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By Electronic Mail (clerk@wicourts.gov; carrie.janto@wicourts.gov)

The Honorable Patience D. Roggensack
Chief Justice
Supreme Court
P.O. Box 1688 Madison, WI 53701

Re: Rule Petition 17-01: In re Rule for Recusal

Dear Chief Justice Roggensack:

On behalf of the Campaign Legal Center, we are submitting this letter in regard to Rule Petition 17-01. The Campaign Legal Center is a nonprofit, nonpartisan organization dedicated to improving our democracy and protecting the fundamental right of all Americans to participate in the political process, and represents the public perspective in administrative and legal proceedings in the areas of campaign finance, voting rights and government ethics.

Rule Petition 17-01, submitted by 54 retired Wisconsin jurists, requests that this Court amend the Code of Judicial Conduct to establish an objective standard for requiring recusal or disqualification of a judge who has received campaign contributions or assistance from a party or lawyer, and supports amending the Wisconsin Constitution so that the Supreme Court can maintain a quorum in the event of such a recusal. Currently, the Court's non-recusal rule adopted in 2010 is at odds with United States Supreme Court opinions addressing recusal and current Wisconsin law, and ultimately risks undermining the integrity of the Wisconsin judiciary.

The Campaign Legal Center supports the underlying policies behind the request in Rule Petition 17-01 and urges this Court to move forward with a rulemaking proceeding. If the Court does initiate a rulemaking proceeding, the Campaign Legal Center would appreciate the opportunity to submit additional comments.

I. Clear recusal rules are an important means of protecting judicial integrity.

The United States Supreme Court has made abundantly clear that large campaign contributions, independent expenditures, and other election-related communications (i.e. "issue advocacy")[1] may threaten the appearance – and in some cases the reality – of judicial integrity. Not long before this Court issued its 2010 recusal rule, the Supreme Court decided *Caperton v. A.T. Massey Coal Co., Inc.*[2] In *Caperton*, the Supreme Court held that judges must recuse themselves under the Due Process Clause, not merely when there is actual bias, but when the degree of campaign spending is such that "'the *probability* of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[3]

This was not a new approach. For centuries, it has been well-understood that judicial independence has required monetary independence.[4] In *Caperton*, the Court recognized this reality, and applied the constitutional recusal standard to a case in which the CEO of A.T. Massey Coal Company, Don Blankenship, had spent over $3 million on independent expenditures and non-express "issue" advocacy communications to help elect one of the West Virginia Supreme Court justices who would later cast a decisive vote in a case involving his company.[5] The Court determined "that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[6] The Court said that, to determine whether the *risk* of bias is sufficiently significant that a judge must recuse

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[1] The Wisconsin Code of Judicial Conduct makes reference to "issue advocacy communications" in recusal-related rules at SCR 60.04(8). Although not defined in the Code, "issue advocacy communications" are generally understood as communications airing near an election that identify a candidate, and praise or critique the candidate's record or qualifications, but omit terms of express advocacy (such as "vote for" or "vote against"). The United States Supreme Court has repeatedly reaffirmed that such communications may be regulated. See, e.g. Indep. Inst. v. Fed. Election Comm'n, No. 14-CV-1500, 2016 WL 6560396, at *7 (D.D.C. Nov. 3, 2016), aff'd sub nom. Indep. Inst. v. F.E.C. (U.S. Feb. 27, 2017). Although so-called "issue advocacy communications" are usually about candidates and elections rather than "issues," for purposes of consistency, this letter will use the "issue advocacy communications" terminology currently reflected in the Code.

[2] 556 U.S. 868 (2009).

[3] *Id*. at 877 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (emphasis added).

[4] *See, e.g.*, Magna Carta, cl. 40 (1215) ("To no one will we sell, to no one will we refuse or delay right or justice."); The Federalist No. 79, at 387 (Alexander Hamilton) ("In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."); WIS. STAT. ANN. § 757.02 (requiring Wisconsin judges to swear "that I will administer justice without respect to persons").

[5] Blankenship had donated the $1,000 legal limit to the West Virginia Supreme Court justice candidate, plus gave $2.5 million to a 527 organization that made independent expenditures and issue advocacy communications supporting the candidate, and himself made $500,000 in independent expenditures supporting the candidate. *Caperton*, 556 U.S. at 873; *see also* Don Blankenship, *And for the Sake of the Kids*, YOUTUBE (June 15, 2009), https://www.youtube.com/watch?v=qyb8xLTJ6SM; *see also Williams-Yulee v. Fla. Bar*, 135 S. Ct 1656, 1675 (2016) (Breyer, J., concurring) (discussing the issue ads of "And for the Sake of the Kids").

[6] *Caperton*, 556 U.S. at 884.

herself, she must examine: (1) "the contribution's relative size in comparison to the total amount of money contributed to the campaign," (2) "the total amount spent in the election," and (3) "the apparent effect such contribution had on the outcome of the election."[7]

The majority opinion made clear that "States may choose to 'adopt recusal standards more rigorous than due process requires.'"[8] However, this Court's current campaign finance recusal rules fall short of even the minimum due process requirements outlined by the U.S. Supreme Court in *Caperton*.

Since this Court developed its current campaign finance recusal rule, the Supreme Court has repeatedly reaffirmed both the specific recusal test set forward in *Caperton* and the broader importance of preserving the reality and appearance of judicial integrity.

Last year, in *Williams v. Pennsylvania*, the Court held that judges *must* recuse themselves when they have had "significant, personal involvement" as prosecutors in any "critical decision" in a defendant's case.[9] In so holding, the Court reiterated that the relevant question for recusal is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'"[10]

Earlier this month, in *Rippo v. Baker,* the Court again emphasized this objective appearance-of-bias standard, and vacated a Nevada Supreme Court decision that did not properly apply it.[11] The Court also clarified that those requesting recusal need not point to any facts suggestive of actual bias.[12]

This objective test is crucial, because, as the Court has observed, "[b]ias is easy to attribute to others and difficult to discern in oneself."[13]

It is also necessary to fully protect the integrity of the judiciary. The Court expanded on the importance of this interest in its 2015 decision *Williams-Yulee v. Florida Bar*.[14] "Unlike the executive or the legislature," the Court noted, "the judiciary 'has no influence over either the sword or the purse; ... neither force nor will but merely judgment.'"[15] Courts have but fragile authority; they depend upon others to enforce and abide by their judgments. "The judiciary's

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7 *Id.*

8 *Id*. at 889. On this point, even the dissenting justices agreed. *Id*. at 893 (Roberts, J., dissenting).

9 136 S. Ct. 1899, 1905 (2016).

10 *Id.*

11 *Rippo v. Baker*, 580 U.S. __ (2017) (slip op. at 2-3).

12 *Id.* (slip op. at 3).

13 *Williams*, 136 S. Ct. at 1905.

14 135 S. Ct. 1656 (2015).

15 *Id.* at 1666 (citation omitted).

authority . . . depends in large measure on the public's willingness to respect and follow its decisions."[16] History has shown exactly how illusive this power can become.[17]

Therefore, public confidence in the judiciary requires more than the avoidance of actual bias among judges. "*Both the appearance* and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."[18] "[T]he appearance of bias demeans the reputation and integrity of not just one jurist, but of the larger institution of which he or she is a part."[19] In other words, "justice must [also] satisfy the appearance of justice."[20]

The Supreme Court has emphasized that judges who benefit from campaign donations or expenditures can easily jeopardize judges' *perceived* impartiality, even in the absence of actual bias. "[E]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary."[21] This is an even greater concern because lawyers and repeat litigants provide the bulk of the money in judicial campaigns.[22] It is not hard to understand why, in the public's mind, large donations or expenditures benefitting a judge "could result (even unknowingly) in 'a possible temptation ... which might lead him not to hold the balance nice, clear and true.'"[23] And this negative perception is just as dangerous to the proper administration of justice as is actual bias.

The fact that judicial campaign contributions and expenditures may themselves be legal, under laws written by the legislative branch, does not solve this problem.[24] As the Supreme Court has recognized, contribution limits are designed as a prophylactic measure to alleviate the reality or appearance of political corruption.[25] Yet enacting contribution limits does not immunize candidates from potential corruption concerns, and when it comes to the judicial branch, the Supreme Court has made clear that the interest in preserving the perceived impartiality of judges

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16 *Williams-Yulee*, 135 S. Ct. at 1666.

17 *See* JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 122 (2004) (discussing non-enforcement of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 124 (2005) (discussing non-enforcement of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

18 *Williams*, 136 S. Ct. at 1909 (emphasis added).

19 *Id*. at 1902.

20 *Williams-Yulee*, 135 S. Ct. at 1666.

21 *Id.* at 1667.

22 *See id.*; *see also* SCOTT GREYTAK ET AL., BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS, 2013-14, at 31, 34 (2015), https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_JudiciaJ_Election_2013_2014.pdf.

23 *Williams-Yulee*, 135 S. Ct. at 1667 (citation omitted).

24 *Contra* Sup. Ct. of Wisc., *In the matter of amendment of the Code of Judicial Conduct's rules on recusal* 3 (July 7, 2010), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874.

25 *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

is broader than the interest in preventing corruption among politicians.[26] Maintaining the appearance and reality of judicial integrity therefore allows – and may require – much more stringent standards than campaign finance laws alone can provide.[27]

Supreme Court case law is emphatic on this point. The constitutional recusal standard set out in *Caperton*, and affirmed in *Williams* and *Rippo*, "'demarks only the outer boundaries of judicial disqualifications.'"[28] This Court "remains free to impose more rigorous standards" for recusal through its ethics rules.[29] The Supreme Court has commended, and recommended, the adoption of such rules.[30]

Bright-line recusal standards, like those before this Court, "are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"[31] They are particularly important for multimember courts like this one, "for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part."[32] The proposed rulemaking is a necessary step to maintain the perception of impartiality necessary for the judicial system to function.[33]

II. Wisconsin's recent history underscores the importance of amending the state's recusal rules.

Concerns about judicial integrity and its appearance become particularly pronounced in light of recent legal changes that now allow Wisconsin judicial candidates to control or otherwise coordinate with outside groups on "issue advocacy"—that is, communications that stop short of using words of express advocacy to urge the election of that candidate, or the defeat of their opponent—with no public disclosure.

These changes undermine the Court's stated reasoning behind its rule, adopted in 2010, that a judge need not recuse "based solely on the sponsorship of an independent expenditure or issue advocacy communication" by an individual or entity involved in the proceeding. SCR 60.04(8). The Comment to that rule states:

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26 *Williams-Yulee*, 135 S. Ct. at 1667, 1672.

27 *Id*. at 1667, 1672; *Citizens United v. FEC*, 558 U.S. 310, 360 (2010); *Caperton*, 556 U.S. at 884-86; *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 124 (2012) ("There are of course differences between a legislator's vote and a judge's, and thus between legislative and judicial recusal rules . . . ."); *id.* at 132 (Kennedy, J., concurring) ("The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, . . . may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.").

28 *Williams*, 136 S. Ct. at 1908 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

29 *Id.*

30 *See id.*; *Caperton*, 556 U.S. at 888-90.

31 *Caperton*, 556 U.S. at 889 (quoting Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11).

32 *Williams*, 136 S. Ct. at 1909.

33 *See Williams-Yulee*, 135 S. Ct. at 1673; *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 124 (2012).

> "[N]either a judge nor the judge's campaign committee has any control of an independent expenditure or issue advocacy communication because these expenditures or communications must be completely independent of the judge's campaign, as required by law, to retain their First Amendment protection."[34]

This is no longer the case.

In 2015, this Court held that a candidate may control or otherwise coordinate with a person engaged in issue advocacy communications for that candidate's benefit, and that such persons are subject to no limits on the amounts they may raise and spend, nor are such persons under any obligation to disclose the source of the contributions used to fund those communications, nor must they disclose whether any such coordination occurred.[35] (Notably, the United States Supreme Court recently reaffirmed that the First Amendment does not limit campaign finance regulation to regulating only express advocacy.[36])

Later that year, the Wisconsin legislature in Act 117 overhauled Chapter 11 of the Wisconsin statutes, removing all earlier provisions that had been interpreted as regulating coordination between candidates and organizations engaged in "issue advocacy."[37] Yet Act 117 did not change the definition of "candidate" at Wis. Stat. § 11.0101(1), thereby allowing judicial candidates to coordinate with third-party groups so long as the coordinated expenditures omit terms of express advocacy.

As a result, an individual may contribute no more than $20,000 to a candidate for Supreme Court, Wis. Stat. § 11.1101(1)(a), yet may give unlimited amounts to an issue advocacy group working under the direction of that candidate. And while corporations are prohibited from contributing to a judicial candidate's campaign, *id.* § 11.1112, they may give unlimited amounts to a judicial candidate's issue advocacy group.

Since *Buckley v. Valeo*, the United States Supreme Court has recognized that coordinated expenditures are inherently more valuable to a candidate than independent expenditures.[38] As the Court has emphasized, "expenditures made after a 'wink or nod' often will be 'as useful to the

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34 *See* SCR 60.04(8).

35 *State ex rel. Three Unnamed Petitioners v. Peterson,* 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165, *mot. for recon. den.* 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49.

36 *See Indep. Inst. v. Fed. Election Comm'n*, No. 14-CV-1500, 2016 WL 6560396, at *7 (D.D.C. Nov. 3, 2016), *aff'd sub nom. Indep. Inst. v. F.E.C.* (U.S. Feb. 27, 2017).

37 *See, e.g.*, *Wis. Coal. for Voter Participation, Inc. v. State Elections Bd.*, 605 N.W.2d 654 (Wis. Ct. App. 1999); Wis. El. Bd. Op. 00-02 (reaffirmed Mar. 26, 2008).

38 424 U.S. 1, 47 (1976). ("[I]independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

candidate as cash.'"[39] As discussed in the foregoing section, in *Caperton*, the Supreme Court held that a litigant's due process rights were violated given the risk of actual or apparent bias from significant and disproportionate *independent* expenditures and *independent* issue advocacy.[40] While the *Caperton* Court was largely concerned about the millions of dollars in *independent* spending that benefitted the justice in that case, Wisconsin's new law permits a judicial candidate to *control* similar expenditures.

Because coordination is now legally permissible between judicial candidates and so-called "issue advocacy" organizations, this Court cannot rely on campaign finance laws to guard against the appearance or reality of corruption, much less to protect due process and the public perception of the judiciary.

The new legal landscape is particularly concerning in the context of judicial elections, because issue advocacy communications have become the dominant form of electoral advocacy in Wisconsin Supreme Court races. For example, in the 2016 Wisconsin Supreme Court race, "issue ad" groups spent more than $2.25 million, while the two leading candidates' campaigns spent just $777,470.[41] This is all the more problematic because so-called "issue advocacy" can explicitly discuss candidates for judicial office, and yet evade regulation by avoiding words of express advocacy.

Issue advocacy communications are also becoming increasingly commonplace in lower court elections. For example, in a 2013 Milwaukee County judicial race, an issue advocacy organization at one point had spent $167,000 in support of a candidate's circuit court election, which exceeded the entire amount spent even by that candidate's own campaign. [42]

Because there are no disclosure requirements for issue advocacy communications, it is not known whether any judicial candidates coordinated in these instances. Yet there is evidence in the recent historical record of campaign committees for Wisconsin Supreme Court candidates admitting to coordination with third-party entities over issue advocacy communications.[43]

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[39] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 221 (2003) (citing *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001).

[40] 556 U.S. at 873, 884.

[41] Brennan Ctr. for Justice, *Buying Time 2016* (Apr. 19, 2016), https://www.brennancenter.org/analysis/buying-time-2016-wisconsin.

[42] *See* Bruce Vielmetti, *Milwaukee County court race focuses heavily on Scott Walker*, MILWAUKEE JOURNAL SENTINEL (Mar. 29, 2013), http://archive.jsonline.com/news/milwaukee/milwaukee-county-court-race-focuses-heavily-on-scott-walker-2v9bit0-200655541.html ("The $167,000 spent by the conservative Club for Growth Wisconsin as of earlier this week exceeds the $114,000 Bradley's campaign reported spending as of March 18.").

[43] *See* Cary Segall, *Wilcox Accepts Burden in Campaign Money Case; Supreme Court Justice to Pay Fine for Committee*, WIS. STATE J., Mar. 6, 2001, at A1 ("Wisconsin Supreme Court Justice Jon Wilcox on Monday acknowledged his responsibility for the illegal actions of his campaign staff that led to one of the largest election corruption cases in state history… The lawsuit charged his committee and his campaign manager, Mark Block, with colluding with another group to evade campaign finance laws in Wilcox's 1997 race for the court."); *see also* Editorial, *Wilcox Case Serves as Warning to Others the State Elections Board Has Served Notice That Illegal "Joint" Campaigns Won't Be Tolerated*, WIS. STATE J., Mar. 7, 2001, at A8 ("[T]he overpowering lesson of this

These new realities present significant challenges for a Court concerned about protecting the integrity of the judicial system, and underscore the importance of establishing reasonable, objective recusal standards for all levels of the elected judiciary.

III. Conclusion

For all of the above stated-reasons, the Campaign Legal Center believes that the underlying policies behind the proposal in Rule Petition 17-01 represent a sound approach to judicial recusal in the context of campaign contributions, independent expenditures and "issue advocacy" communications, and would be a significant improvement to the state's current non-recusal standard. We respectfully urge that the Court take up this petition and proceed with a rulemaking on this important issue. We appreciate the opportunity to submit this letter.

Sincerely,

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Federal and FEC Reform Program Director

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case is that candidates and their campaigns cannot collude with independent or 'issue advocacy' groups at any level. If they do so, it's a joint campaign and all the spending counts against the candidates' limits. More often that not, those limits will have been illegally exceeded.").