SUPREME COURT OF WISCONSIN
Case No. 2013AP2504 - 2508-W
Case No. 2014AP296-OA
Case No. 2014AP417 - 421-W

STATE OF WISCONSIN *ex rel.* THREE UNNAMED PETITIONERS,

Petitioner,

v. Case Nos. 2013AP2504 - 2508-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

[CAPTIONS CONTINUED ON FOLLOWING PAGE]

BRIEF OF PROFESSORS OF LEGAL ETHICS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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STATE OF WISCONSIN *ex rel.* TWO UNNAMED PETITIONERS,

Petitioner,

v. Case No. 2014AP296-OA

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

STATE OF WISCONSIN *ex rel.* FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v. Case Nos. 2014AP417 - 421-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

and

EIGHT UNNAMED MOVANTS,

Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Rules

Other Authorities

INTERESTS OF *AMICI CURIAE*

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INTRODUCTION

On February 12, 2015, a Motion for Recusal and Notice of Ethical Concerns was filed in *Two Unnamed Petitioners v. Gregory A. Peterson*, No. 2014AP000296-OA. While the motion was filed under seal, media reports indicate that the recusal motion may involve independent expenditures by parties in the case made in support of the election of one of more justices on the Court.[1]

Amici respectfully submit this brief to urge the Court to apply its rules regarding judicial recusal, including the provision that "[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," Wis.SCR 60.04(8), so as to comply with controlling precedent of the U.S. Supreme Court, particularly *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Under this precedent, a litigant's independent expenditures in support of a judge's election necessitate judicial recusal when, under the circumstances of the case, such campaign support means that hearing the case would create a

[1] *See, e.g.*, Patrick Marley, *John Doe prosecutor asks one or more justice to step aside*, Milwaukee Journal Sentinel (Feb. 13, 2015), http://www.jsonline.com/news/statepolitics/john-doe-prosecutor-asks-one-or-more-justice-to-step-aside-b99444515z1-291866271.html.

"serious risk of actual bias" and thus violate the right to a fair trial. *Id.* at 884. While the determination as to when such a risk of bias exists is heavily fact-dependent, relevant considerations include the amount of spending, both in absolute terms and as a proportion of total spending; the apparent effect of the spending in the election; and the timing of the spending, the election, and the case in question.

Appropriate recusal standards are vital to the impartial administration of justice, especially in an era of dramatically increasing campaign spending in judicial elections. Because the recusal motion has been sealed, *amici* are unable to assess whether recusal is warranted in light of the particular circumstances of this matter. But any such determination must be guided in the first instance by the U.S. Supreme Court's binding precedent.

ARGUMENT

I. The U.S. Supreme Court established in *Caperton* that campaign spending by litigants can provide a mandatory basis for judicial recusal.

A. Recusal is mandatory where there is a serious risk of actual bias based on objective considerations.

The Supreme Court has long recognized that "[i]t is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton*,

556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotation marks and brackets omitted). Recusal is mandatory when, taking into account the full circumstances of the case, there is a "serious risk of actual bias." *Id.* at 881. In *Caperton*, the Court ruled that West Virginia Supreme Court of Appeals Justice Brent Benjamin's refusal to recuse himself, under circumstances that included extensive independent expenditures in support of his campaign by a litigant, violated due process.

The determination as to whether recusal is required incorporates objective standards. In *Caperton*, Justice Benjamin undertook "an extensive search for actual bias" by examining his own subjective motives and intentions. *Id.* at 886. The Court did "not question his subjective findings of impartiality and propriety." *Id.* at 882. Nevertheless, it concluded that "[d]ue 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.'" *Id.* at 886 (quoting *Murchison*, 349 U.S. at 136). The Court found that Justice Benjamin should have recused himself because, under the facts of the case, the *risk* of actual bias was "sufficiently substantial that [Justice Benjamin sitting on the case] 'must be forbidden if

the guarantee of due process is to be adequately implemented.'" *Id.* at 885 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Thus, even if a judge finds no subjective bias and would sincerely resist any temptation toward partiality, recusal is required when there is a serious risk of bias.

B. Substantial independent expenditures by a litigant can create an objective risk of actual bias necessitating recusal.

As reflected in *Caperton*, a serious risk of actual bias can occur when a litigant in a case spent significant sums on independent expenditures supporting an elected judge's candidacy. That conclusion is echoed by the American Bar Association, *see* ABA Resolution 105C (2014) (noting that "independent expenditures[] made during judicial elections raise concerns about possible effects on judicial impartiality and independence"). In such circumstances, "[d]ue process requires an objective inquiry into whether the contributor's influence on the election . . . 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Caperton*, 556 U.S. at 885 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

In *Caperton*, Don Blankenship, the CEO of Massey Coal Company, spent $3 million supporting Benjamin's successful campaign. *Id.* at 873. All but $1,000 of Blankenship's support consisted of independent expenditures or contributions to entities which engaged in independent expenditures, and Blankenship spent more than both candidates combined. *Id.* A few years later, the West Virginia Supreme Court reversed a $50 million jury verdict against Blankenship's company by a 3-2 vote, with Justice Benjamin joining the majority. *Id.* at 874. The U.S. Supreme Court reversed that decision, holding that Justice Benjamin's failure to recuse himself violated due process. *Id.* at 886-87.

Caperton did not lay out a specific test for determining when recusal is necessary under the due process clause, but rather undertook a fact-specific inquiry as to whether there was a serious risk of actual bias requiring recusal. The Court did, however, provide guidance as to the kind of factual circumstances likely to result in actual bias. Particularly central is the amount of spending, both in absolute terms and as a proportion of total spending. *See id.* at 884 (considering the "relative size in comparison to the total amount of money contributed to the campaign" and "the total amount spent in the election"). The "apparent effect" of the spending "on the

outcome of the election" is likewise an important consideration. *Id.* In *Caperton*, the Court found that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case," *id.*, noting that Blankenship's support was significant in light of the margin of victory of the election.[2] Also relevant is the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case." *Id.* at 886. The Court found that "[i]t was reasonably foreseeable, when [Blankenship's] campaign contributions were made," that his company's appeal would be heard by Benjamin if he was elected. *Id.*

Other considerations may also impact the extent to which independent expenditures pose a risk of actual bias. For example, while not addressed by the Supreme Court, in an amicus brief, the Conference of Chief Justices highlighted several potential factors, including the spender's pre-existing relationship with the judge, the relationship between the spender and the litigant, and whether the judge had knowledge of the support. Brief of the Conference of Chief Justices as Amicus Curiae in

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[2] *But see* Ronald D. Rotunda, *Judicial Disqualification in the Aftermath Of Caperton v. A.T. Massey Coal Co.*, 60 Syracuse L. Rev. 247, 272 (2010) (noting that while the margin of victory was less than 50,000 votes, "Benjamin won the election by 9.6 percentage points!").

Support of Neither Party, *Caperton*, 558 U.S. 868 (2009) (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 8, at *42-48.

The Supreme Court reaffirmed *Caperton* the next year in *Citizens United v. FEC.*, 558 U.S. 310, 358 (2010). Justice Kennedy—the author of the majority opinions in both *Caperton* and *Citizens United*—made clear that the due process requirement of recusal is consistent with the First Amendment's concern for political speech through independent campaign expenditures:

> *Caperton* held that a judge was required to recuse himself 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. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

Id. at 360 (internal citations and quotation marks omitted).

In short, while a litigant is permitted to independently spend as much as he or she wishes supporting a judicial candidate, doing so may result in the judge's mandatory recusal as a matter of due process in cases where the supporter is a litigant. In this way, two fundamental constitutional guarantees are appropriately balanced.

While *Caperton*'s standard for judicial recusal is "admittedly vague," judges subject to election "can be expected to recuse themselves in most cases that cross, or come close to crossing" the constitutional line set by the Court. Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 Syracuse L. Rev. 229, 234 (2010). "Indeed, judges ought to do so, because the ethical standard for recusal should be considered more demanding than the constitutional standard. In other words, a judge's 'impartiality might reasonably be questioned' in a case that merely comes close to satisfying the *Caperton* test." *Id.* (citing Model Code of Judicial Conduct R. 2.11(A) (2007); Model Code of Judicial Conduct Canon 3E(1) (1990)); *see also* Charles Gardner Geyh, James J. Alfini, Steven Lubet, & Jeffrey Shaman, Judicial Conduct and Ethics §4.16 (5th Ed. 2013) (if disqualification rules are "applied and enforced conscientiously, it will effectively force disqualification whenever there is a probability of bias, thus rendering due process claims unnecessary").

II. Wisconsin's judicial recusal rule must be applied so as to be consistent with U.S. Supreme Court precedent.

Under the Supremacy Clause, U.S. Const. art. VI cl. 2, and the Fourteenth Amendment, state judicial recusal rules must comport with the Constitution's guarantee of due process. U.S. Const. amend. XIV, § 1.

The Wisconsin Code of Judicial Conduct states that:

> 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.

Wis.SCR 60.04(8).

Caperton clearly established that under the U.S. Constitution, significant independent expenditures in a judicial election require recusal under circumstances where there is a serious risk of bias. This Court must interpret its recusal rules to comply with this standard. *See State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785 ("[I]t is a cardinal rule that courts should avoid interpreting a statute in a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional."). *See also State v. Allen*, 2010 WI 10, 322 Wis.2d 372, 778 N.W.2d 863, 880 (opinion of Abrahamson, C.J., Bradley, J., and Crooks, J.) ("All state courts are bound by the teachings of *Caperton* . . . .").

The Court can do so consistent with *Caperton* because the rule states that 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." Wis.SCR 60.04(8) (emphasis added). Under *Caperton*, the mere fact of an independent expenditure is not the grounds for recusal; rather, recusal is required when the full factual circumstances show a serious risk of actual bias.

Such an interpretation would not run afoul of the concerns expressed in the comment to Rule 60.04(8), which states that the rule is designed, in part, to prevent "a chilling effect on protected speech." As noted, the U.S. Supreme Court has made clear in *Caperton* and *Citizens United* that recusal based on a litigant's substantial independent expenditures does not violate the First Amendment. Rather, recusal may be required as a matter of due process. Recusal preserves the litigant's right to spend as much as he or she wants supporting a judge's candidacy without impairing the fairness of judicial proceedings.[3]

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[3] While the comment also suggests recusal could allow an independent spender to "dictate a judge's non-participation in a case," thereby "disrupt[ing] the judge's official duties," judges have a duty *not* to participate in a case when their participation presents a serious risk of bias. Furthermore, where, as here, the non-spending litigant moves for recusal, there is no concern that a party has engaged in gamesmanship. *See also* Wis.SCR 60.04(4), (6) (providing that parties and lawyers in a case may waive recusal).

III. Effective recusal standards are essential to an impartial judiciary.

Judicial recusal rules ensure not only the fairness of trials, but also the integrity of the judiciary and the public's confidence therein. As Justice Kennedy explained in *Caperton*, "[t]he citizen's respect for judgments depends . . . upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Caperton*, 556 U.S. at 890 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

For this reason, judges are required to step aside from cases involving close family relations, cases in which they previously participated as an attorney, cases in which they hold a financial interest, and cases in which they have a personal knowledge of disputed evidentiary facts. Wis. Stat. § 757.19(2)(c), (f), (g); Wis.SCR 60.04(4)(a), (c), (d). Regardless of whether a particular judge would in fact be biased in any such case, the risk to judicial integrity in those circumstances is sufficient to require the judge step aside.

Similarly, recusal in cases where a litigant was a key supporter of a judge is vital to preserving the integrity of the judiciary. *See, e.g.,* James Sample et al., Fair Courts: Setting Recusal Standards 8 (2008), *available at*

http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf (offering suggestions "to help judges, courts, legislators, and litigants maximize the due process protection that recusal potentially affords"). High spending in judicial elections, particularly by those with matters before the relevant courts, threatens the public's confidence in the fairness of our courts. As the Conference of Chief Justices explained, "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled." Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party, *Caperton*, 558 U.S. 868 (2009) (No. 08-22), 2009 U.S. C. Ct. Briefs LEXIS 8, at *9.

These concerns are heightened now, as campaign spending by special interests in judicial elections has risen dramatically since the early 1990s. *See* James Sample et al., The New Politics of Judicial Elections 2000-2009: Decade of Change 5-22 (Charles Hall ed., 2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf . Non-candidate spending has taken on an increasingly greater role as well, reaching a record $24 million—42% of total spending—during the 2011-2012 biennium. *See* Alicia Bannon et al., The New Politics of

Judicial Elections 2011-12, at 5 (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20 of%20Judicial%20Elections%202012.pdf.

Polling shows that the public overwhelmingly believes that judges should step aside from cases involving parties that contributed to judicial campaigns or made independent expenditures in judicial campaigns. In a 2013 poll, 87% of respondents said that independent expenditures in support of judicial candidates influence judicial decision making. 20/20 Insight, LLC, Justice at Stake/Brennan Center National Poll 3 (Oct. 2013), http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf. In the same poll, 92% of respondents said a judge should step aside from cases "where one of the two opposing parties had spent a significant amount to support the election of the judge." *Id.* at 4. Effective recusal rules are a critical measure to preserve the public's confidence in the fairness and impartiality of elected judges. *See* Adam Skaggs & Andrew Silver, *Promoting Fair and Impartial Courts Through Recusal Reform* (2011), *available at* https://www.brennancenter.org/page/-/Democracy/Promoting_Fair_Courts_8.7.2011.pdf.

CONCLUSION

For the reasons herein, this Court should consider the recusal motion in a manner consistent with the precedent set by the Supreme Court in *Caperton*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b) and (c)

I hereby certify that this amicus curiae brief conforms to the form and length requirements of Rule 809.19(8)(b) and (c) for an amicus curiae brief produced with a proportional serif font. The length of this brief is 2,918 words.

Dated this 2nd day of March 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this amicus curiae brief in compliance with Rule 809.19(12)(f). I further certify that the text of this electronic copy is identical to the text of the paper copy of this brief filed with the Court.

Dated this 2nd day of March 2015.

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