IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RANDY R. KOSCHNICK,

Plaintiff, Case No. 09-CV-767

v.

GOVERNOR JAMES DOYLE, in his official capacity as Governor of the State of Wisconsin, KEVIN KENNEDY, in his official capacity as Director of Wisconsin's Government Accountability Board, and DAWN MARIE SASS, in her official capacity as Wisconsin State Treasurer,

Defendants.

BRIEF OF COMMON CAUSE IN WISCONSIN, LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND, AND WISCONSIN DEMOCRACY CAMPAIGN AS *AMICI CURIAE* IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

This brief is submitted in opposition to plaintiff Randy R. Koschnick's motion for judgment on the pleadings by Common Cause in Wisconsin, Wisconsin Democracy Campaign, and League of Women Voters of Wisconsin Education Fund as *amici curiae*. On February 8, 2010, *amici* filed a motion to intervene in this action. On March 10, 2010, the Court denied the motion to intervene. However, "recogniz[ing] the experience that proposed intervenors have to offer and hav[ing] no doubt that it will be valuable in resolving this case," the Court granted leave to participate in the case as *amici curiae*. (March 10, 2010 Opinion and Order at 8.)

INTRODUCTION

On December 1, 2009, the state legislature enacted the Impartial Justice Act, a package of reforms aimed at protecting the integrity of Wisconsin's highest court. The package included the creation of a voluntary public financing system for candidates for Supreme Court Justice and a reduction in the limits on contributions for candidates for Supreme Court Justice.

Plaintiff Randy R. Koschnick challenges several provisions of the Act, claiming that the voluntary public financing grant distribution scheme and the new contribution limits chill speech. Specifically, Koschnick argues that the Act's grant distribution scheme discourages candidates who do not participate in the public financing program (hereinafter "traditionally-funded candidates") and the speech of certain third-party supporters of traditionally-funded candidates from making campaign expenditures past a certain threshold. He further asserts that the Act's reporting requirements and limitations on contributions are invalid. None of Koschnick's claims entitle him to judgment on the pleadings.

As an initial matter, this Court does not have jurisdiction to review Koschnick's claims regarding the public funding program's grant distribution scheme because he has failed to establish Article III standing to challenge those provisions. Koschnick has not alleged any actual or imminent "injury in fact" that he has suffered or will suffer because of the Act. Instead, he forwards speculative claims of constitutional injury without ever establishing that he will run in an imminent election or has the ability to spend amounts large enough to cause additional disbursements of public funds to go to an opponent. Koschnick thus fails to satisfy the "irreducible constitutional minimum" required to establish this Court's jurisdiction.

Notwithstanding this fatal flaw, Koschnick's challenge to the Act's grant distribution scheme and the contribution limits should be adjudicated in favor of the state as a matter of law. Koschnick's challenge to the grant distribution scheme is wholly premised on an erroneous

understanding of *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008). The holding in *Davis* has no bearing in the very different legal context of publically financed elections and cannot serve as the foundation upon which to challenge a Wisconsin's public grant distribution system. Indeed, several circuits have upheld similar schemes. *See, e.g., North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied sub nom.* 129 S. Ct. 490 (2008) (upholding North Carolina's judicial public Financing System); *Daggett v. Comm. on Governmental Ethic s& Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's legislative and gubernatorial public financing system). Additionally, the Supreme Court has previously upheld contribution limits of $1,000. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387 (2000) (upholding $1,000 contribution limit for statewide office); *Buckley v. Valeo*, 424 U.S. 1, 23-35 (1976) (upholding $1,000 contribution limit for federal candidates). As a matter of law, the Impartial Justice Act should be upheld.

In the alternative, if this Court declines to decide this case on the law, Koschnick's motion must be rejected because none of his claims are susceptible to determination on the pleadings. Instead, his claims raise myriad factual issues. For example, whether the Act's grant disbursement scheme imposes any constitutional burden requires an inquiry into how the plaintiff's speech would be affected by the provisions, if at all. Furthermore, even if Koschnick could show some burden on his First Amendment rights, the Court would then have to assess whether any sufficiently important governmental interests justify that burden. Likewise, under well established law, contribution limits are only unconstitutional where there is factual evidence that the limits are so low that they prevent candidates from running effective campaigns. Similarly, the constitutionality of reporting requirements — which are routinely upheld — turns

on the extent to which the requirements actually burden speech and the scope of the underlying governmental interests supporting disclosure.

Accordingly, cases involving claims like Koschnick's in the context of public financing of elections have depended greatly on extensive factual development. For example, in *Green Party of Connecticut v. Garfield*, No. 3:06-CV-01030 (D. Conn.), *argued* (2d Cir. Jan. 13, 2010), the district court held a multi-day trial to evaluate plaintiffs' claims that Connecticut's public funding program unconstitutionally discriminated against third party candidates. And in *McComish v. Brewer*, No. 2:08-cv-01550 (D. Ariz.), *argued* (9th Cir. Apr. 12, 2010), questions concerning Arizona's public grant disbursement system were adjudicated not at the pleadings stage, but at summary judgment, after the parties had developed an extensive factual record. *See* Summary Judgment Order of Jan. 20, 2010 in *McComish v. Brewer*, No. 2:08-cv-01550 (Doc. No. 454). [1]

For all of these reasons, explained more fully below, Koschnick's motion must be denied.

THE IMPARTIAL JUSTICE ACT

On December 1, 2009, the State of Wisconsin enacted the Impartial Justice Act, establishing a voluntary public funding program for state Supreme Court elections. Under the Act, eligible candidates can receive the benefit of public funds in exchange for accepting certain countervailing burdens, including forgoing all potentially corrupting private contributions and abiding by spending limits. The Act also contains disclosure provisions that are geared to allow proper administration of the program. Finally, the Act imposes a $1,000 limit on campaign contributions received from any single source.

[1] The novel legal and factual issues raised by both cases are still unresolved; both cases are currently pending on appeal. *Green Party of Connecticut v. Garfield*, No. 3:06-CV-01030 (D. Conn.), *argued* (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. 2:08-cv-01550 (D. Ariz.), *argued* (9th Cir. Apr. 12, 2010)

I. The Public Funding Program for Supreme Court Justice Candidates

To be eligible for public funds, a candidate must first demonstrate sufficient public support by collecting small donations in amounts of $5 to $100 from at least 1,000 separate contributors during a set qualifying period. Wis. Stat. §§ 11.501(16), 11.502(2). In total, candidates must collect at least $5,000, but they cannot collect more than $15,000.[2] *Id*. In addition, participating candidates must agree to abide by all program rules and requirements. Wis. Stat. § 11.502(1).

Once eligible, Wisconsin's carefully crafted program provides a candidate with enough public funds to run a competitive campaign. Grant amounts are tailored to the level of competitiveness within a particular race. Accordingly, uncontested candidates receive no public funds, even if they are otherwise eligible to participate in the program. Wis. State. § 11.511(4). Candidates facing opposition receive a base grant of $100,000 for the primary election; for the general election, participating candidates in contested races may receive another base grant amount of $300,000. Wis. Stat. § 11.511(2), (3). Additional disbursements are available for any participating candidate who runs in a particularly competitive, high-spending race against a traditionally-funded opponent. Wis. Stat. §§ 11.512, 11.513. Specifically, participating candidates receive additional disbursements when: (a) their traditionally-funded opponent's expenditures exceed the participating candidate's base grant amount by more than 5 percent; or (b) if independent parties make expenditures opposed to the participating candidate or in favor of their traditionally-funded opponent that — in total — exceed the participating candidate's

[2] During the qualifying period, a candidate may also accept up to $5,000 in "seed money contributions" – defined as contributions under $100 or money from a candidate's personal funds. Wis. Stat. § 11.508(1). Seed money may be used before and during a candidate's qualifying period, but not during the primary or general election campaign periods. Wis. Stat. § 11.508(2). If a candidate accepts more than $15,000 in qualifying contributions or more than $5,000 in seed money, he or she must immediately transfer that money to the Government Accountability Board for deposit into the democracy trust fund. Wis. Stat. § 11.509.

base grant amount by more than 20 percent. Wis. Stat. §§ 11.512, 11.513. Each additional disbursement to a participating candidate is tiered to the amount spent by his or her traditionally-funded opponent or by the relevant independent parties. Wis. Stat. §§ 11.512(2), 11.513(2). Under each additional disbursement provision, no participating candidate can receive more than three times their base grant amount; that is, $300,000 in the primary election and $900,000 in the general election. Wis. Stat. §§ 11.512(2), 11.513(2).

Participating candidates accept several burdens in exchange for the benefit of public monies. Significantly, participating candidates accept expenditure limits. Under the Act, a participant's total expenditures may not exceed his or her public grant amounts, plus qualifying funds and seed money. Wis. Stat. § 11.511(7). Participants also shoulder substantially greater accounting and reporting responsibilities than nonparticipants, Wis. Stat. § 11.506, and accept the potential of significant penalties, including criminal liability, if they fail to comply with certain provisions of the program. Wis. Stat. §§ 11.517, 11.518.

Moreover, participating candidates are prohibited from almost all private fundraising. They can collect $100 contributions during their qualifying period — a limit that is substantially lower than the generally-applicable $1,000 contribution limit — but cannot engage in any further private fundraising once they qualify for the public funding program. Wis. Stat. § 11.505. Participating candidates are likewise barred from accepting any money from political committees. Wis. Stat. §§ 11.505, 11.507(2).

This prohibition on private fundraising makes the system's flexible grant distribution scheme integral to the success of the program. Between 2000 and 2009, ten candidates ran in five races for Supreme Court Justice.[3] Winning candidates spent as little as $240,154 in 2000

[3] *See* Wisconsin Secretary of State Website, Election Results 2000-2009, *available at*

and as much as $1.4 million in 2008.[4] Given this broad distribution and the potential for independent spenders to weigh in on elections, participating candidates put themselves at a significant disadvantage by agreeing to forgo private fundraising before the start of the election season. The flexible grant distribution scheme enables the state to incentivize participation in the program without wasting public monies by tailoring grant amounts to real-time developments in an election.

II. The Public Funding Program's Reporting Requirements

Under long-standing law, all candidates for Supreme Court must report their contributions and expenditures to Wisconsin's Government Accountability Board on a periodic basis. Wis. Stat. § 11.06 (enacted 1973). Under the Impartial Justice Act, participating candidates must also provide detailed reports of their contributors and expenditures on a monthly basis and be prepared for audit at any time. Wis. Stat. § 11.506. Traditionally-funded candidates are not subject to these monthly reporting requirements. When an election becomes particularly high spending, however, traditionally-funded candidates must report their itemized contributions and expenditures to the Board in a timely manner. Wis. Stat. § 11.512.

Independent parties must report any independent expenditure over $1,000 in a timely manner. Wis. Stat. § 11.513.

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http://elections.state.wi.us/section.asp?linkid=155&locid=47 (last visited April 30, 2010).

[4] *See* Wisconsin Democracy Campaign Record for Diane Sykes, *available at* http://www.wisdc.org/wdc_supreme_fin_summary.php#2008 (last visited April 30, 2010); Wisconsin Campaign Finance Information Center, campaign finance report for Shirley Abrahamson, *available at* http://cfis.wi.gov/ReportsOutputFiles/831b3255-8c80-4384-b9c1-1c74d4b3f89f723200974511AM.pdf (last visited April 30, 2010).

III. Contribution Limits for Supreme Court Justice Candidates

Under the Impartial Justice Act, no Supreme Court candidate may accept a contribution of over $1,000 from any single source.[5] Wis. Stat. § 11.522. Although the $1,000 limit applies broadly to all Supreme Court candidates, candidates who opt into the public funding program agree to a wholly different regime with severe restrictions on allowable private contributions, as described above.

ARGUMENT

I. Standard of Review

Judgment on the pleadings is appropriate only where "the moving party demonstrates that there are no material issues of fact to be resolved" and that he is entitled to judgment as a matter of law. *Supreme Laundry Service, LLC v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 746 (7th Cir. 2008) (quoting *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007)); *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir.1993). In evaluating a motion for judgment on the pleadings, pleaded facts must be viewed "in the light most favorable to the nonmoving party." *GATX Leasing Corp. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995).

II. Plaintiff Does Not Have Standing to Challenge the Grant Distribution Scheme

Koschnick has challenged two provisions that provide additional disbursements to participating candidates running in particularly competitive, high-spending races. *See* Wis. Stat. §§ 11.512, 11.513. According to Koschnick, these provisions will chill speech by discouraging traditionally-funded candidates from spending in excess of their participating opponent's base grant amounts. (Koschnick Br. at 10.) He also argues that third-party spenders will be similarly discouraged from making large independent expenditures that favor traditionally-funded candidates. But, Koschnick has not established that he has suffered or will imminently suffer the

[5] Previously, Wisconsin law limited contributions at $10,000.

constitutionally required injury-in-fact necessary to support standing to challenge either of these provisions. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 567 (1992) (finding no injury-in-fact where plaintiffs failed to establish when the alleged harm would occur, and allegation of harm was based on "pure speculation"); *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 226 (2003); *compare Davis*, 128 S. Ct. at 2769 (finding standing requirement satisfied where alleged injury was to occur in upcoming election and plaintiff had declared specific intention to act in manner proscribed by statute). Without a personal stake in the resolution of these claims, Koschnick cannot rightfully ask this Court to adjudicate them.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (citation omitted). Accordingly, both the Supreme Court and the Seventh Circuit have repeatedly held that "federal courts are under an independent obligation to examine [standing]" even if parties to a proceeding fail to raise the issue. *United States v. Hays*, 515 U.S. 737, 742 (1995)(quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990) (citations omitted)); *Freedom from Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008).

To establish the "irreducible constitutional minimum" of Article III standing, Koschnick must demonstrate that: (1) he has suffered an injury-in-fact; (2) the injury is causally connected to the conduct complained of; and (3) there is a "substantial likelihood," not mere speculation, that the injury would be redressed by a favorable decision. *McConnell*, 540 U.S. at 225-26; *see also Lujan*, 504 U.S. at 560-61; *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 959 (7th Cir. 1997) ("Indignation that the law is not being obeyed ... will [not] support a federal lawsuit…[Plaintiff]

wishes us to eradicate [defendant's] allegedly unlawful practices; yet, she alleges no facts to show how these practices have injured her." (first alteration in original; citations and quotation marks omitted)). To satisfy the first requirement, that of an injury-in-fact, Koschnick must demonstrate the invasion of a judicially cognizable interest that is: (1) "concrete" and "particularized" and (2) "actual or imminent," not conjectural or hypothetical. *Davis*, 128 S.Ct. at 2768; *McConnell*, 540 U.S. at 225-26; *Lujan*, 504 U.S. at 560-61. Vague allegations that a plaintiff may suffer an injury in the distant future will not establish Article III standing. *McConnell*, 540 U.S. at 226; *Daggett*, 205 F.3d at 462-63 (finding no standing where "none of appellants' affidavits provide enough specificity about future plans for contributions to display a real or even a threatened injury" from statutory limitation on contributions).

Here, Koschnick alleges only that he "intends to become a candidate for the Office of Justice" in unspecified "future elections" and "continues to explore these possibilities." (Am. Compl. ¶ 16.) He does not allege an intent to participate in a particular, imminent election, or that he is likely to make independent expenditures in the context of any particular election. These "'some day' intentions — without any description of concrete plans" are precisely the type of non-specific, speculative allegations that have been held insufficient to allege an injury-in-fact. *Lujan*, 504 U.S. at 564; *see also McConnell*, 540 U.S. at 226; *Daggett*, 205 F.3d at 463.

The Supreme Court has repeatedly held such speculative claims of possible chill — without a factual allegation as to when this chill will occur — are insufficient to establish the injury-in-fact element of standing. In *Davis*, the Court found that injury-in-fact was established where the plaintiff showed specific and concrete evidence of relevant past performance, recent conduct, and a statement of intention to act immediately. 128 S. Ct. at 2769. At issue was a provision raising contribution limits for a candidate when that candidate's self-financed

opponent spent over $350,000 of his own money on his campaign. The Supreme Court found that the plaintiff demonstrated that he was in imminent danger of triggering the challenged provision because he had announced his candidacy in the election "whose onset was rapidly approaching" and had declared his plan to spend in excess of $1 million (far more than the $350,000 required by the statute) in personal funds. *Id*. By contrast, the Supreme Court in *McConnell* held that a potential future candidate did not have standing to challenge a statute requiring that candidate to provide, in exchange for low-cost broadcast time, written certification that he would make no direct references to his opponents in his advertisements. 540 U.S. at 225-26. The plaintiff argued that he satisfied the injury-in-fact prong because he had run negative ads against his opponent in the past and planned to run such ads in his next campaign, five years in the future. The Supreme Court, however, held that the claimed injury was "too remote temporally to satisfy Article III standing." *Id*. at 226.

In addition to his failure to allege an intention to participate in any imminent election, Koschnick also fails to establish any likelihood of injury even if he were to run. Koschnick argues that Wis. Stat. §§ 11.512 and 11.513 will chill his First Amendment right to make expenditures in support of his own campaign, and will chill the rights of potential supporters to make independent expenditures in his favor, for fear that such expenditures would lead to the disbursal of additional public funds to Koschnick's hypothetical, publically-funded opponent. (Koschnick Br. 10-11.) In this theoretical situation, however, before any additional disbursements would be provided under § 11.512, Koschnick would still have to spend in an amount that exceeds his participating opponent's base grant amount by more than 5 percent. Wis. Stat. § 11.512(2). Similarly, before additional disbursements would be provided under § 11.513, Koschnick supporters would have to make independent expenditures in support of his

hypothetical candidacy that exceeded his participating opponent's base grant amount by more than 20 percent. Wis. Stat. § 11.513(2).

Koschnick has not alleged any intention to make expenditures in the requisite amount. (*See* Am. Compl. ¶¶ 16-17 (asserting only that "Plaintiff intends to become a candidate … in future elections" and that Koschnick "does expect to expend funds received from committees").) Indeed, Koschnick has not even alleged that he has spent enough in *any* past campaign to cause additional disbursements for his opponent — although even this, by itself, would still be insufficient to establish standing. *See Daggett*, 205 F.3d at 463 (finding that "although the Stearns appellants have made gubernatorial contributions over $500 in the past, that is not sufficient" to establish standing to challenge statute limiting contributions). Nor could he make such allegations: publicly-available campaign finance reports from Koschnick's 2009 bid for Supreme Court Justice indicate that he spent a total of $189,153 in the general election.[6] This amount is far from enough to effect release of additional funds. *See* Wis. Stat. § 11.511 (setting base grant amount for participating candidate in general election at $300,000).

Similarly, Koschnick has not identified any likely source of independent expenditures in support of his theoretical candidacy that would establish an imminent injury-in-fact necessary to establish standing to challenge Wis. Stat. § 11.513. Koschnick asserts only that this provision could chill some unspecified (but extremely high-spending) person or entity from making independent expenditures in some unspecified future election. (Koschnick Br. 10.) Such vague allegations simply do not pass constitutional muster. *See Russell v. Burris*, 146 F.3d 563, 566-67 (8th Cir. 1998) (finding no Article III standing to challenge limit on contributions to independent

[6] This information is most easily accessible at Wisconsin Democracy Campaign, Supreme Court Campaign Finance Summaries, http://www.wisdc.org/wdc_supreme_fin_summary.php (last visited April 29, 2010).

expenditure committees because plaintiffs "indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of [the Act], they would form an independent expenditure committee"); *Nat'l Right to Life Political Action Comm. State Fund v. Webster*, No. Civ. 96-359-P-H, 1997 WL 703388, at *1 (D. Me. Oct. 22, 1997) (granting motion to dismiss challenge to Maine's reporting requirement for independent expenditures for lack of standing because no plaintiff asserted intention to make independent expenditures).

In sum, Koschnick does not have standing to challenge Wis. Stat. §§ 11.512 and 11.513. Thus, his motion for judgment on the pleadings as to those provisions must be denied.

III. Wisconsin's Grant Distribution Scheme is Constitutional

A. *Davis* Does Not Control the Law Applicable to Voluntary Public Funding Programs

Koschnick's argument that his claims can be resolved as a matter of law is based on a fundamental misunderstanding of Supreme Court precedent. Koschnick relies almost exclusively on the Supreme Court's decision in *Davis*, a case concerning an "unprecedented" system imposing "discriminatory" campaign finance laws upon similarly situated traditionally-funded candidates. (Koschnick Br. at 9 ("*Davis* is dispositive.").)[7] In asking this Court to strike down Wisconsin's grant distribution system under a novel theory that all "asymmetrical campaign finance laws have a chilling effect on protected political speech," Koschnick invites the Court to go far beyond *Davis*' actual holding.

[7] In a footnote, Koschnick also claims to find support in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010). (Koschnick Br. at 11 n.4). To the extent it is relevant, *Citizens United* struck down limits on independent campaign expenditures by corporations. *Amici* agree that the same analysis applies to Wis. Stat. § 11.513(2), the matching-funds-for-opposing-independent-expenditures provision, whether the independent expenditures at issue are made by individuals or by corporations. This does not, however, advance Koschnick's argument that the provision is unconstitutional on its face.

As the Defendants demonstrate, Koschnick's reading of *Davis* is totally flawed. (Def. Br. in Opp. to Pls. Mot. for J. on Pleadings at 9-30.) *Davis* did not concern a public funding program and thus did not address the law applicable in that context — instead, the *Davis* Court emphasized that public financing schemes are, as a matter of fact and law, "quite different." 128 S.Ct. at 2772.[8] Unlike the situation in *Davis*, candidates who participate in Wisconsin's public funding program opt into a regulatory regime that is wholly different from the rules applicable to traditionally-funded candidates. Thus, as the Defendants aptly explain, publically-funded candidates and traditionally-funded ones are not similarly situated and there can be no unlawful discrimination in their disparate treatment. More specifically, participating candidates who receive additional disbursements enjoy no competitive advantage relative to their traditionally-funded opponent. The reality under the Act is just the opposite: The traditionally-funded candidate, with an unfettered ability to amass private funds and make unlimited expenditures, ultimately enjoys a fundraising advantage over the publically-funded candidate who operates under an expenditure cap.

B. In the Context of Campaign Finance, the Existence of any Unconstitutional Burden is Necessarily a Mixed Question of Law and Fact

Even if this Court believes that Wisconsin's grant distribution system may potentially burden speech, Plaintiff's claims cannot be resolved as a matter of law. In the campaign finance context, Supreme Court precedent requires that courts assess the nature and magnitude of the burden before determining the appropriate level of scrutiny to apply. Here, this requires a factual record.

[8] Under similar logic, two courts have declined to extend *Davis* to state statutes different from the "Millionaire's Amendment" struck down in *Davis*. *See Ognibene v. Parkes*, 599 F. Supp. 2d 434, 450 (S.D.N.Y. 2009) (holding "[t]he standard applied by *Davis* to expenditure limits is inapplicable to the contribution limits that are at issue on the instant motion practice."); *Ohio Right to Life Soc., Inc. v. Ohio Elections Comm'n.*, 2008 WL 4186312, *10 (S.D. Ohio 2008) (declining to extend *Davis*' approach to Ohio's disclosure law).

In order for this Court to determine the appropriate level of scrutiny, it must apply the "flexible standard" used to review First Amendment or Equal Protection challenges to state election laws. *See Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Under that standard, before deciding on the appropriate level of scrutiny,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (internal citations omitted). The Supreme Court's review of campaign finance regulations traditionally reflects this flexible approach. *See McConnell*, 540 U.S. at 138-139 (assessing magnitude of burden and concluding that lesser scrutiny applied to soft money ban); *Buckley*, 424 U.S. at 21-23, 25, 44-45 (identifying magnitude of burden for contribution limits, expenditure limits and disclosure requirements before applying different standards of review to each).

In the seminal campaign finance case of *Buckley v. Valeo*, the Supreme Court measured the nature and magnitude of the alleged burdens caused by various provisions of the Federal Election Campaign Act (FECA) to determine the applicable level of scrutiny. Relying on an extensive factual record demonstrating the average cost of political advertisements and candidate spending, the Supreme Court found that FECA's expenditure limits created a "substantial rather than merely theoretical restraint[] on the quantity and diversity of political speech" and were therefore subject to exacting scrutiny. 424 U.S. at 19-20 & n.20-21. After examining a factual record cataloguing the size of contributions made to candidates, however, the Court found that FECA's $1,000 contribution limit created only a "marginal restriction" on speech. *Id*. at 21-22

& n.23. Accordingly, FECA's contribution limits were subject to a lesser level of scrutiny and could be sustained if the provision achieved a "sufficiently important interest" and was "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *Id*. at 25; *see also McConnell*, 540 U.S. at 138 n. 40. Finally, the Court explained that, unlike limitations on contributions or expenditures, FECA's "disclosure requirements impose no ceiling on campaign-related activity" and were thus not subject to anything close to strict scrutiny. Instead, these provisions were valid so long as there was "a relevant correlation or substantial relation between the government interest and the information required to be disclosed." *Id.* at 64 & 68.

Post-*Buckley*, the Supreme Court has used this flexible approach when reviewing novel campaign finance regulations. For example, in *McConnell*, the Court reviewed the consitutitonality of a novel campaign finance regulation prohibiting political parties from raising, soliciting or spending contributions in excess of federal contribution limits on federal elections. *McConnell*, 540 U.S. at 138-39. Plaintiffs claimed that this novel regulation should be subject to strict scrutiny because it regulated solicitation and spending as well as contributions. The Court refused to automatically apply strict scrutiny, instead holding that "the relevant inquiry is whether the mechanism adopted to implement the contribution limit...burdens speech in a way" similar to contribution limits. *Id*. After examining the "percentage of contributions to parties and candidates" that would be affected by the regulation, the Court found that the provision would have only a "modest impact." *Id*. at 141. Thus, the "less rigorous scrutiny applicable to contribution limits" was warrented, not strict scrutiny. *Id*.

Like the *McConnell* plaintiffs, Koschnick challenges aspects of the Act — the additional disbursement provisions, for instance — that do not fall squarely into *Buckley*'s framework. While the Plaintiff may claim that the additional disbursement provisions function like a *de facto*

expenditure limit, in fact, these provisions place no limit on the amount that any traditionally-funded candidate or independent party can spend. Recently, in *Citizens United*, the Supreme Court reaffirmed that laws that "may burden the ability to speak, but…impose no ceiling on campaign-related activities" are not subject to strict scrutiny. 130 S.Ct. at 914. Here, if the challenged provisions cause any burden, *amici* contend that any such burden is closer to that caused by disclosure provisions and nothing like the burden of expenditure limits. In sum, development of a factual record is the only way the Court can ascertain the existence and extent of Koschnick's burden.

IV. Even If this Court Found Some Burden on Plaintiff's Rights, This Court Must Then Assess Whether That Burden is Justified by Sufficiently Important Governmental Interests

Koschnick's brief simply ignores that, under controlling case law, any burden imposed by a campaign finance regulation must be weighed against the underlying governmental interests. As explained above, once a plaintiff provides evidence that a law burdens speech, the reviewing court must then determine if that burden is justified by sufficiently important state interests. Here, judgment on the pleadings would improperly deny Defendants the opportunity to present evidence establishing the important interests underlying the Impartial Justice Act. *See, e.g.*, *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1085 (W.D. Wis. 2002) ("Because this case is before the court on plaintiffs' motion for judgment on the pleadings, defendants have not been given any opportunity to present facts addressing the legislature's interests in amending its campaign finance laws in response to campaign practices that have developed and evolved in the decades since *Buckley* was decided.").

For instance, development of a factual record will establish that the Impartial Justice Act serves the compelling state interests of preventing corruption and avoiding its appearance in Supreme Court elections. Anti-corruption is well-recognized as a legitimate and compelling

state interest in campaign finance regulations generally and in public financing schemes in particular. *See Buckley*, 424 U.S. at 96 ("It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest."); *Daggett*, 205 F.3d at 471 (finding that public-funding results in "the assurance that contributors will not have the opportunity to seek special access" and "the avoidance of any appearance of corruption"); *Leake*, 524 F.3d at 440-41 ("the state's public financing system . . . is designed to promote the state's anti-corruption goals"); *see also Davis*, 128 S.Ct. at 2772 (recognizing "[p]reventing corruption or the appearance of corruption" as "legitimate and compelling government interests … for restricting campaign finances"). Indeed, initial factual development shows that the bill's sponsors were certainly motivated by desires to combat corruption. *See* Press Release, Senator Pat Kreitlow, Statement on Today's Impartial Justice Rally (Oct. 27, 2009), http://www.kreitlowforsenate.com/news/impartial-justice.pdf (arguing that public funding is the "one certain way to remove the influence of big money donations from special interest groups in judicial elections and the unethical conduct that it encourages. . ."); Press Release, Representative Gordon Hintz, Impartial Justice Legislation Passes Assembly and Senate Today (Nov. 5, 2009), http://www.wispolitics.com/1006/091105Hintz_release.pdf ("It is crucial that we protect the integrity of the court system and maintain the public perception of an impartial judiciary.").

Here, as the bill's sponsors suggest, the state interest in avoiding any perception of corruption is magnified because the law applies only to campaigns for Justice of the Wisconsin Supreme Court. In *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), the Court explained why maintaining public confidence in judicial integrity is of the utmost importance:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to

> perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Id. at 2266-67 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002)). Indeed, candidates in non-judicial elections are expected to be responsive to the will of their potential constituents, including campaign contributors. There is nothing unusual or untoward about these candidates disclosing how they expect to vote on the major issues of the day, and seeking contributions from those who support their positions. Candidates for Supreme Court Justice are fundamentally different in this respect — they certainly cannot campaign on the basis of how they will vote in future cases.[9] Such candidates can thus be placed in a uniquely uncomfortable position of depending upon campaign contributions to run an effective campaign, but at the same time specifically pledging that those contributions will have no impact whatsoever upon the conclusions he or she will reach as a judge. The tension inherent in this uneasy relationship between present candidate and future Justice, and the risk this tension poses to the perception of

[9] Section SCR 60.06(3)(b) of Wisconsin's Code of Judicial Conduct provides: "A judge, judge-elect, or candidate for judicial office shall not make or permit or authorize others to make on his or her behalf, with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."
The Comment to this provision explains:

> This section prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. A judge or candidate for judicial office may not, while a proceeding is pending or impending in the court to which selection is sought, make any public comment that may reasonably be viewed as committing the judge, judge-elect or candidate to a particular case outcome. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views.

judicial integrity, illustrates that there is an even greater state interest in reducing the role of potentially-corrupting campaign contributions in judicial elections than in other ones.

Due to the compelling anti-corruption interests served by public funding programs, federal courts have repeatedly found that states also have an important interest in encouraging candidate participation. *See, e.g., Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) ("the State has a compelling interest in stimulating candidate participation in its public financing scheme"); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (citation omitted) (holding that "the state possesses a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate,' free candidates from the pressures of fundraising, and, relatedly, tend to combat corruption," and finding that interest to be "compelling"); *Wilkinson v. Jones*, 876 F. Supp. 916, 928 (W.D. Ky. 1995) ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts.").[10]

Development of a factual record will likely also establish that the Impartial Justice Act is structured as it is in order to incentivize participation. Candidates would be unlikely to participate in the public funding program without the guarantee of funds sufficient to run a competitive campaign, particularly in the case of a high-spending, highly competitive race. Defendants should be thus be permitted to establish a factual record showing that additional

[10] The case of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), on which Koschnick heavily relies, also recognizes that incentivizing participation in public funding programs could potentially justify a burden on speech. This governmental interest was not supported by that case's factual record, however, because nearly 100 percent of candidates were participating in the state's public funding program before the challenged provision had been passed. *Id* at 1361.

disbursements in highly competitive races are necessary to encourage fulsome participation in Wisconsin's public funding program.

Finally, development of the factual record will also illustrate that providing additional disbursements only in highly competitive elections supports another compelling state interest — protecting the public fisc. The legislature clearly structured Wisconsin's system to provide enough public funds to be attractive to potential candidates, but not more than is typically necessary to run a competitive campaign.

While it is possible to identify these state interests at the pleadings stage, an assessment of their importance and a weighing of their significance can only be done with further development of an evidentiary record. Notably, *Davis* counsels as much. The *Davis* Court expressly found that the statute before it was justified by no compelling state interest — illustrating that the state's interest must be determined and weighed as a matter of fact. *See Davis*, 128 S. Ct. at 2772 ("Because §319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, that provision cannot stand unless it is 'justified by a compelling state interest'. . . . No such justification is present here." (citations and footnote omitted)).

V. Koschnick's Challenge to the Impartial Justice Act's Contribution Limits Is Unsupported in the Law

In addition to the matching funds provisions of the Impartial Justice Act, Koschnick challenges the Act's imposition of a $1,000 limit on campaign contributions to traditionally-funded candidates.[11]

[11] As noted above, participating candidates are permitted to obtain contributions that do not exceed $100 prior to the start of the election period, but may receive no private contributions after that point.

As the Supreme Court recently reiterated in *Citizens United*, limits on direct contributions to candidates, "have been an accepted means to prevent *quid pro quo* corruption" for decades. *Citizens United*, 130 S. Ct. at 909 (citing *McConnell*, 540 U.S. at 136-38 & n. 40). Accordingly, as the Court noted in *Davis*, facial challenges to contribution limits are generally rejected. *Davis*, 128 S. Ct. at 2770 ("This Court has previously sustained the facial constitutionality of limits on discrete and aggregate individual contributions and on coordinated party expenditures."); *see also Buckley*, 424 U.S. at 23-35, 38, 46-47, & n. 53; *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 437, 465 (2001)). Thus, invalidation of the Impartial Justice Act's contribution limitations on the pleadings would be inconsistent with binding law.

The Supreme Court first addressed the constitutionality of contribution limits in *Buckley*. As stated above, the Court upheld FECA's $1,000 contribution limits, finding that they posed only a marginal burden on speech and were justified by an anti-corruption interest. *Buckley*, 424 U.S. at 26-28. The Court in *Buckley*, did, however, indicate that contribution limits may be invalid if they are so low as to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Id*. at 21. This test is, necessarily, a factual determination.

In *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion), the Supreme Court made clear that if a plaintiff provides evidence of "danger signs" that a contribution limit may be set so low that it hampers elections, then "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Id*. at 249. The Court in *Randall* looked extensively at factual evidence to determine whether the contribution limit before it passed

constitutional muster. *Id*. at 250-52. Defendants must be permitted to present a similar factual record here.[12]

VI. Koschnick's Challenge to the Impartial Justice Act's Reporting Requirements Equally Fails

Finally, Koschnick asserts that the Impartial Justice Act's reporting requirements are facially invalid. As the D.C. Circuit recently noted, however, "The Supreme Court has consistently upheld organizational and reporting requirements against facial challenges." *SpeechNow.org v. Federal Election Comm'n*, Nos. 08-5223, 09-5342, 2010 WL 1133857, at *9 (D.C. Cir. March 26, 2010) (discussing *Buckley*, *McConnell*, *Citizens United* and *Davis*). There is simply no precedent for declaring the Act's reporting requirements invalid as a matter of law.[13]

Moreover, development of a factual record will demonstrate that the Act's reporting requirements are substantially related to the important governmental interest of administering the public financing system. As noted above, the Act requires participating candidates to provide detailed reports of their contributors and expenditures on a monthly basis and to be prepared for audit at any time. Wis. Stat. § 11.506. They must do this to show that they are adhering to all requirements of the Act in exchange for the public funds they receive. Traditionally-funded candidates are subject to extra reporting requirements only when an election becomes particularly high-spending. *See* Wis. Stat. § 11.512. This is necessary so that the Board knows when additional disbursements are warranted. Both of these requirements thus further the Act's

[12] Contribution limits for state Supreme Court races in several states are either the same or lower than the $1,000 limit in Wisconsin. *See* Fla. Stat. §106.08(1)(a)&(1)(c) ($500 contribution limit); Ky. Rev. Stat. Ann. 121.150(6) ($1,000 contribution limit); Mont. Code Ann. §13-37-216(1)(a)(ii) ($600 contribution limit).

[13] Koschnick asserts that *Davis* requires invalidation of the Act's reporting requirements. (Koschnick Br. at 12.) But, in *Davis*, the Court only invalidated the challenged reporting requirement *after* engaging in a factual analysis. Ultimately, the Court determined that those requirements served no state interest other than to implement the unconstitutional, asymmetrical contribution limits. 128 S. Ct. at 2775. *Davis* provides no support that the Act's reporting requirements are facially invalid.

goals of providing an effective public financing system and — as further record development will prove — are certainly constitutional.

CONCLUSION

For the foregoing reasons, Koschnick's motion for judgment on the pleadings should be denied.

Dated: April 30, 2010

COMMON CAUSE IN WISCONSIN,
LEAGUE OF WOMEN VOTERS OF
WISCONSIN EDUCATION FUND, and
WISCONSIN DEMOCRACY CAMPAIGN

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RANDY R. KOSCHNICK,

Plaintiff, Case No. 09-CV-767

v.

GOVERNOR JAMES DOYLE, in his official capacity as Governor of the State of Wisconsin, KEVIN KENNEDY, in his official capacity as Director of Wisconsin's Government Accountability Board, and DAWN MARIE SASS, in her official capacity as Wisconsin State Treasurer,

Defendants.

CERTIFICATE OF SERVICE

I have caused to be electronically filed:

1. Brief Of Common Cause In Wisconsin, League Of Women Voters Of Wisconsin Education Fund, And Wisconsin Democracy Campaign As Amici Curiae In Opposition To Motion For Judgment On The Pleadings; and

2. Certificate of Service

using the ECF system which will send notification of such filing to counsel of record.

Dated: April 30, 2010.

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