SUPREME COURT
STATE OF WISCONSIN

In the Matter of Amending the Rules of Judicial Conduct

PETITION FOR SUPREME COURT RULE

RULE PETITION NO. 08-25

At the request of the Court, the Wisconsin Realtors Association, Inc. (the "Realtors") re-files the accompanying memorandum of law, in support of its Petition for Supreme Court Rule, Rule Petition No. 08-25. This memorandum was originally filed by the Realtors on April 8, 2008 as part of *Wisconsin Realtors Association, Inc. v. Town of West Point* (No. 06-2761).

Dated: October 24, 2008.

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SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2006AP002761

WISCONSIN REALTORS ASSOCIATION, INC., AND
WISCONSIN BUILDERS ASSOCIATION,

Plaintiffs-Appellants-Petitioners,

v.

TOWN OF WEST POINT,

Defendant-Appellee.

Appeal from a Final Judgment of the Circuit Court of Columbia County, the Hon. Andrew P. Bissonnette Presiding,
Circuit Court Case No. 2006CV96
Affirmed by the Court of Appeals

WISCONSIN REALTORS ASSOCIATION, INC.'S AND WISCONSIN BUILDERS ASSOCIATION'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DETERMINE JUDICIAL PARTICIPATION OR, ALTERNATIVELY, PETITION TO AMEND THE CODE OF JUDICIAL CONDUCT

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One question, implicit or explicit, marks the threshold of every case. Should the judge decide the parties' dispute? A conflict of interest, real or perceived, can lead any judge to decline any case. The decision is always individual, sometimes personal, and rarely reviewed. Yet the decision takes place in a context defined by an established set of statutes, rules, and precedent. It is a decision, moreover, that directly affects the litigants and, in some cases, a court's definition of itself.

INTRODUCTION AND PROCEDURAL SUMMARY

Here, the Wisconsin Realtors Association, Inc. (the "Realtors") and the Wisconsin Builders Association (collectively, the "Associations") have filed a petition for review of the Court of Appeals' decision in *Wisconsin Realtors Association v. Town of West Point*, No. 2006AP2761 ("*West Point*"). They also have moved the Court to enter an order affirming the justices' participation in the resolution of that petition to avoid the potential for a recurring substantive deadlock. In particular, the Associations ask the Court to determine that the receipt of a lawful contribution or

endorsement by a judicial campaign committee does not, by itself, warrant judicial recusal.[1]

While the motion requests relief solely in this case, it provides an opportunity for the Court as a whole to address a significant question of law affecting not only the parties but the function of the Court itself in cases yet to be decided and yet to be filed. Accordingly, given the question presented by the motion, the Associations in the alternative petition the Court to amend SCR 60.04 and SCR 60.06(4) to provide that the receipt of an endorsement or a lawful contribution by a judicial campaign committee does not, by itself, constitute a basis for judicial recusal.

This case is before the Supreme Court for the second time. The initial appeal resulted in a three-to-three vote. Justice Annette Ziegler did not participate in the decision after the Town of West Point objected to her participation because her campaign committee

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[1] This memorandum uses the terms "recusal" and "disqualification" interchangeably. Although "recusal" technically refers to a judge's voluntary refusal to preside over a case and "disqualification" to circumstances where a judge is legally required to step aside, most courts and commentators do not draw a distinction between the terms. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 3-4 (2d ed. 2007) ("FLAMM").

received contributions from organizations affiliated with the Associations during her 2007 campaign for the Court.

After hearing oral argument and the divided vote, this Court vacated its order granting certification and remanded the case to the Court of Appeals. The Court of Appeals affirmed the trial court's judgment on February 28, 2008, based in part on the oral argument before the Supreme Court, and the Associations now seek to appeal that decision.

The Associations' motion requests the Court, at the outset, to determine the extent of judicial participation in the resolution of the petition for review to avoid another potential deadlock or its effect on the petition. In deciding the motion, the Court should conclude that neither the law nor public policy compels recusal based solely on a candidate endorsement or a lawful contribution to a judicial campaign committee.

There is no denying the controversy surrounding judicial campaign contributions. It arises from the inherent tension between the public's concern that campaign contributions or endorsements not affect a judge's impartiality and the competing reality that virtually all judicial candidates, through a campaign committee,

must raise money to campaign. Moreover, contributors have a First Amendment right to express their political support or opposition to a judicial candidate by making lawful campaign donations and endorsements.

But recusal does not ease this tension, and it should be especially disfavored in a case like this where only the Court's full participation can resolve an important issue of first impression with state-wide implications. Without that review, the published decision of the Court of Appeals defines state law for every municipality and its citizens and every developer and builder in this state.

A comprehensive review of the case law discloses that *no* court has ever found recusal—whether voluntary or compulsory—warranted based solely on a contribution to a judge's campaign:

> - That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice . . . who has not received campaign contributions from such persons.
>
> . . . .
>
> [L]awful contributions made within these [statutory contribution] limits, lawfully reported and lawfully

disclosed, cannot fairly constitute a basis for judicial disqualification. Otherwise, these [recusal] statutes . . . would be little more than cleverly devised snares to be exploited by those wishing to undermine individual judges. *Adair v. Mich. Dep't of Educ.*, 709 N.W.2d 567, 579, 581 (Mich. 2006).

- "Simply put, I have yet to find a case that required recusal merely based on a campaign contribution within the state's campaign donation limits. To the contrary, the cases that require recusal all involve the existence of a substantial donation coupled with other activities that reasonably raise questions of impartiality." *Dean v. Bondurant*, 193 S.W.3d 744, 751 (Ky. 2006).

- "A contribution not exceeding the legal limit for campaign contributions made by counsel to the campaign of a trial judge . . . is a legally insufficient ground to justify recusal, and a judge's acceptance of campaign contributions from lawyers does not create bias or even an appearance of impropriety necessitating recusal." 46 Am. Jur. 2d Judges § 143 (2006).

- "Contributions from litigants appearing before a judge generally do not raise a question as to the judge's impartiality." AMERICAN BAR ASSOCIATION, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 206 (2004) ("ANNOTATED MODEL CODE").

- "Ethics advisory panels that have addressed this question generally agree that *per se* disqualification is unnecessary." JAMES ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS, § 11.09C, at 11-43 (4th ed. 2007) ("ALFINI").

- Contributions from attorneys for litigants to judicial candidates "have uniformly been held not to constitute grounds for recusal." *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1233 (Ala. 1995).

The First Amendment right to engage in political speech, as a principle and as a practice, should compel the rejection of recusal based solely on campaign contributions or endorsements. The U.S. Supreme Court has never made a First Amendment distinction between financial contributions based on the nature of the office sought, judicial or non-judicial:

> A contribution serves as a general expression of support for the candidate and his [or her] views. . . . Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.

Buckley v. Valeo, 424 U.S. 1, 21 (1976).

As "limitations" on political speech, any *per se* practices leading to judicial recusal based solely on the receipt of lawful campaign contributions or endorsements would effectively punish citizens for their involvement in the political process, threatening the exercise of First Amendment rights, either individually or collectively. "Citizens' political speech would be unacceptably regulated if they had to fear that their efforts in support of a political

candidate, even for judicial office, would remove that candidate from his or her official duties if elected." *Rogers v. Bradley*, 909 S.W.2d 872, 882 (Tex. 1995).

Mailings, meetings across the state, newspaper and broadcast commercials—these are all essential components of an election campaign, and they all cost money. Unless a candidate is independently wealthy—and few would want a system of government in which only those who can self-fund their campaigns are able to serve—that money must come from the public. But whether it is an $8,625 check (the amount contributed by the Realtors' PAC to Justice Ziegler's committee)[2] or a check for $20, that contribution represents support for a candidate, either from the collective voice of a group's members or from an individual citizen.

Financial support from organizations and individuals allows candidates to educate voters about their qualifications and about the judiciary's role, including the importance of judicial independence. That support engages the public. That support fosters debate, controversy, and dialogue, all essential to the democratic process.

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[2] The Building Better Wisconsin Committee, affiliated with the Wisconsin Builders, gave a like amount.

This case presents a significant issue of first impression that will affect communities statewide and will likely recur. It is the role of this Court—not the Court of Appeals—to make the final decision. A judge must recuse where his or her ability to act impartially is reasonably in question. Wis. Stat. § 757.19(2)(g) (2005-06); SCR 60.04(4) (2008). In this case, however, the Associations are aware of no reason to question any justice's ability to resolve this appeal impartially, particularly based on any of the parties' support or opposition to any judicial candidate.

Factual Background

The substantive question in this case is whether state law permits a town to impose a blanket moratorium on real estate development while it develops a master zoning plan. The Columbia County Circuit Court and, now, the Court of Appeals have decided it does permit that.

On July 5, 2007, the Court of Appeals certified the initial appeal to this Court: "The question whether towns have the authority to enact ordinances imposing moratoriums on land development is plainly a matter of statewide importance. . . ." The Court of Appeals also emphasized in its certification that this issue

of "significant statewide interest" is "likely to recur." Finally, the court noted, "the issue is sufficiently important and capable of evading review that it warrants review even if a decision would have no practical effect on the present controversy."

This Court accepted the case for review on August 14, 2007. Justice Ziegler did not participate in the decision to grant review or to grant several organizations permission to file non-party briefs. On October 26, 2007, in a letter to counsel, she noted that two organizations associated with the Realtors and the Builders contributed to her 2007 election campaign. But Justice Ziegler also wrote that she had tentatively decided to participate in the case, requesting counsel to notify her if they objected.

Counsel for the defendant-appellee did. "This decision [to object to her participation] is influenced significantly by the fact that the entities who contributed to her campaign [sic] not only have an interest in the case, they are in fact parties to the case." Subsequently, this Court heard oral argument without Justice Ziegler present and, on December 12, 2007, the Court vacated its order granting certification and remanded the case to the Court of Appeals.

The Court was evenly divided, three-to-three, with Justice Ziegler not participating.

The Court of Appeals entered its decision on February 28, 2008, affirming the judgment of the Columbia County Circuit Court. The appellate court denied a motion to allow additional briefing and oral argument, noting that it would rely on the arguments "from briefing submitted to the supreme court and oral argument held before that court." The Associations filed a timely petition for review on March 31, 2008.

There is no dispute that the Realtors and the Builders supported Justice Ziegler's election campaign, through campaign contributions from their respective PACs and in communications with their own members and in other ways. Along with dozens of other organizations and thousands of individual citizens, including attorneys, the Realtors and the Builders have regularly supported other judicial candidates for election and re-election.[3]

[3] At least seven attorneys at the firm representing the Town of West Point have donated to campaign committees for at least five Supreme Court candidates and one Court of Appeals candidate.

Most recently, the Realtors endorsed the 2008 candidacy of Justice Louis Butler. However, the Realtors and, on information and belief, other organizations, have changed their involvement in judicial campaigns for fear that their support of, or opposition to, a judicial candidate would have direct consequences on the willingness or ability of judges to participate in the resolution of cases in which they became involved or even interested.

Judicial Elections

Thirty-nine states elect their judges in some fashion. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, App. 1 (2007); American Judicature Society, *Methods of Judicial Section* (2008), http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=. While these judicial electoral systems vary substantially—in some, for example, judges run as partisan candidates—common among them is the judicial candidate's need to raise funds for the campaign. Predictably, at least a portion of the contributions—indeed, a significant amount—comes from attorneys and from businesses and organizations that occasionally appear as litigants and, consequently or not, have an interest in the state's judicial system. *See, e.g.*,

Dean, 193 S.W.3d at 751; *State v. Carlson*, 833 P.2d 463, 466 (Wash. Ct. App. 1992); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App. 1983).[4]

In a recent case challenging New York's judicial electoral system, Justice Kennedy discussed judicial elections and the tensions inherent in them:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.
>
> Still, though the Framers did not provide for elections of federal judges, most States have made the opposite choice, at least to some extent. In light of this longstanding practice and tradition in the States, the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications. A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in

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[4] *See generally*, JAMES SAMPLE *et al.*, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 at 18, http://www.justiceatstake.org/files/ NewPoliticsof JudicialElections2006.pdf (attorneys and business interests contributed 21 percent and 44 percent, respectively, of total contributions to the 2005-2006 state supreme court elections); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1405-07 (2001) (detailing interest group contributions to judicial elections in many states).

> the candidates. The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process.

New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring; Breyer, J., joining).

Not surprisingly, the public and the judiciary itself are concerned about campaign contributions to judicial candidates because they question the appearance of improper influence or the possibility of it, however remote. *See* Justice at Stake, *National Surveys of American Voters and State Judges* (2002), http://www.justiceatstake.org/files/ PollingsummaryFINAL.pdf (76 percent of voters believe contributions influence judges' decisions).[5] A survey of Wisconsin voters found that 78 percent believe "campaign contributions have some or 'a great deal' of influence on decisions judges make in the courtroom." Dee J. Hall, *Public Funding of Judge Races Supported*, WIS. STATE J., Jan. 11, 2008, at B3, *available at* http://www.madison.com/archives/read.

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[5] Letter from Wisconsin Supreme Court (Dec. 10, 2007), *available at* http://www.wicourts.gov/news/archives/2007/docs/campaignfinance letter.pdf (indicating this Court's unanimous support for publicly financed judicial elections, citing "[t]he risk inherent in any non-publicly funded judicial election for this Court . . . that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign").

php?ref=/wsj/2008/01/11/0801100387.php. The same survey found that 65 percent of respondents support public financing of judicial elections. *Id.*

Until the legislature provides for that, however, it remains for individual judges and this Court to address these concerns without compromising the judiciary itself or the rights of litigants and those who support judicial candidates. This motion and its alternative petition to amend the code of judicial conduct present that opportunity.

ARGUMENT

The objective of the rules on judicial recusal is to ensure the absence of actual bias and impartiality or the appearance of them. The objective, in other words, is to help ensure the integrity and the independence of the judicial system and the public's confidence in it.

Recusal motions for judicial campaign contributions generally rest on an allegation that the contribution brings the judge's impartiality into question. Some also argue that contributions—from the "other side" of a case—can deny a litigant the right to due process. A forthcoming study in the *Tulane Law Review* raises the specter that may not simply be a matter of

appearance. In nearly half the cases reported over a 14 year period, according to the study, "justices voted in favor of their contributors 65 percent of the time, and two of the justices did so 80 percent of the time." Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. Times, Jan. 29, 2008, at A14. The solution, according to the study's author and others, is straightforward. "If a judge has taken money from a litigant or a lawyer [in a case] . . . , the judge has no business ruling on that person's case." *Id.*

However attractive that outcome may be to some, it is not the law, nor would the practical effect be realistic or even desirable. Nothing should change the discretion inherently and individually vested in every judge to decline to participate in a case. Judges should not consider themselves compelled to withdraw from a case, however, solely because of an endorsement or a judicial campaign contribution, made within the limits prescribed by law and made under the protection of the First Amendment.

I. JUDICIAL CAMPAIGN CONTRIBUTIONS ARE NOT INHERENTLY SUSPECT, NOR DO THEY AUTOMATICALLY COMPROMISE IMPARTIALITY.

"A fair and impartial judge is the cornerstone of the integrity of the judicial system. Even the appearance of partiality can erode the public's confidence in the integrity of the judiciary." *Wisconsin Judicial Comm'n v. Laatsch*, 2007 WI 20, ¶ 13, 299 Wis. 2d 144, 727 N.W.2d 488. In every state, including Wisconsin, a judge may be disqualified from presiding over a case for good cause shown. *See* FLAMM, ch. 28; Deborah Goldberg, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 514 (2007).

In recusal cases based on campaign contributions, the dispositive inquiry is whether the contribution reasonably calls the judge's impartiality into question. The grounds for requesting recusal may be a state's judicial ethics code, a statutory or constitutional provision, judicially-created doctrine, or another form of authority. But the crux is the same: a challenge to the judge's ability to hear the case impartially.

A. Wisconsin's Judicial Code Does Not Require Recusal Based Solely On The Acceptance Of A Campaign Contribution Or Endorsement.

In Wisconsin and most—if not all—other jurisdictions, judges are presumed to be qualified and impartial. *See State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204 ("When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences."); *see also* FLAMM § 19.9, at 573. The presumption recognizes the "reality" that "most judges would go to great lengths to be fair to both parties." *Pierce v. Pierce*, 39 P.3d 791, 802 (Okla. 2001) (Winchester, J., concurring).

Any party suggesting recusal must overcome this presumption of impartiality. *State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). As one court noted in affirming a trial judge's refusal to recuse based on a contribution from a litigant's father, "'[t]he burden of proof required for recusal of a trial judge is an onerous one.'" *Bissell v. Baumgardner*, 236 S.W.3d 24, 28-29 (Ky. Ct. App. 2007) (citation omitted).

In a case involving Georgia's ban on judicial candidates' direct solicitation of campaign contributions, the U.S. Court of Appeals emphasized that "[c]ampaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community. The fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected." *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (citations omitted) (direct solicitation ban held unconstitutional). Successful judicial candidates win because, at least presumably, a majority of voters is confident of the candidate's abilities and integrity.

Wisconsin judges may recuse themselves in any case pursuant to the state's Code of Judicial Conduct or Wis. Stat. § 757.19. The state maintains a practical distinction between the rule and the statute: "The Code of Judicial Ethics governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act and a judge may be disciplined for conduct that would not have required disqualification under § 757.19, Stats." *State v. American TV & Appliance, Inc.*, 151 Wis. 2d 175, 185, 443

N.W.2d 662 (1989). Violations of the Code of Judicial Conduct are not decided in the course of civil actions. Rather, they are the subject of investigation or prosecution by the Judicial Commission.

Wisconsin's judicial ethics code provides that "a judge shall recuse himself or herself . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." SCR 60.04(4). The commentary for this provision states the proposition more broadly: "Under this rule, a judge must recuse himself or herself whenever the facts and circumstances the judge knows or reasonably should know raise reasonable question of the judge's ability to act impartially, regardless of whether any of the specific rules in SCR 60.04(4) applies." Similarly, section 757.19(2)(g) provides that a judge must disqualify himself or herself "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

The courts test impartiality under Rule 60.04(4) according to an objective, reasonable person test, *American TV & Appliance*, 151

Wis. 2d at 182, an approach consistent with most jurisdictions, *see, e.g.*, *Dean*, 193 S.W.3d at 746 ("inquiry under Canon 3E(1) 'is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances'") (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000)).[6]

However, Wisconsin courts apply a subjective test for section 757.19(2)(g). *American TV & Appliance*, 151 Wis. 2d at 180-88. This test "leaves the responsibility of withdrawal to the integrity of the individual judge." *State v. Carprue*, 2004 WI 111, ¶ 61, 274 Wis. 2d 656, 683 N.W.2d 31. In the final analysis, of course, that is where the responsibility always lies.

The judicial conduct code recognizes, at least to some extent, the requirements of a campaign for judicial office. It prohibits a judicial candidate from "personally solicit[ing] or accept[ing]

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[6] *See also City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1062 (Nev. 2000) (inquiry is objective); *Neiman-Marcus Group, Inc. v. Robinson*, 829 So. 2d 967, 968 (Fla. Dist. Ct. App. 2002) ("test is whether the motion demonstrates a well-founded fear on the part of the party that he [or she] will not receive a fair trial at the hands of the trial judge"); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990) (standard "is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial") (quotations omitted).

campaign contributions." However, the rule permits the formation of a campaign committee to do precisely that, admonishing judicial candidates that they "should also be mindful of the requirements of SCR 60.03 [judge shall act in a manner that promotes public confidence] and 60.04(4) [recusal rule]." SCR 60.06(4).

That same admonition applies to a candidate's solicitation and acceptance of endorsements. The code expressly permits endorsements even "from parties who have a case pending before the court . . ." as long as the organization "ordinarily makes recommendations for selection to the office." SCR 60.06(5).

Notably, the code's provisions "should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances." SCR 60 Preamble. While the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), has had a significant effect on the scope of permissible activity by judicial candidates, it has not—to date—been applied in the context of judicial campaign contributions and recusal.

The Code of Judicial Conduct requires recusal where "reasonable, well-informed persons . . . would reasonably question

the judge's ability to be impartial." SCR 60.04(4). Reasonable, well-informed people know that judges are elected in Wisconsin and that, to be elected, judges must campaign for the office and that, to campaign for the office, judges must raise funds from individuals and organizations—regulated under the state's campaign finance law. It would be unreasonable to suggest otherwise.

Moreover, to reach any other conclusion would require individuals and organizations to forfeit their right to contribute to judicial campaign committees in order to preserve their right, in the event of litigation involving them, to the resolution of their case by all of the judges elected to an appellate court. It would require them to run the risk, a risk realized here, that the Supreme Court could not resolve their case at all.

B. Nor Does The ABA Model Code Of Judicial Conduct Or Other State Codes Require Recusal.

The American Bar Association's Model Code of Judicial Conduct ("Model Code") provides a foundation for the law of

recusal.[7] Rule 2.11 of the Model Code states that a judge "shall disqualify himself or herself" where "the judge's impartiality might reasonably be questioned" and lists specific circumstances requiring recusal. All but two states have adopted this general standard. *See* Goldberg, 46 WASHBURN L.J. at 518. However, "the theoretical underpinnings of American judicial disqualification jurisprudence remain murky and unsettled" and its application "replete with inconsistencies." FLAMM § 1.5, at 13.

The inconsistency is due at least in part to each state's disqualification law and practices that vary with state statutes, court rules, codes of judicial conduct, ethics board and administrative rulings, constitutional provisions, and judge-made doctrine. *Id.* at ch. 2. In addition, other factors are in play: "there appear to be no systematic empirical studies on the success rates of disqualification motions or the circumstances in which recusal occurs." Goldberg, 46 WASHBURN L.J. at 524. Moreover, relatively few recusal cases

[7] Every state except Montana has adopted its own code of judicial conduct based in large measure on the Model Code, and even Montana's code is similar to the Model Code. ALFINI § 1.03, at 1-6 – 1-7; Leslie Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned*," 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

are published, FLAMM § 1.5, at 12; the test for recusal for impartiality is objective and fact specific; and, the current Model Code and its predecessors include little guidance on interpreting and applying this standard, Abramson, 14 GEO. J. LEGAL ETHICS at 57-62.

Like its 1990 predecessor, the 2007 Model Code's provisions require judicial candidates to establish campaign committees to solicit and accept contributions (and concomitantly bar judicial candidates from personally soliciting or accepting contributions). The commentary to the 1990 Model Code noted that "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification." Commentary to Canon 5C(2). Commentary in the 2007 Model Code includes similar language, suggesting that where attorneys and parties who appear before the judge may contribute to the judge's campaign, special precautions should be taken to ensure that contributions do not create circumstances under which recusal would be necessary. *See* Commentary to Rule 4.4.

The Model Code also includes a recommended provision specifically addressing campaign contributions but, apparently, *no* state has adopted it. Goldberg, 46 WASHBURN L.J. at 520. In 1999, the ABA introduced this concept in proposing Canon 3E(1)(e),[8] providing that a judge must recuse where "[t]he judge knows or learns by means of a timely motion that a party or a party's lawyer" has made a contribution over a certain amount to the judge's campaign.[9] The Model Code does not include specific dollar amounts or prescribe the weight to be given the timing of the donation, leaving those details to the individual states to impose. *See* ANNOTATED MODEL CODE at 396.

Canon 3E(1)(e) is the first and only provision of the Model Code specifically related to recusal based on contributions to a judicial candidate. The Rule was adopted in response to opinion

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[8] This subsection is Rule 2.11(A)(4) in the 2007 Model Code.

[9] The Canon provides for judicial disqualification only when: "[T]he judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[$ [insert amount] for an individual or [$ [insert amount] for an entity]] [is reasonable and appropriate for an individual or an entity]." Model Code, Canon 3E(1)(e). (The 2007 version is substantially identical but adds "a law firm of a party's lawyer" to broaden the disqualification rule.)

surveys suggesting that the public believed judges' decision-making was influenced by campaign contributions. JEFFREY M. SHAMAN, JUDICIAL CONDUCT AND ETHICS 24 (3d ed. 2004 supp.) ("SHAMAN").

Before the Model Code adopted Canon 3E(1)(e), Alabama had enacted a similar rule that requires a judge to recuse where a party or a party's attorney appearing before the judge has donated more than $4000 if an appellate judge or $2000 if a trial judge. Code of Ala. § 12-24-2 (b), (c) (2008). However, the legal effect of the rule remains in question.

In 2004, the state's supreme court refused to disqualify a judge who received contributions of more than $56,500 from a PAC sponsored by the American Bankers Association (which had filed an *amicus curiae* brief), noting that the statute's enforceability remained unclear because it had not yet obtained approval from the U.S. Department of Justice, required by the Voting Rights Act of 1965. *Brackin v. Trimmier Law Firm*, 897 So. 2d 207, 230-34 (Ala. 2004).

On the other hand, Mississippi rejected a proposal to mandate disqualification where a party or a party's attorney was a "major

donor" to the judge's campaign, defining a "major donor" as an individual who donated more than $2000 to an appellate court candidate or more than $1000 to a candidate for any other court. ANNOTATED MODEL CODE at 396-97. Instead, the state's judicial ethics code now provides that a party *may* move for recusal based on a contribution from a major donor. Miss. Code of Judicial Conduct, Canon 3E(2) (2008). The provision, based on the Model Code, "recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality." *Id.*

The ABA itself has not expressed optimism that provisions like Canon 3E(1)(e) would solve the problem of an appearance of impartiality, if any existed. The Report of the Task Force on Lawyers' Political Contributions noted that specific contribution limits requiring recusal could lead lawyers, perversely, to contribute the specified amount to disqualify a judge, but the committee could not devise a solution to prevent this manipulation of the rule. *See* Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 63 (1999). Thus, "[j]urisdictions adopting this provision[ ] [were] cautioned to consider this problem." *Id.* (quoting the Report).

Moreover, contribution limits of almost any kind are replete with First Amendment concerns.

The absence of a specific code provision on judicial campaign contributions does not mean they are irrelevant in considering disqualification. In determining whether a party's support—financial or otherwise—of a judicial candidate warrants recusal, Florida courts ask whether the facts show "'a specific and substantial political relationship' between the parties to constitute legally sufficient grounds for disqualification." *E.g.*, *Zaias v. Kaye*, 643 So. 2d 687, 688 (Fla. Dist. Ct. App. 1994) (quotations omitted). North Dakota's courts consider several factors when determining whether a judge should recuse based on a party's involvement in the judge's campaign:

> (1) The significance of the person's campaign involvement.
>
> (2) Whether the campaign is underway or how recently it ended.
>
> (3) Whether there is an ongoing relationship between the person and the judge.
>
> (4) The significance of the person's involvement in the current case, including the closeness or remoteness of the involved individual to the case.
>
> (5) Whether the issue was promptly raised.

(6) Evidence of judicial bias.

State v. Stockert, 684 N.W.2d 605, 613 (N.D. 2004).

But the fact remains that there is no *per se* judicial recusal rule or practice, nor should there be.

C. Due Process Does Not Require Recusal Based On A Campaign Contribution Or Endorsement.

It is undebatable that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Tumey v. Ohio*, 273 U.S. 510, 522 (1927) ("That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule.")

The applicable standard is that "[w]here the judge has a direct, personal, substantial, or pecuniary interest, due process is violated." *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005). Yet the U.S. Supreme Court has emphasized that it is "only in the most extreme of cases" that due process demands disqualification. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (holding that party's due process rights were violated because a judge participating in a case stood to directly benefit from

outcome); *see also Carprue*, 2004 WI 111, ¶ 60 ("most matters relating to judicial disqualification [do] not rise to a constitutional level") (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)).

At least three times the U.S. Supreme Court has declined to review a case to decide whether due process requires judges to be disqualified where an interested party has donated to the judge's election campaign. Schotland, 95 GEO. L.J. at 1105 n.98.[10] But federal and state courts uniformly have held that, standing alone, contributions to a judicial candidate's campaign fail to meet the standard articulated by the U.S. Supreme Court to constitutionally require the judge's disqualification. *E.g.*, *Public Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743, 746 (W.D. Tex. 2000), *aff'd*, 274 F.3d 212 (5th Cir. 2001) ("campaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment."); *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 311 (E.D. Pa. 1998) ("The receipt of

[10] Citing *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Wightman v. Conrail*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

campaign contributions . . . does not present the type of 'extreme' case of bias required to implicate the federal constitution."); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999) (recusal not warranted where judge received "substantial political donations from opposing counsel and from one of the parties"), *rev'd on other grounds*, 41 S.W.3d 118 (Tex. 2001); *but see Pierce*, 39 P.3d at 799 (due process violation for a judge to preside where a party's lawyer and family contributed the maximum amount to the judge's re-election campaign and, in addition, assisted the judge in soliciting contributions).

II. NO REPORTED DECISIONS SUPPORT RECUSAL BASED SOLELY ON A JUDICIAL CAMPAIGN CONTRIBUTION.

Campaign contributions or endorsements alone do not warrant recusal.[11] The virtually unbroken line of cases where recusal has not been required cover a broad range of circumstances:

- contributions totaling more than $2 million from parties, attorneys, and amicus;

[11] While a review of the case law is essential, it remains subject to an important limitation. There are relatively few opinions, much less published opinions, where the judge recuses. FLAMM § 1.5, at 12. This is due in part to the fact that judges may feel more need to explain their reasons for not recusing than when they decide to recuse. *Id.* Compounding this precedential difficulty is the fact that once a judge has decided that he or she cannot be impartial, few parties opposing the recusal will appeal—even if the procedure is permitted.

- large contributions from amicus;
- contributions from a law firm that also hosted a victory party for the judge's election;
- active involvement in a judicial candidate's campaign; and,
- contributions to the judicial candidate running against the presiding judge.

Instead, according to the cases surveyed, recusal is warranted only where a significant contribution is combined with additional factors—for example, where a party's attorney contributed the maximum amount, the attorney's family made matching contributions, and the attorney solicited contributions for the judge.

A. A Long Litany Of Cases Holds That Judges Should *Not* Be Disqualified Based On A Campaign Contribution.

The plaintiffs in *Avery v. State Farm*, 835 N.E.2d 801—a class action involving a jury verdict of more than $1 billion—moved an Illinois Supreme Court justice to recuse based on legal corporate contributions made to the justice's campaign while the *Avery* case was pending. *See* Goldberg, 46 WASHBURN L.J. at 510. State Farm, its employees and lawyers, and others associated with the insurance company had donated more than $350,000 to Justice Lloyd Karmeier's re-election campaign. The U.S. Chamber of Commerce,

an amicus, had contributed $2 million. *Id.*; *see also U.S. Supreme Court Denies Review in* Avery v. State Farm: *No Guidance Offered on Recusal for Judges and their Campaign Contributors*, U.S. Newswire, Mar. 9, 2006. He declined to recuse himself and, with the case heard, Justice Karmeier voted to overturn the verdict against State Farm. *Id.*

Contributions from a Party's Counsel in a Pending Case

In *Wightman v. Conrail*, 715 N.E.2d 546 (Ohio 1999), the law firm representing the plaintiffs along with nine attorneys and seven spouses of firm attorneys contributed to the campaigns of two Ohio Supreme Court justices. *See* Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 Loy. L.A. L. Rev. 1489, 1503 (2001). The combined donations totaled $25,000 to each justice, made within weeks of the court's decision to hear the appeal. The defendant filed a motion for recusal after the justices' campaign finance reports had been released—that is, after oral argument but before an opinion had been issued. The court issued its decision without addressing the motion for recusal. *Id.*

Similarly, a federal district court held that the plaintiff failed to show that her right to due process had been violated when a judge refused to recuse in *Shepherdson v. Nigro*, 5 F. Supp. 2d at 306-11; *see supra* at 39. In that case, attorneys with the law firm representing the union the plaintiff had sued contributed $21,100 to the trial judge's campaign with the case pending. *Id.* at 307. And in *Whalen v. Murphy*, 943 So. 2d 504 (La. Ct. App. 2006), the court held that the moving party failed to show a judge would be biased based on the opposing party's contributions to the judge's campaign, made during the litigation. *Id.* at 506, 508-09.

Contributions from Interested Parties

In a case involving amicus contributions, an Alabama Supreme Court justice refused to recuse after the plaintiff protested the contributions of more than $56,500 to the justice's campaign from an American Bankers Association PAC. *Brackin*, 897 So. 2d at 230-34. The justice emphasized that an amicus was not a party to the appeal. *Id.* at 232. In addition, the opinion noted that parties could manipulate the recusal process—if judges were to recuse based on amicus contributions—by soliciting an amicus brief from

an entity that has contributed or would contribute to the judge the party wants recused. *Id.* at 233 n.4.

The Nevada Supreme Court actually reversed a judge's decision to recuse himself, issuing a writ of mandamus compelling the judge to preside in *City of Las Vegas Downtown Redevelopment Agency*, 5 P.3d at 1063, *supra* at 25 n.6. There, the state had brought an eminent domain action against the owners of property in downtown Las Vegas. *Id.* at 1060. The property owners moved for recusal because four casinos that stood to benefit from the action had contributed between $150 and $2000 to the judge's campaign.

The supreme court held that "a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification." *Id.* at 1062. The court then determined that the contribution amounts were "not extraordinary . . . and, without more, constitute only an 'insignificant interest' that does not raise a 'reasonable question as to a judge's impartiality.'" *Id.*

Contributions in Addition to Involvement in a Judge's Campaign

Texaco v. Pennzoil is an oft-cited case on the effect of a party's contributions to a judge's campaign. In that case, lead counsel for the defendant Pennzoil donated $10,000 to the judge's

campaign, after the case had commenced, and he held a position on the judge's campaign steering committee. 729 S.W.2d at 842. For some, increased skepticism stemmed from the widely-held perception that the judge was a "conservative Republican" and the contributing attorney a "liberal Democrat." FLAMM § 9.4, at 244. The Texas Supreme Court held that these facts did not require disqualification under either the state's code of judicial ethics or the Due Process Clause. 729 S.W.2d at 842-45; *see also Nathanson v. Korvick*, 577 So. 2d 943, 944 (Fla. 1991) (court found recusal not required where party's attorney contributed to judge's election campaign and was involved with his campaign committee).

In *Terraces of Sausalito Homeowners Ass'n v. Brayshaw*, the defendants' attorneys donated $2200 to a judge's campaign six days after judgment had been entered. 2005 Cal. App. Unpub. LEXIS 2174, at *35-36 (Cal. Ct. App. Mar. 10, 2005). In addition, one of the attorneys at a firm representing the defendant (but not the lead attorney) co-chaired the judge's campaign. These facts, the court held, failed to show that a reasonable person would question the judge's impartiality. *Id.* at *37-39. The court emphasized that the code of judicial ethics permits attorney contributions, the

contributions were made *after* the judgment, and the attorney who co-chaired the campaign was not directly involved in the case. *Id.*

Contributions from the Party Moving for Recusal

Ex parte Bryant involved a party who sought the judge's recusal after donating to the judge's campaign. 675 So. 2d 552 (Ala. Crim. App. 1996). The court denied the motion, emphasizing that the moving party made the contribution and that the amount was well under the statutory contribution limit. *Id.* at 553-55. Other courts have noted the implications of a contrary rule. For example, the Michigan Supreme Court acknowledged the fear that litigants and attorneys would be able to "'mold' the court that will decide his or her cases by tailoring contributions and opposition contributions." *Adair*, 709 N.W.2d at 580, *supra* at 5-6; *see also Texaco*, 729 S.W.2d at 842.

Texas courts uniformly have emphasized that contributions alone fail to show partiality. For example, in *Rocha v. Ahmad*, the Texas Court of Appeals ruled recusal not required where attorneys at the law firm representing the defendant had contributed "many thousands of dollars" to the judges the plaintiff sought to recuse, and

both judges had held election night parties at the law firm's offices. 662 S.W.2d at 77-79.

In *Aguilar v. Anderson*, the judge solicited and received a contribution from each partner in one of the law firms representing the defendants during the pendency of a case. 855 S.W.2d 799, 801 (Tex. App. 1993). In that case, the court emphasized the relatively small amount donated—$100 from each of the three partners—and the fact that the contributing law firm was not lead counsel. *Id.* at 802. In a concurring opinion, two justices described the factors they considered relevant to recusal including the amount of the contribution, the timing of the contribution, and the judge's solicitation, which the Texas Code does not forbid. *Id.*

Finally, in *Apex Towing Co. v. Tolin*, the court summarily stated that a judge need not recuse because a litigant's attorney contributed to the judge's campaign. 997 S.W.2d at 907. In addition, the court refused to decide whether contributions from parties constituted grounds for recusal, holding that even if the judge should have recused because of the contributions, the court's

summary judgment decision was correct. *Id.* (also holding that party's due process rights were not violated).[12]

Other Cases

The appellate court relied heavily on the reasoning underlying the judge's rulings and her explanation for not recusing in *Jones v. Baker & Hostetler, LLP*, 863 N.E.2d 617, 618-19 (Ohio 2006), to affirm that decision. There, one of the defendants (which was also a law firm) contributed at least $8300 over a 13-year period to the judge's campaign. While this amount "might call into question the judge's impartiality," there was no evidence of a relationship between the contribution and the rulings against the moving party. *Id.* at 619. Similarly, the court in *In re Disqualification of Jackson* considered the amount of the contributions at issue and the timing—the contributions from the plaintiff's attorney and her father had occurred four years prior—to affirm a judge's decision not to recuse himself. 704 N.E.2d 1236 (Ohio 1998).

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[12] *See also Williams v. Viswanathan*, 65 S.W.3d 685, 689 (Tex. App. 2001) (courts have rejected the argument that a party can show bias merely with proof that the opposing party made contributions to the judge's campaign); *Hazen v. Cooper*, No. A14-93-01111, 1994 Tex. App. LEXIS 3089, at *9-15 (Tex. App. Dec. 15, 1994) (same); *J-IV Investments v. David Lynn Machine, Inc.*, 784 S.W.2d 106, 108 (Tex. App. 1990) (same).

In *In the Matter of the Estate of Clyde*, an attorney for one of the parties donated $500 to the presiding judge. 968 So. 2d 475, 488 (Miss. Ct. App. 2006), *rev'd on other grounds*, 968 So. 2d 421 (Miss. 2007). After the Mississippi Supreme Court held the campaign contribution alone "an insufficient basis for recusal," the court of appeals reversed its earlier decision and held that the judge's refusal to recuse was not in error. *Id.*

In *Roe v. Mobile County Appointment Board*, parties moved to disqualify three justices because they themselves had contributed to the chief justice's election campaign and another three justices because they had received contributions from attorneys representing some of the opposing parties. 676 So. 2d at 1232. The court refused to disqualify any of the justices, finding contributions a standard practice that failed to demonstrate an inability for the justices to fairly decide the case. *Id.* at 1233-34; *see also Curvin v. Curvin*, No. 2061020, 2008 Ala. Civ. App. LEXIS 66, at *2-3, *11-16 (Ala. Civ.

App. Feb. 15, 2008) (finding no error in trial judge's decision not to recuse based on a $2000 campaign contribution from counsel).[13]

B. While Judicial Campaign Contributions May Be A Factor In Recusal, They Should Never Be The Dispositive Factor.

In *Dean v. Bondurant*, the Chief Justice of the Kentucky Supreme Court recused himself from participating in the decision on a motion for discretionary review. 193 S.W.3d at 752. The justice based his decision on two factors. First, there were "numerous" contributions from the respondents, respondents' attorney, and several attorneys at a law firm that was also a party to the case, all of which totaled a "not minimal" amount of money. *Id.* But the justice considered more important the second factor: the party moving for recusal was the same party moving for discretionary review and thus was the party "actually harmed by my decision to step aside." *Id.* Regardless of the number of judges participating, the Kentucky

[13] Courts also routinely refuse to disqualify judges based on donations to the judge's opponent in a judicial campaign. *See Grievance Adm'r v. Fieger*, 714 N.W.2d 285, 286 (Mich. 2006); *Nevada v. Barsy*, 941 P.2d 969, 970 (Nev. 1997); *Williams v. Viswanathan*, 65 S.W.3d at 687-89.

Supreme Court does not grant discretionary review without four votes. *Id.* at 746.[14]

In *Pierce v. Pierce*, 39 P.3d at 793, one party argued that the judge presiding over her divorce should have recused because the husband's attorney and the same attorney's father each donated $5000 to the judge's campaign during the pendency of the action. *Id.* The Oklahoma Supreme Court agreed, distinguishing these circumstances from a case involving smaller donations ($50) and minimal assistance on the judge's campaign. *Id.* at 797-98.

The court ruled that a judge's impartiality may be questioned only under the following circumstances: "(1) a lawyer makes a campaign contribution to that judge in the *maximum* amount allowed by statute, and (2) a member of that lawyer's *immediate family* makes a *comparable maximum* contribution, and (3) that lawyer *further assists* the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a

[14] A subsequent Kentucky Court of Appeals decision relied on *Dean* in affirming a trial judge's refusal to recuse based on a campaign contribution from a party's stepfather. *Bissell*, 236 S.W.3d at 29 ("a judge is not required to disqualify himself or herself based solely on an allegation that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge") (citing *Dean*, 193 S.W.3d at 748).

pending case in which the lawyer is appearing before that judge." *Id.* at 798 (emphasis in original). The court went on to note that the result may have been different had the husband shown that the $10,000 in contributions constituted a relatively small portion of the judge's total contributions. *Id.*

Despite its limited scope, the majority opinion in *Pierce* triggered dissent. The dissenting justice emphasized that the state's citizens "have chosen public elections as the method to hold judges accountable. The rules governing judicial campaign contributions are clear and contribution records are open to the public." *Id.* at 801. The justice went on to warn of the administrative implications of a rule allowing recusal based on campaign contributions alone. *Id.*

III. PUBLIC POLICY CONSIDERATIONS ALSO SHOULD ELIMINATE ANY *PER SE* RECUSAL PRACTICE BASED ON A CAMPAIGN CONTRIBUTION OR ENDORSEMENT.

In the last two years, much has been made of "special interest" organizations exercising their constitutional right to engage in issue advocacy. Ironically, if the "price" for making a lawful contribution to a judicial campaign committee is the loss of the candidate's ability, if elected, to do his or her job in a given case,

even more individuals and organizations may decline to contribute to judicial campaign committees or to endorse judicial candidates. There are other alternatives that do not carry that consequence or even the potential for it.

While judicial elections may not be ideal, some courts note, the voters have chosen to maintain a system of governance that subjects judges to an electoral process. As a result, the judiciary and the electorate necessarily must accept the consequences of judicial elections, including the judicial candidate's need to raise money.[15] "As with other elections, judicial elections involve campaigns. As with other campaigns, judicial campaigns require funds. Judicial campaigns and the resultant contributions to those campaigns, therefore, are necessary components of our judicial system." *MacKenzie*, 565 So. 2d at 1335.

Judges and contributors should not be punished for participating in that system. "It is unrealistic and unfair to require

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[15] *See Rogers*, 909 S.W.2d at 882 ("The citizens of this State who . . . subject judges to this wide-open [electoral] process could not reasonably expect a judge to recuse because of the judge's exposure to that process."); *In re Petition to Recall Dunleavy*, 769 P.2d 1271, 1275 (Nev. 1988) (emphasizing that state constitution provides for elected judiciary and the electorate voted to maintain that system).

that judges run for election and then to deride them for accepting the money that is necessary to sustain a campaign from a principal source. Absent public financing or blind funding of judicial campaigns, that a judge may preside in some cases in which a litigant's attorney contributed to the judge's campaign is an almost inevitable concomitant of the policy decision to elect judges." *Shepherdson*, 5 F. Supp. 2d at 311.

There are, of course, significant differences between the role played by members of the judiciary and that played by members of the other branches of government. Although all elected officials may need to raise money, judges must always be impartial and disinterested, unlike members of the legislative and executive branches. *See* Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. Rev. 667, 673 (2001). According to some, this means that "the role of the judiciary is fundamentally at odds with the practical implications of elective politics." Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273, 277 (2002).

Others disagree: "I favor election of judges because the elective system can be an educational experience for both the judges and the electorate." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U.L. Rev. 973, 977 (2001). In addition, while the judiciary serves a function distinct from the other branches, it remains accountable to the electorate:

> The people are the sole legitimate source of power. Judges should be accountable to the people because judges make decisions that affect the community. The people should have the power to get rid of bad judges even if the criteria for the removal of judges may be different from the criteria for removing legislators and governors. Citizens should be encouraged to participate as fully as possible in civic life. Electing judges is citizen participation. Elections legitimize the judicial authority.

Id. at 979-80. Surveys nonetheless disclose that a majority of the public believes that contributions influence judges' decisions. *See, e.g.*, Champagne, 34 LOY. L.A. L. REV. at 1407-08 (81 percent of those surveyed believe judges are influenced by politics and contributions); *see also* Hall, *supra* at 17.

In 1999, Wisconsin's Commission on Judicial Elections and Ethics similarly concluded that raising campaign funds collides with the judiciary's role as an impartial, independent decision-making body. Final Report of the Commission, *reprinted at* Clausen, 83 MARQ. L. REV. at 86. However, given the electoral system, a

majority of the commissioners voted against a limit on lawyer contributions other than the limits imposed generally under state law. *Id.* at 88.[16]

The commissioners agreed that contributions from parties or attorneys appearing before a judge may be relevant in considering recusal, but a majority of the commissioners did not believe recusal should be required for contributions exceeding a certain amount. *Id.* at 91. Their conclusion is consistent with the standard applied in the case law—there is no automatic recusal, but all of the circumstances surrounding a campaign and a contribution can be taken into account.

[16] Wisconsin may one day enact a law providing for complete public financing for Supreme Court elections, but this law would not eliminate the controversy regarding campaign contributions. On February 19, 2008, the State Senate approved Senate Bill 171, which allows Supreme Court candidates the option of public campaign financing if they agree to limit their spending to $400,000 and adhere to other spending and fundraising limits. The bill died in the Assembly. To qualify for financing under the bill, the candidate must raise at least $5000 but no more than $15,000 from individual donations of no less than $5 and no more than $100. Moreover, candidates may decline public financing. Accordingly, although the contributions may be in smaller amounts, should the proposal ever become law judges will still need to decide whether to recuse based on a campaign contribution or endorsement from an individual or organization.

A. Recusal Can Have A Significant—Indeed Dispositive—Impact On A Case.

"The question regarding the participation or nonparticipation of justices frequently recurs and is a matter of public significance because even one justice's decision to participate or not participate may affect the decision and outcome in a case." *Grievance Adm'r v. Fieger*, 714 N.W.2d at 285. Unlike trial court judges, supreme court justices are not ordinarily replaced with another justice.[17] Indeed, the state constitution in Article VII prohibits that.

The result is that fewer justices participate, and that has a variety of consequences. One consequence, of course, is tie votes that automatically affirm a lower court's decision, which means "the recusing justice is effectively casting a vote against the petitioning party." *Dean*, 193 S.W.3d at 746; *see also Adair*, 709 N.W.2d at 579. This is precisely what happened here when this case was first appealed.

[17] Only a few weeks ago, Chief Justice Roberts' recusal in *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008), resulted in a split 4-4 decision, which automatically affirmed the lower court's ruling.

B. Recusal Does Not Distinguish Among The Varying Reasons For Contributing.

Citizens, including attorneys, contribute money to judicial candidates for a variety of reasons. Lawyers may contribute simply because the candidate is a colleague or friend; the contributor may believe that the candidate would be an excellent judge; the contributor may share the candidate's views. It is also possible the contributor may be hoping, however futilely, for a *quid pro quo*. *See* Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 480-81 (1988).

The concern about campaign contributions stems from a fear that contributors contribute only to curry favor with a judge, but *per se* rules and practices do not distinguish among contributors. Mandatory recusal for contributions may limit the reach of a rare contributor with base intentions, but it also effectively penalizes contributors who donate because they believe a candidate would be an excellent judge. Such a result should be unacceptable. Citizen involvement in judicial campaigns should be actively encouraged, not discouraged with assumptions about a contributor's intent. And

this applies with equal force to groups like the Associations that represent the interests of a number of citizens.

C. Recusal Wastes Judicial Resources.

Either as a matter of practice or rule, *per se* recusal would impose a tremendous administrative burden on the courts.

> That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. . . . It is simply impossible for the Supreme Court, as well as most other courts in Michigan, to function if a lawful campaign contribution can constitute a basis for a judge's disqualification.

Adair, 709 N.W.2d at 579-80; *see also Shepherdson*, 5 F. Supp. 2d at 311 (judges who successfully attract financial support would constantly be recused); *Dunleavy*, 769 P.2d at 1275 ("judicial business in the courts of this state would be severely and intolerably obstructed" if attorney contributions alone satisfied the test for disqualification).[18] Another court warned:

> If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to

[18] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (reporting that "[n]one of the [Ohio] justices interviewed suggested that more frequent recusals from contributors' cases would be a positive step rather than a recipe for havoc" due to the prevalence of contributions).

> recuse himself [or herself] in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

Aguilar, 855 S.W.2d at 802 (quoting *Rocha*, 662 S.W.2d at 78).

In Wisconsin, repeated recusal could have a profound effect, according to a 2001 study. The National Institute on Money in State Politics, reviewing contributions to Supreme Court candidates, found that between 1989 and 1999, three-fourths of the cases decided by the court involved an attorney, law firm, party, business, or other organization that had contributed to at least one of the justice's campaigns. Samantha Sanchez, *Campaign Contributions and the Wisconsin Supreme Court* 2 (2001), http://www.followthe money.org/press/WI/20020501.pdf. However, these contributors only represented four percent of all contributors and their donations only eight percent of total contributions. *Id.*

These statistics beg the question of whether there would be any benefit from a practice or rule that would require recusal in 75 percent of the cases heard by the state supreme court, especially where the contributions comprised such a small amount of the total. The number of cases that ended in an even division, already noteworthy, only would increase.

D. Contributions Play A Valuable Role Even In Judicial Elections.

Adequately-funded campaigns allow candidates—especially those who are not independently wealthy—to inform voters about the relevant issues and the candidate's experience and skills. Candidates with sufficient campaign funds can travel state-wide, prepare written materials, and advertise their campaign. This provides an opportunity to help inform the public and, in return, to learn more about the practical implications of judicial rulings. "[I]t would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname." *Adair*, 709 N.W.2d at 580.

In addition, courts frequently suggest that it is not only expected that lawyers contribute more funds to judicial campaigns than any other group of individuals but that it is desirable. *Dean*, 193 S.W.3d at 747-48; *Carlson*, 833 P.2d at 466; *Aguilar*, 855 S.W.2d at 802; *Collier v. Griffith*, No. 01-A-01-339, 1992 Tenn.

App. LEXIS 245, at *16-17 (Tenn. Ct. App. 1992) ("As long as judges must be elected, members of the bar will play active roles in their campaigns and will be a principal source of campaign contributions."). Attorneys are in a particularly good position to evaluate the abilities and experience of judicial candidates and to appreciate the significance of the choice in candidates.

This is consistent with views held by members of the Wisconsin Commission on Judicial Elections and Ethics, who reported in 1999 that restrictions on "contributions from lawyers would remove from the judicial campaign finance picture the potential contributors who are both the best informed and the most likely to contribute." Clausen, 83 MARQ. L. REV. at 88-89 (also reporting majority view that judges should not solicit or accept contributions from litigants involved in a pending case but only a minority believed the same restriction should apply to attorneys).

E. Safeguards Are Already In Place To Protect Judicial Impartiality.

States employ a variety of safeguards to prevent public corruption or the appearance of it. Indeed, elections themselves impose a system of accountability for judges, allowing the public to

vote out a candidate who they believe fails to act impartially. *See Adair*, 709 N.W.2d at 580; *Breakstone v. MacKenzie*, 561 So. 2d 1164, 1176-77 (Fla. Dist. Ct. App. 1989) (Nesbitt, J., dissenting); *Pierce*, 39 P.3d at 801-02. In addition, state statutes and codes of judicial conduct provide safeguards against both the creation of a *quid pro quo* relationship and the appearance of it, primarily with restrictions on solicitation and acceptance of contributions, contribution limits, and disclosure requirements. *See Buckley*, 424 U.S. at 26-27; *Adair*, 709 N.W.2d at 581; *MacKenzie*, 565 So. 2d at 1336-37.

In Wisconsin, three primary safeguards act as preventative measures to protect the integrity of the judicial system:

Restrictions on the solicitation and acceptance of contributions. Wisconsin bars judicial candidates from personally soliciting or accepting campaign contributions. SCR 60.06(4). Instead of direct fund-raising involvement, judicial candidates establish a committee to solicit and accept contributions. In fact, the Code of Judicial Ethics advises candidates to "avoid direct involvement with the committee's fundraising efforts." *Id.* Committees create a barrier between candidates and contributors,

although candidates may attend their own committee fundraisers and send "courtesy thank you letter[s]" to contributors. *See id.*; Commentary to SCR 60.06(4).

Wisconsin's rule is consistent with the general trend. Almost all states bar judicial candidates from personally soliciting or accepting contributions or at least advise that judicial candidates should refrain from this direct fundraising. *See* Mark Spottswood, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 NW. U. L. REV. 331, 334 (2007); FLAMM, § 9.4 at 247.[19]

Campaign contribution limits. In Wisconsin, individual and PAC contributions to supreme court candidates are limited to $10,000 and $8625, respectively. Wis. Stat. §§ 11.26(1)(a), (2)(a). Individual and PAC contributions to court of appeals candidates are

[19] Relying in part on *Republican Party of Minnesota v. White*, 536 U.S. 765, two courts have struck down a state's direct solicitation bans. The U.S. Court of Appeals held that Georgia's solicitation clause failed to satisfy the applicable strict scrutiny test in part because the ban was ineffective in reducing any risk of a *quid pro quo* relationship. *Weaver*, 309 F.3d at 1322-23. Candidates, the court held, "will feel beholden to the people who helped them get elected regardless of who did the soliciting of support." *Id.* at 1323. And the Eighth Circuit struck down Minnesota's ban on solicitation by mail or to large groups in a subsequent *Republican Party of Minnesota v. White* decision, finding the ban violative of the First Amendment. 416 F.3d 738, 764-66 (8th Cir. 2005).

limited to $3000 for candidates running in a district with a population of more than 500,000 and $2500 for all other districts. Wis. Stat. §§ 11.26(1)(cc), (cg), (2)(cc), (cg). Finally, individual and PAC contributions to circuit court candidates are limited to $3000 for candidates running in a county with a population of more than 300,000 and $1000 for all other counties. Wis. Stat. §§ 11.26(1)(cn), (cw), (2)(cn), (cw).

Almost all states impose limits on contributions to judicial campaigns, although the limits vary dramatically. In this state, of course, corporate contributions of any kind are prohibited.

Disclosure requirements. Wisconsin requires candidates to disclose their contributions along with the names of contributors who donate in excess of $20 in one year. Wis. Stat. § 11.06(1)(a); FLAMM § 9.4, at 248 (all states have similar disclosure laws). With respect to contributions exceeding $100 for the year, candidates must also disclose those contributors' occupation and the name and address of the contributors' employer. Wis. Stat. § 11.06(1)(b).

In addition, there are a host of other judicial ethics code provisions that help ensure impartiality, whether or not a party or a party's counsel has contributed to a judge:

SCR 60.04 A judge shall perform the duties of judicial office impartially and diligently. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

. . . .

(b) A judge shall be faithful to the law and maintain professional competence in it. A judge may not be swayed by partisan interests, public clamor or fear of criticism.

. . . .

(e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice . . . .

. . . .

(2) In the performance of the duties under this section, the following apply to administrative responsibilities:

(a) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

. . . .

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial. . . .

Some argue that these front-end safeguards fail to solve the "problem" caused by judicial contributions. According to this view,

"[t]he real problem is the prospect that the judicial candidate, ostensibly a symbol of impartiality, will one day wind up judging the contributor." Banner, 40 STAN. L. REV. at 479. But the prospective problem is not that a judge is ruling in a case involving a contributor but, instead, that a judge cannot rule impartially. Unless a judge cannot rule impartially, there is no reason to recuse, for there is no reason to automatically assume that a judge cannot impartially preside over a case involving a contributor or supporter.

IV. ALTERNATIVELY, THE ASSOCIATIONS PETITION THE COURT TO AMEND THE CODE OF JUDICIAL CONDUCT.

At one level, this case is merely representative. The implications of the Court's decision on this motion are much broader than the Town of West Point, the Associations, and the justices whose campaign committees received or may receive contributions or support from any of the parties affiliated with this case. Countless cases at trial and on appeal involve individuals or entities who have contributed to the campaign committee of a judge presiding over the case. Accordingly, the Court may find it more appropriate to address this issue as well through an administrative proceeding to

amend the Code of Judicial Conduct—either piecemeal or as part of the Court's assessment of the 2007 Model Code.[20]

In any event, on the grounds detailed above, the Associations petition the Court to amend the Code of Judicial Conduct to unequivocally reflect the overwhelming weight of authority providing that the receipt of a lawful contribution by a judicial campaign committee does not, by itself, warrant recusal. To avoid the effect of a *de facto* rule that leads to recusal based on a campaign contribution, the Judicial Code should be amended in the following respects:

SCR 60.04 should be amended to add the following subsection:

> **(5)** 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.

Similarly, SCR 60.06(4) should be amended by adding the highlighted language:

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[20] The Associations understand that the Court is deciding whether to begin a process to consider whether the Wisconsin Code of Judicial Conduct should be amended to conform, in whole or in part, to the 2007 Model Code.

> **(4)** SOLICITATION AND ACCEPTANCE OF CAMPAIGN CONTRIBUTIONS. A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers~~.~~, or parties or entities involved in a proceeding over which the candidate is presiding. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4); provided, however, that the receipt of a lawful campaign contribution shall not, by itself, warrant judicial recusal.

Although the Code today by no means expressly requires recusal due to a contributor's involvement in a case, or an endorsement, the Code also does not make explicit that recusal is unnecessary solely because a party or attorney contributed to the judge's campaign committee. Indeed, because it is not explicit, the Code may be applied inappropriately to, in effect, require recusal and that inevitably penalizes the parties, their counsel, and the court itself.

CONCLUSION

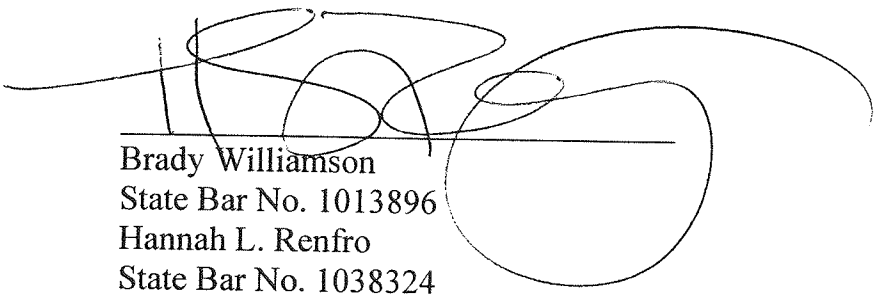
It is unquestionable that citizens are entitled to have their disputes resolved by an impartial court. The issue is whether a contribution to a judicial candidate's election campaign

automatically or inevitably threatens this right. The courts that have issued opinions on the matter have invariably said they do not.

The citizens of this state (and the other thirty-eight states that hold judicial elections) have decided to maintain an elected judiciary. "A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. . . . The organized bar, the legal academy, public advocacy groups, a principled press, and all the other components of functioning democracy must engage in this process." *Lopez Torres*, 128 S. Ct. at 803.

Citizens and organizations have a right under the First Amendment to engage in the election process by contributing funds to candidates within statutory limits as a form of political speech. To encourage, let alone practically mandate, recusal for all or certain contributions is to curtail that right. Some would prefer that judges not be subject to an electoral process. But as long as they are, rules on judicial election should be "construed to encourage citizen involvement, not to chill it." *Rogers*, 909 S.W.2d at 883.

Dated: April 8, 2008.



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