No. 2024AP2429

In the Supreme Court of Wisconsin

ABBOTSFORD EDUCATION ASSOCIATION, AFSCME, LOCAL 47, AFSCME, LOCAL 1215, BEN GRUBER, BEAVER DAM EDUCATION ASSOCIATION, MATTHEW ZIEBARTH, SEIU WISCONSIN, TEACHING ASSISTANTS' ASSN., LOCAL 3220, AFT AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 695
PLAINTIFFS-RESPONDENTS,
v.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, JAMES J. DALEY, DEPARTMENT OF ADMINISTRATION, KATHY BLUMENFELD, DIVISION OF PERSONNEL MANAGEMENT AND JEN FLOGEL,
DEFENDANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Jacob B. Frost, Presiding
Case No. 2023CV3152

MOTION TO RECUSE JUSTICE PROTASIEWICZ

(Counsel for Intervenor-Defendant-Appellant listed on following page)

No. 2024AP2429

KEVIN M. ST. JOHN
State Bar No. 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin
(608) 216-7990
kstjohn@bellgiftos.com

BRYAN WEIR*
TAYLOR A.R. MEEHAN*
DAVID ROSENTHAL*
MARIE SAYER
State Bar No. 1127350
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, Virginia 22209
(703) 243-9423
bryan@consovoymccarthy.com
taylor@consovoymccarthy.com
david@consovoymccarthy.com
mari@consovoymccarthy.com

**Admitted pro hac vice*
(Order attached as App.0004)

MISHA TSEYTLIN
State Bar No. 1102199
Counsel of Record
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER LOCKE LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Attorneys for Intervenor-Defendant-Appellant

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INTRODUCTION

Justice Protasiewicz emphasized during her campaign and investiture the importance of giving everyone who comes before this Court "a fair shot" and ensuring that no one "feel[s] like the thumb is on the scale against them."[1] Applying that standard to 2011 Wisconsin Act 10 specifically—the subject of the present appeal—Justice Protasiewicz acknowledged that her recusal may be required. When asked whether she would recuse should Act 10 come back before this Court, Justice Protasiewicz answered, "[I]t's a maybe, it's a solid maybe."[2] She was candid on the campaign trail: she was one of the Act 10 protestors at the Capitol; she signed the petition to recall Governor Scott Walker over Act 10; she agreed Act 10 was unconstitutional. Based on all of that, she

[1] Shawn Johnson, *Justice Janet Protasiewicz is Sworn In, Giving Liberals Control of Wisconsin Supreme Court*, Wis. Pub. Radio (Aug. 1, 2023), perma.cc/7YSK-QW73 (all websites last visited January 22, 2024) (App.0008); *see also* Jonah Beleckis, *Janet Protasiewicz thinks Judicial Candidates should be Open about their Values*, Wis. Pub. Radio (February 14, 2023) perma.cc/7P3P-7H5G (App.0017).

[2] Milwaukee J. Sentinel, *Wisconsin Supreme Court Candidate Janet Protasiewicz Talks to the Journal Sentinel Editorial Board*, YouTube, at 27:13 (Mar. 20, 2023), perma.cc/8ME9-AG3F.

agreed that her views might require recusal should Act 10 come before the Court again.[3]

That time has now come. Well more than a decade after Act 10's passage—and a mere four months after Justice Protasiewicz's investiture—public sector unions sued again to challenge the constitutionality of Act 10. They claimed the Act's distinction between "general" and "public safety" employees violates equal protection and flunks rational basis review. The Dane County Circuit Court agreed, the Legislature and State Defendants appealed, and a petition to bypass is now before this Court.

As Justice Protasiewicz emphasized on the campaign trail, no party who comes before this Court should feel there is a thumb on the scale against it. Beleckis, *supra* note 1 (App.0017). A Justice's prejudgment of any case, or the appearance of prejudgment, requires her recusal. Wisconsin law and this Court's rules require recusal whenever a judge "cannot, or it appears he or she cannot, act in an impartial manner," or "has a significant . . . personal interest in the outcome of the matter," Wis. Stat.

[3] James N. Fitzhenry, *5 Highlights from Supreme Court candidate Janet Protasiewicz's interview with the Journal Sentinel Editorial Board*, Milwaukee J. Sentinel (Mar. 27, 2023), bit.ly/4gtQEYg (App.0024).

§ 757.19(2)(f)–(g), or has made a public campaign statement that "commits, or appears to commit, the judge with respect to . . . an issue in the proceeding," SCR 60.04(4)(f). In addition, the Due Process Clause of the Fourteenth Amendment requires recusal because those same campaign statements reveal an "unconstitutional potential for bias." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

To comply with state and federal guarantees of fundamental fairness, Justice Protasiewicz should recuse from all proceedings in this appeal.

BACKGROUND

a. Thirteen years ago, the Legislature enacted 2011 Wis. Act 10, a budget repair bill proposed by then-Governor Walker, that altered the State's collective bargaining laws. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 7, 358 Wis. 2d 1, 851 N.W.2d 337 ("*MTI*"). Act 10 aimed to reduce costs associated with public-sector union activities by making "changes to public employee labor relations and compensation practices." Wis. Dep't of Admin., *Fiscal Estimate* 3 (Feb. 14, 2011), perma.cc/R4SB-2GB5 (App.0028); *see MTI*, 2014 WI 99, ¶¶ 120–21. Act 10 succeeded, saving the State $31 billion over the past decade. *See Act 10's True*

Savings to Taxpayers: $31 Billion, MacIver Inst. (Mar. 18, 2024), perma.cc/6RGM-63DZ (App.0034).

Act 10 made various changes to Wisconsin's collective bargaining laws. Relevant here, Act 10 created two categories of state and municipal employees: (1) "general" employees, which includes most state and municipal employees, and (2) "public safety" employees, which includes certain law enforcement officers and firefighters. *See* 2011 Wis. Act 10 §§ 214, 216 (codified at Wis. Stat. §§ 111.70(1)(fm), (mm)).

Act 10 changed collective bargaining laws for "general" employees while carving out "public safety" employee unions from those changes. *See* 2011 Wis. Act 10, §§ 210, 227, 242, 245, 262, 289, 314 (codified at Wis. Stat. §§ 111.70(1)(a), 111.70(3g), 111.70(4)(d)3.b, 111.70(4)(mb), 111.81(1), 111.83(3)(b), 111.91(3)); *see also Int'l Union of Operating Eng'rs, Local 139, AFL-CIO v. Daley*, 983 F.3d 287, 290–91 (7th Cir. 2020). These changes included limiting collective bargaining to the topic of base wages, Wis. Stat. §§ 111.70(1)(a), (4)(mb)(2); requiring general employee unions to recertify annually and obtain support from 51 percent of all eligible voters to be the certified representative for those

employees, *Id.* §§ 111.70(4)(d)1, (cm)8m; and prohibiting general employee unions from collecting dues from members directly through payroll deductions on the government's payroll system, *Id.* § 111.70(3g).

Act 10 faced immediate opposition, including from Democratic legislators and public officials like then-Milwaukee assistant district attorney Janet Protasiewicz. Pod Save America, *Mugshots and Milk Shots*, Crooked Media, at 50:22 (Mar. 20, 2023), perma.cc/QMN5-TMQG. Democratic state senators fled to Illinois for several weeks in an effort to block its passage. James B. Kelleher, *Up to 100,000 Protest Wisconsin Law Curbing Unions*, Reuters (Mar. 12, 2011), bit.ly/3C5cnXw (App.0044). At the same time, for nearly a month between February and March 2011, up to 100,000 protestors gathered in and around the Capitol. *Id.* Justice Protasiewicz told the press that she was among those protestors. Pod Save America, *supra*, at 50:42. In addition, opposition to Act 10 spurred efforts to recall Governor Walker. *See* Eyder Peralta, *Wisconsin Gov. Scott Walker Survives Recall*, NPR (June 5, 2012), perma.cc/F5BC-VCP5 (App.0055) (noting the recall "stemmed from legislation, championed by Walker, that severely limited the

collective-bargaining rights of public employees"). Justice Protasiewicz said she signed the petition to recall Governor Walker. *See* Pod Save America, *supra*, at 50:38.

Following its passage, Act 10 faced legal challenges in both federal and state courts, including equal protection challenges. Each of those challenges failed. In *Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) ("*WEAC*"), the Seventh Circuit rejected the same question presented in this case—whether the distinction between "general" and "public safety" employees satisfies rational basis review—under the coextensive federal Equal Protection Clause. *Id.* at 655; *see MTI*, 2014 WI 99, ¶ 74 n.19 (treating the federal Equal Protection Clause as "coextensive" to the equal protection guarantees of the Wisconsin Constitution). The court reasoned that the Act 10 generally "promot[ed] flexibility in state and local government budgets by providing public employers more leverage in negotiations," but that "Wisconsin was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety unions." *WEAC*, 705 F.3d at 654–55. Applying rational basis review, the court upheld Act 10 despite

arguments that its categories for "general" and "public safety" employees were "overinclusive" or "underinclusive." *Id.* at 654–56.

Likewise in *MTI*, this Court rejected an equal-protection challenge to Act 10's application to represented, but not unrepresented, "general" employees because Act 10 satisfied rational basis review by "promot[ing] flexibility in . . . government budgets" and "improv[ing] Wisconsin's fiscal health." 2014 WI 99, ¶ 82. Justice Ann Walsh Bradley dissented, joined by then-Chief Justice Shirley Abrahamson. Act 10 "violate[d] the constitutional right of public employees to organize in a collective bargaining unit," in their view, and should have been subject to "strict scrutiny, rather than rational basis review." *Id.* ¶¶ 216 n.10, 248 (Ann Walsh Bradley, J., dissenting).

b. In 2022, Justice Patience Drake Roggensack announced her retirement, opening a vacancy on this Court. Now-Justice Protasiewicz ran for the empty seat in a 2023 election against former Justice Dan Kelly and Circuit Judges Jennifer Dorow and Everett Mitchell. Zac Schultz, *Meet the Candidates Running in the 2023 Wisconsin Supreme Court Primary*, PBS Wis. (Jan. 4, 2023), perma.cc/5U7W-Z4SQ (App.0075). During her campaign, Justice

Protasiewicz made several comments expressing her view that Act 10 was unconstitutional and suggesting that she may need to recuse in a future case considering Act 10.

Throughout her campaign, Justice Protasiewicz emphasized the importance of "being a fair jurist" and "not having a thumb on the scale when it comes to issues that are going to come before the Supreme Court." *See, e.g.*, Beleckis, *supra* note 1 (App.0017). She explained that she "will obviously follow any recusal rules," and discussed situations where recusal might be appropriate because "[p]eople think [there is] a thumb on the scale." *Id.* (App.0019).

Justice Protasiewicz was asked her thoughts about Act 10 in an interview with Pod Save America. She explained:

> I come from a union family. I was a union member. I was a union member when Act 10 was enacted. So what action did I take? At that point I was an assistant district attorney in Milwaukee. I signed the governor's recall petition, and I came to this beautiful city and I marched at the Capitol in protest of Act 10.

Pod Save America, *supra*, at 50:22. She went on to explain that "the New York Times asked me about it. And they said what do you think, do you think Act 10 was unconstitutional? And I said, well, I agree with the dissent in that case [*i.e.*, *MTI*], where the author said Act 10 is unconstitutional." *Id.* at 50:57.

In an interview with the Milwaukee Journal Sentinel editorial board, Justice Protasiewicz recalled her conversation with the New York Times, and again repeated: "I agree with the dissent in that case [*i.e.*, *MTI*]." Milwaukee J. Sentinel, *supra* note 2, at 27:20.

At the end of March on the campaign trail, Justice Protasiewicz was asked if she would recuse were Act 10 to come before the Supreme Court, Justice Protasiewicz said, "You know, I'd have to think about it." Milwaukee J. Sentinel, *supra* note 2, at 27:13. She explained, "Given the fact that I marched, given the fact that I signed the recall petition, would I recuse? Maybe. Maybe. But I don't know for sure." *Id*. at 27:32. Asked to elaborate, she stated, "I don't know how the issues would be framed, if they're framed at all. I don't know if that's going to come in front of the Court again, quite frankly—I have no idea. So it's a maybe, it's a solid maybe." *Id*. at 28:00

In addition to her public statements, Justice Protasiewicz received financial support for her campaign from many political action committees associated with public sector unions, including $1,500 in direct contributions from a PAC affiliated with

Wisconsin Education Association Counsel ("WEAC") Region 5—an affiliate of Beaver Dam Education Association, a plaintiff in this case. *See* Janet for Justice, Spring 2023 Campaign Finance Report CF-2, Schedule 1-B (App.0093).

Justice Protasiewicz went on to win the election and was sworn in on August 1, 2023. Anthony Dabruzzi, *Newly Sworn In Justice Janet Protasiewicz Vows 'Fairness and Impartiality' During Investiture Speech*, Spectrum News (August 1, 2023), perma.cc/GL77-V4DU (App.0095). In her investiture speech, she again emphasized the importance of a "fair and impartial Supreme Court" and the "execution of" the Court's "duties without favor to special interests, political pressure, or our own personal beliefs." *Id*. "[E]veryone should get a fair shot to demand justice and not feel like the thumb is on the scale against them." Johnson, *supra* note 1.

c. On November 30, 2023, Plaintiffs filed their complaint in this case. Twelve years after Act 10's enactment, Plaintiffs claimed that Act 10 violates the Equal Protection Clause of the Wisconsin Constitution by distinguishing between "general" and "public safety" employees. Like the lawsuits that came before this

one, the central issue in Plaintiffs' case is the constitutionality of Act 10.

The Circuit Court ultimately granted judgment on the pleadings for Plaintiffs. R.118; R.142. Even though the court agreed with the Legislature that "[a] rational basis exists for the distinction between most of the general employee group versus the public safety group," R.118 at 14, the court nevertheless determined that Act 10's distinction failed rational basis review because the category of "public safety" employees was underinclusive, *id*. at 15 ("[M]any employees in the general employee group should . . . be in the public safety group."). On that basis, the Circuit Court declared Act 10's collective bargaining provisions unconstitutional and invalid. R.142 at 9–10. The merits question on appeal then is whether Act 10's distinction between "general" and "public safety" employees violates the equal protection guarantees in Article I, Section 1 of the Wisconsin Constitution.

ARGUMENT

During her campaign, Justice Protasiewicz agreed that justice must be fair and impartial. And she agreed that fundamental fairness principle might require her recusal in a case

challenging Act 10. When asked about recusing in an action over Act 10 specifically, Justice Protasiewicz was candid: whether she would have to recuse was a "solid maybe." Milwaukee J. Sentinel, *supra* note 2, at 28:00. With the question of Act 10's unconstitutionality back before this Court, Justice Protasiewicz should recuse under state law and the federal Due Process Clause.

I. Judicial Ethics Laws Require Justice Protasiewicz's Recusal

Codes of judicial conduct "serve to maintain the integrity of the judiciary and the rule of law." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009); *see also In re Jud. Disciplinary Proc. Against Laatsch*, 2007 WI 20, ¶ 13, 299 Wis.2d 144, 727 N.W.2d 488 ("A fair and impartial judge is the cornerstone of the integrity of the judicial system.").

Under Wisconsin law, "[a]ny judge," including a "supreme court justice[]," "shall disqualify himself or herself from any civil . . . action or proceeding" under two circumstances relevant here. Wis. Stat. § 757.19(1)–(2). First, a judge must recuse "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." *Id.* § 757.19(2)(g). Second, a judge must recuse "[w]hen a judge has a

significant financial or personal interest in the outcome of the matter." *Id.* § 757.19(2)(f). This is a "mandatory disqualification statute." *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 181, 443 N.W.2d 662 (1989). If those circumstances are present, recusal "must occur." Wis. Stat. § 757.19(4).

In addition, 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 . . . an 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).

Applied here, Justice Protasiewicz candidly acknowledged on the campaign trail that recusal might be required if someone again challenged Act 10's constitutionality. After all, she was one

of the Act 10 protestors. She signed the recall petition. And she was transparent about her views on the Act's constitutionality—she agreed with dissenters in earlier litigation that it was unconstitutional. Now that this renewed challenge to Act 10's constitutionality has materialized, Justice Protasiewicz's caution about her ability to participate was exactly right. Her recusal is warranted because of the appearance of partiality prohibited by state law and this Court's rules. *See* Wis. Stat. § 757.19(2)(f), (g); SCR 60.04(4).

A. Justice Protasiewicz's Campaign Statements Create The Appearance Of Partiality

Under subsection (g) of the mandatory recusal statute, a Justice must recuse upon a "determination of an actual or apparent inability to act impartially." *American TV*, 151 Wis. 2d at 186. So in order to hear this case, Justice Protasiewicz must determine not only that "she could act in an impartial manner" but also "that it *appeared* that . . . she could act in an impartial manner." *See Ozanne v. Fitzgerald*, 2012 WI 82, ¶ 5, 822 N.W.2d 67 (Abrahamson, C.J.) (emphasis added).

When it appears that a Justice has prejudged the merits of a case, she must recuse. Under this Court's Code of Judicial

Conduct, "'[i]mpartiality' means the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." SCR 60.01(7m). Where, for example, a Justice has already remarked that she agrees a law is unconstitutional, one could conclude that she does not "maintain[] an open mind in considering" a later constitutional challenge. *Id.* Put simply, that "prejudgment," or even the appearance of prejudgment, "can require recusal." *State v. Herrmann*, 2015 WI 84, ¶ 148 n.14, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring).

Here, as Justice Protasiewicz acknowledged on the campaign trail, recusal is warranted because of the appearance that she has prejudged the merits of this case. *See* Wis. Stat. § 757.19(2)(g). Justice Protasiewicz protested its enactment and signed the petition to recall Governor Walker. In her words, it was thus a "solid maybe" that she would need to recuse if Act 10 came before the Court again. Milwaukee J. Sentinel, *supra*, at 28:00. The question of Act 10's constitutionality is back before this Court. Plaintiffs claim that Act 10 is unconstitutional. Justice Protasiewicz said during her campaign that she "agree[d]" that

"Act 10 is unconstitutional." Pod Save America, *supra*, at 51:04. Plaintiffs' case depends upon the Court holding Act 10 unconstitutional, and on the campaign trail, Justice Protasiewicz emphasized her opposition to Act 10 and expressed her view that it is unconstitutional. Consistent with Justice Protasiewicz's candor on the campaign trail, her past political activities, and her firmly held views about Act 10, her stated views about Act 10's unconstitutionality on the campaign trial warrant recusal.

Importantly, Justice Protasiewicz approached the issue of Act 10 and a possible recusal differently than other issues, such as redistricting or abortion, arising during the campaign. When asked whether Justice Protasiewicz's other views might put a "thumb on the scale" for these other issues, she emphasized that "all of [her] decisions are going to be rooted in the law." Beleckis, *supra* note 1 (App.0018). For example, when asked how her views on redistricting would impact her decision-making, Justice Protasiewicz emphasized that she would "uphold the law (and) follow the Constitution when I make any decisions." *Id*. But here, when asked directly if she should recuse in future Act 10 litigation, Justice Protasiewicz was transparent: she was a union member,

she protested Act 10, she signed the recall petition, she agreed Act 10 was unconstitutional, so it was a "solid maybe" that she would need to recuse. Milwaukee J. Sentinel, *supra* note 2, at 28:00.

Justice Protasiewicz's candid acknowledgment that recusal could be required is now grounds for recusal with Act 10 back before this Court, to avoid any appearance that Justice Protasiewicz "cannot[] act in an impartial manner." Wis. Stat. § 757.19(2)(f). Recusal is warranted so that no party has a reasonable basis to believe that there is a thumb on the scale against it in this Court. This is particularly true when considering Justice Protasiewicz's prior political advocacy, campaign statements about Act 10's unconstitutionality, and financial contributions from a PAC associated with one of the plaintiffs in this case. A jurist cannot "announc[e] in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge." *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972) (memorandum of Rehnquist, J., on motion to disqualify). Any such appearance of partiality requires recusal here.

B. Justice Protasiewicz Has A Significant Personal Interest In The Outcome Of This Matter

Subsection (f) also requires recusal when "a judge has a significant financial or personal interest in the outcome of the matter." Wis. Stat. § 757.19(2)(f). Unlike subsection (g), which requires a "subjective determination," subsection (f) is a "fact-specific situation[], the existence of which can be determined objectively." *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996). The "very existence" of a personal interest in the outcome of the matter "creates a disqualification by law." *Id.* "The effect, if any," of the interest "upon a judge's ability to act impartially in a case is immaterial." *American TV*, 151 Wis. 2d at 182.

Subsection (f) applies to both "financial" and other "personal interest[s]." Wis. Stat. § 757.19(2)(f). The interest must be "a substantial interest in the result of the hearing." *Goodman v. Wis. Elec. Power Co.*, 248 Wis. 52, 58, 20 N.W.2d 553 (1945). It must be "direct, real and certain" and not "merely indirect, or incidental, or remote, or contingent, or possible." *Id.* And it "must be established by evidence and reasonable inferences." *State ex rel. Dressler v.*

Cir. Ct. for Racine Cnty., Branch 1, 163 Wis. 2d 622, 643, 472 N.W.2d 532 (Ct. App. 1991).

Here, the evidence establishes that Justice Protasiewicz has a personal interest in the outcome of this case. During her campaign, Justice Protasiewicz made several comments evincing her personal views on this case and her personal interest in Act 10. She emphasized that she "come[s] from a union family" and "was a union member," that she "marched at the Capitol in protest of Act 10," and that she signed the resulting petition to recall Governor Walker. Pod Save America, *supra*, at 50:22. Justice Protasiewicz clarified her substantial and direct personal interest in Act 10 while on the campaign trail, and thus should not participate in this case.

C. Justice Protasiewicz's Statements Commit Her To A Position In This Case, So A Reasonable, Well-Informed Person Would Question Her Ability To Be Impartial In This Case

Under Supreme Court Rules, a Justice should 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). For the same reasons she should recuse under subsection (g) of Wisconsin's recusal statute, Justice Protasiewicz should recuse under this Court's rule. Justice Protasiewicz herself questioned her ability to be impartial should Act 10 come back before the Court. On the possibility of recusal, it was "a solid maybe." Milwaukee J. Sentinel, *supra* note 2, at 28:00. That Act 10 litigation has now materialized. Recusal is thus necessary under this Court's rule and by Justice Protasiewicz's own admonition that no party should feel there is a thumb on the scales of justice.

In addition, this Court's rule requires a Justice to recuse from a proceeding "when the facts and circumstances the judge knows or reasonably should know establish" that she "while . . . a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to" an issue or controversy in the proceeding. SCR 60.04(4)(f). During her campaign, Justice Protasiewicz was transparent: "Act 10 is unconstitutional" in her view. Pod Save America, *supra*, at 51:09. With that issue now back before this Court, this Court's rules compel recusal.

II. Due Process Requires Justice Protasiewicz To Recuse

A "basic requirement" of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution is "a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955). "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id*. Judges must not face the "temptation . . . not to hold the balance nice, clear, and true." *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)). Judges must be "neutral and detached." *Id* at 62. Thus, a judge is disqualified under the Fourteenth Amendment from hearing a case in which she is biased.

The federal Due Process Clause within the Fourteenth Amendment "guarantees 'an absence of actual bias' on the part of a judge" in American courts. *Williams*, 579 U.S. at 8 (quoting *In re Murchison*, 349 U.S. at 136). However, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent *even the probability of unfairness*.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added). "[J]ustice must satisfy the appearance of justice." *Murchison*, 349 U.S. at 136.

So "[r]ecusal 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); *see also Caperton*, 556 U.S. at 884 (requiring recusal when there is a "serious risk," "based on objective and reasonable perceptions" of "actual bias or prejudgment"). Due process "do[es] not require proof of actual bias." *Caperton*, 556 U.S. at 883. Though "actual bias, if disclosed, no doubt would be grounds for appropriate relief," courts instead must determine "whether the situation is one which would offer a possible temptation to the average judge." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (cleaned up).

This is an "objective" inquiry, which requires consideration of "all the circumstances of th[e] case." *Caperton*, 556 U.S. at 872. The question is "not whether a judge harbors an actual, subjective bias," but is instead "whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams*, 579 U.S. at 8 (cleaned up).

Here, Justice Protasiewicz's comments during her campaign strongly indicate a "serious risk of actual bias." *Caperton*, 556 U.S. at 884. Because of the appearance than Justice Protasiewicz has "prejudged the . . . outcome of the dispute before her," recusal is warranted. *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005).

The merits question in this case is whether Act 10's sorting of public employees is constitutional. During her campaign, Justice Protasiewicz emphasized her support for and association with unions who stand to benefit from the Court's renewed look at Act 10, stating that she "come[s] from a union family" and "was a union member." Pod Save America, *supra*, at 50:22. And she emphasized that her disagreement with Act 10 and support for those unions culminated in her "march[ing] at the Capitol in protest of Act 10." *Id*. She also repeatedly emphasized her view that Act 10 was unconstitutional. *See* Pod Save America, *supra*, at 51:09; Milwaukee J. Sentinel, *supra* note 2, at 17:20. And given all that, she was candid that her recusal might be necessary. *Id*. Consistent with the federal Due Process Clause, Justice Protasiewicz cannot preside over this appeal.

Justice Protasiewicz's acknowledgement that recusal might be necessary further supports the conclusion that her other campaign statements regarding Act 10 evince her prejudgment of this case. She noted that "the fact that [she] marched" and "signed the recall petition" would be relevant to a recusal decision. *Id.* By stating that those facts are relevant to a recusal decision, Justice Protasiewicz acknowledges that those facts tend to show an "unconstitutional potential for bias." *Williams*, 579 U.S. at 8. And more than that, when given the opportunity to disclaim any such bias and state that she would be able to decide an Act 10 case fairly and impartially, Justice Protasiewicz simply agreed that "maybe" she should recuse. Milwaukee J. Sentinel, *supra* note 2, at 28:00. As Justice Protasiewicz herself acknowledged, her past political advocacy and her continuing views on Act 10 put recusal in play. Now that Act 10 is back before this Court, the decision to recuse is clear.

Finally, this is not a case where Justice Protasiewicz has simply indicated a "general opinion regarding a law at issue in a case before . . . her." *Franklin*, 398 F.3d at 962; *see also Wright v. Wisconsin Elections Comm'n*, 2023 WI 67, ¶ 62, 409 Wis. 2d 311,

995 N.W.2d 699. Instead, by stating that Act 10 is unconstitutional, by recalling actions she took in opposition to Act 10, by announcing she agreed with dissenters in Act 10's previous constitutional challenge in this Court, and by agreeing that her beliefs may indeed require recusal, Justice Protasiewicz's comments create the constitutionally intolerable perception that this appeal will have been prejudged. *Franklin*, 398 F.3d at 962; *see also Wright*, 2023 WI 67, ¶ 62. The federal Due Process Clause requires her recusal.

CONCLUSION

For the foregoing reasons, Justice Protasiewicz should recuse in this case.

Dated: January 27, 2025

Respectfully submitted,

Electronically signed by Kevin M. St. John
KEVIN M. ST. JOHN
State Bar No. 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
(608) 216-7990
kstjohn@bellgiftos.com

BRYAN WEIR*
TAYLOR A.R. MEEHAN*
DAVID ROSENTHAL*
MARIE SAYER
State Bar No. 1127350
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, Virginia 22209
(703) 243-9423
bryan@consovoymccarthy.com
taylor@consovoymccarthy.com
david@consovoymccarthy.com
mari@consovoymccarthy.com

**Admitted pro hac vice*
(Order attached as App.0004)

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
State Bar No. 1102199
Counsel of Record
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER LOCKE LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

CERTIFICATION REGARDING LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this brief is 4,751 words as calculated by Microsoft Word.

Dated this 27th day of January, 2025

Respectfully submitted,

Electronically Signed by
Misha Tseytlin
MISHA TSEYTLIN
State Bar No. 1102199
TROUTMAN PEPPER LOCKE LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240
misha.tseytlin@troutman.com