SUPREME COURT OF WISCONSIN

No. 17-01

In re rule for recusal when a party or lawyer has made a large campaign contribution.

FILED

JUN 30, 2017

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On January 11, 2017, a rule petition was filed asking the court to amend SCR Chapter 60 (Judicial Code) to change the standard for which judicial recusal or disqualification is required, based on campaign contributions or assistance to the judge from a party, lawyer or through an organization making an independent expenditure. The petition also sought Supreme Court assistance in obtaining amendments of the Wisconsin Constitution so that Court of Appeals judges or retired Supreme Court justices could replace Supreme Court justices who were required to recuse or were disqualified under the proposed amendments to SCR Chapter 60.

The petition was initially placed on the court's March 16, 2017 open rules conference agenda. On March 14, 2017, the court received correspondence from the Wisconsin Institute for Law & Liberty, Inc. (WILL), requesting the court remove the matter from the agenda to afford WILL an opportunity to provide a substantive comment on the petition, prior to the court's initial discussion. Several other written comments also were filed. The matter was removed from the

March 16, 2017 agenda and, on March 21, 2017, a letter was sent to the standard list of interested persons, advising them that the petition would be placed on the court's April 20, 2017 open rules conference agenda for preliminary discussion. The court stated that it would accept and consider written comments on the petition received by April 7, 2017.

The court received written comments in support of the petition from: Wisconsin Justice Initiative, Campaign Legal Center, Brennan Center for Justice, Wisconsin Democracy Campaign, One Wisconsin Now, American Civil Liberties Union of Wisconsin, Common Cause of Wisconsin, Wisconsin Voices, League of Women Voters of Wisconsin, and correspondence from individual citizens.

The court received written comments in opposition to the petition from: Curtis LaSage, Jr., retired Justice Jon P. Wilcox on behalf of retired members of the Wisconsin judiciary, and the Wisconsin Bankers Association. WILL filed a 30 page response addressing numerous constitutional concerns affected by the proposed amendment to SCR Ch. 60.

The petitioners also filed a responsive statement as well as a response to technical and drafting comments made by the Legislative Reference Bureau.

On Thursday, April 20, 2017, the court met in open administrative rules conference to discuss the petition. Justice Shirley S. Abrahamson moved to schedule a public hearing, seconded by Justice Ann Walsh Bradley. The court discussed the motion. It failed on a vote of 5:2 (Chief Justice Patience Drake Roggensack, Justices Annette Kingsland Ziegler, Michael J. Gableman, Rebecca

Grassl Bradley, and Daniel Kelly opposed). Justice Ann Walsh Bradley then moved to adopt the petition without holding a public hearing, seconded by Justice Shirley S. Abrahamson. The court discussed the motion. The motion failed on a vote of 5:2 (Chief Justice Patience Drake Roggensack, Justices Annette Kingsland Ziegler, Michael J. Gableman, Rebecca Grassl Bradley, and Daniel Kelly opposed).

Justice Annette Kingsland Ziegler then moved to deny the petition, seconded by Justice Rebecca Grassl Bradley, which motion was based in part on constitutional concerns caused by the petition's proposed amendment to the Wisconsin Constitution over which the court has no control and the real potential that granting the petition could preclude Supreme Court review in some cases. Additionally, the petition presumes, as a categorical matter, that the judges and justices of this state are incapable of fulfilling their oaths to "administer justice without respect to persons" and to "faithfully and impartially discharge the duties of [their] office." This is an entirely unwarranted presumption and we will not entertain it. After an hour of discussion, the court denied the petition by a vote of 5:2 (Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley opposed).

IT IS ORDERED that the petition is denied.

Dated at Madison, Wisconsin, this 30th day of June, 2017.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). More than fifty[1] retired Wisconsin judges, with combined trial and appellate judicial experience of over one thousand years (in addition to their law practice experience), filed Rule Petition 17-01 seeking to amend the Code of Judicial Conduct. Petition 17-01 proposes rules governing recusal[2] of a judge or justice on the basis of campaign contributions.[3] Courts in other states have adopted rules tying judicial disqualification to campaign contributions.[4]

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[1] This number of retired judges supporting the petition has increased since the petition was filed. Two of the petitioners were former state supreme court justices.

[2] I use the words "recusal" and "disqualification" interchangeably.

[3] One editorial summarized the Petition this way: "Take the 'For Sale' sign off Wisconsin Courts." Editorial, State's Courts Shouldn't Be for Sale, Racine J. Times (Jan. 22, 2017).

Attachment 1 is a copy of the Petition's proposed language for the Code of Judicial Conduct.

Attachment 2 is the present rule governing recusal and campaign contributions. The rule was drafted by the Wisconsin Realtors Association and Wisconsin Manufacturers and Commerce and adopted by the court in 2010 by a 4-3 vote. Justices David T. Prosser, Patience D. Roggensack, Annette K. Ziegler, and Michael J. Gableman voted in favor of the rule. Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and N. Patrick Crooks dissented.

[4] For a multistate survey (including the text of the rules cited below), see the National Center for State Courts, Judicial Disqualification Based on Campaign Contributions (updated Nov. 2016), http://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx.

¶2 Five justices voted to dismiss Petition 17-01. At an open public conference on Rule Petition 17-01 on April 20, 2017, Chief Justice Patience D. Roggensack and Justices Annette K. Ziegler, Michael J. Gableman, Rebecca G. Bradley, and Daniel Kelly joined to adopt Justice Ziegler's motion, seconded by Justice Rebecca G. Bradley, to dismiss[5] Rule Petition 17-01 without a hearing.

¶3 Contrary to the court's past practice of holding a public hearing on a rule petition relating to judicial ethics and at times appointing a committee to further explore a

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Five states have adopted a disqualification rule setting forth a specific amount or percentage of a campaign contribution. See Ala. Code § 12-24-3 (2017); A.R.S. Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 2.11 (Ariz. 2017); Cal. Civ. Proc. Code § 170.1 (West 2017) and Cal. Code of Jud. Ethics, Canon 3E(5)(j) (West 2017); Miss. Code of Jud. Conduct, Canon 3E(2) (West 2017); Utah Judicial Administration Code, Canon 2, Rule 2.11(A)(4) (2017).

Eleven states have adopted disqualification rules that do not have specific triggers relating to campaign contributions but expressly or impliedly incorporate the Caperton decision. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009). See, e.g., Ark. Code of Jud. Conduct, Rule 2.11, Comment 4 (2017); I.C.A., Rule 51:2.11(A)(4) (Iowa 2017); New Mexico Code of Jud. Conduct, Rule 21.211, Comment [6] (2017); Tenn. Sup. Ct. Rules, Code of Jud. Conduct, Rule 2.11(A)(4) (2017); Wash. Code of Jud. Conduct, Rule 2.11(D) (2017).

[5] Although "dismiss" and "deny" have different meanings in appellate practice, the words were used interchangeably in the justices' discussion.

Petition,[6] the five justices dismissed Petition 17-01 out of hand, without a public hearing or further study. Justice Ann Walsh Bradley and I voted against the motion of dismissal.

¶4 Justice Ann Walsh Bradley urged that a public hearing be held: What's so threatening about a public hearing? Retired Judge William Foust commented in the media: "I'm surprised they wouldn't even talk about why they wouldn't hold a public hearing on this."[7]

¶5 The court received more comments (from both in-state and out-of-state correspondents) on Rule Petition 17-01 than it has ever received regarding any other petition.[8] The vast majority of comments favored adoption of the Petition. The

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[6] Justice Ann Walsh Bradley sets forth the history of proposals in this court relating to recusal and campaign contributions in her dissent to S. Ct. Order 08-16, 08-25, 09-10, and 09-11, 2010 WI 73, (issued July 7, 2010, eff. July 7, 2010), available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874.

[7] See Matthew Rothschild, Wisconsin's High Court Does Hack Job on Recusal Petition, Capital Times (Apr. 20, 2017).

"A public hearing on these questions . . . is more than justified, given significant changes to Wisconsin's campaign financing system in recent years." Editorial, State Must Ensure Justice Isn't For Sale, Wis. State J. (Feb. 1, 2017).

[8] "The petition received support from Wisconsin editorial boards, bipartisan campaign finance reform groups, and voters." Billy Corriher, Wisconsin Supreme Court Rejects Request from 56 Judges To Address Judicial Campaign Cash, ThinkProgress (Apr. 20, 2017).

comments are available to the public on the Wisconsin court system's website at https://www.wicourts.gov/scrules/1701.htm.[9]

¶6 I take this opportunity for an aside. The same five justices who voted to dismiss Petition 17-01 on April 20, 2017, voted on June 21, 2017, to close court conferences to the public when the court is deliberating on rules petitions. Court conferences on rules petitions have been open to the public since 1995.[10] The court's deliberations have been televised,

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[9] The proponents of the Petition believe "Wisconsin's recusal rules must be strengthened if we expect justice to be blind, not biased." Mike Lucci, Bias Is Not Justice, Superior Telegram (May 5, 2017).

[10] Beginning in 1989, I often wrote in favor of opening the court's deliberations on rule petitions to the public. After turning down Attorney Steven Levine's petition on the topic, in 1992 the court on its own motion adopted a one-year pilot program opening the deliberations. In 1993, the court extended open deliberation conferences on rule petitions indefinitely.

In 1999, the court, on motion of Justices Crooks and Bablitch, extended open court deliberations to all administrative matters. We proudly proclaimed ourselves to be first court in the nation to openly deliberate in public on administrative matters.

In 2012 began a movement to close court deliberations to the public. On motion of Justice Patience Roggensack, Justices Roggensack, Prosser, Ziegler, and Gableman voted to close deliberations on administrative matters other than rule petitions. Justices Ann Walsh Bradley, N. Patrick Crooks, and I voted against this motion to close court deliberations on administrative matters.

shown live and archived on the Wisconsin Eye Public Affairs Network. As a result of the five justices' vote, when next this court takes up ethical rules (and other rule matters), the court will discuss the matter privately.

¶7 Some may wonder whether the critical public reaction to the court's dismissal of Petition 17-01 and the justices' reasoning stimulated the sudden, unexpected motion by Justice Gableman, adopted by the other four justices, to close future court deliberations on rule petitions.[11] Justice Ann Walsh Bradley and I voted against the closure motion.

¶8 Let me summarize the comments the court received on Rule Petition 17-01. The court received e-mails from individuals and communications from the following entities,

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The movement to close all court deliberations to the public culminated on June 21, 2017. On motion of Justice Gableman, joined by Chief Justice Patience Roggensack and Justices Ziegler and Daniel Kelly, the deliberations on rule petitions were closed to the public. Justice Rebecca G. Bradley was not present for the conference and did not voice in any way her position on other matters raised that day. She did voice her vote on the motion to close deliberations on rule petitions. Justice Gableman read a text message from her stating that she joined in Justice Gableman's motion.

Justice Ann Walsh Bradley and I (apparently the only justices who did not have advance notice of Justice Gableman's motion) asked that the motion be held for further discussion. It was not. I tried to make a motion that Justice Gableman's motion be put on for a public hearing. I could not get recognized to put my motion to a vote.

[11] See, e.g., Matthew Rothschild: Wisconsin Supreme Court Shuts Public Out, Capital Times, June 25, 2017.

including thoughtful constitutional analyses supporting the Petition: the Wisconsin Justice Initiative, the Campaign Legal Center, the Brennan Center for Justice, the Wisconsin Democracy Campaign, One Wisconsin Now, American Civil Liberties Union of Wisconsin, Common Cause of Wisconsin, Wisconsin Voices, and the League of Women Voters.

¶9 Director Richard Kyte of the Viterbo University D.B. Reinhart Institute for Ethics and Leadership commented in the media: "I find it remarkable that engineers, nurses and dieticians all have much higher standards for eliminating conflict of interest than judges do."[12]

¶10 So why did five justices dismiss out of hand the carefully crafted Petition (supported by two excellent memoranda)? You will not find an answer to this question in the court order.

¶11 The court order makes a feeble and somewhat misleading attempt to justify the dismissal. Why feeble and somewhat misleading? Probably because the justifications proffered by the justices themselves and the commentators favoring dismissal are, in my opinion, unsubstantiated and misguided. But readers can judge for themselves. Here are the claims for dismissal without a hearing and the counterarguments.

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[12] John Davis, Retired Judge: New Judicial Recusal Rules Could Restore Faith In Wisconsin Supreme Court, Wis. Public Radio (Feb. 9, 2017).

The Claim: The Petition is An Unconstitutional Violation of the First Amendment.[13]

¶12 The Wisconsin Institute for Law & Liberty, Inc. requested the court delay a public hearing on the Petition on the promise of a constitutional analysis of the Petition.[14] And so the court delayed scheduling a public hearing.

¶13 Unfortunately the Institute's filing in this court cites no federal or state case declaring, directly or indirectly, expressly or subliminally, or in any other way, that recusal on the basis of campaign contributions violates any constitutional provision. The cases cited and arguments made

[13] "We're fierce advocates for First Amendment rights. But this has little to do with free speech and much to do with the court's integrity. . . . [H]iding behind the Constitution . . . is nothing but a dodge from the real issue: Big Money donors who seem to believe they can buy the court." David D. Haynes, Editorial: Supreme Court Justices Let Down Wisconsin Citizens, Milwaukee J. Sentinel (Apr. 20, 2017).

"This argument is a dramatic expansion of the free speech principles defined in cases like Citizens United and it misapplies and misconstrues U.S. Supreme Court precedent regarding conflicts and recusals articulated in cases like Caperton." Peg Lautenschlager, Op-Ed Misconstrues Supreme Court's Ruling on Judicial Campaign Cash, Wispolitics (May 17, 2017).

[14] "We believe based upon our legal and empirical work that the petition is without merit. We intend to show the Court that, given the Court's action on this same issue in 2010 and the constitutional issues involved, the petition should be dismissed without a further and wasteful investment of judicial and public resources." E-mail from Brian W. McGrath of the Wisconsin Institute for Law and Liberty, Inc. (Mar. 14, 2017), available at https://www.wicourts.gov/scrules/1701/htm.

deal mostly with the validity of limitations on campaign contributions. The Petition does not limit contributions; it relates only to recusal.[15]

¶14 No one has cited any case (and I cannot find any) holding or even hinting that judicial recusal requirements violate a campaign donor's or a voter's (or anyone else's) First Amendment (or any other) rights.

¶15 Attorney Esenberg of the Wisconsin Institute for Law & Liberty. Inc. wrote (without citing any authority) that the court "quite sensibly" declined to adopt the petition because the petition would "burden participation in the electoral process and . . . this raises substantial First Amendment concerns." See Rick Esenberg, State Supreme Court Was Right to Reject Change in Recusal Rules, Milwaukee J. Sentinel, May 1, 2017.[16]

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[15] Nevertheless, the Institute wrote: "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." Memorandum of Wisconsin Institute for Law & Liberty. Inc., Apr. 7, 2017 at 11.

[16] See also the Institute's press release entitled "WILL Files Response to Recusal Petition with State Supreme Court, posted April 7, 2017, in Press Release, Wisconsin Institute for Law & Liberty News, at the Institute's website at http://www.will-law.org/tag/recusal/. Attorney Esenberg is quoted as follows: "The petition is nothing more than hyperbole. Mechanisms already exist which allow litigants at the circuit court level to substitute on a judge. And as we explained, petitioners have utterly failed in establishing campaign contributions have the type of negative affect [sic] on judges and justices they argue is rampant throughout the judicial system."

¶16 Justice Annette K. Ziegler, in moving to dismiss Petition 17-01, stated: "I believe as a matter of law [the petition] cannot withstand constitutional or structural scrutiny. . . . For me, the issue is the law. . . . " She continued in this vein:

> The petitioners have asked us, I think, to do something that does not comport with the Constitution as I view it. I also take a look at, boy, is there

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The petitioners in Rule Petition 17-01, the Conference of Chief Justices, and the United States Supreme Court disagree with Attorney Esenberg's view that campaign contributions do not have a corrosive effect on the public's perception of judicial integrity.

The Conference of Chief Justices' amicus brief filed in the United States Supreme Court in Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), and cited with approval by the United States Supreme Court in its Caperton decision, underscored that campaign abuses threaten public confidence in the judiciary and that the Codes of Judicial Conduct are "'[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'" Brief for Conference of Chief Justices as Amicus Curiae at 4, 11; Caperton, 556 U.S. at 889.

The Caperton Court, 556 U.S. at 889, further declared that public confidence in an impartial judiciary is a "vital state interest":

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order. Republican Party of Minn. v. White, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring).

> precedent? Does that support this somehow? Have I missed something? And the answer to me is no, it simply doesn't support the petition as I view it. . . . But as I see it, and I mean this as respectfully as humanly possible, as I see it, as a matter of law and structural integrity, the petition can't stand. So that's why I voted the way I did, and I just want to be clear on that, and that's why I made the motion that I have, to be clear on that. It's not a matter of disrespect. It is a matter of the law.[17]

¶17 Justice Ziegler referenced no constitutional provision (or "structural" whatever). Justice Ziegler offered no "scrutiny" or authority or explanation to support her position. Justice Ziegler can be charged with an ipse dixit, that is, making an assertion without proof.

¶18 Justice Daniel Kelly, unequivocally and without dilly-dallying, adopted "the comments made by Justice Ziegler . . . ."

¶19 Justice Ann Walsh Bradley and I turned to pronouncements of the United States Supreme Court supporting the constitutionality of the Petition and demonstrating that Wisconsin's current rule on recusal is at odds with the United States Supreme Court's instructions on recusal. Many United States Supreme Court cases were referenced in the material filed with the court upon which we relied. We saw nothing in the

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[17] Justice Ziegler's, Justice Rebecca G. Bradley's, Justice Gableman's, and Justice Kelly's comments are printed in full in Attachment 3. The full cite to the Donohoo case referred to in Justice Ziegler's comments is Donohoo v. Action Wis., Inc., 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480. Justice Roggensack also referred to Donohoo in her concurrence to S. Ct. Order 08-16, 08-25, 09-10, and 09-11, 2010 WI 73, (issued July 7, 2010, eff. July 7, 2010) (see Attachment 4).

Wisconsin Constitution or the United States Constitution that barred the Wisconsin Supreme Court from adopting reasonable recusal rules.

¶20 Justice Michael Gableman and Justice Daniel Kelly were not impressed by our references to United States Supreme Court cases.

¶21 Justice Gableman's rebuttal to my discussion of United States Supreme Court cases was as follows:

> You can take language——we all know, and the judges who are here, the lawyers who are here, and the judges——the justices at this table know, you can extract language from any case which could be as broadly or as narrowly——OK, thank you, I appreciate your willingness to listen to my position.

¶22 Justice Kelly was dismissive of the cases that were cited:

> I think the cases that Justice Abrahamson and Justice Ann Walsh Bradley have cited demonstrate why such a rule is not necessary and not appropriate. None of these cases have indicated that a bright-line rule is necessary or warranted requiring recusal upon a contribution of any specific amount. What they say is that there are certain unusual circumstances that Caperton described as extraordinary and occurring under extreme facts, that could potentially indicate that a justice or a judge is unable to discharge the duties that he swore to uphold. Those are unusual circumstances, and they're to be addressed on a case-by-case basis when facts suggest they need to be raised.

¶23 Here are the pronouncements of the United States Supreme Court that Justice Ann Walsh Bradley and I——and various commentators——view as supportive of Petition 17-01:

- In Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), the Court recognized that judicial independence requires monetary independence. It held that judges must recuse themselves under the Due Process Clause not merely when there is actual bias on the part of the judge, but when the degree of campaign spending is such that the "probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." Caperton, 556 U.S. at 877.

- All the Justices of the United State Supreme Court agree that "States may choose to 'adopt recusal standards more rigorous than due process requires'" without noting any First Amendment concerns.[18] Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 889 (2009). See also Williams v. Pennsylvania, 136 S. Ct. 1899, 1908 (2016) (a state court remains free to impose more rigorous standards for recusal through its ethics rules).[19] Indeed the Court has recommended the states adopt rules and Codes of Judicial Conduct that provide more protection than due process requires. Williams, 136 S. Ct. at 1908.

- The United States Supreme Court recently reiterated that the relevant question for recusal is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'" Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (quoted source omitted).

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[18] Chief Justice Roberts wrote in dissent: "States are, of course, free to adopt broader recusal rules than the Constitution requires——and every State has——but these developments are not continuously incorporated into the Due Process Clause." Caperton, 556 U.S. at 893 (Roberts, C.J., dissenting).

[19] Williams v. Pennsylvania, 136 S. Ct. 1899 (2016), involved a state supreme court justice participating in a case in which many years previously he played a role as a prosecutor.

- In March 2017, in Rippo v. Baker, 137 S. Ct. 905, 908 (2017), the United States Supreme Court vacated a decision of the Nevada Supreme Court that applied an actual bias standard instead of applying the objective appearance-of-bias standard. The Court declared that those requesting recusal need not point to any facts suggestive of actual bias.

- The United States Supreme Court has recognized that "[t]he judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions." Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2017). Recusal standards are necessary to foster the public's willingness to respect the judiciary. The Court declared that "even 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. . . . [In the public's mind, large donations or expenditures] could result (even unknowingly) in a 'possible temptation . . . which might lead [the judge] to not to hold the balance nice, clear and true.'" Williams-Yulee v. Florida Bar, 135 S. Ct at 1667 (internal quotation marks and citations omitted).[20]

- In Citizens United v. Federal Election Commission, 130 S. Ct. 876, 910 (2010), the United States Supreme Court noted that mandatory recusal rules do not abridge First Amendment rights:

  Caperton held that a judge was required to recuse himself "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." The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See Withrow v. Larkin, 421 U.S.

[20] In Williams-Yulee v. Florida Bar, 133 S. Ct. 1656 (2017), the Court upheld Florida's prohibition on judicial candidates personally soliciting campaign contributions.

> 35, 46 (1975). Caperton's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

¶24 Several commentators have noted that concern about judicial integrity and the appearance of bias has become particularly pronounced in Wisconsin in light of this court's recent John Doe decisions and the change in the Wisconsin statutes allowing Wisconsin candidates to control or otherwise coordinate with outside groups on "issue advocacy."[21] The argument advanced is that these changes undermine this court's stated reasoning behind its 2010 recusal rule (that a judge need not recuse herself or himself based solely on independent expenditures or issue advocacy communications) because neither the judge nor the judge's campaign has any control over these expenditures.[22]

¶25 In the 2015 John Doe decisions, this court held that a candidate may control or otherwise coordinate issue advocacy

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[21] State ex rel. Three Unnamed Petitioners v. Peterson, 2015 85, 363 Wis. 2d 1, 866 N.W.2d 165, reh'g den., 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49.

[22] For an example of illegal collusion before the change in the law between a candidate and an issue advocacy group in Wisconsin, see Cary Segall, Wilcox Accepts Burden in Campaign Money Case; Supreme Court Justice to Pay Fine for Committee, Wis. State J., Mar. 6, 2001, at A1.

communications,[23] and the legislature overhauled the Wisconsin statutes regulating campaigns. See 2016 Wis. Act 117.

¶26 The concern expressed is that expenditures for "issue advocacy" in coordination with and on behalf of judicial candidates have the potential to create the reality or appearance of bias.

¶27 Issues of campaign contributions, money, recusal, and judicial integrity are not limited to elected state court judges. These issues are surfacing in the context of appointed federal judges as special interest groups are spending large sums of money publicly campaigning in support of the appointment of certain individuals as federal judges.[24]

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[23] State ex rel. Three Unnamed Petitioners v. Peterson, 2015 85, 363 Wis. 2d 1, 866 N.W.2d 165, reh'g den., 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49 (referencing the First Amendment 24 times).

A more recent United States Supreme Court decision has been interpreted as reaffirming that the First Amendment does not limit campaign finance regulation to express advocacy. See Indep. Inst. v. Fed. Election Comm'n, 26 F. Supp. 3d 176, 186-188 (D.D.C. Nov. 3, 2016), Indep. Inst. v. F.E.C., 137 S. Ct. 1204 (Feb 27, 2017).

[24] See Stephanie Francis Ward, PAC Ad Supports Law Professor's Nomination to 3rd Circuit Seat, ABA Journal (June 20, 2017) (reporting that online ads placed by a PAC urging readers to tell their senators to confirm Stephanos Bibas for a federal judgeship has caused speculation that the ad may give rise to a recusal obligation.) See http://www.abajournal.com/news/article/pac_ad_supports_law_professors_nomination_to_3rd_circuit_seat.

The Claim: The Petition Violates the Voters' Right to Vote For A Judicial Candidate of One's Choice.

¶28 The Wisconsin Institute for Law & Liberty, Inc. mentioned voters' rights but did not discuss the rights of voters, explaining that there was no need for discussion because the court had relied on this claim in adopting the 2010 recusal rules drafted by the Wisconsin Realtors Association and Wisconsin Manufacturers and Commerce and denying other proposals in 2010 tying recusal to campaign contributions.[25]

¶29 Justice Rebecca G. Bradley backed this claim about voters, seconding Justice Ziegler's motion and stating that the Petition infringes on the people's First Amendment right to speak out in judicial races. She stated:

> [The Petition] asks us to infringe the First Amendment rights of the people of Wisconsin who wish to participate in judicial elections, either through supporting a candidate directly or speaking out on issues in a judicial race. The people of Wisconsin, like everybody else in this country, have a First Amendment Right to do that. They have a First Amendment right to speak out in favor of the judges they support, and in opposition to the judges they oppose, without being penalized for exercising their free speech rights. . . . In my mind, this petition is somewhat shocking in its disregard for the Wisconsin Constitution and the United States Constitution, particularly the First Amendment.

¶30 Justice Rebecca Bradley offered no authority or explanation or about how a person's free speech was affected by

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[25] Memorandum of Wisconsin Institute for Law and Liberty, Inc., Apr. 7, 2017, at 2 n.1:

the Petition. She offered no legal support.[26] Justice Rebecca Bradley can also be charged with an ipse dixit. She too made an assertion without proof.

¶31 Justice Daniel Kelly, unequivocally and without dilly-dallying, adopted "the comments made by . . . Justice Rebecca G. Bradley . . . ."

¶32 The argument that the petition violates the voters' right to vote for the judicial candidate of one's choice was championed at the open conference on the Petition by Chief Justice Patience D. Roggensack. She had previously endorsed this idea in her writing in a newspaper piece in 2009[27] and in her writing in the court in 2010.[28] She too offered no authority. Three ipse dixits in a row (plus Justice Kelly).

> 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 in its previous decision, WILL does not believe it necessary to repeat that explanation here.

[26] A transcript of Justice Rebecca Bradley's full remarks appears in Attachment 3.

[27] See Patience Drake Roggensack, The Vote Was About Protecting State's Voters, Milwaukee J. Sentinel (Dec. 5, 2009), available at archive.jsonline.com/news/opinion.78556262.html/.

[28] See S. Ct. Order 08-16, 08-25, 09-10, & 09-11, 2010 WI 73, (issued July 7, 2010, eff. July 7, 2010) (Roggensack, J., concurring), available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874. For the convenience of the reader, the concurrence is attached as Attachment 4.

¶33 This "voter rights" argument was neither validated nor defensible in 2009 and 2010 and it isn't now. Judicial recusal is unrelated to a citizen's casting a vote or any person (other than a judge) speaking in a judicial election.[29] Citizens do not have a constitutional right to have a judge of their choice (whether the judge is elected or appointed) sit on their case.[30] If they did, could an elected justice ever refuse to participate in a case?

The Claim: The Adoption of the Proposal Requires a Constitutional Amendment Providing That a Disqualified Justice Be Temporarily Replaced by Another Judge.

¶34 The order, like some discussion at the open conference, somewhat misleadingly states or implies that the Petition cannot be adopted without an amendment to the Wisconsin Constitution.

¶35 Justice Rebecca G. Bradley tied the Petition to the need for a state constitutional amendment in this way: "With respect to the Wisconsin Constitution, the petitioners

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[29] See S. Ct. Order 08-16, 08-25, 09-10, & 09-11, 2010 WI 73 (issued July 7, 2010, eff. July 7, 2010) (Bradley, J., dissenting), available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874.

[30] "Everybody is entitled to a fair and impartial judge. . . . They're not necessarily entitled to the one that they contributed all that money to," said Retired Judge John Perlich. John Davis, Retired Judge: New Judicial Recusal Rules Could Restore Faith In Wisconsin Supreme Court, Wis. Public Radio (Feb. 9, 2017).

acknowledge that the Wisconsin Constitution would have to be amended in order for their proposal to work. They know that we don't have the power to do this. That power remains with the people. To further consider this petition would essentially require us to disregard or even violate the Wisconsin Constitution."

¶36 Chief Justice Patience Roggensack commented at the hearing about the need for a constitutional amendment. She reinforced the notion that the Petition was inescapably tied to such a constitutional amendment in an interview with Steve Walters on Wisconsin Eye on April 28, 2017. Their conversation went like this:

> **PDR:** . . . [T]he petition . . . would have required a constitutional amendment before you could ever have the kind of recusal that was suggested——
>
> **Steve Walters:** So it's not a rule that the court could have adopted. Excuse me for interrupting.
>
> **PDR:** No, I don't believe it was a rule we could have adopted. . . .
>
> . . . .
>
> **PDR:** . . . [Y]ou could end up with a Supreme Court that couldn't function. We need four people to have a quorum. . . . [Y]ou have to have four justices to go forward . . . . So you would have to have amended the constitution to follow through on what they were asking us to do. You couldn't just do one part of it.

> And I do think that the judges who filed this petition recognize that. That's why they put them together.[31]

¶37 Adoption of the Petition does not require a constitutional amendment.

¶38 Rather, the narrative in the Petition about a constitutional amendment is an attempt to respond to the court's 2010 Comment in adopting the present recusal rule, stating that it did not favor recusals inasmuch as a non-participating supreme court justice cannot be replaced with another judge.[32]

¶39 The ban on replacing a Wisconsin justice who does not participate in a case dates back to the 1848 constitution. This court's hearing cases with the participation of fewer than seven justices participating is nothing new.

¶40 Since 1848, this court has decided cases with fewer than the allotted number of justices for a variety of reasons. I found more than 140 cases decided from 1848 through 2017 in which one or more justices did not participate and in which the

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[31] For an instance when the court issued an order without a quorum, see the court's Sept. 20, 2016 order in the John Doe trilogy, Nos. 2013AP2504-2508-W, 2014AP296-OA, and 2014AP417-421-W. The September 20 order states that only Chief Justice Patience D. Roggensack, Justice Annette K. Ziegler, and Justice Michael J. Gableman approved the order. Justices Shirley S. Abrahamson, Ann Walsh Bradley, Rebecca G. Bradley, and Daniel Kelly did not participate. Thus, the court took action when only three justices (not a quorum) participated.

[32] See Attachment 2.

court evenly divided.[33] In many more cases, one or more justices did not participate, and the court did not equally divide. I did not do a survey of cases of all the cases for the last 169 years since 1848. I did survey cases in the last 10 years (2007-2017). In this 10-year period I found that in more than 50 cases, fewer than seven justices participated.[34] No recusals, to the best of my recollection, related to campaign contributions.

¶41 Whether to replace disqualified justices is an issue independent of Petition 17-01. Deciding cases with fewer than seven justices sometimes does raise difficulties. The court has attended to the difficulties and will do so in the future regardless of Petition 17-01.

¶42 The legislature has also tried to deal with the issue of the court's deciding cases without seven justices participating. Several State Assembly resolutions have been proposed since 2000 to amend the Wisconsin Constitution to allow a disqualified justice to be replaced with another judge to

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[33] For a list of the cases, see my concurrence in Smith v. Kleynerman, 2017 WI 22, ¶¶3-8, 374 Wis. 2d 1, 892 N.W.2d 734 (Abrahamson, J., concurring) (regarding the court's changing its practice to no longer reveal how each justice voted in a tie vote case).

[34] I did a Westlaw search to find these cases. The court does not collect aggregate data on disqualification/recusal activity, e.g., motions filed, self recusals, asserted bases, dispositions, and reasons given.

avoid the court's sitting without a full complement of seven justices or failing to have a quorum.[35]

¶43 Deciding cases with fewer than seven justices sometimes introduces complications, but deciding cases with justices who are challenged on grounds of bias or the appearance of bias raises even more complications.[36] It is not necessary, however, to adopt a constitutional amendment to ensure that

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[35] See, e.g., 2015 Assembly Joint Resolution 88, 2013 Assembly Joint Resolution 18, 2011 Assembly Joint Resolution 128, 2003 Assembly Joint Resolution 44, 1999 Assembly Joint Resolution 96.

[36] Campaign contributions to justices' elections have stimulated recusal motions and media stories. The online docket for the John Doe trilogy, Nos. 2013AP2504-2508-W, 2014AP296-OA, and 2014AP417-421-W, contains numerous references to the parties' motions and various justices' writings regarding recusals related to campaign contributions. See https://wscca.wicourts.gov/appealHistory.xsl;jsessionid=20F7D006B7C7F1316486990396C49AA1?caseNo=2013AP002504&cacheId=9BEA5888D9A7A39FDC4C4FB75AB1D17C&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC.

See also Patrick Marley, John Doe Prosecutor Asks One or More Justices To Step Aside, Milwaukee J. Sentinel (Feb. 13, 2015), http://archive.jsonline.com/news/statepolitics/john-doe-prosecutor-asks-one-or-more-justice-to-step-aside-b99444515z1-291866271.html/; Patrick Marley and Mary Spicuzza, Wisconsin Supreme Court Ends John Doe Probe into Scott Walker's Campaign, Milwaukee J. Sentinel (July 16, 2015), http://archive.jsonline.com/news/statepolitics/wisconsin-supreme-court-ends-john-doe-probe-into-scott-walkers-campaign-b99535414z1-315784501.html; Gerald C. Nichol, Big Donations to Judges Should Require Recusal, Wis. State J. (June 5, 2017), http://host.madison.com/wsj/opinion/column/gerald-c-nichol-big-donations-to-judges-should-require-recusal/article_a5fce986-42b4-5c60-aab8-b2aa8b304654.html.

seven justices will sit on every case in order to adopt Rule Petition 17-01 on recusal.

The Claim: Adopting the Petition Violates a Justice's or Judge's Oath of Office.

¶44 Here is the oath of office each justice and judge in this state is required to take upon entering office:

> I, [Name], who have been elected (or appointed) to the office of ...., but have not yet entered upon the duties thereof, do solemnly swear that I will support the constitution of the United States and the constitution of the state of Wisconsin; that I will administer justice without respect to persons and will faithfully and impartially discharge the duties of said office to the best of my ability. So help me God.[37]

¶45 Justice Rebecca G. Bradley maintained that the Petition asks judges to violate and disregard the oath:

> [W]e cannot consider the petition further, because to do so would violate the oath that each of us took when we undertook our office, and I want to be very clear about the oath. . . . The oath that we took is to support the Constitution of the United States and the Constitution of the State of Wisconsin. We also swear solemnly to administer justice without respect to persons, and to faithfully and impartially discharge the duties of this office to the best of our ability, so help us God. . . . [T]he petition asks us to disregard that oath, in my mind. . . . One would think the petitioners who tout their 1,100 years of combined service in the judiciary would understand that this court cannot act on this petition without violating our oaths to uphold our Constitution.

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[37] The oath is set forth in Wis. Stat. § 757.02.

¶46 I have addressed the argument that the Rule Petition is an unconstitutional violation of First Amendment rights at ¶¶12-33, supra. I disagree with Justice Rebecca Bradley's assertion that the adoption of this rule would be a violation of our oath to support the constitution.

¶47 Justice Kelly claimed that the Petition was not only unnecessary but was also inappropriate and casts aspersions on the oath. His remarks are as follows:

> [To adopt the bright-line hard and fast rule in the Petition requiring recusal upon contribution of a specific amount] declaring to all the world that we cannot trust the judges of this state to uphold their oath to support the Constitution, to discharge their responsibilities to apply law to facts and come to a good, true, and just judgment, is to cast aspersions on the oath they took. I think that would be a manifestly inappropriate thing for this court to do, and for that reason I support the motion to dismiss and deny the petition.

¶48 If this reasoning is accepted, and I do not accept it, then in all likelihood no code of judicial conduct will ever be needed because the oath in general terms already prohibits much (if not all) the conduct specifically prohibited in the Code. I conclude that a Code of Judicial Conduct that provides more specific direction for judges than does the oath serves judges and the public well.

The Claim: The Petition is an Insult to the Judges and Justices of this State.

¶49 This claim was framed by the justices in a number of different ways.

¶50 Justice Rebecca G. Bradley illuminated the "insult" argument as follows:

> Every judge and justice in the State of Wisconsin should be highly offended by this petition, because it attacks their integrity and their character, and I today defend every justice and judge in this state in rejecting this petition. I practiced law for over 16 years, I've served at every level of the judiciary, and I know that the judges and justices in this state strive every day to render impartial justice, setting aside their own personal feelings about cases and the people involved in those cases to render decisions in accordance with the law. And if any judge fails to do so, if a judge does not act with impartiality and integrity, that judge will answer to the people of Wisconsin on their election day. And that's the beauty of our system of an elected judiciary, which our state has had for about 170 years. Every one of us who serve the people of Wisconsin as a member of the judiciary is directly accountable to the people.[38]

¶51 Attorney Casey Hoff called this comment a "head scratch[er]." He wrote: "Using Justice Rebecca Bradley's logic, no judge, nor any attorney for that matter, should ever be held to any ethics rules because to impose any rules on an attorney or a judge would be 'highly offensive' and an attack on

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[38] The Beloit Daily News remarked in response to Justice Rebecca Bradley's comments: "Seriously? Come on." Editorial, Money First, at the Supreme Court, Beloit Daily News (Apr. 24, 2017).

Retired Judge Mike Lucci wrote: "[A]s voters we should all remember this important issue and what just transpired in Madison when the next Supreme Court election rolls around." Mike Lucci, Bias Is Not Justice, Superior Telegram (May 5, 2017).

their integrity. Her argument is, in essence, 'just trust us.'"[39]

¶52 An editorial responded: "The judge involved may indeed judge the case fairly and honestly——we have no doubt that the vast majority would——but the appearance of a conflict of interest can be just as damaging to the public's trust as an actual conflict."[40]

¶53 Justice Daniel Kelly phrased the claim of "insult" to judges this way:

> The question presented by the petition is not whether or not we should recuse under certain circumstances. The question is whether we ought to tell judges in this state that we do not trust them to make that judgment on their own. I think that's a caustic and inappropriate and unnecessary thing for us to do.

¶54 Recusal standards are, in my opinion, no more of an insult to judges and justices than it is an insult to all law-abiding people to have laws governing ethics for public officials; laws governing criminal and tortious conduct; laws protecting our rivers, lakes, and streams; laws regulating the quality of dairy products; and so on and so forth.

¶55 Unfortunately, judges and justices, like all people, even very good people, need guidance and make mistakes. Members of the judiciary have violated the Code of the Judicial Conduct.

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[39] Casey Hoff, USA Today Network-Wis., Wisconsin Supreme Court's Troubling Move, Sheboygan Press (Apr. 28, 2017).

[40] Editorial, Judge Recusal Proposal Make Sense, Milwaukee J. Sentinel (Jan. 14, 2017).

Justices and judges are not above the law; they are governed by law. See Annual Report of the Judicial Commission.

¶56 In a perfect world, we would not need a Code of Judicial Conduct, and we would not need many of the statutes that now cover six hefty volumes of the Wisconsin Statutes.

Counterclaim: Overwhelming Public Support for the Petition and Opposition to the Dismissal

¶57 Editorial support, op-ed pieces, letters to the editor, cartoons, and miscellaneous commentary have overwhelmingly supported the court's granting a hearing on the Petition, have overwhelmingly supported adoption of the Petition, and have overwhelmingly expressed disagreement with the dismissal of Petition 17-01 by five justices. I reference these writings here. The very titles of the writings tell a story:

- Editorial, **Judge Recusal Proposal Make Sense**, Milwaukee J. Sentinel (Jan. 14, 2017).[41]
- Editorial, **State's Courts Shouldn't Be for Sale**, Racine J. Times (Jan. 22, 2017).[42]
- Editorial, **State Must Ensure Justice Isn't For Sale**, Wis. State J. (Feb. 1, 2017).[43]

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[41] Available at http://www.jsonline.com/story/opinion/editorials/2017/01/14/editorial-judge-recusal-proposal-make-sense/96561330/.

[42] Available at http://journaltimes.com/news/opinion/editorial/journal-times-editorial-state-s-courts-shouldn-t-be-for/article_ad1a4d2a-44ec-5e3a-af4f-1ce257d15e84.html.

- Tanya Arditi, **Statement: Wisconsin Supreme Court Missed an Opportunity to Address Its Ethical Shortcomings, Says CAP's Michele L. Jawando**, Center for Am. Progress (Apr. 20, 2017).[44]

- David D. Haynes, **Editorial: Supreme Court Justices Let Down Wisconsin Citizens**, Milwaukee J. Sentinel (Apr. 20, 2017).[45]

- Billy Corriher, **Wisconsin Supreme Court Rejects Request from 56 Judges To Address Judicial Campaign Cash**, ThinkProgress (Apr. 20, 2017).[46]

- Matthew Rothschild, **Wisconsin's High Court Does Hack Job on Recusal Petition**, Capital Times (Apr. 20, 2017).[47]

- Phil Hands, **Hands on Wisconsin: Supreme Court Justices Refuse to Recuse**, Wis. State J. (Apr. 23,

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[43] Available at http://host.madison.com/wsj/opinion/editorial/editorial-state-must-ensure-justice-isn-t-for-sale/article_a3759af4-00ff-5f2d-b1cf-dc82a4785174.html.

[44] Available at https://www.americanprogress.org/press/statement/2017/04/20/430883/statement-wisconsin-supreme-court-missed-opportunity-address-ethical-shortcomings-says-caps-michele-l-jawando/.

[45] Available at http://www.jsonline.com/story/opinion/blogs/real-time/2017/04/20/editorial-supreme-court-justices-let-down-wisconsin-citizens/100697616/.

[46] Available at https://thinkprogress.org/wisconsin-supreme-court-campaign-finance-23d81ba9889f.

[47] Available at http://host.madison.com/ct/opinion/column/matthew-rothschild-wisconsin-s-high-court-does-hack-job-on/article_f88f744c-ccf4-5cb6-b6c2-96130523c923.html.

2017).[48] (political cartoon titled "The 'Best' Legal Minds in Our State," depicting a Wisconsin Supreme Court Justice sitting in the pocket of a campaign donor and saying, "Recusals? We don't need no stinkin' recusals!" as he tears a document labeled "New Rules.").

- Editorial, **Money First, at the Supreme Court**, Beloit Daily News (Apr. 24, 2017).[49]
- John Nichols, **The Scorching Shamelessness of the Wisconsin Supreme Court**, Capital Times (Apr. 25, 2017).[50]
- Casey Hoff, USA Today Network-Wis., **Wisconsin Supreme Court's Troubling Move**, Sheboygan Press (Apr. 28, 2017).[51]
- Editorial, **Fat Wallets Plunked on the Scales of Justice**, Racine J. Times (May 4, 2017).[52]

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[48] Available at http://host.madison.com/wsj/opinion/cartoon/hands-on-wisconsin-supreme-court-justices-refuse-to-recuse/article_8e94d406-a677-581c-b5b3-dedce6568533.html.

[49] Available at http://www.beloitdailynews.com/article/20170424/ARTICLE/170429897.

[50] Available at http://host.madison.com/ct/opinion/column/john_nichols/john-nichols-the-scorching-shamelessness-of-the-wisconsin-supreme-court/article_fd17869c-f857-5373-8454-20e43028d557.html.

[51] Available at http://www.sheboyganpress.com/story/opinion/2017/04/28/wisconsin-supreme-court-recusal-rules-public-hearing-rebecca-bradley-roggensack/101024858/.

[52] Available at http://journaltimes.com/news/opinion/editorial/journal-times-editorial-fat-wallets-plunked-on-the-scales-of/article_0c9bfaff-d612-5e02-9bc7-549d356a9c45.html.

- Mike Lucci, **Bias Is Not Justice**, Superior Telegram (May 5, 2017).[53]
- Peg Lautenschlager, **Op-Ed Misconstrues Supreme Court's Ruling on Judicial Campaign Cash**, Wispolitics (May 17, 2017).[54]
- Gerald C. Nichol, **Big Donations to Judges Should Require Recusal**, Wis. State J. (June 5, 2017).[55]

¶58 In the words of the Racine Journal Times: "The fat wallets of special interest spending have been placed on the scales of justice."[56]

¶59 Retired Judge Mike Skwierawski summed it up: "At some level, you have to hope that the integrity of the court system becomes the highest priority for the Supreme Court. Not just keep the money flowing."[57]

¶60 And Retired Judge Sarah O'Brien stated: "I just feel sad. The people believe that large campaign contributions can

[53] Available at http://www.superiortelegram.com/opinion/4261448-bias-not-justice.

[54] Available at https://www.wispolitics.com/2017/peg-lautenschlager-op-ed-misconstrues-supreme-courts-ruling-on-judicial-campaign-cash/.

[55] Available at http://host.madison.com/wsj/opinion/column/gerald-c-nichol-big-donations-to-judges-should-require-recusal/article_a5fce986-42b4-5c60-aab8-b2aa8b304654.html.

[56] Editorial, Fat Wallets Plunked on the Scales of Justice, Racine J. Times (May 4, 2017).

[57] Editorial: Judge Recusal Proposal Make Sense, Milwaukee J. Sentinel (Jan. 14, 2017).

influence judges, but the justices refuse to acknowledge that. It's what we expected, but it's no less heartbreaking."[58]

¶61 I want to thank the retired judges who signed Petition 17-01. Even in retirement they continue their commitment to the Wisconsin judicial system, a fair, neutral, impartial and non-partisan judiciary, and the people of this state. I too am sad and disappointed that the five justices dismissed the Petition. I therefore write in dissent.

¶62 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

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[58] Matthew Rothschild, Wisconsin's High Court Does Hack Job on Recusal Petition, Capital Times (Apr. 20, 2017).

ATTACHMENT 1

Rule Petition 17-01: Proposed Supreme Court Rule

Section 1. SCR 60.01 (1m) is created to read:

(1m) "Campaign contributions" means (a) direct contributions to the judge or the judge's campaign committee; (b) 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; or (c) contributions by or to a third party made with the intention or reasonable expectation that the third party would use the contribution to make independent expenditures either supporting the judge or opposing the judge's opponent, or otherwise attempting to influence the outcome of a judicial election. The definition includes monetary or in kind contributions.

Section 2. Create SCR 60.04(4)(g)1-4 to read:

(g) 1. The judge's campaign committee has received campaign contributions from a party to a proceeding or that party's lawyer which in the aggregate total at least the following amounts for election to the following judicial offices:

a. Supreme Court Justice--$10,000

b. Court of Appeals Judge--$2,500

c. Circuit Court Judge--$1,000

d. Municipal Court Judge--$500

This section does not apply if the contributions are returned prior to the general election.

2. Campaign contributions are made separate from the judge's campaign but with the apparent purpose to favorably influence the judge's election by a party to a proceeding or that party's lawyer which in the aggregate total at least the amounts listed for the judicial offices listed in subpara. (g)1.

3. For purposes of determining whether the monetary limits of paragraph 1. have been exceeded, the rule applies to campaign contributions made both during the judge's current term and during the immediately preceding term, however, the contribution limits apply separately to each of these time periods. If the judge is serving his or her first term, the "immediately preceding term" is considered the period beginning on the date on which the judge became a candidate under Wis. Stat. s. 11.0101 (1) (a) and ending on the day before the current term of office began.

4. Subparagraphs 1 and 2 apply whether such contributions, disbursements or expenditures were made or done with or without the knowledge or approval of the judge.

5. As used in paragraph g, the term "lawyer" means each individual attorney of record. The term "party" includes named individuals and any such individual's spouse and relatives within the 2nd degree of kinship. When the named party is a corporation or organization, "party" shall include not only the corporation or organization itself, but any individual officer, executive director, member of the board of directors, managing partner, or owner of more than 10% of the corporation or organization.

COMMENT

Wisconsin has had an elective judiciary for over 150 years. Money in judicial elections has in recent years played a far more prominent role. Indeed, the legislature in 2015 Wisconsin Act 117 increased the limits on direct contributions to judicial candidates and their campaign committees to $6000 for circuit court candidates in large counties and to $20,000 for Supreme Court candidates.

In addition, in 2015 the Wisconsin Supreme Court issued *State ex rel. Unnamed Pet. v. Peterson*, 363 Wis. 2d 1, in which the Court decided that an individual or organization engaged in issue advocacy may coordinate with a campaign in any fashion it wishes with no limits on what it may spend and without any obligation to report the source of its funds.

These rules do not suggest that receipt of a campaign contribution or the benefit of an expenditure from an independent source automatically impairs the judge's integrity. Instead, they are a response to the widespread reasonable perception of average citizens. There is a commonly held belief that when one side to a lawsuit has devoted substantial amounts to the election of the judge assigned to that lawsuit, the natural tendency to feel gratitude may interfere with that judge's ability to keep the scales of justice totally even. Such a perception undermines respect for our courts.

Citizens, and now corporations, have a constitutional right to contribute to the judicial candidate of their choice. They do not, however, have the right to have that person preside over their lawsuit.

When subsec. (4)(g) refers to a party's "lawyer," it is intended that this shall include each individual attorney of record. However, large aggregate contributions from an individual attorney's law firm may cause an appearance of bias requiring recusal even if the precise limits of the rule are not exceeded by a particular attorney. The following factors may be considered in any situation in which the judge's impartiality may reasonably be questioned due to campaign contributions:

a. amount of the expenditure;

b. timing of the expenditure;

c. relationship of contributor or supporter to the party;

d. impact of the expenditure;

e. nature of the contributor's prior political activities or support and prior relationship with the judge;

f. nature of pending matter or proceeding and its importance to the party or counsel;

g. any other factor relevant to a judge's campaign that causes the judge's impartiality to be questioned.

Section 3. Create SCR 60.04(4)(g)6 to read:

6. Once the judge or judges assigned to a case are known, each party or the party's lawyer shall file an affidavit disclosing any campaign contribution exceeding $250 made by the party or the party's lawyer to any assigned judge during the time periods described in subparagraph 3. The lawyer shall engage in reasonable efforts to ascertain if the party or the party's lawyer has made any such campaign contribution.

COMMENT

Ordinarily the facts that may require recusal are known to or readily available to the judge, but in the case of campaign spending, especially spending outside of the judge's own campaign committee, that is not always true. Of course, this rule is not intended to replace a judge's duty to make disclosure when he or she does know the facts. However, judges should not be expected to devote the enormous time needed to ascertain who connected to every case has made campaign contributions. This task can more accurately and easily be performed by counsel.

Section 4. Create SCR 60.04(4)(h) to read:

(h) 1. Ordinarily the need for a judge to recuse himself or herself shall be disclosed by the judge. A party may bring a motion for recusal or disqualification and shall by affidavit include all grounds for recusal or disqualification that are known at the time the motion is filed. Any such motion shall be filed at the earliest possible time after discovery of the grounds requiring recusal or disqualification in order to avoid delay in the proceeding.

2. The challenged judge shall initially decide the motion and enter his or her decision on the record. If the challenged judge denies the motion, a party may seek review of the decision within 7 days by filing a written motion. If the challenged judge is a municipal judge or a circuit court judge, the review shall be conducted by the chief judge of the district in which the judge's court is located. If the challenged judge is a court of appeals judge, the review shall be conducted by a Supreme Court justice randomly selected by the Director of State Courts. If the challenged judge is a Supreme Court justice, the review shall be conducted by a panel of three court of appeals judges randomly selected by the Director of State Courts.

3. The reviewing authority shall expeditiously decide the motion de novo by written order reciting the reasons for its grant or denial using such procedure as is fair under the circumstances.

COMMENT

Certain of the preceding rules establish an objective standard for when recusal is required. A review procedure is a necessary ingredient to the effectiveness of such a standard.

When the chief judge of a district is the subject of a recusal motion or is otherwise unable to act, the deputy chief judge of the district shall conduct the review.

Section 5. Add to SCR 60.04(6) the following:

In the case of a recusal required by sub. (4)(g), agreement that the judge should not be required to recuse will only be needed from the non-contributing party or parties.

COMMENT

The final sentence of the rule is included to avoid the disqualification of a judge by a party making a contribution or an expenditure with the intent to cause circumstances that would require recusal.

Section 6. Repeal SCR 60.04(7) and (8).

ATTACHMENT 2

Current Recusal Rule – SCR 60.04(7) – (8)

(7) EFFECT OF CAMPAIGN CONTRIBUTIONS. 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 proceeding.

Comment, July 2010: Wisconsin vigorously debated an elective judiciary during the formation and adoption of the Wisconsin Constitution in 1848. An elective judiciary was selected and has been part of the Wisconsin democratic tradition for more than 160 years.

Campaign contributions to judicial candidates are a fundamental component of judicial elections. Since 1974 the size of contributions has been limited by state statute. The limit on individual contributions to candidates for the supreme court was reduced from $10,000 to $1,000 in 2009 Wisconsin Act 89 after the 2009 supreme court election. The legislation also reduced the limit on contributions to supreme court candidates from political action committees, from $8,625 to $1,000.

The purpose of this rule is to make clear that the receipt of a lawful campaign contribution by a judicial candidate's campaign committee does not, by itself, require the candidate to recuse himself or herself as a judge from a proceeding involving a contributor. An endorsement of the judge by a lawyer, other individual, or entity also does not, by itself, require a judge's recusal from a proceeding involving the endorser. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal.

Campaign contributions must be publicly reported. Disqualifying a judge from participating in a proceeding solely because the judge's campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs the judge's integrity. It would have the effect of discouraging "the broadest possible participation in financing campaigns by all citizens of the state" through voluntary contributions, see Wis. Stat. § 11.001, because it would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect.

Involuntary recusal of judges has greater policy implications in the supreme court than in the circuit court and court of appeals. Litigants have a broad right to substitution of a judge in circuit court. When a judge withdraws following the filing of a substitution request, a new judge will be assigned. When a judge on the court of appeals withdraws from a case, a new judge also is assigned. When a justice of the supreme court withdraws from a case, however, the justice is not replaced. Thus, the recusal of a supreme court justice alters the number of justices reviewing a case as well as the composition of the court. These recusals affect the interests of non-litigants as well as non-contributors, inasmuch as supreme court decisions almost invariably have repercussions beyond the parties.

(8) EFFECT OF INDEPENDENT COMMUNICATIONS. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an "independent communication") by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

Comment, July 2010: Independent expenditures and issue advocacy communications are different from campaign contributions to a judge's campaign committee. Contributions are regulated by statute. They are often solicited by a judge's campaign committee, and they must be accepted by the judge's campaign committee. Contributions that are accepted may be returned. By contrast, neither a judge nor the judge's campaign committee has any control of an independent expenditure or issue advocacy communication because these expenditures or communications must be completely independent of the judge's campaign, as required by law, to retain their First Amendment protection.

A judge is not required to recuse himself or herself from a proceeding solely because an individual or entity involved in the proceeding has sponsored or donated to an independent communication. Any other result would permit the sponsor of an independent communication to dictate a judge's non-participation in a case, by sponsoring an independent communication. Automatically disqualifying a judge because of an independent communication would disrupt the judge's official duties and also have a chilling effect on protected speech.

History: Sup. Ct. Order No. 95–05, 202 Wis. 2d xvii (1997), modified 210 Wis. 2d xvii (1998); Sup. Ct. Order No. 00-07, 2004 WI 134, 274 Wis. 2d xvii; Sup. Ct. Order Nos. 08-16, 08-25, 09-10, and 09-11, 2010 WI 73, filed and eff. 7-7-10; Sup. Ct. Order No. 11-09, 2012 WI 56, filed 5-22-12, eff. 7-1-12; Sup. Ct. Order No. 13-14, 2014 WI 49, filed and eff. 7-1-14.

LRB note: Sub. (4) (e) 1., requires a judge to recuse himself or herself from presiding in a case in which the judge's spouse is a director of a party to the proceeding. The fact that allegations of misconduct were made during an election does not mean that the allegations may be given short shrift. Although a judge may commit a "willful" violation constituting judicial misconduct when the judge has no actual knowledge that his or her conduct is prohibited by the code of judicial conduct, the judge's actual knowledge, or lack thereof, of the code is relevant to the issue of discipline. Wisconsin Judicial Commission v. Ziegler, 2008 WI 47, 309 Wis. 2d 253, 750 N.W.2d 710, 07-2066.

ATTACHMENT 3

Excerpts from Transcript of Open Rules Conference
April 20, 2017
Discussion of Rule Petition 17-01

Justice Annette K. Ziegler: I have a motion. I would like to move to dismiss and deny the petition. I believe as a matter of law it cannot withstand constitutional or structural scrutiny. It's not about the petitioners. I have to tell you, I respect, like, and have served with, consider them colleagues, many of the petitioners here. And it isn't about a popularity contest or whether I like them or not, because I certainly do, and I think many of them are well-intentioned good judges here. That's not the issue. For me, the issue is the law. And as a judge, I have taken an oath to uphold and support the Constitution of the United States and the Constitution of the State of Wisconsin, and it's my obligation to do just that. The petitioners here have asked us, I think, to do something that just does not comport with the Constitution as I view it. I also take a look at, boy, is there precedent? Does that support this somehow? Have I missed something? And the answer to me is no, it simply doesn't support the petition as I view it. We have recent opinions from the court, fairly recent rules where the court debated pretty much these very issues, even—you know, when I very first started on this court, there was a case, I can't remember the exact name, I'm just thinking of it, Donohoo, I believe, where, in the summer break, we took up, and the then-Chief Justice called a special hearing to decide an issue because there were attacks made against Louis Butler, that he ought to recuse himself on a case where he was involved in a campaign, deciding a case, and something—and the answer was clearly no. It was Justice Butler's call. And we unanimously reached that conclusion. I believed then that was the right conclusion. I believe now that's the right conclusion. And I would decide that case with respect to Louis Butler the same way today. To me, that's consistency. Ultimately, the people of Wisconsin have decided for, I don't know, 170 years, and will continue to decide the fate of the people who sit in these chairs. But as I see it, and I mean this as respectfully as humanly possible, as I see it, as a matter of law and structural integrity, the petition can't stand. So that's why I voted the way I did, and I just want to be clear on that, and that's why I made the motion that I have, to be clear on that. It's not a matter of disrespect. It is a matter of the law.

Justice Rebecca G. Bradley: I will second Justice Ziegler's motion, and I would like to speak to that. I support the motion to dismiss and to deny the petition for several reasons. As Justice Ziegler mentioned, we cannot consider the petition further, because to do so would violate the oath that each of us took when we undertook our office, and I want to be very clear about the oath. We just had an admissions ceremony for lawyers. Their oath is much longer than ours, so I will be brief. The oath that we took is to support the Constitution of the United States and the Constitution of the State of Wisconsin. We also swear solemnly to administer justice without respect to persons, and to faithfully and impartially discharge the duties of this office to the best of our ability, so help us God. This petition, which I have reviewed and studied, I've also

reviewed and studied all of the materials that many people decided to file with respect to the merits of this petition, the petition asks us to disregard that oath, in my mind. It asks us to infringe the First Amendment rights of the people of Wisconsin who wish to participate in judicial elections, either through supporting a candidate directly or speaking out on issues relevant in a judicial race. The people of Wisconsin, like everybody else in this country, have a First Amendment right to do that. They have a First Amendment right to speak out in favor of the judges they support, and in opposition to the judges they oppose, without being penalized for exercising their free speech rights. With respect to the Wisconsin Constitution, the petitioners acknowledge that the Wisconsin Constitution would have to be amended in order for their proposal to work. They know that we don't have the power to do this. That power remains with the people. To further consider this petition would essentially require us to disregard or even violate the Wisconsin Constitution. The final point I would like to make is that this petition rests on a presumption that is false. This petition presumes that the 272 judges and justices who serve the people of Wisconsin are incapable of fulfilling their oaths to administer justice without respect for persons and to faithfully and impartially discharge the duties of their office. I reject that premise. It is a falsehood. Every judge and justice in the State of Wisconsin should be highly offended by this petition, because it attacks their integrity and their character, and I today defend every justice and judge in this state in rejecting this petition. I practiced law for over 16 years, I've served at every level of the judiciary, and I know that the judges and justices in this state strive every day to fulfill that oath to render impartial justice, setting aside their own personal feelings about cases and the people involved in those cases to render decisions in accordance with the law. And if any judge fails to do so, if a judge does not act with impartiality and integrity, that judge will answer to the people of Wisconsin on their election day. And that's the beauty of our system of an elected judiciary, which our state has had for about 170 years. Every one of us who serve the people of Wisconsin as a member of the judiciary is directly accountable to the people. In my mind, this petition is somewhat shocking in its disregard for the Wisconsin Constitution and the United States Constitution, particularly the First Amendment. One would think the petitioners who tout their 1,100 years of combined service in the judiciary would understand that this court cannot act on this petition without violating our oaths to uphold our Constitution. For all of these reasons, I strongly urge my colleagues to deny this petition and dismiss it without further hearing.

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Justice Michael J. Gableman: [to Justice Abrahamson] The case you cite, where a person who becomes a member of the Supreme Court has already staked out a position, is not, as you acknowledged at some point, relevant to the—well, is not what we are talking about, that's the phrase you've used. And I thought you were going to acknowledge—I thought where you were going at the very end of it was to acknowledge that you have been the recipient of contributions during your campaigns from lawyers and parties with cases before the court at the time, as

recently as 2009, and you defended that, and I—you know what, Justice Abrahamson? I defend your ability to determine for yourself, for the reasons that have been stated by Justice Ziegler and Justice Rebecca Bradley, your ability to discern for yourself, as is consistent with the rules of this court, with the Internal Operating Procedures, and with the rules that govern this court, and I defend your right to make that determination. That's where I thought you were going when you started to say, "I acknowledge," but you kind of took a U-turn there, going back to another case that is not related to the subject matter of the petition. Obviously if a judge has a pecuniary interest such as an investment that would be affected by the result of the case, that is a—that is another situation, that is another fact pattern similar to the one that you started reading to us about in regard to a judge who has staked out a position as to whether a defendant should receive the death penalty and then becomes a judge of that case, well, I—I think we would all take another look at that, if that was what we were talking about. So, I guess I appreciate your interesting stories, but I'm not sure that I see that they are relevant to the issue at hand, which you have quite candidly acknowledged, and I appreciate that.

Justice Abrahamson: The fact situation in the Castille case, that's the Terrance Williams case, is different, but the language of the United States Supreme Court in these cases is quite clear—

Justice Gableman You can take language—we all know, and the judges who are here, the lawyers who are here, and the judges—the justices at this table know, you can extract language from any case which could be as broadly or as narrowly—OK, thank you, I appreciate your willingness to listen to my position.

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Justice Daniel Kelly: I adopt the comments made by Justice Ziegler and Justice Rebecca Bradley, and in particular with respect to the obligations that we take, and that we swear that we will uphold. The question presented by the petition is not whether or not we should recuse under certain circumstances. The question is whether we ought to tell judges in this state that we do not trust them to make that judgment on their own. I think that's a caustic and inappropriate and unnecessary thing for us to do. I think the cases that Justice Abrahamson and Justice Ann Walsh Bradley have cited demonstrate why such a rule is not necessary and not appropriate. None of these cases have indicated that a bright-line rule is necessary or warranted requiring recusal upon a contribution of any specific amount. What they say is that there are certain unusual circumstances that Caperton described as extraordinary and occurring under extreme facts, that could potentially indicate that a justice or a judge is unable to discharge the duties that he swore to uphold. Those are unusual circumstances, and they're to be addressed on a case-by-case basis when the facts suggest they need to be raised. To convert that into a hard and fast rule, declaring to all the world that we cannot trust the judges of this state to uphold their oath to support the Constitution, to discharge their responsibilities to apply law to facts and come to a good, true,

and just judgment, is to case aspersions on the oath that they took. I think that would be a manifestly inappropriate thing for this court to do, and for that reason I support the motion to dismiss and deny the petition.

ATTACHMENT 4

Nos. 08-16, 08-25, 09-10 & 09-11.pdr

¶1 PATIENCE DRAKE ROGGENSACK, J. I write in support of SCR 60.04(7), the recusal rule recently enacted by the court, and to comment on Justice Bradley's dissent to the rule. SCR 60.04(7) comports with the commands of the Wisconsin Constitution, the United States Constitution and our most recent discussion of the effect of political contributions on a justice's participation, Donohoo v. Action Wisconsin, Inc., 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480. In contrast, Justice Bradley has chosen to espouse the politically correct position, which she supports with numerous comments from newspapers.

¶2 SCR 60.04(7) applies to judges and justices for whom the people of Wisconsin exercised their constitutional right to vote. Article III of the Wisconsin Constitution sets out a statement of the general right to vote in elections for Wisconsin public officers. It provides:

> Electors. Section 1. Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.

¶3 The right to vote is well-grounded in Wisconsin law. It has long been understood that "[t]he right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to [the people] by the constitution." State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613, 37 N.W.2d 473 (1949); see also McNally v. Tollander, 100 Wis. 2d 490, 501, 302 N.W.2d 440 (1981) (explaining that "[t]he right to vote is the principal means by which the consent of the

governed, the abiding principal of our form of government, is obtained").

¶4 Article I, Section 2 of the United States Constitution confers the general right to vote in federal elections. A federal constitutional right to vote in state elections is nowhere expressly mentioned in the United States Constitution. However, once franchise is granted in state elections, it becomes a right implicitly guaranteed by the United States Constitution. Dunn v. Blumstein, 405 U.S. 330 (1972) (concluding that Tennessee's durational residence requirements violated citizens' right to vote that is protected by the United States Constitution).

¶5 Supreme Court Justices who have commented on the protection the federal Constitution confers on voters in state elections have concluded that the First Amendment is the source for that federal right. Once established, that right is protected from unconstitutional infringement by the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (noting that "the right to vote is too precious, too fundamental to be so burdened or conditioned").

¶6 The right to vote freely for candidates of one's choice is the essence of a democratic society and, therefore, it may not be trammeled upon. Reynolds v. Sims, 377 U.S. 533, 555 (1964). The right to vote is a fundamental right that has been repeatedly analogized to "having a voice," i.e., speech in an election. Clingman v. Beaver, 544 U.S. 581, 599 (2005).

¶7 As Justice William Brennan remarked:

> The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment.

Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (citations omitted). Justice Brennan further explained, "the right to vote is 'a fundamental political right, because [it is] preservative of all [other] rights.'" Id. (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

¶8 The right to vote is not simply a right to cast a ballot, but rather, it is the right to cast an effective vote. As the United States Supreme Court instructed in Williams v. Rhodes, 393 U.S. 23 (1968), the state law at issue placed burdens on two kinds of rights: The first was the right "to associate for the advancement of political beliefs, and the [second was the] right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Id. at 30.

¶9 In addition, money spent in the course of an election has long been held to be an element of speech. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). As the United States Supreme Court has repeatedly explained, it finds "no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because [of] its source." Id.

¶10 When the right to vote is burdened, "governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." Oregon v. Mitchell, 400 U.S. 112, 238 (1970).

¶11 We elect judges in Wisconsin; therefore, judicial recusal rules have the potential to impact the effectiveness of citizens' votes cast for judges. Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case. Accordingly, recusal rules, such as SCR 60.04(7), must be narrowly tailored to meet a compelling state interest. See id.

¶12 This court was mindful of the obligations created by the state and federal constitutions as well as the public's concern for the effect of money in judicial races, when it enacted SCR 60.04(7). The wording of the Supreme Court Rule accommodates those interests by providing that a judge is not required to recuse himself or herself "based solely on" a "lawful campaign contribution." (Emphasis added.) The precision in SCR 60.04(7)'s language creates a rule that is narrowly tailored; yet, the rule does not limit recusal when a lawful contribution is combined with some objectionable action, such as a contribution made in exchange for a judge's vote on an issue of interest to the contributor.

¶13 The text of SCR 60.04(7) is also consistent with our most recent consideration of a challenge to a justice's

participation based on that justice's receipt of lawful campaign contributions from interested persons. See Donohoo, 314 Wis. 2d 510. In Donohoo, Attorney Donohoo filed a motion to disqualify Justice Butler based on Justice Butler's receipt of $300 from an attorney representing Action Wisconsin, Inc., then known as Fair Wisconsin, Inc., and $1,225 from Action Wisconsin, Inc.'s board members. Id., ¶5. The contributions were made while Action Wisconsin, Inc.'s case was proceeding in this court. Id.

¶14 In denying Donohoo's claim that Justice Butler was disqualified due to his receipt of contributions to his campaign, we quoted a statement from the Judicial Commission:

> There is no case in Wisconsin or elsewhere that requires recusal of a judge or justice based solely on a contribution to a judicial campaign.

Id., ¶19 (emphasis added). The words, "based solely on," when referring to lawful campaign contributions, which the court employed in SCR 60.04(7), mirror the wording of our reasoning in Donohoo. Even though SCR 60.04(7) was recently passed, it is not new law for Wisconsin. Rather, it codifies what we decided in Donohoo.[1] Stated more completely, there was no allegation in Donohoo that anything was at issue other than lawful contributions made by contributors who had some involvement in the proceedings before the court. No quid pro quo was alleged.

[1] Donohoo was based on State v. American TV & Appliance, 151 Wis. 2d 175, 443 N.W.2d 662 (1989); City of Edgerton v. General Casualty Co., 190 Wis. 2d 510, 527 N.W.2d 305 (1995); and Jackson v. Benson, 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545. Donohoo v. Action Wis., Inc., 2008 WI 110, ¶16, 314 Wis. 2d 510, 754 N.W.2d 480.

¶15 Justice Bradley's dissent is a political statement that will foster disrespect for and distrust of the Wisconsin Supreme Court as an institution. Her comment misses the serious legal purpose of SCR 60.04(7). As such, her comment misses the point that abridgement of indispensable First Amendment freedoms may flow from a recusal rule enacted without the understanding necessary to appreciate its effect on protected liberties. Justice Bradley has chosen to base her attack on popular political positions, which she supports with newspaper articles rather than with the legal tenets upon which legal writing customarily is based.

¶16 Justice Bradley's attack is undeserved. All who voted in favor of creating SCR 60.04(7) knew that their votes would not be popular. However, the oath of judicial office, an oath that we all took, requires that we protect the United States Constitution and the Wisconsin Constitution, even when our decisions that do so are not popular.

¶17 I am authorized to state that Justices DAVID T. PROSSER, ANNETTE KINGSLAND ZIEGLER and MICHAEL J. GABLEMAN join this statement in support of SCR 60.04(7).