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 motion, in support of its Petition for Supreme Court Rule, Rule Petition No. 08-25. This motion 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, 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 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.

MOTION

The Wisconsin Realtors Association, Inc. (the "Realtors Association") and the Wisconsin Builders Association (collectively, the "Associations"), by their appellate counsel, Godfrey & Kahn, S.C. and Axley Brynelson, LLP, move the justices of the Court collectively—and, if necessary, individually—to enter an order affirming their participation in the Court's resolution of the pending petition for review in this matter.

In particular, to avoid the potential for the recurrence of a substantive deadlock, the Associations ask the Court to determine that the receipt of a lawful campaign contribution or endorsement by a judicial campaign committee does not, by itself, warrant judicial recusal. Alternatively, if the Court finds it necessary to go beyond the confines of

this case, the Associations petition the Court to amend SCR 60.04 and SCR 60.06(4) to so provide.

In support of the motion, the Associations submit the accompanying memorandum of law and, in summary, state that:

FACTUAL BACKGROUND

1. On February 28, 2008, the Court of Appeals (District IV) affirmed the judgment of the Columbia County Circuit Court, which had concluded on summary judgment that § 236.45, Stats., permits a town to impose a blanket moratorium on real estate development while it develops a master plan for zoning. *See* § 66.1001, Stats. (requires state municipalities to develop comprehensive land use plans by 2010).

2. On March 31, 2008, the Associations filed a timely petition for review, asking this Court to review and reverse the decision of the Court of Appeals and the judgment of the circuit court. That petition is pending with a response from the defendant-appellee due on or about April 14, 2008 under § 809.62(3), Stats.

3. The case has had an uncommon, but not unprecedented, appellate history:

A. The circuit court entered its judgment on October 26, 2006, and the Associations filed a timely notice of appeal less than two weeks later. Several organizations filed, with the permission of the appellate court, non-party briefs. On April 16, 2007, the Court of Appeals accepted the case as submitted on the briefs.

B. On July 5, 2007, the Court of Appeals in a five-page decision certified the appeal to this Court, noting that the case presented a "question of significant statewide interest that is likely to recur...." Moreover, the appellate court stated, the "statutory authority of a Wisconsin town to impose a land division moratorium poses an issue of first impression." In a footnote, the court's order also said "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." The court concluded its certification with this unequivocal declaration: "The question whether towns have the authority to enact ordinances imposing moratoriums on land development is plainly a matter of statewide importance...."

C. On August 14, 2007, this Court accepted the case on that certification. The order noted that Justice Annette Ziegler did not participate in the decision to accept the appeal.

D. Over the next several months, a number of organizations filed motions to submit non-party briefs, which this Court granted. The orders granting permission to file non-party briefs noted that Justice Ziegler did not participate in the decisions to accept the briefs.

E. On October 26, 2007, Justice Ziegler wrote a letter to counsel in this case advising them of her campaign committee's receipt—in conjunction with her 2007 campaign for election to the Court—of contributions from two organizations associated with the Realtors Association and the Builders Association, not from the Associations themselves. (As corporations, the Associations cannot make campaign contributions under § 11.38, Stats.) That same letter noted her "tentative decision to participate in this case and [, by writing the letter,] to determine whether counsel objects to this decision."

F. On November 9, 2007, counsel for the defendant-appellee wrote to the Clerk of the Supreme Court "respectfully request[ing] that Justice Ziegler not participate in this appeal. This decision 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." (Emphasis added.) (The entities that contributed to the campaign committee were not, in fact, "parties to the case," but they were affiliated with the parties.)

G. The Court heard oral argument on November 29, 2007. Justice Ziegler was not present for the argument.

H. On December 12, 2007, in a two-page, *per curiam* decision, the Court vacated its order granting certification and remanded the case to the Court of Appeals. The order noted that this Court was evenly divided, three-to-three, on the merits of the case. Justice Ziegler did not participate in the decision.

I. The Court of Appeals, after denying a motion to hear oral argument on its own and to consider additional briefs, entered its decision almost three months later. It noted that its "references

to the parties' arguments are drawn from briefing submitted to the supreme court and oral argument held before *that* court." (Emphasis added.)

4. In her October 26, 2007 letter, Justice Ziegler had called attention to the publicly-reported financial support her campaign received from the Associations' political committees in her 2007 election campaign.

5. The Realtors Association and the Builders Association supported Justice Ziegler's candidacy, through campaign contributions from their PACs (funded by individual member contributions), in endorsement communications with their own members and in other ways. That support was not only legal but constitutionally-protected.

A. The Realtors Association has endorsed other candidates for Supreme Court in the past including, most recently, the candidacy of Justice Louis Butler for a full term on the Court. Its PAC did not, however, make a contribution to Justice Butler's campaign committee.

B. Neither the Builders Association nor its affiliated organizations took a position in the most recent Supreme Court election campaign.

6. In the wake of Justice Ziegler's recusal, the Realtors Association and, on information and belief, other organizations have changed their practices of contributing to judicial campaign committees and otherwise expressing themselves with respect to judicial candidates. *See* ¶ 5, *supra*.

A. They are concerned that their financial and non-financial support of, or opposition to, a judicial candidate will have direct consequences on the willingness or ability of judges or candidates, once elected, to participate in the resolution of cases in which they are involved.

B. That reluctance even extends to cases in which the organizations, though not parties, have an interest. *See, e.g., Stuart v. Weisflog Showroom Gallery, Inc.*, 2008 WI 22 (March 28, 2008) (amicus brief submitted by Wisconsin Builders Association).

SUMMARY OF ARGUMENT

7. Wisconsin is one of thirty-nine states that elect their judges. Wisconsin always has held—and, apparently, it will continue to hold—judicial elections.

8. Judicial campaigns inherently involve individual and organizational support for candidates, including financial support. State law in Chapter 11, Stats., and the judicial ethics code in SCR Chapter 60 have established restrictions on campaign contributions and solicitations to safeguard the integrity of the judiciary's electoral system.

9. The state and federal constitutions protect the right of any individual, speaking individually or collectively, to participate in the political life of the state and to express a point of view freely on the qualifications of candidates for public office, including judicial office.

A. That freedom extends to making publicly-disclosed and reported contributions to judicial candidates within the statutory source restrictions and contribution limits.

B. Judges and justices themselves on occasion endorse other judges, expressing their own point of view, and they have every right to do so. The First Amendment guarantees it.

10. Individuals and political committees endorse and contribute to judicial candidates for a variety of reasons. This involvement in the electoral process by individuals (including lawyers) and organizations cannot be discouraged, practically or constitutionally. Financial support

from contributors allows candidates to spread their message and to educate voters about the judiciary and its role in government, issues directly relevant to any judicial election, and about a candidate's specific qualifications.

11. Neither state law nor the judicial code of ethics requires judicial recusal in response to litigants' or lawyers' exercise of their constitutional rights, either by expressing an opinion for or against any judicial candidate or making a legal contribution. *See* § 757.19, Stats.; SCR 60.04, 60.06.

12. The plaintiffs-appellants-petitioners have not found a single reported decision, from any jurisdiction, at any level, in which the receipt of a campaign contribution or endorsement by itself has required the recusal of a judge or justice. *See, e.g., Dean v. Bondurant*, 193 S.W.3d 744, 751 (Ky. 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.").

13. While any justice or judge may decide, for reasons apparent or unstated, not to participate in the resolution of a case, members of the judiciary are presumed to be impartial. The recusal decision is for the individual judge or justice, but it nevertheless is a decision made within an established set of rules, statutes, and precedent.

14. Any decision to recuse is significant because of the administrative burden it can cause and because it can—and, sometimes, does—have real consequences for litigants and for the development of the law for the entire state.

15. In this case, notwithstanding its initial certification, the Court of Appeals has become—for now—the final arbiter of the law. The appellate process has been transparent, and in good faith, but it inevitably has affected the role of this Court and the state of the law.

16. The Court of Appeals, now in its 30th year after creation by constitutional amendment, is an error correcting court. *See, e.g., Smith v. Kappell*, 147 Wis. 2d 380, 388, 433 N.W.2d 588 (Ct. App. 1988) (*citing State v. Mosley*, 162 Wis. 2d 636, 666, 307 N.W.2d 200 (1981)). It is not the appropriate appellate court, as the Court of Appeals itself explicitly

recognized in certifying this appeal, to decide with final authority statewide questions of first impression.

17. By rule, this Court has provided for the acceptance of petitions for review on the affirmative vote of three members. *See* Wis. Sup. Ct. Internal Operating Procedures II, B(1). The state constitution provides for a quorum of four. *See* Wis. Const., Art. VII, § 4(1).

18. A decision by one or more justices not to participate in the decision on this petition for review—based upon a party or related entity's constitutionally-protected activities—unfairly compromises the role of the Court, ceding its authority. Not incidentally, it also implicates the due process and First Amendment rights of the litigants.

19. While this 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 functions of the Court itself in cases yet to be decided and yet to be filed.

PETITION TO AMEND SCR 60, THE CODE OF JUDICIAL CONDUCT

20. For the reasons stated above, the Associations alternatively petition the Court to adopt amendments to SCR 60.04 and 60.06(4) to conform these rules to the overwhelming weight of authority providing that

the receipt of a lawful campaign contribution or endorsement by a judicial campaign committee does not, by itself, warrant recusal.

21. 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 campaign 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.

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

> (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.

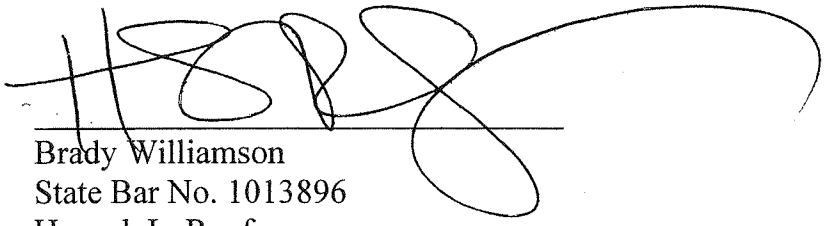
RELIEF REQUESTED

The people of this state, 160 years ago, chose to select their judges and justices by popular election. Unless and until the legislature establishes another method of financing judicial campaigns, candidates for judicial offices and their registered and regulated committees—in an appropriate fashion—will either have to pay for campaigns themselves or solicit public contributions. The decision by any individual (including lawyers) or organization to make a contribution to a judicial campaign, or to express support or opposition to a judicial candidate, should not require any compromise of due process or the forfeiture of any right.

WHEREFORE, the Associations in furtherance of their petition for review and in the interests of justice request that the Court, individually and collectively, determine that the receipt of a lawful campaign contribution or endorsement by a judicial campaign committee does not, by itself, warrant judicial recusal. Alternatively, the Associations petition the Court to adopt the proposed amendments to SCR 60.04 and SCR 60.06(4) to so provide.

To the extent this motion requires any justice to reconsider or expressly consider his or her participation in resolving the pending petition for review, the Associations so move as well. The pending petition for review should be decided by the full Court, not just part of it.

Dated: April 8, 2008.



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