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April 27, 2026

Mr. Samuel A. Christensen
Clerk of Supreme Court
Attn: Deputy Clerk–Rules
P.O. Box 1688
Madison, WI 53701-1688

RECEIVED

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CLERK OF SUPREME COURT
OF WISCONSIN

Via Email and Hand Delivery

Re: Rule Petition 26-01, *In re Amendments to SCR 60.04(4)–(8) Regarding
Judicial Campaign-Related Recusal Rules*

Dear Mr. Christensen,

On behalf of Law Forward, a nonprofit, nonpartisan organization dedicated to advancing democracy and principles of good governance in Wisconsin, we write to share comments regarding Rule Petition 26-01, addressing judicial recusal.

We agree with Petitioners' animating sentiment: transparency and ethical conduct among elected officials are critical to preserving a functioning democracy. However, we are concerned that finding the precise balance of competing interests implicated (not all of which are addressed in the proposed rule) and minimizing the risk of unintended negative consequences both require additional study and work.

As discussed below, we urge the Court not to adopt the rule proposal as submitted, but instead to appoint a committee with representation from across the legal field, including practicing attorneys and election experts, to thoroughly study the issue and make recommendations about how best to address judicial recusal in a way that learns from other states' experiences, accommodates Wisconsin's needs, and charts a careful, considered path forward.

Good Governance Requires Ethical Conduct

As a matter of general principle, a properly functioning democratic republic like ours requires that public officials, whether elected, appointed, or hired, act in good faith to advance the people's common interests. It is also true that

public officials should take all reasonable steps to ensure public confidence, which requires such officials to recuse themselves from participation in decision making that suggests any form of self-dealing, the conference of improper benefit upon them, or a *quid pro quo*. Impartiality is critical in government decision making. This is especially true with respect to the judiciary. We share Petitioners' conviction that it is vital to ensure Wisconsin courts continue to enjoy the benefit of "public confidence in judicial independence, integrity, and impartiality." Pet'rs' Supporting Memo at 2. But doing so successfully and across the long term requires careful consideration and balancing of the many, cross-cutting interests implicated by any rule addressing recusal.

Wisconsin Judges and Justices Have Long Been Elected

The reality, as every member of this Court knows from personal experience, is that we elect our judges and justices in Wisconsin. Indeed, the framers of our state constitution created a system to hold nonpartisan elections for judicial offices, a system that has been maintained ever since. *Compare* Wis. Const. art. VII, §§ 4, 7 (1848), *with* Wis. Const. art. VII, §§ 4, 5, 7 (2026). It goes without saying that campaigns for office cost money, and, except for a very brief flirtation with publicly financing Wisconsin Supreme Court campaigns,¹ we expect judicial candidates to raise their own campaign funds.

Attorneys Provide Valuable Perspective to Judicial Races

The proposed rule seeks to mitigate the supposed perception that judges and justices who have accepted campaign contributions may be less than fully impartial when contributors appear before them in court, whether as litigants or legal counsel. To the extent Wisconsinites hold this perception, this is a laudable goal. Just as we agree with Petitioners that transparency is paramount to preserving public confidence in our governing institutions and the democratic process that holds them accountable, we also agree that the exorbitant influx of money in all elections, including recent judicial elections in Wisconsin, is extremely problematic.

But attorneys and litigants share all Wisconsinites' interest in the results of

¹ The Impartial Justice Act of 2009 (2009 Wis. Act 89) created a state trust fund from which eligible Wisconsin Supreme Court Justice candidates could receive public financing for their campaigns in exchange for generally eschewing private contributions. The Act took effect on December 1, 2010, and was repealed in the 2011-2013 state biennial budget. *See* 2011 Wis. Act 32, §§ 13wb-16e. The Impartial Justice Act was implemented for only one election cycle in the spring of 2011.

our state's judicial elections. And those who are US citizens have constitutionally protected rights to speech and participation in the electoral process. Those constitutional rights are not checked at the door when one receives a Bar license. Moreover, attorneys generally have greater insight into the issues facing Wisconsin's judiciary than most members of the public do, such that their participation in the electoral process should be encouraged, rather than discouraged.

The proposed rule may swing the pendulum too far. Petitioners explain their aim to “flip the implied presumption to favor recusal where the source or amount of any campaign contribution or ‘independent expenditure’ raises an objectively reasonable question about a judge’s ability to preside on a case impartially.” Pet’rs’ Supporting Memo at 1. In so doing, the proposed rule could discourage attorneys from exercising their constitutional rights to participate in elections and could chill protected speech.

The proposed rule would require a judge weighing recusal to consider not only any financial contributions made by a litigant or attorney, but also “any support of the judge’s candidacy.” Proposed SCR 60.04(4)(h). Concern that involvement in a judge’s or justice’s political campaign—even something as small as informal vocal support—could trigger recusal might lead attorneys to sit out elections altogether. That is neither desirable in any way nor consistent with constitutional values.

Good-Faith Conduct Under Existing Rules Should Not Be Punished

As if it were not troubling enough that the proposed rule could discourage prospective litigants and attorneys from any participation in judicial elections beyond merely casting votes, the proposal also raises the prospect that past conduct could come back to bite litigants and attorneys. Because the proposed rule lacks both an effective date and an initial applicability clause, it is amenable to arguments that it should apply both to conduct in the future and to conduct related to past elections. That is a significant flaw.

As drafted, the proposed rule could encourage judges or justices to more strongly consider—or could be wielded by participants in litigation in an effort to force them to more strongly consider—recusal based on actions taken before the new recusal rules took effect. Recusal would remain a discretionary decision for each judge and justice. But the possibility that an attorney’s past decisions to participate in one or more judicial campaigns by taking actions fully consistent with the rules governing at that time could, under the text of the proposed rule, be used to advocate for future recusals smacks of injustice.

In a similar but distinct way, it is problematic to change the rules in the midst of ongoing judicial campaigns. At least one candidate has already begun their campaign for next year's judicial election and has presumably initiated fundraising efforts. It would be profoundly unfair for a candidate to have accepted contributions, or donors to have already made contributions, based on their understandings of the existing rules, but then to have the proposed rule govern how those actions are construed.

No judge, justice, attorney, or litigant should be punished or disadvantaged as a result of good-faith conduct that was consistent with the rules in effect at the time of that conduct. For this reason, any new recusal rule should, at minimum, include a clear effective date and initial applicability clause, making plain that the rule applies only to future conduct undertaken in the context of campaigns launched after the new rule's effective date. Candidates in races that have already begun should be permitted to conduct their campaigns under the existing rules on judicial recusal.

Recusal Can Leave Courts Short-Handed

Finally, the proposed rule falls short because it fails to grapple with the fact that recusal, while essential in some circumstances, imposes a hardship on courts. In some circumstances, recusal shifts work from the recusing judge to one or more of their colleagues. In other circumstances, recusal impairs a court's ability to perform its function at all, either because it deprives the court of a quorum necessary for adjudication or it leaves the court short-handed in a way that increases the likelihood of an even split among the participating judges. In this respect, even where necessary, recusal can also be problematic.

For that reason, it is of paramount importance that any rule likely to increase the frequency of recusal, including the proposed rule, also include a procedure to ensure that the courts can function as intended. This is an aspect absent entirely from, and not even considered by, the proposed rule.

Such a Complex Issue Merits a Study Committee

As the foregoing discussion shows, the topic of judicial recusal is not only extremely important but also multi-faceted, complex, and nuanced. It is critical that any change to the existing rules take into consideration the full range of interests at play, balancing them to encourage good-faith participation in our judicial elections, ensure the proper functioning of the judicial branch, and bolster public confidence in both the electoral process and the judiciary. The Judicial Council is empowered to establish study committees, SCR

§ 70.15(4), and this Court has at times appointed *ad hoc* expert committees to study particularly complex issues of procedure, *see, e.g.*, Rules File No. 02–03, *In the matter of the adoption of procedures for original action case involving state legislative redistricting*. We encourage the Court to delay action on Rule Petition 26-01 until a study committee, comprising members of the judiciary and representatives of the varied interests at stake here, including both election experts and practicing attorneys, is appointed, can fully evaluate the issue, and then publicly releases recommendations for public comment and a hearing before this Court.

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For the reasons discussed above, we respectfully urge the Court not to take immediate, precipitous action on Rule Petition 26-01 but instead to appoint a committee with representation from across the legal field, including practicing attorneys and election experts, to study the issue and make recommendations about how to address judicial recusal.

Sincerely,

LAW FORWARD



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