No.

In the Court of Appeals of Wisconsin

District III

COUNTY OF DANE *ET AL.*,
PETITIONERS,

V.

PUBLIC SERVICE COMMISSION *ET AL.*,
RESPONDENT.

On Appeal from the Dane County Circuit Court,
the Honorable Jacob Frost, Presiding
Case No. 2019CV003418

NON-PARTY MICHAEL HUEBSCH'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL AND SUPERVISORY WRIT

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INTRODUCTION

The unprecedented oral ruling at issue here—issued by the Dane County Circuit Court on late Friday, July 30, and likely to be enforced on Wednesday, August 4—cries out for an immediate stay and swift reversal. Its errors are many and plain. Unless it is stayed, Michael Huebsch, a former member of the Wisconsin Public Service Commission (PSC) who is not even a party below, will be irreparably harmed by having to comply with a legally baseless subpoena demanding, among other things, that he turn over his private smartphone and all of his passwords to a third party.

It is extremely likely that the order will be reversed on appeal. To begin, it openly defies binding precedent. It holds, consistent with the court's earlier rulings in this case, that an adjudicator's mere "appearance of bias" is enough to invalidate the adjudicator's decision (and those of his colleagues) under the federal Due Process Clause. The circuit court clings to this position notwithstanding that *a majority of the sitting justices of the Supreme Court of Wisconsin unmistakably have rejected it,*

concluding that "appearance of bias" is not the constitutional standard. Confronted with those controlling opinions, the circuit court dismissed them as dealing in mere "semantic[s]." Exhibit M at 13. Even more candidly, the court added that, **while "a majority [of the justices] said they weren't going to use that phrase 'appearance,' *that's their choice*."** Exhibit M at 15 (unofficial transcript of oral ruling; emphasis added). The circuit court, quite deliberately, made a different choice: "**I'm going to call [the controlling standard] [the] 'appearance [of bias' standard], because that really is what it is."** Exhibit M at 15.

There is more. After denying Michael Huebsch's motion to quash, the court denied his motion for a stay pending appeal—on the very ground that the Supreme Court in *Waity v. LeMahieu*, a little more than two weeks ago, held is a *per se* abuse of discretion. Appendix ("App.") at 31–34. In concluding that Huebsch had failed to show a likelihood of success on appeal under the first *Gundenschwager* factor, the circuit court simply cross-referenced its earlier rulings agreeing "with [counsel for the bias claimants] as to the arguments on the merits," concluding therefore that ***it simply "can't find that that factor favors a stay pending***

appeal." Exhibit M at 52–53 (emphasis added). But this, the Supreme Court has held, "***is not the correct legal analysis***." App. 34 (emphasis added). The issue "when considering a stay pending appeal is not whether the movant has come up with some new legal source or theory in its motion for a stay," the Court recently reiterated, "but whether the movant has shown 'more than the mere possibility' of convincing a different court (namely, an appellate court), which, when coupled with irreparable harm, requires that the effect of the circuit court's judgment or order be temporarily stayed while the appellate court is reviewing the case." *Id.* Huebsch cited this decision to the circuit court. It did not heed it.

Worse, the circuit court's order threatens to revolutionize the law of adjudicator "bias" under the Due Process Clause in several other ways, even beyond its attempted revival of the defunct "appearance of bias" standard. And its overreach will have breathtaking implications not only for public officials in general but especially for judges. Consider what the litigants claiming "bias" in this case allege: (1) that Huebsch sat on an advisory panel of a multi-state regional transmission organization—on which

regulators from other states also served—that sometimes appeared before the PSC; (2) that Huebsch has long been friends with senior employees of utility companies that had matters before the PSC; and (3) that Huebsch, *after* he left the PSC, applied for the position of CEO at a utility company that had appeared before the PSC. According to the circuit court, these allegations (which Huebsch does not dispute) are enough to make out a claim of constitutionally intolerable bias and entitle claimants to seek discovery of *anyone*, including Huebsch, so long as their target is *merely suspected* of having possibly engaged in improper *ex parte* communications with the supposedly "biased" adjudicator. That, thankfully, is not the law. Courts instead apply presumptions of impartiality, honestly, and integrity to the decisions of adjudicators—presumptions that the circuit court and the claimants in this case have studiously ignored—and forbid fishing expeditions based on nothing more than speculation, as here.

Consider also the countless run-of-the-mill cases before courts that, under the reasoning below, could easily turn into pitched battles over unconstitutional "bias." All it would take is for one party wishing to shop for a new judge to make allegations of

connections between chambers and interested law firms, businesses, or other entities. Maybe even the judge's extracurricular involvement with industry and working groups would similarly raise due-process concerns. And if a judge left the bench and pursued employment at a company that had a matter before it previously, perhaps that would even be grounds for vacating the judge's previous decision in favor of the business. Unsurprisingly, courts across the country have roundly rejected such theories, and this Court should do the same.

This is no ordinary dispute over a discovery order. **Huebsch respectfully requests that this Court enter an administrative stay to preserve the status quo and a permanent stay pending appeal of enforcement of the subpoena by noon on Monday, August 2. If Huebsch does not receive relief by that time from this Court, he will immediately seek emergency relief in the Supreme Court of Wisconsin.**

STATEMENT OF THE CASE

I. FACTS

A. Michael Huebsch Serves in Public Office for Nearly 30 Years, Including as Public Service Commissioner and Wisconsin's Advisor to the Organization Responsible for Managing the Midwest's Power Grid

Mr. Huebsch served the State of Wisconsin with distinction for nearly 30 years. He was elected to the State Assembly in 1995. He worked there for more than fifteen years and served as speaker from 2007 to 2009. He resigned in 2011 after the governor appointed him secretary of the Wisconsin Department of Administration. In early 2015, the governor appointed him to the Public Service Commission of Wisconsin ("PSC" or the "Commission"). Exhibit A ¶ 1. He served there until February 2020 when he resigned. *Id*.

At the very beginning of his career, he formed several friendships. Huebsch and Brian Rude first met in the 1980s when Huebsch volunteered for his political campaign. *Id.* ¶ 17 (a). They have remained friends since then, having both been active "in La Crosse area politics and the community" for more than 30 years. *Id*. Huebsch is also a friend of Robert ("Bert") and John Garvin,

who are brothers. Huebsch and the Garvins have remained very close since the late 1980s. *Id.* ¶¶ 17 (b) & (c). They "fish, golf, and talk sports together." *Id.* They have gone to "weddings and funerals together." *Id.* They also like to "talk about family," "health," and the state of the world with one another. *Id.* Huebsch has testified that they have never discussed pending PSC matters, and there is no evidence suggesting otherwise. Evidentiary Hearing, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585, at pp. 45–48 (Dane Cnty. Cir. Ct. July 9, 2021); Deposition of Brian Rude, *Clean Wis., Inc. v. Pub. Serv. Comm'n*, No. 20-cv-585, at 31–33 (Dane Cnty. Cir. Ct. Apr. 26, 2021); Deposition of Michael Huebsch; *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. May 17, 2021); Deposition of Barbara Nick, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. July 26, 2021).

Huebsch has also formed countless professional relationships over the many decades of his public career. One such acquaintance is Barbara Nick, the former chief executive officer of Dairyland Power Cooperative. *Id.* ¶ 17 (d). Huebsch and Nick, along with Brian Rude, met for lunch in October 2019 at Rude's

suggestion. *Id.* ¶ 15. At lunch, Nick asked for Huebsch's advice regarding her upcoming appointment to the board of directors of the Wisconsin Manufacturers and Commerce. *Id.* She sought his "advice given [his] experience and knowledge of that organization from [his] time as a legislator." *Id.*; *see also* Exhibit B. All three attendees have testified that they did not discuss PSC business at the lunch, and there is no evidence to the contrary. Evidentiary Hearing, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585, at pp. 45–48 (Dane Cnty. Cir. Ct. July 9, 2021); Deposition of Brian Rude, *Clean Wis., Inc. v. Pub. Serv. Comm'n*, No. 20-cv-585, at 31–33 (Dane Cnty. Cir. Ct. Apr. 26, 2021); Deposition of Michael Huebsch; *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. May 17, 2021); Deposition of Barbara Nick, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. July 26, 2021).

Huebsch has other "acquaintance[s]" in the industry, including Melissa Seymour and John Bear, who work for the Organization of MISO States ("OMS"). *See id.* ¶ 6. "MISO" stands for the Midcontinent Independent System Operators. *Id.* ¶¶ 18 (e) & (f). He has discussed "professional activities" and "industry

developments" with those two. *Id.* At no time has he ever had an improper *ex parte* communication with either of them—or anyone. *Id.* ¶¶ 8–11, 15, 17; *see also* Wis. Stat. 227.50 (distinguishing improper from permitted *ex parte* communications); *id.* ("[I]n a contested case, no *ex parte* communication relative to the merits or a threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process.").

While Huebsch served on the Commission, the chairperson appointed him as Wisconsin's representative to the Organization of MISO States. *See id.* ¶ 6. MISO is a regional transmission organization under the supervision of Federal Energy Regulatory Commission ("FERC"). MISO manages the power grid across 15 U.S. States and "is committed to delivering electricity reliability, dependably, and cost-effectively." MISO, About MISO, https://www.misoenergy.org/about/ (last visited July 30, 2021); *see also* Brief of *Amicus Curiae* National Association of Regulatory Utility Commissioners, No. 20-3325, Dkt. 37 at 14 (7th Cir. Jan. 22, 2021) (MISO's role "is vital" to ensuring that each state within

its service area "maintains transmission capacity sufficient to reliably meet projected [energy] demand.").[1]

FERC in fact requires '[e]ach public utility transmission provider [to] participate in a regional transmission planning process" and to "coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs." FERC, Order No. 1000 - Transmission Planning and Cost Allocation, https://tinyurl.com/x8k6uve5 (last visited July 30, 2021). FERC "has recognized the important role of the states in the formation, governance and development of regional transmission orders." *PJM Interconnection, LLC*, 113 FERC ¶ 61292, at 2–3 (2005); *see also* FERC Order No. 2000, 89 FERC ¶ 61,285 (Dec. 20, 1999); Brief of *Amicus Curiae* National Association of Regulatory Utility Commissioners, No. 20-3325, Dkt. 37 at 14–15. State involvement in these processes also "has the support of Congress, which has included . . . a legislative

[1] As explained more fully below, *infra* I.B, DALC and WWF also filed a federal lawsuit alleging procedural due process violations for the same reasons as here. A number of parties, including MISO, filed amicus briefs in support of the commissioners' integrity. The case is currently before the Seventh Circuit as the court considers several federal jurisdictional issues.

mandate . . . to convene joint state boards on a regional basis in order to study and develop recommendations regarding the use of economic dispatch in various regions." *PJM*, 113 FERC at 2–3 (emphasis added).

OMS selected Huebsch to represent Wisconsin on an advisory board to MISO. Exhibit A ¶ 6. He did so as "one of the stakeholders who could help provide input and planning assessments related to transmission systems." *Id*. This allowed him "to maintain professional activities and keep pace with industry changes" while he served on the Commission. *Id*. His involvement with MISO and OMS "were well known publicly before and during the course" of his time on the Commission, *id.* ¶ 5, because he participated in open meetings available to all. *Id.* ¶ 7.

B. The Public Service Commission Unanimously and on a Bipartisan Basis Approves the Cardinal-Hickory Creek Project and Rejects Unsupported Allegations of "Bias"

In September 2019, the Commission, drawing upon its collective decades of specialized knowledge and accumulated experience, approved a new high-voltage Cardinal-Hickory Creek transmission line, at an estimated cost of $474 to $560 million,

that would bring reliable and affordable energy to Southern Wisconsin. Exhibit C at 6. The proposed transmission line would run from Dubuque County, Iowa, through Grant and Iowa Counties in Wisconsin and terminate in Dane County. The Commission found that this proposal would generate substantial economic benefits to Wisconsin residents. *Id.* at 10–11, 19–26 (describing the "approximately $23 [to] $350 million in net economic benefits"). The project enjoyed broad and bipartisan support, including from green-energy interest groups, unions, and ordinary citizens.[2] The project also received bipartisan, unanimous approval from the commissioners. *Id.* at 80.

The Commission approved the project after more than a year of adversarial proceedings and public comment. *See supra* n.2. The

[2] *See* PSC, Dkt. 5-CE-146, *available at* https://tinyurl.com/4wj4smnw; *see, e.g.*, *id.* PSC REF#: 364209 (Clean Energy Organizations' Comments) ("Clean Grid Alliance, Fresh Energy, and Minnesota Center for Environmental Advocacy . . . are nongovernmental organizations working to support the transition from fossil fuels to a clean energy future [that] understand that the Cardinal Hickory Creek transmission line . . . will support renewable energy development, reduce grid congestion, and improve electric system reliability . . . [and therefore is] a necessary component of a clean energy future and support the development of the project."); *id.* PSC REF#: 370310 (Utility Workers Coalition); *id.* PSC REF#: 353685 (Caton Roberts).

proceedings began when, in April 2018, American Transmission Company LLC, ITC Midwest LLC, and Dairyland Power Cooperative (the "Transmission Companies") petitioned the Commission for a Certificate of Public Convenience and Necessity ("CPCN") for the construction and operation of the transmission line. Exhibit C at 1. The stated purpose for their project was to "(1) improve electric system reliability . . . ; (2) deliver economic savings for Wisconsin utilities and electric consumers; and (3) expand infrastructure to support . . . greater use of renewable-based electric generation." *Id*. at 16. The Commission considered the Transmission Companies' application complete in October 2018 and, shortly thereafter, permitted numerous parties to intervene in the proceedings. *Id*. at 1–2. Among the dozens of intervenors were Dane County, Driftless Area Land Conservancy (DALC), Wisconsin Wildlife Federation (WWF), and MISO. *Id*. (citing PSC, Dkt. 5-CE-146, PSC REF#: 362093).

The Commission also worked jointly with both the Wisconsin Department of Natural Resources and the Department of Agriculture, Trade and Consumer Protection to assess the environmental impact of the project. *Id*. at 2–3. Following an

environmental impact statement issued by those three agencies in February 2019, the Commission held technical hearings with fact and expert witnesses throughout June 2019. *Id.* at 3. Briefs supporting the project and briefs opposing the project were filed the following month. *Id.* at 4–5. The Commission held an open meeting on August 20, 2019, to discuss the record, and unanimously approved the project that same day. *Id.* at 5; *see also* PSC, Dkt. 5-CE-146, PCF REF#: 374489.

The Commission issued its final written decision on September 26, 2019. Among other findings, the Commission determined that the Cardinal-Hickory Creek transmission line would provide "benefits to wholesale and retail customers" and would "not have [an] undue adverse impact[] on environmental values." Exhibit C at 7; *see also id.* at 49–53 (discussing environment impact). Nor would the "high-voltage transmission line facilities as approved . . . unreasonably interfere with the orderly land use and development plans for the area." *Id.* at 7. The Commission further found "that this project is necessary to support interconnection of renewable resources among other public policy benefits." *Id.* at 32. Consequently, the "general public

interest and public convenience and necessity require completion of the project." *Id.* at 7. The Commission unanimously granted the certificate. *Id.* at 86–87.

After the oral decision and right before the final written decision, DALC and WWF filed a motion for recusal. *Id.* at 80. DALC and WWF alleged that two commissioners' participation presented "an appearance of bias and lack of impartiality." *Id.*

As to Chairperson Rebecca Cameron Valcq, DALC and WWF said that her "relationship with We Energies, when objectively and reasonably viewed, create[d] an appearance of bias" in light of the relationship that We Energies had with certain parties to the proceedings. *Id.*

As to Huebsch, DALC and WWF asserted that his relationship with MISO, including as an advisor to the organization, precluded his participation in the proceeding since MISO had become a party to the proceedings. *Id.* They speculated that Huebsch must have "received *ex parte* communications" while at MISO events and that "such interactions" raised "an impression of impropriety and appearance of bias." *Id.* They asked the Commission to "refrain from approving" the Transmission

Companies' application for the Cardinal-Hickory Creek transmission line based on these allegations. *Id*. at 80–81.

The Commission denied the request. On the merits of their allegations, the Commission explained that its commissioners "must comply with Wis. Stat. ch. 19, subch. III" and "Wis. Stat. §§ 15.06(3)(a) and 15.79(2)," among other standards. *Id*. at 84. Wis. Stat. § 15.79 precludes the commissioners from having a "financial interest" in a "public utility." Wis. Stat. § 19.45(1), meanwhile, provides that public officials hold their "position as a public trust" and "any effort to realize substantial personal gain through official conduct is a violation of that trust." At the same time, Wisconsin law "does not prevent any state public official from . . . following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state." *Id*. "[S]tate public officials may need to engage in . . . professional or business activities, other than official duties, . . . to maintain a continuity of professional or business activity." *Id*. Finally, the Commission observed that "[t]here is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings." Exhibit C at 85.

No allegations relating to Huebsch and MISO, the Commission held, upset this presumption. Nor had DALC or WWF "set forth any facts, verified or not, that [would] otherwise show any actual instances, statements, communications, or other substantiated events that show bias, prejudice, or improper contacts." *Id*. Accordingly, the Commission unanimously held on a bipartisan basis that Huebsch "complied with all applicable ethical and legal standards" and the motion for recusal and disqualification lacked "any merit." *Id*. at 86.

C. Huebsch Resigns From the Commission in February 2020 and, Later, Pursues Other Employment

Sometime in Fall 2019, after the Commission approved the transmission line, Huebsch was approached by a prospective business partner about an opportunity to start a consulting firm. Exhibit A ¶ 12. The prospective business partner—who has never lived in Wisconsin, was not a party to the Cardinal-Hickory Creek proceedings, and approached Huebsch in St. Paul, Minnesota—planned on transitioning out of the work. *Id*. ¶ 12–13. He sought someone who could both help with the transition and, later, take over the job. *Id*. ¶ 13. Because the person sought to transition in

the near future, Huebsch had to decide whether to take up the offer or to continue to serve in public office. *Id.* He choose to accept the offer. *Id.* He subsequently resigned from the Commission in February 2020 and started Huebsch Consulting Group with that business partner. *Id.*

Some months after leaving the Commission he half-heartedly submitted an employment application to be chief executive officer of Dairyland, which had appeared before him while he served on the Commission. *Id.* ¶ 16. When he submitted his application, in April 2020 (months after he had left the Commission, and after the deadline for applications had passed), he had already started working on Huebsch Consulting Group. *Id.* He sent in the Dairyland application out of "persistent requests" from his "decades-long friend and mentor" named Brian Rude (VP, External and Member Relations, Dairyland) who had said he thought Huebsch would be a "good fit." *Id.*; *see also supra* I.A.1.a (describing relationship with Rude). Huebsch never seriously considered the job nor thought he was seriously in the running. *Id.* He had only "applied out of respect for [his] longtime friend and mentor." *Id.* ¶ 16. He also applied through an independent third-

party search firm that walled off Dairyland from the third-party executive search. Transcript of Evidentiary Hearing, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585, at pp. 177–81 (Dane Cnty. Cir. Ct. July 9, 2021); Deposition of Michael Huebsch; *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. May 17, 2021); Deposition of Barbara Nick, *Clean Wis. v. Pub. Serv. Comm'n*, No. 20-cv-585 (Dane Cnty. Cir. Ct. July 26, 2021). The executive search firm many months later rejected his application in a firm letter. *See id.*

II. PROCEDURAL HISTORY

A. DALC and WWF Challenge the Cardinal-Hickory Creek Approval in State and Federal Court

Certain parties who had opposed the Cardinal-Hickory Creek project filed state and federal lawsuits to invalidate the decision. *See Cnty. of Dane v. Pub. Serv. Comm'n*, No. 19-cv-3418 (Dane Cnty. Cir. Ct.); *Driftless Area Land Conservancy v. Huebsch*, No. 19-cv-1007 (W.D. Wis.). The United States Court of Appeals for the Seventh Circuit has stayed all discovery in the federal case. *See Driftless Area Land Conservancy v. Huebsch*, No. 20-3325, Dkt.15 (7th Cir. Dec. 17, 2020).

In Dane County Circuit Court, DALC and WWF filed petitions for judicial review under Chapter 227 in December 2019. Chapter 227 permits narrow challenges to certain agency orders. Chapter 227 imposes strict procedural requirements, limits available remedies, and confines review to the record except "in cases of alleged irregularities in procedure before the agency," in which case certain discovery may be permitted. Wis. Stat. § 227.57(1).

DALC and WWF allege in their petitions that Huebsch' s "various roles for" MISO, including his "continued participation and extensive meetings" with MISO members "were *ex parte* communications" that created a "risk of bias." *Driftless Area Land Conservancy v. Pub. Serv. Comm'n* , No. 2019-cv-144, Dkt. 2 at ¶¶ 107, 113 (Iowa Cnty. Cir. Ct. Dec. 13, 2019).[3] They never described in any detail the conversations, meetings, or engagements that Huebsch had in his legally permissible and public work with MISO. *See id.* ¶¶ 102–21. They instead alleged that "the *risk* or

[3] DALC and WWF first filed separate petitions in Iowa and Columbia Counties, respectively, and their cases were subsequently consolidated in Dane County. *See Cnty. of Dane*, No. 19-cv-3418, Dkt. 95 (Jan. 24, 2020) (ordering consolidation). Their petitions are virtually identical.

appearance of bias in an administrative proceeding [was] 'impermissibly high'" due to his continued engagement with MISO. *Id*. ¶ 117.

DALC and WWF attempted to append another set of "bias" allegations to their case months later in October 2020. They moved the circuit court to accept non-record evidence under Wis. Stat. § 227.57(1) to consider additional facts not part of the administrative record in their ongoing effort to vacate the decision. *See Cnty. of Dane*, No. 19-cv-3418, Dkt. 236 (Oct. 19, 2020). They alleged that they had "more information about the meetings, industry events, dinners, and other interactions" Huebsch had with members of MISO. They also sought information concerning his job application to Dairyland as described above. *Id*. at 2. They also included a request to enter into the administrative record "a series of text messages" between Huebsch and his longtime friend and mentor Brian Rude. *Id*. "These new materials are relevant," they said, because the information "contribute[d] to an appearance of impropriety and serious risk of bias that require reversal of" the Commission's decision. *Id*. They then argued that the "'appearance of impropriety on the part of the administrative judge' is one of the

'irregularities' that justif[ies] the admission of non-record evidence" pursuant to the exception in § 227.57(1) that otherwise confines judicial review of administrative proceedings to the agency record. *Id.* at 3.

The circuit court held oral argument in January 2021 to determine whether DALC and WWF had presented sufficient information to allow the non-record evidence along with further discovery. *See* Exhibit D at 10:16–11:2. The court concluded that due process is violated by either "actual bias or the inappropriate and improper appearance of bias." *Id.* at 78:22–79:1. Under this standard, the court concluded that a "prima facie" showing of bias had been alleged concerning Huebsch. *Id.* at 77:18–23. The court focused on allegations of "communications" with parties connected to the Cardinal-Hickory Creek proceedings that supposedly "culminated in his applying for [a] job." *Id.* at 78:1–10. "So enough has been shown," according to the court, "to allow further exploration under [§] 227.57(1) of exactly what happened." *Id.* at 79:2–5. The court conceded that it "[didn't] know what was discussed" as it related to the allegations, "but that's exactly why you would allow discovery"—"to figure out what was discussed

there, hear testimony, [and] see [the] evidence [to] decide if any of that shows bias or if it just shows perfectly harmless activity." *Id.* 80:4–9. The court did not discuss the presumption of impartiality and honesty that attaches to public officials. Nor did it discuss the presumption of regularity affixed to judicial-like proceedings.

The court followed its oral decision with a written decision on May 25, 2021. Exhibit E. The court reiterated that the Due Process Clause requires both "actual impartiality and the appearance of impartiality." *Id.* at 4. The court again omitted any discussion of the presumptions of integrity, impartiality, honesty, or regularity in administrative proceedings. Because the court determined that Huebsch's "involvement in the decision . . . create[ed] an appearance of partiality," the court allowed discovery into his industry relationships and his post-commission application for employment to Dairyland. *Id.* at 1. "If [DALC and WWF] prove [that] he was partial or that his involvement create[ed] an *improper appearance of partiality*," the court held, "Huebsch's actions denied [them] and the public due process." *Id.* (emphasis added).

B. DALC and WWF Serve Huebsch with a Subpoena Demanding, Among Other Things, His Smartphone, His Passwords, and Private Correspondences with Friends

DALC and WWF subpoenaed Huebsch on July 12, 2021. *See* Exhibit G.[4] Incredibly, they demanded that he turn over to them

[4] The subpoena that Huebsch seeks to quash is the latest "update" in a series of increasingly broad subpoenas issued by DALC and WWF to Huebsch. DALC and WWF first subpoenaed Huebsch in May 2021. Then, on June 28, 2021, DALC and WWF started over by subpoenaing Huebsch again. DALC's and WWF's June subpoena demanded, among other things, documents related to his post-commission employment to Dairyland, his decision to leave the Commission, his interactions at MISO, his current consulting business, and "[a]ll" communications and documents with specific individuals who maintain longstanding, decades-old relationships with him, including Brian Rude, John Garvin, and Robert Garvin. *See* Exhibit A at ¶ 17. The other individuals named in the subpoena, Barbara Nick, Melissa Seymour, and John Bear, are professional acquaintances. *Id*.; *see supra* I.A.1.a (describing relationships).

After they issued the June subpoena, a law firm representing ATC circulated a letter suggesting that Huebsch has from time to time used a popular encrypted messaging application called Signal, which includes an "ephemeral messaging" feature. *See* Exhibit F at 1–2. Encrypted and ephemeral messaging applications, such as WhatsApp and Snapchat, are "increasingly used around the globe." Sedona Conference, *Commentary on Ephemeral Messaging*, at 1 (Jan. 2021) (describing ephemeral messaging); *id*. at 5 (encryption), *available at* https://tinyurl.com/4ev7bmfn. An estimated "2 billion users in 180 countries" use WhatsApp and "approximately 90 million" people use Snapchat in North America. *Id*. at 14. The benefits of these applications include "information governance," "privacy," "data security," "productivity," "data minimization," and more. *Id*. at 9–14. Huebsch has used Signal occasionally with only a small group of friends to manage data usage, to share non-compressed pictures and videos more easily with devices whose operating systems differ (*e.g.*, iPhone to Android),

his personal phone and any other phone he "used" between April 2018 and the present (in addition to, curiously, a demand that he preserve his phone charger[5]). *Id*. at 2–3. They also ordered him to produce "[d]ocuments sufficient to identify the password, passcode, or other method of unlocking" the phones he "used." *Id*. Their command is without limitation, even though Huebsch, like the rest of us, uses his phone for all things personal, such as banking and family photos. *See* Exhibit A ¶ 24.

Huebsch promptly moved to quash this subpoena nine days later. He argued that the subpoena should be quashed because DALC and WWF failed to allege a cognizable legal claim entitling them to discovery under Section 227.57(1). Accordingly, any document or thing Huebsch could ever produce would be irrelevant, because DALC and WWF are not entitled to any relief in the first place. Huebsch also argued that the subpoena is oppressive and unduly burdensome, especially demands his phone

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and to protect his communications from commercial third parties, but never to communicate about state business. *See* Exhibit A ¶¶ 20–23.

Then, on July 15, DALC and WWF started over by issuing a new subpoena, described above.

[5] *See* Exhibit H.

and any other phone he "used" without any limits (without seeking, more narrowly, merely any relevant materials *saved to, or accessible by, his phone*). Finally, Huebsch maintained that permitting discovery now would be an abuse of process because this case might soon be moot. **Nonetheless, since being subpoenaed, Huebsch has preserved all documents relevant to these proceedings.** Exhibit L. On July 1, after learning of the letter mentioned above, the Commission issued a notice of "intent to rescind" its final decision "in response to the request" of the Transmissions Companies who requested recession. *See* PSC, Dkt. 5-CE-146, PSC REF#: 415003 at 1 (July 1, 2021).

On July 29, 2021, DALC and WWF filed a response to Huebsch's motion to quash. Exhibit J. In their response, petitioners proposed what they style a "compromise," which would force Huebsch to "turn his phone over" "with all biometric authentication controls deactivated" and with "any passcodes, passwords, PINs, or other credentials necessary to unlock it or access its backups . . . provided" "to a neutral third party for data extraction and forensic analysis." Exhibit J. The third party would

then extract data from the phone under their "proposal" and produce a report that shows (a) the history and usage of messaging apps and email services on the phone, (b) contact lists, (c) communications with numerous identified individuals, and (d) documents and messages that include dozens of keywords DALC and WWF list. *Id*. at 14–15. Among other things, the "compromise" broadens the universe of persons from six names listed in the subpoena to 28 different individuals whom DALC and WWF now seek to drag into this dispute, along with "[a]ny and all messages" and "documents" from them that touch upon the "keywords". *Id*. They also propose that counsel meet and confer to determine whether "[m]ore analysis is warranted" and whether "[t]he extracted data may be destroyed." *Id*. at 15.

C. The Circuit Court Denies Huebsch's Emergency Motion to Quash and Emergency Motion to Stay Enforcement of the Subpoena Pending Appeal—Openly Defying the Supreme Court's Iteration of the Bias Standard

On July 30, the circuit court held a hearing on Huebsch's motion to quash. The court commenced its colloquy explaining that Huebsch's arguments "raise concerns I've already addressed, and I'm not undoing my decisions." Exhibit M at 10–11. The court

therefore did not address Huebsch's arguments made in his motion and at the hearing that, for example, the court's prior orders did not analyze the role of the presumption of regularity when seeking discovery on a bias claim. *Id.* at 11–12. Turning next to the Wisconsin Supreme Court's decision in *In re Paternity of B.J.M.*, 392 Wis. 2d 49, 59 (2020), the court disagreed that *B.J.M.*—by a vote of six of the seven sitting justices—explicitly rejected an "appearance of bias" standard for purposes of stating a due-process "bias" claim. In particular, the court stated that the justices' separate opinions in *B.J.M.* "didn't disagree on the substance" and that any differences in those opinions about the appearance of bias standard are nothing more than "semantic." Exhibit M at 13. The court nevertheless acknowledged that "a majority [of justices] said they weren't going to use that phrase 'appearance.'" *Id.* at 14–15. "That's their choice," the court stated, "I'm going to call it appearance [of bias standard] because that really is what it is." *Id.* at 15.

The court thereafter denied Huebsch's motion to quash and commanded that he turn over his phones for inspection and appear for a deposition on August 4. *Id.* at 42–48. The court also denied

the motion for a stay and cross-referenced his reasons already given for denying the motion to quash and previous motions. *Id*. at 52–53.

The court refused to delay the Huebsch's apparent obligations under the subpoena, *id*. at 57–58, despite repeated statements by counsel for Huebsch that a slight delay would not interfere with the case's schedule and—more importantly—would allow for appellate review on a less expedited schedule, *id*. at 51–52.[6]

ARGUMENT

Applying the *Gudenschwager* test to determine whether to issue a stay pending appeal, courts first ask whether the party seeking the stay has made "a strong showing that it is likely to succeed on the merits of the . . . appeal." *State v. Gudenschwager*, 191 Wis. 2d 431, 440 (1995). The requisite "'strong showing' of a

[6] In the event that Judge Frost's July 30, 2021, order is deemed to be non-final, and the court denies Huebsch's concurrently filed petition for leave to appeal, an appeal by definition will be an inadequate remedy. Therefore, the first criterion for a supervisory writ is satisfied. *See DNR v. Wis. Ct. App., Dist. IV*, 380 Wid. 2d 354, 909 (1980). Huebsch also seeks relief immediately, thereby satisfying the fourth criterion for a supervisory writ. *See id.*

likelihood of success on appeal does not require a particular chance or odds of success; it is not even a showing of being more likely than not of succeeding on appeal." *Waity v. LeMahieu*, No. 2021AP802 (July 15, 2021), at App. 35 (granting stay motion). "The question when considering a stay pending appeal is . . . whether the movant has shown 'more than the mere possibility' of convincing a different court (namely, an appellate court), which, when coupled with irreparable harm, requires that the effect of the circuit court's judgment or order be temporarily stayed while the appellate court is reviewing the case." *Id.* at p. 8. Importantly, because appellate courts review legal issues *de novo*, as here, a party will have a greater chance of success on an appeal seeking a determination of a legal issue. *See id.* at p. 8 n.13. And even for discretionary acts, appellate courts must overrule such acts if the circuit court failed to examine relevant facts, applied an improper standard of law, or failed to use a rational process to reach a conclusion that a reasonable judge could reach. *Gundenschwager*, 191 Wis. 2d at 440.

Even more importantly, and as the Supreme Court of Wisconsin has reiterated at least three times in the last three

years, including just weeks ago, *it is a categorical and obvious abuse of discretion to reject a movant's argument on the "likelihood of success on the merits" prong simply on the basis of the judge's relevant earlier decision on the merits against the movant.* *See Waity*, No. 2021AP802 (App. 29); *League of Women Voters v. Evers*, No. 2019AP559 (Apr. 30, 2019) (App. 1); *SEIU*, Local 1 v. Vos., No. 2019AP622 (June 11, 2019) (App. 14).

The remaining factors in the stay analysis include whether the moving party shows that it will suffer irreparable harm absent the stay, the stay will not harm the public interest, and the nonmoving party is unlikely to suffer substantial harm. *Gundenschwager*, 191 Wis. 2d at 440. "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id*. In addition to these balancing factors, "a stay should be granted when necessary to preserve the status quo" and "where the appeal presents debatable questions of law." *Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331 (1966).

I. THE DANE COUNTY CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION ON THE "LIKELIHOOD OF SUCCESS" PRONG WHEN DENYING HUEBSCH'S STAY MOTION—IN EXACTLY THE SAME WAY AS THE DANE COUNTY CIRCUIT COURT DID IN ITS *LWV*, *SEIU*, AND *WAITY* STAY ORDERS

The Wisconsin Supreme Court's stay decisions have repeatedly reminded all circuit courts, and particularly the Dane County Circuit Court, that a court erroneously exercises its discretion when it decides the likelihood of success portion of a stay by simply cross-referencing its merits decision. In *League of Women Voters*, a circuit court enjoined several laws and then denied the Legislature's motion for a stay of the injunction pending appeal, concluding that "because it had found the plaintiffs' interpretation of the constitution and statutes to be more compelling, that determination meant that the Legislature had 'no likelihood of success on the merits.'" App. 7. In upholding and then expanding this Court's decision to stay that injunction, App. 10, the Supreme Court overturned the circuit court for failing to "recognize[ ] that success on the merits in th[at] case turned on questions of law that would be reviewed de novo by the appellate courts," and that the circuit court had only "the first word, not the

last, on the interpretation of the relevant constitutional provisions and statutes." App. 7. In other words, the Supreme Court held that, for cases in which "a de novo standard of appellate review will apply, it is an error of law for a circuit court to proclaim that because it has decided the legal issue against the appellant in granting an injunction, the appellant must therefore have 'no likelihood of success on the merits' on appeal." *Id.* n.8. It reiterated this principle again in *SEIU*. App. 14.

Yet again, and quite recently, the Dane County Circuit Court committed the same error in denying a stay motion in *Waity*, with the "sum total of the circuit court's analysis on all of the [merits] issues" appearing in a "single paragraph from its oral ruling." App. 31–32. That paragraph stated that, "[i]n terms of the [merits] arguments on the various statutes, much of the argument [from the movants] is a re-presentation or a slightly differently stated way of arguing what was originally before me, and **I would merely be repeating what I have already set forth in my written decision**." *Id.* (emphasis added by Supreme Court). But as the Supreme Court explained, this constituted a "complete[ ] fail[ure] to understand that the analysis of likelihood of success on

appeal in the context of a stay motion is substantively different from the analysis of likelihood of success on the merits it had previously performed in deciding to [reject movants' argument on the merits]." *Id.* at 33. In other words, "the circuit court said that it would not even discuss" in its stay decision "the likelihood of the [movants' merits] arguments being successful on appeal," since "it would 'merely be repeating what I have already set forth in my written decision.'" *Id.* (quoting circuit court's oral ruling). But this "***is not the correct legal analysis***." *Id.* at 34. The issue "when considering a stay pending appeal is not whether the movant has come up with some new legal source or theory in its motion for a stay, but whether the movant has shown 'more than the mere possibility' of convincing a different court (namely, an appellate court), which, when coupled with irreparable harm, requires that the effect of the circuit court's judgment or order be temporarily stayed while the appellate court is reviewing the case." *Id.*

The Dane County Circuit Court repeated the same mistake here. In a "single paragraph from its oral ruling," App. 31–32, it stated the following as to likelihood of success:

> Okay I have reviewed the filing requesting a stay pending appeal. I've reviewed both filings as to that. There are the four factors to consider. A stay pending appeal is appropriate where the moving party, one, make as strong showing that it's likely to [succeed]. [F]or all of the reasons that I've said already, both in today's hearing and in in previous orders I think that there is not a strong showing of likelihood to succeed on the merits. *In fact I agreed with [counsel for DALC and WWF] as to the arguments on the merits so I can't find that that factor favors a stay pending appeal.*

Exhibit M at 52–53. (emphasis added; unofficial transcript revised to aid readability). The previous "reasons that [the court] said already" refers to earlier in the hearing, when the court denied Huebsch's motion to quash largely for the reasons that he denied previous motions to limit discovery in the proceeding. *Id.* at 42–43. But this is not "the correct analysis," for the reasons stated most recently by the Court in *Waity*. The circuit court here therefore committed a straightforward reversible error and a clear abuse of discretion in denying Huebsch's stay motion.[7]

[7] Because the circuit court also plainly contradicted binding precedent, it "acted . . . in violation of [its] duty." *DNR*, 380 Wis. 2d at 909. Therefore, the second criterion necessary for a supervisory writ is satisfied.

II. HUEBSCH HAS A VERY HIGH LIKELIHOOD OF SUCCESS ON APPEAL

A. DALC and WWF Are Not Entitled to Discovery Under Section 227.57(1)'s "Procedural Irregularity" Exception, Because Their Due Process Theory of "Bias"—Even if Proven—Fails as a Matter of Law and Thus No Information Sought to Support It Could Possibly Be Relevant

On top of the typical litigant's burden of establishing "relevance" to justify discovery, a petitioner in a Section 227.57(1) action must overcome the rule that judicial "review . . . shall be confined to the record." The rule's only exception permits discovery of extra-record evidence "in cases of alleged irregularities in procedure before the agency." *Id.* The parties here have assumed that a claim of adjudicator bias, in violation of federal procedural due process, triggers Section 227.57(1)'s exception.[8]

Yet, an allegation of bias, including under the exception, must overcome several, well-established presumptions of legitimacy that attach to adjudicators' decisions, which prevent "harassment based upon mere suspicion." *Wright v. Indus. Comm'n*, 10 Wis. 2d 653, 661–62 (1960). Such presumptions

[8] Huebsch does not dispute this premise for purposes of this motion but reserves the right to do so later.

include "regularity" in proceedings before a tribunal, *id*.; "that [the adjudicator] acted fairly, impartially, and without bias," *In re Paternity of B.J.M.*, 392 Wis. 2d 49, 59 (2020); "that administrative adjudicators are able to maintain their professional and ethical responsibility to remain impartial and to conduct themselves appropriately," *Marder v. Bd. of Regents of Univ. Sys.*, 286 Wis. 2d 252, 274 (2005); and that adjudicators "act in good faith, honestly, and with integrity," *Head v. Chi. Sch. Reform Bd. of Trustees*, 225 F.3d 794, 804 (7th Cir. 2000); *see also_Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157 (2004 ("[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties." (citation omitted)). Critically, "Wisconsin appellate courts have applied [these presumptions] *in cases of administrative adjudication in which professional relationships and dual roles linked [interested parties] and adjudicators* and *required a strong showing to rebut the presumption that administrative agents act with integrity*." *Marder*, 286 Wis. 2d 252, 272–73 (emphasis added; collecting cases).

Rebutting any of these presumptions is a "heavy burden," especially where the adjudicator and interested party "were not prohibited from talking to one another." *Id.* at 272–274. To overcome the presumptions, and justify discovery, a plaintiff must put forth *prima facie* "facts"—as opposed to mere suspicion or conclusory allegations—showing procedural irregularities. *Id.* at 273–74. This requires that the plaintiff "come forward with substantial evidence of actual or potential bias, such as evidence of a pecuniary interest in the proceeding, personal animosity toward the plaintiff, or actual prejudgment of the plaintiff's case." *Head*, 225 F.3d at 804; *see also Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 914 (2004) (Scalia, J., in chambers) ("The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of *the facts as they existed*, and not as they were surmised or reported") (emphasis added); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., respecting recusal) (same).

1. Petitioners' "appearance of impropriety" theory of bias—on which they and the circuit court have staked this case—is indisputably bad law under Wisconsin Supreme Court precedent, which prescribes a test that the circuit court considered and explicitly rejected.

Both the United States Supreme Court and the Wisconsin Supreme Court have held that an adjudicator's alleged "appearance of impropriety" does not violate due process. "[M]uch more is required." *State v. Herrmann*, 364 Wis. 2d 336, 377–78 (2015) (Ziegler, J., concurring). The United States Supreme Court recognized this in *Caperton v. A.T. Massey Coal Company*, in which it held a due-process bias claim has merit only if it makes an "objective" showing that the "practice" at issue creates a "serious, objective risk of actual bias." 556 U.S. 868, 886 (2009); *see also id.* at 888 (explaining that many states have gone further by statute, forbidding even the "appearance of bias," but that the Constitution does not adopt this standard). In 2020, six of the seven then-sitting Wisconsin Supreme Court justices unambiguously concluded that "appearance of bias" is not the standard, suggesting that it was merely a relic of "*pre*-Caperton" case law. *B.J.M.*, 392 Wis. 2d at 64 n.18 (declining to apply the

"appearance of bias" standard favored by Justice A.W. Bradley) (lead opinion of Dallet, J., joined by Roggensack, C.J., and Ziegler, J.).; *id.* at 82–83 (Ziegler, J., concurring) (explaining that, under settled law, the "mere appearance or allegation of bias alone will not rebut the presumption that [an adjudicator] is impartial and will not constitute a due process violation" and that she "join[ed] the majority because it does not adopt the standard suggested in Justice Ann Walsh Bradley's concurrence"); *id.* at 109 (Hagedorn, J., dissenting, joined by Kelly, J., and R.G. Bradley, J.) ("[A]ppearance of bias is not enough to trigger a constitutional problem.").[9] Chief Justice Ziegler has explained in extreme detail why the "appearance of bias" is not the constitutional standard, including in an opinion joined by Justice Roggensack. *Herrmann*, 364 Wis. 2d at 377–404 (Ziegler, J., concurring). Thus, even if one does not count the members of the Court who joined the B.J.M. lead opinion, there are at least four currently sitting justices who

[9] *Accord State v. Hollingsworth*, 160 Wis. 2d 883, 894 (Ct. App. 1991) ("A litigant is not deprived of fundamental fairness guaranteed by the constitution either by the appearance of a judge's partiality or by circumstances which might lead one to speculate as to his or her partiality.").

have unambiguously affirmed that "appearance of bias" is not the test: Chief Justice Ziegler, Justice Roggensack, Justice R.G. Bradley, and Justice Hagedorn.

This exercise in vote-tallying is important, because whenever a majority of Wisconsin Supreme Court justices agree on a point of law (even if not all of them join in the same opinion), that point of law becomes controlling precedent, as numerous cases have held. *E.g.*, *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 719 (1996) (*per curiam*); *see also Tetra Tech EC, Inc. v. Wis. Dep't of Rev.*, 382 Wis. 2d 496, 582–82 n.1 (2018) (same) (Bradley, J., concurring).

Agreeing with petitioners below, the circuit court, meanwhile, has announced in so many words that it instead will apply the position adopted by Justice A.W. Bradley in *B.J.M.*—notwithstanding, in the circuit court's words, ***the mere "semantics"*** favored by the controlling opinions of the justices, ***whose wording the circuit court dismissed as merely "their choice."*** Exhibit M at 13. Indeed, DALC and WWF have repeatedly advocated, and the circuit court has applied, this improper "appearance of impartiality" standard for more than a

year. *See, e.g.*, *Driftless Area Land Conservancy v. Pub. Serv. Comm'n*, No. 2019-cv-144, Dkt. 2 at ¶ 117 (Dec. 13, 2019) (advocating "risk or appearance of bias" standard); Exhibit D at 10:25–11:2 (concluding due process may be violated by "improper appearance of bias"); *see also supra* II.A. (reiterating "appearance of impartiality" time and again before permitting discovery on Huebsch). Most recently, DALC and WWF doubled down on their erroneous statement of law by citing Justice A.W. Bradley's concurrence in *B.J.M.*, which every other justice on the court rejected. Exhibit J. Even worse, neither DALC and WWF below nor the circuit court have ever analyzed (let alone mentioned, *see, e.g., id.*) the presumptions accorded to public officials and proceedings. The circuit court's repeated application of the wrong legal standard, on top of its disregard of the presumptions, cry out for a stay and eventual reversal. *See Waity*, at App. 35–40 (circuit court's "errors of law" justify granting stay).

2. Even if evaluated under the appropriate standard, none of the "practices" challenged here—even if proven—created an objective "serious risk of actual bias."

Under the correct test, courts must ask whether there is "such a risk of actual bias or prejudgment that *the practice* must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883–84. One must show that the adjudicator's allegedly problematic "practice," considered objectively, makes "the probability of actual bias too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 868 (citation omitted). For example, adjudicating a case in which one previously participated violates due process, not because of any "appearance of impropriety," but because the practice itself creates a constitutionally impermissible risk of bias. *Guthrie v. Wis. Emp. Relations Comm'n*, 111 Wis. 2d 447, 457–58 (1983). Having a pecuniary interest in the outcome of a case is another practice that is *per se* forbidden. *See Caperton*, 556 U.S. at 876. But in reality, because banning a practice outright as unconstitutional is extreme by any measure, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Id*.

None of the allegedly unconstitutional practices alleged here gives rise to an objective "serious risk of actual bias" as a matter of law.

a. The only "practice" properly raised by DALC and WWF in their petitions for review are their (naked) assertions of *ex parte* communications between Huebsch and MISO.[10] Their allegations, in particular, concern his professional participation and relationships in an industry group, MISO, that manages power grids across the States. But as courts have repeatedly recognized, "professional relationship[s] . . . do[] not constitute a 'strong showing' necessary to overcome the presumption of honesty and

[10] Literally, an *ex parte* communication is a "communication between counsel or a party and the court when opposing counsel or party is not present." *B.J.M.*, 392 Wis. 2d at 70 n.22. But that is not what is meant by the expression "ex parte communication" when the speaker is referring to an alleged impropriety. Communications between "party and the court" encapsulates only those communications that go to the subject matter or merits of the proceeding. A chance encounter at the grocery store, a conversation about Aaron Rodgers, a prayer request, or a get-well wish between a litigant and a judge, for example, are not forbidden *"ex parte* communications." *B.J.M.* itself involved *ex parte* communications since the decision before the trial court in that case concerned domestic relations while the social media interactions communicated a one-sided view of domestic life for one of the parties to the proceeding. State law confirms that *ex parte* communications related only "to the merits or a threat or offer of reward . . . before a decision is rendered." Wis. Stat. 227.50.

integrity." *Nu-Roc Nursing Home, Inc. v. State Dep't of Health & Soc. Servs.*, 200 Wis. 2d 405, 420–21 (App. Ct. 1996); *Jenson v. Fisher*, 99 F.3d 1149, at *2 (10th Cir. 1996) ("Professional associations alone are insufficient to establish judicial bias.").[11] Nor do "general complaints" of *ex parte* communications involving professional or personal relationships "overcome the high burden [courts] have established to overcome the presumption . . . [of] honesty and integrity." *Marder*, 286 Wis. 2d at 275.

Marder controls here. That case squarely holds that general allegations of *ex parte* communications cannot overcome the presumptions of integrity, honesty, and impartiality and therefore cannot justify fishing expeditions for "susp[ected]" improprieties, such as *ex parte* communications. In *Marder*, a member of a tribunal traveled with the chancellor of a university who had

[11] Professional relationships and associated communications involving adjudicators are, in fact, extremely common and perfectly legitimate. *See Getsy v. Mitchell*, 495 F.3d 295, 311 (6th Cir. 2007) ("[E]x parte contact" between judge and lawyer "does not, in itself, evidence any kind of bias.") (citation omitted); *Pellegrini v. Merchant*, 2017 WL 735740, at *3 (E.D. Cal. Feb. 24, 2017) (rejecting motion for recusal and noting that plaintiff "provides no authority holding that a purely professional association suggests an appearance of impropriety").

recommended terminating a faculty member. *Id.* at 273. The party to the termination proceeding alleged that they had spent "suspicious" time together "on the same day" the board voted to terminate him, speculating that they must have engaged in forbidden *ex parte* communications. *Id*. The Court rejected this claim, holding that unsubstantiated "general complaints" of *ex parte* communications do not overcome "the legal presumption that administrative adjudicators are able to maintain their professional and ethical responsibility to remain impartial." *Id.* at 274. *The court therefore did not disturb the court of appeals' determination that depositions to explore whether* ex parte *communications in fact occurred between those two could not proceed.*

Sills v. Walworth, 254 Wis. 2d 538, 545 (Ct. App. 2002), applies the same standard as *Marder*. There, a group of citizens argued (in a certiorari posture, similar in many respects to a limited Section 227 review) that they should have been allowed to conduct additional discovery for the purpose of uncovering bias. In particular, the "neighbors sought to question [a non-party lobbyist] regarding *ex parte* communications he may have had with" members of the tribunal who had awarded a permit to build a

public museum. *Id.* at 561 (italics added). *Sills* rejected their request, determining "as a matter of law that the neighbors [had] failed to demonstrate a *prima facie* showing of bias or even an impermissible risk of bias." *Id.* at 565 (italics added). First, the neighbors' general allegations made it "transparent" that they were "attempt[ing] to use the discovery process as a fishing expedition to uncover evidence of bias," but the "presumption of honesty and integrity" accorded to public officers precluded them from doing so. *Id.* at 566. Second, "the neighbors [failed to cite] legal authority to support [their] contention that *ex parte* communication[s]" were "illegal." *Id.* (italics added). In fact, given the nature of the decisions in question, "it may [have been] natural that such contacts occur." *Id.* "Thus, even if the neighbors had actual evidence of *ex parte* communications, they would still fail to make a *prima facie* showing of a procedural due process violation in the absence of bias or an impermissibly high risk of bias." *Id.* at 567 (italics added).

As applied here, DALC and WWF speculate that Huebsch's "continued participation and extensive meetings and discussions" with members of MISO must have given rise to "*ex parte*

communications [that] created at least a 'risk of bias' and lack of impartiality." Exhibit K ¶ 113. They say "that the *risk* or *appearance* of bias in an administrative proceeding [was] 'impermissibly high'" given his MISO interactions. *Id.* ¶ 117 (emphasis added). Yet this is precisely the general allegations based on mere suspicion that the Court has already rejected. *Marder*, 286 Wis. 2d at 270.

Indeed, given the nature of the industry and the status of Huebsch as a representative of Wisconsin to MISO, "it [is] natural that such contacts occur." *Sills*, 254 Wis. 2d at 566. Huebsch's highly visible and widely known public work with MISO—to which he was appointed by an organization regulated by FERC—is no different from the many collaborations that take place in the legal industry among judges, academics, and practitioners, which courts repeatedly have found not to create an unconstitutional risk of bias.[12]

[12] *See, e.g.*, *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1117–18 (4th Cir. 1988) (judge who was formerly a member of Sierra Club not required to recuse himself from case involving Sierra Club); *UCO Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213, 1215 (S.D.N.Y. 1984) (rejecting bias claim against arbitrator, and noting that arbitrator's

In all events, DALC and WWF fail to allege with specific facts that Huebsch actually engaged in improper *ex parte* communications concerning the subject matter of the Cardinal-Hickory Creek proceedings via his participation in MISO. And although his MISO participation was and is completely public, DALC and WWF fail to specify where he had his supposed *ex parte* communications, what was said, how it was conveyed, or how it impacted the Commission's final decision. Instead, they speculate that Huebsch *could* have engaged in improper *ex parte* communications because of his participation in an industry group that is policed under federal law. That is not enough. *See Marder*, 286 Wis. 2d at 270; *Sills*, 254 Wis. 2d at 566.

Put simply, not only do DALC and WWF fail to actually allege any improper *ex parte* communications, but Huebsch's

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participation in professional associations were "in the ordinary course of his business"); *Wessmann ex rel. Wessmann v. Bos. Sch. Comm'n*¸ 979 F. Supp. 915, 916–18 (D. Mass. 1977) (judge in school desegregation case not required to disqualify himself based on his being a former member of the Board of Lawyers Committee for Civil Rights of the Boston Bar Association); *Sabatier v. Suntrust Bank*, 2009 WL 2430892, at *3 (S.D. Fla. Aug. 7, 2009) (accepting withdrawal of motion that sought judge's recusal based on his connections to, *inter alia*, the Federalist Society).

participation in MISO as a matter of law is not a practice that creates a "serious risk of actual bias." *Caperton*, 556 U.S. at 884.

DALC and WWF further overlook the fact that Huebsch's participation in MISO benefited Wisconsin by enhancing the Commission's expertise and giving Wisconsin a voice in regional transmission discussions. *See, e.g.*, Exhibit A ¶¶ 5–6; *supra* I.A.1; *cf. Cheney*, 541 U.S. at 920 (Scalia, J., in chambers) ("[T]here is nothing illegal or immoral about making '[] industry executives' members of a task force. . .; some people probably think it would be a good idea."). That is probably one of the reasons that Wisconsin law *expressly permits* "state public officials" "to maintain a continuity of professional or business activity." Wis. Stat. § 19.45(1).

State law, surely *more* protective against bias than the Constitution, confirms the legitimacy of these practices. To that end, Wisconsin prohibits only "*ex parte* communication[s] relative to the merits or a threat or offer of reward . . . before a decision is rendered." Wis. Stat. § 227.50. It also "recognizes . . . that citizens who serve as state public officials retain their rights as citizens to interests of a *personal* or *economic* nature." Wis. Stat. § 19.45(1)

(emphases added). The "standards of ethical conduct for state public officials" further "need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material." *Id.* "[S]tate public officials may need to engage in . . . professional or business activities, other than official duties, . . . to maintain a continuity of professional . . . activity." *Id.* They further can "follow[] any pursuit," including "employment," that "in no way interferes" with their duties. *Id.*

b. In their motion to expand the record, DALC and WWF make additional bias allegations.[13] *See supra* I.B.1. They claim that Huebsch's "interactions" with other persons connected to parties to the Cardinal-Hickory Creek proceedings and his post-Commission application for employment at Dairyland "contribut[ed] to a disqualifying appearance of impropriety and serious risk of bias." *Id.* Yet, not only do DALC and WWF fail to make a *prima facie* showing, "in light of the facts as they exist[]

[13] These allegations are not properly part of their case, since they are not in the petition for review, which has not been amended. For the sake of argument, this memorandum nonetheless responds to these allegations.

and not as they [are] surmised," to support this claim, *Cheney*, 541 U.S. at 914 (Scalia, *in chambers*), they fail to cite cases even suggesting that friendships in a regulated industry (including with employees of a party appearing before the adjudicator) or an after-the-fact application for employment at a regulated company create a serious risk of actual bias. In fact, courts have held the opposite.

To begin, it is well established that "a judge need not disqualify himself just because a friend—even a close friend—appears [before him]." *United States. v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985) (citing cases). There is nothing untoward about adjudicators having friendships, including friendships with people from "*named part[ies].*" *Cheney*, 541 U.S. at 917 (Scalia, *in chambers*). As Justice Scalia explained when another environmental group, Sierra Club, sought his recusal based on an adjudicator's friendships, "[a] rule that required [judges] to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling." *Id. at* 916–17, 924–26. Rather, judges often reach their posts "precisely because" of their relationships with people who might be involved with proceedings before them, including, for example, Justice White and Robert

Kennedy, Justice Jackson and Franklin Roosevelt, and Chief Justice Marshall and John Quincy Adams. *See id.* In fact, even "[e]vidence of prior familiarity with the plaintiff or his or her situation, or even of involvement of the particular matter under consideration, is not adequate by itself to overcome" the presumptions due public officials and proceedings. *Head*, 225 F.3d at 804.

A fortiori, there is also nothing problematic about a judge's making and maintaining professional acquaintances or getting to know someone new in industry, whether or not those new contacts might have business before the adjudicator's tribunal. Doing so is, in fact, routine for public officials, just as it is routine for judges to keep in touch with former law clerks or meet new attorneys at professional events who might from time to time argue cases before them.[14]

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[14] *See Hardy Indus. Techs., LLC v. BJB LLC*, 2016 WL 7325152, at *4 (N.D. Ohio Dec. 16, 2016) ("Courts have consistently rejected the argument that a panel of arbitrators is biased merely because they are members of the same industry, or even the same trade association, as one of the parties."); *id.* ("[T]o disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to

Huebsch retains decades-long relationships with friends and mentors named in the subpoena. *Compare* Exhibit G at 4; *with* Exhibit A ¶ 17 (listing Brian Rude, Robert Garvin, John Garvin). Nothing in Wisconsin or federal law suggests that these friendships mean that Huebsch could not have impartially adjudicated matters in which these persons were interested. To the contrary, such a conclusion would flip the presumptions of integrity, impartiality, honesty, and regularity on their heads.

c. Finally, there is nothing problematic about a former state official, having developed expertise in an industry, applying for a job in that industry. To the contrary, this routine practice is recognized as permissible under state law that "does not prevent

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find a qualified arbitrator at all.") (citation omitted); *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993) (recusal not required when judge was adjunct professor for defendant university); *Olmstead v. CCA of Tenn., LLC*, 2008 WL 5216018, at *2 (S.D. Ind. Dec. 11, 2008) (Hamilton, J.) ("Like most judges, I know many lawyers in a blend of professional relationships and personal acquaintances and friendships. I often know lawyers on both sides of cases; I rule in favor of and against the clients of lawyers who have been friends. There is nothing unusual about that."); *TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1079 (D. Colo. 1991) ("Mere allegations of a social relationship between a judge and a litigant in his court are not sufficient grounds for disqualification."); *Clayton v. Sklodowski*, 1987 WL 11834, at *1 (N.D. Ill. May 29, 1987) ("[A] judge is not required to remove himself from a case simply because it involves a party whom he knows professionally.").

any state public official from accepting other employment or following any pursuit." Wis. Stat. 19.45(1). In fact, judges have even refused to disqualify themselves from cases when they sought employment from an interested party *before* the party came before the court. *See, e.g.*, *Mass. v. McClenahan*, 1995 WL 106106, at *1, 3 (S.D.N.Y. Mar. 9, 1995) (rejecting defendants' argument that judge should recuse himself even though judge previously had contacted "of counsel" for plaintiff to discuss possibility of teaching at said counsel's law school).

Huebsch here applied half-heartedly to Dairyland at the urging of his mentor *months* after he left the Commission. Exhibit A ¶ 16. There is *no* evidence whatsoever that he pursued employment opportunities with parties before him while he served on the Commission. *Id.* ¶¶ 14–16. Nor is it "objectively" reasonable to ban public officials from pursuing work with parties who had appeared before them, because such everyday "practices" are not constitutionally intolerable. *See Caperton*, 556 U.S. at 886. And as with DALC and WWF's other allegations, there is no allegation here that Huebsch actually engaged in any improper *ex parte* communications or other acts.

3. Separately, DALC and WWF's mere suspicions that Huebsch engaged in improper conduct—*even assuming that their underlying constitutional theory were valid*—is not enough to overcome the presumptions of honesty and impartiality to justify discovery.

DALC and WWF's mere suspicions that Huebsch engaged in inappropriate conduct cannot overcome the presumptions of integrity, impartiality, honesty, and regularity necessary to receive discovery under Wisconsin law. *Marder* makes clear that to justify discovery, DALC and WWF must put forth actual "facts"—not mere insinuations—to make out a *prima facie* case of procedural irregularity. *Marder*, 286 Wis. 2d at 273–74. Otherwise, DALC and WWF would be permitted to engage in a "fishing expedition" that would abrogate the presumptions due public officials. *Sills*, 254 Wis. 2d at 566; *B.J.M.*, 392 Wis. 2d at 63.

DALC and WWF have failed to meet their heavy burden. "Indeed, it is clear that [they] have no idea if any [*ex parte* communications] occurred at all," since the "sole and limited purpose for the requested discovery is to determine" whether they had. *Sills*, 254 Wis. 2d at 566. The circuit court also conceded that it "[didn't] know what was discussed" as it related to the

allegations, but erroneously held that is why it must "allow discovery"—"to figure out what was discussed there, hear testimony, [and] see [the] evidence [to] decide if any of that shows bias or if it just shows perfectly harmless activity." Exhibit D at 80:4–9.

DALC and WWF's general allegations are precisely the mere "suspici[on]" that, per *Marder*, cannot justify discovery. 286 Wis. 2d at 273. As *Marder* put it, "general complaints do not meet the high burden" of overcoming the presumption of honesty and integrity we place in public officials. *Id.* at 274–75. DALC and WWF have "not presented any facts that would overcome the presumption," especially so since Huebsch was "not prohibited from talking" to them and "the legal presumption that administrative adjudicators are able to maintain their professional and ethical responsibility to remain impartial and to conduct themselves appropriately" applies to all involved here. *Id*. at 273–74; *see also* Exhibit A ¶¶ 8–9. At any rate, whatever *prima facie* showing DALC and WWF might have had previously no longer exists. Huebsch has sworn that he never discussed employment with any party to a current proceeding while he served at

Commission, and his alleged interlocutors say the same. *See* Exhibit A ¶¶ 14–15. The documents produced thus far in other cases that touch on these issues are also consistent with this uncontroverted testimony. *See supra* I.B.1.[15]

DALC and WWF may respond that they need first to sift through all of Huebsch's documents (and even have his phone forensically examined) to confirm their speculation that he engaged in improper *ex parte* communications. But this is not what the presumptions due to public officials and proceedings permit. The burden is on DALC and WWF to put forth *prima facie* facts demonstrating a serious risk of actual bias *before* receiving discovery. They have not met this burden.

[15] Most recently, DALC and WWF produced to the circuit court an email from Barbara Nick to Brian Rude, dated October 1, 2019, with the subject line, "Meeting with Mike Huebsch." Exhibit B. According to DALC and WWF, this email demonstrates their need to depose Huebsch. In fact, this email supports Huebsch's testimony; the email is *entirely* about Nick seeking education from Huebsch and Rude about how best to "approach change" with the Wisconsin Manufacturers and Commerce, whose board of directors she would be joining. *Id.* There is *nothing* in this communication supporting any of the allegations DALC and WWF have made.

4. In any event, DALC and WWF cannot show that the 2019 project approval deprived them, or imminently will deprive them, of "property."

"[T]he first step necessary to a due process claim" is establishing "the deprivation of a . . . property right." *Ande v. Rock*, 256 Wis.2d 365, 383 (2002) (Roggensack, J.); *see Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972). The government must actually come into "possession" of a property right for a deprivation to occur. *See United States v. Dow*, 257 U.S. 17, 22 (1958). "The mere enactment of legislation which authorizes condemnation of property" is not enough. *Danforth v. United States*, 308 U.S. 271, 286 (1939).

Hence a utility commission's decision to approve a project as in the public interest by issuing a CPCN, which is materially identical to a legislative act, cannot constitute a property deprivation. *See Wis. Power & Light Co. v. Pub. Serv. Comm'n*, 148 Wis. 2d 881, 888 (1989) (Commission's CPCN decisions are legislative determinations). That is because, even if a CPCN is a but-for cause of some *eventual* deprivation, "any actual [deprivation] of real property . . . would occur through the process

of eminent domain, which would be a separate proceeding." *Del. Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 152-531 (D.D.C. 2017), *aff'd* 895 F.3d 102 108-11 (D.C. Cir. 2018) (rejecting procedural bias challenge and holding that issuance of CPCN for project could not constitute a property deprivation); *see also Green Bay & W. R. Co. v. Pub. Serv. Comm'n* , 269 Wis. 178, 180, 191 (1955) (PSC approval of grade crossing over company's railroad tracks subject to condemnation action only in separate proceedings). Consistent with this rule, courts have also held that the allegedly deprived property cannot be "speculative, tentative, [or] hypothetical" or otherwise not at "imminent danger of deprivation." *Reichenberger v. Pritchard*, 660 F.2d 280, 285–86 (7th Cir. 1981). A "possible future" deprivation is not enough. *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009).

DALC's and WWF's claim that the Commission's issuance of a CPCN for the project directly deprived them of a property interest is all but certain to fail. Indisputably, the government has not taken possession of any property right owned by DALC, WWF, or any of their members. Indeed, issuance of the CPCN is only a necessary-but-not-sufficient condition to the potential exercise of

eminent domain to construct the project; the project owners still need to complete several steps under Wisconsin law in separate proceedings to possess the property right. *See generally* Wis. Stat. §§ 32.03(5)(a), 32.06. And courts have already explained that a challenge to an anticipated deprivation of property—which DALC and WWF attempt to raise here—must occur during the eminent domain proceedings, not during CPCN proceedings. *See Del. Riverkeeper*, 243 F. Supp. 3d at 153; *Green Bay*, 269 Wis. at 191.

Regardless, even if this current lawsuit were the proper proceeding in which to challenge a property deprivation, DALC's and WWF's challenge still would be meritless, as they have not even alleged that either of them, or their members, owns any property interest at risk of imminent deprivation. DALC and WWF have offered nothing more than speculation about a possible future deprivation, which is unsuitable for resolution during these proceedings.

In fact, the Commission may still rescind the issuance of a CPCN for the project, suggesting at the very least that Petitioners' due process claim is not yet ripe. The Commission began soliciting comments on its proposed rescission on July 1, 2021, and the

applicants themselves have submitted comments favoring rescission. *See* PSC, Dkt. 5-CE-146, PSC REF#: 415003 (July 1, 2021); *id.*, PSC REF#: 415916 (July 12, 2021); *see supra* I.B.2. And while, in a split 1–1 decision, the Commission provisionally refrained from rescinding the CPCN during an initial public meeting on July 29, 2021, it has scheduled another meeting for August 5, 2021.[16] The possibility of rescission makes eminent domain proceedings even more remote.

[16] Neither a transcript nor a recording of the meeting is immediately available, but minutes will be considered for approval at the next meeting. At the July 29, 2021 meeting, Commissioner Huebner did not participate in the rescission discussion. Commissioner Nowak spoke in favor of rescission, arguing that although the initial proceedings were free from partiality and DALC's and WWF's arguments were frivolous, it was in the public interest to promptly rescind and reconsider the CPCN, because the cost savings for the project depend upon timely construction, and without rescission, DALC's and WWF's challenges will cause further delay. Commissioner Valcq agreed that the initial proceedings were free from partiality and that DALC's and WWF's arguments were frivolous, but spoke against rescission, arguing that rescission would invite further frivolous challenges and signal incorrectly that the project is not in the public interest.

B. Even if the Subpoena Sought Information Relevant to a Cognizable Bias Claim and Reviewable Under Section 225.57(1)'s Narrow Exception, The Subpoena and Order Declining to Quash It Are Still Oppressive on Their Face

Even if a subpoena seeks information relevant to a cognizable claim, the party issuing the subpoena "must take reasonable steps to avoid imposing [an] undue burden" on a receiving party. *Weather Shield Mfg., Inc. v. Drost*, 2017 WL 7053652, at *1 (W.D. Wis. Nov. 16, 2017) (quoting Fed. R. Civ. P. 45(d)).[17] Courts "must enforce this duty and impose an appropriate sanction" on parties that violate this injunction. *Id.* A subpoena is oppressive if it seeks information of "sweeping breadth" or of a "sensitive nature." *Meta v. Target Corp.*, 2015 WL 7459981, at *2 (E.D. Wis. Nov. 24, 2015). Further, "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight" in determining whether a subpoena is oppressive. *Id.*

[17] Because the subpoena seeks information that is categorically irrelevant to any cognizable theory of bias, it is overly burdensome as a matter of law, so the Court need not undertake a separate burdensomeness analysis (such as the one set forth in this section) if it agrees with Huebsch as to one or more of the independent arguments raised in Part II.A.

Needless to say, "cell phones, which are ubiquitous in this day and age, can reveal a wealth of private information about an individual." *United States v. Williams*, 2016 WL 492934, at *2 (N.D. Cal. Feb. 9, 2016) (quotation omitted). "Modern cell phones"—which contain "[t]he sum of an individual's private life"—therefore "implicate privacy concerns far beyond those implicated by the search of [even] a cigarette pack, a wallet, or a purse." *Riley v. California*, 573 U.S. 373, 393–94 (2014). Access to a person's phone also permits one to snoop through information not even contained within the phone itself, but contained in remote storage locations accessible via the phone. *See id.* at 397. Thus, access to a person's phone grants one access to even more intimate and extensive information than could be found in a person's home. *Id.* at 397–98.

DALC's and WWF's request is patently oppressive, unduly burdensome, and legally impermissible. They do not demand that Huebsch merely turn over relevant materials saved to, or accessible by, his phone. Instead, as their first choice, they seek custody of the phone itself, in addition all personal passwords, so that they might conduct a freewheeling inspection of it. Exhibit G.

DALC's and WWF's later proposed "compromise," adopted in large part by the circuit court, is no better. They still demand that Huebsch relinquish custody of his personal phone and provide "any passcodes, passwords, PINs, or other credentials necessary to unlock it or access its backups" to a third party and to deliver his phone "with all biometric authentication controls deactivated." Exhibit J. They further seek "*any and all* messages sent to or received from" 28 different individuals from April 20, 2018 through the present, personal or otherwise. *Id.* (emphasis added). And they seek any documents and communications referencing 26 absurdly broad keywords—including "CEO," "battery," "PSC," "Rebecca," "transmission," and more—no matter the documents or communications in which these words appear. *Id.*

Courts throughout the country have found even less intrusive requests to be "overbroad on [their] face." *See*, *e.g.*, *Charles Schwab & Co., Inc. v. Highwater Wealth Mgmt.*, LLC, 2017 WL 4278494, at *7 (D. Colo. Sept. 27, 2017) (denying request to "search for relevant materials" on non-parties' personal cell phones); *see also Cummings v. Gen. Motors Corp.* , 2002 WL 32713320, at *8 (W.D. Okla. June 18, 2002) (describing plaintiffs'

attempt to access defendant's computer files and databases as "overly broad," "unduly burdensome," and "nothing more nor less than an attempt to rummage around in Defendant's files"). DALC and WWF's apparent attempt to harass Mr. Huebsch, as well as his friends and acquaintances, by "unduly intrud[ing]" into his personal affairs makes the request even more egregious. *See Salas v. 3M Co.*, 2008 WL 10706143, at *2 (N.D. Ill. Aug. 28, 2008) (quashing subpoena).

III. A STAY WILL HARM NEITHER DALC NOR WWF AND IS NECESSARY TO AVOID IRREPARABLE HARM, TO PROTECT THE PUBLIC, AND TO PROTECT THE STATUS QUO

The remaining factors in the stay analysis include whether the moving party shows that it will suffer irreparable harm absent the stay, the stay will not harm the public interest, and the nonmoving party is unlikely to suffer substantial harm. *Gudenschwager*, 191 Wis. 2d at 440. "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id*. In addition to these balancing factors, "a stay should be granted when necessary to preserve the status quo" and "where the appeal presents debatable questions of law." *Banach*, 31 Wis. 2d at 331.

Here, all equitable factors support a stay pending appeal.

a. *Irreparable harm*. "The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Gudenschwager*, 191 Wis. 2d at 441–42. Under this standard, Huebsch will unquestionably suffer substantial harm by the circuit court's failure to correctly apply the objective test for claims of bias. By relying on the incorrect legal standard, *supra* II.A, the court gave DALC and WWF unfettered authority to depose Huebsch and rummage through his documents and personal property to substantiate their conclusory allegations of bias. That violation of privacy cannot be remedied. The bell cannot be unrung. *See, e.g.*, *First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d 540, 543 (S.D.N.Y. 2001) (subpoenaed party would suffer irreparable injury unless stay of discovery was granted); *Pollard v. Roberts*, 283 F. Supp. 248, 252, 257 (E.D. Ark. 1968) (injunction granted to stop enforcement of subpoena alleged to be designed to harass).

Worse, if the circuit court's decision stands—*i.e.,* if a speculative "appearance of bias" may subject public officials to intrusive discovery—then all public official and judges will be

subject to the same aggressive harassment as they defend against unsatisfied parties' broad allegations of "bias." Such a world would significantly frustrate the administration of justice.

b. *Public interest.* The public suffers equally substantial harm as a consequence of the circuit court's "appearance of bias" standard. The presumptions of integrity, impartiality, honesty, and regularity preserve finality and efficiency in our adjudicatory processes. All public officials, including judges, take an oath to uphold the Wisconsin Constitution and apply the law impartially, and courts trust that they will live up to this promise. Wis. CONST. art. IV, § 28; *see Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J. concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor.'"). In stark contrast to the circuit court's opening of the floodgates to bias allegations, controlling case law has identified only few, extremely "rare" instances in which the Due Process Clause requires disqualification of a judge. *See supra* I.A.3.

Wisely so. In any given case, there are a number of factors that could rise to an "appearance," even a "probability," of bias if the circuit court's decision stands: friendships, employment,

schools, membership in clubs or associations, family history, life experiences, speeches and writings, religious affiliation, newspapers or books read, and many more. *See*, *e.g.*, *Sataki v. Broad. Bd. of Governors*, 733 F. Supp. 2d 54, 69 (D.D.C. 2010) (denying disqualification motion based on judge's alleged political affiliation); *TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1079 (D. Colo. 1991) (denying recusal motion based on attenuated family ties and observing "[w]hen a judge presides in an area where he and his family have lived for one or more generations, the number of people who have, directly or indirectly, helped family members, relatives, close friends, and friends of friends would form a large and indeterminate community"). Such an "appearance of bias" standard then completely erodes the confidence we place in our public officials to impartially make decisions as well as the importance of finality to decisions they make. *See Tripodi v. United States*, 2021 WL 2283797, at *2 (D. Ariz. May 14, 2021) ("It is vital to the integrity of the judicial system that a judge not recuse themself on unsupported, irrational or highly tenuous speculation."). Indeed, as here, final decisions could be litigated for years to sus out whether anything improper

occurred during the proceedings, no matter how conclusory the allegations. *See Taylor v. Fresh Fields Mtks., Inc.*, 1996 WL 403787, at *2 (W.D. Va. June 27, 1996) (chastising plaintiff's "dilatory tactic[]" of making conclusory bias allegations to "deliberately frustrat[e] the court's efforts to deal with [the] case").

In this age of social networks and seamless connectivity, moreover, relationships among civil servants and those they serve are not only common, they are "desirable." *Murphy*, 768 F.2d at 1537. For example, "[s]ocial as well as official communications among judges and lawyers may improve the quality of legal decisions." *Id.*; *Clayton v. Sklodowski*, 1987 WL 11834, at *1 (N.D. Ill. May 29, 1987) ("By the very nature of the legal profession, a judge establishes relationships with many lawyers and other members of the judiciary."). The same is true for regulators, where social relationships and memberships in professional organizations "help [them] provide input" regarding the State's interests in a regulated industry and "keep pace with industry changes." Exhibit A ¶ 6. Indeed, regulators and quasi-judicial officials are often comprised of industry insiders who are preferred for their better understanding of a "trade's norms of doing business

and the consequences of proposed lines of decision." *Hardy*, 2016 WL 7325152, at *4. The public is thus unquestionably served by having well-qualified, accessible, and reputable public servants. Yet many of these people would hesitate to answer the call of public service if they knew that it meant any conclusory allegation of bias permits a limitless probe into their private affairs.

The practical implications of the circuit court's rule accentuate the public harm. Like Huebsch, "ninety-five percent of American adults have a cell phone, with nearly three quarters of adults with smartphones being within five feet of their phones most of the time." *United States v. Serrano*, 2017 WL 3055244, at *2 (S.D.N.Y. July 18, 2017) (cleaned up). Considering this reality, imagine a judge congratulating a former law clerk's new job or the birth of a child by way of a phone text. Or even weekly texts, over a period of years, about family life or sports news. No one would reasonably expect that judge to surrender full control over her phone for a bias investigation if her clerk's law firm had a case pending before her. *See*, *e.g.*, *Olmstead v. CCA of Tennessee, LLC*, 2008 WL 5216018, at *1 (S.D. Ind. Dec. 11, 2008) ("A lifetime of disqualification" for cases involving former clerks is

"unwarranted"); *Clayton*, 1987 WL 11834, at *1 (a "professional acquaintanceship" does not warrant recusal for bias concerning a party). Or imagine a judge preparing for a career off the bench. No one would reasonably expect a judge to surrender her cell phone for a search of every communication with a prospective employer law firm because the judge, months prior, issued a favorable decision on behalf of that law firm's client. Yet all these ordinary practices are now considered constitutionally intolerable for raising serious risk of "bias" under the circuit court's ruling. A stay is therefore necessary to prevent the ruling's chilling effect on public officials' reasonable and "desirable" communications.

c. *Harm to nonmoving party*. Whatever possible harms that DALC and WWF will conjure from a stay pending this this appeal pale in comparison to the irreparable harms to Huebsch and the public. No one disputes the importance of unbiased decisionmakers in a free society, including means to prevent and inspect potentially partial adjudications. But even if that interest was implicated here—and it is not—Huebsch has acknowledged his intent to preserve all communications at issue in this case.

Exhibits H; Exhibit L ¶ 4. So there is simply no reason to compel discovery before the pure legal issues are resolved by this Court.

d. *Status quo.* Finally, a stay pending appeal here will plainly preserve the status quo, by freezing the process whereby DALC and WWF burden Huebsch with burdensome discovery, allowing the appellate courts to rule, in due course, whether that course is justified before the question is mooted.[18]

CONCLUSION

This Court should grant an administrative stay and an emergency stay pending appeal (whether that appeal proceeds as of right or by permission) and, alternatively, a supervisory writ if necessary.

[18] For the same reasons, Huebsch shows that he satisfies the "grave hardship or irreparable harm" requirement for a supervisory writ. *See DNR*, 380 Wis. at 909. Huebsch has therefore satisfied all requirements necessary for a supervisory writ. *See supra* nn.6, 7.

Dated: July 31, 2021

Respectfully submitted,

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