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July 29, 2015

To: See Attached Service List

You are hereby notified of the following:

Nos. 2013AP2504-08-W Three Unnamed Petitioners v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

2014AP296-OA Two Unnamed Petitioners v. Peterson
L.C.#s2012JC23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

2014AP417-421-W Schmitz v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

Before David T. Prosser, J.

On February 12, 2015, Special Prosecutor Francis D. Schmitz filed under seal a Motion for Recusal directed to Justice David Prosser seeking his disqualification from participation in the above-captioned cases. On July 16, 2015, the Motion for Recusal was denied. A comment accompanying the order denying the Motion for Recusal stated that a separate writing would follow. That separate writing is attached.

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July 29, 2015

Dear Counsel:

On February 12, 2015, Special Prosecutor Francis D. Schmitz filed a motion requesting my recusal "from all further proceedings" in the three cases relating to a John Doe investigation then pending before the court. The special prosecutor outlined multiple grounds for his motion and cited Wis. Stat. § 797.19 (sic), SCR 60.03, and SCR 60.04(1) and (4) as authority for his position. Although I denied the Special Prosecutor's motion on July 16, 2015, at the time the three cases were decided, I made a commitment then to explain the basis for the denial. This writing will serve that purpose.

I

Wisconsin Stat. § 757.19, entitled "Disqualification of judge," reads in part:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> . . . .
>
> (f) When a judge has a significant financial or personal interest in the outcome of the matter. . . .
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

Paragraphs (a) through (f) "are susceptible of objective determination, that is, without recourse to the judge's state of mind." State v. Am. TV & Appliance, 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989). To the best of my knowledge, I do not have "a significant financial or personal interest in the outcome" of the three cases before the court, and I do not understand the special prosecutor to allege that I do.

Paragraph (g) is different from the preceding paragraphs. This paragraph "concerns not what exists in the external world subject to objective determination, but what exists in the judge's mind. . . . The determination of a basis for disqualification here is subjective." Id.

This paragraph, according to our established precedent, "does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner." Id. at 183. It does not require disqualification in a situation in which "the judge's impartiality 'can reasonably be questioned' by someone other than the judge." Id.

Thus, my obligation under Wis. Stat. § 757.19(g) is to determine whether, for any reason, I believe that I cannot, or I believe that it appears that I cannot, act in an impartial manner.

I conclude that I can act in an impartial manner in this matter and that it does not appear otherwise to a reasonable person who understands the facts.

On two occasions, both before and after the special prosecutor's motion, I wrote separately on orders issued by the court with respect to these matters. In both writings, I disagreed with a majority of the court.

In addition, I have approached the John Doe cases before the court in the same manner I have approached other cases over the past 17 years. Because I came to the court with a partisan background in legislative service and did not have formal judicial experience, I have assumed that many persons would be skeptical about my opinions, especially if those opinions related to political controversies. Consequently, I have tried to issue opinions that fully set out the facts on which my decisions are grounded and fully reveal my thinking and analysis in relation to the law as best I understand it. I have tried to avoid stating facts or conclusions without support. I have tried to base my decisions on precedent, on statutory language, or on clearly stated policy determinations, so that people who disagree with the results of my decisions can focus on my legal analysis, rather than on their preference for different outcomes.

Wisconsin Stat. § 757.19 provides in subsection (5) that "when a judge is disqualified, the judge shall file in writing the reasons and the assignment of another judge shall be requested under s. 751.03." Were I to disqualify myself in this matter, I would not be able to state reasons that would not apply equally to many other judges in a state that has historically elected judges, and I would not be able to request "the assignment of another judge" because assignment of another person to serve as a justice on the Wisconsin Supreme Court is simply not possible under current law.

II

The special prosecutor also cited SCR 60.03 and SCR 60.04(1) and (4).

SCR 60.03 contains general language that "(1) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." This broadly-worded provision cannot mean that a judge must step aside every time a litigant claims that a judge's participation in a case will undermine public confidence in the court.

The most relevant parts of SCR 60.04 are contained in subsections (4), (7), and (8). Subsection (4) reads in part:

> (4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or <u>when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial</u> . . . .

(Emphasis added.)

The highlighted language in this subsection appears to seek an objective standard that is different from Wis. Stat. § 757.19(g). The scope of the language is very broad, meaning that it is intended to apply to situations beyond those enumerated in paragraphs (a)-(f). However, the language in (4) is dangerously subjective for the non-judicial people seeking to interpret it, permitting such people to be influenced by their policy biases. That is one reason why the court added subsections (7) and (8) addressing the controversial issue of campaign finance:

> (7) Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.
>
> (8) Effect of Independent Communications. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an "independent communication") by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

A third relevant provision is found in SCR 60.06(4), which reads:

> (4) Solicitation and Acceptance of Campaign Contributions. A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers, other individuals or entities even though the contributor may be involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge, candidate for judicial office, or judge-elect should also be mindful of the requirements of SCR 60.03 and 60.04(4); provided, however, that the receipt of a lawful campaign contribution shall not, by itself, warrant judicial recusal.

The history of SCR 60.04(7) and (8) and SCR 60.06(4) deserves discussion.

On June 20, 2008, the League of Women Voters of Wisconsin filed Petition 08-16 asking for amendments to the Wisconsin Code of Judicial Conduct, specifically SCR 60.01 and SCR 60.04(4) and (6). In essence, the League sought to amend SCR 60.04(4) to require a judge to recuse himself or herself if "a party to the proceeding made a contribution of $1,000 or more to

support the judge's election to the judge's current or prospective judicial position." The petition also sought to require a judge's recusal in a proceeding involving an individual or entity that paid for certain "mass communications" that include a "reference to the judge or another candidate" for the judicial position.

The League pointedly asked the supreme court to act promptly on its proposed petition "so that the public hearing can be held so that donors, third parties who spend money to influence campaigns, and judicial candidates will have a clear understanding of the impact of making or accepting contributions, and of spending money to influence the spring 2009 judicial campaigns."

The spring 2009 judicial campaign was Chief Justice Abrahamson's reelection campaign. On October 28, 2008, the court briefly considered the League's petition at an open administrative conference. Before the conference, Justice Ann Walsh Bradley approached me in the hallway outside my office and asked for my help in delaying the petition because voting on it before the election would be "embarrassing" to Chief Justice Abrahamson.

The court voted unanimously to delay the petition. Justice Bradley contended at the conference that the petition should not be taken up during an election campaign. Later the delay was explained by some as a desire to wait for the Supreme Court's decision in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009), which was accepted for review by the Supreme Court shortly after the October 28 conference and decided on June 8, 2009.

Milwaukee BizTimes reported after the spring election and after the decision in Caperton that Chief Justice Abrahamson had received 341 "individual campaign donations of $1,000 or more . . . . [Ironically,] [o]nly Justice David Prosser Jr. has not received any individual donations of $1,000 or more." See Steve Jagler, "To recuse or not to recuse," Milwaukee BizTimes (June 28, 2009), http://www.biztimes.com/article/20090628/BLOGS/306289999/0/. The BizTimes article credited a study by the Wisconsin Democracy Campaign for the information. As will be noted, I did not receive any $1,000 contributions in my 2011 election campaign, either.

Following her re-election, Chief Justice Abrahamson began to promote the League's petition and scheduled a hearing for late October 2009. In the meantime, however, the Wisconsin Realtors Association, Inc. and Wisconsin Manufacturers and Commerce (WMC) filed their own petitions to amend SCR 60.04. The Realtors' petition proposed subsection (7); WMC's petition proposed subsection (8), together with an amendment to SCR 60.06(4).

There was an obvious reason for the Realtors' petition. The political action committee affiliated with the Realtors contributed $8,625 to the campaign of Washington County Circuit Judge Annette Ziegler when she was running for the supreme court in the spring of 2007. Later, in July 2007, the Wisconsin Court of Appeals certified a case to the Wisconsin Supreme Court, Wisconsin Realtors Association, Inc. v. Town of West Point, 2007 WI 139, 306 Wis. 2d 42, 743 N.W.2d 441. Justice Ziegler disclosed to the parties and amici that she had received a contribution from the Realtors' PAC. The attorney for the Town of West Point promptly asked Justice Ziegler to withdraw from the case. She did. The court thereafter was unable to decide

the case because of a tie vote and the Realtors organization eventually lost in the court of appeals. The issue in the case was whether state law permits a town to impose a blanket moratorium on real estate developments while the town develops a master zoning plan——an issue of importance to the Realtors' members.

The Realtors were concerned that the organization had been seriously disadvantaged in the West Point case because it had made an open, modest, and completely lawful contribution to a candidate for the supreme court and that it would be disadvantaged in future cases under the League's proposed rule if it made a contribution of only $1,000 to a supreme court candidate who heard a case. WMC, on the other hand, was concerned that its affiliated organization for making independent communications could not engage in issue advocacy without gravely jeopardizing WMC's ability to participate in legal proceedings as a friend of the court.

All this came to a head after a lengthy public hearing on October 28, 2009. At an open administrative conference, a majority adopted the one sentence amendment to SCR 60.04 proposed by the Realtors and the one sentence amendment to SCR 60.04 proposed by WMC. The court rejected the League's petition, a second petition proposed by retired Justice William Bablitch, and a motion to send all proposals to a study committee.

After the vote, this Justice asked WMC to request that the court reopen the rules to make some technical corrections. WMC made the request, and several corrections were made in the text of SCR 60.06(4), at my direction. In addition, I wrote comments to accompany each of the three new provisions. These comments, explaining the basis for the changes, consisted of nine paragraphs containing more than 700 words.

Moreover, Justice Patience Roggensack, joined by three justices, wrote a six page concurrence providing background for and explanation of the rule changes.

Frankly, much of the subsequent criticism of the rule changes has misrepresented their adoption and their effect. The rule amendments were not adopted "word-for-word" or "verbatim," as is often represented by critics. The hundreds of words of comments by the court did not come from the petitioners. The court had two conflicting proposals before it for more than a year, and two petitions were adopted in substance after lengthy testimony at a public hearing and subsequent discussion. The suggestion that the court did not carefully consider the rule changes is thus unfounded.

The rules are grounded in the reality that the law must permit contributions from people and entities who may have cases before the court because some attorneys and some entities are nearly always before the court. Thus, a rule that provides that a "judge shall not be required to recuse himself or herself in a proceeding based solely on . . . the judge's campaign committee's receipt of a lawful campaign contribution" is a rational rule consistent with United States Supreme Court holdings. The rule does not mean that a judge should never recuse himself or herself because of a campaign contribution or independent communication. The court's comments to the rule changes include the following observation:

> The solicitation of contributions from participants in judicial proceedings is always a matter requiring close, careful attention. Campaign committees should be sensitive to the existence of pending litigation, the proximity of judicial elections, and the wording of campaign solicitations to avoid the appearance of promise or pressure.

SCR 60.06(4) cmt.

III

This brings us to the nub of the special prosecutor's motion.

The special prosecutor contends that serious ethical issues arise because several "individuals" and "entities" under his investigation had "significant involvement" in my 2011 re-election to the supreme court. Because of secrecy orders sought by the special prosecutor and the Milwaukee County District Attorney's Office, I am not able forthrightly to name names in this writing. However, the special prosecutor alleged that an "estimated $3,344,000" was "contributed" by certain entities "to the benefit of the Justice Prosser re-election effort," "nearly eight times the public funding" spent by the campaign. Thus, "Due Process considerations warranting recusal exist here as existed in" Caperton.

The special prosecutor fails to acknowledge or explain the context in which the 2011 election occurred.

In 2009 the Wisconsin Legislature substantially revised the campaign finance law affecting supreme court elections. See 2009 Wis. Act 89. The maximum individual contribution limit for supreme court candidates, which had been in place since 1974, was reduced from $10,000 to $1,000. Wis. Stat. § 11.26(1)(a) and (1)(am) (2009-10). The maximum committee contribution to a supreme court candidate also was reduced from $8,625 to $1,000. Wis. Stat. § 11.26(2)(a) and (2)(am) (2009-10). These major reductions in contributions were designed to induce, if not force, supreme court candidates to participate in a new public funding plan designed exclusively for supreme court races.

Under the plan, candidates for the supreme court were given the option to register for public funding——$100,000 for a primary election, and $300,000 for a general election. Wis. Stat. § 11.511(2) and (3) (2009-10). To qualify for this public funding, a candidate was required to raise not less than $5,000 nor more than $15,000 "from at least 1,000 separate contributors." Wis. Stat. § 11.502(2) (2009-10). A candidate could also raise up to $5,000 in "seed money contributions" to be used in raising the qualifying contributions from at least 1,000 separate contributors. Wis. Stat. § 11.508(1) (2009-10). In short, a candidate who applied for public funding could not raise more than $20,000 in private contributions for the entire campaign and could not receive—with some inapplicable exceptions—more than $400,000 in public funding.

As a result, a candidate for the supreme court was extremely vulnerable to third-party expenditures, especially if those expenditures were limited to issue advocacy. The only practical and lawful response to issue advocacy attacks on a candidate taking public funding had to come

from other issue advocacy. This reality became apparent to everyone knowledgeable about the new laws.

These new laws had not applied to Chief Justice Abrahamson who was re-elected in April 2009 and able to raise $1,452,000 directly for her campaign. These new laws were specifically designed to apply to the supreme court election in 2011 when I would be on the ballot.

Early in 2010, I discovered a very different atmosphere from what I had experienced in 2001 when I ran unopposed. There was going to be a major effort to challenge my re-election. This was evident well before Scott Walker was elected governor. This effort was led inside the supreme court by then-Chief Justice Abrahamson and Justice Bradley. It was led outside the court by interests hoping that a new supreme court majority, led by Justice Abrahamson, would take charge of deciding legislative reapportionment.

Three challengers announced their candidacies. Two of these challengers qualified for public funding. All three candidates campaigned in the primary on why I should be replaced.

The primary election was held on February 15, 2011. I received 55 percent of the vote. However, February 15 was the date Governor Walker announced the legislative initiative that became Act 10. This legislation led to massive demonstrations and transformed the campaign to defeat me into a symbolic election against Scott Walker, even though I had no involvement in or prior notice of Governor Walker's proposed legislation.

The Brennan Center for Justice acknowledged that the 2011 race featured "vicious, mudslinging attack ads." Brennan Center for Justice, Buying Time 2011: Judicial Public Financing in Wisconsin, (April 5, 2011), available at http://www.brennancenter.org/analysis/judicial-public-financing-wisconsin-%E2%80%94-2011. Ads of this nature did not emanate from my campaign.

The special prosecutor now contends that because he is investigating "individuals" and "entities" who spent substantial amounts of money responding to attack ads and supporting my re-election, I must recuse myself from his case.

This is not a Caperton case. In Caperton, a single individual (1) contributed $1,000 to the campaign committee of a West Virginia Supreme Court candidate trying to unseat an incumbent, (2) donated $2.5 million to a political action organization formed under 26 U.S.C. § 527 to support the candidate and oppose the incumbent, and (3) spent an additional $500,000 on independent expenditures "to support" the candidate. Caperton, 556 U.S. at 873. The individual, Don Blankenship, was the chairman, chief executive officer, and president of a coal company that had just lost a jury trial in which it was accused of fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. Id. at 872-73. A jury awarded plaintiff Caperton $50 million in compensatory and punitive damages. This verdict was certain to be appealed to the West Virginia Supreme Court of Appeals on which Blankenship's favored candidate hoped to serve.

After winning the election, the candidate did serve on the Supreme Court of Appeals, denied a recusal motion, and voted to reverse the $50 million verdict. The vote was 3-2. There were then new procedural moves and the court reconsidered its vote, with two new judges. The candidate at issue again did not recuse himself and again voted, in a 3-2 vote, to reverse the jury verdict.

When the Caperton case was reviewed by the United States Supreme Court, the Court reversed, saying:

> We conclude that there is a serious risk of actual bias——based on objective and reasonable perceptions——when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

Id. at 884 (emphasis added).

The Court said that the Caperton case addressed "an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case." Id. at 887 (emphasis added).

The Court also said:

> The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, [the new justice] would review a judgment that cost his biggest donor's company $50 million. Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested interest at 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.

Id. at 886.

My colleague, Justice Annette Kingsland Ziegler, recently discussed the Caperton decision in State v. Herrmann, 2015 WI 84, ¶¶136-37, ___ Wis. 2d ___, ___ N.W.2d ___ (Ziegler, J., concurring). She wrote:

> The United States Supreme Court concluded that there was a serious risk of Justice Benjamin's actual bias in sitting on Caperton because: (1) the case had been pending since before Justice Benjamin was elected; (2) the jury verdict in

> that case was $50 million; (3) if elected, Justice Benjamin would be sitting on the court that would review this $50 million verdict; (4) Blankenship's extraordinary $3 million expenditures supporting Benjamin dwarfed the amount spent by both campaign committees combined; (5) Blankenship's $3 million expenditures exceeded the expenditures of all other Benjamin supporters combined; and (6) Blankenship's $3 million expenditures had a "significant and disproportionate influence" in helping Benjamin win a close election. See Caperton, 556 U.S. at 883-86. . . .
>
> The Supreme Court made clear that no one factor alone——or anything short of this combination of factors——would have constituted a due process violation so to require recusal. In that regard, the Supreme Court noted that its holding was based on "all the circumstances of [that] case . . . ." Id. at 872. The Court further noted that "[a]pplication of the constitutional standard implicated in [Caperton] will [] be confined to rare instances." Id. at 890.
>
> Here, the circumstances are very different from Caperton.

First, there was no "pending or imminent" case against any individual or entity who made expenditures in the 2011 election at the time the expenditures were made. Although one organization whose affiliate made expenditures occasionally appears before the Wisconsin Supreme Court as amicus curiae, there was no likelihood that this organization would be a party in litigation before the court in the foreseeable future.

Second, unlike the candidate in West Virginia, I had been a member of our court for almost 13 years before the expenditures were made.

Third, unlike West Virginia, Wisconsin has no procedure to replace a justice who withdraws from a case as a result of a recusal motion. Successful recusal motions alter the composition of the Wisconsin Supreme Court, so that, in a very real sense, a party moving for a justice's recusal is trying to change the composition of the court that will hear its case.

Fourth, although several large expenditures were made to support my candidacy in the 2011 election, the Wisconsin Legislature made this result inevitable when it limited the total amount of contributions to my campaign committee to $20,000. There were approximately 2,000 contributors to my campaign, but most of the contributions were between $5 and $10. There were no contributions of $1,000. Total expenditures by my committee in the primary and general elections were $420,000, of which $400,000 consisted of public grants. My opponents received $500,000 in public grants.

Well over a million dollars was spent by third parties on issue advocacy distorting or misrepresenting my record. Wisconsin law provided no practical means for my committee to respond to the misrepresentations because I participated in a publicly funded campaign. These misrepresentations were made in the context of substantial hostility to Governor Walker over issues in which I had no part, and they were made in the context of the organization of the

potential recall of eight Republican state senators, which provided invaluable information to campaign operatives seeking to get out the vote of particular people likely to vote against me.

Thus, while it can be argued that independent communications supporting my campaign were "significant and disproportionate," there was no alternative under Wisconsin law for people who believed I had done a good job and wanted me to continue. Statistics can be very misleading. For instance, even a $100,000 independent communication would have been "five times what all of Prosser's contributors gave to his campaign and more than 200 times the amount received from his largest contributor." Such statistics are meaningless in the context of the 2011 supreme court election. What should be understood is that the election generated the largest turnout of any supreme court election in Wisconsin history.

Fifth, although parties in litigation are entitled to judges who are impartial, due process claims against judges are normally not asserted by the State. When private individuals and organizations are defendants in an action by the State, the defendants may assert due process claims concerning the alleged bias of a judge. However, it is virtually unprecedented for the State to assert such claims. This is why the State has no authority to substitute against a judge in circuit court under Wis. Stat. § 971.20. The principle is well illustrated in the landmark case of Tumey v. Ohio, 273 U.S. 510, 532 (1927), where the Court said:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Caperton, 556 U.S. at 878 (citing Tumey, 273 U.S. at 532) (emphasis added).

Finally, the expenditures at issue in the special prosecutor's motion were made in 2011. It is now 2015, four years later. Unless the expenditures made in 2011 are viewed as a lifetime ban on my participation in cases involving the organizations that made the expenditures in 2011, I believe that sufficient time has passed since the expenditures and the present case that my recusal is not required.

IV

The special prosecutor articulates additional specific concerns that he believes should disqualify me from participation in the John Doe cases. I do not agree.

First, he asserts that my campaign treasurer also serves as the campaign treasurer for one of the many targets of his investigation. This is mostly coincidence. The treasurer filed an affidavit with the court that explains that she has served as a treasurer or bookkeeper for 25-30 political candidates. "My work has never involved any strategy, political or otherwise, with respect to any of these candidates," she writes.

Although I have spoken occasionally with my campaign treasurer by telephone, I do not recall ever meeting her in person. She is a professional who performs ministerial duties with

respect to multiple campaigns. My campaign treasurer was never a target of the investigation and thus I do not see any conflict in my sitting in the John Doe cases because of her.

Second, the special prosecutor alleges that two of the unnamed petitioners "were actively involved in the Justice Prosser re-election campaign, as exemplified by a November 17, 2010 email." The email reads in pertinent part: "We need to do a quick conference call at 2PM tomorrow to discuss the Prosser race and his need for 1,000 low dollar donors by year end."

This email was sent before my campaign manager was hired. In due course, my campaign sent out many letters and emails asking for low-dollar contributions, which had to be received within a limited period of time to qualify for a public grant. Countless people involved in the novel 2011 supreme court election understood the importance of securing a large number of small donors, and many people helped because failure to secure the requisite number of small donations would have doomed the campaign. The truth of this assessment was proven by the candidate who failed to qualify for public funding. She had no money for television and her candidacy did not survive the primary.

One of the Unnamed Petitioners is quoted in another email about raising money for a campaign "to maintain the Court." This and another quoted email are little more than evidence of the fact that some targets of the investigation (who had participated in other campaigns for the supreme court) engaged in expenditures that, under all the circumstances, were very valuable to my campaign.

The special prosecutor does not contend that there was any impropriety in these third party campaign activities, only that because I received support from groups that came under his investigation, I must not participate in a review of the investigation.

The public ultimately decides at the ballot box who is permitted to serve on the Wisconsin Supreme Court. The special prosecutor seeks to prevent an elected justice from performing that service unless the unelected special prosecutor wants the elected justice to sit on the case. This is not the way the system works.

Third, the special prosecutor cites an email from my volunteer campaign coordinator in Waukesha County to a staff member in Governor Walker's office. As an addendum to the email, the volunteer wrote:

> NOTE: Justice Prosser sent a letter to me and I thought you may wish to forward it if appropriate. I needed to get very creative with diverse state and National organizations to help his campaign due to being capped at $300,000 and it was a non-partisan race without the benefit of normal political party help which was very different than working with Governor Walker's team. Justice Prosser is an experienced Justice on our Supreme Court and a pleasure to work with.

The volunteer attached a letter I had written to him thanking him for his efforts.

My letter referenced "the exceptional commitment of literally hundreds and hundreds of people across Wisconsin." If we had had a more stable financial operation, I would have sent out many, many, many letters of thanks——to election volunteers, recount volunteers, and recount contributors.

This volunteer asked for a letter of recommendation. Since he was not a hired employee and I had met him only once or twice, I thought it safer to send him a warm letter of thanks. Although I had no reason to doubt excellent work on his part, I frankly did not know what he had done. The letter repeats what he said he had done. I have no knowledge that this volunteer raised any money. If he did, any such money did not and could not pass through my campaign committee, and any fundraising was not directed by my campaign manager.

Finally, the special prosecutor alleges the "close connection of Justice Prosser's campaign with Governor Walker's administrative team" because my campaign manager issued a news release in December 2010 announcing his appointment and adding the comment that "our campaign will include building an organization that will return Justice Prosser to the bench, protecting the conservative judicial majority and acting as a common sense compliment [sic] to both the new administration (Governor Walker) and Legislature."

This news release should not have been issued as written. The problem for the special prosecutor is that this news release was put out without my knowledge or approval, and the fact that I had not approved the news release and did not agree with the objectionable statement has been widely reported. See, e.g., Jason Stein and Patrick Marley, More Than They Bargained For 245 (2013). Consequently, the special prosecutor is relying on information that is taken out of context and incomplete.

These four concerns add nothing of substance to the indisputable fact that several groups supported my campaign in 2011 with substantial spending on independent communications. If my recusal were required now because of these expenditures——that is, four years after lawful independent communications were made to support my candidacy when there was no other practical way to support that candidacy and answer the virulent personal attacks on my integrity——the special prosecutor will have found a way to undermine judicial elections in Wisconsin.

I would, of course, have preferred to run for re-election without opposition as I did in 2001. I would have preferred to run without controversy. I am very proud, however, to have received more votes than any judge in a contested election in Wisconsin history, to have participated in a unique publicly funded campaign, and to have engaged in 11 different debates with my opponents during that campaign. The people of Wisconsin knew who they were voting for. The special prosecutor should be expected to live with the results.

For the reasons stated, the special prosecutor's motion is denied.