

**In the Supreme Court of Wisconsin**

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ELIZABETH BOTHFELD, JO ELLEN BURKE, MARY COLLINS,  
CHARLENE GAEBLER-UHING, PAUL HAYES, SALLY HUCK,  
TOM KLOOSTERBOER, ELIZABETH LUDEMAN, *and* LINDA  
WEAVER,  
PETITIONERS,

*v.*

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT  
F. SPINDELL, JR., MARGE BOSTELMANN, ANN S. JACOBS,  
MARK L. THOMSEN, *and* CARRIE RIEPL, in their official  
capacities as commissioners of the Wisconsin Elections  
Commission; *and* MEAGAN WOLFE, in her official capacity  
as administrator of the Wisconsin Elections Commission,  
RESPONDENTS.

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On Petition To The Supreme Court To  
Take Jurisdiction Of An Original Action

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**PROPOSED MOTION TO RECUSE JUSTICE JANET  
C. PROTASIEWICZ BY PROPOSED  
INTERVENOR-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**

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*(Counsel for the Congressmen and the Individual Voters listed on the  
following page)*

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MISHA TSEYTLIN  
*Counsel of Record*  
State Bar No. 1102199  
KEVIN M. LEROY  
State Bar No. 1105053  
TROUTMAN PEPPER  
LOCKE LLP  
111 S. Wacker Dr.  
Suite 4100  
Chicago, IL 60606  
(608) 999-1240 (MT)  
(312) 759-1938 (KL)  
(312) 759-1939 (fax)  
misha.tseytlin@troutman.com  
kevin.leroy@troutman.com

*Counsel for 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*

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## INTRODUCTION<sup>1</sup>

In *Johnson v. WEC*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402 (“*Johnson II*”), the Court adopted a congressional redistricting map for the State proposed by Governor Tony Evers that he based on a bipartisan-created 2011 map, concluding that the map complied with “all relevant state and federal laws.” *Id.* ¶¶ 7, 13–25. A year later, certain petitioners, represented by the Elias Law Group, tried to reopen *Johnson II* and obtain a new map, based upon the Court’s rejection of the “least change” approach for state-legislative districts in *Clarke v. WEC*, 2023 WI 79, ¶ 77, 410 Wis. 2d 1, 998 N.W.2d 370, and the alleged partisan skew of the congressional map. *See* App.333–37 (Mot. Relief From J., *Johnson v. WEC*, No.2021AP1450-OA (Wis. Jan. 16, 2024)).<sup>2</sup> In response, the Congressmen in *Johnson*—along with the Wisconsin State Legislature (the “Legislature”) and certain individual voters—filed a motion to recuse Justice Janet C. Protasiewicz, App.387–93 (Mot. to Recuse Justice Protasiewicz, *Johnson*, No.2021AP1450-OA (Jan. 29,

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<sup>1</sup> The Congressmen and Individual Voters have moved to intervene and oppose a similar petition for original action challenging this same congressional map in *Felton v. WEC*, No.2025AP999-OA (Wis.). Given the similar interests and considerations involved, this brief reproduces in large part what the Congressmen and Individual Voters filed in that case with certain limited changes relevant to the difference as between the two equally meritless petitions.

<sup>2</sup> Citations of “App.” refer to the Appendix that the Congressmen and the Individual Voters have filed to support this Motion and their simultaneously filed Proposed Response in Opposition to the Petition.

2024)). Justice Protasiewicz instead declined to participate in the decision of whether to grant the motion to reopen in *Johnson* because she “was not a member of the court when” it decided *Johnson* and simultaneously denied the recusal motion as moot. App.463–65 (Order of Justice Protasiewicz, *Johnson*, 2021AP1450 (Mar. 1, 2024)).

Now, Petitioners represented by the Elias Law Group have filed this Petition For Original Action challenging the *Johnson II* congressional map, which Petition is no different in substance than the motion to reopen in *Johnson*. Since this is a not-so-thinly-veiled effort to reopen *Johnson*, all the same reasons require Justice Protasiewicz’s recusal; or, at minimum, similarly support her not taking part in this case.

## BACKGROUND

### **A. This Court Redraws Wisconsin’s Congressional Map In *Johnson II***

In 2011, the Legislature and Governor engaged in a “bipartisan [ ] process” to draw Wisconsin’s congressional and state-legislative maps. *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 862 F. Supp. 2d 860, 862 (E.D. Wis. 2012); *Johnson v. WEC*, 2021 WI 87, ¶ 4, 399 Wis. 2d 623, 967 N.W.2d 469 (“*Johnson I*”). In 2021, changes in Wisconsin’s population data required modifications to the maps to secure population

equality between the districts. *Johnson I*, 2021 WI 87, ¶ 2. When the Legislature and the Governor came to an impasse in adopting the remedial maps, this Court confronted the “unwelcome task” of “redraw[ing] the boundaries” through an exercise of its original jurisdiction in *Johnson*. *Johnson II*, 2022 WI 14, ¶¶ 1–2. Certain of the Congressmen here and various individual voters intervened in *Johnson* to defend their interests in the creation of the new congressional map. See App.231–34 (Order, *Johnson*, No.2021AP1450-OA (Oct. 14, 2021)).

Before it could impose any remedy, the Court considered arguments that the 2011 map “reflect[ed] a partisan gerrymander favoring Republican Party candidates at the expense of Democrat party candidates,” requiring the Court to “redraw the maps to allocate districts equally between these dominant parties.” *Johnson I*, 2021 WI 87, ¶ 2. The Court ultimately rejected this argument after fully considering the text and history of Wisconsin Constitution Article I, Sections 1, 3, 4, and 22. *Id.* ¶ 53. It held that nothing in any of those provisions guaranteed a “right to partisan fairness,” and partisan gerrymandering therefore did not offend the Wisconsin Constitution. *Id.*

With the applicable legal principles settled, this Court invited the parties to submit proposed maps for the Court to choose from, Order,

*Johnson*, No.2021AP1450-OA (Nov. 17, 2021), explaining that it would utilize the “least-change” approach to choose between the proposed maps because “[t]reading further than necessary to remedy” the issues with the prior maps, “would intrude upon the constitutional prerogatives of the political branches and unsettle the constitutional allocation of power,” *Johnson I*, 2021 WI 87, ¶¶ 64–79, 81; see U.S. Const. art. I, § 4.

Three Justices dissented from *Johnson I*'s adoption of the “least-change” approach. In their view, “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. Bradely and Karofsky, J.J.); see also *Johnson v. WEC*, 2022 WI 19, ¶¶ 159, 184, 401 Wis. 2d 198, 972 N.W.2d 559 (“*Johnson III*”) (Karofsky, J., dissenting). Thus, 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. Bradely and Karofsky, J.J.).

In *Johnson II*, this Court adopted the proposed congressional map submitted by Governor Evers, reasoning that “Governor

Evers' . . . congressional map” was the best map 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.

After this Court adopted the *Johnson II* map, each of the Congressmen here sought and won election or reelection to be the representative to Congress from their respective congressional districts, as drawn in that map. App.529–546. The Congressmen intend to seek reelection under the *Johnson II* map in the upcoming 2026 Election. App.529–546. The Individual Voters have expended 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.547–558.

**B. Then-Judge Protasiewicz Makes Overturning *Johnson II*'s Remedial Congressional Map A Platform Of Her Election Campaign**

After the *Johnson* litigation, Justice Patience D. Roggensack announced her retirement from this Court, creating a vacancy to be filled in the 2023 election. App.1–2 (Associated Press, *Milwaukee County Judge Janet Protasiewicz announces candidacy for state Supreme Court*,

Wis. Pub. Radio (May 25, 2022)).<sup>3</sup> Among the candidates for that open seat was now-Justice Protasiewicz.

Then-candidate 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, then-candidate Protasiewicz repeatedly decried Wisconsin’s congressional and state maps as “gerrymandered,” “rigged,” “unfair,” and “wrong.” *See infra* pp.14–17. She invited the opportunity to give Wisconsin’s districts a “fresh look,” while stating she would “agree with the dissent” in *Johnson II*. *See infra* pp.14–17. And she said in a campaign debate, “[W]e have 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*”).<sup>4</sup>

On January 9, 2023, before the primary election, Justice Protasiewicz participated in a WisPolitics Wisconsin Supreme Court

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<sup>3</sup> Available at <https://perma.cc/RMK5-G34R> (all webpages last visited June 5, 2025).

<sup>4</sup> Available at <https://bit.ly/3HAtZtv>.

candidate forum. App.31 (Zac Schultz, *Candidates tangle over political issues, judicial perspectives at first 2023 Wisconsin Supreme Court forum*, PBS Wis. (Jan. 10, 2023)).<sup>5</sup> Asked about the maps that this Court adopted in *Johnson II*, Justice Protasiewicz said that she “see[s] no basis” for the “[l]east change approach” “in the Constitution” or “in case law,” concluding, “I believe the gerrymandering decision was wrong.” App.23 (WisPolitics State Supreme Court Election Forum Tr.46:9–18 (Jan. 9, 2023)); see App.42 (Alexander Shur, *Candidate Q&A: Wisconsin Supreme Court*, Wis. State J. (Jan. 30, 2023)).<sup>6</sup> She chastised the district adjustments in *Johnson II* under the “least change” approach: “So let’s be clear here: The maps are rigged, bottom line, absolutely[,] positively rigged. They do not reflect the people in this state.” App.22–23 (responding to moderator’s question regarding the “least change approach”).

For months on the campaign trail, Justice Protasiewicz echoed the same statements in several public interviews. For example, in response to a question regarding the “75 percent Republican representation” map—that is, the congressional map—Justice Protasiewicz revealed that she “agree[d] with the dissent in that matter” because “you look at

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<sup>5</sup> Available at <https://perma.cc/HC4L-NFUS>.

<sup>6</sup> Available at <https://perma.cc/J4V6-E5RQ>.

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)<sup>7</sup>; see also App.54 (Jessie Opoien & Jack Kelly, *Protasiewicz would ‘enjoy taking a fresh look’ at Wisconsin voting maps*, Cap Times (Mar. 2, 2023) (quoting Justice Protasiewicz as stating, “I think anybody with any sense knows our maps are rigged,” and Wisconsin’s maps are “amongst the most gerrymandered maps in the entire country”)).<sup>8</sup> In response to a question about this Court’s “least change approach” on the Cap Time’s *Wedge Issues* podcast, Justice Protasiewicz stated 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)),<sup>9</sup> and, during a Pod Save America event, she broadly “welcome[d] the opportunity to have a fresh look at our maps,” App.93 (Shawn Johnson, *In a supreme court race like no other, Wisconsin’s political future is up for grabs*, NPR (Apr. 2, 2023)).<sup>10</sup> When asked about this Court’s “least

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<sup>7</sup> Available at <https://bit.ly/4mL8WIn>.

<sup>8</sup> Available at <https://perma.cc/THH2-VH3Q>.

<sup>9</sup> Available at <https://podcasts.apple.com/podcast/id1385156002?i=1000602474107>.

<sup>10</sup> Available at <https://perma.cc/W2YA-WPA2>.

change” remedial approach during an interview on PBS, 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.57 (Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin redistricting*, PBS Wis. (Mar. 9, 2023)).<sup>11</sup> She then predicted how she would decide future arguments related to “‘least change’ map[s]”: “You’ll hear people argue that the Republicans used very, very sophisticated 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.57.

On March 21, 2023, before the general election, Justice Protasiewicz made a direct pronouncement about the partisan makeup 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. She continued decrying the maps—“[t]he map issue is really kind of easy,” App.70 (Scott Bauer, *Wisconsin Supreme Court candidates clash over abortion, maps in only 2023 debate*, PBS Wis. (Mar.

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<sup>11</sup> Available at <https://perma.cc/R45C-RDPV>.

21, 2023)),<sup>12</sup> and “[i]f you look at the dissent in that maps case, that dissent is what I will tell you I agree with,” App.66 (Henry Redman, *Supreme Court candidates accuse each other of lying, extremism in sole debate*, Wis. Exam’r (Mar. 21, 2023)).<sup>13</sup> “We know the maps are not fair,” she said. “We have battleground elections. We know they are not fair.” App.61 (A.J. Bayatpour, *In only state Supreme Court debate, candidates trade accusations of partisan ties*, CBS 58 (Mar. 21, 2023)).<sup>14</sup> Justice Protasiewicz also described the “least change” approach as “totally unfair.” *Supreme Court Debate, supra*, at 29:21–29:28. She continued, “[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.

Justice Protasiewicz’s campaign strategy “shattered long-held notions of how judicial candidates should conduct themselves by making her political priorities central to her campaign.” App.96 (Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. Times (Apr. 4, 2023)).<sup>15</sup> She “pushed the envelope for a

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<sup>12</sup> Available at <https://perma.cc/SE77-ED4Z>.

<sup>13</sup> Available at <https://perma.cc/5KLA-S2FV>.

<sup>14</sup> Available at <https://perma.cc/87BY-66CB>.

<sup>15</sup> Available at <https://perma.cc/A6NP-S4TC>.

judicial candidate by offering voters explicit declarations of her views,” App.82 (Ronald Brownstein, *The First Electoral Test of Trump’s Indictment*, Atlantic (Mar. 31, 2023)),<sup>16</sup> apparently “ma[king] a calculation from the start of the race that Wisconsin voters would reward her for making clear her positions on . . . the state’s maps,” App.98; see App.48 (Editorial Board, Opinion, *Wisconsin’s Judicial Election Donnybrook*, Wall St. J. (Feb. 26, 2023) (“No one believes she won’t overturn the maps in a future case.”)); see also App.105 (Shawn Johnson, *Justice Janet Protasiewicz is sworn in, giving liberals control of Wisconsin Supreme Court*, Wis. Pub. Radio (Aug. 1, 2023) (observing that Justice Protasiewicz’s criticism of the maps “helped her mobilize Democratic voters in her . . . victory”)).<sup>17</sup>

Justice Protasiewicz won her election 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, the Justice Protasiewicz campaign spent more than \$16 million, more than four times her opponent’s total campaign spending. See App.102 (Janet for Justice, Campaign Finance Report, Form CF-2 (July 2023)) (reporting \$16.54 million in campaign

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<sup>16</sup> Available at <https://perma.cc/CL5C-W5QY>.

<sup>17</sup> Available at <https://perma.cc/8KVV-MQDN>.

disbursements));<sup>18</sup> App.100 (Friends of Justice Daniel Kelly, Campaign Finance Report, Form CF-2 (July 2023)) (reporting \$3.66 million in campaign disbursements).<sup>19</sup> The Democratic Party of Wisconsin contributed \$9.9 million of that total—60%—including \$8.3 million in direct transfers. *See* App.116–18. The Democratic Party’s contributions to Justice Protasiewicz *alone* were more than twice what Justice Kelly’s *entire* campaign spent.

**C. Clarke Rejects Johnson’s “Least Change” Approach As To State-Legislative Maps—With Justice Protasiewicz Voting Just As She Said She Would On The Campaign Trail**

As soon as Justice Protasiewicz was elected, Law Forward—a self-described “progressive” law firm, App.119–21 (*Our Story*, Law Forward)<sup>20</sup>—filed a petition, challenging the state legislative map adopted in *Johnson* for its failure to contain contiguous districts. App.238–86 (Pet., *Clarke v. WEC*, No.2023AP1399-OA (Wis. Aug. 2, 2023)). The petitioners also took issue with the Court’s use of the “least change” approach. *See* App.263.

Relying on the Democratic Party’s campaign contributions and Justice Protasiewicz’s campaign statements, *supra* pp.6–12, the

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<sup>18</sup> Available at <https://perma.cc/X6FA-QTSL>.

<sup>19</sup> Available at <https://perma.cc/P2EW-D9KU>.

<sup>20</sup> Available at <https://www.lawforward.org/about-us/our-story/>.

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 her from deciding a case. *Clarke v. WEC*, 2023 WI 66, ¶¶ 7, 22, 409 Wis. 2d 249, 995 N.W.2d 735. In her view, absent a “pledge about the result of [the] case,” there was no need to recuse. *Id.* ¶ 22.

With Justice Protasiewicz in the majority, the *Clarke* Court held that the state legislative maps were unconstitutional for failure to contain contiguous districts. *Clarke*, 2023 WI 79, ¶ 77. Although the Court noted that resolution of the “contiguity issues” would foreclose the need “to adopt remedial maps,” *id.* ¶ 57, the Court nonetheless overruled *Johnson’s* “least change” approach as to the state legislative maps—consistent with Justice Protasiewicz’s campaign statements, *id.* ¶¶ 60–63. Instead, the Court explained, it would consider “other traditional districting criteria” when adopting a remedial map, such as “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, Which Motion This Court Denies With Justice Protasiewicz Abstaining**

On January 16, 2024, a set 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.333–37 (showing that Hunter Intervenors are represented by the Elias Law Group); see App.115 (*About, Elias Law Group*) (explaining their mission is to “help[] Democrats win”). The Hunter Intervenors argued that *Clarke*’s overruling of *Johnson II*’s “mandate” of “a least change approach,” 2023 WI 79, ¶ 63, left the current congressional map with “no basis in Wisconsin law,” App.312–13 (Mem. In Supp. Of Mot. For Relief From J. at 17–18, *Johnson*, No.2021AP1450-OA (Wis. Jan. 16, 2024)). They suggested the *Johnson II* map unlawfully “perpetuate[d] the partisan unfairness that has radically skewed Wisconsin’s districting maps since 2011,” App.303, and that “the Court cannot [lawfully] ‘ignore partisan impact’” when drawing a remedial congressional map, App.305 (citation omitted). They then requested a redrawing of the *Johnson II* map to be less favorable to Republicans. App.303.

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald—who were intervenor-petitioners in *Johnson*—opposed the Hunter Intervenors’ motion on a variety of grounds. To begin, they argued that the motion was not made in a “reasonable time,” App.415–27 (Resp. Of Congressmen In Opp. To Mot. For Relief From J. at 22–34, *Johnson*, No.2021AP1450-OA (Jan. 29, 2024)), and that *Clarke* did not overrule *Johnson II*’s “least change” approach as it applied to a *congressional* map that was not alleged to be independently unlawful, App.430–37. Those Congressmen argued that the U.S. Constitution’s Elections Clause required the “least change” approach with respect to remedial congressional maps because it vests the Legislature—and not the courts—with broad “discretion to decide how congressional elections are conducted.” App.437 (citation omitted).

Those Congressmen also filed a motion to recuse Justice Protasiewicz, joined by the Legislature and certain voters. App.387–93. 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 Wis. Stat. § 757.19, App.349–55,

358–94 (Mem. In Supp. Of Mot. To Recuse Justice Protasiewicz at 12–18, 21–47, *Johnson*, No.2021AP1450-OA (Jan. 29, 2024)).

This Court denied the Hunter Intervenors’ motion, without explanation. App.459–62 (Order, *Johnson*, No.2021AP1450-OA (Mar. 1, 2024)). Justice Protasiewicz issued a separate order stating 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.463. She then denied the recusal motion as moot without addressing whether recusal would have been required. App.463–64.

**E. Another Set Of Petitioners Represented By The Same Law Firm File Yet Another Challenge To The *Johnson II* Congressional Map, With This Petition For Original Action**

Now, three years after this Court in *Johnson II* adopted the Governor’s proposed congressional map, Petitioners—also represented by the Elias Law Group—have filed this Petition For Original Action, claiming that the congressional map violates Article I, Sections 1, 3, 4, and 22 of the Wisconsin Constitution as a partisan gerrymander, even though this Court in *Johnson I* rejected those against claims. *Johnson II*, 2021 WI 87, ¶¶ 53–63; Pet. ¶¶ 69–86. Petitioners also contend that the Court’s reliance on the “least change” approach to adopt the congressional map violated the separation of powers, Pet. ¶¶ 87–92,

despite the fact that the *Johnson I* Court adopted that approach out of respect for the Legislature’s core power to redistrict. *Johnson I*, 2021 WI 87, ¶¶ 64–79. Petitioners then claim 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. Pet. ¶¶ 14, 58. And they assert that the Court must adopt this remedial map on an “expedited” basis, before the “2026 congressional elections.” Pet. ¶ 93.

The Congressmen and the Individual Voters now move to recuse Justice Protasiewicz, or alternatively, request that she decline to participate in this case like she did in the *Johnson II* motion-for-relief-from-judgment litigation.

## ARGUMENT

### **I. The Federal Due Process Clause Requires Justice Protasiewicz’s Recusal**

Because the Fourteenth Amendment’s Due Process Clause “guarantees ‘an absence of actual bias’ on the part of a judge” in American courts, *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), a judge must recuse from any case in which she has an actual bias, *Caperton v. A.T. Massey Coal Co., Inc.*, 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, a judge must be “neutral and detached” from the cases before them, *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972), while avoiding the “temptation . . . not to hold the balance nice, clear, and true,” *id.* at 60. Unlawful prejudgment can be shown where a judge promises to “ma[k]e new law” in a given case to achieve a desired outcome. *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” show 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). Thus, courts must determine "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 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).

Fourteenth Amendment due process principles also require that "no judge . . . try cases where he has an interest in the outcome." *Lavoie*, 475 U.S. at 822 (citation omitted). In evaluating a judge's potential interest, courts consider "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.

In assessing 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 is instructive. There, Don Blankenship, the CEO of A.T. Massey Coal Company (“Massey”), donated \$3 million to a West Virginia Supreme Court candidate’s campaign while the court was expected to hear the appeal of a \$50 million verdict against Massey. *Id.* at 873. The plaintiff moved to disqualify the newly elected justice, but he denied recusal and the court ultimately reversed the verdict against Massey. *Id.* at 874–75. The U.S. Supreme Court reversed, holding that the failure to recuse violated due process 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.

Here, just as in the motion-for-relief-from-judgment litigation, the Fourteenth Amendment’s Due Process Clause demands Justice Protasiewicz’s recusal for at least two reasons.

**A. Justice Protasiewicz Made Specific Campaign Statements That Demonstrate At Least A Serious Risk That She Has Prejudged The Outcome Of This Case**

Justice Protasiewicz has “disclosed” “actual bias,” *Caperton*, 556 U.S. at 883, or at least objectively shown a “serious risk” of “actual bias or prejudgment,” *id.* at 884, warranting recusal here because she made specific statements on the campaign trail about the supposed partisan imbalance of the *Johnson II* congressional map—the object of Petitioners’ challenge here—and the need to correct it. These statements at least 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.

The Petition in this case requires the Court to address Petitioners’ claim that the *Johnson II* congressional map constitutes an “unlawful partisan gerrymander[.]” under the Wisconsin Constitution, *see* Pet. ¶¶ 69–86, that must be cast aside because it “delivered 75% of Wisconsin’s congressional districts to Republican candidates” and resulted in “a stark 6-2 split favoring Republican candidates,” “even though statewide elections revealed near-even support for Democratic

and Republican candidates,” Pet. ¶¶ 66–68. The Petition also requires the Court to address Petitioners’ claim that utilizing the “least change” approach as a remedy for congressional redistricting violates the separation of powers, see Pet. ¶¶ 38–57, 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,” Pet. ¶¶ 42–43 (citations omitted). 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 has predetermined that this map constitutes a partisan gerrymander and forecasted her willingness to replace the map during her campaign. She publicly proclaimed that “something is wrong” with Wisconsin’s congressional map because “we have eight seats [in Congress]—six are red, two are blue, in a battleground state,” *Supreme Court Debate, supra*, at 29:40–29:50—going directly to the heart of Petitioners’ claims here, see Pet. ¶¶ 69–86. Even more clearly endorsing Petitioners’ 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. She went as far as to say 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.54. She also made clear that she “agreed with the dissent” in *Johnson*, River Channel, *supra*, at 5:00–6:15, and even predicted future arguments in favor of the map’s constitutionality that she would dismiss, *see* App.56–58. Accordingly, she “welcome[d] the opportunity to have a fresh look at our maps,” App.93, specifically stating that she “would enjoy taking a fresh look at the gerrymandering question,” Wedge Issues, *supra*. These open admissions reveal that Justice Protasiewicz already decided that the congressional map an “unfair” partisan gerrymander and she will “change” the “precedent”—that is, *Johnson II*’s conclusion that the map was constitutional—“to [make it] fair.” App.75.

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.93, 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 vote in favor of finding the *Johnson II* congressional map an unconstitutional partisan gerrymander regardless of the evidence or arguments presented. “[A]s an objective matter,” it is unreasonable to think that “the average judge” could make these statements and nevertheless remain “neutral” when presented with an opportunity to declare the *Johnson II* map unconstitutional. See *Williams*, 579 U.S. at 8. Justice Protasiewicz’s participation in this case therefore cannot “satisfy the appearance of justice,” *In re Murchison*, 349 U.S. at 136, and the objective “probability of unfairness” in her adjudicating this matter requires recusal, *Withrow*, 421 U.S. at 47 (citations omitted); see *Rippo*, 580 U.S. at 287; *Williams*, 579 U.S. at 8.

*Second*, Justice Protasiewicz has also prejudged the remedial question in this case, as she has already decided that the Court’s remedial map-drawing process should disregard the “least change” approach and achieve partisan balance.

To remedy the alleged deficiencies in the *Johnson II* map, Petitioners ultimately ask this Court to “replace the adopted congressional map” with an entirely new, court-drawn map that

considers “partisan impact”—instead of the “least change” approach—on an expedited basis prior to the upcoming 2026 congressional elections. Pet. ¶¶ 14, 42, 93 (citations omitted). Based on her public comments, Justice Protasiewicz has already decided that the map is unfair, making it clear that she will vote to adopt an entirely new map—without regard to the “least change” approach—to remedy the alleged partisan gerrymandering Petitioners challenge.

As to *Johnson II*'s “least change” approach, Justice Protasiewicz could not have been clearer: 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 caselaw,” App.6–10 (Shawn Johnson, *Wisconsin Supreme Court candidates discuss abortion, redistricting at Madison forum*, Wis. Pub. Radio (Jan. 9, 2023)),<sup>21</sup> “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.23.

Regarding the partisan makeup of any new remedial map the Court may draw, Justice Protasiewicz went on record during her campaign stating that the current congressional map needs to be

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<sup>21</sup> Available at <https://perma.cc/NF68-NQ35>.

replaced with one that achieves a four-four partisan balance. She publicly condemned any congressional map in which “six [Representatives] are red, two are blue” and opined that such an imbalance necessarily means “something is wrong.” *Supreme Court Debate, supra*, at 29:20–30:10. She “welcome[d] the opportunity to have a fresh look at our maps,” App.93, in order to achieve a partisan balance suitable for a “battleground state,” App.45. Indeed, in response to a question regarding the “75 percent Republican Map”—the congressional map at issue here—she let slip that “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, supra*, at 5:00–6:15. For that reason she “*agreed with the dissent in [Johnson II]*,”—the case Petitioners effectively ask this Court to reopen here. *Id.* Justice Protasiewicz predicted that any defensive arguments about “us[ing] very, very sophisticated computer technology to draw those maps” is “when I [Justice Protasiewicz] say, yes, those maps are rigged.” App.57.

Given her statements condemning the Court’s “least change” methodology, *see Supreme Court Debate, supra*, at 29:21–29:28; App.8–9, and decrying the current 6-2 partisan split among Wisconsin’s congressional districts as “wrong,” *Supreme Court Debate, supra*,

at 29:40–29:49, 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.

These repeated statements require recusal to maintain a “neutral and detached” courtroom. *Ward*, 409 U.S. at 62. Even a *single* statement indicating how a judge will rule in a given case is sufficient to trigger recusal—and here, proposed Respondents-Intervenors have presented *many* such statements. *See supra* pp.14–17. For example, U.S. Supreme Court Justice Antonin Scalia—whom Justice Protasiewicz invoked repeatedly in her decision against recusing in *Clarke*, 2023 WI 66, ¶¶ 20, 21, 63, 64, 68, 91—recused in a case concerning the constitutionality of the phrase “under God” in the Pledge of Allegiance due to a single incident where he had publicly indicated that the controlling decision in that case was wrong without being “fully apprised of all the facts,” App.127 (Suggestion for Recusal at 3, *Newdow v. United States*, No.03-7 (U.S. Sept. 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 said *multiple* times that the congressional map here was adopted pursuant to a legal standard that is “unfair” and has no basis in the law, and that the map is “wrong” and “gerrymandered,” and she has repeatedly invited opportunities to “take a fresh look” at it. *Supra* pp.14–17. 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 29:20–30:10. These statements are a promise to “ma[k]e new law” to achieve a desired outcome. *Lavoie*, 475 U.S. at 822. And they have created a very clear “risk that [Justice Protasiewicz] ‘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.

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 “campaign[ed] against the gerrymandered maps and then won her election in a landslide.” App.112; *see* App.96–99; App.105 (observing that Justice Protasiewicz’s criticism of the maps “helped her mobilize Democratic voters in her . . . victory”). She cannot afford to go back now.

Nor can Justice Protasiewicz retroactively temper these statements on the congressional map as statements about “values,” *Clarke*, 2023 WI 66, ¶¶ 17, 22, 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 stated how she would apply the “Constitution” and “caselaw,” App.8–9, to the facts of this case—the “wrong,” *Supreme Court Debate, supra*, at 29:40–29:49, “rigged,” App.33, and “gerrymandered,” App.54, map this Court adopted in *Johnson II*. Unlike value statements or “general opinion[s] regarding a law,” her statements show 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 6-2 Republican congressional delegation. *Supreme Court Debate, supra*, at 29:40–29:49

(emphasis added). And, as one newspaper put it during her campaign, “[n]o one believes she won’t overturn the maps in a future case.” App.48.

**B. Justice Protasiewicz’s Campaign Platform And Large Democratic Donations Create An Objective Perception That She Has A Personal Interest In The Outcome Of This Matter**

If there were any doubt remaining that federal due-process principles require Justice Protasiewicz’s recusal based on her campaign statements, *supra* Part I.A, the massive amount of contributions she received from the Democratic Party confirms her need to recuse.

Here, 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.19—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, dwarfing her opponent’s total campaign expenditures of \$3.66 million. App.102; App.100 (reporting \$3.66 million in campaign disbursements). As such, the Democratic Party of Wisconsin’s contribution unquestionably 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.49 (Scott Bauer, *Protasiewicz pledges to recuse in lawsuits from Democrats, while Kelly declines to pledge for Republican cases*, PBS Wis. (Mar. 1, 2023)).<sup>22</sup> And this Petition—brought by Democratic Party-aligned Wisconsin voters who are represented by the Elias Law Group whose mission is to “help[ ] Democrats win,” App.115, and represented the Hunter Intervenors in seeking to reopen *Johnson II*, App.333–37—presents an ideal case for her to do so.

The nature of this Petition 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). Petitioners’ request for the Court to “prescribe procedures for” another remedial map-drawing process and ultimately itself draw a new congressional map, see Pet ¶¶ 14, 93, asks this Court 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 engaging in this enterprise looks like “a policymaking body rather than a law-declaring one.” *Johnson I*,

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<sup>22</sup> Available at <https://perma.cc/NFX2-37GZ>.

2021 WI 87, ¶ 52. Thus, 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.

## **II. Wisconsin Law Likewise Mandates Justice Protasiewicz’s Recusal**

A. The federal Due Process Clause establishes “only the outer boundaries of judicial disqualifications,” and “states . . . remain free to impose more rigorous standards for judicial disqualification” by enacting 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 done so 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 circumstances that do not necessarily implicate federal due process concerns. Relevant here, Wis. Stat. § 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 Wisconsin law requires that recusal occur if either of the circumstances identified in the statute are present, Wis. Stat. § 757.19(4).

Wisconsin’s Code of Judicial Conduct further delineates circumstances in which judges should recuse themselves from cases pending before them. *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). The rules thus 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.” *See Ozanne v. Fitzgerald*, 2012 WI 82, ¶ 5, 822 N.W.2d 67 (opinion of Abrahamson, C.J.).

Wisconsin law defines “impartiality” as “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 because 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 example, 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). That “prejudgment,” or even the appearance of prejudgment, “can require recusal.” *Herrmann*, 2015 WI 84, ¶ 148 n.14 (Ziegler, J., concurring).

Campaign statements can demonstrate 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 give the impression 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 “apply the law without fear or favor,” *Williams-Yulee*, 575 U.S. at 438, requiring recusal from those matters she has apparently prejudged, *see* SCR 60.01(7m).

Determining whether a judge has a “financial or personal interest in the outcome of the matter,” Wis. Stat. § 757.19(2)(f), that warrants recusal requires a “fact-specific” and “objective” inquiry, *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). If the party seeking 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), the “very existence” of that interest “creates a disqualification by law,” *Harrell*, 199 Wis. 2d at 658, regardless whether the judge is actually “ab[le] to act impartially in a case,” *Am. TV*, 151 Wis. 2d at 182.

B. Here, for the same reasons that federal law requires Justice Protasiewicz’s recusal in this matter, *supra* Part I, Wisconsin law likewise mandates her recusal because she has predetermined the merits of this case and has a significant personal interest in its outcome.

*First*, the statements that Justice Protasiewicz made on the campaign trail specific to the congressional maps and map-drawing methodology at issue here preclude her from participating in this case. *See* Wis. Stat. § 757.19(2)(g); SCR 60.01(7m). During her campaign, Justice Protasiewicz expressly stated 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.14–15, that the map is impermissibly “rigged” in favor of Republicans, *supra* pp.14–16, that the *Johnson II* decision that drew the map was wrongly decided, *supra* pp.14, 17, 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 assured 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* p.15. The Petition currently pending before the Court in this case squarely asks the Court to invalidate the *Johnson II* map as an unconstitutional partisan gerrymander, hold unlawful the “least change” methodology, and, ultimately, adopt an entirely new map that creates a partisan balance. *Supra* pp.23–24. 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 give 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 enough to require “mandatory disqualification” under Wisconsin law, *Am. TV*, 151 Wis. 2d at 181, and 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 map and the “least change” approach, knowing that those very issues “might come before h[er] as a judge,” *Laird*, 409 U.S. at 836 n.5. Justice Protasiewicz’s statements are the type of “pledges or promises to decide cases in a

certain way,” *Storms*, 2008 WI 110, ¶ 21, that evince a judge’s partiality, *Williams-Yulee*, 575 U.S. at 438, thus warranting her recusal.

*Second*, Justice Protasiewicz’s significant personal interest in the outcome of this matter 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 declared 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.15–18. And she received nearly \$10 million in Democratic Party campaign contributions based on those commitments. *Supra* p.19. Petitioners in this case—represented by counsel who are “committed to helping Democrats win,” App.115—now offer Justice Protasiewicz precisely the opportunity 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.93; *see supra* p.15. And it is no mystery how she will rule if given the chance. *See supra* p.18; App.63–67. Having invited this opportunity and campaigned on it, there is at least, objectively speaking, 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); see *Harrell*, 199 Wis. 2d at 658; *Goodman*, 248 Wis. at 58.

**III. At Minimum, Justice Protasiewicz Should Decline To Participate In This Case As She Did In The *Johnson* 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*, App.463, as this case is nothing more than a thinly-veiled second attempt to reopen *Johnson*. The Petition asks the Court to reconsider issues squarely decided in *Johnson*, bringing the same claim that their counsel pursued on behalf of the Hunter Intervenors in their unsuccessful attempt to reopen *Johnson II*. Justice Protasiewicz *had declined to participate in Johnson II's reopening* at the time, but now Petitioners and their same counsel seek a backdoor to invite Justice Protasiewicz in to fulfill her campaign pledge to dismantle the congressional map.

This Petition, bringing only claims previously rejected by this Court, is nothing more than an attempt to ensure Justice Protasiewicz can hear their challenge this time around. Petitioners ultimately seek a judicial redraw of the *Johnson II* congressional map based upon a repudiated and unsupported interpretation of the Wisconsin Constitution that recognizes partisan gerrymandering claims. See

*generally* Pet. 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. Thus, the Petition is a not-so-veiled attempt to have the Court reconsider issues *Johnson* decided in a case where Justice Protasiewicz has not already declined to participate.

That the Petition essentially asks the Court to reopen *Johnson II* also distinguishes it from *Clarke*, where Justice Protasiewicz chose to participate. Unlike this case, *Clarke* focused exclusively on whether the state legislative map violated the Wisconsin Constitution’s contiguity requirements, which was not at issue in *Johnson II*, justifying Justice Protasiewicz’s decision to participate in *Clarke*’s decision. *See Clarke*, 2023 WI 79, ¶ 2. Justice Protasiewicz additionally reasoned that recusal was not required because *Clarke* was “unrelated” to *Johnson II* and “involve[d] different parties,” *Clarke*, 2023 WI 66, ¶¶ 12–15 (citation omitted)—although it did not, *see Clarke*, 2023 WI 79, ¶¶ 93, 95, 123, 143–46 (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—Elias Law Group—which represented the Hunter Intervenors whose claims were rejected in *Johnson II*, also represents Petitioners 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, including as to whether to grant the Petition, or, alternatively, decline to participate in the Court's consideration of this case.

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Respectfully submitted,

MISHA TSEYTLIN

*Counsel of Record*

State Bar No. 1102199

KEVIN M. LEROY

State Bar No. 1105053

TROUTMAN PEPPER

LOCKE LLP

111 S. Wacker Dr.

Suite 4100

Chicago, Illinois 60606

(608) 999-1240 (MT)

(312) 759-1938 (KL)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

*Counsel for 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*