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Testimony in the Matter of Amendment of the Judicial Code of Conduct's Rules on Recusal

October 28, 2009

Thank you for this opportunity to testify. My name is Mike McCabe and I am the executive director of the Wisconsin Democracy Campaign. On behalf of the Democracy Campaign, I applaud you for undertaking the task of examining when the financing and conduct of judicial campaigns should result in a judge's disqualification from hearing and ruling on a case.

I appear before you to express our support for the general thrust of the League of Women Voters' petition. We do not agree with every detail in the League's proposed amendments to the Judicial Code of Conduct's recusal rules, but we share a strong belief in the need for recusal reform and we believe the League's proposal provides a useful starting point for the Court's examination.

Our justice system is built on a bedrock principle. Judges aren't supposed to belong to anyone. They are to be accountable only to the law and the constitution.

The public clearly believes this bedrock is cracking. Both the Brennan Center for Justice and Justice at Stake make mention in their testimony of a February 2009 Harris Interactive poll commissioned by Justice at Stake, so in the interest of the Court's time I will not reiterate that poll's findings. I will, however, call attention to two other polls that showed strong evidence of widespread public unease over the mixing of campaign money and judicial affairs. A January 2008 poll done for Justice at Stake by the national polling firm American Viewpoint found only 5% of Wisconsin residents believe that campaign contributions to judges do not influence decisions. A May 2008 poll by the national survey research firm Belden Russonello and Stewart for the Midwest Democracy Network found nearly half of Wisconsin residents (47%) now believe judges' decisions are based on politics and special interest pressure.

Recusal reform addresses one of three areas in need of attention in order to rebuild public confidence in the fairness and impartiality of judges and the independence of state courts and the Supreme Court in particular. The other two are the financing of election campaigns by judicial candidates and the efforts of interest groups to influence the outcome of judicial elections.

None of these three needed reforms is incompatible or contradictory. The accomplishment of one of these reforms will not eliminate or even substantially diminish the need for reform in the other two areas. They each make up a leg in a three-legged stool upon which reestablishment of public trust in judicial integrity rests.

As for the petitions filed with the Court in this matter, let me first describe where we agree with the League of Women Voters and where our position differs from that of the League. We agree that the Court should amend the Judicial Code of Conduct to clearly spell out when campaign contributions and other forms of campaign support call for mandatory disqualification of a judge. We agree that such a rule should include a waiver provision to discourage gamesmanship. And we strongly agree that any rule the Court adopts should address both direct campaign contributions and spending done on behalf of candidates by interest groups.

The League proposes a $1,000 threshold for determing when campaign donations or spending should compel recusal. We are more agnostic than the League on the question of where to draw the line, but are convinced a clear line needs to be drawn. As you wrestle with this question, I have no doubt that regardless of where the line is drawn – at $1,000 or $2,500 or $5,000 or $50,000 – every member of this Court will contend that their judgment could not be influenced for that amount. That is beside the point. As the aforementioned public opinion polls indicate, the public is increasingly convinced that campaign donations and other forms of political support do have an impact on judges' decisions. The threshold needs to be set at a level that restores public trust and inspires confidence in the integrity of the judiciary. Accomplishing that goal argues for a disqualification threshold that is quite low. While some will argue the League's proposal sets it too low, pegging it at the legal limit on contributions to a candidate for state Supreme Court – $10,000 – is most certainly too high to have the desired impact on public perception of money's influence on the judiciary.

It is worth mentioning here that 631 contributors – or 1 one-hundredth of 1% of Wisconsin's population – have made a donation of $1,000 or more to a candidate for Supreme Court since 1991.

More important from our perspective than the dollar amount that is established as the disqualification threshold is the period of time covered by such a rule. The League's proposal covers campaign donations and spending done by interest groups in the previous two years. If such a rule were in place today, its effects would apply to only two members of this Court. We suggest a rule applying to contributions or expenditures made in support of a judge's most recent election as well as any made thereafter.

The League's proposed recusal rule applies to contributions or spending by a "party to the proceeding or attorney or law firm for a party to the proceeding." We agree an amended recusal rule should apply to contributions or campaign spending by any individuals who or organizations which are parties to a case as well as the attorneys who represent them. We are less certain of the wisdom of including law firms. A law firm is a corporate entity and cannot legally make campaign contributions to candidates for public office in Wisconsin. Furthermore, many large law firms practice in many different areas of the law, so the practical effect of the proposed rule would be to sweep in donations from members of a law firm who have no involvement whatsoever in the area of the law pertaining to a particular case before a court. To accomplish its intended purpose, an amended recusal rule need not apply so broadly.

Having said that, the approach advocated by the League is vastly preferable to the one advanced in the petition submitted by Wisconsin Manufacturers and Commerce. The recusal standard recommended by WMC is inconsistent with and contradicts the U.S. Supreme Court's holding in *Caperton v. A.T. Massey Coal Co*. Put another way, if such a recusal standard were applied to the *Caperton* scenario, Don Blankenship's expenditure of approximately $3 million to support Brent Benjamin's campaign for West Virginia's Supreme Court would not and should not result in Justice Benjamin's

disqualification from hearing and ruling on a case involving Blankenship's company. The U.S. Supreme Court ruled exactly the opposite.

The recusal standard recommended in the petition submitted by the Wisconsin Realtors Association also is flawed in two important ways. First, a standard holding that receiving a lawful campaign contribution – or many such contributions – should never constitute grounds for recusal would create conditions under which judges would be presiding over cases after having received tens of thousands or even hundreds of thousands of dollars in direct donations from parties to a case and attorneys representing them. It is hard to imagine that would not be perceived as a conflict of interest for a judge by many if not most citizens. In this way, the Realtors' proposal falls far short of what is needed to restore public trust and inspire confidence in the integrity of the judiciary. Second, the Realtors focus only on campaign contributions and not other forms of campaign support. This is a serious drawback in the Realtors' recommended standard. The public will never draw a distinction between contributions given directly to a candidate and money spent on behalf of a candidate by a supposedly independent group. In either case, what is perceived is an attempt to influence the outcome of the election and ultimately influence the judge.

Thank you once again for holding this hearing and inviting us to offer our observations on this matter.