SUPREME COURT
STATE OF WISCONSIN

In the Matter of Amending the Code of Judicial Conduct	**PETITION FOR SUPREME COURT RULE**

WISCONSIN MANUFACTURERS & COMMERCE'S MEMORANDUM OF LAW IN SUPPORT OF ITS RULE PETITION TO AMEND THE CODE OF JUDICIAL CONDUCT

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INTRODUCTION

"Under the First Amendment, generally the view is that more rather than less information advances democratic values and that the government should not be the arbiter of which ideas are true or false, important or unimportant, helpful or harmful. Particularly in the context of popular elections, it is the people who decide through their votes which message resonates." *Siefert v. Alexander*, 597 F. Supp. 2d 860, 862 (W.D. Wis. 2009). At its core, this rule petition attempts to protect this freedom by ensuring that there is no penalty for independent speech about judges, judicial candidates and campaigns, and public policy matters involving the courts.

Through an affiliated organization, WMC-Issues Mobilization Council, Inc. ("WMC-IMC"), Wisconsin Manufacturers & Commerce ("WMC") has long engaged in issue advocacy communications on behalf of its members, large and small. *See Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 669-71, 597 N.W.2d 721 (1999). WMC also maintains a political action committee (a "PAC") that sponsors independent expenditure communications in non-judicial

and judicial campaigns and contributes to candidates. The focus of this rule petition, however, is limited to independent expenditures and issue advocacy communications (collectively, "independent communications").[1]

To avoid *de facto* suppression of political expression, WMC petitions the Court to amend the Code of Judicial Conduct (the "Code") to provide that a judge shall not be required to recuse himself or herself in a proceeding where the recusal is based solely on the sponsorship by a party to the proceeding of an independent communication or by a party's donation to another organization that, in turn, sponsors an independent communication.

To that end, SCR 60.04 should be amended to add the following subsection:[2]

> (6) EFFECT OF INDEPENDENT COMMUNICATIONS. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on a party to the

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[1] The Wisconsin Realtors Association's Rule Petition, No. 08-25 (the "Realtors' Rule Petition"), which WMC supports, addresses only campaign contributions, not independent communications. The rule petition filed by the League of Women Voters of Wisconsin Education Fund, No. 08-16 (the "League's Rule Petition"), would impose a recusal penalty on both forms of speech—contributions and independent communications.

[2] WMC requests that the amendment be added as a subsection (6), assuming that the Court adopts the amendments to the Code outlined in the Realtors' Rule Petition.

> proceeding's sponsorship of an independent expenditure or issue advocacy communication (collectively, an "independent communication") or by a party to the proceeding donating to an organization that sponsors an independent communication.

WMC's proposed rule does not change the regulations applicable to judges, judicial candidates, or judicial elections. Rather, the effect of this proposed provision is to avoid regulating independent communications through the judicial code—that is, spending which, by definition, is not controlled or influenced by any judicial candidate. The proposal guards the right of individuals and organizations to express themselves on candidates and matters of public policy and eliminates unwarranted litigation over judicial recusal. As the letter filed by the Brennan Center for Justice emphasizes: "the Supreme Court of Wisconsin should act now to bring clarity to this area, so that potential litigants know the consequences of their independent spending in support of candidates for judicial office." Brennan Center for Justice, Letter to Carrie Janto Regarding Rule Petition Nos. 08-16 and 08-25, at 4 (filed Oct. 12, 2009) ("Brennan Center Letter").

This petition stands in sharp contrast to the League's Rule Petition. The League would have this Court adopt a rule intended to

restrict independent spending in two ways. First, independent spending by an individual or an organization, in any amount to support a judicial candidate, would require that candidate, if elected, to recuse himself or herself in a case involving the individual or organization that sponsored or financially supported the independent communication. Second, recusal also would be required based solely on an individual's or organization's sponsorship or support of an independent communication that even refers to a candidate (whether to support or oppose that candidate or his or her opponent) where the independent communication is in the 60-day period before an election.

In sum, WMC's Rule Petition would expressly eliminate compelled judicial recusal in connection with independent communications; the League's Rule Petition would expressly mandate recusal.

ARGUMENT

Independent communications—issue advocacy communications that address public policy matters and independent expenditures that support or oppose a candidate for public office—

are protected political expression. Unlike campaign contributions and disbursements, they are subject to few restrictions.[3]

Courts have consistently held that, with limited exceptions that primarily involve disclosure, the First Amendment precludes any restrictions on the ability of an individual or organization to sponsor or financially support an independent communication, or on how much those individuals and organizations can spend on independent communications. As a result, any practice or rule that requires or leads to judicial recusal based solely on independent communications would be facially unconstitutional.

I. INTRODUCTION AND BACKGROUND.

The broad protection for political speech in the campaign finance context was first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976). The decision permitted the regulation of campaign contributions to candidates. But it found unconstitutional restrictions on overall campaign spending, by candidates or by any other individual or organization, because those restrictions were not

[3] This state only regulates contributions and spending for "political purposes," a defined term that is further limited to a "communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate. . . ." Wis. Stat. § 11.01(16)(a)1.

narrowly tailored to advance the compelling state interest in preventing corruption or the appearance of corruption. *Id.* at 45-48.

The U.S. Court of Appeals has just outlined several overarching principles that flow from *Buckley* and the Supreme Court's application of the First Amendment to political speech. These principles provide a useful framework for the issues raised by the rule petitions pending before this Court:

> First, the [U.S. Supreme] Court has held that campaign contributions and expenditures constitute "speech" within the protection of the First Amendment. . . .
>
> Second, the Court has ruled that the Government cannot limit campaign contributions and expenditures to achieve "equalization"—that is, it cannot restrict the speech of some so that others might have equal voice or influence in the electoral process. . . .
>
> Third, the Court has recognized a strong governmental interest in combating corruption and the appearance thereof. . . . This, indeed, is the only interest the Court thus far has recognized as justifying campaign finance regulation. . . . The core corruption that Government may permissibly target with campaign finance regulation is the financial *quid pro quo*: dollars for political favors. . . .
>
> Fourth, in applying the anti-corruption rationale, the Court has afforded stronger protection to *expenditures* by citizens and groups . . . than it has provided to their *contributions* to candidates or parties. The Court has explained that contributions to a candidate or party pose a greater risk of *quid pro quo* corruption than do [independent] expenditures. . . .

Emily's List v. Federal Election Commission, No. 08-5422, 2009 WL 2972412, *2-5, ___ F.3d ___ (D.C. Cir. Sept. 18, 2009) (quotation marks and citations omitted).

A. Coordination.

The key feature of an independent communication is the absence of coordination—that is, the absence of any inappropriate communications between a candidate or a candidate's agent and an individual or group engaged in independent communications. A communication is *not* coordinated if the candidate (or his or her agent) is not requesting, directing, consulting, controlling, assisting, or organizing the spending and its concomitant message. *See Keep Our North Strong PAC, Findings of Fact & Conclusions*, Government Accountability Board ("GAB") Case No. 2008-40 (June 22, 2009); *Opinion of Wis. Elections Board to Susan Armacost and William S. Reid*, El. Bd. Op. 00-02 (June 21, 2000), affirmed by the GAB on March 26, 2008. Uncoordinated communications are independent from candidates as well as from a candidate's campaign committee or other agents.

In contrast, coordinated spending takes place in cooperation or consultation with, or at the direction of, a candidate. Coordinated spending is considered an in-kind contribution to the candidate's campaign and, as a result, it is subject to all applicable contribution limits, including those that prohibit corporate contributions. Independent spending is not.

B. Issue Advocacy Communications.

Issue advocacy communications comment on public policy matters. These communications do not expressly advocate the election or defeat of a particular candidate, nor are they coordinated with a candidate. Issue advocacy communications frequently provide information on public policy matters and, in some instances, on a public policy associated with a public official or candidate, by name, as part of a grassroots lobbying effort. Those communications may or may not take place within a campaign period.[4]

To understand the meaning of issue advocacy communication, it is essential to note what it is not—it is not express

[4] WMC-IMC regularly sponsors issue advocacy communications, and sometimes those independent communications occur within the time period prior to an election.

advocacy. Express advocacy is a communication that expressly advocates the election or defeat of a clearly identified candidate. Support for or opposition to a specifically identified candidate often is indicated with words such as "elect," "defeat," "vote for," "vote against." *Buckley*, 424 U.S. at 44 n.52; *see Wisconsin Manufacturers & Commerce*, 227 Wis. 2d at 669-71.

C. Independent Expenditures.

An independent expenditure is money spent in support of or in opposition to a clearly-identified candidate but without coordination with a candidate. In other words, an independent expenditure communication contains express advocacy but, like issue advocacy, it takes place without coordination with a candidate or a candidate's agent.

These independent expenditure communications can be and are regulated but only with respect to registration by the sponsoring organization and, in some instances, financial disclosure of the organization's contributions and disbursements. *See* Wis. Stat. §§ 11.05, 11.06(7). Neither issue advocacy communications nor

independent expenditures can be subject to any spending limitation. *See Buckley*, 424 U.S. at 26-27, 44-48.

II. INDEPENDENT COMMUNICATIONS ARE, AND WILL REMAIN, PROTECTED POLITICAL SPEECH.

Independent communications are uncoordinated forms of political speech—the candidate is not requesting, directing, consulting, controlling, or organizing the spending and its message. *Id.* at 26-27, 45-48. The absence of coordination eliminates or, at the least, significantly reduces the risk of corruption. *Id.*; *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 614-15 (1996).

The Supreme Court has emphasized that restrictions on contributions[5] are a "marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. But a "restriction on the amount of money a person or group can spend [independently] on political communication during

[5] In Wisconsin, individual and PAC contributions to supreme court candidates are limited to $10,000 and $8,625, respectively. Wis. Stat. §§ 11.26(1)(a), (2)(a). Individual and PAC contributions to court of appeals candidates are limited to $3,000 for candidates running in a district with a population of more than 500,000 and $2,500 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 $3,000 for candidates running in a county with a population of more than 300,000 and $1,000 for all other counties. Wis. Stat. §§ 11.26(1)(cn), (cw), (2)(cn), (cw).

a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

Uncoordinated—that is, independent—spending does not create the opportunity for a *quid pro quo* arrangement between a supporter and a public official, and the nature of the speech is a fundamental form of political expression. In *Buckley*, the U.S. Supreme Court held that the government may regulate under federal campaign finance law only those communications that expressly advocate for or against a specific candidate. 424 U.S. at 26-27, 44-45. Accordingly, issue advocacy remains wholly unregulated under state campaign finance law and independent expenditures are subject only to registration and reporting requirements.[6]

A. The First Amendment Precludes Restrictions On Independent Expenditures.

The U.S. Supreme Court has critically described limitations on independent expenditures as restrictions that "exclude all citizens and groups except candidates, political parties, and the institutional

[6] The U.S. Supreme Court is now considering whether to revisit its prior rulings that found constitutional restrictions on independent expenditures by corporations and labor organizations. *Citizens United v. Federal Election Commission*, No. 08-205 (re-argued September 9, 2009).

press from any significant use of the most effective modes of communication" and, as a result, "heavily burden[] core First Amendment expression." 424 U.S. at 19-20, 48. These limitations curtail "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Due to the nature of the expression at issue—core political speech—and the lack of a compelling interest in restricting that expression, the U.S. Supreme Court has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441-42 (2001) (citing *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985)); *Buckley*, 424 U.S. at 39-58; *see also Randall v. Sorrell*, 548 U.S. 230, 240-46 (2006).

Indeed, the only restriction upheld by the U.S. Supreme Court involves the source of funding for the independent expenditures: the government, state or federal, may restrict corporations and labor unions from making independent expenditures. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 656-65 (1990). Wisconsin

and about half of the other states do have such a source restriction. *See* Wis. Stat. § 11.38(1)(a). However, even this source restriction may be held unconstitutional soon, depending on the forthcoming U.S. Supreme Court decision in *Citizens United* in which the Court may decide to reverse or modify *Austin*. Many commentators agree that the Court has signaled that it is poised to do so. *See, e.g.*, Adam Liptak, *Justices Are Pressed for a Broad Ruling in Campaign Case*, N.Y. TIMES, Sept. 9, 2009, at A28 ("There seemed little question after the argument . . . that the makers of a slashing political documentary about Hillary Rodham Clinton were poised to win. The open issue was just how broad that victory would be.").

B. Issue Advocacy Communication Is Subject To Only A Narrow Set Of Restrictions Under Campaign Finance Law Applicable Only In Federal Elections.

After *Buckley* and prior to the U.S. Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), a long line of court decisions struck down virtually every government attempt to regulate issue advocacy or expand the definition of express advocacy beyond those communications expressly advocating the election or defeat of a clearly identified candidate. In upholding the federal electioneering communication standard established in the Bipartisan

Campaign Reform Act of 2002 ("BCRA"), the *McConnell* decision interrupted that unbroken line of cases. But BCRA's "electioneering communication" standard applies only to a limited scope of advocacy in federal elections, for specified time periods, and only for broadcast advertisements.

Moreover, in a subsequent decision, *FEC v. Wisconsin Right to Life*, the U.S. Supreme Court narrowed the scope of the "electioneering communication" standard in BCRA. 551 U.S. 449, 478-79 (2007). The Court held that only those electioneering communications (within a defined period) that are the "functional equivalent of express advocacy" and "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" may be subject to federal regulation. *Id.* at 469-70.

The Chief Justice's majority opinion in *Wisconsin Right to Life* discusses extensively the role of the First Amendment in regulating speech and the importance of encouraging speech:

- "[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Id.* at 457.
- "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will

come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.* at 470.

- "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 474.

- "[D]iscussion of issues cannot be banned merely because the issues might be relevant to an election. . . . [I]n a debatable case, the tie is resolved in favor of protecting speech." *Id.* at 474 n.7.

These fundamental principles encouraging speech and protecting individuals' and groups' exercise of the right to speak freely in the political context will continue to frame any attempt to restrict independent communications or, as the League's petition would do, to penalize them. The Judicial Code is not the place—indeed, it is probably the last place—where regulations should be imposed that directly or indirectly limit speech, especially that of private citizens and organizations.

III. ANY *PER SE* RECUSAL RULE WOULD RESTRAIN THE RIGHTS OF INDIVIDUALS AND GROUPS TO ENGAGE IN POLITICAL EXPRESSION.

Wisconsin's Code should not be and cannot be amended to require recusal as an "exception" to the protection demanded by the First Amendment. The League's Rule Petition asks the Court to

amend the Code to require a judge to recuse himself or herself wherever:

> a party to the proceeding or attorney or law firm for a party to the proceeding was an entity or organization, or a member of the board of directors of that entity or organization, that within the preceding two years paid in full or in part for a mass communication that was disseminated in support of the judge's election to the judge's current or prospective judicial position[, or]
>
> ... a party to the proceeding was an entity or organization, or a member of the board of directors of that entity or organization, that paid in full or in part for a mass communication that was disseminated during the period beginning on the 60th day preceding an election for the judge's current or prospective judicial position and ending on the date of the election, and that includes a reference to the judge or another candidate for that position.

League's Rule Petition at 6-7.

This Court should not adopt the League's Rule Petition or any variation on it. Any rule that requires recusal based solely on independent communications collides with the U.S. Supreme Court's application of the First Amendment and the Court's recent landmark decision in *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). A recusal decision by a judge cannot turn on someone else's independent conduct or speech. It is the judge's position, interests and ethics that are measured by the Code, no one else's. If judges are required to recuse based on someone else's sponsorship of or

support for an independent communication, within or without a campaign period, individuals and organizations will be effectively subjected to severe limitations on independent spending. Any such restriction or consequence cannot withstand constitutional scrutiny.

Mandatory recusal embodies an assumption that an independent expenditure or issue advocacy communication in support of a judicial candidate *necessarily* translates into partiality on the part of that candidate if she wins the election. But this would directly conflict with the Supreme Court's long line of cases rejecting restrictions on independent communications as infringing the First Amendment right to engage in unfettered political expression. And

> [t]he difference between the judicial and legislative functions is a weak distinction for finding that independent expenditures that cannot create a threat of quid pro quo in a legislator *must* create a direct, personal or pecuniary interest in a judge.

Stephen M. Hoersting & Bradley A. Smith, *The* Caperton *Caper and the Kennedy Conundrum*, 2009 CATO SUP. CT. REV. 319, 341 (2008-2009).

A rule for *per se* recusal would also be flatly inconsistent with *Caperton*, 129 S. Ct. 2252, which discussed the role of massive

independent spending in a judicial election. The 5-4 decision in *Caperton* did not hold that *any* amount of spending or involvement in an election requires recusal. According to the Court, determining whether recusal is warranted "requires an objective inquiry into whether the contributor's [sic] influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Id.* at 2264.

Applying that standard, a court must inquire into a host of factors including the relative amount of the financial support, the total amount spent in the election, the apparent effect the spending had on the outcome of the election, the relative timing of the support, and the characteristics of the supporter. *Id.*[7] Mandatory recusal based simply on the occurrence of an independent communication omits this crucial step. The analysis must be comprehensive, not narrow; a judge evaluates all of the facts surrounding a challenge or a concern about his or her impartiality

[7] The Chief Justice also identified 40 preliminary questions that the majority left unanswered but that state courts must now consider when the recusal issue arises in the context of judicial elections. *Id.* at 2269-72 (Roberts, C.J., dissenting).

and, only then, determines whether there is a need to recuse. The Brennan Center correctly notes the dangers of *per se* rules, indicating that "the preferred rule would call on judges assessing disqualification to consider the *totality of the circumstances* surrounding a litigant's campaign spending . . . ." Brennan Center Letter at 6 (emphasis added).

The decision in *Caperton* did *not* mandate due process recusal because of independent campaign spending—whether directly or through financial support to other organizations. Instead, the Court reached the result in *Caperton* by evaluating all of the circumstances, including the relative amount of independent spending by one individual and one organization. Far from providing support for the League's petition, the *Caperton* decision undermines it. The League would make independent spending, even in nominal amounts, the sole basis for recusal. By contrast, WMC's petition eliminates sponsorship of or support for independent communication—recognized, protected forms of political expression—as the sole basis for recusal.

Finally, even if a rule requiring recusal for certain sponsorship of, or spending on, independent communications would withstand constitutional scrutiny, public policy should lead to its rejection. It is through uncensored speech that an informed electorate participates in the democratic process of selecting judges and commenting on public policy matters involving the courts. The Code not only must protect speech because the constitution requires it, but the Code's provisions should be consistent with the need to promote the participation of the electorate in judicial selection by disseminating and receiving all of the information available—often through independent communication.

Rather than restraining speech, the Code should make clear that independent communications are protected from restrictions.[8] The Code should be amended to leave no doubt that a judge is not required, nor should he feel compelled, to recuse based on a third party's engagement in a protected form of political expression—

[8] A practical benefit of WMC's rule petition is that it may well reduce the fiscal and administrative burden caused by unmeritorious motions for recusal based on independent spending. With no clarity in the Code's rules today on recusal, parties can move for a judge to recuse based solely on independent communications, even though it is, unless very strict circumstances under federal law apply, unconstitutional to restrict the amount spent on independent communications.

sponsoring or financially supporting an independent expenditure or issue advocacy communication.

Far from treating judicial campaigns differently than other campaigns, courts have emphasized that—for First Amendment purposes, at least—they are not different. *See, e.g., Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) ("[the court] do[es] not believe that the distinction [between judicial elections and other types of elections], if there truly is one, justifies greater restrictions on speech during judicial campaigns than other types of campaigns"). And Wisconsin's campaign finance law makes no distinction between judicial and non-judicial elections. It never has.

The U.S. Court of Appeals decision in *Chamber of Commerce of the United States v. Moore* is instructive. 288 F.3d 187, 195-98 (5th Cir. 2002) (collecting cases). In that case, a business organization in Mississippi sponsored independent broadcast advertisements during the 2000 judicial election that referred, positively, to candidates for each of four positions on the state supreme court. The advertisements did not expressly refer to their candidacy or the election. *Id.* at 190-91, 198. The business

organization sued after the state attorney general attempted to enforce a statute that would have compelled disclosure of the amount and source of the expenditures used for the advertisements. *Id.* at 190-91.

The court of appeals concluded that the advertisements, notwithstanding their proximity to the election, did not constitute express advocacy. "We hold that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a [specifically and clearly identified] candidate." *Id.* at 190. While acknowledging that the result it reached "may be counterintuitive," *id.* at 198, the court found it unavoidable under the First Amendment as applied in *Buckley* "to balance the state's interest in regulating elections with the constitutional right of free speech." *Id.* at 199.

IV. ELECTED JUDGES, EXCEPT WHERE THE CODE CURRENTLY REQUIRES RECUSAL, SHOULD PRESIDE OVER CASES THAT COME BEFORE THEM.

There is no question that campaign contributions and independent communications constitute protected political expression. Mandating recusal based on a constitutionally protected

form of expression is an abridgment of that right because, among other reasons, it deters individuals and organizations from engaging in these protected activities. That one judge in some courts (but not the state supreme court) can "simply" substitute for another is not a remedy.

Individuals and organizations spend money to help elect a judicial candidate precisely because they want that candidate to be a judge—that is, to preside over cases, including their own. There is nothing corrupt about that. That is democracy. A Wisconsin citizen who helps pay for a television advertisement in support of a legislator's campaign does so precisely because she believes that legislator is best qualified to represent her interests and those of every resident's interests. The First Amendment guards that independent expenditure as an act of political expression. The First Amendment does not permit curtailing that right simply because there may be a few individuals who contribute with an ignoble intent. *See Wisconsin Right to Life*, 551 U.S. at 465-69 (rejecting an intent-based test to determine if a political advertisement is issue or express advocacy); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234,

255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.").

The same principles and protection apply to the democratic process of electing judges. Wisconsin "cannot opt for an elected judiciary and then assert that judicial impartiality can occur only in the absence of speech" in connection with these judicial elections. *See* Hoersting & Smith, 2009 CATO SUP. CT. REV. at 327.

Moreover, recusal can have a significant impact on a case. At the state supreme court level, "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 285, 285 (Mich. 2006). Wisconsin's constitution does not permit case-by-case replacement of a supreme court justice. WIS. CONST. ART. VII. The result is that a tie vote resulting from a recusal automatically affirms a lower court's decision, depriving the affected party of its right to have the highest state court review the case and, in the process, establish precedent for every other court in the state.

Recusal has an adverse effect at the circuit court level as well. Substituting a circuit court judge in a one-judge county means that a judge not elected by the people of that county will preside over a matter, perhaps a whole host of matters if a number of individuals and groups provided financial support in connection with the judge's campaign.[9] Substitution is warranted where there is a justifiable reason—for example, the case involves the county judge's family, the judge's caseload has reached an unacceptable level, or the judge has a financial interest in the case. But there is *no basis* for assuming a risk of corruption based on independent expenditures or support for issue advocacy communications. The First Amendment demands more before a restriction on speech can be imposed: the U.S. Supreme Court has repeatedly and expressly rejected the notion that independent communications can be limited, except under a very narrow set of circumstances. *See, e.g., Buckley*, 424 U.S.

[9] This issue with a one-judge county is not an isolated matter. There are 30 one-judge counties in Wisconsin, representing over 40 percent of all counties. *See* Wis. Stat. § 753.06. And there are an additional 22 counties with two or three judges. *Id.* It would not be surprising in a county with two or three judges to find that a party or lawyer who contributed or otherwise supported one judicial candidate in that county supported the other judicial candidate(s) in that county.

at 26-27, 44-48; *Randall*, 548 U.S. at 240-62; *Wisconsin Right to Life*, 551 U.S. at 464-81.

The logical extension of mandatory recusal reaches all types of political expression. If the Code mandates a judge recuse because an independent communication raises the specter of partiality, what other types of speech will eventually be subjected to the same rationale? Should a judge be forced to recuse from presiding over a case involving individuals who spend their weekends passing out literature in support of, or in opposition to, a candidate? Such a restraint would not be tolerated. Nor should mandatory recusal based on any other type of political expression.

CONCLUSION

The touchstone in *Buckley*, and virtually every related case since then, has been the strict scrutiny standard demanded by the constitution. In general, only limitations on contributions to candidates and committees have met that standard because only there have the courts found the relationship between money and the appearance of corruption sufficient to justify the limitation.

Independent spending lacks that relationship, by definition, precisely because it is independent.

If an organization decides to express its support for or opposition to a judicial candidate or on a public policy matter involving the courts through independent communications, the candidate has no involvement. Mandatory recusal as a matter of judicial ethics cannot be justified when the mandate is triggered by conduct and speech over which the candidate has no control.

"The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (quotation marks and citations omitted). The proposed amendment in WMC's rule petition protects this right by assuring both supporters and judges that recusal is not automatically warranted based on an independent communication sponsored or supported by a party involved in a proceeding.

For all of the reasons outlined here and in the additional materials filed in support of its rule petition, WMC requests the

Court adopt its rule petition to amend the Code of Judicial Conduct. In addition, WMC asks that the Court decline to adopt the League's Rule Petition.

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