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OF WISCONSIN

IN THE SUPREME COURT OF WISCONSIN
Rules Petition 17-01

IN RE: PETITION FOR PROPOSED RULE FOR RECUSAL

OPPOSITION TO PETITION FROM
WISCONSIN INSTITUTE FOR LAW & LIBERTY

A group of retired judges have submitted a Petition asking this Court to amend the Code of Judicial Conduct (the "Code") in several ways to accomplish the goal of allowing litigants to force the recusal of Wisconsin judges on any of the following bases: (1) the judge has received a contribution from a party or a party's lawyer that is half or more of the amount that an individual may lawfully contribute to a judicial candidate; (2) the judge has received such a contribution from the party's spouse, child, parent, sibling or grandparent; (3) the judge has received such a contribution from any individual officer, board member, managing partner, or 10% or greater owner of a corporate party; or (4) any of the above made such a contribution that was used for independent expenditures made for either express or issue advocacy related to the judge's election.

The Code currently commits recusal to the discretion of the judge which would, of course, be guided by any constitutional due process requirements. The Petition wants to go farther than prudent judgment and the Constitution require and make recusal demands a litigation tactic (and one that interferes with the First

Amendment rights of Wisconsin citizens). The Petition rests on the premise that judges cannot be trusted.

The Wisconsin Institute for Law & Liberty ("WILL") opposes the Petition's proposed changes to the Code for the reasons set forth in detail below. In summary, we oppose the Petition because the proposed rules changes are inconsistent with an elected judiciary and the concomitant First Amendment rights of Wisconsin citizens to support judicial candidates and express themselves on issues that are pertinent to judicial elections and that might influence others on how to approach them. The proposed changes are wildly under inclusive (further demonstrating their incompatibility with the notion of an elected judiciary) and there is no evidence they are necessary given the practicalities of Wisconsin's current judicial system and the extant evidence relating to the size and number of campaign contributions in recent judicial elections. [1]

We urge this Court to reject the Petition by taking no further action on it. Given the substantial legal and constitutional problems presented by the proposed rule change requested in the Petition, it would be a waste of judicial and public resources to spend further time considering it.

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[1] In 2010 this Court explained an additional reason why the Petition should be denied in its decision *In the matter of amendment of Wis. Stat. § 757.19*. In that decision, this Court detailed how a similar proposed rule interfered with the right to vote. Because this Court fully explained the right to vote issue in its previous decision, WILL does not believe it necessary to repeat that explanation here.

I. THE PETITION IS AN ATTACK ON WISCONSIN'S SYSTEM OF AN ELECTED JUDICIARY.

Wisconsin is one of 39 states that select all or some of their judges through an election process. *Williams-Yulee v. Florida Bar,* 135 S. Ct. 1656, 1662 (2015). Wisconsin Circuit Court judges have been elected since Wisconsin became a state in 1848. Justices on the Wisconsin Supreme Court have been elected since the Supreme Court was created in 1853 and the judges on the Wisconsin Court of Appeals have been elected since that court was created in 1977.

There are some (apparently including the Petitioners) that believe that a system of elected judges should be disfavored and that judges should be appointed and not elected.[2] They believe that elections compromise judicial independence and that the public is not qualified to assess the legal capabilities of judicial candidates. But that view has never held sway in Wisconsin. We have always selected our judges based upon the will of the people. If Petitioners want to oppose our long-standing system of an elected judiciary they should do so openly and directly.

It is worth noting that campaign contributions and spending are only one – and probably not the most important – source of public pressure on judges. The need to be perceived as "tough on crime" or "pro-middle class" or the need to obtain endorsements from other judges, elected officials, lawyer groups and the

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[2] See, *State must ensure justice isn't for sale,* Wisconsin State Journal, February 1, 2017. http://host.madison.com/wsj/opinion/editorial/editorial-state-must-ensure-justice-isn-t-for-sale/article_a3759af4-00ff-5f2d-b1cf-dc82a4785174.html

media could equally (or even more so) place pressure on a judge to rule in a certain way. The Petition makes no effort to deal with these other factors.

But however one feels about an elected judiciary, the Petition must be reconciled with the needs and ramifications of Wisconsin's decision to elect its judges. Given judicial elections, Wisconsin citizens have a First Amendment right to speak – and to associate – in favor of the candidates they prefer and against those they oppose. This includes the right to endorse candidates, work on behalf of their election and contribute money to or spend money in support of those candidates. Although the state may take reasonable measures to safeguard impartiality, those measures must be consistent with the First Amendment.

The United States Supreme Court has made clear that freedom of speech and association are fully protected in judicial elections. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), for example, the U.S. Supreme Court made clear that speech by judicial candidates cannot be limited simply because it might create an appearance of "bias." Justice Scalia, writing for the majority, emphasized that the argument that the First Amendment ought to apply differently in judicial elections "greatly exaggerates the difference between judicial and legislative elections" especially given the judiciary's power to make law and set aside laws enacted by the legislature. *Id.* at 784. He pointed out that "the notion that the special context of electioneering justifies an abridgment of the right to

speak out on disputed issues sets our First Amendment jurisprudence on its head." *Id.* at 781.

Justice O'Connor, who does not herself support judicial elections,[3] thought that having a system of electing judges and worrying about activity common to lawful election campaigns were mutually inconsistent. Justice O'Connor said that, having chosen an elected judiciary, Minnesota's "claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling." *Id.* at 792. Justice Kennedy added that a "State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Id.* at 795.

The Petitioners might argue that a punctilious regard for judicial independence warrants sacrificing the accountability offered by elections. But Wisconsin has chosen otherwise and this presupposes faith in the ability of judges to be both impartial and accountable. As noted earlier, to believe as the Petitioners apparently do would require a much broader set of restrictions than they advocate. For example, the endorsement of prominent law enforcement officials – sheriffs, police chiefs and district attorneys – are quite valuable in judicial elections. More than one judicial candidate has prominently featured the endorsements of uniformed officials (sometimes in patrol cars or otherwise engaged in public

[3] In 2014, Justice O'Connor went so far as to publicly issue *The O'Connor Judicial Selection Plan*, in partnership with The Institute for the Advancement of the American Legal System. *See* http://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf.

safety activities). These endorsements are arguably worth much more than even a maximum campaign contribution, much less half of that amount. There is no reason to suppose that a judge would be any less grateful to the endorsing official than to a campaign contributor. Yet no one supposes that a judge must recuse herself in all criminal cases brought by the endorser's agency.[4]

The same would be true for endorsements by local newspapers and lawyers and lawyer groups, all of which are specifically permitted by the Code and many of which are worth far more than the contributions that the Petitioners believe ought to require recusal. A candidate will always be grateful for the support she receives, but that gratitude is not normally thought to disqualify her from doing her job impartially.

Nor does the Petition address the risk to impartiality that might be presented by support of a judge's unsuccessful opponent. A party who makes a maximum contribution to a judge's opponent or a contribution to issue advocacy efforts that may have benefited that opponent – is unable under the proposed language of the Petition to force the judge's recusal. Yet there is no reason to suppose that "gratitude" is any more a threat to impartiality than "vengeance." As William Makepeace Thackeray astutely noted, "revenge may be wicked, but it's natural."

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[4] Well, almost no one. Certain criminal defense attorneys filed a rash of recusal motions directed at Justice Michael Gableman because he ran what they regarded as an overly "tough on crime" campaign.

The purpose of pointing out the radical under inclusiveness of the Petition is not to suggest that it be broadened, but to point out that it fails on its own terms. If we truly believe that judges cannot set aside the gratitude they may feel to supporters, there is no reason to limit the recusal requirement to financial support. If we believe that judges can't put the election aside when it is time to decide a case, there is no reason to believe that they will be likely to reward supporters but won't penalize opponents. But to take the underlying premise of the Petition to its logical conclusion would be wholly inconsistent with judicial elections.

For almost 170 years we have presumed that judges can put such valuable support aside. The Petition – with respect to one and only one form of support – wants to reverse that presumption. It wants the Code to assume that a judge cannot be impartial in a case involving her supporters. In support of that extraordinary proposition, the Petitioners offer precisely no evidence.

A 2013 report by the Wisconsin Center for Investigative Journalism which purported to "show" that most of the Justices of this Court "favored" their contributors is unsophisticated and poorly done.[5] It is a first order principle of studying the effect of campaign contributions or other phenomena on judicial or other forms of decision-making that one must attempt to determine whether the

[5] Jake Harper, *Wisconsin Supreme Court justices tend to favor attorney donors*, WisconsinWatch.org (October 20, 2013), http://wisconsinwatch.org/2013/10/wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/ (noting Justice Abrahamson was the top campaign contribution recipient on the court and justices remain involved in 98 percent of cases involving attorney donors).

phenomenon – say campaign contributions – cause the observed decisions or are caused by them. In other words, does a judge favor plaintiffs in personal injury cases because she is supported by the plaintiffs' bar or is she supported by the plaintiffs' bar because she is philosophically inclined to vote in ways that favor personal injury claimants?

Contributions may come to a judge because she is seen to be "tough on crime" or "an originalist" or "pro-civil liberties." But having a perspective – a set of views on contested legal issues – is not "bias." *Republican Party of Minnesota v. White,* 536 U.S. at 778 (noting even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so, and further, if a Justice's mind at the time she joined the Court was a complete *tabula rasa* in the area of constitutional adjudication it would be evidence of lack of qualification, not lack of bias). Proper academic studies of judicial decision-making attempt to control for the ideology or philosophy of the judge. The WCIJ study does not.[6]

In fact, a study by Williams and Ditslear relating specifically to this Court found little or no evidence for the presumption that the Petition would create.

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[6] See, e.g,, Czarnezki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 MARQUETTE LAW REVIEW 323 (2003) (controlling for justices' predisposition to vote for criminal defendants in assessing whether pendency of re-election makes justices less likely to uphold claim of criminal defendant); Williams and Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 THE JUSTICE SYSTEM JOURNAL 135 (2007) (controlling for judicial ideology in determining whether attorney contributions affected votes of justices).

Properly controlling for judicial philosophy, the study concluded that "for the most part, contributions by attorneys to a judge of the Wisconsin Supreme Court do not result in a greater likelihood that the vote of that judge will be influenced." *Id.* at 152. Systemically, it found "little evidence to support a systematic relationship between attorneys' campaign contributions and the votes of judges in Wisconsin." *Id.* at 135.

Knowing that they lack evidence for the rule they seek, the Petitioners employ the rhetorical device of saying they do not mean to suggest that lawful contributions *actually* compromise the judiciary, but that the "perception of average citizens" is that they do. (Petition at 6) As we will see, the "perception" of average citizens is not a sufficient basis to compromise First Amendment rights. Nor is it clear that making policy on the basis of unfounded perceptions is something to be encouraged. In any event, with an elected judiciary, these "average citizens" can act in accordance with their perceptions and correct any misbehavior they see. Voters have the opportunity to vote those judges off the bench if they do not like the way they handle cases.

This is not to say that the "appearance of bias" does not matter. But the Wisconsin legislature has already addressed it in limiting the size of campaign contributions. In setting the limits that it has, the legislature – elected officials who are presumably more in touch with the "perception" of "average" voters than retired judges or advocacy organizations – have determined that contributions in

the permitted amounts do not create the risk of corruption or its appearance. The Petition calls upon this Court to second guess that legislative judgment. The Petitioners believe that a contribution of half of the allowed amount is enough to cause the appearance of impropriety and undermine respect for Wisconsin courts. For example, the Petitioners believe that a contribution of $1,000 to the campaign of any Wisconsin Circuit Court Judge will lead to "the natural tendency to feel gratitude" for the contribution and "may interfere with that judge's ability to keep the scales of justice totally even." (Petition at 6) It is hard to see how this view is consistent with respect for an elected judiciary.

In addition, the legislature has made the judgment that independent expenditures do not give rise to the risk of corruption or its appearance – a judgment that is constitutionally required. The Petition wants this Court to say otherwise. Of course, this Court is not bound by the judgment of the legislature but, particularly in light of the serious imposition of the proposed changes on First Amendment rights, it should carefully consider the reasoned judgment of the legislature and approach with caution any attempts, such as those advocated in the Petition, to hinder Wisconsinite's efforts to actively and substantively participate in the selection of their judges.

II. THE PETITION IMPACTS THE FIRST AMENDMENT RIGHTS OF WISCONSIN CITIZENS.

Money is speech, or more accurately, speech requires money. When the state restricts the ability of people to spend money on expression, it is restricting expression itself. This proposition is now well settled in the law. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court's original pronouncement in the modern era of campaign finance regulation, the Supreme Court clearly enunciated the principle that money is speech. The *Buckley* Court explained:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. Valeo, 424 U.S. at 19. The sentiments contained in the 1976 decision are even more pronounced today in the digital era, where modern campaigns require websites, social media platforms, digital advertising, and radio and television advertising, all for the purpose of distributing one's political message and all of which require significant financial investments from the campaign. The Court has repeatedly reaffirmed this aspect of *Buckley*. *See Davis v. FEC*, 554

U.S. 724 (2008) (holding that Section 319(a) and (b) of the Bipartisan Campaign Reform Act of 2002 unconstitutionally infringed on a candidate's First Amendment rights); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*") (holding that issue ads may not be banned from the months preceding a primary or general election); *Citizens United v. FEC, infra.*

A. The effect of the Petition on individual contributors will be profound.

The Petitioners suggest that the right to contribute and spend money in support of or in opposition to judicial candidates is not adversely affected by the Petition. People can still contribute and support candidates. The only thing they will lose, they say, is having a particular person preside over their lawsuit and no one has the right to any particular judge. (Petition at 6)

But the protection offered by the First Amendment is not so cramped. It prohibits not only the direct restriction of speech, but the imposition of burdens as a consequence of speaking. *Davis*, 554 U.S. at 740-42 (struck down law that raised the contribution limits for candidates whose opponents had self-funded because the law impermissibly burdened that candidate's right to expend his resources on his own campaign). Closer to home, the district court in *Duwe v. Alexander*, 490 F.Supp.2d 968 (W.D. Wis. 2007) explained how recusal burdens speech:

> While it is true that the recusal requirement is not a direct regulation of speech, the chilling effect on judicial candidates is likely to be the same. Although a candidate would not fear

> immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a positon.

Id. at 977.

While *Duwe* involved candidate statements and not contributions or expenditures, the rationale is the same. If the price of supporting a judge is that he or she will be the one judge that will never sit on your case or those of your clients, the price will be, for most, too high to pay. That type of burden on speech raises dire constitutional concerns.

The Petitioners argue that the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) justifies their proposal. But it does not - *Caperton* does not support a rule that would require recusal based on a campaign contribution at a level that is half of the legal contribution limit. To the contrary, *Caperton* involved a case in which the CEO of a company, at a time when a very significant case involving the company was pending and certain to come before the West Virginia Supreme Court of Appeals, spent over three million dollars in support of a candidate for the court who subsequently declined to recuse himself. *Id.* at 2257. Justice Kennedy, writing for the majority, repeatedly emphasized that the facts before the Court were "rare," "extraordinary"

and "extreme."[7] The Petitioners want to take a burden that may be imposed on speech in only the most extreme cases and make it commonplace.

B. The Petition also attacks all forms of advocacy, both express and issue.

The Petition's extension of the rule to issue advocacy is even more problematic. The Petition would expand the definition of "campaign contribution" to mean "independent expenditures made by the contributor either supporting the judge or opposing the judge's opponent, *or otherwise attempting to influence the outcome of a judicial election.*" It also includes in the definition contributions "to a third party made with the intention or reasonable expectation that the third party would use the contribution to make independent expenditures" to support or oppose a judicial candidate "*or otherwise attempting to influence the outcome of a judicial election.*"

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[7] *See, e.g.*, *id.* at 2256 ("[Justice Benjamin] received campaign contributions in an extraordinary amount from, and through the efforts of, [litigant]."); *Id.* at 2262 ("Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to [litigant] for his extraordinary efforts to get him elected."); *id.* at 2263 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."); *id.* at 2265 ("[T]he fact remains that [litigant's] extraordinary contributions were made at a time when he had a vested stake in the outcome [of his pending case]."); *id.* ("On these extreme facts the probability of actual bias rises to an unconstitutional level."); *id.* ("Our decision today addresses an extraordinary situation where the Constitution requires recusal."); *id.* ("The facts now before us are extreme by any measure."); *id.* ("It is true that extreme cases often test the bounds of established legal principles . . . . But it is also true that extreme cases are more likely to cross constitutional limits . . . ."); *id.* at 2265–66 ("In each [prior recusal] case the Court dealt with extreme facts that created an unconstitutional probability of bias . . . . The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level."); *id.* at 2266 (recognizing that the Court was not "flooded" with motions after the prior recusal cases, which was "perhaps due in part to the extreme facts those standards sought to address"); *id.* at 2267 (holding that litigant's contributions presented one of the "rare instances" that requires judicial recusal).

By choosing the italicized language that regulates independent expenditures that "attempt to influence the outcome of judicial elections" the Petitioners have deliberately chosen to advocate for a proposal that flies in the face of precedent from the U.S. Supreme Court, the Seventh Circuit Court of Appeals and this Court.

The difference between express advocacy and issue advocacy is well-known in the law. Express advocacy is speech that urges people to vote for or against a particular candidate. In *Buckley*, the Supreme Court stated that express advocacy was limited to communications that included words such as, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Buckley*, 424 U.S. at 44, n.52. These terms are often referred to as the "magic words," which many lower courts have ruled are required, under *Buckley,* in order for a communication to constitute express advocacy.

Issue advocacy is everything else. In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Supreme Court made clear that only expenditures for express advocacy or its functional equivalent could be limited and only speech that is susceptible of no reasonable interpretation other than a call to elect or defeat a specified candidate qualifies. As a practical matter, and probably as a matter of doctrine, issue advocacy is political speech that does not use the magic words described in *Buckley*. Restrictions on such speech are judged under the strict scrutiny standard. Because these expenditures are independently made, they do

not, as a constitutional matter, give rise to sufficiently strong risk of corruption or its appearance to warrant restriction.

The Petitioners, by targeting independent expenditures "which attempt to influence the outcome of a judicial election" are making their restrictions applicable to issue advocacy. Under Petitioners' proposal, any speech – even that susceptible to a reasonable interpretation other than as a call to elect or defeat a specific candidate – would trigger recusal if someone could make the subjective determination that the speaker intended to influence an election or that the speech may have such an effect.

We have a history on this issue in Wisconsin. In *Wisconsin Right to Life v. Barland,* 751 F.3d 804 (7th Cir. 2014), the Seventh Circuit struck down language in the Wisconsin Statutes which regulated contributions for independent expenditures made for *the purpose of influencing the election* or nomination for election of any individual to state or local office. *Id* at 833. The Seventh Circuit held that such language was unconstitutional because it would apply to issue advocacy and adopted a saving construction limiting the scope of Chapter 11 to express advocacy as defined by *WRTL II.* This Court did much the same thing in *State ex rel. Two Unnamed Petitioners v. Peterson.* 2015 WI 85, ¶ 48, 363 Wis. 2d 1, 48, 866 N.W.2d 165, 188.

The Petitioners want to accomplish through the back door of a recusal rule what they cannot accomplish through the front door of campaign finance

regulation. Even if the language in the Petition could somehow be restricted to express advocacy, the problem would remain. In *Citizens United v. FEC*, 130 S. Ct 876 (2010), the United States Supreme Court essentially extended *WRTL II* to independent express advocacy. Writing for the majority, Justice Kennedy explained that:

> The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial government interest in stemming the reality or appearance of corruption in the electoral process" because "[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 901-02 (internal citations omitted).[8]

The Petitioners' recusal rule must be judged by and cannot survive a strict scrutiny analysis. There may be circumstances where "rare, "extraordinary" and "extreme" examples of campaign contributions and issue advocacy expenditures are very large and very significant in affecting a race and are made at the time the case is pending – and, as a result, may warrant recusal. If so – there is no need to adopt a new rule to handle such cases – they will be decided based under the due

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[8] While *Citizens United* involved the entity making its expenditures, lower courts have held that its rationale also prohibits restrictions on contributions to the party making independent expenditures. See *SpeechNOW.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (finding provision of FICA limiting contributions by individuals to political committees that made only independent expenditures violated the First Amendment); *Wisconsin Right to Life State Political Action Comm. V. Barland*, 664 F.3d 139 (7th Cir. 2011) ("Barland I") (finding Wisconsin statute limiting aggregate annual contributions to political committees violated First Amendment).

process standard relied upon in *Caperton*. But the Petition does not address those extreme cases. The Petition says that any expenditure by a party or those related in certain ways to a party that is as little as half the legal contribution limit will require recusal without regard to how that contribution might compare to a judge's other support. The case in which recusal has been sought need not have even been pending when the contribution was made. Such a rule does not and cannot survive strict scrutiny.

C. <u>The Petition is simply a backdoor attempt to eliminate the otherwise constitutionally acceptable issue advocacy</u>.

As discussed in more detail in *The Caperton Caper and the Kennedy Conundrum*, Stephen M. Hoersting and Bradley A. Smith, CATO SUP. CT. REV. 319 (2008-2009), the argument made by the Petitioners here regarding due process and appearance of impropriety are in many instances a stalking horse to challenge the protection for issue advocacy. The advocates for recusal based on independent expenditures for issue advocacy are "less about due process than about getting the Court to overrule *sub rosa Buckley's* protections for independent expenditures in election campaigns." *Id.* at 342-343. That is the goal of the Petitioners here.

And they do so by fomenting litigation and uncertainty. It allows parties to assert that certain issue ads fall within the definition in the Petition and then in subsequent litigation demand to know everyone who contributed more than $250

to the organization that ran the ad and to seek recusal of any judge whose campaign they could argue benefited in any way from the ad. There will be litigation about whose campaign the ad helped or hurt and whether each contributor to the organization that ran the ad intended or had a reasonable expectation that the organization would run such an ad.

Assume, for example, that, given the interest in the courts during an election, a legal group – think the ACLU or Federalist Society – has opined on a legal issue of interest or on more general issues of legal philosophy in a way that can be said to favor the position of one candidate. Will the contributors to that effort now face recusal motions? If Justice Prosser thought *Caperton* resulted in numerous and savage attacks on judges in this state,[9] that history will be dwarfed by what will occur under the rules advocated in the Petition.

D. A $250 limit is arbitrary and goes well beyond what is contemplated by Chapter 11 of the Wisconsin Statutes.

The Petition presents additional First Amendment concerns as well. It proposes that once a judge is assigned to a case each party or the party's lawyers must file an affidavit disclosing any campaign contribution exceeding $250 made to the assigned judge in her last two campaigns by the party or the party's lawyer. There are two problems. First, even under the Petition's proposed changes, a contribution of $250 does not trigger recusal. Second, under the Petition "party"

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[9] See *State v. Allen*, 2010 WI 10, ¶ 255, 322 Wis. 2d 372, 490, 778 N.W.2d 863, 924 (noting that the number and savagery of the recusal motions was unprecedented and amounted to a frontal assault on the court).

means the party or their spouse, sibling, parent, child or grandparent and for corporate parties it includes all officers, directors, etc. In addition, based on the definition of "campaign contribution" it means any contribution to any group that engaged in express or issue advocacy during the judge's last two campaigns. Thus, it imposes disclosure obligations that go far beyond anything in Chapter 11 of the Wisconsin Statutes.

This part of the Petition leads to an obvious question – why is this even included? The Petitioners offer little explanation for why there is a disclosure requirement at all (given that campaign contributions are already disclosed to the Election Commission and publicly reported) and no explanation for why it is set at $250. Why is it important to know that Jane Jones (or her grandmother) contributed $250 to the judicial candidate? Presumably, a provision requiring disclosure at or over the amounts listed in Section 2 of the Petition (for example, $10,000 to Supreme Court Justices) would make some sense if those limits were imposed by law. But the provision as submitted in the Petition (all contributions over $250) does not. Moreover, the disclosure requirement points out the constitutional overbreadth of the entire proposed recusal rule. It imposes an obligation on the actual party to obtain information from their grandparents, parents, children, and siblings, and for corporate parties from every officer, director, etc. That information may simply be unavailable to the actual party and,

as importantly, it chills the First Amendment rights of a much broader group than the party and her lawyer.[10]

Disclosing Jane Jones' contribution of $250 will tell us nothing relevant to the rest of the proposed rule. It may be of prurient interest. It may serve the interests of those who seek to intimidate persons who give to judicial candidates. But it serves no public interest identified in the Petition.

The changes proposed by the Petition are also likely to encourage gamesmanship. The Petitioners argue that we needn't worry about parties making strategic contributions to a judge in order to force recusal because the non-contributing party may assent to the judge sitting on the case. But that highlights the weakness in the Petition's assumption that a judge can never be trusted to put aside what has happened in a campaign. Parties will have no way of knowing which judges would, in fact, be biased by campaign support. They will seek recusal – or decline to seek it – only for those judges they object to on other grounds. Plaintiffs' lawyers will seek the recusal only of judges they believe to be "pro-defense." The reason given by the rule for a recusal is unlikely to be the rule

[10] Moreover, disclosure requirements can have negative ramifications. There is little or no informational interest in the identity of persons who make small to average contributions to a candidate, including a judicial candidate and studies show that people's willingness to make contributions go down as disclosure rules make the contributions more public. Sixty percent of people said that they would think twice before donating money if their name and address were released to the public. Dick Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, INSTITUTE FOR JUSTICE, March 2007.

that governs the actions of the parties. The Petition allows litigants to weaponize campaign support.

III. EVEN IF ONE ACCEPTS THE UNDERLYING ASSUMPTIONS OF THE PETITIONERS, THE RULE PROPOSED BY THEM IS UNNECESSARY FOR WISCONSIN JUDICIAL ELECTIONS.

Currently, under Wisconsin law, if a litigant or their counsel believes for any reason (or no reason) that a particular circuit court judge will not give them a fair hearing, they have the automatic right to have a substitute judge assigned to the case under Wis. Stat. §801.58. The proposed new party-controlled recusal rule is simply not necessary.

Although the Petition suggests that the changes proposed are necessary because money in judicial elections has become more predominant, they offer little or no support for that statement. As a starter, it does not appear to be the case for circuit court elections. A review of the available data suggests that circuit court campaigns tend to be largely self-funded.

Two recent contested races for the Milwaukee County Circuit Court in 2016 (Havas/Kies and Rifelj/Dugan) stand out. These two races were recent, contested and took place in the most expensive media market in the state. All four candidates contributed more to their own campaigns than they raised from individual contributors, and these contributions tended to be small and disbursed.

Of those that received contributions from individuals,[11] Havas raised the most ($40,114.91 from 256 contributors), while Dugan raised the least ($14,551 from 132 contributors). These amounts seem inconsequential and ought to raise no concerns of any type about "money in politics," particularly in light of the increasing expenses associated with operating a campaign in today's modern era. Interestingly, in these examples the candidate that raised the most lost the election, while the candidate that raised the least won the election. The amount of money raised not only appears inconsequential in amount but it had little or no effect on the elections.

In recent years hotly contested races have also taken place outside Milwaukee County. In a 2013 race in Ozaukee County (Voiland/Wolfgram), each candidate personally loaned their campaign about twice as much money as they raised from individual contributors. Voiland raised $27,104 from 207 contributors and Wolfgram raised $23,500 from 173 contributors. Voiland received only eight contributions of $1,000 or more, representing 3.8% of his donations while Wolfgram received only one contribution of $1,000 or more representing .58% of his donations.

In a recent judicial election in Dane County, the opponent ran against the incumbent who had been appointed to the bench by Governor Walker. One would think this would be the type of election where the candidates would be the

[11] Kies' campaign was *entirely* self-financed.

beneficiaries of substantial fund-raising. But the records show that the challenger (Rhonda Lanford) raised $59,402 from 412 contributors and the incumbent Rebecca St. John raised $52,435 from 392 contributors. Again, not the type of numbers that would seem to be any cause for concern.

Most importantly, the Petitioners do not point to any instance in which a party has raised a concern that a circuit court judge presided over a case where one of the parties or their lawyer had made a substantial campaign donation. In fact, even under Chapter 11 as amended, the maximum contribution to a candidate running for the Circuit Court is $2,000 for a candidate in counties with less than 300,000 people, and $6,000 for a candidate in counties with more than 300,000 people. It is difficult to see the possibility of corruption or even the appearance of impropriety given the low limits. The Petitioners are proposing a solution for a problem that does not exist at the Circuit Court level.

Wisconsin Court of Appeals and Supreme Court elections are no different, at least relative to the size of the respective districts and scope of their campaign activities. The most recent contested Court of Appeals race in Southeast Wisconsin featured Judges Reilly and Van De Water in District II. Judge Reilly loaned $51,500 to his campaign and raised $46,121 from 530 contributors, while Judge Van De Water loaned her campaign $140,075 and raised only $12,488 from 80 contributors. Reilly received only seven contributions of $1,000 or more,

representing 1.3% of his donations while Van De Water received only one contribution of $1,000 or more, representing 1.3% of her donations.

Even Supreme Court races do not feature the type of campaign committee spending which would result in the need to gut the ability of citizens to participate in the electoral process. Most recently in 2016, Appeals Court Judges Bradley and Kloppenburg faced off. Justice Bradley raised $1,024,759 from 7,280 total individual donations, of which only 206 were in an amount of $1,000 or more, comprising only 2.8% of her total donations. Judge Kloppenburg raised $592,873 from 4,056 total individual donations, of which only 95 were in an amount of $1,000 or more, comprising only 2.3% of total donations.

In 2015, Justice Anne Walsh Bradley was challenged by Judge James Daley. Justice Bradley raised $724,338 from 4,397 total individual donations, of which only 136 were in an amount of $1,000 or more, comprising 3.1% of total donations. Judge Daley raised $284,872 from 768 total individual donations. Only 58 donations were made to Judge Daley in an amount of $1,000 or more, comprising 7.6% of total donations.

In 2013, Justice Roggensack was challenged by Edward Fallone. Justice Roggensack raised $802,673 from 6,710 total individual donations, of which only 156 were in an amount of $1,000 or more, comprising 2.3% of total donations. Fallone raised $309,603 from 2,648 total individual donations. Only 41 donations

were made to Fallone in an amount of $1,000 or more, comprising 1.5% of total donations.

IV. THERE IS NO REASON TO REVISIT THIS ISSUE AT THIS TIME.

The Petitioners, themselves, acknowledge that they are asking this Court to revisit an issue this Court decided in 2010. At that time this Court rejected a petition by the League of Women Voters of Wisconsin to amend the Code of Judicial Conduct to require recusal for contributions of $1,000 or more to a judicial candidate. That Petition also had language that would have covered issue advocacy. This Court rejected the Petition and adopted the rule as it exists today. Despite the Petitioners' argument to the contrary, nothing **relevant** has changed.

Wisconsin still has an elected judiciary. The Legislature has still placed a cap on contributions to judicial candidates. The First Amendment still protects citizens' right to make contributions and still protects issue advocacy. These are the material facts and they have not changed. And because they have not changed, this Court should not require a further expenditure of judicial and public resources on the Petition.

The Petitioners assert there are five changes that support reconsidering the issue despite the fact it was decided in 2010 – but the arguments offered are unpersuasive. First, the Petitioners say that "[i]n 2015 Wisconsin Act 117, the legislature increased by 20 times the limit in place in 2010." This statement is not

true. In 2015, the limit for Circuit Court judges in smaller counties went from $1,000 to $2,000 and in larger counties from $3,000 to $6,000, for the Court of Appeals they went from $2,500 in smaller districts to $5,000 and from $3,000 to $6,000 in larger districts, and for the Supreme Court they went from $10,000[12] to $20,000. Thus, they were doubled, not increased by "20 times" as asserted by the Petitioners.

Second, Petitioners say this Court's decision in *State ex rel. Two Unnamed Petitioners v. Peterson* was a change in the law – but it was not. That decision simply made it clear that Wisconsin law was aligned with federal law when it came to the constitutional protections for issue advocacy. *Unnamed Petitioners* followed the Seventh Circuit's lead in *Barland II* which, in turn, followed the United States Supreme Court's decision in *WRTL II* from 2007.

Third, Petitioners cavalierly say that the existing state constitutional ban on replacing a Supreme Court Justice who withdraws could be amended through a constitutional amendment, so it should serve as no impediment to their Petition. But the ban remains in place today, as it did in 2010, and this Court cannot unilaterally amend the Constitution.

Fourth, Petitioners claim that this Court did not mention the "appearance of bias" as a concern in its 2010 decision. This is an odd statement in two ways. It

[12] The limit of $10,000 for contributions to Supreme Court Justices had been in place for a long period of time. It was reduced to $1,000 for one election cycle in 2009 Act 89 but then reinstated to $10,000 in 2011 Act 32 and then increased to $20,000 by 2015 Act 117.

is not a "change" but rather seems to be an argument that this Court was simply wrong in its 2010 decision, but the Petitioners do not want to come out and say that so they try to soft sell the proposition. Second, it completely ignores what this Court actually said. This Court said "a judge is not required to recuse himself or herself based solely on a lawful campaign contribution." The logical reading of that statement is that a lawful campaign contribution does not lead to the appearance of bias (in the same way that endorsements by the district attorney, sheriff, local newspaper or lawyers do not lead to an appearance of bias). Simply because the Petitioners think they do, does not make it so.

Petitioners cite to *Williams v. Pennsylvania,* 136 S.Ct.1899, 579 U.S. ___ (2016) on this point, but that case has nothing to do with the rules changes requested in the Petition. In that case, one of the participating judges in an appeal had been the district attorney in the case who had personally approved an application to seek the death penalty. That situation is dealt with separately in the Wisconsin Code of Judicial Conduct under SCR 60.04(4)(c) (A judge must recuse herself if "The judge served as a lawyer in the matter in controversy".) The comment to SCR 60.04(4)(c) points out that there may be some complications where the lawyer worked for a government agency, but the point here is that the situation in *Williams* involves a subsection of the Code not at issue in this Petition.

Fifth, the Petitioners point to a paper written by the Center for American Progress in 2014 that the Petitioners call an "empirical study." The description is only partially accurate and only because "empirical" means nothing more than research based on observation. The authors at Center for American Progress did, in fact, "observe" the recusal rules in all 50 states, but they then applied their own subjective judgment to "grade" them. They found that the vast majority of states "failed" their test. However, their "test" was designed to obtain the conclusion that they wanted to reach. For example, they gave negative points if a state concluded that lawful campaign contributions were not a basis for required recusal. If you assign grades based upon an outcome you want (regulating issue advocacy, aggressive recusal litigation, ending judicial elections), it is not surprising that states that don't agree with you "fail" your test.

It is as if the Petitioners went out and looked for an advocacy organization that held an identical subjective view as the Petitioners regarding recusal rules and then cited to the subjective statements of that advocacy group as a reason for this Court to revisit the issues decided in 2010. It seems that way because that is likely what actually occurred in this matter. Petitioners are free to utilize such a tactic. But this Court must identify it for what it is. The one thing it cannot be considered is an objective, peer reviewed "study." And it is certainly no reason to revisit the issue previously decided.

CONCLUSION

WILL asks this Court to take no further action on the Petition, and to leave the Code as it exists today. The Petition improperly interferes with the First Amendment rights of Wisconsin citizens, attempts to solve problems that don't exist, and most importantly, is an unfair attack on Wisconsin's long-standing system of elected judges.

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Respectfully Submitted,

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