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Explainer: Judicial Recusal in Wisconsin and Beyond

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Introduction

Just a month after joining the Wisconsin Supreme Court, Justice Janet Protasiewicz faces calls to recuse from two pending lawsuits that challenge Wisconsin's state legislative districts as unlawful partisan gerrymanders. In a motion requesting her recusal, the state's Republican-led legislature and some of its members invoke both the federal constitution and state judicial ethics rules. They object to Justice Protasiewicz's participation in the redistricting cases on two main grounds: First, they note that Justice Protasiewicz's campaign received significant financial support from the Democratic Party of Wisconsin, which they describe as having a substantial interest in these cases (although it is not a party in the cases). Second, lawmakers argue that comments Justice Protasiewicz made on the campaign trail show that she has improperly prejudged the cases. They point in particular to her statements that Wisconsin has "amongst the most gerrymandered maps in the country," that "the maps are rigged" and "unfair," and that the "dissent [in the state's prior redistricting case] is what I will tell you I agree with."[1] If Justice Protasiewicz were required to recuse, the redistricting actions might be heard by only six justices—a recipe for potential deadlock given those justices' 3-3 ideological divide.

Even before the legislature filed the recusal motion, one of Justice Protasiewicz's colleagues, Justice Rebecca Bradley, filed an unusual dissent from a scheduling order in which she lamented that, "[d]espite receiving nearly $10 million from the Democrat [sic] Party of Wisconsin and declaring the maps 'rigged,' Protasiewicz has not recused herself from the case."[2] Justice Bradley suggested that due process principles require Protasiewicz to step aside (even without

[1] *See* Jessie Opoien and Jack Kelly, *Protasiewicz Would 'Enjoy Taking a Fresh Look' at Wisconsin Voting Maps*, Cap Times (Mar. 2, 2023), https://captimes.com/news/government/protasiewicz-would-enjoy-taking-a-fresh-look-at-wisconsin-voting-maps/article_d07fbe12-79e6-5c78-a702-3de7b444b332.html; Zac Schultz, *Janet Protasiewicz, Daniel Kelly on Wisconsin Redistricting*, PBS Wisconsin (Mar. 9, 2023), https://pbswisconsin.org/news-item/janet-protasiewicz-daniel-kelly-on-wisconsin-redistricting/.
[2] Order, *Clarke v. Wisconsin Elections Commission*, No. 2023AP1399-OA (Wis. August. 15,2023), https://acefiling.wicourts.gov/document/eFiled/2023AP001399/692192 (Bradley, J. dissenting).

a formal recusal request) and that her failure to do so "showcases that justice is now for sale in Wisconsin."[3]

This Explainer offers legal and practical context for this high-stakes recusal controversy. It begins by describing the relevant federal and Wisconsin-specific legal standards for recusal. It then gives examples from Wisconsin and around the country of other instances in which recusal has—and has not—been required. The purpose of this explainer is to describe existing recusal rules, precedents, and practices, not to endorse or criticize them or to express a view on what the law of recusal *should* be.

Several key takeaways emerge from this analysis:

- As a constitutional matter, judges are required to recuse for reasons related to campaign funds or campaign statements only in extraordinary circumstances.
  - With respect to funding, the U.S. Supreme Court has held only once that a judge violated due process by failing to recuse after receiving campaign support from someone with a stake in the outcome. In the 14 years since that ruling, it does not appear that any federal or state court anywhere in the country has found another due process violation based on campaign funding.
  - With respect to statements, the U.S. Supreme Court has never held that a judge violated due process by failing to recuse after making comments on the campaign trail about issues in a case. Instead, the Court has stressed that the First Amendment protects the right of judicial candidates to express their views on disputed legal and political matters as long as they do not directly commit to making a particular legal ruling.
- Wisconsin's state-specific rules likewise rarely call for recusal for reasons related to campaign funds or campaign statements.
  - In fact, Wisconsin's Code of Judicial Conduct declares that "[a] judge shall *not* be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding."[4] The Wisconsin Supreme Court's conservative majority adopted this provision and a related one in 2010 in response to proposals from two of their largest financial backers.

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[3] *Id.*

[4] Wisconsin Supreme Court Rule ("SCR") 60.04(7).

  - Wisconsin's Code of Judicial Conduct requires a judge to recuse when the judge, while a judicial candidate, makes statements committing the judge to rule in a particular way. The relevant precedent makes clear, however, that this provision only covers unmistakable promises or commitments and leaves judges free to express views on legal issues on the campaign trail and to participate in cases involving those issues.
  - Wisconsin also has general ethics provisions that call for judges to recuse if it appears that they cannot be impartial, bearing in mind that judges are entitled to a presumption of impartiality.
  - Wisconsin Supreme Court justices make their own individual decisions about whether to recuse, and those judgments are not subject to review by the remainder of the court.
  - Over the past 15 years, the Wisconsin Supreme Court has rejected multiple proposals to tighten the state's judicial ethics rules and expand the grounds for recusal.
- The Wisconsin Supreme Court has experienced a number of recusal controversies in recent years involving campaign statements and campaign funding, and most ended with decisions not to recuse.
  - Shortly after she was elected to the court in 2007, then-Justice (now Chief Justice) Ziegler declined to recuse from a case in which Wisconsin Manufacturers & Commerce participated as an *amicus curiae* because the group had spent about $2.2 million on her behalf (which exceeded the total amount that her own campaign committee raised). In a later case, Justice Gableman denied a similar request to recuse based on the $1.8 million that WMC spent on his behalf during his 2008 campaign.
  - Shortly his 2008 election, Justice Gableman rejected a request to recuse in a criminal appeal based on concerns that his "tough on crime" campaign messages called into question his ability to be fair to the defendant.
  - In 2015, the special prosecutor in Wisconsin's high-profile *John Doe* campaign finance investigation asked Justices Prosser and Gableman to recuse themselves because they had received millions of dollars of campaign support from several individuals and entities who were targets of the investigation. Both justices declined to recuse.
  - In the wake of the *John Doe* episode, the state's Republican-controlled legislature loosened the state's campaign finance laws in several ways, including by allowing political parties to make unlimited contributions to

judicial candidates. It is that legal change that opened the door to the contributions that the legislature now cites as grounds for Justice Protasiewicz's recusal.

- In 2017, the Wisconsin Supreme Court rejected a petition to adopt a rule requiring the state's judges to recuse from matters involving their financial supporters.

- Large funders have participated in all of Wisconsin's recent supreme court elections. The state's 2023 race was the most expensive judicial election in American history, and the sums deployed by the Democratic Party of Wisconsin and other major funders on both sides were larger in absolute terms than in previous races. But in relative terms, the Democratic Party's support in 2023 was closely in line with the state's immediately preceding supreme court elections in 2020, 2019, and 2018. In all four of those contests, the winning candidate's largest financial backer supplied between 15 and 20% of the total amount spent on the election. This relative level of support pales in comparison to 2016, when Justice Rebecca Bradley's largest backer (the Wisconsin Alliance for Reform) accounted for nearly half of the total amount spent on the election. None of these justices have recused from cases in which these large supporters have an interest.

- Looking beyond Wisconsin, judges in other states have repeatedly rejected calls to recuse for reasons related to their campaign funds, statements, and more.
    - Judges have commonly received substantial financial backing from political parties. In some states, judges even run in partisan elections, meaning that they formally align themselves with a political party and rely on the backing of that party and its supporters. Nevertheless, these judges have regularly participated in redistricting litigation and other politically sensitive cases.
    - In addition to rebuffing campaign-related recusal calls, judges elsewhere have declined to step away from redistricting cases even where they have familial ties to the litigants. In Ohio, the governor's son sits on the state supreme court and has participated in that state's post-2020 redistricting litigation even though his father sat on the redistricting commission whose actions were being challenged. Along similar lines, one of the members of North Carolina's supreme court is the son of the president of the state senate and has declined to recuse in cases where his father is the named defendant.

- Wisconsin's current recusal controversy flips conventional ideological alignments. Conservative lawmakers and jurists have generally favored narrower recusal

standards and (successfully) opposed efforts to bolster judicial ethics rules. They have been the architects of Wisconsin's relatively permissive approach to recusal (and campaign finance). Here, however, they are the ones seeking to extend recusal practice. Meanwhile, liberal lawmakers and jurists have generally sought more robust ethics rules and recusal requirements. Here, however, they are ones reminding their conservative colleagues of the limited scope of existing recusal law and doctrine.

I. Background: The Law of Judicial Recusal

Judicial recusal standards come from multiple sources. First, there are federal constitutional principles that apply nationwide. Specifically, all state and federal judges must abide by the Constitution's guarantee of due process. The U.S. Supreme Court has identified only a limited set of circumstances in which due process requires recusal. Second, there are state-level requirements. Some states, though not Wisconsin, have state constitutional provisions that expressly address recusal. All states, including Wisconsin, have statutes and judicial ethics rules that set out recusal criteria. These rules can require recusal even in circumstances when the federal or state constitution would not.

A. Federal Constitutional Standards

The Supreme Court has long held that the Constitution's guarantee of "due process of law" includes the right to a "fair trial in a fair tribunal."[5] But the Court has also long said that "only in the most extreme of cases" does due process require a judge's recusal,[6] and "most matters relating to judicial disqualification [do] not rise to a constitutional level."[7] Instead, recusal is primarily governed by statutes and judicial codes.

Traditionally, the Court understood the Due Process Clause merely to incorporate "the common-law rule that a judge must recuse himself when he has a 'direct, personal, substantial, pecuniary interest' in a case.[8]" This rule was rooted in the English principle that "no man shall be a judge in his own cause."[9] The Court did *not* recognize a due process right to "'disqualification for bias or prejudice.'"[10]

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[5] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (quoting In re Murchison, 349 U.S. 133, 136 (1955)); *see also* Miller v. Carroll., 392 Wis.3d 49, 59, 944 N.W.2d 542 (2020) ("The right to an impartial judge is fundamental to our notion of due process.") (citation omitted).
[6] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).
[7] Caperton, supra, 556 U.S. at 876 (quoting FTC v. Cement Institute, 333 U.S. 683, 702 (1948)); *see also* Williams v. Pennsylvania, 579 U.S. 1, 13 (2016) (quoting Lavoie, supra, 475 U.S. at 828) ("It is important to note that due process 'demarks only the outer boundaries of judicial disqualifications.'").
[8] Caperton, supra, 556 U.S. at 876 (quoting Tumey v. State of Ohio, 273 U.S. 510, 523 (1927)).
[9] Id. (quoting The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison).
[10] Id. (quoting Lavoie, supra, 475 U.S. at 820).

The Court's position evolved somewhat during the twentieth century. In several cases, the Court held that due process required judges to recuse in the face of conflicts arising from their financial interests or incentives, even if recusal might not have been required under the traditional common-law rule. The Court, for example, rejected a system in which a town's mayor served as an adjudicator and had an incentive to fine defendants in order to boost the town's finances.[11] The Court also said that it was unconstitutional for an Alabama Supreme Court justice to participate in a case involving a punitive damages award against an insurance company when the justice was himself the lead plaintiff in a nearly identical case pending in a lower state court.[12] None of these cases involved conduct during judicial campaigns.

1. Campaign Funding

In 2009, the Supreme Court addressed for the first (and only) time a due process recusal claim arising out of a judicial election. That case, *Caperton v. A.T. Massey Coal Co.*, involved a member of the West Virginia Supreme Court, Justice Brent Benjamin. He had been elected after receiving $3 million in campaign support, mostly in the form of independent expenditures, from Don Blankenship, the head of A.T. Massey Coal.[13] At the time, A.T. Massey Coal was looking to appeal a $50 million judgment that had been entered against it in a state trial court.[14] According to the U.S. Supreme Court, Blankenship's $3 million was "more than the total amount spent by all other Benjamin supporters," "three times the amount spent by Benjamin's own committee," and "$1 million more than the total amount spent by the campaign committees of both candidates combined."[15] Soon after he was elected, Benjamin declined to recuse from A.T. Massey's appeal, and then cast the deciding vote in the company's favor, wiping out the $50 million liability award.[16]

The Supreme Court ruled 5-4 that Benjamin's failure to recuse violated due process. The Court's opinion, authored by Justice Kennedy, stated that due process requires recusal when, "as an objective matter," there is a "probability of actual bias on the part of the judge."[17] The

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[11] Tumey, supra, 270 U.S. at 520, 522, 535 (finding that a village mayor-judge had an unconstitutional financial interest in the outcome of certain matters because he received a salary supplement for guilty convictions but not acquittals, and because criminal fines were deposited into the village's general treasury fund); *see also* Ward v. Monroeville, 409 U.S. 57, 60 (1972) (finding that a mayor-judge who did not directly share in the fees and costs of fines was still disqualified from hearing matters because the fines went to the town's general funds which could create a "possible temptation" for the mayor).
[12] *See* Lavoie, supra, 475 U.S. at 825; *see also* Gibson v. Berryhill, 411 U.S. 564 (1973) (finding that a board of optometrists had a pecuniary interest of "sufficient substance" so that it could not preside over a hearing of competing optometrists.).
[13] Caperton, supra, 556 U.S. at 873.
[14] Id. at 872.
[15] Id. at 873.
[16] Id. at 873-74.
[17] Id. at 884.

Court explained that, in the judicial election context, this means conducting "an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average … judge to … lead him not to hold the balance nice, clear, and true.'"[18] According to the majority, "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[19]

The Court's probability-of-bias analysis centered on several key considerations: "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."[20] In the Court's view, the absolute and relative amount of Blankenship's contributions to Benjamin, the money's apparent influence on the election result (where the margin was less than 50,000 votes), and the temporal proximity between the contributions and the election, collectively added up to a due process violation.[21]

The Court, however, stressed the narrowness of its ruling and reiterated that "most matters relating to judicial disqualification [do] not rise to a constitutional level."[22] Emphasizing that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," the Court repeatedly observed that "this is an exceptional case," involving "an extraordinary situation," with facts that were "extreme by any measure."[23] It added: "Application of the constitutional standard implicated in this case will thus be confined to rare circumstances."[24]

Joining Justice Kennedy in the *Caperton* majority were the Court's liberal members. The Court's conservatives—Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—dissented. Despite the majority's efforts to cabin its ruling, the dissenters opposed even this limited broadening of the due process standard. Chief Justice Roberts expressed concern that the majority's "amorphous" rule would be difficult to administer and would undermine rather than improve confidence in the judiciary by incentivizing more calls for recusal and encouraging litigants and the public to assume the worst about judges' motives.[25]

The due process violation found in *Caperton* has thus far been one of a kind. Litigants around the country have brought recusal motions since *Caperton* premised on a judge's receipt of

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[18] Id. at 885.
[19] Id. at 884.
[20] Id.
[21] Id. at 885-86.
[22] Id. at 876.
[23] Id. at 884, 887.
[24] Id. at 890.
[25] Id. at 902 (Roberts, C.J., dissenting).

campaign funds from an interested party, but it does not appear that any court, state or federal, has held that due process required the judge to recuse. Some examples are provided below.

In Wisconsin, several members of the state supreme court have underscored that *Caperton* involved unique circumstances and observed that due process rarely compels recusal. Chief Justice Ziegler, for instance, recently "emphasize[d] that *Caperton* due process violations are rare and limited to the most extraordinary and extreme cases."[26] She has explained that *Caperton* involved a "perfect storm" of facts and observed that that the Court "nowhere" suggested that "any lesser fact situation would have required Justice Benjamin's recusal."[27] She has also noted the "presumption that a judge is impartial" and warned against "the use of *Caperton* to 'judge shop,'" writing that "the court should not condone such manipulation."[28]

Justice Hagedorn, meanwhile, has written that, "[f]or most of American history, the United States Constitution was understood to say close to nothing about judicial recusal."[29] By way of illustration, he noted that Chief Justice John Marshall presided over *Marbury v. Madison*, "one of the most famous cases in American legal history," even though the case involved federal commissions that Marshall himself had failed to deliver when he served as Secretary of State.[30] According to Justice Hagedorn, "[n]one of that violated the common law or constitutional rules for judicial disqualification as understood at the time."[31] Justice Hagedorn has described *Caperton* as "a case with extreme facts" that produced "a limited expansion of the protections afforded by the Constitution."[32] In Justice Hagedorn's words, "[u]nder Caperton, appearance of bias is not enough to trigger a constitutional problem. Rather, recusal is required under the Constitution only in the extreme, exceptional, and extraordinary case where the risk of actual bias is so unusually high that it cannot be tolerated."[33] Elsewhere, Judge Hagedorn has written that "[t]he constitutional standard underlying a *Caperton* due process claim is extraordinarily high" and hinges on "a serious risk of bias so extreme and unusual that it occurs only in only the rarest of circumstances."[34]

On multiple occasions, Justice Hagedorn has also expressed concern about the misuse of *Caperton*, lamenting that "bias and recusal allegations" have increasingly become "weaponiz[ed]

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[26] Miller v. Carroll, 392 Wis. 2d 49, 81, 944 N.W.2d 542, 558 (2020) (Ziegler, J. concurring).
[27] Id., 944 N.W.2d at 560-61 (Ziegler, J. concurring) (quoting State v. Hermann, 364 Wis.2d 336, 867 N.W.2d 772 (2015) (Ziegler, J. concurring)).
[28] Id., 944 N.W.2d at 558 (Ziegler, J. concurring); *see also* State v. Allen, 322 Wis. 2d 372, 493-94, 778 N.W.2d 863, 926, (2010) (Ziegler, J. concurring).
[29] Id., 944 N.W.2d at 569 (Hagedorn, J. dissenting).
[30] Id. at 570 (Hagedorn, J. dissenting).
[31] Id. at 571 (Hagedorn, J. dissenting).
[32] Id. (Hagedorn, J. dissenting).
[33] Id. at 572 (Hagedorn, J. dissenting).
[34] County of Dane v. Public Service Commission of Wisconsin, 403 Wis.2d 306, 355, 976 N.W.2d 790, 814 (2022) (Hagedorn, J. concurring).

... to achieve litigation ends."[35] He has written: "we cannot validate and routinize a litigation tactic that aims its fire at the decision-maker rather than the decision....The constitutional due process guarantee announced in *Caperton* will rarely be met, and therefore should rarely be invoked."[36] He has elsewhere expressed concern that, "the more recusal becomes a litigation weapon, the more damage it does to the judiciary as a whole."[37]

2. Campaign Statements

Caperton was not a case about a judge's campaign statements. No Supreme Court case has ever held that due process required a judge to recuse because of the judge's expression of views, whether on the campaign trail or elsewhere. In fact, the Court has rejected several such claims. In *Federal Trade Commission v. Cement Institute*, a litigant argued that federal administrative adjudicators who had previously expressed views about the illegality of certain conduct had improperly prejudged the matter and should have been required to recuse.[38] Rejecting this argument, the Court first observed that these prior statements did not mean that the adjudicators' minds were "irrevocably closed."[39] The Court then explained that none of its precedents indicated "that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."[40] It added: "In fact, judges frequently try the same case more than once and decide identical issues each time."[41]

In a precursor case, the Court held that a cabinet secretary with a legally assigned adjudicative role had not become "unfit" to participate because he had previously "expressed strong views" on the matters at issue.[42] The Court wrote: "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[43]

The key U.S. Supreme Court case on judicial campaign statements is *Republican Party of Minnesota v. White*, which considered the interaction of free speech and due process principles.[44]

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[35] Id. (Hagedorn, J. concurring).
[36] Id. (Hagedorn, J. concurring).
[37] Miller, supra, 944 N.W.2d at 575 (Hagedorn, J. dissenting).
[38] 333 U.S. 683 (1948).
[39] Id. at 701.
[40] Id. at 702-03.
[41] Id. at 703.
[42] U.S. v. Morgan, 313 U.S. 409 (1941)
[43] Id. at 421.
[44] 536 U.S. 765 (2002).

White involved a First Amendment challenge to a Minnesota judicial ethics rule that barred judicial candidates from announcing their views "on disputed legal or political issues." One of the challengers was a former Minnesota Supreme Court candidate whose campaign literature had criticized several of the court's prior decisions "on issues such as crime, welfare, and abortion."[45] Another challenger was the state Republican Party, which argued that Minnesota's rule unlawfully hampered the ability of the party and its voters to "learn [a judicial candidate's] views and support or oppose his candidacy accordingly."[46] Seeking to defend the rule, the state argued that it properly sought to preserve judicial impartiality and thus protect the due process rights of litigants.[47]

The Supreme Court rejected the state's defense and ruled 5-4 that Minnesota's limitation on judicial candidate statements violated the First Amendment. Writing for the Court, Justice Scalia explained that due process did not require the kind of impartiality that the state had in mind. Judicial impartiality in the due process sense, he wrote, is primarily about avoiding bias "for or against either *party* to the proceeding," not about avoiding the prior expression of views on *issues*.[48] In his words, "when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly."[49]

According to the *White* majority, "A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law."[50] For another, as Justice Scalia saw it, a lack of preconceptions was "evidence of lack of *qualification*, not lack of bias."[51]

The *White* majority saw nothing unusual or problematic about judges deciding cases involving issues on which they have previously expressed views. As Justice Scalia observed, "[b]efore they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule on."[52] His opinion offered two historical examples from the U.S. Supreme Court: Justice Black participated in "cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of

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[45] Id. at 768.
[46] Id. at 770.
[47] Id. at 775.
[48] Id. at 775-78 (emphasis added).
[49] Id. at 776-77.
[50] Id. at 777.
[51] Id. at 778 (emphasis added) (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum opinion)).
[52] Id. at 779.

its principal authors," while Chief Justice Hughes wrote an opinion overruling a "a case he had criticized in a book written before his appointment to the Court."[53] The majority added that, once on the bench, judges often continue to "state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches."[54]

With respect to judicial election campaigns specifically, the *White* majority noted that most judicial elections were originally partisan contests: "[N]ot only were judicial candidates … discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while."[55] In the majority's estimation, none of this activity posed a due process problem.

Justice Scalia also noted in *White* that it is routine and entirely permissible for judges to rule on legal issues after having shared a view about them in the context of a prior case.[56] In Wisconsin, for example, every member of the state supreme court *except* Justice Protasiewicz participated in the state's 2021-22 redistricting litigation, *Johnson v. Wisconsin Election Commission*. Those justices took positions on issues similar to those now presented in the state's new redistricting cases, and they conveyed those positions more formally and in greater detail, than any views expressed by the candidate on the 2023 campaign trail. Yet, no one has contended this precludes those justices from participating in the new redistricting cases and resolving them impartially.

B. Wisconsin-Specific Recusal Rules

Beyond due process, state-level policies, which vary across the country, can require recusal even when the federal Constitution does not. In Wisconsin, these rules take the form of statutes enacted by the legislature and a Code of Judicial Conduct adopted by the state supreme court.

1. Statutory Provisions

By statute (Wis. Stat. § 757.19), lawmakers have identified seven circumstances when judges or justices must recuse themselves from a case. Six of these seven circumstances involve the existence of specific relationships or interests. A judge or justice is required to recuse when the judge or justice: is related to any party or a party's lawyers (or their spouses); is a party or material witness; has previously acted as counsel to any party in the same action; prepared any legal instrument or paper, like a contract or will, that is at issue; previously handled the action while judge in a lower court; or has a "significant financial or personal interest" in the outcome of the matter, though the statute clarifies that this does *not* occur by simply being a member of a

[53] Id.
[54] Id.
[55] Id. at 786.
[56] Id.

political or taxing body that is a party.[57] If one of these circumstances is present, the judge or justice must recuse even if they genuinely believe they could nevertheless remain impartial.

The seventh statutory recusal reason is a catchall that additionally requires recusal when a judge or justice "determines that, for any reason, he or she cannot, or it appears that he or she cannot, act in an impartial manner."[58] The Wisconsin Supreme Court has explained that, unlike the other circumstances set out in the statute, this provision "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind."[59] For this reason, the court has long read the provision "to place the determination of partiality solely upon the judge."[60] If a lower court judge declines to recuse pursuant this provision, review on appeal is limited to assessing whether the judge indeed "went through the required exercise of making a subjective determination."[61]

Additionally, the Wisconsin Supreme Court has long recognized a presumption of judicial impartiality.[62] This accords with the U.S. Supreme Court's recognition of "a presumption of honesty and integrity in those serving as adjudicators,"[63] and its refusal "to impute to judges a lack of firmness, wisdom, or honor."[64]

2. Code of Judicial Conduct

Wisconsin's Code of Judicial Code identifies further grounds for recusal that overlap with but go beyond the statutory recusal rules described above. Like the statute, the Code (SCR 60.04(4)) includes a catchall, which states that a judge shall 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." Also like the statute, the Code identifies specific situations when judges are required to recuse—namely, the judge has a "personal bias or prejudice concerning a party or the party's lawyer"; has "personal knowledge of disputed evidentiary facts concerning the proceeding" or "has been a material witness concerning the matter"; previously handled the matter as a lower court judge; previously served as a lawyer in

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[57] Wis. Stat. § 757.19(2)(a)-(f).
[58] Wis. Stat. § 757.19(2)(g).
[59] State v. Am. TV & Appliance, 151 Wis.2d 175, 182, 443 N.W.2d 662 (1989).
[60] State v. Harrell, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996).
[61] Id., 546 N.W.2d at 663-64.
[62] See, e.g., State v. Herrmann, 2015 WI 84, ¶ 24, 364 Wis. 2d 336, 867 N.W.2d 772 (2015) ("There is a presumption that a judge has acted fairly, impartially, and without prejudice."); State v. Allen, 2010 WI 10, ¶ 269, 322 Wis.2d 372, 778 N.W.2d 863 (2010) (Ziegler, J., concurring) ("[J]ustices are always presumed to be fair and impartial.").
[63] Withrow v. Larkin, 421 U.S. 35, 48 (1971).
[64] Bridges v. California, 314 U.S. 252, 273 (1941).

the matter or previously worked with the lawyer handling the matter while the matter was ongoing; has a known economic interest that "could be substantially affected by the proceeding," or has a spouse, minor child, or family member residing the judge's household with such an interest; or is (or has spouse or relative who is) a party, lawyer, or otherwise involved with the proceeding.[65]

The final enumerated recusal ground is of particular interest here. The Code requires recusal when "[t]he judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to … [a]n issue in the proceeding … [or] [t]he controversy in the proceeding."[66] This provision operates alongside a separate section of the Code that addresses the conduct of judges and judicial candidates during judicial campaigns. That provision bars judges and judicial candidates from making "pledges, promises, or commitments" "with respect to cases, controversies, or issues that are likely to come before the court … that are inconsistent with the impartial performance of the adjudicative duties of the office."[67]

Note that, in line with the U.S. Supreme Court's decision in *White*, discussed above, these Code provisions do *not* prohibit judges and judicial candidates from announcing their views on legal or political issues or require recusal when they do. A Wisconsin federal district court explained this point in *Duwe v. Alexander*.[68] In that case, Wisconsin Right to Life, Inc., a nonprofit advocacy group, successfully argued that the First Amendment protected the right of judicial candidates to complete surveys from the group soliciting the candidates' views on various issues.

With respect to the scope of the Code provision barring promises, pledges, and commitments, the district court wrote, "it is clear that the [campaign] provision requires an actual commitment to rule a certain way on a case, controversy or issue likely to come before the court."[69] Invoking the Supreme Court's decision in *White*, the district court noted the "very real distinction between a judge committing to an outcome before the case begins, … and a judge disclosing an opinion and predisposition before the case. A disclosure of a predisposition on an issue is nothing more than an acknowledgement of the inescapable truth that thoughtful judicial minds are likely to have considered many issues and formed opinions on them prior to addressing the issue in the context of a case."[70]

The district court offered the following guidance as to whether a statement crosses the line and becomes an improper pledge, promise, or commitment: "It requires affirmative assurance of

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[65] Wisconsin Supreme Court Rule ("SCR") 60.04.
[66] SCR 60.04(f).
[67] SCR 60.06(3)(b).
[68] 490 F.Supp.2d 968 (W.D. Wis. 2007).
[69] Id. at 976.
[70] Id. at 975.

a particular action. It is a predetermination of the resolution of a case or issue. It is not a statement of belief or opinion. Absent a statement committing the speaker to decide a case, controversy or issue in a particular way, the speaker can be confident that the rule is not violated.... A promise, pledge or commitment typically includes one of those three words or phrases like 'I will' or 'I will not.' Phrases like 'I believe' or 'It is my opinion' signal the absence of commitment."[71]

As for the Code's recusal provision, the district court noted that it calls for recusal when a judicial candidate's statement "commits, or appears to commit" the judge to a particular ruling. But the court explained that, to the extent that the words "appears to commit" purported to cover more than statements that objectively reflect a commitment, the provision was "unconstitutionally overbroad and vague" in light of judicial candidates' First Amendment rights.[72] The district court's bottom line was that "[r]esponses to the Wisconsin Right to Life survey do not constitute promises, pledges or commitments such that they could be constitutionally restricted or sanctioned in the interest of judicial openmindedness."[73]

Notably, the Code of Judicial Conduct identifies several limitations to its recusal requirements. First, and directly relevant to judicial campaign activity, the Code provides that "a judge shall not be required to recuse ... based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding."[74] The Code similarly disclaims the need for recusal based solely on "an independent expenditure or issue advocacy communication" made by someone involved in the proceeding.[75] As discussed below, these provisions were proposed by two advocacy groups with a history of providing substantial financial backing to conservative Wisconsin Supreme Court candidates, and they were adopted verbatim by the court's conservative majority in 2010.

The official Comment to this provision states that "[c]ampaign contributions to judicial candidates are a fundamental component of judicial elections.... Disqualifying a judge from participating in a proceeding solely because the judge's campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs a judge's integrity. It would ... [also] deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect."[76] The Comment adds that "[i]nvoluntary recusal of judges has greater policy implications in the supreme court than in the circuit court and court of appeals," because, unlike lower court judges,

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[71] Id. at 976.
[72] Id. at 977.
[73] Id. at 976.
[74] SCR 60.04(7).
[75] SCR 60.04(8).
[76] SCR 60.04(7), cmt.

supreme court justices are not replaced when they withdraw from a case.[77] "Thus, the recusal of a supreme court justice alters the number of justices reviewing a case as well as the composition of the court. These recusals affect the interests of non-litigants as well as non-contributors, inasmuch as supreme court decisions almost invariably have repercussions beyond the parties."[78]

The provisions of Wisconsin's Code of Judicial Conduct that affirmatively disclaim recusal based on campaign contributions and independent expenditures are unusual. Several states (as well as the American Bar Association in its Model Code of Judicial Conduct) have essentially the opposite rule: They automatically require judges to recuse when a party or a party's lawyer have contributed more than a specific amount to a judge's campaign.[79] The Wisconsin Supreme Court rejected proposals along these lines when they were submitted to the justices in 2010.[80] Several more states have rules that set objective standards requiring recusal on the basis of campaign contributions, but without setting specific dollar thresholds.[81] Most other states leave it to the individual judge to determine if they believe they can remain impartial in a matter involving a campaign funder without specifically discouraging funder-based recusals.[82]

The Code includes two further recusal caveats: The parties can usually waive recusal, allowing a judge to participate in a case even if the judge would otherwise have been required to recuse.[83] Additionally, an official Comment to the Code notes that "the rule of necessity may override the rule of recusal."[84] For example, recusal may not be warranted where it would deprive the court of its ability to act because the basis for recusal would apply widely, such as a legal challenge to a judicial salary statute.[85]

Finally, it bears noting that the Code's preamble warns that its "necessarily general rules do not constitute a trap for the unwary judge or a weapon to be wielded unscrupulously against a judge."[86] In a recent disciplinary proceeding involving a lower court judge, Justice Rebecca

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[77] Id.
[78] Id.
[79] *See* Model Code of Judicial Conduct R. 2.11(A)(4) (2020); American Bar Association, Comparison of ABA Model Code of Judicial Conduct and State Variations, R.2.11 (Aug. 16, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.pdf.
[80] Order (July 7, 2010), *In the matter of amendment of the Code of Judicial Conduct's rules on recusal & In the matter of amendment of Wis. Stat. 757.19*, Nos. 08-16, 08-25-, 09-10, and 09-11 (Wis.); *see also* Tom Solberg, *Supreme Court Revises Judicial Recusal Guidelines*, InsideTrack (July 9, 2010), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=14&ArticleID=5912.
[81] *Cf.* American Bar Association, supra note _.
[82] *Cf.* id.
[83] SCR 60.04(6).
[84] SCR 60.04(4), cmt.
[85] *See* id.; *see also* Wisconsin Judicial Comm'n v. Prosser, 2012 WI 69, 341 Wis. 2d 656, 817 N.W.2d 830 (2012) (opinion of Crooks, J.) (discussing rule of necessity).
[86] SCR ch. 60 preamble.

Bradley stressed that the Code should not be "weaponize[d]" or "brandish[ed] … as a blunderbuss … by 'any lawyer or any pundit' with a political agenda."[87] She expressed concern that "manipulations of the Code unjustly 'besmirch and tarnish' the reputation of individual judges and the judiciary as a whole" and "also undermine the public's confidence in the justice system, which is contrary to the Code's purpose."[88] She added that it was appropriate to "resolv[e] doubts about the intended meaning of a judge's statements in favor of the judge."[89]

3. Recusal Procedure in Wisconsin

At the state supreme court level, each justice decides for herself or himself whether or not to recuse in a given case.[90] The other members of the court do not review or override that individual decision. The court confirmed this practice in its 2011 decision in *State v. Henley*.[91] In that case, a criminal defendant asked Justice Roggensack to recuse due to her participation in a related case as a court of appeals judge. She declined to do so, and the defendant raised the recusal question as part of a motion for reconsideration.[92] In a divided decision, the court held that "determining whether to recuse is the sole responsibility of the individual justice for whom disqualification from participation is sought."[93] The court added: "a majority of this court does not have the power to disqualify a judicial peer from performing the constitutional functions of a Wisconsin Supreme Court justice on a case-by-case basis."[94]

The upshot of this practice is that litigants dissatisfied with a justice's decision not to recuse have limited options. A litigant who believes that a justice's failure to recuse violated due process can seek to raise that federal constitutional issue with the U.S. Supreme Court in a petition for certiorari. The Supreme Court agrees to hear only a small fraction of the certiorari petitions it receives. A litigant who believes a justice erred by failing to recuse as a matter of state law has no further judicial recourse; the individual justice has the last word. The litigant could conceivably pursue a complaint with the Wisconsin Judicial Commission, which has authority to investigate

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[87] Matter of Disciplinary Proceeding Against Woldt, 2021 WI 73, ¶ 55, 398 Wis. 2d 482, 961 N.W.2d 854 (2021) (R. Bradley, J., concurring in part and dissenting in part).
[88] Id.
[89] Id. ¶ 74. Earlier, as a state supreme court candidate in 2016, Justice Bradley observed, "We're people. We have opinions on the issues of the day. Once we put the black robe on … we put those opinions aside." Patrick Marley, Election 2016: Bradley, Kloppenburg Clash Again During Debate, Milwaukee Journal-Sentinel (Mar. 17, 2016), https://www.jsonline.com/story/news/politics/elections/2016/03/18/election-2016-bradley-kloppenburg-clash-again-during-debate/84898270/.
[90] Wis. Sup. Ct. Internal Operating Procedures II.L.1 ("The decision of a justice to recuse or disqualify himself or herself is that of the justice alone.").
[91] 338 Wis. 2d 610, 802 N.W.2d 175 (2011).
[92] Id., 802 N.W.2d at 176.
[93] Id.
[94] Id.

judges and justices for "misconduct." "Misconduct," however, is defined as a "*[w]ilful* violation of a rule of the code of judicial ethics" or "*[w]ilful* or persistent failure to perform official duties."[95] In other words, a mere disagreement about the proper application of the Code of Judicial Conduct would not be actionable; there would need to be a showing that a justice deliberately flouted the rules. Moreover, any disciplinary recommendation from the commission would then go the state supreme court, which would act only if a majority of the justices agreed to do so. And any such discipline would presumably only penalize the justice, not affect the outcome in any previously decided case.[96] Notably, before Justice Protasiewicz took office, several complaints were lodged with the Wisconsin Judicial Commission concerning statements she made as a candidate. After "carefully consider[ing]" the relevant rules and precedents, including relevant Wisconsin case law and the U.S. Supreme Court's decision in *White*, the Commission dismissed these complaints and closed the matter.[97]

It also bears noting that Wisconsin rules and precedent do not establish specific requirements for when and how a judge should respond to a recusal request. By statute, a judge who recuses is supposed to "file in writing the reasons" for doing so.[98] When judges and justices have declined to recuse, they have sometimes also issued explanatory statements, but in other instances, they have merely denied a recusal motion without explanation. Justices have also sometimes remained silent on a recusal motion while a case was pending and formally ruled on the motion only at the end of the case. This was the case in Wisconsin's *John Doe* litigation, which is discussed in more detail below. One of the parties requested the recusal of Justices Prosser and Gableman. For months, they left the recusal request unaddressed, while continuing to participate in interim procedural steps in the litigation. They then denied the motion at the time the court issued its ruling on the merits. Two weeks later, Justice Prosser issued a statement explaining his decision to remain on the case; Justice Gableman did not.

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[95] Wis. Stat. § 757.81(4) (emphasis added).

[96] For instance, in 2008, then-Justice Ziegler was disciplined for having previously presided as a trial court judge in 11 cases involving a bank for which her husband served on the board of directors. She faced public reprimand from her fellow justices, but the underlying decisions she rendered were not vacated. *See Zeigler Receive Public Reprimand from Colleagues*, Wisconsin Law Journal (June 2, 2008), https://wislawjournal.com/2008/06/02/ziegler-receives-public-reprimand-from-colleagues/.

[97] See Letter from Jeremiah C. Van Heck, Executive Director, Wisconsin Judicial Commission, to Judge Protasiewicz (May 31, 2023), https://www.documentcloud.org/documents/23937430-justice-protasiewicz-complaints-dismissed-letter; see also Scott Bauer, Complaints Over Campaign Comments by Wisconsin Supreme Court Justice Are Dismissed, Associated Press (Sept. 5, 2023), https://apnews.com/article/wisconsin-supreme-court-impeach-865fadb85762b0039490f218da3b8db8.

[98] Wis. Stat. § 757.19(5).

II. Recusal Practice and Controversies

As the above discussion of the legal standards suggests, recusal based on campaign funds or statements is rare. Judges in Wisconsin and around the country routinely participate in cases involving the interests of campaign supporters, issues on which they have expressed views, or other circumstances that a layperson might find concerning. This Part first discusses (non)recusal in Wisconsin and then offers some illustrative examples from outside Wisconsin.

Note that it is relatively uncommon for litigants even to request recusal based on campaign funding or a judge's extrajudicial statements. Litigants generally appreciate that *Caperton*'s due process standard for funding-related recusals is extraordinarily difficult to meet. They also generally appreciate, in line with Justice Scalia's opinion in *White*, that judges are entitled to express views on disputed legal issues, whether on the campaign trail or elsewhere, and that this does not preclude them from impartially deciding cases.

A. Recusal in Wisconsin

Wisconsin has seen high-profile recusal-related controversies for many years. These disputes have involved campaign statements made by a supreme court justice, as well as major financial backers of the justices' candidacies. In nearly every instance, the result was the same: the justice did not recuse.

1. Justice Michael Gableman's 2008 Campaign Remarks

The state's highest profile controversy concerning campaign and extrajudicial statements started in 2008 when Michael Gableman challenged then-Justice Louis Butler for a seat on the Wisconsin Supreme Court. During the election, Gableman's campaign committee ran a "tough on crime"-style television ad that accused Butler of putting "criminals on the street" and finding a "loophole" that resulted in the release of a child molester.[99] The ad resulted in ethics charges filed against Gableman by the Wisconsin Judicial Commission alleging that the ad violated the Wisconsin Code of Judicial Conduct's prohibitions against making false and misleading statements in a judicial campaign. (The Wisconsin Supreme Court ultimately deadlocked 3-3 on whether to find Gableman in violation.[100]) During a resulting hearing, Gableman's attorney doubled down on the remarks, contending that they were about the "willingness" of Butler, who

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[99] *See* In the Matter of Judicial Disciplinary Proceedings Against the Honorable Michael J. Gableman, 325 Wis.2d 631, 784 N.W.2d 631, 634 (2010) (Decision of Prosser, Rogensack, and Ziegler); In the Matter of Judicial Disciplinary Proceedings Against the Honorable Michael J. Gableman, 325 Wis.2d 579, 784 N.W.2d 605, 610 (2010) (Decision of Abrahamson, A.W. Bradley, and Crooks).
[100] *Cf.* opinions cited id.

was a public defender, "to find loopholes" for "despicable" people.[101] The ad and comments from Gableman's attorney prompted the State Bar of Wisconsin's Board of Governors to issue a unanimous statement regarding the constitutional right of criminal defendants to receive effective legal assistance.[102]

The following spring, a pro bono criminal defense attorney, citing the campaign ad and comments from Gableman's attorney, asked Gableman to recuse from a criminal appeal on the basis of an alleged bias against criminal defendants.[103] Gableman declined to do so, and the criminal defense attorney then asked the entire court to decide whether Gableman should be disqualified from the matter.[104] Gableman did not participate in deciding the motion directed to the entire court.[105] Without his participation, the court was unable to get agreement from a four-justice majority on what to do next. The three more liberal justices would have ordered briefs and arguments on the motion, including briefing on the court's ability to disqualify an individual justice. [106] The three more conservative justices wrote separate decisions, with each taking the position that the court cannot require another justice to recuse from a case.[107] As a result of this deadlock, Gableman did not have to recuse. (As discussed above, the court's conservative majority later declared in *Henley* that each individual justice has the final say over whether they will recuse.)

2. *Campaign Support for Justices Annette Ziegler and Michael Gableman & 2010 Rulemaking*

The Wisconsin Supreme Court has also experienced a number of high-profile recusal controversies stemming from campaign contributions and spending, as well as a change in recusal rules in 2010.

An important cluster of disputes occurred soon after Chief Justice Ziegler won her first election to the court in 2007. During her campaign, she received about $1.45 million in contributions, while her opponent raised about $1.2 million.[108] Outside groups spent about $3.1

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[101] *See* State v. Allen, 322 Wis.2d 372, 778 N.W.2d 863, 886 n. 83 (2010) (Opinion of Abrahamson, A.W. Bradley, and Crooks).
[102] Id., 778 N.W.2d at 886-87.
[103] *See* id. at 864-65.
[104] *See* id.
[105] *See* id.
[106] Id. at 866-90.
[107] Id. at 911-23 (Roggensack, J. writing separately), 923-25 (Prosser, J. writing separately), 925-30 (Ziegler, J. writing separately).
[108] Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2007,* https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2007.

million more.[109] The bulk of that money—about $2.2 million—came from a single group, Wisconsin Manufacturers & Commerce (WMC), which supported Ziegler and often participates in matters before the court.[110] In November 2007, a few months after Ziegler took office, the court heard a major business tax dispute in which WMC appeared as an *amicus curiae* (but not as a party).[111] Ziegler disclosed WMC's spending to the litigants but told them she still intended to participate, in part because of WMC's nonparty status.[112] Dividing 4-3, the court ultimately ruled in favor of WMC's position, and Justice Ziegler authored the majority opinion.[113]

WMC was tied to another recusal dispute in 2009. The organization had participated as an *amicus curiae* before the state court of appeals in a business law matter that the Wisconsin Supreme Court accepted for review.[114] WMC's involvement prompted an advocacy group to present a petition with 2,400 signatures requesting the recusals of Justices Ziegler and Gableman;[115] similar to Ziegler's 2007 campaign, Gableman's 2008 campaign benefitted from $1.8 million in spending by WMC.[116] Ziegler and Gableman both declined to recuse, though WMC opted against filing an amicus curiae brief with the court in the matter.[117] Justice Roggensack did, however, recuse for reasons unrelated to WMC, and the court ended up dividing 3-3.[118] The same matter returned to the court in 2011, and this time Roggensack participated, but Ziegler did not, though she did not provide a reason why.[119] The result was another 3-3 decision.[120] (Justice Roggensack's decision to participate after previously recusing prompted one of the parties to seek reconsideration of the 3-3 decision on the basis that Roggensack should have recused, but the court deadlocked 3-3 on the motion, effectively denying it.[121])

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[109] Id.
[110] *See* id.
[111] The case was Wisconsin Dep't of Revenue v. Menasha Corp., 311 Wis.2d 579, 754 N.W.2d 95 (2008).
[112] *See* Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, Milwaukee Journal Sentinel (Oct. 28, 2009), https://archive.jsonline.com/news/statepolitics/67012672.html.
[113] Menasha Corp., supra, 754 N.W.2d 95; *see also* Brian E. Clark, *Supreme Court Ruling Means State Take $300 Tax Hit*, WisBusiness (July 11, 2008), https://www.wisbusiness.com/2008/wisbusiness-supreme-court-ruling-means-state-take-300-million-tax-hit/.
[114] *See* Polsky v. Virnich, No. 2007AP203, 2008 WL 2536752, *1 n. 1 (Wis. Ct. App. June 26, 2008).
[115] *See* Bill Lueders, *Roggensack Decided Case Involving Her Own Lawyer*, Wisconsin Watch (Mar. 10, 2012), https://wisconsinwatch.org/2012/03/roggensack-decided-case-involving-her-own-lawyer/.
[116] *See* Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2008* (Apr. 26, 2021), https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2008.
[117] *See* Polsky v. Virnich, 318 Wis.2d 599, 769 N.W.2d 52 (2009).
[118] *See* id. Roggensack did not provide a reason for her recusal but reporting suggested that it may have been due to the participation in the matter by an attorney who had recently represented her in a proceeding before the sate Governmental Accountability Board. Lueders, supra, note 114.
[119] *See* Polsky v. Virnich, 332 Wis.2d 1, 800 N.W.2d 742 (2011).
[120] Id.
[121] Polsky v. Virnich, 335 Wis.2d 555, 804 N.W.2d 80 (2011).

Justice Ziegler did recuse in December 2007 from a case brought by the Wisconsin Realtors Association and the Wisconsin Builders Association. The associations had each directly contributed $8,625 to her campaign (the legal maximum), prompting a lawyer for the defendant to ask Ziegler to not participate.[122] Without Ziegler's participation, the court deadlocked 3-3.[123] a judge or justice does not have to recuse from a matter based solely on a campaign contribution or campaign endorsement.[124] WMC followed suit and petitioned the court in October 2009 to adopt a rule providing that a judge or justice does not have to recuse from a matter based solely on independent expenditures made in a judicial campaign.[125]

In 2010, the court, dividing 4-3, voted to adopt these nonrecusal proposals as SCR 60.04(7) and (8), discussed above.[126] Neither Justice Ziegler nor any other justice recused from this rulemaking process despite the financial backing they had received from the parties requesting the rules. (Meanwhile, the court rejected competing proposals to create recusal rules based on campaign finance activities.) In support of the court's rulemaking decision, Justice Roggensack issued a statement casting recusal as a threat to constitutionally protected rights of Wisconsin voters. In her words: "judicial recusal rules have the potential to impact the effectiveness of citizens' votes cast for judges. Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case."[127] For this reason, she contended that "recusal rules … must be narrowly tailored."[128]

Justice Ziegler and other justices who have received support from WMC have continued to participate in cases involving the group—despite sometimes receiving criticism for doing so. In June 2022, for example, former Dane County Circuit Court Judge Sarah O'Brien criticized Justices Ziegler and Roggensack, whose 2013 re-election campaign benefitted from $500,000 in spending by WMC, for not recusing in a case involving a COVID-related regulation on

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[122] *See With New Member Out, Wis. Court Fails to Decide Development Case*, AP (Dec. 12, 2007), https://www.law.com/dailyreportonline/almID/1202552283649/.
[123] Wis. Realtors Association v. Town of West Point, 306 Wis.2d 42, 743 N.W.2d 441 (2007).
[124] Petition for Wisconsin Supreme Court Rule No. 08-25, available at https://www.wicourts.gov/supreme/docs/0825petition.pdf.
[125] Petition for Wisconsin Supreme Court Rule No. 09-10, available at https://www.wicourts.gov/supreme/docs/0910petition.pdf.
[126] Order, *In the matter of amendment of the Code of Judicial Conduct's rules on recusal & In the matter of amendment of Wis. Stat. 757.19*, Nos. 08-16, 08-25-, 09-10, and 09-11 (Wis. July 7, 2010); *see also* Tom Solberg, *Supreme Court Revises Judicial Recusal Guidelines*, InsideTrack (July 9, 2010), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=14&ArticleID=5912.
[127] Order, *In the matter of amendment of the Code of Judicial Conduct's rules on recusal & In the matter of amendment of Wis. Stat. 757.19*, supra, ¶ 11 (Roggensack, J. writing separately).
[128] Id.

businesses.[129] WMC lost the case 4-3, but Justices Ziegler and Roggensack dissented and would have ruled in WMC's favor.[130]

3. Campaign Support for Justice Louis Butler

Around the same time as Justice Ziegler's initial recusal controversies, a recusal dispute also arose involving Justice Louis Butler.[131] In 2008, the court issued a 4-3 decision sanctioning an attorney for bringing a frivolous defamation action against an LGBT rights organization.[132] The attorney then moved to vacate the sanction, contending that Justice Butler should not have participated because he had appeared at a fundraiser for the defendant organization's political action committee (PAC), accepted contributions from two of the PAC's board members, and received a re-election endorsement from the defendant's attorney.

The court unanimously rejected the attorney's arguments. As to the fundraiser, the court quoted the state's Judicial Commission as explaining that 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."[133] The court also quoted the Code of Judicial Conduct which expressly allows judges to be a speaker or guest of honor at an organization's fundraising event so long as the judge's attendance is not advertised as a means to encourage people to attend and that contributions are made before the judge's speech.[134] With respect to receiving donations from two of the PAC's board members, the court cited a number of reasons why the donations did not require recusal; these included that the contributions were "legal and well within the maximum for individual contributions in Supreme Court races as established by law," the contributors were *not* parties in the action, and a Wisconsin Supreme Court Judicial Conduct Advisory Committee Opinion that advised that "prior support or, or opposition to, a judge's election does not necessarily rise to the level of impropriety" as people "are fully aware of, and likely comfortable with, the fact that people will support an individual for judicial office with various levels of assistance, monetary support or endorsements."[135] With respect to the re-election endorsement from the defendant's legal counsel, the court explained that the Code of Judicial Conduct explicitly allows judges to receive funds from attorneys and *encourages* judges

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

[130] Wisconsin Manufacturers & Com. v. Evers, 977 N.W.2d 374 (2022).

[131] Donohoo v. Action Wisconsin, Inc., 314 Wis.2d 510, 754 N.W.2d 480 (2008).

[132] *See* id., 754 N.W.2d at 481 (citing Donohoo v. Action Wisconsin, Inc., 309 Wis.2d 704, 750 N.W.2d 739 (2008)).

[133] Id. at 488.

[134] Id. (quoting SCR 50.05(3)(c)).

[135] Id. at 487.

to receive endorsements, which the Code describes as "an important method of informing the electorate of broad-based and presumably informed support for a particular candidacy."[136]

4. John Doe Campaign Finance Investigation, Failed 2017 Rulemaking, & Campaign Finance Changes

Recusal questions also came up for three justices in a years-long John Doe investigation into potential violations of state campaign finance law during the 2010s. Justice Ann Walsh Bradley recused herself at the outset because her son practiced law with one of the attorneys representing one of the unnamed targets.[137] After this, the special prosecutor requested that Justices Prosser and Gableman recuse themselves; the request was filed under seal, but a subsequent response from Justice Prosser revealed that the request directed at him was based on allegations that several individuals and entities that were targets of the investigation had contributed and spent approximately $3,344,000 to support Justice Prosser's re-election campaign a few years earlier.[138] Both justices declined to recuse themselves from the matter in docket entries posted after the court's decision on the merits, but only Justice Prosser later explained his decision.

Justice Prosser explained his decision not to recuse from the John Doe matter in a 12-page letter. He first noted that none of the statutory reasons for disqualification applied and that he believed he could act in an impartial manner in the action.[139] He then analyzed the relevant provisions of the Wisconsin Code of Judicial Conduct, including the 2010 rule changes clarifying that Wisconsin judges and justices do not have to recuse from matters based solely on campaign contributions.[140] As for due process, he concluded that none of the factors identified in the U.S. Supreme Court's *Caperton* decision pointed to recusal.[141] He observed that the John Doe investigation was not pending at the time of his election and suggested that he would have won reelection even without the expenditures at issue given his past electoral success.[142] As additional reasons for his nonrecusal, he noted that the court lacks a mechanism to replace a recused justice, described spending by outside groups as a natural byproduct of the legislature's decision

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[136] Id. at 488 (quoting SCR 60.06(5)).
[137] Justice Ann Walsh Bradley's Recusal Letter, Three Unnamed Petitioners v. Peterson, No. 2013AP2504-08-W (Wis. Mar. 19, 2014), available at https://uwmadison.app.box.com/s/g3o74mvnbg1xoe5ftgbgkz1zvyopykbc.
[138] Justice David T. Prosser's Comment Accompanying Order Denying Mot. For Recusal, Three Unnamed Petitioners v. Peterson, No. 2013AP2504-08-W (Wis. July 29, 2015), https://uwmadison.app.box.com/s/9pyiufggk1up84eq18aikrd6kmno7st2.
[139] Id. at *1-2.
[140] Id. at *2-6.
[141] *Id.* at *9-13.
[142] *Id.* at *12.

to limit contributions to candidates, and decried what he deemed the "unprecedented" nature of the State seeking recusal.[143]

In the wake of the *John Doe* controversy, the state's Republican-controlled legislature chose to loosen the state's campaign finance laws. Among other things, legislation enacted in late 2015 raised the state's contribution limits, including for judicial candidates, and also authorized political parties to make unlimited direct and in-kind contributions to those candidates. It is this legislatively enacted change that opened the door to the Wisconsin Democratic Party's contributions to Justice Protasiewicz that the legislature now cites in its recusal motion. At the time, the lawmakers who supported the change did not describe large party contributions as a potential threat to the impartiality of the state's elected judges.

In response to these *John Doe* and campaign finance developments, a group of 54 retired Wisconsin judges petitioned the state supreme court in 2017 to adopt a rule requiring judges and justices to recuse from matters involving individuals and entities who financially supported their campaigns.[144] The justices denied the request by a 5-2 vote, with Justices Abrahamson and Ann Walsh Bradley dissenting.[145] Explaining their opposition to the proposal in an open conference of the court, Justices Ziegler, Gableman, and Kelly each emphasized that they trusted individual judges and justices to decide for themselves when recusal was warranted.[146]

Going further, Justice Rebecca Bradley argued that the proposal would "penalize" the people of Wisconsin for exercising their First Amendment rights to participate in judicial elections by disqualifying the judges and justices they supported from cases.[147] In her view, the proposal rested on the "false" presumption that the "judges and justices who serve the people of Wisconsin are incapable of fulfilling their oaths to administer justice without respect for persons and to faithfully and impartially discharge the duties of their office."[148] That "falsehood," she said, impugned the "integrity" and "character" of the state's judges.[149] Rather than a rule requiring recusal, Justice Rebecca Bradley stated that the optimal remedy when a judge fails to act with

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[143] *Id.* at *12-13.
[144] Petition for Wisconsin Supreme Court Rule No. 17-01, available at https://www.wicourts.gov/supreme/docs/1701petition.pdf.
[145] Order (June 30, 2017), In re rule for recusal when a party or lawyer has made a large campaign contribution,
[146] *See* Excerpts from Transcript of Open Rules Conference, Discussion of Rule Petition 17-01 (Apr. 20, 2017), available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=192530#page=42.
[147] *Id.* at 43.
[148] Id.
[149] Id.

impartiality and integrity is for Wisconsinites to vote them out when they stand for election next.[150]

5. Campaign Spending Under the Current Approach to Recusal

With the Wisconsin Supreme Court's approach to campaign spending and recusal largely set in place since the early 2010s, elections for the court have continued to see heavy campaign spending by individuals and groups who often appear before the court. Justice Rebecca Bradley's 2016 campaign, for instance, was supported by approximately $2.6 million in independent expenditures by a conservative advocacy group called Wisconsin Alliance for Reform (WAR), as well as over $100,000 from the Republican State Leadership Committee.[151] This amount spent by WAR was more than double the approximately $1.1 million spent by Justice Bradley's own campaign committee and more than triple the approximately $800,000 spent by her opponent's campaign committee.[152] One of WAR's leaders, Eric O'Keefe, was a named plaintiff in the state's 2021 redistricting lawsuit, *Johnson v. Wisconsin Elections Commission*.[153] O'Keefe and his co-plaintiffs successfully urged the court to adopt Republican-drawn legislative maps that closely resembled the state's prior Republican-drawn maps and to reject calls for more politically balanced maps. The court's vote was 4-3.[154] Justice Rebecca Bradley participated in the case and sided with the majority, ruling in favor of a litigant who had helped to raise and spend a nearly *Caperton*-sized sum of money on her behalf (in both absolute and relative terms).[155]

Other members of the court—both conservative and liberal—have likewise been backed by large campaign funders and then participated in cases in which those funders have an interest. In 2019, the Republican State Leadership Committee spent $1.25 million on behalf of Justice Hagedorn—nearly as much as the approximately $1.7 million spent by his own campaign committee.[156] Prior to joining the court, Justice Hagedorn also served as chief legal counsel to Republican Governor Scott Walker.[157] He was in that role in 2011, when Walker signed into law the legislative maps that the plaintiffs in *Johnson v. Wisconsin Elections Commission* urged the

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[150] Id.
[151] Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2016,* https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2016.
[152] *Id.*
[153] 401 Wis.2d 198, 972 N.W.2d 559 (2022).
[154] Id.
[155] Id.
[156] Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2019,* https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2019.
[157] *See* Wisconsin Supreme Court, *Justice Brian Hagedorn*, https://www.wicourts.gov/courts/supreme/justices/hagedorn.htm.

Wisconsin Supreme Court to carry forward. Justice Hagedorn nevertheless participated in *Johnson* as well as other politically infused cases.

In 2018, a liberal group called the Greater Wisconsin Committee spent nearly $1 million on behalf of Justice Dallet—nearly as much as the $1.3 million spent by her campaign committee.[158] In 2020, Justice Karofsky's campaign received about $1.36 million from the Democratic Party of Wisconsin[159]—about half of the $2.7 million that her campaign committee spent.[160] A liberal group called A Better Wisconsin Together Political Fund spent an additional $1.9 million on her behalf.[161] Yet these justices likewise participated in *Johnson* and in other politically infused cases, and they have not been asked to recuse from the current redistricting lawsuits.

The table below compares how much money came from the winning candidate's largest financial supporter as a proportion of total spending in each of Wisconsin's last five contested supreme court races. This compilation indicates that, despite its large size in absolute terms, the Democratic Party of Wisconsin's financial backing of Justice Protasiewicz was closely in line in relative terms with the amounts spent by the winning candidates' largest supporters in 2020, 2019, and 2018. The amount of money deployed in 2016 by Justice Rebecca Bradley's largest backer—the Wisconsin Alliance for Reform—was more than twice as high in relative terms than in any other recent race. That group singlehandedly accounted for nearly half of the total amount spent on that election.

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[158] Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2018,* https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2018.
[159] *See* Wisconsin Campaign Finance Information System.
[160] Wisconsin Democracy Campaign, *Wisconsin Supreme Court Finance Summaries, 2020,* https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries#2020.
[161] Id.

Table: Largest Financial Backers in Wisconsin's Five Most Recent Contested Supreme Court Elections[162]

Year	Winning candidate	Winning candidate's margin of victory	Total Amount Spent on Race (Candidate committees + outside groups)	Winning Candidate's Largest Financial Backer	Money from winning candidate's largest backer as a percentage of total spending
2023	Justice Janet Protasiewicz	203,503 votes (11.0%)	$51 million[163]	Democratic Party of Wisconsin- $9.9 million	19.4%
2020	Justice Jill Karofsky	162,439 votes (10.5%)	$10 million	A Better Wisconsin Together Political Fund - $1.88 million	18.8%
2019	Justice Brian Hagedorn	5,981 votes (0.5%)	$8.2 million	Republican State Leadership Committee - $1.25 million	15.2%
2018	Justice Rebecca Dallet	115,040 votes (11.5%)	$5.5 million	Greater Wisconsin Committee - $940,000	17.0%
2016	Justice Rebecca Bradley	95,515 votes (4.8%)	$5.6 million	Wisconsin Alliance for Reform – $2.6 million	46.2%

[162] This campaign finance data has been drawn from the Wisconsin Democracy Campaign's Wisconsin Supreme Court Finance Summaries (https://www.wisdc.org/follow-the-money/31-nonpartisan-candidates/656-wisconsin-supreme-court-finance-summaries) and from www.followthemoney.org/.
[163] Other sources have reported total spending on the race as high as $56 million. See WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race (July 19, 2023), https://www.wispolitics.com/2023/wispolitics-tracks-56-million-in-spending-on-wisconsin-supreme-court-race/. Using that figure, the proportion of total funds coming from the Democratic Party of Wisconsin would be 17.7%.

B. Other State and Federal Courts

Judges outside Wisconsin have likewise generally set a high bar for recusal. This includes both elected state court judges and unelected federal judges. At the state level, judges in about three-quarters of states must stand for election to win or retain their positions.[164] As judicial candidates, they commonly express their views on a range of issues and receive sizable financial support from individuals or entities with interests in litigation. These realities are especially pronounced in the seven states that conduct partisan judicial elections—Alabama, Illinois, Louisiana, North Carolina, Ohio, Pennsylvania, and Texas. Most judges in those states have formally aligned themselves with, and received support from, one major party or the other. Yet even in those states, it is rare for a judge to recuse from a case based on prior statements, the involvement of campaign funders, or other circumstances that might catch a layperson's eye. At the federal level, there are no campaigns and thus no campaign-related recusals, but federal judges likewise commonly reject calls to step aside based on past statements or professional activities.

1. Redistricting and Other Politically Sensitive Litigation in Ohio

Wisconsin is not alone in seeing recusal controversies arise over the hot-button issue of redistricting. In Ohio, Governor Mike DeWine's son, Pat DeWine, sits on the state supreme court and has participated in that state's post-2020 redistricting litigation even though Governor DeWine sat on the redistricting commission whose actions were being challenged. (Justice DeWine and Governor DeWine were both elected as Republicans.) Justice DeWine had previously recused himself from several matters involving his father's administration, but with respect to redistricting, he told a reporter that he felt that his father, as one of seven redistricting commission members, exerted less control than he did over other administration actions.[165]

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[164] *See* Daniel Nichanian and Quinn Yeargain, *Everything You Always Wanted to Know About State Supreme Courts*, Bolts (Aug. 22, 2023), https://boltsmag.org/what-to-know-about-state-supreme-courts/; Brennan Center for Justice, *Judicial Selection: An Interactive Map* (Oct. 11, 2022), https://www.brennancenter.org/judicial-selection-map.

After Justice DeWine received criticism for failing to recuse, the state Republican Party launched a media campaign calling for one of the court's Democratic justices, Jennifer Brunner, to recuse from the matter.[166] These calls cited a 2020 campaign statement in which Justice Brunner explained that she ran for the Ohio Supreme Court, in part, because of the role the court would play in any redistricting litigation. They also pointed to the support Justice Brunner's campaign received from former U.S. Attorney General Eric Holder, whose National Redistricting Action Fund filed one of the redistricting lawsuits, and from the PAC of an environmental group that was a plaintiff in another of the redistricting lawsuits. Justice Brunner did not recuse from the matter.

Several years earlier, politically charged campaign comments from another member of the Ohio Supreme Court Justice Judith French, spawned a recusal controversy. While speaking at a GOP event during her 2014 election campaign, Justice French reportedly told the crowd, "I am a Republican and you should vote for me."[167] She went on: "You're going to hear from your elected officials and I see a lot of them in the crowd. Let me tell you something, the Ohio Supreme Court is the backstop for all those other votes you are going to cast. Whatever the governor does, whatever your state representative, your state senator does, whatever they do, we are the ones that will decide whether it is constitutional, we decide whether it's lawful. We decide what it means and we decide how to implement it in a given case. So, forget all those other votes if you don't keep the Ohio Supreme Court conservative."[168] Soon after the election, a labor union asked Justice French to recuse based on these comments in a case challenging prison privatization

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[165] *See* Jessie Balmert, *Justice Pat DeWine Won't Recuse Himself from Lawsuits Over Maps Approved by Father Gov. Mike DeWine*, Cincinnati Enquirer (Sept. 30, 2021), https://www.cincinnati.com/story/news/politics/2021/09/30/justice-pat-dewine-wont-recuse-himself-redistricting-lawsuits/5932977001/. As the redistricting litigation played out, the justices were asked to decide whether to hold Governor DeWine and other individual members of the redistricting commission in contempt for failing to comply with the court's earlier orders. Justice DeWine did ultimately recuse from the court's consideration of sanctions against his father. See Notice of Recusal of Justice DeWine, League of Women Voters of Ohio v. Ohio Redistricting Commission, No. 2021-1193 (Ohio Feb. 24, 2022), available at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=919946.pdf&subdirectory=2021-1198\DocketItems&source=DL_Clerk; *see also* April 14, 2022 Case Announcements #4, 2022-Ohio-1244 (Ohio Apr. 14, 2022), available at https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-ohio-1244.pdf

[166] Jessie Balmert, *Ohio GOP Calls on Justice Jennifer Brunner to Recuse Herself from Redistricting Cases*, Cincinnati Enquirer (Oct. 13, 2021), https://www.cincinnati.com/story/news/politics/2021/10/13/ohio-gop-wants-justice-jennifer-brunner-recuse-herself-redistricting-cases/8435570002/.

[167] *Justice French: Court the 'Backstop' for GOP Legislation*, Columbus Dispatch (Oct. 26, 2014), https://www.dispatch.com/story/news/politics/2014/10/26/justice-french-court-backstop-for/23913986007/.

[168] Id.

legislation enacted by the Republican-controlled legislature.[169] She declined to do so, explaining that the statements "reflect[ed]" her "philosophical view that policy-making must stop with the legislature and must not enter my decision-making as a judge" and that they did "not reflect bias as to a particular case, issue or party."[170]

2. Redistricting and Other Politically Sensitive Litigation in North Carolina

Along similar lines to Ohio, a member of North Carolina's supreme court, Phil Berger, Jr., is the son of the president of the state senate, Phil Berger. He has declined to recuse from redistricting litigation in which his father is a named defendant. Although Justice Berger offered little explanation of his decision to not recuse in this matter,[171] he previously explained in more detail why he declined to recuse from another case in which his father was a named defendant.[172] That case challenged a voter-ID requirement that had been submitted to the state's voters for approval by the legislature with the father's support. The plaintiffs moved for Justice Berger's recusal due to the familial relationship; they also moved for recusal of another justice, Tamara Barringer, who was a member of the legislature when the underlying legislation was approved. The recusal motions prompted the court to formally adopt a procedure for determining recusal motions that allows the justice who is subject of the motion to determine for themselves whether to recuse or to opt to allow the remaining justices to decide whether recusal is appropriate.[173]

In the voter-ID litigation, Justice Berger opted to decide the recusal motion himself. He argued that, because the lawsuit was against his father in his father's official capacity as senate president, it was effectively a suit against the state and not against his father as an individual, and that he could therefore remain fair and impartial.[174] He also reasoned that the people who voted for him knew about his father's legislative service and still elected him to decide issues like this, writing "[m]ore than 2.7 million North Carolinians, knowing or at least having information available

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[169] Randy Ludlow, *Union Wants Ohio Supreme Court's Judith French Off Case, Alleging Bias*, Columbus Dispatch (Jan. 28, 2015), https://www.dispatch.com/story/news/politics/2015/01/29/union-wants-ohio-supreme-court/24120451007/.

[170] Letter from Justice Judith French, *State ex rel. Ohio Civil Service Employees Association v. State of Ohio*, No. 14-0319 (Ohio Feb. 4, 2015), available at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=761490.pdf&subdirectory=2014-0319\DocketItems&source=DL_Clerk.

[171] Order from Justice Berger, Harper v. Hall, No. 413PA21 (N.C. Jan. 22, 2022), available at https://appellate.nccourts.org/orders.php?t=PA&court=1&id=395573&pdf=1&a=0&docket=1&dev=1.

[172] Order from Justice Berger, N.C. N.A.A.C.P. v. Moore, No. 261A18-3 (N.C. Jan. 7, 2022), available at https://appellate.nccourts.org/orders.php?t=A&court=1&id=390658&pdf=1&a=0&docket=1&dev=1.

[173] December 23, 2021 Order of the North Carolina Supreme Court, available at https://www.nccourts.gov/assets/news-uploads/Order%20re%20Recusal%20Motions%20Clocked%20In_0.pdf?tF6Vi_8fLKF_2Cd7vX74DItZ0woUshB3=.

[174] Id. *2-3.

to them concerning my father's service in the Legislature, elected me to consider and resolve significant constitutional questions like the one at issue here."[175]

Justice Barringer also opted to decide for herself whether to recuse. Like Justice Berger, she denied the request.[176] Justice Barringer reasoned, in part, that she was "following a strong and firmly rooted tradition" not to recuse due to prior legislative service, noting that 51 of her 100 predecessor justices had first served in the state legislature and went on to judge statutes that they had voted on as a legislator.[177]

Two more North Carolina justices faced calls to recuse from the state's post-2020 redistricting litigation. One, Justice Samuel Ervin, was asked to recuse because of the potential effect of the litigation on the 2022 election calendar, when that justice would be on the ballot seeking re-election. Justice Ervin decided the motion for himself and declined to recuse.[178] He reasoned that he was "unable to see" how a decision potentially affecting legislative and congressional districts might impact his re-election in the fall.[179] He also noted that other justices had previously participated in redistricting matters in years when they stood for election and that no one would be able to replace him if he recused from the matter, concluding that, as a justice, he has "an obligation to accept the responsibility that results from hearing and deciding controversial cases."[180]

The second, Justice Anita Earls, was asked to recuse on several grounds, including the support her 2018 election campaign received from the state Democratic Party, an alleged personal bias against the defendants due to her past civil rights work representing clients adverse to the state, and various public statements before becoming a justice in which she expressed views about redistricting.[181] Justice Earls noted that similar arguments for her recusal had been made in redistricting litigation in 2019, and the court, in conference, rejected them.[182] She then addressed each argument individually. As to her past career as a civil rights attorney and prior statement she made, Justice Earls explained that every judge will have had a prior career in some substantive area of the law, and that no one would suggest that a former prosecutor now serving as a justice must be disqualified from criminal cases because of a bias against criminal

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[175] Id. at *3.
[176] Order from Justice Barringer, N.C. N.A.A.C.P. v. Moore, No. 261A18-3 (N.C. Jan. 7, 2022), available at https://appellate.nccourts.org/orders.php?t=A&court=1&id=396396&pdf=1&a=0&docket=1&dev=1.
[177] Id. at *2.
[178] Order from Justice Ervin, Harper v. Hall, No. 413PA21 (N.C. Jan. 31, 2022), available at https://appellate.nccourts.org/orders.php?t=PA&court=1&id=396713&pdf=1&a=0&docket=1&dev=1.
[179] Id. at *3-4.
[180] Id. at *4-5.
[181] Order from Justice Earls, Harper v. Hall, No. 413PA21 (N.C. Jan. 31, 2022), available at https://appellate.nccourts.org/orders.php?t=PA&court=1&id=396921&pdf=1&a=0&docket=1&dev=1.
[182] Id. at *5-6.

defendants.[183] She also quoted Justice Scalia's opinion in *Republican Party of Minnesota v. White* that said it would be "not merely unusual, but extraordinary, if [a judge] had not at least given opinions as to constitutional issues in their previous legal careers."[184] With respect to the Democratic Party's support for her campaign, Justice Earls went through the *Caperton* factors, noting that the Democratic Party was not a party to the lawsuit and that the relative size of the Party's support was not comparable to the spending at issue in *Caperton*.[185]

Further, Justice Earls explained that, in North Carolina, "it is common for political parties to contribute to judicial campaigns,"[186] noting that the court had summarily denied a motion to recuse then-Associate (now-Chief) Justice Paul Newby from a challenge to redistricting plans drawn by consultants with the Republican State Leadership Committee (RSLC) after the Committee accounted for "well over half the money spent on advertising in support of [Newby's] candidacy."[187] As to this last point, Justice Earls concluded: "If the spending at issue [in the prior case] was insufficient to warrant recusal, then so too are the contributions identified here."[188]

3. Redistricting Litigation in Pennsylvania

Pennsylvania also saw a recusal dispute in recent redistricting litigation. In 2018, shortly after the Pennsylvania Supreme Court declared that the state's congressional redistricting was an unlawful partisan gerrymander under the state constitution and indicated that the court's opinion would follow, the legislative defendants asked Justice David Wecht to recuse from the case. Their motion cited various statements that Justice Wecht had made about gerrymandering while campaigning for the court in 2015. These included statements that "gerrymandering is an absolute abomination," "a travesty," "insane," and "deeply wrong," and that "extreme gerrymandering is … antithetical to the concept of one person, one vote."[189] Wecht had also mentioned the thirteen-to-five split in favor of Republican representatives in the state's congressional delegation despite a Democratic advantage in voter representation in the state, and in another instance, he stated "I challenge anybody to look at the map of our districts and deem them to be compact and contiguous."[190]

Justice Wecht declined to recuse and offered several reasons for his decision. Procedurally, he believed that the defendants had waived their right to seek recusal by failing to raise the issue sooner. Substantively, he acknowledged that his campaign statements were "indisputably …

[183] Id. at *6-7.
[184] Id. at *6-7 (quoting Republican Party of Minnesota v. White, 536 U.S. 765, 777-78 (2002)).
[185] Id. at *9-10.
[186] Id. at *10.
[187] Id. at *10
[188] Id. at *11.
[189] League of Women Voters of Pennsylvania, 179 A.3d at 1084.
[190] Id.

sometimes ardent" and that he "did not always qualify [them] to clarify that [he] would view each case on its individual merits, subject to the particular laws implicated, the particular arguments presented, and the particular factual record the parties developed."[191] Still, he reasoned that the "context" and "sum" of his statements demonstrated that he had "aptly and sincerely qualified [his] opinion on the subject by noting that there was no impending case on the matter, and that [he] would be bound to judge any such case on the merits should the occasion arise."[192] Concluding, Justice Wecht stated that he was certain that he had evaluated the case "strictly on the facts and the law without regard to a handful of statements" he had made as a candidate and therefore did not need to remove himself from the proceeding.[193]

4. Abortion-Related Lawsuits in Florida, Michigan, and Ohio

There have also been several high-profile recusal disputes in litigation related to abortion rights. In Florida, for instance, there is an ongoing controversy over whether Justice Charles Canady will recuse himself from a challenge to a six-week abortion ban that his wife, who is a state legislator, sponsored.[194] The justice himself is a former state legislator and congressman who sponsored numerous pieces of anti-abortion legislation. He has thus far declined to recuse from the matter.

In Michigan, in 2022, the Michigan Catholic Conference and Right to Life of Michigan moved to recuse the state trial court judge assigned to hear a challenge brought by Planned Parenthood of Michigan against the state's 1931 abortion ban.[195] The movants cited the judge's work in the 1990s representing Planned Parenthood in lawsuits challenging abortion restrictions, the judge's receipt of a "Planned Parenthood Advocate Award," and the fact that the judge makes annual contributions to Planned Parenthood.[196] The Republican-led Michigan House and Senate intervened in the matter, and subsequently moved for the judge's disqualification based on the same facts, as well the fact that the judge had made $1,000 contributions to the campaigns of

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[191] Id. at 1091.
[192] Id.
[193] Id. at 1092.
[194] *See* Anthony Man, *Florida Supreme Court Justice Should Recuse Himself on Key Abortion Case, Says Ex-Chief Justice,* South Florida Sun Sentinel (June 27, 2013), https://www.sun-sentinel.com/2023/06/27/florida-supreme-court-justice-should-recuse-himself-on-key-abortion-case-says-ex-chief-justice/; Sun Sentinel Editorial Board, *For the Far Right, Florida Supreme Court has Become "the Court of Our Dreams*," South Florida Sun Sentinel (June 23, 2023), https://www.sun-sentinel.com/2023/06/23/for-the-far-right-florida-supreme-court-has-become-the-court-of-our-dreams-editorial/.
[195] *See* Proposed Amici Curiae Brief of Right to Life of Michigan and the Michigan Catholic Conference (1) in Support for Dismissal for Lack of Jurisdiction, (2) for Recusal, and (3) if Necessary, a Briefing Schedule, *Planned Parenthood of Michigan v. Nessel*, Case No. 22-000044-MM (Mich. Ct. of Claims), available at https://adfmedialegalfiles.blob.core.windows.net/files/RightToLifeMichiganAmicusBrief.pdf.
[196] Id.

the governor and state attorney general, the latter of whom was a named defendant in the case.[197]

The judge declined to recuse, providing a 12-page response.[198] She explained that she had not actually represented Planned Parenthood, but rather four physicians who specialized in obstetrics and gynecology.[199] As to her contributions to Planned Parenthood, she said that she had contributed to the organization for many years, that the contributions never exceeded $1,000 in a calendar year, and that she had not contributed since several months before the case was (randomly) assigned to her.[200] She described her contributions as "a far cry factually and legally" from the contributions at issue in *Caperton.*[201] As to her contributions to the governor and attorney general, the judge explained that the state's judicial ethics rules specifically provide that judges can make such contributions, and, rejecting the notion that she was biased towards either officer, she noted that she had previously ruled against the attorney general.[202]

The judge concluded by addressing the movants' "real argument," which she said was their opposition to the U.S. Supreme Court's decision in *Roe v. Wade*. She explained that *Roe* was a "flashpoint for legitimate political debate" for fifty years, and that it is "highly unlikely" that any judge in Michigan "would claim to have no opinion regarding whether *Roe* was correctly decided."[203] Instead, she asserted that nearly every one of her judicial colleagues "almost certainly has a deeply-held opinion regarding whether abortion should be legal," but that she was "confident" that every judge, including those who have "contributed to or been endorsed by Right to Life of Michigan," can address the legal issues in a fair and impartial manner.[204]

In Ohio, the state supreme court in 2017 agreed to hear an appeal of a lower court ruling that declared certain restrictions on abortion clinics to be unconstitutional. The plaintiff in the suit was the last remaining abortion clinic in Toledo, Ohio. Two days after the court accepted the appeal, then-Justice (now-Chief Justice) Sharon Kennedy gave a keynote speech at the Greater Toledo Right to Life's Annual Legislative Briefing Breakfast, which also served, in part, as a fundraiser for another group in Toledo opposed to abortion.[205] The abortion clinic requested Justice Kennedy's

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[197] *See* Opinion and Order Denying Motion for Disqualification, *Planned Parenthood of Michigan v. Nessel*, Case No. 22-000044-MM (Mich. Ct. of Claims July 29, 2022), available at https://aboutblaw.com/4dd.
[198] Id.
[199] Id. at *2.
[200] Id. at *2-3.
[201] Id. at *8.
[202] Id. at *3-7.
[203] Id. at *10.
[204] Id. at *11.
[205] *See, e.g.,* Jessie Balmert, *As Court Considers Clinic Closure, Justice Speaks at Anti-Abortion Event*, Cincinnati Enquirer (Mar. 16, 2017), https://www.cincinnati.com/story/news/2017/03/16/ohio-justice-sharon-kennedy-toledo-right-to-life-court--abortion-clinic-case/99274538/.

recusal based on this speech, as well as some of Kennedy's prior campaign activities.[206] For instance, Kennedy had been endorsed by several anti-abortion groups in her 2012 and 2014 campaigns for the supreme court, and during her 2014 campaign, she completed a survey for such a group in which she agreed with statements indicating that the federal constitution does not contain a right to privacy, that "an unborn child is biologically human at every stage of his or her biological development, beginning at fertilization," and that nothing in the Ohio Constitution is "intended to require the use of public funds for abortion."[207] Justice Kennedy declined to recuse from the matter, explaining only that "[h]aving reviewed the request, I find it to be without merit and will continue to participate in the case."[208] Although not addressed in Justice Kennedy's explanation, a judicial grievance panel had, the month before, considered and dismissed a complaint filed against Kennedy for the same remarks.[209]

5. Firearms-Related Litigation in Illinois

Illinois provides a recent example of a high-profile recusal dispute involving campaign contributions and activities. In early 2023, the state enacted an assault weapon ban that was immediately challenged in court. The matter made it to the Illinois Supreme Court, where the plaintiffs filed a motion asking two recently elected justices, Mary Kay O'Brien and Elizabeth Rochford, to recuse themselves.[210] The motion highlighted large campaign contributions that each justice had received from the governor and the speaker of the house, who were named defendants in the lawsuit.[211] Each justice's campaign had received $500,000 from the governor's

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[206] Request to Recuse the Honorable Sharon Kennedy, *Capital Care Network of Toledo v. State of Ohio Department of Health*, Ohio Supreme Court Case No. 2016-1348, available at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=829404.pdf&subdirectory=2016-1348\DocketItems&source=DL_Clerk; *see also* Randy Ludlow, *Justice Kennedy's Speech to Anti-Abortion Group Prompts Call for Recusal*, Columbus Dispatch (Mar. 17, 2017), https://www.dispatch.com/story/news/columns/the-daily-briefing/2017/03/17/justice-kennedy-s-speech-to/21942568007/.

[207] Id.

[208] Memorandum from Justice Kennedy, *Capital Care Network of Toledo v. State of Ohio Department of Health*, No. 2016-1348 (Ohio Aug. 21, 2017), available at https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=829559.pdf&subdirectory=2016-1348\DocketItems&source=DL_Clerk.

[209] *See* Randy Ludlow, *'Abortion' Grievance Against Ohio Justice Dismissed,* Columbus Dispatch (July 18, 2017), https://www.dispatch.com/story/news/politics/state/2017/07/18/the-daily-briefing-abortion-grievance/20146386007/.

[210] *See* Greg Bishop, *Motion: Pritzker's Campaign Donations Grounds for Justices' Recusal in Challenge to Illinois' Gun Ban*, The Center Square (Mar. 31, 2023), https://www.thecentersquare.com/illinois/article_9e17d63a-cff2-11ed-a7bc-7b96223555b7.html.

campaign committee and $500,000 from the governor's personal trust.[212] Additionally, one of the justices had received a $350,000 contribution from the speaker's campaign committee while the other justice received a $150,000 contribution.[213] According to the motion, these contributions amounted to more than a third of the total campaign funds that each candidate raised. The motion also cited a joint statement from two pro-gun-safety PACs that celebrated the two justices' election victories and had suggested that the candidates indicated that they supported banning assault weapons and large-capacity magazines in Illinois.[214]

Both justices declined to recuse in separate responses. In Justice Rochford's response, she noted that the campaign contributions she received were within the state's campaign finance limits.[215] She also addressed the plaintiffs' claim that her participation would create the "appearance of political influence," reasoning that such a standard would be unworkable as judges would constantly have to recuse themselves.[216] She also cited a 2014 matter in which Illinois Supreme Court Justice Lloyd Karmeier declined to recuse himself from a matter involving tobacco giant Philip Morris, the parent company of which had contributed $500,000 to the justice's campaign. Karmeier had written: "When judges are elected, as the Illinois Constitution requires, it is inevitable (and entirely appropriate) that interest groups will support judges whose judicial philosophies they believe are most closely aligned with their own views. … [T]he system would come to a grinding halt if contributions by organizations and interest groups were sufficient to force a judge to recuse himself or herself in any case in which the member of the group was a party. … Members of the court would be prevented from hearing a substantial number of cases for the entire duration of the terms they were elected by the voters to serve, and the court's ability to do its work would be compromised."[217]

Justice O'Brien's response took a similar tone.[218] And like Justice Rochford, Justice O'Brien approvingly quoted Justice Karmeier's order declining to recuse from the *Philip Morris* matter,

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[211] Plaintiffs-Appellees' Motion for Recusal/Disqualification, *Caulkins v. Pritzker*, Illinois Supreme Court Case No. 129453, available at https://bloximages.newyork1.vip.townnews.com/thecentersquare.com/content/tncms/assets/v3/editorial/3/b2/3b27f95e-cfea-11ed-b822-6bd0447a3f2a/642719a3076c8.pdf.
[212] Id. at *2-3.
[213] Id.
[214] Id. at *3-4.
[215] April 14, 2023 Order by Justice Rochford, *Caulkins v. Pritzker*, Illinois Supreme Court Case No. 129453, available at https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/9b4c2e6f-ef9d-48cb-9414-1d36b8c521fc/129453_Order_Motion_for_Recusal_EMR.pdf.
[216] Id. at *4.
[217] Id. at *5 (quoting *Philip Morris USA, Inc. v. Appellate Court, Fifth District*, No. 117689, *10-11 (Ill. Sept. 24, 2014)
[218] April 14, 2023 Order by Justice O'Brien, *Caulkins v. Pritzker*, Illinois Supreme Court Case No. 129453, available at https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/31df03df-4ce4-49df-8e54-180c2327c656/129453_Order_Motion_for_Recusal_MKO.pdf.

writing: "[R]umor, speculation, belief, conclusion, suspicion, opinion or similar nonfactual matter are not sufficient [to require recusal]. … A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."[219]

6. Recusal Controversies in Federal Court

Recusal disputes are not limited to state courts. At the federal level, multiple U.S. Supreme Court justices have faced criticism over their decisions not to recuse from various cases. Questions have recently arisen, for example, concerning Justice Thomas's participation in matters relating to the 2020 election given his wife's involvement in White House efforts to challenge the election results, and concerning the participation of Justices Sotomayor and Gorsuch in cases involving their book publisher. A full survey of Supreme Court-level recusal controversies is beyond the scope of this explainer.[220]

With respect to redistricting specifically, there have been several recent recusal controversies involving lower federal court judges. In 2022, a federal judge in Arkansas, Lee Rudofsky, rejected requests from litigants to recuse from redistricting litigation based on Judge Rudofsky's connections to the state's Republican attorney general and governor, who were two of the three members of a panel in charge of the state's legislative redistricting. The litigants cited activities from before the judge took the bench, including campaign contributions he made to the governor and attorney general, hosting a campaign fundraiser for the attorney general, and serving as state solicitor general in the attorney general's office.[221] Judge Rudofsky addressed each allegation and concluded that his impartiality could not reasonably be questioned.[222]

Meanwhile, a federal judge in South Carolina, Richard Mark Gergel, *twice* rejected requests from litigants in 2022 to recuse from a lawsuit alleging that South Carolina's state house districts were drawn to dilute the votes of African American voters.[223] A group of defendants first

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[219] Id. at *4 (quoting *Philip Morris USA, Inc.*, at *6-7).
[220] For a recent analysis of U.S. Supreme Court recusals, see John Crawley and Kimberly Strawbridge Robinson, *Alito, Kagan Top Justices in Supreme Court Recusal 'Black Box,'* Bloomberg Law (Feb. 13, 2023), https://news.bloomberglaw.com/us-law-week/alito-kagan-top-justices-in-supreme-court-recusal-black-box-1.
[221] *See* Plaintiffs' Brief in Support of Their Motion for Recusal, *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, Case No. 4:21-cv-1239-LPR (E.D. Ark. Dec. 31, 2021), available at https://www.democracydocket.com/wp-content/uploads/2021/12/28-021-12-31-Plaintiffs-Brief-in-Support-of-Their-Motion-for-Recusal.pdf.
[222] Order, *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, Case No. 4:21-cv-1239-LPR (E.D. Ark. Jan. 05, 2022), available at https://www.democracydocket.com/wp-content/uploads/2021/12/42-2022-01-05-order-denying-motion-for-recusal.pdf.
[223] *See* Allison Dunn, *Rejecting Second Request, Fed. Judge Says Book He Published Not Grounds for Recusal from Redistricting Case*, Law.com (Jan. 25, 2022), https://www.law.com/2022/01/25/rejecting-second-request-fed-judge-says-book-he-published-not-grounds-for-recusal-from-redistricting-case/.

requested Judge Gergel to recuse because he had previously served as counsel for litigants who opposed redistricting plans in 1995-1996 and 2001-2002—representation that caused the judge, once on the bench, to recuse from hearing a redistricting matter in 2011. Judge Gergel explained that he recused in 2011 because two legislative leaders whom he had "vigorously deposed and cross examined" in the prior redistricting cases would again be key witnesses, and he felt this warranted recusal.[224] Judge Gergel then noted that, nearly 20 years later, there had been "significant turnover" in the state's leadership, and that the situation that existed in 2011 no longer existed.[225] Explaining that the federal recusal statute is "not designed to be a sword with which litigants can pick and choose judges," Judge Gergel denied the motion.[226]

Unsatisfied, the same group of defendants moved for reconsideration, again asking Judge Gergel to recuse.[227] Addressing the motion the next day, Judge Gergel wrote that the movants had largely repeated the same arguments previously made but were now also taking issue with the fact that he had written a book about the history of racial discrimination in South Carolina.[228] With respect to his prior participation in reapportionment litigation, Judge Gergel reasoned that requiring recusal on these grounds would be unworkable for the judiciary, writing: "Under this theory, Associate Justice Thurgood Marshall should not have participated in civil rights cases pending before the Supreme Court since he had handled race discrimination cases as General Counsel for the NAACP Legal Defense Fund" and that "Associate Justice Ruth Bader Ginsburg should not have participated in cases before the Supreme Court that involved allegations of sex discrimination since she had been lead counsel in numerous landmark sex discrimination cases."[229] Judge Gergel also rejected the suggestion that his authorship of a book addressing the history of racial discrimination in South Carolina required his recusal by noting that the rules

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[224] Order, South Carolina State Conference NAACP v. McMaster, No. 3:21-3302, *3 (D.S.C. Jan. 10, 2022), available at https://images.law.com/contrib/content/uploads/documents/292/106558/163112433598.pdf?tokenvalue=D274B221-E64D-44DB-BD0B-910F97BE3CDC.

[225] Id.

[226] Id. at *6.

[227] Motion for Reconsideration and Renewed Motion to Disqualify the Honorable Richard M. Gergel, South Carolina State Conference NAACP v. McMaster, No. 3:21-3302 (D.S.C. Jan. 18, 2022), available at https://images.law.com/contrib/content/uploads/documents/292/106558/102-House-Defendants-Motion-to-Reconsider-Gergel-Recusal-Motion-1.pdf?tokenvalue=0922C83E-C29F-416E-8CC8-4F6D46714079.

[228] Order, South Carolina State Conference NAACP v. McMaster, No. 3:21-3302 (D.S.C. Jan. 19, 2022), available at https://images.law.com/contrib/content/uploads/documents/292/106558/108-Order-Denying-House-Defendants-Motion-to-Reconsider-Gergel-Recusal-Motion-2.pdf?tokenvalue=4EC3BE60-8D18-4853-B350-DA4B3F26A8D1.

[229] Id. at *3.

for federal judges expressly authorize judges to write books and that many U.S. Supreme Court justices have even done so.[230] Based on these factors, he denied the motion for reconsideration.

Conclusion

The idea behind recusal requirements is straightforward: Litigants are entitled to judges who will decide their cases fairly, based on law rather than personal interests or prejudices. The rules and doctrines that implement this principle aim to protect litigants from true unfairness, but without undermining the operation of the judiciary or unduly inhibiting what judges can say or do on and off the bench. The heartland of recusal law involves judges with direct personal, financial, or relational interests in a case. In contrast, because campaigning for office is an ordinary and accepted part of an elected state judge's role, it is relatively uncommon for parties even to seek recusal based on a judge's campaign funding sources or views expressed on the campaign trail.

When litigants do invoke campaign funding or statements as grounds for recusal, the usual result is that the judge declines to recuse. As a constitutional matter, the U.S. Supreme Court has made clear that (1) it is extraordinarily rare for due process to require recusal based on campaign support received from someone interested in litigation, and (2) that judges have a First Amendment right to express view on disputed issues while campaigning for office (and at other times). Wisconsin's state-specific rules, meanwhile, specifically disclaim the need for recusal based solely on campaign contributions or expenditures and recognize that judicial candidates overstep only when they directly commit to ruling a particular way on a particular matter. Surveying prior recusal practice in Wisconsin and around the country reveals numerous examples of judges participating in cases despite having received significant campaign support from interested individuals or groups and despite having expressed opinions on the matters being litigated.

[230] Id. At *4-5.