**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

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| SHIRLEY S. ABRAHAMSON, JOSEPH P. HEIM, DAVID PERKINS, JOHN V. LIEN, MARILYN WITTRY, and HILDE ADLER<br><br>Plaintiffs,<br><br>vs.<br><br>SCOTT NEITZEL, in his official capacity as Secretary of the Wisconsin Department of Administration; WISCONSIN DEPARTMENT OF ADMINISTRATION; JUSTICES ANN WALSH BRADLEY, N. PATRICK CROOKS, MICHAEL J. GABELMAN, DAVID T. PROSSER, JR., PATIENCE D. ROGGENSACK, and ANNETTE KINGSLAND ZIEGLER, each in their official capacity as a justice of the Wisconsin Supreme Court; PAM RADLOFF, in her official capacity as Deputy Director of Management Services, Wisconsin State Courts; MARGARET BRADY, in her official capacity as human resources officer for the Wisconsin State Courts; DOUG LA FOLLETTE, in his official capacity as Secretary of State of the State of Wisconsin; and MATT ADAMCZYK, in his official capacity as State Treasurer of Wisconsin,<br><br>Defendants. | Case No. 15-cv-211 |

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW**

COME NOW Plaintiffs, by and through Counsel, and move this Court pursuant to Federal Rule Civil Procedure 65(b) to issue a Temporary Restraining Order and/or Preliminary Injunction restraining and enjoining Defendants and all persons acting at Defendants' direction from enforcing or implementing the new amendments to article VII, section 4(2) of the Wisconsin Constitution. In support of this motion, Plaintiffs rely upon the incorporated memorandum of

points and authorities. A proposed order is attached. Counsel will make himself available should the Court deem oral argument is necessary.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Introduction

On April 7, 2015, Wisconsin voters approved a constitutional amendment changing the 126-year-old method for selecting the Chief Justice of the Wisconsin Supreme Court. Certification of that result by the Wisconsin Board of Elections is imminent. As a result, article VII, section 4(2) of the Wisconsin Constitution was changed by striking its first sentence, which for the past 126 years conferred the title, emoluments, and responsibilities of Chief Justice on the member of the Court with the longest continuous service,[1] and replacing that sentence with a provision for election of the Chief Justice for a "term of 2 years by a majority of justices then serving."[2] Verified Compl., Exhibit A.

Then-Governor Patrick Lucey appointed Plaintiff Shirley S. Abrahamson a justice on the Wisconsin Supreme Court in 1976. She won election as a justice in 1979 and 1989, earning ten-year terms of office in each of those elections. By operation of article VII, section 4(2) as it then stood, and as the member of the court with the longest continuous tenure as a justice on the Supreme Court, Abrahamson became chief justice on August 1, 1996. Abrahamson was subsequently reelected as chief justice by popular vote in 1999, maintaining her in that office until July 31, 2009. On April 7, 2009, Chief Justice Abrahamson again stood for reelection. Her

[1] Article VII, section 4(2), of the Wisconsin Constitution provided: "The justice having been longest a continuous member of said court, or in case 2 or more such justices shall have served for the same length of time, the justice whose term first expires, shall be the chief justice."

[2] The new language of article VII, section 4(2) reads: "The chief justice of the supreme court shall be elected for a term of 2 years by a majority of the justices then serving on the court."

campaign committee was called "Chief Justice Shirley Abrahamson Reelection Committee." Verified Compl., Exhibit C. Her campaign advertising featured the tagline, "Wisconsin's Chief." *Id*. She campaigned extensively and expended substantial resources for reelection on the theme of the administrative work she had done as chief justice and continuity in the chief justice position. Abrahamson won 59.6 percent of the vote in the 2009 election and earned a new ten-year term, which will end on July 31, 2019.

Plaintiffs Joseph P. Heim, David Perkins, John V. Lien, Marilyn Wittry, and Hilde Adler (collectively, "Plaintiff Voters") were supporters of the 2009 reelection of Chief Justice Abrahamson and, as registered Wisconsin voters, voted to reelect Chief Justice Abrahamson, as did Chief Justice Abrahamson herself. Ms. Adler additionally served as treasurer for the Chief Justice Shirley Abrahamson Reelection Committee. Under the terms of the election, Plaintiff Voters reasonably expected that electoral success meant that, absent disability or misconduct warranting removal, Chief Justice Abrahamson would continue to serve as chief justice until her term ended on July 31, 2019.

By its explicit terms, the newly amended article VII, section 4(2) provides no guidance as to its temporal reach; specifically, whether it operates to shorten Chief Justice Abrahamson's tenure as chief justice or whether its first implementation will occur on the occasion of the first vacancy for chief justice, such as when Chief Justice Abrahamson completes her current term. Because the uncertainty about its applicability to her and the implications for the federal constitutional rights of all plaintiffs here, this action seeks a declaration of their rights with respect to article VII, section 4(2) as amended. Specifically, Plaintiffs request that this Court declare that the amendment may only apply prospectively once a vacancy in the office of chief justice occurs, either at the end of Chief Justice Abrahamson's current term or earlier if she leaves office because

of disability, resignation, or removal, and issue an order enjoining implementation of the amendment except and until those circumstances involving such a vacancy occur. Such a declaration would resolve an actual controversy between the parties and serve the useful purpose of vindicating electoral rights of candidates and voters and assuring continued stable leadership of the Wisconsin Courts.

**II. Injunctive Relief Is Warranted.**

A well-established threshold test governs eligibility for preliminary injunctive relief. The movant must demonstrate: (1) "some likelihood of succeeding on the merits," and (2) the plaintiff has "no adequate remedy at law" and will suffer "irreparable harm" if preliminary relief is denied. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992).

If those threshold inquiries are met, a "court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Id*. The same test applies to applications for the issuance of temporary restraining orders, the "core difference" between the two being a TRO may be issued "'before the adverse party can be heard in opposition.'" *Winnig v. Sellen*, 731 F. Supp. 2d 855, 856 (W.D. Wis. 2010) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) and Fed. R. Civ. P. 65(b)(1)(A)). This action fully qualifies for injunctive relief.

**A. There is a likelihood of success that statutory construction canons and federal constitutional requirements hold that article VI, section 4(2) does not apply until a naturally occurring vacancy exists in the office of chief justice.**

*1. Without explicit text instructing otherwise, article VI, section 4(2) must be construed to apply prospectively.*

On its face, article VII, section 4(2) contains no language to indicate that it should apply retroactively. The amendment replaced the first sentence of article VII, section 2, which for 126 years made the selection a matter of seniority, with a sentence indicating the chief justice shall be selected by an election for a "term of 2 years by [the vote of] a majority of justices then serving." Nothing in that language indicates when the new selection method shall go into effect. Moreover, the official explanation of the amendment provided to the voters offers no basis to believe that the amendment affects the tenure of Chief Justice Abrahamson. It informed voters that

> A **"yes"** vote on this question would mean that the chief justice shall be elected for a term of two years by a majority of the justices then serving on the Wisconsin Supreme Court. The justice who is elected may decline to serve as chief justice or resign the position, but still continue to serve as a justice of the Wisconsin Supreme Court.

Referendum on Election of Chief Justice, Verified Compl., Exhibit B (bold in original). Moreover, proponents of the constitutional amendment repeatedly told opponents that the amendment was not aimed at Chief Justice Abrahamson but at a longer-term approach to selecting the chief justice. *See, e.g.*, Jason Stein, "Assembly Approves Amendment on Chief Justice Selection," *Milwaukee Journal-Sentinel*, Jan. 22, 2015, *available at* http://www.jsonline.com/news/statepolitics/assembly-to-take-up-chief-justice-selection-upskirting-bill-b99430054z1-289443541.html (last visited Apr. 7, 2015) (reporting that Rep. Rob Hutton of Brookfield, the amendment's lead sponsor, said the proposal was about the court as an institution, not Abrahamson.); Jason Stein, "Constitutional Amendment Would Let Court Select Chief Justice," *Milwaukee Journal-Sentinel*, Oct. 29, 2013, *available at* http://www.jsonline.com/news/statepolitics/constitutional-

amendment-would-let-court-select-chief-justice-b99130796z1-229741271.html (last visited Apr. 7, 2015) (reporting Hutton "denied that his amendment to the state constitution was a tactic to marginalize Abrahamson").

The views of voters, based on what they were told as they go to the polls, constitutes an important factor in the "proper interpretation of a constitutional amendment."[3] *Appling v. Walker*, 853 N.W.2d 888, 907 (Wis. 2014) (holding that voters had a right to rely on what they were told by proponents, including the framers of the Amendment, that the constitutional amendment barring same-sex marriage did not prohibit a domestic partnership law extending certain benefits to same-sex couples).

Moreover, longstanding precedent establishes that "a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952). *See also Reynolds v. McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829) ("It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable.").

Uniform application of this holding establishes that "[a]s a general rule, legislative enactments, including constitutional amendments, apply only prospectively." *Nelson v. Ada*, 878 F.2d 277, 280 (9th Cir. 1989).[4] Federal district courts have unvaryingly applied this principle to

[3] After all, "[v]oters do not have the same access to the 'words' of a provision as the legislators who framed those words; and most voters are not familiar with the debates in the legislature. As a result, voters necessarily consider second-hand explanations and discussion at the time of ratification." *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 447 (Wis. 2006), *quoted in Appling*, 853 N.W.2d at 897.

[4] This rule is distinguishable from pending litigation, where the legislature changes the underlying law at issue. In those circumstances, "a court is to apply the law in effect at the time it

the construction of state constitutions. *See, e.g.*, *Richardson v. F.B.I.*, 124 F. Supp. 2d 429, 431 (W.D. La. 2000), *aff'd*, 264 F.3d 1141 (5th Cir. 2001) (Louisiana constitutional provision restoring civil rights of former criminal prisoners does not apply retroactively); *St. Louis & S.F. R. Co. v. Cross*, 171 F. 480, 494 (C.C.W.D. Okla. 1909), *aff'd sub nom.*, *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S. 318 (1914) (holding article 9, section 8 of the Oklahoma Constitution, limiting rights of foreign corporations to eminent domain until incorporated in the state does not apply retroactively). *See also Sears v. City of Akron*, 246 U.S. 242, 252 (1918) (ordinance approved two months before constitutional amendment but not acted upon cannot be retroactively negated by new constitution); *Cerda v. 2004-EQR1 L.L.C.*, 612 F.3d 781, 787 (5th Cir. 2010) (Texas homestead amendment not retroactive). *Cf. Dairyland Greyhound Park*, 719 N.W.2d at 422 (citing *Kayden Industries, Inc. v. Murphy*, 150 N.W.2d 447, 453 (Wis. 1967) ("constitutional amendments that deal with the substantive law of the State are presumed to be prospective in effect unless there is an express indication to the contrary")); *Shupe v. Wasatch Elec. Co.*, 546 P.2d 896, 898 (Utah 1976) ("Constitutions, as well as statutes, should operate prospectively only unless the words employed show a clear intention that they should have a retrospective effect.").

The fact is that a "'court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties.'" *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *1204-05 (D. Utah May 19, 2014) (quoting *Thomas v. Color Country Mgmt.*, 84 P.3d 1201, 1210 (Utah 2004) (Durham, C.J., concurring)). That is because "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

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renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). *Bradley*, which concerned a procedural rule, did not "displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994).

Thus, where "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280.

In *Vartelas v. Holder*, --- U.S. ----, 132 S. Ct. 1479 (2012), the U.S. Supreme Court was confronted with a congressional enactment that—like the amendment at issue here—was silent about its retroactive effect. A 1996 immigration statute imposed removal hearings on lawful permanent alien residents who depart from the United States and seek reentry when the resident had committed certain criminal acts. The plaintiff in this case challenged the application of the 1996 law to him because his offense took place in 1994, before the enactment, and because under the prior law, he had been permitted to travel to his native Greece and return without being subjected to removal proceedings.

The Court agreed, "[g]uided by the deeply rooted presumption against retroactive legislation." *Id*. at 1484. That principle "embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. In fact, our law continues to adhere to the concern, first expressed by Justice Story, that a law cannot be given retroactive application when it would "tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past." *Vartelas*, 132 S. Ct. at 1486-87 (quoting with approval, *Soc'y for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (D.N.H. 1814) (Story, J.) (edits in original). Thus, the rule against retroactivity is designed to "give[] people confidence about the legal consequences of their

actions." *Landgraf*, 511 U.S. at 266. The Court added, "a requirement that [the legislature] first make its intention clear helps ensure that [the legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id*. at 268.

In *Landgraf*, the Court described a retroactive law as one that

> attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. . . . retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

*Id*. at 270 (citation omitted). It added to determine whether a law is retroactive, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id*. at 269-70. *See also Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'") (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)); *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); *Jeudy v. Holder*, 768 F.3d 595, 599 (7th Cir. 2014).

Thus, the "presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270. *See, e.g., United States v. Heth*, 3 U.S. (Cranch) 399, 413 (1806) (Paterson, J.) (refusing retroactive application of a federal law reducing the commissions of customs collectors for activity commenced before the statute's enactment because the statute lacked "clear, strong, and imperative" language requiring retroactive application).

State courts have adopted the same approach, including in cases affecting judicial terms of office. For example, in *Torvinen v. Rollins*, 560 P.2d 915, 916 (Nev. 1977), a 1976 constitutional amendment, approved by voters, enlarged the term of office for district court judges from four to six years. Because it lacked terms that clearly made it retrospective, the Nevada Supreme Court gave it only prospective application. Explaining that holding more recently, the court said, "Because the amendment in *Torvinen* altered the term of the affected office, it could only be properly prospectively applied to elections following the amendment's adoption." *Miller v. Burk*, 188 P.3d 1112, 1122 (Nev. 2008). The *Miller* Court went on to say, the amendment in *Torvinen* otherwise "changed the term of the office to which a candidate was elected." *Id*. To apply it to an election occurring before it went into effect "would fundamentally alter the office to which the judge had been elected, and consequently, the elected judge's vested rights and the public's settled expectations—the judge had been elected to a four-year term but would nonetheless serve a six-year term." *Id*. The Court refused to permit the amendment to add an additional two years to the judge's term.

In Louisiana, the issue came up when an individual was elected a justice of the Supreme Court in November 1974, the same day that voters approved a constitutional amendment that reduced the term of a justice from 14 to ten years. The newly elected justice brought a declaratory judgment action, seeking a ruling that the 1921 Constitution's 14-year term applied to his office. The effective date of the new constitution with its provision for a shorter term of office and the commencement of the justice's new term of office coincided. Nevertheless, the Louisiana Supreme Court held that "[w]hen the election establishing the term is held, the constitution in effect at that time controls the length of the term," because elsewhere in the new constitution the framers had placed a general anti-retroactivity provision and because "certainty on the date of the expression

of the popular will is an essential element in the maintaining of the legitimacy of popular elections in a democratic society." *Calogero v. State ex rel. Treen*, 445 So. 2d 736, 738 (La. 1984).

Venerable precedent in other states adhere to the same approach. *See Gratopp v. Van Eps*, 71 N.W. 1080, 1081 (Mich. 1897) ("constitutional officers whose terms are fixed by that instrument cannot be legislated out of office by such reorganization or amendment. . . . having been elected for a full term, the act of reincorporation of the city did not operate to legislate him out of office."); *State ex rel. Orr v. Leonard*, 7 S.W. 453, 455 (Tenn. 1888) (holding judge elected to constitutional term of eight years cannot be constitutionally deprived "of the office by devolving its powers and duties upon another").

Wisconsin has taken a similar stance. In anticipation of legislation reallocating duties of the coroner to a new office of medical examiner, Milwaukee County attempted to lower the coroner's salary in line with his reduced duties from $5,000 annually to $50 per month. The Wisconsin Supreme Court held that, because the state Constitution and statutes provided for the coroner's election for a specific term of office, and because another such "an election was bound to occur if the orderly processes of government were to continue," the fixed salary of $5,000 per year "would continue at that figure for the term for which he was duly elected." *Schultz v. Milwaukee Cnty.*, 26 N.W.2d 260, 262 (Wis. 1947). It further held that the statutes existing at the time of the plaintiff-coroner's election "furnished the authoritative rule fixing the terms governing the respondent's position and relation to the office." *Id.* at 262.

The Seventh Circuit recently described the retroactivity inquiry as a two-step process. First, a court must determine whether there is a clear expression of intent for retroactive application. Then, it must determine "whether the statute would have an impermissible retroactive effect in the given case." *Jeudy*, 768 F.3d at 600.

Here, there is no text indicating retroactive application. Nothing in the language of the amendment, or even its explanation to voters, indicates that it would affect the incumbent chief justice during her current term of office or abridge the results of the 2009 election. Moreover, the language retained in section 4(2), that the "justice so designated as chief justice may, irrevocably, decline to serve as chief justice or resign as chief justice," appears to support the idea that a serving chief justice continues in office until he or she resigns or completes the term of office. After all, when a legislating body leaves language undisturbed through a subsequent enactment, "courts presume that the new statute has the same effect as the older version." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001).

Thus, there is no mandate to apply the amendment in a manner that disrupts the present tenure of the current chief justice, and "[c]ourts must avoid retroactive application 'unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.'" *Jeudy*, 768 F.3d at 603 (quoting *Landgraf*, 511 U.S. at 272). *Jeudy* then directs courts to move to step two to determine whether the person affected by possible retroactive application will suffer "a new and serious consequence" as a result. *Id*. at 603-04. It is the effect that counts; "detrimental reliance is not required." *Id*. at 604. Even so, "the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively." *Vartelas*, 132 S. Ct. at 1491.

Here the second factor entirely favors Plaintiffs. The consequences of retroactive application of the amendment would upset the candidate and voters' settled expectations that reelection of Plaintiff Abrahamson meant her service as chief justice until July 31, 2019, would change the office that Chief Justice Abrahamson occupies and adversely affect her salary, and subject her to another election for an office she already lawfully holds. If reelection did not mean

retention of the office of chief justice, Chief Justice Abrahamson would not have undertaken the rigors and expense of a contested statewide race. Verified Compl. ¶ 42. Moreover, she campaigned as Chief Justice and her role as Chief Justice. *Id*. *See also* Verified Compl., Exhibit C. Here, there can be no doubt that retroactive application would constitute a "new and serious consequence" and have an adverse effect on her prerogatives as chief justice. Moreover, her case is strengthened, as *Vartelas* establishes, by the evident reliance she and her political supporters had in seeking reelection as chief justice.

Finally, as more fully described below, because retroactive application of the new constitutional amendment raises profound and serious issues of due process and equal protection, the doctrine of constitutional avoidance impels an interpretation that avoids deciding that constitutional inquiry. *See Harris v. United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (where a statute "susceptible of two constructions, by one of which grave and doubtful constitutional questions arise" and by the other of which such questions are avoided, there is a "duty is to adopt the latter.")). Thus, the canons of interpretation applicable to statutes and constitutional provisions alike, as well as the weight of precedent and the doctrine of constitutional avoidance, support a construction of the new article VII, section 4(2) that applies only prospectively at the occasion of a naturally occurring vacancy in the office of chief justice.

*2. Retroactive application of the amendment violates federal Due Process rights of the incumbent.*

The Due Process Clause of the Fourteenth Amendment erects a bulwark to protect individuals against arbitrary governmental action. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Its reach extends to "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," which is usually described as substantive due process. *Cnty.*

*of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Thus, it is said that "due process bars . . . enactments that shock the sense of fair play." *Galvan v. Press*, 347 U.S. 522, 530 (1954). As the epitome of arbitrary deprivations, retroactive laws can "sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 266. Thus, "applying a new law retroactively to conduct completed before its enactment may violate due process if it 'impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed.'" *Lara-Ruiz v. I.N.S.*, 241 F.3d 934, 943 (7th Cir. 2001) (quoting *Landgraf*, 511 U.S. at 280).

To constitute a deprivation of due process, there must be state action which deprives a person of life, liberty, or property without "rational basis—that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'" *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008) (quoting *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974) (Stevens, J.)). Eligible "property interests are created and defined by an independent source, such as a contract or state law." *Id.* The state law can take any form. For example, a "village ordinance, like a state statute or constitutional provision, may create a protectable property interest in employment." *Domiano v. River Grove*, 904 F.2d 1142, 1148 (7th Cir. 1990) (holding a city fire chief had a property interest in his employment by virtue of a particular municipal ordinance). For that reason, public employees have a property right in continued employment and cannot be deprived of that protected right by the state without due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). The due-process right of public employees covers elected public officials as well. *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979); *Brown v. Perkins*, 706 F. Supp. 633, 634 (N.D. Ill. 1989) (citing *Crowe* and *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971)).

Here, the Wisconsin Constitution, as in effect at the beginning of her 2009 term, gave Chief Justice Abrahamson a protectable and vested property interest in her employment in that office. It provided her with a definite term of office to which she had a cognizable constitutionally protected interest. *See Wolf v. City of Fitchburg*, 870 F.2d 1327, 1331 (7th Cir. 1989). *See also State ex rel. DeLuca v. Common Council*, 242 N.W.2d 689, 693 (Wis. 1976) (employment conferred by Wisconsin law constitutes a property interest "protected by the due-process provisions of both the state and federal constitutions."). The Constitution provided that the longest continuously serving member of the Wisconsin Supreme Court holds office as Chief Justice. Wis. Const. art. VII, § 4(2) (pre-2015 amendment). It further directs that justices are "elected for 10-year terms of office." *Id.* at § 4(1). Upon her reelection in 2009, Chief Justice Abrahamson plainly had a legitimate expectation that she would serve as chief justice for a 10-year-term, just as she expected and experienced after her 1999 reelection. Even if that were not enough, an interest in the enhanced salary that the chief justice receives over that paid to other justices, Verified Compl. ¶¶ 45, 48, provides an additional constitutionally protected interest. After all, a salary, even that of a public official, constitutes a property interest protected by the Due Process Clause. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-42 (1969); *Eguia v. Tompkins*, 756 F.2d 1130, 1138 (5th Cir. 1985).

That the new constitutional amendment reflects the result of a popular vote is of no moment. Voters were not informed of the consequences of their support for the new amendment on their vote in 2009 to reelect Chief Justice Abrahamson. Moreover, our due process rights, the "right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). It is also of no moment that the amendment, in its application prospectively, has a

rational basis. As a matter of due process, "a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Landgraf*, 511 U.S. at 266 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). Whatever rationality may justify the prospective change in enabling members of the court to choose their own leader every two years, there is no imperative that justifies changing that leadership at this time. The temporary continuation of the method of selection utilized in Wisconsin for the past 126 years, to the end of Chief Justice Abrahamson's current term, creates no crisis for the courts and impairs no settled expectations. Instead, it may fairly be characterized as arbitrary. As the Tennessee Supreme Court recognized in *Leonard*, taking an office with a constitutionally defined term and "devolving these intact upon another," only threatens judicial independence, encourages interference and control of the judicial branch by political elements, and invites "constant and frequent experimenting with court systems." 7 S.W. at 454-55. Prospective application of the amendment is the only way to avoid these evils.

*3. Retroactive application of the amendment violates federal Due Process and Equal Protection rights of the voters and the candidate.*

Retroactive application of the amendment also implicates the protected liberty interests of Plaintiff Voters, as well as the candidate.[5] The right to vote "is of the most fundamental significance under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). In fact, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is a right that includes "the right to participate in an

[5] The Wisconsin Supreme Court has recognized that "the right to run for public office is a constitutionally protected liberty interest." *Wagner v. Milwaukee Cnty. Election Comm'n*, 666 N.W.2d 816, 848 (Wis. 2003).

electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). All "[o]ther rights, even the most basic are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17.

Thus, "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). That right includes a right of voters "to have their votes counted," which is "as open to protection . . . as the right to put a ballot in a box." *Id*. (quotation marks and citation omitted). This "right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Id*. at 555 (citations omitted). Because impairment of the right to vote "strike[s] at the heart of representative government," it is axiomatic that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (footnote omitted).

A Section 1983 case involving debasement and dilution of the vote in violation of equal protection exists "only when there is '*willful* conduct which undermines the organic processes by which candidates are elected.'" *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271-72 (7th Cir. 1986) (quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)) (emphasis in *Bodine*). Willful conduct means acts "with the intent of undermining the electoral process or impairing a citizen's right to vote." *Kozuszek v. Brewer*, 546 F.3d 485, 488 (7th Cir. 2008). If new article VII, section 4(2) is intended to operate retroactively by virtue of some inexplicit legislative intent, then there can be no doubt that the constitutional amendment evidences willful conduct, as opposed to unintentional conduct. It plainly undermines the vote of the electorate, including Plaintiff Voters, by giving their cast ballots an import and effect that is less than it had when cast.

When the results and consequences of an election are changed well after the results have been certified and no doubt was raised about the election's validity, the integrity of our democratic system is impaired. Voters properly have an "expectation that when they elect a judge or justice, he or she will serve the term constitutionally set—the term for which elected." *Wagner v. Milwaukee Cnty. Election Comm'n*, 666 N.W.2d at 848. The act of changing the result and meaning of that vote, as was said in the context of obstacles placed in the establishment of a new political party,

> place[s] burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

*Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Evaluation of burdens on the right to vote occurs under the standards set in *Anderson* and were concisely described in *Burdick v. Takushi*, 504 U.S 428 (1992):

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

*Id.* at 434 (quoting *Anderson*, 460 U.S. at 789). Because the fundamental nature of the right to vote, when these rights are "subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* at 434 (citation omitted).

Here, the amendment, if applied retrospectively, changes the consequences of an election. Reelection to a ten-year term as chief justice, some six years later, becomes reelection to a six-year term as chief justice. No more severe, post-hoc restriction could be imagined, as the consequence of the change is to oust the elected chief justice from the fixed term of office

immediately. Plainly, such an action dilutes and debases votes already cast by Plaintiff Voters. However, if *Burdick*'s narrow drawing requirement is observed, the impairment of the Plaintiff Voters and Chief Justice Abrahamson's liberty rights can be entirely avoided by prospective application of the new amendment.

*4. Retroactive application of the amendment violates federal Equal Protection rights of Chief Justice Abrahamson and the Plaintiff Voters.*

Because retrospective application of the new amendment plainly burdens the fundamental voting rights of the Plaintiff Voters by giving the ballots they cast in 2009 a lesser, severely restricted meaning than they had when cast, the voters are being treated differently than similarly situated voters in prior elections when the reelection candidate was chief justice. By the same token, Chief Justice Abrahamson is also accorded different and disparate treatment as compared to her predecessors as chief justice, all of whom, including herself after her 1999 reelection, were eligible to serve terms of ten years as chief justice following reelection.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Equal-protection analysis "requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). One such fundamental right warranting strict scrutiny is the right to vote. *Id.* at 312 n.3 (citing *Bullock*, 405 U.S. 134). Strict scrutiny also requires that laws employ "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, --- U.S. ----, 134 S. Ct. 2518, 2530 (2014).

There is no compelling governmental interest that can be imagined to support a post-hoc revision of the consequences of this election. There is no pressing public necessity to change the

selection process for chief justice today, as opposed to July 31, 2019, when the office is due next to be vacant. Even if Chief Justice Abrahamson runs again then, both she and the voters are on notice before a ballot is cast, that a new means of electing a chief justice will now prevail and that their votes would have a different import than it had in 2009. Moreover, the second part of the strict-scrutiny test requires that the new amendment employ the "least restrict means." This means that the law, or its application, must utilize the available means that least impinges on constitutionally protected rights. *See Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Even where compelling state interests exist, failure to employ a narrowly tailored solution dooms the law. *Id*. at 131.

Here, the rationale that supports the new amendment, while less than compelling, fails to employ the least restrictive means, if the amendment is to apply to the vested interest that the Plaintiff Voters and Chief Justice Abrahamson have in the results of the 2009 election. As the North Carolina Supreme Court observed, there is a "serious consequence" to depriving the people who elected a judge—in this case, a chief justice—of those services for the remainder of the elected term. *In re Hayes*, 584 S.E.2d 260, 266 (N.C. 2002).

The least restrictive means here, the means that least burdens the rights of candidate and voters in the 2009 election, plainly is prospective application. Any other approach cannot be rationally, let alone compellingly, justified and cannot constitute the least restrictive means.

**B. Plaintiffs will suffer irreparable harm without injunctive relief and no other remedy is available.**

If given retroactive application, Chief Justice Abrahamson's current term will end prematurely, and she will be deprived of the honor, authority, and emoluments of the office for the remainder of her elected term. These constitute irreparable harms, as no compensation can remedy her loss and reinstating her at a later time if another has taken the office of chief justice, would be

disruptive of the operation of the Wisconsin Supreme Court and its lower courts, which she oversees as administrative head of the judicial system, Wis. Const. art. VII, § 4(3), and which includes a variety of judicial programs she has championed, for example, those that establish guardians for elderly and vulnerable populations. Moreover, later reinstatement ought to be a disfavored remedy because it would sow dissension on a court that has just selected its own new leader. Unfortunately, her current office, once lost, cannot be recovered.

Even if Chief Justice Abrahamson were to prevail in the newly mandated election before her fellow justices, the harm to her and to Plaintiff Voters would continue. Her campaign and their votes would still be diluted and debased because the results of that valid election would be set aside in favor of an election by a wholly different constituency. In addition, the new election would be for a term of two years, half of the time remaining on Chief Justice Abrahamson's current term. Injunctive relief is necessary to preserve the current status quo. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974) (recognizing *ex parte* temporary restraining orders are sometimes necessary to preserve the status quo and prevent irreparable harm until there is an opportunity to hold a hearing). No governmental body and no administrative mechanism exists to provide an alternative remedy.

**C. The harm to plaintiffs exceeds harm to defendants.**

The delay in implementing article VII, section 4(2), while avoiding irreparable harm to the Plaintiffs, causes no conceivable harm to Defendants. Before ratification of the new constitutional amendment, no Defendant had any right or expectation that the Wisconsin Chief Justice would be selected by any other means than by seniority or that anyone else might serve in that post other than Chief Justice Abrahamson through July 31, 2019.

Injunctive relief at this time will merely preserve the status quo. It impairs no rights of and creates no injury to any defendant by delaying implementation of the new amendment. Thus, the

harm to Plaintiffs does not merely exceed any harm to Defendants, which would be speculative at best, but outweighs any harm by a substantial margin.

**D. Issuance of an injunction would serve the public interest.**

The rights of Plaintiffs in assuring that their votes are counted and given the status and meaning they had when cast, is of fundamental significance, *Illinois Board of Elections*, 440 U.S. at 184, is preservative of all other rights, *Wesberry*, 376 U.S. at 17, and lies at the heart of representative government. *Reynolds*, 377 U.S. at 555. Injunctive relief would undoubtedly serve the public interest for these reasons alone.

Yet, there are additional reasons the public interest would be served by injunctive relief. Maintaining the status quo assures that the amendment is not interposed to harm judicial independence by removing the leader of the courts because political winds might be blowing in a different direction in the other branches of government. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 804 (2002). *See also Leonard*, 7 S.W. at 454-55. Moreover, it will assure a more orderly transition between chief justices, whether it comes sooner or later, by assuring that it is accomplished in accordance with the rule of law.

**CONCLUSION**

For the foregoing reasons, Plaintiffs pray for a temporary restraining order and/or preliminary injunction restraining and enjoining Defendants and all persons acting at Defendants' direction from enforcing or implementing the new amendments to article VII, section 4(2) of the Wisconsin Constitution. In addition, Plaintiffs ask this Court to set a briefing schedule and hearing for further injunctive relief.

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Respectfully submitted,

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