

**In The
Supreme Court of the United States**

DEBRA K. SANDS,

Petitioner,

v.

JOHN R. MENARD, JR., MENARD THOROUGHBREDS,
INC., MENARD, INC., WEBSTER HART AS TRUSTEE
OF THE JOHN R. MENARD, JR. 2002 TRUST AND
RELATED TRUSTS, ANGELA L. BOWE AS TRUSTEE
OF THE JOHN R. MENARD, JR. 2002 TRUST AND
RELATED TRUSTS AND ALPHONS PITTLERLE AS
TRUSTEE OF THE JOHN R. MENARD, JR.
2002 TRUST AND RELATED TRUSTS,

Respondents.

**On Petition For Writ Of Certiorari
To The Wisconsin Supreme Court**

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether Debra Sands (“Sands”) has presented compelling reasons to grant her petition on the basis that the Wisconsin Supreme Court violated her Fourteenth Amendment right to be heard, where the court simply affirmed an order granting summary judgment on a state common law claim on a ground different from that of the court of appeals, but one that the parties raised, argued, and briefed extensively below.

2. Whether Sands has presented compelling reasons to grant her petition based on her contention that all five Wisconsin Supreme Court justices in the majority were biased in violation of the Due Process Clause, even though Sands never made a motion to recuse any of them or otherwise raised the issue below, and nothing in the record supports her contention.

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns any percentage of the stock of either Menard, Inc. or Menard Thoroughbreds, Inc.

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INTRODUCTION

Sands presents no compelling reasons for this Court to grant her petition. *See* Sup. Ct. R. 10. This case did not decide an important federal question that this Court should resolve or that is in conflict with other courts. Rather, the Wisconsin Supreme Court simply decided an issue of state common law based on settled jurisprudence and procedures, which Sands simply refuses to accept as the last word on the matter.

Sands brought this action for, among other things, unjust enrichment, alleging that she, a lawyer, had a joint enterprise with John Menard (“Menard”) by which he promised her ownership interests in his established companies as compensation for her legal and business services. Following extensive discovery, Respondents moved for partial summary judgment on three independent grounds: (1) Wisconsin Supreme Court Rule 20:1.8(a) (“Rule 1.8(a)”)¹ barred Sands from

¹ At all relevant times, this rule – which the Wisconsin Supreme Court adopted to prevent overreaching by lawyers – provided that:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to

recovering ownership interests in her client's business, or the equivalent in damages, absent written consent by Menard, (2) Sands did not have a joint enterprise with John Menard under *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 305 (1987),² and (3) Sands could not prove the amount by which the Menard companies supposedly increased in value because of her alleged services.

The circuit court granted summary judgment on the first ground, that Rule 1.8(a) barred Sands' claim, and the court of appeals affirmed. The Wisconsin Supreme Court affirmed summary judgment, but on the other grounds raised in Respondents' motion for partial summary judgment. It concluded that while Rule

seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

SCR 20:1.8(a) (1998).

² In *Watts*, the Wisconsin Supreme Court held that that public policy did not preclude unmarried, former cohabitants from raising "claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both." *Watts*, 137 Wis. 2d 506 at 532-33. Under *Watts* and the cases that followed, "unjust enrichment by a former cohabitant is founded on the premise of a mutual undertaking or joint enterprise which results in the accumulation of assets in which the parties expected to share equally but which are unfairly retained by one party." *Sands v. Menard*, 2017 WI 110 ¶ 45, 379 Wis. 2d 1, 904 N.W.2d 789.

1.8(a) was not an absolute defense to her claim, Sands did not have a joint enterprise with Menard, based on her allegations and the undisputed facts. As a result, the Wisconsin Supreme Court found that Sands could not recover on her unjust enrichment theory under *Watts*.

Sands raises two challenges to this ruling, neither of which merit review. First, she contends that the Wisconsin Supreme Court ruled on an issue never raised below, supposedly violating her Fourteenth Amendment right to be heard. The record, however, demonstrates that the Wisconsin Supreme Court simply affirmed summary judgment on an alternative legal theory that the parties argued extensively below. Far from making a *sua sponte* ruling, the Wisconsin Supreme Court followed settled jurisprudence that permits an appellate court to affirm a decision on any ground that finds support in the record. The Wisconsin Supreme Court did not violate Sands' due process rights, because she had every opportunity and did respond to the legal theory upon which it based its decision.

Second, Sands contends that, under *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), all five justices of the Wisconsin Supreme Court who ruled against her should have been recused because of their supposed bias arising out of Respondents' claimed indirect campaign expenditures. This issue is not reviewable because Sands did not present it first to the state court. At no point in the underlying proceedings did Sands move for recusal of any of these justices, nor did

she otherwise raise the issue in her petition for review, briefs on the merits, oral argument or motion to reconsider. As a result, the Wisconsin Supreme Court did not make any ruling on this question and nothing in the record supports her claim of bias. Instead, Sands held in reserve her attack on the court's impartiality until after the court's adverse ruling and denial of her motion to reconsider, raising the issue for the first time in her petition to this Court. Although this alone is reason enough to deny her petition, the argument she constructs here, based solely on conjecture and speculation drawn from newspaper articles and other "sources" outside the record, is, in any event, insufficient to show a constitutional violation under *Caper-ton*.

For these reasons and those set forth below, the Court should deny the petition, which raises no legitimate constitutional issues, but simply vents Sands' unhappiness with the decision below and attacks the integrity of the court that issued it.



RESTATEMENT OF THE CASE

Sands' petition contains numerous misstatements of fact and omissions, which results in an inaccurate view of the case and proceedings, necessitating the following counterstatement.

A. Sands' and Menard's Personal and Professional Relationship

Menard is the oldest of eight children who grew up on a dairy farm outside of Eau Claire, Wisconsin. (R.293 at 773-774.) In 1958, at age 18, he began building pole barns to work his way through college at the University of Wisconsin – Eau Claire. (*Id.*) Sands was not yet born. (R.296 at 1760.) Two years later, in 1960, he opened his first retail store, known as Menards Cashway Lumber. (R.293 at 773-774.) Over the next 50 years that business, which became Menard, Inc. (“Menards”), steadily grew to over 260 stores in 13 states with over 40,000 employees. (R.292 at 357.)

As of 1998, Menards had expanded to approximately 138 stores with revenues of \$3.8 billion. (*Id.*) At about this time, nearly 40 years *after* starting his business, Menard met Sands, an attorney, who was then 37 years old. (R.217, ¶ 10; R.293 at 876.) She had graduated from law school in 1993, and was admitted to practice in Minnesota. (R.293 at 945; R.292 at 428.)

According to Sands, she began dating Menard in November 1997, moved into his home in August 1998, and became engaged to him in December 1998. (R.293 at 895; R.292 at 588; R.217 at ¶¶ 15-16.) Menard admits that he and Sands dated, that he loved her, that they were engaged to be married, and that they spent significant time together. He disputes, however, that they ever cohabited. (R.290 at 27-32.) Regardless, it is undisputed that the two had no children, never commingled their finances, never filed joint tax returns,

had no joint bank accounts, did not share living expenses, and did not jointly own any real or personal property. (R.293 at 869-873.) Their relationship ended no later than March 2006. (R.498 at 10-12.)³

Sands has judicially admitted in her complaint that “throughout” the eight-year period that she was engaged to Menard, she had an attorney-client relationship with Respondents through which she provided “substantial and extensive legal work”:

45. Throughout the eight-year period of Sands’ cohabitation and engagement with Menard, Menard also regularly and continuously exploited Sands’ legal training, expertise, and experience by requiring her to do substantial and extensive legal work for himself and his various business interests as described above.

(R.217 at ¶ 45.) Sands’ legal invoices, interrogatory responses, evidentiary admissions, legal memoranda, and correspondence all confirm her judicial admission. (R.46 at ¶¶ 51, 106; R.291 at 124-128, 286-290; R.292 at 588; R.293 at 779-793, 839-840; R.295 at 1604-1613, 1622-1623; R.296 at 1625-1627.)

³ Although Sands claims that her relationship with Menard ended following disputes between Menard and Sands’ sister that ultimately resulted in an arbitration (Pet. at 6 n. 4), Sands neglects to inform the Court that the arbitration award was subsequently vacated. *See* <https://wcca.wicourts.gov/caseDetail.html?caseNo=2007CV000991&countyNo=18&index=0> (docket entry reflecting “order vacating arbitration award and judgment (dismissing action).”)

Like most outside counsel, Sands invoiced her clients for her legal services at an agreed rate, in this case \$145 per hour (R.229 at ¶ 8; R.293.) Every invoice that Sands submitted to Menards identified her as “Debra K. Sands, Esq.” “Attorney-at-Law,” and included the following description: “Professional fees in respect of legal services in acting on your behalf in relation to the above referenced matter(s).” (R.292 at 362-583.) Sands was paid in excess of \$200,000 for these services and, at the time the attorney-client relationship ended in 2006, she submitted an additional 190 invoices for legal services, totaling in excess of \$1,000,000. (*Id.* at ¶ 4; *Id.* at 375-583.)

B. Sands’ Complaint

In November 2008, more than two years after Sands’ and Menard’s personal and professional relationship ended, she filed a complaint in the Circuit Court of Eau Claire County, Wisconsin. (R.46.) Sands alleged a number of claims, including unjust enrichment under *Watts*.

The centerpiece of all of Sands’ claims, regardless of theory, was her contention that she had provided legal and non-legal/business services to Respondents, throughout the eight-year period she was engaged to Menard, in reliance on his alleged “promise” to “compensate” her, not at an agreed hourly rate, but with an “ownership interest” in his companies:

13. Menard specifically promised Sands, as an inducement, that in exchange for her

commitment to assisting Menard and his business, ***Sands would receive as compensation therefor an ownership interest in the various Menard business ventures for which she provided assistance.*** Menard reiterated this promise on multiple occasions throughout his relationship with Sands.

(R.217 at ¶ 13, emphasis added.) Sands repeated this alleged promise no fewer than ***twelve*** times in her second amended complaint, and made it part of every count, including her count for unjust enrichment. (R.217 at ¶¶ 13, 17, 36, 44, 46, 64, 69-70, 72-73, 78-79.) Through these claims, Sands sought damages equal to the fair value of the “promised” ownership interests or a fair share of Menard’s increased net worth during their eight-year relationship, a share that Sands estimated to be worth billions of dollars.⁴

⁴ Menards filed a counterclaim against Sands for breach of her fiduciary duty of loyalty in connection with the formation of a private equity fund, which caused Menards hundreds of millions of dollars in losses. (R.47.) The record showed that while Sands was purportedly acting as Menards’ counsel on this transaction, she was secretly working on behalf of the opposing party. (R.465 at Ex. A.) The counterclaim is not relevant to Sands’ petition, other than to note that the supposedly biased majority of the Wisconsin Supreme Court ruled against Menards, upholding the order granting Sands’ motion for summary judgment on Menards’ counterclaim. Sands does not argue that she was denied her due process rights in connection with this ruling. Apparently, it is Sands’ position that the Wisconsin Supreme Court was biased when it ruled against her, but unbiased when it ruled in her favor.

C. Respondents' Motion for Partial Summary Judgment

Respondents conceded that Sands could sue to recover fees for the legal services that she rendered at the agreed rate of \$145 per hour, but, following extensive discovery, they moved for partial summary judgment on all of her other claims. Contrary to Sands' repeated misstatements, her failure to comply with Rule 1.8(a) was not "the sole basis and issue on which this case was litigated by the parties." (Pet. at 7.) Rather, the Respondents moved for partial summary judgment on three independent grounds. In addition to raising Sands' failure to comply with Rule 1.8(a), Respondents demonstrated – in nearly 50 pages of undisputed facts and argument – that Sands did not have a joint enterprise with Menard to accumulate assets and share in the gains or losses, as a matter of law. (R.290 at 4-33, 49-68, *see* R.App. 2a-30a.)

Respondents pointed out that Sands had alleged in her complaint that "Menard specifically promised Sands, as an inducement, that in exchange for her commitment to assisting Menard and his businesses, Sands would receive *as compensation* therefore an ownership interest in the various business ventures for which she provided assistance." (R.217 at ¶¶ 13, 17, 36, 44, 46, 64, 69-70, 72-73, 78-79) (emphasis added). Respondents argued that this alleged arrangement was not a "joint enterprise" at all, but a promise – albeit too vague to be enforceable – to be paid for her services with stock. (R.290 at 57, R.App. 20a-21a.) As Sands herself framed the alleged relationship, there

was no common purpose to accumulate assets and share equally in the profits and losses, as confirmed by the following undisputed facts (*see id.* at 4-5, 18-26, 56-57):

- Menard had been in business for over 40 years when he met Sands, at which time Menards already had 138 stores and revenues of \$3.8 billion;
- Sands and Menard did not jointly own property, have joint bank accounts, submit joint tax returns, have joint credit cards, or otherwise commingle their finances;
- Sands was not responsible for any losses of the Menard companies;
- Menard was not entitled to any increase in value of assets Sands owned or purchased during the alleged period of cohabitation;
- Sands agreed to bill Respondents for legal services at an agreed rate, submitted invoices to Menards, and was paid in excess of \$200,000 on those invoices;⁵

⁵ Sands contends that approximately \$50,000 of this amount, although billed as attorneys' fees and costs, was really intended to pay for her student loans. But there is no dispute that she was paid in excess of \$200,000 on invoices she submitted to Menards for legal services.

- Sands was paid another \$180,000 by a Menard-related company, for acting as its general counsel;
- Menards paid Sands' company, Prima Trading, approximately \$509,000 for coffee purchases, and Menards paid Sands' family printing business in excess of \$3.8 million for printing services; and,
- Sands made more money during the period that she dated Menard than at any other time immediately before or after.

Respondents also argued that Sands' claims should be dismissed, as a matter of law, because she could not prove the amount by which the value of the Menard companies increased due to her alleged efforts, as opposed to other causes, such as the continued, organic growth of a 40-year-old business. (R.290 at 63-68, R.App. 23a-30a; R.331 at 37-41.)

On page one of her 64-page response, Sands demonstrated that she fully understood that whether she had a joint enterprise with Menard was at issue in the motion for partial summary judgment:

The Menard Defendants seek to dismiss Sands' unjust enrichment claim as a matter of law on the grounds that (1) Sands and Menard did not work cooperatively to accumulate and grow assets – i.e., they had no so-called 'joint enterprise'; (2) even if the evidence supports Sands' claim of a joint enterprise, she cannot recover damages as a matter

of law because she cannot prove, on an-asset-by-asset basis, the amount by which the value of Menard's assets increased as a result of her efforts; and (3) Sands had an express contract for the provision of legal services, which precludes her from bringing a claim for equitable relief.

(R.306 at 1, R.App. 32a.)

Sands set out the facts and allegations that she believed supported her claim of a joint enterprise (R.306 at 4-50, *see* R.App. 31a-50a), arguing that the "evidence is more than sufficient to establish each of the three elements of [unjust enrichment]: (1) a joint enterprise between the parties to accumulate assets and wealth; (2) a benefit conferred on the Menard Defendants by Sands; and (3) the inequity of allowing the Menard Defendants to retain the entirety of that benefit." (*Id.* at 2, R.App. 32a-33a.) Indeed, Sands devoted only nine pages of her response to the argument that Rule 1.8(a) barred her claims. (*Id.* at 54-62.) She used the remainder of her brief to explain how the facts, in her view, showed that she had a joint enterprise with Menard to accumulate assets, and to argue that she did not have to prove how her efforts increased the value of the Menard companies. (*Id.* at 4-53, *see* R.App. 31a-50a.)

The assigned special master/referee recommended that the circuit court grant summary judgment due to Sands' failure to comply with the requirements of Rule

1.8(a).⁶ (R.335.) The circuit court, following a *de novo* review, granted the motion on essentially the same ground, without commenting on Respondents' other asserted grounds. Later, the court granted Menards' motions to strike Sands' claims for compensation for her non-legal services and her claim to recover the *quantum meruit* value of her legal services, because the circuit court found that Sands had an express contract to be paid \$145 per hour for such services. (R.409; R.468.) Sands then voluntarily dismissed with prejudice this express contract claim, for which she claimed damages of approximately \$1 million, so that she could pursue an appeal of the circuit court's order granting partial summary judgment on her other claims. (R.507.) That is the only order Sands appealed.

D. Sands' Appeals

In the court of appeals, Sands challenged the circuit court's ruling that Rule 1.8(a) barred her claims. Respondents opposed this argument and reiterated, as an alternative ground to affirm the judgment, that Sands' relationship with Respondents looked nothing like a joint enterprise under *Watts* (Menard Respondents' 2/11/2016 App. Ct. Combined Br. at 6-8, 35-37, R.App. 52a-56a), to which Sands responded (Sands' 3/16/16 Combined Br. at 12, R.App. 59a.) While analyzing the issue differently than the circuit court, the

⁶ The special master/referee also issued a separate recommendation on the Trustees' motion for summary judgment that specifically focused on the elements of unjust enrichment. Thus, these issues were briefed and argued on multiple occasions.

court of appeals affirmed on the ground that Sands' failure to comply with Rule 1.8(a) barred her claims to recover for her legal services and that she had waived any claims to recover for her non-legal services. *Sands v. Menard*, 2016 WI App 76 ¶¶ 46-49, 372 Wis. 2d 127, 887 N.W.2d 94.

The Wisconsin Supreme Court granted Sands' petition for review. Again, Sands argued that her failure to comply with Rule 1.8(a) did not bar her claims. Respondents not only addressed that argument (Menards' 11/17/2016 Combined Wis. Sup. Ct. Br., Response at 25-30, but *also* showed that, unlike *Watts*, Sands did not have a joint enterprise with Menard based on her own allegations and the undisputed facts:

Here, in contrast, John Menard already had a business, the two did not commingle their finances or jointly own property (*see supra* at 12), and Sands admittedly was paid in excess of \$200,000 for her legal services, while she claimed that another \$1,000,000 in fees were "outstanding." Indeed, Sands made more money during the period that she had a personal relationship with John Menard than she did beforehand.

In addition, Sands claimed that for her legal and non-legal services John Menard promised she "would receive *as compensation* . . . an ownership interest in the various Menard business ventures for which she provided assistance." (emphasis added.) To this end, Sands also testified that she was not responsible for any "risk and losses of the

enterprise”, and she denied that John Menard was entitled to any share in assets that she accumulated during the relevant period.

Thus, this relationship looks nothing like a joint enterprise, but rather is, as alleged by Sands, some kind of stock option for compensation of services rendered. *Watts*, however, does not recognize compensation for services, unless the services are linked to an accumulation of wealth as part of a joint enterprise. See *Waage v. Borer*, 188 Wis. 2d 324, 330-31, 525 N.W.2d 96, 98-99 (Ct. App. 1994).

(*Id.* at 36-37, R.App. 62a-64a) (internal record citations omitted).

In addition, during oral argument, Respondents’ counsel again argued that Sands’ complaint alleged a promise to be ***compensated*** for her services with ownership interests, which was not a joint enterprise:

JUSTICE BRADLEY: So you’re disputing that the basic law that we’re dealing with here is a *Watts* unjust enrichment claim?

ATTY NORTON: Well, I would dispute it in this sense. I would argue that she actually isn’t bringing an unjust enrichment claim at all. If you look at the promise that she alleges. An unjust enrichment claim . . . the *Watts* case, the *Waage v. Borer* case, the *Ulrich* case. All talk about a joint enterprise.

JUSTICE BRADLEY: That’s exactly . . . that goes to the heart of my question and the focus of my thinking . . . of your opposing

counsel when he started to say “look, the court of appeals in paragraphs 4 through 10 are just talking about payment for legal services, when and where” or something like that. And, of course, that’s not what a *Watts* unjust enrichment claim is. A *Watts* unjust enrichment claim doesn’t give compensation for specific services. Rather, the idea is this is a *joint* venture. We bring things together.

ATTY NORTON: Exactly right.

JUSTICE BRADLEY: And because of that, it seems to me that there is a dilution of emphasis, if not irrelevancy of what the code of ethics is regarding provision of legal services. So, if you can address that because that’s the heart of your argument.

ATTY NORTON: Certainly, and I’ll address it in two ways. I would agree with the first comment you made that she doesn’t allege a joint enterprise under *Watts*. She’s saying I get compensation for legal services. That’s the promise that she says twelve times in her complaint.

JUSTICE BRADLEY: So this is *not* a *Watts* unjust enrichment case?

ATTY NORTON: I don’t believe, the way she pled it, it is.

(Sup. Ct. Oral Argument at 25:05-26:39; *see also* 1:22:06-1:23:16, *available at* mms://sc-media.wicourts.gov/sc-media/12AP2377.wma.)

The Wisconsin Supreme Court affirmed the judgment. While the court concluded that Sands' failure to comply with Rule 1.8(a) was not an absolute defense to her claim (*Sands*, 2017 WI 110 ¶ 74), it determined that she had "failed to demonstrate facts which, if true, would support her legal conclusion that she and Menard had a joint enterprise that included accumulation of assets in which both she and Menard expected to share equally." (*Id.* at ¶ 73.) The court agreed with Respondents that the case was fundamentally different from *Watts*, starting with the fact that Menard had already built his business before he ever met Sands. (*Id.* at ¶ 48, App. 23a.) In addition, the court concluded that other undisputed facts further demonstrated that Sands and Respondent did not have a joint enterprise as required by *Watts*:

Second, we note the inherent differences between how Sue Ann and James Watts conducted themselves, and how Sands and Menard conducted themselves during their respective relationships. Sands has not alleged that during their relationship she and Menard commingled finances, filed joint tax returns, or made joint purchases of real and/or personal property. Sands did not obligate herself to any business or personal debt Menard incurred. Given these undisputed facts, we conclude that Sands and Menard were not engaged in a "joint enterprise" as required under *Watts*.

(*Id.* at ¶ 49, App. 23a-24a.)

The Wisconsin Supreme Court went on to hold that Sands had not pled sufficient facts to satisfy any of the three requirements of an unjust enrichment claim. (*Id.* at ¶¶ 50-52, App. 24a-25a.) Sands filed a motion to reconsider the judgment, which the court denied.⁷

E. Sands Never Filed a Motion to Recuse Any Justice of the Wisconsin Supreme Court at Any Point in the Underlying Proceedings

Although Sands now asserts that each of the five justices in the majority were so biased that the constitution was offended, she never bothered to make a motion to recuse any one of them. Nor did she raise the issue in any of her briefs or even in her motion to reconsider after the court reached its decision. Rather, she raised the issue for the first time in this petition.



⁷ Although the dissenting justices conclude in their five-paragraph dissent to denial of the motion for reconsideration that the majority had ruled “sua sponte on issues not briefed by the parties,” nowhere do the dissenting justices discuss or explain how this was true in light of the extensive briefing on Respondent’s motion for partial summary judgment.

REASONS FOR DENYING THE PETITION

I. It is Not Unconstitutional for a Court of Appeals to Uphold Summary Judgment on a Different Legal Theory – Raised, Briefed and Argued Below – Than the Lower Court Embraced.

Sands’ contention that the Wisconsin Supreme Court violated her Fourteenth Amendment right to be heard rests entirely on a false premise. She asserts that “the sole issue contested by the parties was whether [her] claim was barred by a Wisconsin Supreme Court Rule of Professional Responsibility.” (Pet. at i.) As a result, Sands concludes that the Wisconsin Supreme Court affirmed the judgment of the court of appeals “on an issue never raised, argued or briefed during the entire course of the litigation.” (*Id.* at 13.)

The record, however, proves otherwise. Contrary to what Sands says, Respondents made the argument at every level of the proceedings, that Sands did not have a joint enterprise. Sands had every opportunity to respond to this argument, and, in fact, did. Far from making a *sua sponte* ruling that violated Sands’ right to be heard, the court simply affirmed summary judgment on another ground that the parties had raised, briefed, and argued below. This does not offend the constitution.

As indicated, Respondents moved for partial summary judgment on the basis, among others, that Sands did not have a joint enterprise with Menard, as a matter of law, and set forth the undisputed facts that

supported that conclusion. *See supra* at 8-11. Sands responded at length to all of these facts and argued why she had a joint enterprise. *See supra* at 11-12. Afterwards, Respondents raised this same issue in their briefs, in both the court of appeals and Wisconsin Supreme Court, and during oral argument. *See supra* at 13-17.

By resting its ruling on this ground, the Wisconsin Supreme Court did not violate Sands' Fourteenth Amendment right to be heard. Rather, the court adhered to the long-settled and universal rule, applied in federal and state courts alike, that a court of appeals can affirm on any appropriate ground found in the record, regardless of whether the lower court addressed, adopted, rejected, or ignored it.⁸ *See Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018) (noting that “we may affirm a lower court judgment on any ground permitted by the law and the record”) (quotations and alteration omitted); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (“[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below”); *Smith v. Phillips*, 455 U.S. 209, 215 n. 6 (1982) (“Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted”); *Dandridge*

⁸ In addition, once a case is before the Wisconsin Supreme Court, the court has discretion to review any substantial and compelling issue the case presents. *See Chevron Chem. Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 945, 501 N.W.2d 15, 19 (1993); *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 39, 435 N.W.2d 234 (1989).

v. Williams, 397 U.S. 471, 475 n. 6 (1970) (“The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court”); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (“A successful party in the District Court may sustain its judgment on any ground that finds support in the record”); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (noting the “settled rule” that “in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason”) (quotations omitted); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“[T]he rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason”); *State v. Scheidell*, 227 Wis. 2d 285, 311 n. 14, 595 N.W.2d 661 (1999); *In re Termination of Parental Rights to Moriah K.*, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257; *Koestler v. Pollard*, 162 Wis. 2d 797, 809 n. 8, 471 N.W.2d 7 (1991); *Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269 (1967); *Laffey v. Milwaukee*, 4 Wis. 2d 111, 115, 89 N.W.2d 801 (1958); *Kaitlin Woods Condo. Ass’n Inc. v. North Shore Bank, FSB*, 2013 WI App 146, ¶ 9, 352 Wis. 2d 1, 841 N.W.2d 562.

Indeed, this uniformly-accepted principle can be traced back at least to this Court’s decision in *Williams v. Norris*, 12 Wheat. 117, 120, 6 L.Ed. 571 (1827), when Chief Justice John Marshall stated that “[i]f the judgment [of the lower court] should be correct, although the reasoning, by which the mind of the Judge was

conducted to it, should be deemed unsound, that judgment would certainly be affirmed in [this] Court.” Therefore, the Wisconsin Supreme Court did not violate Sands’ constitutional rights in upholding partial summary judgment on a ground argued and briefed below, even if the lower courts did not address it.

In addition, although this Court does not exercise its certiorari jurisdiction to correct claimed state-law errors, the judgment of the Wisconsin Supreme Court is correct and well-grounded in Wisconsin law. Regardless of Sands’ legal theory – breach of contract, promissory estoppel, or unjust enrichment – “*Watts* stands for the proposition that a party seeking a division of assets following a period of cohabitation ***must provide evidence of a shared enterprise***.”⁹ The provision of services for compensation alone, without such a joint enterprise, is not enough. See *Waage*, 188 Wis. 2d at 330-31, 525 N.W.2d at 98-99.

Here, however, Sands admittedly sought “compensation” for her services to existing businesses, conceded that she would not be responsible for any losses of those businesses, billed and received payment for her services at an agreed rate, and never commingled assets with Menard. This relationship was nothing like

⁹ *Ward v. Jahnke*, 220 Wis. 2d 539, 549, 583 N.W.2d 656, 660 (Ct. App. 1998) (emphasis added); *Watts*, 137 Wis. 2d at 529, 405 N.W.2d at 529; see also *Ulrich v. Zemke*, 2002 WI App 246 ¶ 11, 258 Wis. 2d 180, 654 N.W.2d 458; *Waage v. Borer*, 188 Wis. 2d 324, 330-31, 525 N.W.2d 96, 98-99 (Ct. App. 1994).

the joint enterprise recognized in *Watts*, as the Wisconsin Supreme Court concluded.

In addition, Wisconsin courts have made clear since *Watts* that a claimant must show what she did to increase the value of the assets.¹⁰ Sands admittedly could not show how her efforts, as opposed to other causes, increased the value of the Menard companies.¹¹

Simply put, the Wisconsin Supreme Court did not overlook controlling legal precedent, but applied settled law to the undisputed facts of this case to conclude that “Sands and Menard were not engaged in a ‘joint enterprise’ as required under *Watts*.”¹² (Op., ¶ 49.)

¹⁰ See *Ward*, 220 Wis. 2d at 547, 583 N.W.2d at 660-61; see also *Ulrich*, 2002 WI App 246 ¶ 12; *Waage*, 188 Wis. 2d at 332, 525 N.W.2d at 99. Moreover, a plaintiff is not entitled to recover the appreciation in the value of a defendant’s property that is attributable to other causes. See 22 Am. Jur. *Damages* § 57 (2010) (an injured party “is only entitled to recover restitution damages to the extent that the defendant was unjustly enriched as a result of the plaintiff’s actions; other causes for the appreciation of the defendant’s property are not to be taken into account.”)

¹¹ Finally, Sands never appealed from the circuit court’s order, concluding that she had an express contract to be paid \$145 per hour for her legal services, which results in a waiver of this issue. See *Posyniak v. Sch. Sisters of St. Francis of St. Joseph’s Convent*, 180 Wis. 2d 619, 627 n. 3, 511 N.W.2d 300, 304 (Ct. App. 1993). This is fatal to her unjust enrichment claim because “[w]here a valid express contract is proven, no recovery can be had on an implied contract.” *Schultz v. Andrus’ Estate*, 178 Wis. 358, 361, 190 N.W. 83, 84 (1922); see also *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 509 n. 13, 577 N.W.2d 617, 624 (1998); *Greenlee v. Rainbow Auction/Realty Co.*, 202 Wis. 2d 653, 671, 553 N.W.2d 257, 265 (Ct. App. 1996).

¹² Sands’ criticism, that the Wisconsin Supreme Court “reached beyond the pleadings and the evidence” to conclude that

Sands had every opportunity and did respond to this issue. She argued it at length below and lost because the undisputed facts did not support her state common law claims. As a consequence, the Wisconsin Supreme Court did not violate her Fourteenth Amendment right to be heard.

Equally absurd is Sands' attempt to liken her situation to slavery (Pet. at 29-30), by arguing that the Wisconsin Supreme Court somehow allowed Menards to deprive Sands of the fruits of her labor. As set forth above, Menards or Menard-related companies (1) paid Sands in excess of \$200,000 on invoices she submitted for legal services rendered (R.290 at 2, 18-19, R.293 at 973), (2) paid her an additional \$180,000 for acting as general counsel (R.290 at 22, 24; R.293 at 671, 934-935; R.295 at 1586-1598), and (3) purchased in excess of \$4.3 million in goods and services from Sands and her family's businesses. (R.290 at 7, 25, 53; R.292 at 336, 344, 358-359.) In addition, Sands voluntarily dismissed with prejudice her claim to recover another \$1.0 million for legal services, based on her express contract to be paid \$145 per hour, so that she could pursue her quasi-contract claim to recover more. (See R.502-504.)

Thus, Sands has been paid for the fruits of her labor. To the extent she wanted more, she took a

she lived an "expansive lifestyle" with Menard (Pet. 17 at n. 10) is wholly unfounded when she herself insisted on putting 415 photos in the record of the many galas, fashion shows, and international vacations she attended with Menard. (See Sands' March 7, 2017 Sup. Ct. Appendix at A251-A442.)

calculated risk and lost, by voluntarily dismissing her breach of contract claim with prejudice and pursuing a legal theory that was not supported by the record or her own admissions.

II. Sands Never Raised – and the Wisconsin Supreme Court Never Decided – Sands’ Belated Challenge to the Alleged Impartiality of That Tribunal, Which, In any Event, Finds No Support in the Record.

Sands also asks that the Court grant her petition on a ground she never previously raised and that the state court did not decide. Before filing this petition, Sands never challenged the impartiality of any justice of the Wisconsin Supreme Court, let alone did she mount a federal constitutional challenge. Although this circumstance alone justifies denial of her petition, it should also be denied for the independent reason that the allegations upon which she relies here are insufficient to show a constitutional violation even if the issue had otherwise been raised.

A. Sands Made No Challenge to the State Court’s Alleged Bias.

Sands frames the second issue in her petition as “how to protect litigants” from justices with an alleged risk of bias. (Pet. at 5.) The first way to do so is, of course, to raise the issue below. Indeed, the statute controlling the Court’s jurisdiction over state-court judgments provides for review of such judgments where a

constitutional challenge is “specially set up or claimed.” 28 U.S.C. § 1257(a). And this Court has long held that it “will not decide federal constitutional issues raised here for the first time on review of state court decisions.” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). “[S]ound reasons” exist for this limitation. *Id.* at 439. Where constitutional issues were not raised below, “the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.” *Id.*

At no point before seeking this Court’s review did Sands make any constitutional challenge to the impartiality of the Wisconsin Supreme Court or any of its members. In fact, she made no challenge to the impartiality of the court at all. Accordingly, neither the Wisconsin Supreme Court’s opinion affirming the judgment, nor even its subsequent order denying Sands’ motion to reconsider the affirmance, address any challenge, constitutional or otherwise, to the composition or impartiality of the court. Where the highest state court is silent on a federal question, the Court assumes that the issue was not properly presented. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). The burden of overcoming that presumption and showing that an issue was properly presented to the state court rests with the petitioner. *See id.* at 86.

Sands has done nothing to meet that burden here. She fails to comply with Supreme Court Rule 14(g)(i), which requires a petitioner seeking review of a state-court judgment to specify the stage in the proceedings “when the federal questions sought to be reviewed

were raised; the method or manner of raising them and the way in which they were passed on by those courts,” with specific references to the record, “so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.” The petition contains no such information with respect to any due process attack on the Wisconsin Supreme Court because Sands made none.

No excuse exists for this failure. Sands was not prevented from raising this issue in the state court. The justices of the Wisconsin Supreme Court permit and adjudicate motions to recuse or disqualify based on challenges to their actual or apparent impartiality, including claims arising under the United States Constitution.¹³ Moreover, Sands is not relying on information that was somehow unavailable or concealed during the pendency of her case. On the contrary, she begins her attack on the Wisconsin Supreme Court by declaring (Pet. at 19) that “[i]t is well known” that the state’s judiciary is politicized, particularly with respect to the “appointment, election, and decision-making of Wisconsin Supreme Court Justices.” Sands

¹³ See, e.g., *Adams v. State*, 2012 WI 81, 342 Wis. 2d 374, 822 N.W.2d 867; *State v. Henley*, 2011 WI 67, 338 Wis. 2d 610, 802 N.W.2d 175; *State v. Allen*, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863; *State v. Henley*, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853; *Storms v. Action Wis., Inc.*, 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480; *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989).

points to information pulled from a best-selling book,¹⁴ an article from an international newspaper,¹⁵ an article from the Associated Press,¹⁶ articles from the second-largest newspaper in Wisconsin,¹⁷ a segment from Wisconsin public radio,¹⁸ and Wisconsin state bar publications,¹⁹ all of which have one thing in common. They

¹⁴ Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (2016).

¹⁵ Ed Pilkington, *Because Scott Walker Asked*, The Guardian, Sept. 14, 2016, available at <https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics>.

¹⁶ Associated Press, *Wisconsin Supreme Court: Rebecca Bradley win adds another conservative vote*, Pioneer Press, Apr. 6, 2016, available at <https://www.twincities.com/2016/04/06/wisconsin-supreme-court-rebecca-bradley-win-adds-another-conservative-vote>.

¹⁷ Molly Beck, *Analysis: Last 6 state Supreme Court races attracted \$13.2M in issue ad spending*, Wisconsin State Journal, Jan. 11, 2016, available at http://host.madison.com/wsj/news/local/govt-and-politics/analysis-last-state-supreme-court-races-attracted-m-in-issue/article_b670e7c4-7bb5-5771-9153-c224ce696389.html; Molly Beck, *Scott Walker picks Waukesha lawyer Daniel Kelly for seat on Supreme Court*, July 23, 2016, available at http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-picks-waukesha-lawyer-daniel-kelly-for-seat-on/article_17eb913d-91d2-5c8a-8921-45409b8b65c8.html; see also Wikipedia, *Wisconsin State Journal*, https://en.wikipedia.org/wiki/Wisconsin_State_Journal (noting that Wisconsin State Journal is second largest newspaper in Wisconsin).

¹⁸ Chris Malina and Bill Martens, wpr.org, July 27, 2016, available at <https://www.wpr.org/walkers-wisconsin-supreme-court-pick-draws-criticism-praise>.

¹⁹ Alex DeGrand, *Wisconsin Supreme Court adopts amended recusal rules*, State Bar of Wisconsin, Jan. 22, 2010, available at <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=3&ArticleID=5794>; Joe Forward,

were all part of the public domain *before* she filed her opening brief with the Wisconsin Supreme Court. Yet, Sands never raised the argument she makes now.

Because of Sands’ failure, neither Respondents nor the justices of the court themselves had any opportunity to evaluate and challenge the accuracy of the information upon which she now relies – none of which is in the record – or to introduce other relevant facts that bear on the constitutional issue she is raising here for the first time. Nor did any of the parties have the “opportunity to test and refine their positions before reaching this Court.” *Adams*, 520 U.S. at 91.

The absence of a factual record is particularly problematic in this case given the fact-intensive focus of a due process challenge arising from the alleged bias of a state court judge. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). In *Caperton*, the Court focused the constitutional analysis on whether a party had a significant and disproportionate influence on placing the state court judge through campaign contributions, or by directing the judge’s campaign, while the case was pending or imminent. *Id.* at 884. This requires an examination of the “contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Id.* The “temporal

Retired Judges Request New Recusal Rules for Campaign Contributions, State Bar of Wisconsin, Jan. 12, 2017, available at <https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?volume=0&issue=0&articleid=25339>.

relationship” between the contributions, the individual judge’s election, and the pendency of the case, is “critical.” *Id.* at 886. Because Sands never raised the issue, she developed no factual record on these matters with respect to any of the five justices in the majority. As a result, even assuming that the Court was now inclined to elaborate on the application of *Caperton*, this would not be a suitable vehicle for it to do so.

At bottom, Sands’ decision to withhold any challenge to the court’s impartiality until after the adverse judgment (and, even then, to fail to present her challenge to the Wisconsin Supreme Court in a motion to reconsider) was seemingly a tactical one that should not be encouraged. Sands elides her failure in a dramatic plea that invokes Thomas Jefferson and highlights the importance of the issue of dark money in judicial elections. (Pet. at 35.) Although the influence of campaign contributions on the judiciary is indeed a matter of public importance, Sands fails to recognize that the importance of the underlying question provides “strong reasons to adhere scrupulously to customary limitations on [the Court’s] discretion.” *Illinois v. Gates*, 462 U.S. 213, 224 (1983). Refusing to consider constitutional questions not presented to a state’s highest court promotes respect for this Court’s procedures and “confidence in the stability of prior decisions.” *Id.*; see also *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (“While this Court decides questions of public importance, it decides them in the context of meaningful litigation.”). No reason

exists to depart from the Court's settled principles here. Sands' petition should be denied for this reason alone.

B. Regardless, Sands Has Not Identified Any Due Process Violation.

Even setting aside the fact that Sands failed to raise her due process claim before the state court, the allegations that she raises here for the first time, which are not based on any facts of record, do not come close to establishing a constitutional violation.

Caperton provides the governing standard – and it is exacting. There, the Court concluded that the \$3 million spent by Massey's CEO on the election of a swing justice to the West Virginia Supreme Court, at a time when the court was soon to hear Massey's appeal, was so "significant" and had such a "disproportionate influence" on the election that it violated the constitution. *See Caperton*, 556 U.S. at 884-86. The Court emphasized that it was addressing an "extraordinary situation where the Constitution requires recusal," *id.* at 887, and that the application of its standard would be "confined to rare instances," *id.* at 889, that present "extreme facts," *id.* at 886-887.

Sands has not identified such extreme facts here. Nor has she made any attempt to undertake the analysis required by *Caperton*, which focuses on the relative size of campaign contributions compared to the total election spend, the apparent effect of the contributions on the outcome, and the temporal relationship

between the contributions, the election, and the pendency of her case. *See id* at 885-886. In fact, she fails to draw a connection of any kind between any contribution or expenditure of Menard or a Menard-affiliated company and the election campaign of any one of the five justices that she now accuses of constitutional violations.

Instead, Sands focuses on campaign expenditures by two easier targets, the “Wisconsin Club for Growth” (“WCFG”) and the state’s century-old chamber of commerce, “Wisconsin Manufacturers & Commerce.” (“WMC”). (Pet. at 20-26.) Although Sands strains to conflate these two organizations with John Menard, the individual, she identifies no facts that would support such a leap. She asserts only that: (a) Menard at one time served as a WMC director and one of his sons is currently serving in that capacity (as one of forty-eight directors); (b) that Menard years ago contributed \$1 million to the WCFG, which then donated that money to Scott Walker’s 2012 gubernatorial recall-election campaign; and (c) a Menard-affiliated company years ago donated \$500,000 to the WCFG, which then donated that money to the same 2012 campaign.²⁰ Nowhere does Sands assert Menard ever had the

²⁰ Pet. at 20-22. Petitioner also asserts that Menard was once introduced as one of thirty-two donors to the Charles G. Koch Charitable Foundation that had contributed a million dollars or more. (Pet. at 20-21, *See* Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (2016) at 373-374). But she does not allege that the Charles G. Koch Charitable Foundation contributed to any relevant Wisconsin judicial election.

power to direct the subsequent expenditures of either of these groups to any particular candidate or election, much less that he actually exercised such power. Nor does she attempt to quantify the *other* individual contributors to these groups or the amount of their contributions relative to Menard's. Most importantly for purposes of *Caperton*, Sands does not link either of the referenced Menard-related contributions, which were made in or around 2012, to the election campaign of any Wisconsin Supreme Court justice that joined the majority opinion affirming the judgment against her, and to the pendency of this action. That is dispositive of any *Caperton* claim.

A review of Sands' assertions relating to each challenged justice proves the point.

Justice Ziegler: Sands asserts that the WCFG and the WMC supported Justice Ziegler's campaign in 2007 with advertising expenditures that more than doubled the justice's own campaign spending. (Pet. at 22.) But, Sands does not specify that any of this money came from Menard, or that Menard somehow directed its expenditure to this particular campaign. Nor does Sands compare the expenditures to the overall election totals. Moreover, Sands ignores that the justice's election took place more than a year before she filed this action and more than ten years before the Wisconsin Supreme Court affirmed the judgment against her.

Justice Gabelman: Sands asserts that the WMC supported Justice Gabelman's campaign in 2008 with advertising expenditures that were more than five

times the justice's own campaign spending. (*Id.*) Sands, of course, does not point to any Menard donation to the WMC, nor does she attempt to compare the WMC's spending to the overall election total. Moreover, Sands ignores that the justice's election took place six months before she filed this action and ten years before the Wisconsin Supreme Court affirmed the judgment against her.

Chief Justice Roggensack: Sands asserts that the WMC and the WCFG provided combined advertising expenditures that amounted to 1.3 times the justice's campaign spending. (Pet. at 23.) Again, however, Sands does not assert that any of this money came from Menard, or that Menard somehow directed its expenditure to this particular campaign. Nor does she compare the expenditures to the overall election totals. The incumbent justice won re-election by a fifteen percent margin in an election that took place in 2013, more than four years before the Wisconsin Supreme Court affirmed the judgment in this case.²¹

²¹ See <http://elections.wi.gov/elections-voting/results/2013/spring-election>. Sands also references (Pet. at 23) WMC's support of a 2005 state-wide referendum to amend the Wisconsin constitution with respect to the selection process for chief justice. The referendum proposed that, instead of the most senior justice serving as chief justice, the justices would elect a chief justice. The referendum passed, and Justice Roggensack was ultimately elected chief justice. Sands does not explain how these facts relate to her claim of a due process violation. In addition, we note that the former chief justice, Shirley Abrahamson, who authored the dissent in this case and was displaced as chief justice by Justice Roggensack, brought a lawsuit against all of the other justices claiming that her procedural due process rights were violated by this change.

Justice Bradley: Sands asserts that expenditures from the Wisconsin Alliance for Reform, among other contributors, and the Republican State Leadership Committee exceeded Justice Bradley’s own spending by a factor of 2.6. (*Id.*) Nowhere, however, does Sands allege any connection between Menard and any contributor to that campaign. The incumbent justice won re-election by a margin of nearly five percent in an election that took place in 2016, more than 18 months before the Wisconsin Supreme Court affirmed the judgment in this case.²²

Justice Kelly: Finally, Sands does not attempt to draw any connection between Menard and Justice Daniel Kelly, appointed by the governor in 2016 to fill an open seat.²³ Instead, she cites to Justice Kelly’s past experiences as an attorney representing the Republican party and his work on certain conservative political causes. (Pet. at 24.) This does not implicate the due process clause. *See, e.g., Higganbotham v. Okla. ex rel. Okla. Transp. Com’n*, 328 F.3d 638, 645 (10th Cir. 2003) (“It is, of course, an inescapable part of our system of government that judges are drawn primarily from

(*See Abrahamson v. Wis. Dept. of Admin.*, United States District Court for the Western District of Wisconsin, Case No. 3:15-cv-00211-jdp). The federal court disagreed and dismissed her case. (*Id.*)

²² *See* <http://elections.wi.gov/elections-voting/results/2015/spring-election>.

²³ Justice Kelly replaced Justice Prosser. Although Sands notes that the WMC and WCFG supported Justice Prosser’s re-election campaign in 2011, her concerns are misplaced given that Justice Prosser retired prior to her case coming before the court.

lawyers who have participated in public and political affairs.”) (quotations omitted); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981) (“All judges come to the bench with a background of experiences, associations and viewpoints. This background alone is seldom sufficient in itself to provide a reasonable basis for recusal.”).

In sum, Sands made no record before the state court regarding her claim of judicial bias. But even if the Court were to take at face value the factual assertions she makes in her petition for the first time, Sands would be unable to meet the *Caperton* standard for any of the five justices in the majority. This is yet another reason her petition should be denied.²⁴



²⁴ In addition, the Wisconsin Supreme Court can only act when it has a quorum of at least four members. Wis. Const. art. VII, § 4, cl. 1; *State v. Henley*, 2011 WI 67, ¶ 8 n. 9, 338 Wis. 2d 610, 802 N.W.2d 175. If Sands were to succeed in recusing the four purportedly biased justices in the majority who are still on the bench, she would deprive the Wisconsin Supreme Court of a quorum, which would mean that the court of appeals decision would stand. Nor will anyone ever know whether fewer than four justices would have recused themselves, because Sands never made a motion to recuse any of them and did not develop the record.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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