johnson II*, the Congressmen and Individual Voters respectfully submit that Justice Protasiewicz should recuse or, at minimum, decline to participate in this case, for the same reasons she declined to participate in prior matters challenging the *Johnson II* map. The Congressmen and Individual Voters recognize that Justice Protasiewicz is likely to reject this Motion as she did with the prior Motions To Recuse in *Bothfeld v. WEC*, No.2025AP996-OA (Wis.) and *Felton v. WEC*, No.2025AP999-OA (Wis.), App.721–22, 725–26, and in the miscellaneous proceeding when this case came to this Court on the question of whether it should appoint the Panel, given the identity of issues and arguments raised between the Motions. Nevertheless, they respectfully submit this Motion, which is based in large part on their prior Motion To Recuse, so that there can be no dispute that this issue is preserved for any future appeal that may occur to the U.S. Supreme Court. The Congressmen and Individual Voters make clear that their present Motion necessarily includes a request that Justice Protasiewicz overturn any aspects of both her denial

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of their prior recusal motion when this case came before this Court in the miscellaneous matter, as well as her decision to deny the recusal motion in *Clarke*, for all the reasons articulated in this Motion.

BACKGROUND

A. This Court Adopts Wisconsin's Current Congressional Map In *Johnson II*

In 2011, the Legislature and Governor undertook a "bipartisan process" to craft Wisconsin's congressional map. *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853–54 (E.D. Wis. 2012) (per curiam); *Johnson I*, 2021 WI 87, ¶ 4 (citing *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012)). By 2021, changes in the geographic distribution of Wisconsin's population required modifications to the maps to ensure population equality between the districts. *Johnson I*, 2021 WI 87, ¶ 2. When the political branches deadlocked, this Court confronted the "unwelcome task" of "redraw[ing] the boundaries" through an exercise of its original jurisdiction in *Johnson II*. *Johnson II*, 2022 WI 14, ¶¶ 1–2. Certain of the Congressmen here and various individual voters intervened in *Johnson II* to protect their interests in the creation of a new congressional map. *See* App.123–26.

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Before imposing any remedy, this Court addressed arguments that the 2011 map "reflect[ed] a partisan gerrymander favoring Republican Party candidates at the expense of Democrat party candidates," which, it was urged, required the Court to "redraw the maps to allocate districts equally between these dominant parties." *Johnson I*, 2021 WI 87, ¶ 2. After fully considering the text and history of Wisconsin Constitution Article I, Sections 1, 3, 4, and 22, the Court rejected that argument, holding that none of those provisions guarantee a "right to partisan fairness," and thus that partisan gerrymandering did not violate the Wisconsin Constitution. *Id.* ¶ 53.

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With the governing legal principles settled, this Court invited the parties to submit proposals for congressional district maps for the Court to choose from, explaining that it would use the "least-change" approach to decide between the proposed maps because "[t]reading further than necessary to remedy" any defects "would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power," *id.* ¶¶ 64–79, 81; *see id.* ¶ 87 (Hagedorn, J., concurring); U.S. Const. art. I, § 4.

Three Justices dissented from *Johnson I*'s adoption of the "least-change" approach, asserting that "applying th[e] approach to 2011's

maps affirmatively perpetuates the partisan agenda of politicians no longer in power." *Johnson I*, 2021 WI 87, ¶ 93 (Dallet, J., dissenting, joined by A.W. Bradley & Karofsky, J.J.); *see also Johnson v. WEC*, 2022 WI 19, ¶¶ 159, 184, 401 Wis. 2d 198, 972 N.W.2d 559 (Karofsky, J., dissenting). These Justices would have enacted a map that "preserve[d] communities of interest," "ensure[d] districts [that] foster a representative democracy," and "respect[ed] . . . political subdivision boundaries." *Johnson I*, 2021 WI 87, ¶¶ 94, 98 (Dallet, J., dissenting, joined by A.W. Bradley & Karofsky, J.J.).

In *Johnson II*, this Court selected Governor Evers's proposed congressional district map, reasoning that "Governor Evers' . . . congressional map" best satisfied the least-change standard because it made "the least changes from existing congressional district boundaries while complying with all relevant state and federal laws." 2022 WI 14, ¶¶ 7, 25.

Following this Court's adoption of the *Johnson II* map, each of the Congressmen here was elected or reelected to represent his respective congressional district, as drawn in that map. App.346–63. Further, most of the Congressmen intend to seek reelection under the *Johnson II*

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map in the upcoming 2026 election. App.346–63.[3] The Individual Voters devoted significant time and resources supporting and campaigning for the Congressmen in the 2024 election, and they intend to do the same in the 2026 election cycle. App.364–75.

B. Then-Judge Protasiewicz Campaigns On Overturning *Johnson II*'s Remedial Congressional Map

After the *Johnson* litigation, Justice Patience D. Roggensack announced her retirement from this Court, creating a vacancy. App.1–2. Now-Justice Protasiewicz was among the candidates who ran for that open seat in the 2023 election.

As a candidate, Justice Protasiewicz centered her campaign on a number of causes important to the Democratic Party, including overturning the congressional and state-legislative maps and the "least change" approach this Court adopted in *Johnson II*. As detailed below, she repeatedly labeled Wisconsin's congressional and state maps "gerrymandered," "rigged," "unfair," and "wrong." *See infra* pp.14–16. She invited the opportunity to give Wisconsin's maps a "fresh look," while stating that she would "agree with the dissent" in *Johnson II*. *See infra* pp.. And in a televised campaign debate, she remarked, "we have

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[3] Representative Tiffany is running for Governor for the upcoming 2026 election. Representative Tiffany maintains a significant interest in the boundaries of the district he represents for the duration of his current term in Congress.

eight seats [in Congress]—six are red, two are blue, in a battleground state . . . we [therefore] know something is wrong." Channel 3000 / News 3 Now, *Wisconsin Supreme Court debate presented by News 3 Now and WisPolitics*, at 29:40–29:50 (YouTube, Mar. 21, 2023) ("*Supreme Court Debate*").[4]

On January 9, 2023, in a WisPolitics Wisconsin Supreme Court candidate forum before the primary election, App.28–34, Justice Protasiewicz stated that she "see[s] no basis" for the "[l]east change approach" "in the Constitution" or "in case law," concluding that she "believe[s] the gerrymandering decision was wrong." App.20; *see* App.35–39. She criticized the *Johnson II* map adjustments made under the "least change" approach, proclaiming "let's be clear here: [t]he maps are rigged, bottom line, absolutely[,] positively rigged. They do not reflect the people in this state." App.19–20 (responding to moderator's question regarding the "least change approach").

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Over the ensuing months on the campaign trail, Justice Protasiewicz reiterated the same views in several public interviews. For example, addressing the "75 percent Republican representation" congressional map, Justice Protasiewicz revealed that she "*agree[d] with*

[4] Available at https://bit.ly/3HAtZtv (all webpages last accessed on Aug. 20, 2026).

the dissent in that matter" because "you look at those maps and something's wrong, they just don't look right, and you know that was the product of intense gerrymandering." River Channel, *Western Wisconsin Journal*: *Wisconsin Supreme Court Candidate: Janet Protasiewicz*, at 5:00–6:15 (YouTube, Feb. 12, 2023) (emphasis added)[5]; *see also* App.46–48. On the Cap Times' *Wedge Issues* podcast, Justice Protasiewicz responded to a question about the "least change approach" by saying that she "would enjoy taking a fresh look at the gerrymandering question," Wedge Issues, *Janet Protasiewicz, 'common sense' and the Wisconsin Supreme Court*, Cap Times (Mar. 2, 2023) (transcript available via Apple Podcasts),[6] and, at a Pod Save America event, she "welcome[d] the opportunity to have a fresh look at our maps," App.85. Asked about this Court's "least change" remedial approach during a PBS interview, she responded, "[t]here's no legal precedent [for it]. There's nothing in the Constitution. There's nothing in case law"—although, she conceded, "[it] kind of on its face makes sense" "to an uneducated voter." App.50. Predicting how she would decide future arguments related to "'least change' map[s]," she added: "[y]ou'll hear people argue that the Republicans used very, very sophisticated

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[5] Available at https://bit.ly/4mL8WIn.

[6] Available at https://podcasts.apple.com/podcast/id1385156002?i=1000602474107.

computer technology to draw those maps and to draw those maps in a way that are absolutely the most favorable to them. So that's when I say, yes, those maps are rigged." App.50.

On March 21, 2023, before the general election, Justice Protasiewicz specifically addressed the partisan balance of the *Johnson II* congressional map: "[L]ook[ing] at Congress—you know, we have eight seats—six are red, two are blue, in a battleground state. So, we know something is wrong." *Supreme Court Debate*, *supra*, at 29:40–29:49. Continuing to decry the maps, she explained that, in her view, "[t]he map issue is really kind of easy," App.63, and "[i]f you look at the dissent in that maps case, that dissent is what I will tell you I agree with," App.59. "We know the maps are not fair," she said; "[w]e have battleground elections. We know they are not fair." App.54. She also described the "least change" approach as "totally unfair," *Supreme Court Debate*, *supra*, at 29:21–29:28, and opined, "[w]e know that this least-change rule certainly inhibits people's ability to cast a vote and a vote that counts. . . . Everybody's vote should count and with this least-change rule, everybody's vote is not counting," *id.* at 29:50–30:10.

Commentators observed that Justice Protasiewicz's campaign strategy "shattered long-held notions of how judicial candidates should

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conduct themselves by making her political priorities central to her campaign." App.87. She "pushed the envelope for a judicial candidate by offering voters explicit declarations of her views," App.74, apparently "calculati[ng] from the start of the race that Wisconsin voters would reward her for making clear her positions on . . . the state's maps," App.89; *see* App.41 ("No one believes she won't overturn the maps in a future case."); *see also* App.96 (noting that Justice Protasiewicz's criticism of the maps "helped her mobilize Democratic voters in her . . . victory").

Justice Protasiewicz prevailed in what was then the "most expensive campaign for a state supreme court seat in United States history." Order, *Felton*, No.2025AP999-OA (May 15, 2025) (Bradley, J., dissenting). Specifically, her campaign reported more than $16 million in spending, over four times her opponent's total campaign spending. *See* App.93 (reporting $16.54 million in campaign disbursements); App.91 (reporting $3.66 million in campaign disbursements). The Democratic Party of Wisconsin provided $9.9 million of that total—about 60%—including $8.3 million in direct transfers. *See* App.93, 107. That party support *alone* was more than twice what Justice Kelly's *entire* campaign spent.

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C. *Clarke* Rejects *Johnson*'s "Least Change" Approach For State-Legislative Maps—With Justice Protasiewicz Voting Consistent With Her Campaign Statements

Soon after Justice Protasiewicz joined this Court, Law Forward—a self-described "progressive" law firm, App.109–11[7]—filed a petition, challenging the state-legislative map adopted in *Johnson II* for its failure to contain contiguous districts, App.127–75. The petition also took issue with the Court's use of the "least change[ ]" approach. *See* App.146–47.

Citing the Democratic Party's campaign contributions and Justice Protasiewicz's campaign statements, *supra* pp.13–16, the Legislature moved for her recusal. Justice Protasiewicz denied that motion, reasoning that "justices of this court have repeatedly participated in redistricting cases despite receiving substantial support from politically affiliated groups" and, further, "describing [her] values about political issues" does not disqualify a justice. *Clarke v. WEC*, 2023 WI 66, ¶¶ 7, 22, 409 Wis. 2d 249, 995 N.W.2d 735 (mem. of Protasiewicz, J.). In her view, absent a "pledge about the result of [the] case," she saw no need to recuse. *Id.* ¶ 22.

With Justice Protasiewicz in the majority, the Court held the state-legislative maps unconstitutional for lack of contiguity. *Clarke*, 2023 WI

[7] Available at https://www.lawforward.org/about-us/our-story/.

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79, ¶ 77. Although resolving "contiguity issues" would normally obviate the need "to adopt remedial maps," *id.* ¶ 57, the Court nonetheless overruled *Johnson*'s "least change" approach as to the state-legislative maps—aligning with Justice Protasiewicz's campaign statements, *id.* ¶¶ 60–63. Instead, the Court announced that it would consider "other traditional districting criteria" when adopting a remedial map, including "preserving communities of interest" and "partisan impact." *Id.* ¶¶ 68–69.

D. Democratic Party-Aligned Parties In *Johnson II* Move For Relief From The *Johnson II* Congressional Map, And This Court Denies The Motion, With Justice Protasiewicz Abstaining

On January 16, 2024, a group of Wisconsin voters aligned with the Democratic Party who had intervened in *Johnson II* and were represented by the Elias Law Group (the *Hunter* Intervenors) moved for relief from *Johnson II*'s judgment. App.213–17; App.736–37 (explaining that the Elias Law Group's mission is to "help[ ] Democrats win"). The *Hunter* Intervenors argued that *Clarke*'s repudiation of *Johnson II*'s "mandate" of "a least change approach," 2023 WI 79, ¶ 63, left the congressional district map with "no basis in Wisconsin law," App.192–93. They further asserted that the *Johnson II* map unlawfully "perpetuate[d] the partisan unfairness that has radically skewed

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Wisconsin's districting maps since 2011," App.183, and that "the Court cannot [lawfully] 'ignore partisan impact'" when drawing a remedial congressional map, App.185 (citation omitted). They requested a redraw of the *Johnson II* map that is less favorable to Republicans. App.185.

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald—intervenor-petitioners in *Johnson*—opposed the *Hunter* Intervenors' motion on multiple grounds. First, they argued that the motion was not made in a "reasonable time," App.295–307, and that *Clarke* did not displace *Johnson II*'s "least change" approach for a *congressional* map that was not alleged to be independently unlawful, App.310–20. Those Congressmen further argued that the U.S. Constitution's Elections Clause required the "least change" approach for remedial congressional maps because it grants the Legislature—and not the courts—broad "discretion to decide how congressional elections are conducted." App.317 (citation omitted).

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Those Congressmen, joined by the Legislature and certain individual voters, also filed a Motion To Recuse Justice Protasiewicz. App.267–73. They argued that the Democratic Party's donations and Justice Protasiewicz's campaign statements, *see infra* Part I, demonstrated either actual bias or the appearance of bias in violation of

the Fourteenth Amendment's Due Process Clause and Section 757.19 of the Wisconsin Statutes, App.229–35, 238–64.

This Court denied the *Hunter* Intervenors' motion without explanation. App.339–42. Justice Protasiewicz issued a separate order noting that she did not participate in the Court's decision because she "was not a member of the court when it issued its [original] decision and order." App.343. She then denied the recusal motion as moot without reaching the merits. App.343–44.

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E. Another Group Of Petitioners File Yet Another Challenge To The *Johnson II* Congressional District Map

Four years after this Court determined in *Johnson I* that partisan gerrymandering does not violate our Constitution and three years after this Court adopted the Governor's proposed congressional map in *Johnson II*, two separate groups of petitioners—including eight of the nine Plaintiffs here—filed petitions for original action with this Court, alleging that this map constituted an unconstitutional partisan gerrymander, violated the separation of powers, and was malapportioned. *See* App.399–404, 420–21. To remedy the alleged unconstitutionality, those petitioners asked this Court to "replace the adopted congressional map with a lawful alternative" on an "expedited" basis, "in time for the 2026 congressional elections." App.382, 405; *see*

App.421–22. The Congressmen and the Individual Voters moved to intervene in both actions, filed response briefs in opposition to the petitions, and sought Justice Protasiewicz's recusal. *See* App.425–648. Notably, eight of the nine Plaintiffs here were petitioners in the *Bothfeld* matter, raising the same claim at issue in the underlying Complaint here. *Compare* Compl. ¶¶ 76–97, *with* App.399–405.

On June 20, 2025, this Court granted the Congressmen and the Individual Voters' intervention motion, App.715–18, and, five days later, the Court issued orders denying the two petitions for original action, *see* App.719–20, 723–24. In separate orders issued that same day, Justice Protasiewicz denied the Congressmen and the Individual Voters' recusal motions and thus participated in the case. App.721–22, 725–26.

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F. Plaintiffs Subsequently File A Complaint In Dane County Circuit Court Again Seeking To Challenge The *Johnson II* Map

On July 21, 2025—just four weeks after this Court rejected the *Bothfeld* and *Felton* petitions—Plaintiffs filed a complaint in Dane County Circuit Court challenging the *Johnson II* map under the same partisan-gerrymandering theory that they unsuccessfully sought to raise as petitioners in the *Bothfeld* original action. *See* Compl. ¶¶ 80–106. Plaintiffs claim that the *Johnson II* congressional map is an unconstitutional partisan gerrymander that "systematically disfavor[s]

Democrats because they are Democrats," "condemn[ing]" them "to permanent minority status in the state's congressional delegation." Compl. ¶¶ 1–2. The Complaint also requires the three-judge panel to address Plaintiffs' claim that *Johnson II*'s utilization of the "least change" approach as a remedy for congressional redistricting violates the separation of powers, *see* Compl. ¶¶ 76–82, as the Wisconsin Constitution requires the Court to engage in a remedial map-drawing process that does "not 'ignore partisan impact'" and "consideration[s] of [partisan] fairness," Compl. ¶¶ 49–50 (citations omitted). Plaintiffs also asked this Court to appoint a three-judge panel under Wis. Stat. § 801.50(4m) and Wis. Stat. § 751.035(1) to adjudicate Plaintiffs' constitutional challenge to the *Johnson II* map. Compl. ¶ 34. Plaintiffs requested that the three-judge panel, if appointed, invalidate the *Johnson II* map and "[p]rescribe procedures for the adoption of a lawful congressional map in time for the 2026 congressional elections." Compl. at 26.

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On July 22, 2025, the Dane County Clerk of Courts sent written notice to this Court of Plaintiffs' Complaint and three-judge panel request under Wis. Stat. § 801.50(4m) and Wis. Stat. § 751.035(1), and

this Court opened a miscellaneous matter. *See Bothfeld*, No.2025XX1438.

On September 25, 2025, this Court issued an order in the miscellaneous matter directing the parties to file briefs "addressing whether [Plaintiffs'] complaint filed in the circuit court constitutes 'an action to challenge the apportionment of a congressional or state legislative district' under Wis. Stat. § 801.50(4m)." R.49:2 (citation omitted). This Court also noted that the Congressmen and Individual Voters—who had filed nonparty correspondence with the Court shortly after it opened the miscellaneous matter—"may move in th[e] miscellaneous matter for intervention or for leave to participate as amicus curiae." R.49:2. The Congressmen and Individual Voters then intervened in that miscellaneous proceeding and opposed Plaintiffs' request. *See* Proposed Br. Of Proposed Intervenor-Defendants Congressmen Glenn Grothman, Bryan Steil, Tom Tiffany, Scott Fitzgerald, Derrick Van Orden, And Tony Wied, And Individual Voters Gregory Hutcheson, Patrick Keller, Patrick McCalvy, and Mike Moeller, Per This Court's September 25, 2025 Order, No.2025XX1438 (Wis. Oct. 9, 2025). The Congressmen and Individual Voters also moved to recuse Justices Protasiewicz and Crawford on the same bases that they invoke

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in the present motions. The Justices individually denied these motions. R.56; R.57.

On November 26, 2025, this Court appointed a three-judge panel of the Circuit Court ("Panel") under Sections 801.50(4m) and 751.035, while selecting Dane County as the venue. R.58:4–5. In entering that order, the Court explained that Section 801.50(4m) statutorily "required" the Court "to appoint a three-judge panel." R.58:4. Writing separately, Justice Hagedorn emphasized that whether Plaintiffs could obtain their requested relief was not before the Court "at this stage," while also flagging the significant "legal roadblocks" that would need to "be reckoned with" before the Panel could grant the "extraordinary" relief of declaring an "order of this court unconstitutional." R.58:6–7 (Hagedorn, J., concurring).

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G. The Panel Dismisses Plaintiffs' Complaint

In the Circuit Court, Plaintiffs moved for judgment on the pleadings on their separation-of-powers argument, R.44, and the Congressmen and Individual Voters moved for dismissal of all of Plaintiffs' claims, R.145. The Congressmen and Individual Voters made four arguments, as relevant here. First, the Panel could not constitutionally afford Plaintiffs relief because doing so would require an inferior tribunal to declare unlawful this Court's *Johnson II* judgment.

R.145:10–17. Second, Plaintiffs' claims were all nonjusticiable political questions under *Johnson I* and, regardless, failed as a matter of law. R.145:17–29. Third, granting Plaintiffs relief would violate the U.S. Constitution's Elections Clause. R.145:29–38. Finally, laches barred Plaintiffs' challenge to the *Johnson II* map. R.145:38–40.

The Panel denied the Motion for Judgment on the Pleadings and granted the Motion To Dismiss, R.158, along with similar motions filed by the *Johnson* Intervenors, R.138, and the Legislature, R.141. Before considering the parties' arguments, the Panel questioned its "scope of authority" in this action, R.158:6–7 (formatting altered), and ultimately determined it was a "circuit court"—as opposed to "an arm of the state supreme court" or a "referee"—with "no endowment of additional powers" or "authority to supersede decisions of th[is Court]," R.158:7.

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The Panel then concluded that Plaintiffs failed to show "that they are entitled to judgment as a matter of law" on their separation-of-powers claim. R.158:11. Plaintiffs' separation-of-powers theory asked the Panel to "read into *Clarke* an analysis that it does not contain," R.158:11, as *Clarke* neither overruled *Johnson II* nor "reject[ed]" the least-change approach "based on a finding that there was a separation-of-powers violation," R.158:10–11. As to Plaintiffs' partisan-

gerrymandering claims, the Panel determined that such claims are nonjusticiable under this Court's precedent. R.158:16–17.

Plaintiffs appealed, R.159, and filed their Opening Brief. The Congressmen and Individual Voters, simultaneously with the filing of their Response Brief, file this Motion to Recuse Justice Protasiewicz.

ARGUMENT

I. The Federal Due Process Clause Requires Justice Protasiewicz's Recusal

The Fourteenth Amendment's Due Process Clause "guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). A judge must therefore recuse from any case in which she has an actual bias, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) ("[A]ctual bias, if disclosed, no doubt would be grounds for appropriate relief."), or if she "has prejudged the facts or the outcome of the dispute before her," *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005). After all, judges must remain "neutral and detached" from the cases before them, *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972), and avoid any "temptation . . . not to hold the balance nice, clear, and true," *id.* at 60 (citation omitted). Unlawful prejudgment is shown, for example, where a judge promises to "ma[k]e new law" in a given case to

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achieve a preferred result. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). Such predeterminations create an impermissible "risk that [a] judge would be so psychologically wedded to . . . her previous position . . . that [she] would consciously or unconsciously avoid the appearance of having erred or changed position," regardless of "the parties' arguments to the court." *Williams*, 579 U.S. at 9–10 (citations omitted).

Due process "do[es] not require proof of actual bias," as recusal is also warranted where "objective and reasonable perceptions" reveal a "serious *risk*" of "actual bias or prejudgment." *Caperton*, 556 U.S. at 883–84 (emphasis added) (citation omitted); *see In re Murchison*, 349 U.S. at 136 ("[J]ustice must satisfy the *appearance* of justice." (emphasis added) (citation omitted)); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("'[O]ur system of law has always endeavored to prevent *even the probability of unfairness*.'" (emphasis added) (citations omitted)). The question is "whether, as an objective matter, the average judge in [the judge's] position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams*, 579 U.S. at 8 (citations omitted); *see Lavoie*, 475 U.S. at 822. "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the

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judge or decisionmaker is too high to be constitutionally tolerable.'" *Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam) (quoting *Withrow*, 421 U.S. at 47).

Due process also requires that "no judge . . . try cases where he has an interest in the outcome." *Lavoie*, 475 U.S. at 822 (citation omitted). Courts assess such interests by considering "all the circumstances of th[e] case," *Caperton*, 556 U.S. at 872, "under a realistic appraisal of psychological tendencies and human weakness," *id.* at 883–84 (citation omitted). "[T]here 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 when the case was pending or imminent." *Id.* at 884. To assess whether due process requires a judge to recuse based on contributions, courts should consider (1) "the contribution's relative size in comparison to the total amount of money contributed to the campaign," (2) "the total amount spent in the election," and (3) "the apparent effect such contribution had on the outcome of the election." *Id.*

The U.S. Supreme Court's *Caperton* decision illustrates these principles. There, the CEO of A.T. Massey Coal Company ("Massey"),

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Don Blankenship, donated $3 million to a state supreme court candidate's campaign, while that court was expected to hear the appeal of a $50 million verdict against Massey. *Id.* at 873. While the plaintiff moved to disqualify the newly elected justice, he denied recusal and the court ultimately reversed the verdict against Massey. *Id.* at 874–75. The U.S. Supreme Court reversed, finding failure to recuse created a due process violation based on two "extreme facts": Blankenship had "a significant and disproportionate influence in placing [the new justice] on the case"; and "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case" made it "apparent" that the contributions' target would "review a judgment that cost his biggest donor's company $50 million." *Id.* at 884–87.

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Here, as in the motion-for-relief-from-judgment litigation, and in the *Bothfeld* and *Felton* original-action petitions, the Fourteenth Amendment's Due Process Clause demands Justice Protasiewicz's recusal for at least two reasons.

A. Justice Protasiewicz's Campaign Statements Show At Least A Serious Risk Of Prejudgment

Justice Protasiewicz has "disclosed" "actual bias," *Caperton*, 556 U.S. at 883, or, at a minimum, has shown a "serious risk" of "actual bias or prejudgment," *id.* at 884 (citation omitted), warranting recusal here

because she made specific statements on the campaign trail about the constitutionality and competitiveness of the *Johnson II* congressional map—the object of Plaintiffs' challenge here—and the need to correct it. Those statements demonstrate a serious risk that Justice Protasiewicz "has prejudged the facts or the outcome of the dispute before her," requiring her recusal. *Franklin*, 398 F.3d at 962.

Plaintiffs here asked the Panel to determine whether the *Johnson II* congressional map constitutes an "unlawful partisan gerrymander" under the Wisconsin Constitution, *see* Compl. ¶¶ 83–97 (citation modified), that must be cast aside because it "disadvantages voters based on their political views and partisan affiliation," Compl. ¶ 1. In particular, they sought adjudication of their claim that the *Johnson II* congressional map "systematically disfavor[s] Democrats because they are Democrats," "condemn[ing]" them "to permanent minority status in the state's congressional delegation." Compl. ¶¶ 1–2. Plaintiffs also requested that the Panel address their claim that utilizing the "least change" approach as a remedy for congressional redistricting violates the separation of powers, *see* Compl. ¶¶ 76–82, as the Wisconsin Constitution requires the Court to engage in a remedial map-drawing process that does "not 'ignore partisan impact'" and "consideration[s] of

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[partisan] fairness," Compl. ¶¶ 49–50 (citations omitted). Plaintiffs finally requested that the Panel address their claim that this Court utilizing the "least change" approach as a remedy for congressional redistricting "preserved and perpetuated" the alleged partisan gerrymander that led to the 2011 congressional district map. *See* Compl. ¶ 75. Justice Protasiewicz already pre-decided these central issues on the campaign trail—or, at the very least, demonstrated a "serious risk" of "actual bias or prejudgment." *Caperton*, 556 U.S. at 884.

First, Justice Protasiewicz labeled the existing congressional district map a gerrymander and forecasted her willingness to replace the map during her campaign. She publicly declared that "something is wrong" with Wisconsin's congressional map due to the partisan split in the current congressional delegation "in a battleground state." *Supreme Court Debate*, *supra*, at 29:40–29:50; *compare* Compl. ¶¶ 74–75 (describing the map as displaying a "heavy bias" and a "dramatic skew" "[e]ven though Wisconsin voters were evenly split"). Even more clearly endorsing Plaintiffs' position here, Justice Protasiewicz declared that "something's wrong" with the congressional map because she "know[s] that [it] was the product of intense gerrymandering." River Channel, *supra*, at 5:00–6:15; *compare* Compl. ¶ 75 (claiming the congressional

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map "reflects the intentional cracking and packing engineered by the 2011 gerrymander"). Indeed, she proclaimed that Wisconsin's maps are some of "the most gerrymandered maps in the entire country" and that anyone "with any sense knows [they] are rigged." App.47. She also made it very clear that she "agreed with the dissent" in *Johnson*, River Channel, *supra*, at 5:00–6:15, and even predicted that she would dismiss future arguments in favor of the map's constitutionality, *see* App.49–51. Accordingly, she "welcome[d] the opportunity to have a fresh look at our maps," App.85, specifically stating that she "would enjoy taking a fresh look at the gerrymandering question," App.46. These statements reveal that Justice Protasiewicz has already decided that the congressional district map is an "unfair" gerrymander and she will "change" the "precedent"—*i.e.*, *Johnson II*'s conclusion that the map was constitutional—"to [make it] fair." App.738–39.

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Given her explicit statements that the State's current congressional map is "wrong," *Supreme Court Debate*, *supra*, at 29:40–29:49, "gerrymander[ed]," River Channel, *supra*, at 5:00–6:15, and based on a methodology that is "totally unfair" and lacks any legal basis, *Supreme Court Debate*, *supra*, at 29:21–29:28; *see* App.85, an objective person could reasonably conclude that there is a "serious risk,"

Caperton, 556 U.S. at 884, that Justice Protasiewicz has "prejudged . . . the outcome of th[is] dispute," *Franklin*, 398 F.3d at 962, and will not maintain impartiality in approaching the merits issues in this appeal regardless of the evidence or arguments presented. "[A]s an objective matter," it is not reasonable to think that "the average judge" could make these statements and still remain "neutral" when presented with an opportunity to declare the *Johnson II* map unconstitutional. *See Williams*, 579 U.S. at 8 (citation omitted). Therefore, Justice Protasiewicz's participation in this case cannot "satisfy the appearance of justice," *In re Murchison*, 349 U.S. at 136 (citation omitted), and the objective "probability of unfairness" in her adjudicating this matter requires recusal, *Withrow*, 421 U.S. at 47 (citation omitted); *see Rippo*, 580 U.S. at 287; *Williams*, 579 U.S. at 8.

Second, Justice Protasiewicz also prejudged the remedial question in this case, as she has already forecast her view that the Court's remedial map-drawing process should disregard the "least change" approach to achieve partisan balance.

To remedy the alleged deficiencies in the *Johnson II* map, Plaintiffs ultimately asked the Panel to "replace" "the existing congressional map" with an entirely new, court-drawn map that

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considers "partisan impact"—instead of the "least change" approach—on an expedited basis prior to the upcoming 2026 congressional elections. Compl. ¶¶ 14, 49, 81 (citations omitted). Justice Protasiewicz's public comments make clear that she has already decided that the map is unfair and that she will vote to adopt an entirely new map—without regard to the "least change" approach—to remedy the alleged partisan gerrymandering that Plaintiffs challenge.

As to *Johnson II*'s "least change" approach, Justice Protasiewicz could not have been more clear: she declared that the approach is "totally unfair," *Supreme Court Debate*, *supra*, at 29:21–29:28, and claimed that it has "no basis . . . in the Constitution" or "in case law," App.20, "inhibits people's ability to cast a vote," *Supreme Court Debate*, *supra*, at 29:39–30:10, and "take[s] . . . meaningful votes away from people in large communities," App.20.

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These repeated statements require recusal to maintain a "neutral and detached" courtroom. *Ward*, 409 U.S. at 61–62. Even a *single* statement indicating how a judge will rule in a case suffices to trigger recusal—and, here, there are *many* such statements. *See supra* pp.13–16. For example, Justice Antonin Scalia—whom Justice Protasiewicz invoked repeatedly in her decision against recusing in *Clarke*, 2023 WI

66, ¶¶ 20, 21, 63, 64, 68, 91 (mem. of Protasiewicz, J.)—recused in a case concerning the constitutionality of the phrase "under God" in the Pledge of Allegiance after a single incident where he had publicly stated that the controlling decision in that case was wrong without being "fully apprised of all the facts," App.117 (Suggestion for Recusal at 3, *Newdow v. United States*, No.03-7 (U.S. Sep. 5, 2003)); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 2 (2004) ("SCALIA, J., took no part in the consideration or decision of the case."); *see also* Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 Rutgers L. Rev. 107, 122–25 (2004).

Justice Protasiewicz has *repeatedly* said that the congressional map here was adopted pursuant to a legal standard that is "unfair" and has no basis in the law, that the map is "wrong" and "gerrymandered," and she has repeatedly invited opportunities to "take a fresh look" at it. *Supra* pp.13–16. Indeed, she directly stated that Wisconsin has "eight seats [in Congress]—six are red, two are blue, in a battleground state . . . we [therefore] know something is wrong." *Supreme Court Debate*, *supra*, at 29:40–29:50. These statements promise to "ma[k]e new law" in order to achieve a desired outcome. *Lavoie*, 475 U.S. at 822. As such, they have created a very clear "risk that [Justice Protasiewicz] would be so

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psychologically wedded to . . . her previous position . . . that [she] would consciously or unconsciously avoid the appearance of having erred or changed position," regardless of "the parties' arguments to the court." *Williams*, 579 U.S. at 9–10 (citations omitted).

Moreover, given that her position on *Johnson II* and this very map was central to Justice Protasiewicz's campaign, it is improbable that she will now profess to "having erred or changed position." *Id.* at 9 (citations omitted). Justice Protasiewicz's public criticism of the congressional maps undoubtedly had a "significant . . . influence in placing [her] on th[is] case," *Caperton*, 556 U.S. at 884—indeed, Justice Protasiewicz "campaigned against the gerrymandered maps and then won her election in a landslide." App.103; *see* App.87–90; App.96 (observing that Justice Protasiewicz's criticism of the maps "helped her mobilize Democratic voters in her . . . victory").

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Nor can one retroactively reframe these statements on the congressional map as being merely about "values," *Clarke*, 2023 WI 66, ¶¶ 17, 22 (mem. of Protasiewicz, J.), or as "general observation[s] about the law," *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (mem. of Rehnquist, J.). She expressly spoke to how she would apply the "Constitution" and "caselaw," App.5, to the facts underlying the

Complaint in this case in order to ensure that she is able to vote against the "wrong," *Supreme Court Debate*, *supra*, at 29:40–29:50, "rigged," and "gerrymandered," App.47, map that this Court adopted in *Johnson II*. Unlike value statements or "general opinion[s] regarding a law," her statements make clear that she "has prejudged the facts or the outcome of the dispute." *Franklin*, 398 F.3d at 962. Indeed, she announced that her mind is firmly made up on the issue: "we *know* something's wrong" with the current congressional map. *Supreme Court Debate*, *supra*, at 29:40–29:49 (emphasis added). As one newspaper put it during her campaign, "[n]o one believes she won't overturn the maps in a future case." App.739.

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B. Justice Protasiewicz's Campaign Platform And Extraordinary Democratic Donations Create An Objective Appearance That She Has A Personal Interest In The Outcome Of This Matter

Even if any doubt were to remain as to whether Justice Protasiewicz's campaign statements require her recusal from this case, *supra* Part I.A, the massive amount of contributions she received from the Democratic Party confirms her need to recuse.

As in *Caperton*, Justice Protasiewicz's campaign received "disproportionate" financial support from a single donor that has a vested interest in the outcome of challenges to Wisconsin's congressional

map. 556 U.S. at 884. The Democratic Party of Wisconsin contributed nearly $10 million to Justice Protasiewicz, *supra* p.17—a sum more than three times the "extreme" amount contributed in *Caperton*, 556 U.S. at 886. This contribution accounts for 60% of all of Justice Protasiewicz's campaign spending, which dwarfs her opponent's total campaign expenditures of $3.66 million. App.93; App.91 (reporting $3.66 million in campaign disbursements). As such, the Democratic Party of Wisconsin's contribution undoubtedly had a "significant and disproportionate influence" on her election. *Caperton*, 556 U.S. at 884. Justice Protasiewicz committed to recuse from all cases involving the Democratic Party of Wisconsin to preserve the perception that "she's fair." App.44. And this action—brought by Democratic Party-aligned Wisconsin voters who are represented by the Elias Law Group whose mission is to "help[ ] Democrats win," App.735, and represented the *Hunter* Intervenors in seeking to reopen *Johnson II*, App.333–37—presents an ideal case for her to do so, given that it seeks a redraw of the *Johnson II* map in a manner that specifically and intentionally favors the Democratic Party.

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The nature of this appeal heightens the problem. Redistricting is "one of the most intensely partisan aspects of American political life."

Rucho v. Common Cause, 588 U.S. 684, 718–19 (2019). Plaintiffs' request for the Panel to "[p]rescribe procedures for the adoption of a lawful congressional map in time for the 2026 congressional elections," *see* Compl. at 26, asks this Court on appeal to "recast itself as a redistricting commission in order to make its own political judgment about how much representation particular political parties *deserve*," *Johnson I*, 2021 WI 87, ¶ 45 (citations omitted). A court that engages in this enterprise looks like "a policymaking body rather than a law-declaring one." *Id.* ¶ 52. As a consequence, concerns of bias are at their peak in redistricting legislation—and such concerns are clearly exacerbated where Justices have already indicated, without hearing a single word of "the parties' arguments to the court," *Williams*, 579 U.S. at 9–10, that they "know something's wrong," *Supreme Court Debate*, *supra*, at 29:40–29:49.

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II. Wisconsin Law Likewise Mandates Justice Protasiewicz's Recusal

A. The federal Due Process Clause establishes "only the outer boundaries of judicial disqualifications," and "[S]tates . . . remain free to impose more rigorous standards for judicial disqualification" through laws and "codes of judicial conduct" that "provide more protection than due process requires." *Caperton*, 556 U.S. at 889–90 (citation omitted).

Wisconsin has provided such heightened protection by enacting statutes and rules that "create[ ] a mandatory duty for judges to disqualify themselves in certain circumstances," *State v. Allen*, 2010 WI 10, ¶ 43 n.17, 322 Wis. 2d 372, 778 N.W.2d 863 (per curiam), including under circumstances that do not necessarily implicate federal due process concerns. As relevant here, Section 757.19 provides that "[a]ny judge"—including any "supreme court justice[ ]"—"shall disqualify . . . herself" from "any" case where "she cannot, or it appears . . . she cannot, act in an impartial manner" or she "has a significant . . . personal interest in the outcome of the matter." Wis. Stat. § 757.19(1), (2)(f)–(g). Notably, Section 757.19 is a "mandatory disqualification statute," *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 181, 443 N.W.2d 662 (1989), meaning that Wisconsin law requires recusal if either of the circumstances identified in the statute are present, Wis. Stat. § 757.19(4).

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Wisconsin's Code of Judicial Conduct further defines the circumstances in which judges should recuse themselves. *See* Wis. Sup. Ct. R. ("SCR") 60.04. Supreme Court Rule 60.04(4) requires recusal under two circumstances relevant here. First, a judge must recuse "when the facts and circumstances the judge knows or reasonably should

know establish" that "[t]he judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to . . . [a]n issue in the proceeding." SCR 60.04(4)(f). Second, a judge must recuse "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). Therefore, the rules require recusal based on both actual, subjective bias and the objective perception of partiality. *See id.*; *Am. TV*, 151 Wis. 2d at 186. So, a judge must determine not only that "she could act in an impartial manner" but also "that it appear[s] that . . . she could act in an impartial manner." *Ozanne v. Fitzgerald*, 2012 WI 82, ¶ 5, 822 N.W.2d 67 (opinion of Abrahamson, C.J.).

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Wisconsin law provides that "impartiality" is "the absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." SCR 60.01(7m). Accordingly, a judge who has prejudged a case must recuse as she cannot maintain "the absence of bias" or "an open mind" in considering the issues in that case. *Id.*; *see*

State v. Herrmann, 2015 WI 84, ¶ 148 n.14, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring); Wis. Stat. § 757.19(2)(g). For instance, if a judge remarks that a law is unconstitutional, an objective observer could reasonably conclude that the judge would not "maintain[ ] an open mind in considering" a later constitutional challenge. SCR 60.01(7m). Such "prejudgment," or even the appearance of prejudgment, "can require recusal." *Herrmann*, 2015 WI 84, ¶ 148 n.14 (Ziegler, J., concurring).

Campaign statements can demonstrate a judge's partiality. *See Storms v. Action Wis. Inc.*, 2008 WI 110, ¶ 21, 314 Wis. 2d 510, 754 N.W.2d 480 ("Judges and candidates for judicial office can announce their views on political and legal issues as long as they are not pledges or promises to decide cases in a certain way." (citation omitted)). Elected judges "are not politicians," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015), and must avoid making statements that create the perception that "in order to obtain [victory], [they] deliberately w[ere] announcing in advance, without benefit of judicial oath, briefs, or argument, how [they] would decide a particular question that might come before [them] as a judge," *Laird*, 409 U.S. at 836 n.5 (mem. of Rehnquist, J.). Thus, a judge who makes campaign statements proclaiming how she intends to vote on a matter impermissibly creates the perception that she will not

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"apply the law without fear or favor," *Williams-Yulee*, 575 U.S. at 438, requiring recusal from those matters she has seemingly prejudged, *see* SCR 60.01(7m).

This Court engages in a "fact-specific" and "objective" inquiry, *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996), in order to determine whether a judge has a "financial or personal interest in the outcome of the matter" that warrants recusal, Wis. Stat. § 757.19(2)(f). If the party moving for recusal can "establish[] by evidence and reasonable inferences," *State ex rel. Dressler v. Cir. Ct. for Racine Cnty.*, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991), that a judge's interest in the outcome of matter is "substantial" rather than "remote," *Goodman v. Wis. Elec. Power Co.*, 248 Wis. 52, 58, 20 N.W.2d 553 (1945) (citation omitted), then the "very existence" of that interest "creates a disqualification by law," *Harrell*, 199 Wis. 2d at 658 (citation omitted), regardless of whether the judge is actually "ab[le] to act impartially in a case," *Am. TV*, 151 Wis. 2d at 182.

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B. Here, Wisconsin law likewise mandates Justice Protasiewicz's recusal because she has predetermined the merits of the underlying Complaint in this case and has a significant personal interest in its

outcome for the same reasons that federal law requires Justice Protasiewicz's recusal in this matter. *Supra* Part I.

First, Justice Protasiewicz's campaign statements regarding the congressional maps and map-drawing methodology at issue here preclude her from participating in this Court's rendering of a decision in this matter that will substantially impact the resolution of the underlying Complaint. *See* Wis. Stat. § 757.19(2)(g); SCR 60.01(7m). During her campaign, Justice Protasiewicz expressly said that she "know[s] something's wrong" with Wisconsin's current congressional map due to the partisan split in the current congressional delegation, *supra* pp.13–14, that the map is "rigged" in favor of Republicans, *supra* p.14, that the *Johnson II* decision that adopted the map was wrongly decided, *supra* p.14, and that the "least change" approach the Court used to draw the map in *Johnson II* has "no basis" in the law, *supra* p.14. She also repeatedly promised voters that she would take a "fresh look" at Wisconsin's map and that electing her could directly change the outcome of the then-upcoming 2024 elections. *Supra* pp.14–16. Plaintiffs squarely ask the Court to invalidate the *Johnson II* map as an "unlawful partisan gerrymand[er]," hold unlawful the "least change" methodology, and, ultimately, adopt an entirely new map that creates "partisan

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impact." Compl. ¶¶ 49, 76–97 (citation modified); *supra* pp.22–25. Plaintiffs have made clear that they seek a new congressional map that is less "favor[able] [to] Republican candidates." Compl. ¶ 74. Given her public statements predetermining those issues, Justice Protasiewicz cannot now cast a vote in this case. *See* Wis. Stat. § 757.19(2)(g); SCR 60.01(7m).

At the very least, Justice Protasiewicz's campaign statements create the "appear[ance] . . . she cannot[ ] act in an impartial manner" in this case. Wis. Stat. § 757.19(2)(g); *see* SCR 60.04(4)(f). That is sufficient to require "mandatory disqualification" under Wisconsin law, *Am. TV*, 151 Wis. 2d at 181, and so her recusal "must occur," Wis. Stat. § 757.19(4). She "deliberately" "announc[ed] in advance . . . how [s]he would decide" the constitutionality of the *Johnson II* congressional district map and the "least change" approach, while being fully aware that those very issues "might come before h[er] as a judge." *Laird*, 409 U.S. at 836 n.5 (mem. of Rehnquist, J.). Justice Protasiewicz's statements are the type of "pledges or promises to decide cases in a certain way," *Storms*, 2008 WI 110, ¶ 21 (citation omitted), that display a judge's partiality, *Williams-Yulee*, 575 U.S. at 438, and therefore warrant her recusal.

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Second, Justice Protasiewicz's significant personal interest in the outcome of this case separately warrants her recusal under Wisconsin law. Justice Protasiewicz made the *Johnson II* maps a centerpiece of her successful campaign's record-setting fundraising and openly explained to voters how she would vote on the merits of a case—like this one—giving her an opportunity to revisit those maps. *See supra* pp.13–16. She received nearly $10 million in campaign contributions from the Democratic Party based on those commitments. *Supra* p.17. In reviewing the Panel's decision, Justice Protasiewicz has the opportunity that she promised voters she would seize upon to redraw Wisconsin's maps during her campaign: taking a "fresh look" with respect to the congressional map drawn in *Johnson II*, App.85; *see supra* pp.15–16. And it is clear how she will rule if given the chance. *See supra* pp.13–16. Having invited this opportunity and campaigned on it, there is, objectively, a "reasonable inference[ ]," *State ex rel. Dressler*, 163 Wis. 2d at 643, that Justice Protasiewicz has a substantial "personal interest in the outcome of th[is] matter" that requires her recusal, Wis. Stat. § 757.19(2)(f).

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III. At Minimum, Justice Protasiewicz Should Decline To Participate In This Case Just As She Did In The *Johnson II* Motion-For-Relief Litigation

At minimum, Justice Protasiewicz should decline to participate in this case for the same reasons she declined to participate in the motion-for-relief litigation in *Johnson II*, App.721–22, 725–26, given that this case is simply a "thinly veiled" attempt to reopen *Johnson II, see* R.49:4 n.2 (Ziegler, J., concurring). Plaintiffs seek reconsideration of the issues squarely decided in *Johnson II*. Justice Protasiewicz *had declined to participate in* Johnson II's *reopening* at the time, but now Plaintiffs and their same counsel seek a backdoor to invite Justice Protasiewicz to fulfill her campaign pledge to dismantle the *Johnson II* congressional map.

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This action, raising only claims previously rejected by this Court, is nothing more than an attempt to ensure Justice Protasiewicz can hear their challenge this time around. Plaintiffs ultimately seek a judicial redraw of the *Johnson II* congressional map based upon a repudiated and unsupported interpretation of our Constitution that recognizes partisan gerrymandering claims. *See generally* Compl. ¶¶ 76–93. But this Court explicitly declined to recognize such claims in *Johnson I*—holding that the Wisconsin Constitution "has nothing to say about partisan gerrymandering" and "[c]ontriving a partisan gerrymandering claim

from the text of the Wisconsin Constitution" would "overstep[ ] [the Court's] judicial role." 2021 WI 87, ¶¶ 55–56. And this Court declined to hear Plaintiffs' arguments when they packaged them as an original-action petition. App.719–20. Therefore, this appeal is an attempt to have this Court reconsider issues that *Johnson II* decided in a case in which Justice Protasiewicz has not already declined to participate.

That Plaintiffs effectively ask this Court to reopen *Johnson II* also distinguishes it from *Clarke*, where Justice Protasiewicz chose to participate. Unlike here, *Clarke* focused exclusively on whether the state-legislative map violated our Constitution's contiguity requirements, which was not under consideration in *Johnson II*, and therefore justified Justice Protasiewicz's decision to participate in *Clarke*'s decision, under her rationale. *See Clarke*, 2023 WI 79, ¶ 2. Justice Protasiewicz additionally determined that recusal was not required because *Clarke* was "unrelated" to *Johnson II* and "involve[d] different parties," *Clarke*, 2023 WI 66, ¶¶ 12–15 (mem. of Protasiewicz, J.) (citation omitted)—although it did not, *see Clarke*, 2023 WI 79, ¶ 89 (Ziegler, C.J., dissenting). Applying Justice Protasiewicz's own reasoning, she cannot participate in this decision because it directly stems from *Johnson II*, and the same progressive-interest law firm—

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Elias Law Group, which represented the *Hunter* Intervenors and *Bothfeld* Petitioners whose claims this Court rejected—also represents Plaintiffs here.

Accordingly, even if Justice Protasiewicz declines to recuse, she should decline to participate as she did in the motion-for-relief litigation in *Johnson II*.

CONCLUSION

Justice Janet C. Protasiewicz should recuse from this case, or, alternatively, decline to participate in the Court's consideration of this case.

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Respectfully submitted,

Electronically signed by Misha Tseytlin

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