No. 11-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN RIGHT TO LIFE POLITICAL ACTION COMMITTEE, GEORGE MITCHELL, and the WISCONSIN CENTER FOR ECONOMIC PROSPERITY,

Plaintiffs-Appellants,

v.

MICHAEL BRENNAN, WILLIAM EICH, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and GORDON MYSE, each in their official capacities as members of the Government Accountability Board, DAWN MARIE SASS, in her official capacity as Wisconsin State Treasurer, JOHN T. CHISHOLM, in his official capacity as Milwaukee County District Attorney, and BRAD SCHIMEL, in his official capacity as Waukesha County District Attorney,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin, No 3:09-cv-00764-WMC, Hon. William M. Conley

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AMICI BRIEF OF COMMON CAUSE IN WISCONSIN, THE WISCONSIN DEMOCRACY CAMPAIGN, AND THE LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND, IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for *Amici* Common Cause in Wisconsin, the Wisconsin Democracy Campaign, and the League of Women Voters of Wisconsin Education fund states as follows:

1. None of the *Amici* issues any stock and none has any corporate parents.

2. No law firm other than those listed on the cover and first page of this brief has appeared for *Amici* in this case (including in the proceedings below) or are expected to appear in this court.

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Dated: June 17, 2011

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INTERESTS OF THE *AMICI*[1]

Amici are non-partisan, non-profit organizations that work to support independent and impartial courts in Wisconsin. Common Cause in Wisconsin ("CC-WI") is Wisconsin's largest non-partisan government reform organization, having approximately 3,000 members. CC-WI and its members are strongly committed to promoting an independent, impartial judiciary through public financing for judicial elections. CC-WI lobbied for the consideration, passage, and enactment of the Impartial Justice Act at issue in this litigation.

The Wisconsin Democracy Campaign ("WDC") is a political watchdog group dedicated to clean government. Six and a half years ago, WDC made enactment of the Impartial Justice Act a reform priority. Ever since, WDC has worked to raise awareness of new threats to judicial independence, and to promote the importance of judicial public financing.

The League of Women Voters of Wisconsin Education Fund (the "League") is a nonpartisan organization working to encourage active and informed participation in government. The League has approximately 1,500 members and supporters around the state, and is committed to advancing a fair and impartial judiciary. The League and its members have supported public financing for state offices, including the Supreme Court, for more than three decades.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have informed *Amici* that they have no objections to the filing of this brief.

SUMMARY OF ARGUMENT

Amici fully endorse the arguments presented in the State's appellate brief, and strongly agree that the challenged trigger provisions have not hampered anyone's ability to participate in Wisconsin's judicial elections—including, and especially, the Plaintiffs-Appellants (hereinafter "Plaintiffs"). As described in full in the State's brief, there is no reliable evidence that Plaintiffs have suffered any cognizable First Amendment injury. But should this Court find that the Impartial Justice Act (the "Act") imposes some conceivable burden, *Amici* urge the Court to recognize that the unique constitutional issues raised by *judicial* elections justify the Act in full.

Plaintiffs wrongly argue that Wisconsin's legitimate interests in the regulation of judicial elections are limited to preventing corruption and that the instant case is controlled by recent decisions invaliding regulations of legislative elections. Plaintiffs ignore that whereas legislators are elected to represent specific interests, judges must appear impartial. That is a requirement of the Due Process Clause, and the Supreme Court has held that spending in judicial election campaigns can undermine the appearance of judicial impartiality. *Caperton v. A.T. Massey Coal Company*, 129 S. Ct. 2252 (2009). Wisconsin therefore has a compelling interest in assuring spending in judicial elections does not undermine the appearance that Wisconsin state judges are impartial. As the district court explained, Wisconsin's interest " in safeguarding [against] even an appearance of

bias" distinguishes this case from "any of the public financing statutes considered by courts to date." Slip op. at 33.

This Court recognized this fundamental distinction in in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *cert. denied,* ___ S. Ct. ___, 2011 WL 1631092 (May 2, 2011) and *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), *cert denied*, ___ S. Ct. ___, 2011 WL 1631059 (May 2, 2011)). There, it held that First Amendment protections for political speech must be evaluated differently in the context of judicial elections because of the compelling interest in assuring that judges both are impartial in fact and appear impartial to litigants. Thus, Plaintiffs' speculative and attenuated claims that the Wisconsin law has impaired their political speech must be weighed against Wisconsin's compelling interest in using public financing to protect the integrity of its courts and assuring that they appear impartial.

Retired Justice David Souter has observed that the most difficult constitutional cases are those where constitutional interests lie on both sides. *See* David Souter, Remarks to Harvard's 359th Commencement, 124 HARV. L. REV. 429, 433 (2010) ("Even the First Amendment, then, expressing the value of speech and publication in the terms of a right as paramount as any fundamental right can be, does not quite get to the point of an absolute guarantee . . . because the Constitution has to be read as a whole, and when it is, other values crop up in potential conflict."). This is certainly one such case. But, when the Constitution is properly considered as a whole, it is clear that the balance weighs heavily in favor of the State's judicial public financing program, including the provisions in which

spending by opponents "trigger" supplemental public funds.[2] This Court should thus affirm the district court's decision and uphold the Act in its entirety.

[2] Although the parties refer to these provisions as "matching funds," that term is confusing. Matching funds is often understood to refer to public financing systems such as the presidential primary system, that "match" small contributions to publicly financed candidates. By contrast, under Wisconsin's system, additional grants of public funds may be "triggered" by hostile spending from an opponent or outside groups.

ARGUMENT

I. In the Context of Judicial Elections, Plaintiffs' Speculative Claims Of Interference With Their Political Speech Must be Balanced Against Wisconsin's Compelling Interest In Combating Judicial Bias and Preserving Public Confidence in the Impartiality Of its Judiciary.

A. Wisconsin Has a Compelling Interest in Combating Bias and Preserving Public Confidence in the Judiciary That Is Distinct from Its General Anti-Corruption Interests.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton,* 129 S. Ct. at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The public's confidence in a fair and impartial judiciary is equally important. *See Republican Party of MN v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("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."). This is because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Thus, "'justice must not only be done, it must be seen to be done.' Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy." *In re Greenberg*, 280 A.2d 370, 372 (Pa. 1971) (citation omitted), *vacated on other grounds*, 318 A.2d 740 (Pa. 1974); *accord Offut v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). In other words, without public faith in the courts, the judiciary cannot function. *Bauer*, 620 F.3d at 712-13.

For these reasons, Wisconsin has a compelling interest in combating both actual and apparent judicial bias. Plaintiffs maintain that judicial bias is simply a

form of political corruption, stating that "[i]n the judicial context, [] corruption takes on the form of partiality, or bias for or against parties before a judge." Appellants Br. at 26. The above-cited cases belie that claim. They establish that the need to prevent bias and preserve the appearance of judicial impartiality is a unique interest that is not implicated in non-judicial elections. As the State rightly observes, "[j]udges and justices—even when popularly elected—are required to be impartial and independent in carrying out their duty of applying the rule of law, whereas officials in the political branches are expected to be representative of and responsive to the interests of their electoral constituencies." Appellees' Br. at 59 (citing *Siefert,* 608 F.3d at 989 n.6).

Wisconsin's interest in preventing judicial bias and assuring the appearance of judicial impartiality thus exists *in addition to* the State's general anti-corruption interests. Accordingly, the instant case is not fully controlled by those campaign finance cases that raised the question whether a regulation of executive or legislative elections properly advances the government's interest in preventing *quid pro quo* corruption. Instead, this Court must balance the First Amendment's protections for campaign spending against the State's constitutional obligation to protect Due Process and its compelling state interest in assuring that its judges appear impartial.[3]

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[3] In the campaign finance context, Supreme Court precedent directs courts to assess the actual nature and magnitude of the alleged burden before determining the applicable level of scrutiny. *See McConnell v. FEC*, 540 U.S. 93, 138-141 (2003) (assessing magnitude of burden and concluding that lesser scrutiny applied to soft money ban), *overruled in part on other grounds by Citizens United v. FEC*, 130 S.

That political spending can fatally undermine judicial impartiality is established by the Supreme Court's 2009 ruling in *Caperton*. In that case, the CEO and President of a party in a pending state court case had spent $3 million to support the electoral campaign of a West Virginia Supreme Court candidate, Brent Benjamin. 129 S. Ct. at 2257. Of that $3 million, the CEO donated just $1,000 to Benjamin directly; he used the rest for independent expenditures to support Benjamin or attack his opponent.[4] Benjamin was elected, and after taking his seat

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Ct. 876, 913 (2010); *Buckley v. Valeo*, 424 U.S. 1, 19-23, 25, 44-45, 64-66 (1976) (identifying magnitude of burden for contribution limits, expenditure limits and disclosure requirements before applying different standards of review). In making this determination, the "flexible standard" used to review First Amendment challenges to state election laws has traditionally been employed. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 786-89 (1983). Under that standard, before deciding on the appropriate level of scrutiny,

> [a] court . . . 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 (citations omitted).

We do not dwell on the appropriate level of First Amendment scrutiny, both because it may be affected by the Supreme Court's pending decision in *McComish v. Bennett*, Nos. 10-238 and 10-239 (argued Mar. 28, 2011), and more importantly, because—as explained herein—the challenged provisions survive even the strictest scrutiny. Ultimately, the substantial Due Process rights protected by Wisconsin's judicial public financing program in its entirety outweigh any conceivable burden on Plaintiffs' political spending.

[4] While Justice Kennedy characterizes the litigants' financial participation as "contributions" at points in the opinion, Blankenship "donated almost $2.5 million to 'And For The Sake Of The Kids,' a political organization formed under 26 U.S.C. § 527" to support Benjamin, and then made $500,000 of independent expenditures to support Benjamin's election directly. *Id.* at 2257.

on the bench, heard the case involving the CEO's company. Justice Benjamin then cast the tie-breaking vote to throw out a multi-million dollar jury verdict rendered against the company.

The U.S. Supreme Court disqualified Justice Benjamin, holding that his participation in his benefactor's case violated Due Process guarantees. Notably, the Court did not determine that Justice Benjamin was actually biased. Instead, it concluded that the high independent expenditures created a *perception of bias* that undermined the public's confidence in a fair and impartial judiciary. As Justice Anthony Kennedy explained in the opinion for the court:

> Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary [campaign spending was] made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

129 S. Ct. at 2265; *see also id.* ("Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'") (citation omitted).

By contrast, the Supreme Court has held that there is no interest in assuring the appearance of impartiality in non-judicial elections. In *Citizens United v. FEC,* 130 S. Ct. 876 (2010), the Court held that restrictions on independent expenditures in non-judicial elections violate the First Amendment, notwithstanding the fact that independent campaign spending creates an appearance that speakers have influence over elected officials. The Court concluded that the fact "that speakers

may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* at 910. It held that, in non-judicial elections, "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy." *Id.* The Court distinguished *Caperton* because it involved judicial elections, where "[t]he appearance of influence or access" is constitutionally intolerable because of Due Process concerns absent from other electoral contexts. *Id.*

This Court has recognized that there is a fundamental distinction between judges and legislators. "Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them." *Siefert v. Alexander,* 608 F.3d 974., 989 n.6 (2010), *cert denied,* __ S. Ct. __, 2011 WL 1631092 (May 2, 2011).

Thus, the Supreme Court's decisions in *Caperton* and *Citizens United,* and this Court's decision in *Siefert,* teach that judicial elections present different considerations than non-judicial elections. There is no constitutional requirement that non-judicial state officials appear impartial. In non-judicial elections, the state interest is limited to preventing corruption, and *Citizens United* held that independent spending did not raise concerns about corruption. By contrast, the Due Process Clause of the Federal Constitution requires that judges appear impartial, and *Caperton* held that independent spending raised constitutionally unacceptable risks of bias that threatened the judiciary. In judicial elections, therefore, the state

has a distinct and constitutionally valid interest in ensuring an appearance of impartiality that is absent from other political contests. *See generally Nevada Comm'n on Ethics v. Carrigan*, No. 10-568, __ S. Ct. ___, Slip op. at 4 (June 13, 2011) (Kennedy, J., concurring) ("The differences between the role of political bodies in formulating and enforcing public policy . . . and the role of courts in adjudicating individual disputes according to law . . . 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*.") (emphasis added).[5]

In short, Wisconsin has a compelling state interest in assuring that judicial elections do not give rise to bias or the appearance of bias. Plaintiff's contrary arguments rest entirely on non-judicial elections and are therefore entirely inapposite.[6]

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[5] *See also* James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 776 (2011) (arguing "that judicial elections really are and ought to be different from legislative and executive races in constitutionally meaningful respects"); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 612-15 (2011) (positing that explanation for evident inconsistency between *Caperton* and *Citizens United* "may be that Justice Kennedy views the balancing of interests in judicial elections differently"); Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203, 203 (2010) (suggesting "that the Supreme Court views the justice system as specially vulnerable to the influence of money").

[6] None of the recent cases striking down similar public financing trigger provisions involved judicial elections. *See Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010); *see also Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994). By contrast, the Fourth Circuit upheld North Carolina's judicial public financing system, which has trigger provisions similar to Wisconsin's. *See N.C. Right to Life v. Leake*, 524 F.3d 427, 441 (4th Cir.), *cert denied* 129 S. Ct. 490 (2008).

B. Wisconsin's Compelling Interest in Assuring Unbiased Judges Permits Regulations of Political Speech in Judicial Elections That Would Be Impermissible in Other Elections.

Because states have a compelling interest in assuring impartial judges that is unique to judicial elections, states may impose restrictions on political speech in these elections that would be impermissible in elections for legislative offices. *See Republican Party of MN v. White*, 536 U.S. 765, 783 (2002) (disclaiming any implication that "the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."); Erwin Chemerinsky & James Sample*, You Get the Judges You Pay For, N.Y. Times,* Apr. 18, 2011 ("[T]he compelling interest in ensuring impartial judges is sufficient to permit restrictions on campaign spending that would be unconstitutional for nonjudicial elections."). For this reason, in two recent cases, this Court has upheld restrictions on political activities by judges and judicial candidates—even though these First Amendment infringements could not be justified in other contexts.

In *Siefert*, this Court upheld Wisconsin's ban on partisan endorsements and personal campaign solicitations by judges and judicial candidates. Ordinarily, the First Amendment would prevent the state from regulating anyone's ability to make partisan endorsements. But *Siefert* held that those First Amendment rights must be balanced against the state's interest in a fair and impartial judiciary. 608 F.3d at 983. Shortly afterward, this Court applied the same reasoning to uphold Indiana's ban against judges and judicial candidates leading, or making speeches on

behalf of, political organizations. *See Bauer v. Shepard*, 620 F.3d 704, 710-13 (2010), *cert. denied*, __ S. Ct. __, 2011 WL 1631059 (May 2, 2011).[7]

In reaching these results, this Court relied on the well-established principle that "while political speech restrictions are [generally] subject to strict scrutiny, 'a narrow class of speech restrictions' are constitutionally permissible if 'based on an interest in allowing governmental entities to perform their functions.'" *Siefert*, 608 F.3d at 984 (citing and quoting *Citizens United*, 130 S. Ct. at 899). In other words, because "'there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech,'" the First Amendment allows certain regulations of speech that would be barred in other contexts. *Id.* at 980 (quoting *Citizens United*, 130 S. Ct. at 899)).

As *Citizens United* reaffirmed, federal courts have relied on this principle to uphold a variety of speech regulations, including the Hatch Act's ban on political activities by federal government employees, *see U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 561 (1973); similar restrictions on state government employees' political activity, *see Broadrick v. Oklahoma,* 413 U.S. 601, 616 (1973); restrictions on public school teachers' speech, *see Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); prohibitions of students' vulgarities while in school, *see Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986); restrictions on state employees' speech about working conditions*, see Connick v. Myers,* 461

[7] As discussed below, *see infra* Sec. III, this Court has also upheld bans on the personal solicitation of contributions by judges and judicial candidates. *See Siefert*, 608 F.3d at 988-89; *Bauer*, 620 F.3d at 710.

U.S. 138, 146 (1983); restrictions on prisoners' union-organizing activity, *see Jones v. N.C. Prisoners' Labor Union,* 433 U.S. 119, 131-32 (1977); and punishment for dissenting speech by military personnel, *see Parker v. Levy,* 417 U.S. 733, 758 (1974).

In upholding the judicial endorsement ban, *Seifert* particularly relied on a line of cases permitting regulation of the speech of government employees. 608 F.3d at 984-85 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick*, 461 U.S. at 146; *Letter Carriers*, 413 U.S. at 565; *Pickering*, 391 U.S. at 568). But *Siefert* stressed that the rationale supporting these restrictions was not merely "the government's power as an employer." *Id.* at 985. Instead, the Constitution permits these restrictions because First Amendment rights must sometimes be balanced against the government's "duty to promote the efficiency of the public services it performs." *Id.* This rationale, which has been used by federal courts to uphold outright bans on political activity and speech, is actually far weaker than the state's interest here—protecting judicial integrity and impartiality. *See id.* ("[W]e are not concerned merely with the efficiency of [government] services, but that the work of the judiciary conforms with the due process requirements of the Constitution; this tips the balance even more firmly in favor of the government regulation."). As this Court explained in *Bauer*,

> one principal justification for [restrictions on the political activities of public employees in] the Hatch Act is the preservation of public confidence in the bureaucracy. That is even more true about rules that keep judges out of active politics. The judicial system *depends on its reputation for impartiality*; it is public acceptance, rather than the

> sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife.

620 F.3d at 712 (citations omitted) (emphasis added).

The Supreme Court's student speech decisions are also analogous. *See Citizens United*, 130 S. Ct. at 899 (citing *Fraser*, 478 U.S. at 683, for ruling that speech may be restricted to "protect[] the 'function of public school education'"). As the Court has made clear, "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Morse v. Frederick*, 551 U.S. 393, 396 (2007) (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). But school administrators may regulate student speech—even when the same speech could not be subject to regulation in other contexts*, see, e.g.*, *Fraser*, 478 U.S. 675 at 682—because the speech rights of some students may not interfere with other students' countervailing and equally compelling right to receive a meaningful public education. *See id.* at 689 (Brennan, J., concurring) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express.").

The same principles apply here. There is no evidence that Wisconsin has attempted to prevent Plaintiffs or anyone else from participating in robust debate about judicial candidates. Nor is Wisconsin trying to regulate speech because of its content or viewpoint. Instead, Wisconsin has enacted a public financing system to protect the impartiality of its judiciary and the Due Process rights of its citizens.

Any incidental burden on First Amendment rights cannot outweigh these competing constitutional interests.

Siefert and *Bauer* both involved direct and substantial restrictions on the speech of judges and judicial candidates, rather than the indirect and *de minimis* burden alleged by Plaintiffs. *A fortiori,* Wisconsin's public financing program for judicial elections is constitutional.

II. The District Court Properly Found that Wisconsin's Compelling Interest in Protecting Judicial Integrity Outweighs Plaintiffs' Speculative and Unpersuasive Evidence of First Amendment Injury.

A. Wisconsin's Judicial Public Financing Program Furthers the State's Compelling Interest in Combating Bias and Preserving Public Confidence in the Judiciary.

Against this background, Wisconsin's judicial financing program is constitutional. It not only provides a valuable bulwark against corruption, but also advances the state's compelling interest of combating bias in its courts and assuring that its judges appear impartial. As the Fourth Circuit explained when upholding North Carolina's judicial public financing program (including the provisions in which spending by opponents triggered supplemental funds):

> The Act's public funding system is necessary, the state concluded, because the "effects [of money have been] especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts." The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that "the complete independence of the courts of justice is peculiarly essential" to our form of government. *The Federalist* No. 78, at 426 (E.H. Scott ed., 1898). We conclude that the provisions challenged today, which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within the limits placed on the state by the First Amendment.

N.C. Right to Life v. Leake, 524 F.3d 427, 441 (4th Cir. 2008) (citation omitted), *cert denied* 129 S. Ct. 490 (2008).

Wisconsin too turned to public financing as a means to protect the integrity of its courts. In the years before enactment, the state's judicial elections (like those across the country) had become increasingly expensive and politicized. The record in this case shows that, prior to public financing, the cost of campaigns for the Wisconsin Supreme Court was steadily rising—from $50,000 in 1965, to an average of $194,643 per campaign in 1989, to an average of $656,202 and a high of $1.2 million in 1999. Slip op. at 4. Judicial candidates were forced to turn to special-interest money—from trial lawyers, businesses, unions, and other litigants—to gain or keep their jobs. Indeed, the record shows that campaign funders were overwhelmingly lawyers or litigants with matters before the Wisconsin Supreme Court. *Id.*

This trend has grown even more pronounced in recent years. Since 2007, more has been spent in Wisconsin Supreme Court elections than in high court contests in every state but Pennsylvania; a staggering $14.8 million was spent in these elections from 2007 through 2011, including spending by candidates and special-interest groups. *See, e.g.*, Press Release, Brennan Center for Justice, *Special Interest TV Spending Sets Record in Wisconsin*, Apr. 5, 2011, http://www.brennancenter.org/WI_TV_record. Indeed, in Wisconsin's 2007 and 2008 judicial races, television spending alone reached a staggering $6 million—more than quadruple previous years' races—and in each year, more money was

spent on television in Wisconsin than in any other state. *See Judicial Public Financing in Wisconsin—2011*, brennancenter.org (Apr. 5, 2011), http://www.brennancenter.org/WI_2011; *see generally* James Sample et al., *The New Politics of Judicial Elections, 2000-2009: Decade of Change* (Charles Hall, ed., 2010). In Wisconsin's just-concluded April 5, 2011 Supreme Court contest, special interests broke previous records for television spending, funding nearly $3.6 million of television advertisements—many of them vicious attack ads—in the race. *See* Press Release, Brennan Center for Justice, *Final Numbers: Special Interest Spending Near $3.6 Million in Wisconsin*, Apr. 6, 2011, http://www.brennancenter.org/WI_2011_Final.

This tsunami of money and mud poses a tremendous threat to the public's faith in fair and impartial courts. A poll cited by the district court found 78 percent of Wisconsin voters believed so. Slip op. at 6. These figures are consistent with national opinion. Nearly nine in ten Americans believe that campaign spending influences judicial decision-making, and more than 80 percent of Americans believe judges should not hear cases involving major campaign supporters. *See* Adam Skaggs, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 4-7 (Brennan Center 2010) (collecting national and state polling data).

Faced with the threat of actual bias and declining public confidence in their courts, it is of little surprise that "65 percent of Wisconsin's voters supported the public financing of judicial campaigns" as a solution. Slip op. at 6. Wisconsin took action, and enacted the Impartial Justice Act to combat actual and apparent bias.

See, *e.g.*, Press Release, Governor Jim Doyle, *Governor Doyle Signs Impartial Justice Bill to Provide Full Public Financing of Supreme Court Campaigns* (Dec. 1, 2009) ("This legislation is an important campaign finance reform that will ensure impartiality and public confidence in our state's highest court."); *Hearing on The Impartial Justice Bill, AB 65 and SB 40, before the Assembly Comm. on Elections & Campaign Reform and the Senate Comm. on Judiciary, Corrections, Insurance, Campaign Finance Reform & Housing*, 2009 Leg. Sess. (May 27, 2009) (statement of Rep. Gary Hebl) (arguing that public funding would ensure that judges are "even handed in their interpretation of the law and are not overly sympathetic to the pet causes of the groups who paid for their election").

By implementing judicial public financing, the state sought to reduce the influence that campaign spending has—or is perceived to have—on judicial decision-making. Public funding allows participating candidates to get their message out to voters without relying on direct contributions from the lawyers and litigants who appear before them in court. This system thus directly promotes Wisconsin's compelling interest in combating bias in the judiciary and preserving public confidence in the judiciary.

This year, the first year the program was operational, three of four Wisconsin Supreme Court candidates participated. Although the state's highly politicized election attracted large amounts of outside spending, the publicly financed candidates were insulated from political fundraising, and could stay above the partisan fray. They ran largely positive campaigns using public funds alone,

without the need to beg for cash from the lawyers and litigants who traditionally bankroll judicial campaigns. *See, e.g.*, *Judicial Public Financing in Wisconsin—2011*, brennancenter.org (Apr. 5, 2011), http://www.brennancenter.org/WI_2011 (collecting publicly funded candidates' largely positive television advertisements).

Thus, as it was intended to do, the Act furthers Wisconsin's compelling interest in keeping corruption and bias out of its courts, and in preserving the public's confidence in a fair and impartial judiciary.[8] Accordingly, the district court correctly found that the Act furthers Wisconsin's compelling anti-bias interest and, in doing so, does not burden the First Amendment rights of nonparticipants any more than necessary to further that interest.

B. Plaintiffs Lack Any Credible Evidence that the Wisconsin Impartial Justice Act Chilled Their Speech.

In stark contrast to the substantial evidence establishing the State's compelling interest in preventing bias and the appearance of bias, the existing record illustrates the conjectural, *de minimis* nature of Plaintiffs' allegations of injury. *See* slip op. at 27, 31. Quite simply, there is no credible evidence that Plaintiffs' political spending has been deterred or "chilled" by the Act's triggered supplemental funds.

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[8] And, as explained at length in the State's brief, Wisconsin's public financing system accomplishes these goals without placing any limits on any non-participating party. Under the Act, only participating judicial candidates must limit fundraising and abide by expenditure ceilings. Everyone else—traditionally funded candidates as well as outside spenders like Plaintiffs—remain free to raise and spend unlimited amounts of campaign dollars.

Plaintiffs' evidence of injury consists of rote allegations that the district court properly found to be vague and speculative. *See* J.A. 128 n.16. In fact, none of the Plaintiffs has ever made expenditures, or demonstrated a likelihood of making expenditures, remotely close to the $360,000 threshold for triggering supplemental funds. *See* J.A. 132 n.19. Neither George Mitchell nor Wisconsin Center for Economic Prosperity reported any independent expenditure in connection with the primary or general election for Supreme Court in 2011; they also made no independent expenditures in the November 2010 general election.[9] Wisconsin Right to Life PAC ("WRTL") reported just $1,261 in independent expenditures for the 2011 election period,[10] $522.36 of which was spent during the general election.[11] This low amount is consistent with past spending levels—WRTL's average independent spending per year is about $10,000, and it has only spent about $100,000 in total since 2000. J.A. 112 n.8.

In full, less than one week before the 2011 general election, only $14,000 in independent expenditures had been reported to Wisconsin's Governmental

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[9] *See* Wis. Gov't Accountability Bd. ("WGAB"), Wisconsin Campaign Finance Information System, http://cfis.wi.gov/Public/Registration.aspx?page=FiledReports ("WCFIS") (indicating no recent independent expenditures for these registrants).

[10] *See* WGAB, *Wisconsin Right to Life PAC, GAB 2* (filed Mar. 28, 2011), *available at* http://cfis.wi.gov/ReportsOutputFiles/11ad2da3-9580-403c-ac8e-fcb9dfcec0f63292011110142AM.pdf (showing independent expenditures of $1161.66 in favor of Prosser); WGAB, *Wisconsin Right to Life PAC, GAB 7S* (filed Mar. 31, 2011), WCFIS (showing independent expenditures of $100.00 in favor of Prosser or against Kloppenburg (GAB ID 0500640)).

[11] WGAB, *Independent Disbursements Summary-Supreme Court (Spring Election)*, http://gab.wi.gov/sites/default/files/page/independent_disbursements_summary_supreme_court_s_15781.xls (last visited June 2, 2011).

Accountability Board, J.A. 132 n.19. And, by Election Day, only $12,386 of reported spending favored David Prosser, the Plaintiffs' preferred candidate.[12] Ultimately, no supplemental funds were triggered,[13] underscoring that there was never any credible risk that Plaintiffs would trigger supplemental funds. *See* slip op. at 3.

Under Plaintiffs' theory of the case, the Act and its trigger provisions should have tamped down debate and free speech during Wisconsin's 2011 judicial election. Nothing could be further from the truth. Instead, outside groups spent $3.6 million on advocacy related to the election. *See* Press Release, Brennan Center for Justice, *Final Numbers: Special Interest Spending Near $3.6 Million in Wisconsin*, Apr. 6, 2011, http://www.brennancenter.org/WI_2011_Final. Observers recognized a hard-fought (and "highly politicized") contest that attracted national attention. *See, e.g.,* Peter Hardin, *Report: $5.4 Million Spent in WI Race*, Gavel Grab, April 19, 2011, http://www.gavelgrab.org/?p=19992. And Plaintiff WRTL was a particularly active participant in the race, endorsing Justice Prosser and urging supporters to vote for him via e-mail, telephone and social media, among other methods.[14]

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[12] WGAB, *Independent Disbursements Summary-Supreme Court (Spring Election)*, http://gab.wi.gov/sites/default/files/page/independent_disbursements_summary_supreme_court_s_15781.xls (last visited June 2, 2011).

[13] *See* WGAB, *Supreme Court Public Funding Distributions*, http://gab.wi.gov/campaign-finance/public-funding/democracytrustfund-distributions (last visited June 2, 2011).

[14] *See, e.g.,* Wis. Right to Life, *Endorsed Candidates*, http://www.wrtl.org/legislation/endorsedcandidates/ (last visited June 2, 2011); Barbara Lyons, Wis. Right to Life, *Prosser and Spring Election Voter Turnout*, Life Voice Blog (Mar. 28, 2011), http://www.wrtl.org/blog/index.php/2011/03/28/prosser-and-spring-election-voter-turnout/; Wis. Right to Life, Facebook, http://www.facebook.com/pages/Wisconsin-Right-to-Life/20715882266 (last visited

The reality of the 2011 judicial race bore no resemblance to the conjecture put forth in Plaintiffs' affidavits and briefs, further undermining their attenuated and speculative rote allegations. This Court should thus affirm the district court's conclusions,[15] and find that Plaintiffs' speculative claims are easily outweighed by the State's well-established anti-bias interests.

III. Wisconsin's Public Financing Law Is Appropriately Tailored To Further its Compelling State Interests.

The district court properly concluded that the Act should be upheld in its entirety because it is narrowly drawn to regulate only the conduct most likely to create risks to judicial impartiality, and because there are no "realistic" alternatives. *See* slip op. at 35. In making this determination, the district court applied the lessons of *Siefert*, where this Court found that a ban on direct solicitations by judges and judicial candidates survives strict scrutiny. *See Siefert*, 608 F.3d at 988-89; *see also Bauer*, 620 F.3d at 710 (upholding Indiana's personal solicitation rules under *Siefert*). The public financing program challenged here, like the challenged judicial solicitation bans, is appropriately tailored to "serve[] the

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June 2, 2011). (including statements like "Reports this morning are that voting is very heavy in Madison (bad news) and in Waukesha (good news). Keep up the momentum for Prosser! Vote today."); Wis. Right to Life, Twitter (Apr. 4, 2011), http://twitter.com/#!/WRTL (last visited June 2, 2011).

[15] The district court's factual conclusions have ample support, and thus cannot be considered "clearly erroneous." *See U.S. Neurosurgical, Inc. v. City of Chicago*, 572 F.3d 325, 333 (7th Cir. 2009) (explaining that appellate court "will not set aside a district court's findings of fact unless they are clearly erroneous").

anti-corruption rationale articulated in *Buckley* and acts to preserve judicial impartiality." *Siefert*, 608 F.3d at 989.[16]

To start, the trigger provisions of Wisconsin's public financing system were carefully drawn to provide participating candidates with sufficient financing without wasting the public fisc on low-spending races where additional funds are unnecessary. *See Buckley*, 424 U.S. at 96 (recognizing governmental interest in not wasting "large sums of public money" through public financing system). Recent events in Wisconsin have underscored the state's serious fiscal concerns. As the district court determined, the state cannot afford to substitute larger lump sum grants in place of the triggered supplemental funds currently in place. Slip op. at 35.

By ensuring participants that they will have enough money to respond to nonparticipating opponents or to high-spending independent groups, the trigger addresses what would otherwise be a powerful disincentive to participation. Wisconsin's participation interest flows directly from its compelling interest in using public funds to preserve the integrity of judicial elections in the first place. *See Daggett v.Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445,

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[16] *Compare Siefert*, 608 F.3d at 990 (concluding that "the solicitation ban is drawn closely enough to the state's interest in preserving impartiality and preventing corruption" because, although a judge could become aware of campaign contributions through other means, "the personal solicitation itself presents the greatest danger to impartiality and its appearance") *with WRTL*, slip op. at 29 ("Admittedly, the [express advocacy] theoretically being impinged is still core, political speech. . . . But it is also the most overt tie of the speaker *to the candidate* and, therefore, the most likely to create an appearance of bias should the speaker (or those of similar special interest) later appear before the court.") (emphasis in original).

469 (1st Cir. 2000) ("[W]ithout the matching funds, even though they are limited in amount, candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent."). After all, if Wisconsin could not attract judicial candidates to accept public financing and abide by the program's rules, the Act would do nothing to promote public confidence in the state's elections. In recognition of this reality, federal appellate courts have repeatedly found that states have a compelling interest in encouraging candidate participation, which survives even strict scrutiny. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) ("[G]iven the importance of these interests, the State has a compelling interest in stimulating candidate participation in its public financing scheme."); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993) (same).

Moreover, as this Court has recognized, judicial recusal is an inadequate substitute to the challenge of maintaining the integrity and impartiality of an elected judiciary. For example, *Siefert* found that judicial recusal was not a "reasonable, less restrictive" alternative to a ban on judicial solicitation. 608 F.3d at 990. The Court explained:

> It is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins. It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution.

Id. As in *Siefert*, because of the demands widespread disqualification would place on scarce judicial resources, judicial recusal is not a realistic alternative to public financing.

Recusal is a particularly insufficient alternative here. Wisconsin's disqualification standards do not adequately address the issues posed by judicial campaign spending, and the Wisconsin judicial financing program was enacted in recognition of this fact. Wisconsin's current recusal rules were adopted when, by a one-vote margin, the Wisconsin Supreme Court voted to accept proposed recusal rules written by two interest groups that have been among the biggest spenders in Wisconsin's judicial elections—Wisconsin Manufacturers and Commerce and the Wisconsin Realtors Association. *See generally In re Amendment of the Code of Judicial Conduct's Rules on Recusal*, Nos. 08-16, 08-25, 09-10, 09-11 (Wis. Jul. 7, 2010); *see also id at* 2-3 (Bradley, J., dissenting) (warning that Wisconsin judges "will be perceived as just your common ordinary politician . . . affected by big money . . . [because] a majority of the court adopt[ed] word-for-word the script of special interests that may want to sway the results of future judicial campaigns"). The rules provide that no campaign contribution or independent spending by a party to a lawsuit—no matter how many millions of dollars are involved—can ever be sufficient to require a judge's disqualification. These rules are inconsistent with *Caperton*.

The controversial new recusal rules provoked widespread outrage and public condemnation amid warnings that the new rules would make Wisconsin judges

increasingly accountable "'to special interests that inject millions of dollars into campaigns for judicial office in the Badger State.'" *Id.* (Bradley, J., dissenting) (collecting newspaper editorials from across Wisconsin) (citation omitted). The *Milwaukee Journal-Sentinel* opined that the proper response to adoption of the misguided recusal rule was judicial public financing, stating that "[i]f the majority of the justices cannot discern that the free flow of money into their campaigns or on their behalf is a corrupting influence, the Legislature should make that point clear by passing [the Impartial Justice Act]." *A Breach in Reality*, Milwaukee Journal-Sentinel, Oct. 29, 2009. The Legislature agreed: Less than five weeks after Wisconsin's Supreme Court adopted these state recusal rules, the Impartial Justice Act was signed into law. It represented a legislative judgment that the public financing of judicial campaigns and the statute's trigger provisions are the most feasible means of assuring that Wisconsin's judiciary appears impartial. The Wisconsin legislature has thus made the same determination that this Court made in *Siefert.*

The State properly characterizes "[t]he fundamental issue in this case" as "whether a state, for the purpose of protecting the real and perceived integrity and impartiality of its highest court, may establish a voluntary public funding program for elections to that court and provide reasonable incentives for participation in that program." Appellees' Br. at 10-11. As the district court found, Wisconsin may do so, in complete accordance with the Constitution. Given the crucial constitutional interests served by the Act, and the lack of any reasonable, less restrictive

alternative to Wisconsin's judicial public financing model, this Court should uphold the Act in its entirety.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

/s Sean Siekkinen

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Dated: June 17, 2011

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULES OF APPELLATE PROCEDURE 29(d) & 32(a)

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because the brief contains 6,846 words, not counting the sections excluded under 32(a)(7)(B)(iii).

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/s Sean Siekkinen

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Dated: June 17, 2011

<u>CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)</u>

Pursuant to Circuit Rule 31(e), the undersigned counsel hereby certifies that he has filed the brief electronically.

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Dated: June 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, I caused copies of the foregoing Brief in Support of Defendants-Appellees,to be served upon the following individuals by first class mail:

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