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March 15, 2017

Clerk of the Supreme Court and Court of Appeals
Diane Fremgen
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: 17-01 In re Rule for Recusal When a Party or Lawyer Has Made a Large
Campaign Contribution

Dear Ms. Fremgen:

On behalf of the Brennan Center for Justice at NYU School of Law¹, we write to offer strong support for the above-referenced petition, signed by fifty-four former members of the Wisconsin judiciary, which urges the Justices of the Supreme Court of Wisconsin to adopt a rule establishing an objective standard for recusal when a judge has benefited from campaign contributions or independent expenditures from a party or lawyer. The Brennan Center respectfully submits the following comments in order to provide the Court with an overview of how this recusal proposal mitigates the risks to judicial integrity that occur when lawyers and litigants provide financial support to judicial candidates in their elections.

*I. Legal and Policy Developments Since the Court Last Revised Its Recusal Rules
Make This Petition Timely and Necessary*

The former judges' petition presents the Court with an opportunity to bolster public faith in the integrity of the Wisconsin judiciary at a critical moment. This Court last revised its recusal rules in 2010 with an amendment explicitly instructing judges that recusal is not required based solely on campaign contributions,² despite the United States Supreme

¹ The Brennan Center for Justice at NYU School of Law is a non-profit, nonpartisan public policy and law institute that recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system and works to protect them from the undue influence of partisan politics. This comment does not purport to convey the position of NYU School of Law.

² The current Wisconsin recusal rule states: "A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the

Court’s 2009 finding in *Caperton v. Massey* that the “significant and disproportionate” campaign contributions at issue in the case necessitated recusal.³ Since *Caperton*, two United States Supreme Court opinions have affirmed the importance of judicial integrity as a vital state interest justifying regulation of judicial conduct and elections, while resolutions from both the American Bar Association and the National Conference of Chief Justices have called on states to strengthen their recusal rules to promote this interest. At the same time, high-cost judicial elections, dominated by special interests, remain the norm both nationally and within Wisconsin—where total spending in every race for the state high court since 2007 has exceeded \$1 million, with much of the spending coming from lawyers, business interests, unions, and others likely to appear before the Court.⁴

Recent United States Supreme Court Decisions: *Williams-Yulee v. Florida Bar* and *Williams v. Pennsylvania*

Following this Court’s last revision to its recusal rules, the United States Supreme Court has twice reiterated the “‘vital state interest’ in safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges’” that *Caperton* identifies.⁵ In *Caperton*, the Court addressed the circumstances under which campaign contributions and independent expenditures require recusal under the Due Process Clause. The Court held that “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”⁶ In particular, the Court directed consideration of “the contribution’s relative size in comparison to the total amount contributed to the campaign, the total amount spent in the election, and the apparent effect of the contribution on the outcome.”⁷ The Court, finding recusal necessary under the facts of the case before it, made clear that while it is “an extraordinary situation where the Constitution requires recusal,” states may pass rules “more rigorous than due process requires” in order to “maintain the integrity of the judiciary and the rule of law.”⁸

In 2015, the Court upheld a state rule designed to protect judicial integrity in *Williams-Yulee v. Florida Bar*. In considering Florida’s prohibition on judicial candidates personally soliciting campaign contributions, the Court explained “a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.”⁹ The Court made clear that “[s]tates may regulate judicial elections differently than they regulate political elections, because the role of judges differs from

proceeding.” WIS. SUP. CT. R. 60.04 § 7, available at <https://www.wicourts.gov/sc/rulhear/DisplayDocument.html?content=html&seqNo=51874>.

³ *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868, 884 (2009).

⁴ Spending in Wisconsin high court elections was calculated using data from the National Institute on Money in State Politics at FollowTheMoney.org and Kantar Media/CMAG.

⁵ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1659 (2015) (citing *Caperton*, 566 U.S. at 889).

⁶ *Caperton*, 566 U.S. at 884.

⁷ *Id.* at 870.

⁸ *Id.* at 887-89.

⁹ *Williams-Yulee*, 135 S. Ct. at 1662.

the role of politicians” and upheld the rule in question designed to mitigate the risks posed by campaign fundraising.¹⁰

Even more recently, the Court affirmed the important role of recusal in preserving judicial integrity in *Williams v. Pennsylvania*. The Court applied “an objective standard that requires recusal when the likelihood of bias on the part of the judge ‘is too high to be constitutionally tolerable’” to determine that “[u]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.”¹¹ Indeed, the Court reiterated this objective standard in its *per curiam* decision this month in *Rippo v. Baker*, vacating the Nevada Supreme Court’s decision below for applying an “actual bias standard” to a recusal motion and reaffirming that “[r]ecusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.”¹²

Taken together, these cases affirm the Court’s commitment to protecting judicial independence and public confidence therein, as well as the crucial role judicial recusal plays in forwarding these values.

American Bar Association and National Conference of Chief Justices Resolutions

Both the American Bar Association and the National Conference of Chief Justices have adopted resolutions calling on states to develop clear, objective recusal rules. In 2014, the American Bar Association passed resolution 105C, urging states to develop rules that, among other criteria, consider the effect campaign spending has on judicial impartiality.¹³ Specifically, the resolution recommends that states:

- (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) are transparent; (3) provide for the timely resolution of disqualification and recusal motions; and (4) include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge.¹⁴

That same year, the National Conference of Chief Justices adopted resolution 8, which urges states to “establish procedures that incorporate a transparent, timely, and independent review for determining a party’s motion for judicial disqualification/recusal.”¹⁵ The Conference based its adoption of the resolution on a

¹⁰ *Id.* at 1667.

¹¹ *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1901 (2016).

¹² *Rippo v. Baker*, No. 16-6316, 2017 WL 855913, at *1 (Mar. 6, 2017) (internal citations omitted).

¹³ Am. Bar. Ass’n Standing Comm. on Judicial Indep. Res. 105C (2014), *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf.

¹⁴ *Id.*

¹⁵ Conference of Chief Justices Res. 8 (2014), *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx>.

number of factors, including the fact that “certain campaign expenditures and contributions made during judicial elections have raised concerns about the possible effects on judicial impartiality and independence.”¹⁶

II. The Rise of Campaign Spending in Judicial Elections, Particularly by Litigants and Lawyers, Creates a Unique Threat to Public Confidence in the Courts

Campaign Spending Trends

Over the past decade and a half, spending in judicial elections, in Wisconsin and across the nation, has surged. In 2016, television spending by outside groups reached \$20 million nationally, shattering records for outside spending, according to an analysis by the Brennan Center for Justice.¹⁷ Ten states saw television spending of more than \$1 million.¹⁸ Notably, a significant amount of outside spending came from groups that did not fully disclose their donors. Of the 20 groups that spent on television in 2015-16, only three were fully transparent.¹⁹ During the 2013-14 cycle, for which fuller data is available, more than \$34.5 million was spent in 19 states, much of it coming from special interests.²⁰ Data shows that the top ten spenders for the cycle made up nearly 40 percent of total spending nationwide.²¹

Much of this spending comes from people and businesses that may potentially have matters before the court. A Brennan Center analysis of contributions in the 2013-14 cycle, for example, found that “business interests as well as lawyers and lobbyists were the largest donors [to supreme court campaigns], each responsible for about a third of all contributions, and together equaling 63 percent of all donations made to candidates.”²²

Wisconsin’s judicial elections reflect these national spending trends. As noted above, the last seven elections in Wisconsin have each cost more than \$1 million, including four races that topped \$3 million (2007, 2008, 2011, 2016) and one race that topped \$5 million (2011).²³ In 2016, the campaigns of the two leading candidates spent \$846,938 and

¹⁶ *Id.*

¹⁷ Dorothy Samuels & Alicia Bannon, *Big Money’s Other Casualty: Fair Courts*, AM. PROSPECT (Jan. 24, 2017), <http://prospect.org/article/big-money%E2%80%99s-other-casualty-fair-courts>.

¹⁸ Press Release, Brennan Ctr. For Justice, Spending By Outside Groups in Judicial Races Hits Record High, Secret Money Dominates (Nov. 15, 2016), *available at* <http://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates>.

¹⁹ *Id.*

²⁰ SCOTT GREYTAK, ALICIA BANNON, ALLYSE FALCE & LINDA CASEY, *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-14*, at 6 (Laurie Kinney ed. 2015), *available at* <https://www.brennancenter.org/publication/bankrolling-bench-new-politics-judicial-elections>.

²¹ *Id.* at 14.

²² *Id.* at 31.

²³ Spending in Wisconsin high court elections was calculated using data from the National Institute on Money in State Politics at FollowTheMoney.org and Kantar Media/CMAG.

\$1,096,907 respectively,²⁴ while outside groups spent more than \$2.4 million on the race.²⁵

Indeed, in 2015 this Court heard a case implicating independent spending in Wisconsin, *Unnamed Petitioners v. Peterson*, challenging an investigation into alleged illegal campaign coordination between Governor Scott Walker’s 2011/2012 recall election campaign and special interest groups. Public records reveal that several of the special interest groups targeted by the investigation spent millions in independent expenditures on supreme court races as well—including \$3.5 million in support of Justice Prosser’s 2011 election and \$3.2 million in support of Justice Gableman’s election.²⁶

Threat to Public Confidence in the Courts

The U.S. Supreme Court has repeatedly acknowledged the unique threat to public confidence presented by campaign spending. As the Court explained in *Williams-Yulee*, the judiciary’s “authority depends in large measure on the public’s willingness to respect and follow its decisions.”²⁷ Thus, “[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public’s confidence in the judiciary.”²⁸

Survey data bolsters concerns about the effect of judicial campaign spending on public confidence in the courts. Ninety-five percent of respondents in a 2013 nationwide poll indicated that they believe contributions have at least a little impact on judicial decisions. Seventy percent of respondents answered that judicial candidates receiving campaign contributions from an individual, lawyer, business, or interest group with a case on which a judicial candidate may adjudicate was a “very serious” problem, and 20 percent indicated it was a “somewhat serious problem.”²⁹ In that same poll, 92 percent of respondents said that if there were a court case in which one of the two opposing parties had contributed a significant amount to the judge’s campaign, the judge should step aside and let another judge hear it. Only five percent of respondents said the judge should hear the case.³⁰

²⁴ *Follow the Money*, Nat’l Inst. on Money in State Politics (2017), <https://www.followthemoney.org/show-me?s=WI&y=2016&c-exi=1&c-r-ot=J#{1|gro=c-t-id>.

²⁵ See Press Release, Brennan Ctr. for Justice, Spending in Wisconsin Supreme Court Race Totals More Than \$4.3 Million (Apr. 6, 2016), available at <http://www.brennancenter.org/press-release/spending-wisconsin-supreme-court-race-totals-more-43-million>.

²⁶ Brief of the Center for Media and Democracy, the Brennan Center for Justice, and Common Cause as Amici Curiae in Support of Petitioner at 19, *Chisolm v. Two Unnamed Petitioners*, 137 S. Ct. 77 (2016) (No. 15-1416). While Petitioners in *Two Unnamed Petitioners* sought the recusal of Justice Prosser and Justice Gableman as a result of campaign spending, the Justices declined to recuse themselves.

²⁷ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015).

²⁸ *Id.* at 1667 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O’Connor, J., concurring)).

²⁹ *National Poll 10/22-10/24*, JUSTICE AT STAKE & BRENNAN CTR. FOR JUSTICE 3-4 (Oct. 2013), <https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf>.

³⁰ *Id.*

Indeed, judges themselves have expressed concern that in some cases campaign contributions can impact their decision-making. In a 2001 survey of state judges, when high-cost judicial races were just becoming a trend, nearly half of those responding thought campaign contributions had an impact on judicial decisions.³¹ As a retired chief justice of the West Virginia Supreme Court of Appeals told *The New York Times*: “It’s pretty hard in big-money races not to take care of your friends. It’s very hard not to dance with the one who brung you.”³²

III. The Proposed Recusal Rule Would Promote Judicial Integrity and Public Confidence in the Courts

Recusal rules are vital to the constellation of protections that guard the integrity of our courts. Effective rules can facilitate judicial functioning by providing clear guidance on when questions about judicial impartiality could reasonably undermine public confidence that justice is being done.

Wisconsin’s current recusal rule creates the potential for conflicts of interest that could undermine public faith in the impartiality of the judiciary. The instant petition proposes to change Wisconsin’s rule by (1) creating an objective standard for recusal when he or she has received campaign contributions or benefited from independent expenditures from a party or lawyer; and (2) seeking an amendment to the Wisconsin Constitution granting authority to this Court to appoint Wisconsin Court of Appeals judges to temporarily serve as justices when necessary to achieve a quorum.³³

The revised rules would strengthen Wisconsin’s recusal standards and promote public confidence in the courts in several important ways. First, they adopt an objective standard, with bright-line rules for assessing when recusal is warranted. As the Court made clear in *Caperton*, “[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.”³⁴ By providing judges clear guidance on when campaign contributions and independent expenditures warrant recusal, the rules prevent Wisconsin judges from being in the difficult situation of assessing the risks posed by spending in their own campaigns.

Second, the proposed rules target a significant threat to judicial integrity: campaign spending, including independent expenditures. Given the continued pattern of heavy campaign spending in Wisconsin and nationally, including the growing role of independent expenditures, it is vital for recusal rules to directly safeguard courts against the perception of bias this spending presents.

³¹ *State Judges Frequency Questionnaire*, JUSTICE AT STAKE 5 (Nov. 2001-Jan. 2002), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

³² Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all>.

³³ Petition at 1, *In re* rule for recusal when a party or lawyer has made a large campaign contribution (Wis. filed Jan. 11, 2017).

³⁴ *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868, 883 (2009).

Third, the rules specifically address the campaign contributors that pose the greatest risk to judicial integrity—lawyers and litigants. When major campaign spenders appear before a judge they have supported, the public may reasonably raise questions about the risk of bias and the appearance thereof. By implementing rules targeting court users, the Court can bolster public confidence that justice is not bought and sold.

Fourth, the rules place responsibility on lawyers and litigants to disclose contributions above a delineated threshold, thus designating the burden of disclosure on the parties most likely to already possess the necessary information. It also responds effectively to the rise of secret money in judicial elections. Without removing the onus from judges to disclose contributions they know of, the revised rules clarify that “judges should not be expected to devote the enormous time needed to ascertain who connected to every case has made campaign contributions.”³⁵

Finally, the rules establish clear procedures for allowing an independent decision-maker to review a judge’s determination of whether or not to recuse, and propose a Constitutional amendment granting the Supreme Court authority to appoint judges from the Wisconsin Court of Appeals to the high court when necessary. These procedures would further strengthen public confidence that any concerns about judicial bias will be fully and fairly reviewed, and that the recusal process will not interfere with the functioning of the courts.

For these reasons, we offer our support for the pending petition. Thank you for your consideration of this important issue.

Sincerely,



Kate Berry
Counsel, Democracy Program

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³⁵ Petition at 7.