15-1416

IN THE

Supreme Court of the United States

JOHN R. CHISHOLM, *et al.*,

Petitioners,

—v.—

TWO UNNAMED PETITIONERS,

Respondents.

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF THE CENTER FOR MEDIA AND DEMOCRACY, THE BRENNAN CENTER FOR JUSTICE, AND COMMON CAUSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Petitioners,

—v.—

THE HONORABLE GREGORY PETERSON, and
EIGHT UNNAMED MOVANTS,

Respondents.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are national, nonpartisan organizations that work to promote fair and impartial courts and to expose the undue influence of wealthy special interests on our democratic institutions. *Amici* respectfully submit this brief because this case presents questions of overriding public importance that involve threats to the independence and impartiality of the Wisconsin judiciary and the ability of the state to ensure the integrity of its campaign finance regulations.

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law[2] is a not-for-profit, nonpartisan public policy and law institute that focuses on issues of democracy and justice and advocates for fair and impartial courts as guarantors of liberty in our constitutional system. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and

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[1] This *amicus curiae* brief is filed with the consent of all parties. Written consent is filed herewith in accordance with this Court's Rule 37.2(a). No counsel to any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

[2] This brief contains only the position of the Brennan Center and does not purport to represent the position of N.Y.U. School of Law.

interests that make for a rich and energetic democracy.

Amicus curiae The Center for Media and Democracy is a national watchdog group, with headquarters in Madison, Wisconsin, that conducts in-depth investigations into the undue influence of corporations on media and democracy. The Center has reported extensively on the John Doe investigation and the subsequent weakening of the state's campaign finance laws, its nonpartisan elections board, and its anti-corruption statutes.

Amicus curiae Common Cause is a nonpartisan, nonprofit advocacy organization founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. With nearly 475,000 members and supporters and 36 state organizations, Common Cause fights for honest, open and accountable government at all levels. Common Cause Wisconsin has played an important role for decades in promoting state campaign reforms, transparency and government accountability.

Amici submit this brief to highlight longstanding precedent which allows states to protect the integrity of their campaign finance rules, regulate coordinated expenditures, and prevent corruption through campaign contribution limits.

STATEMENT OF THE CASE

This is an extraordinary case with sweeping implications for both Wisconsin law and the integrity of its judiciary that "requir[es] this Court's intervention

and formulation of objective standards." *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 887 (2009).

Following a tumultuous period in Wisconsin politics that sparked massive political unrest and garnered intense national and international attention, a number of state senators and Governor Walker were subjected to recall elections in 2011 and 2012. Spending on those elections broke all previous records for the state and was dominated by outside spending by corporate entities that were prohibited from contributing to the candidates directly.[3] Governor Walker prevailed in the recall election.

Subsequently, a "John Doe" criminal investigation was commenced by five county district attorneys into alleged coordination of political spending between Governor Walker's campaign committee and other entities for the purpose of circumventing the state's ban on corporate contributions, contribution limits, and reporting requirements. That investigation was joined by Wisconsin's Government Accountability Board, and Francis Schmitz, a former anti-terrorism investigator at the U.S. Department of Justice under President George W. Bush, was appointed as special prosecutor. Subpoenas were granted by Judge Barbara Kluka and thousands of pages of documents collected.

Before the investigation could be completed, however, the new John Doe judge, Gregory Peterson, granted motions to quash the subpoenas and ordered the evidence returned. A flurry of related litigation ensued, and eventually the matter was heard on

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[3] *Recall Race for Governor Cost $81 Million*, WIS. DEMOCRACY CAMPAIGN (Jan. 31, 2013), http://www.wisdc.org/pr072512.php.

consolidated motions before the Wisconsin Supreme Court.

Special Prosecutor Schmitz filed a Motion for Recusal and Notice of Ethical Concerns in February 2015, asking justices Prosser and Gableman to step aside, and raising concerns about two other justices.[4] Appendix N. Although the motion is heavily redacted, it is possible to glean from the motion, Justice Prosser's response, and news accounts that the focus of the special prosecutor's concerns was that the same entities subject to the John Doe criminal investigation had spent $10 million since 2007 to elect the four justices to the Wisconsin Supreme Court.[5]

Even more troubling, the special prosecutor may have unearthed documents suggesting that justices Prosser and Gableman or their campaigns benefitted from coordinated activities by the subjects of the investigation, may have had direct campaign-related interactions with individuals under investigation, and may have had knowledge of the movants' activities on their behalf.

Nonetheless, the two justices refused to recuse themselves from the case.

The court went on to cancel oral argument, issue sweeping secrecy orders, halt the investigation, fire the special prosecutor, order the evidence returned and copies destroyed, and dramatically curtail Wis-

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[4] Justice Bradley had previously recused herself from the case because her son worked at one of the law firms representing Unnamed Movant No. 7.

[5] Brendan Fischer, *Justices in Walker Criminal Probe Face Conflicts of Interest*, PR WATCH (Oct. 6, 2014), http://www.prwatch.org/news/2014/10/12617/justices-walker-criminal-probe-face-conflict-interest.

consin's campaign finance law, rendering the longstanding limits and other restrictions the state places on contributions to candidates virtually meaningless.

Amici respectfully urge the Court to grant the Writ of Certiorari to address two separate issues:

First, must campaign spending coordinated with a candidate contain "express advocacy" or its equivalent in order to be treated as a direct contribution to that candidate? The Wisconsin court said that it must, relying almost entirely on *Citizens United v. FEC* and *Wisconsin Right to Life v. FEC*, both of which were about limits on *independent expenditures* and had nothing to do with contribution limits. Those cases did not displace, and in fact reaffirmed, decades of precedent—including a 7-2 ruling in *McConnell v. FEC*—holding that a broad array of coordinated spending will be "as useful to the candidate as cash" and can be treated accordingly. *See* 540 U.S. 93, 221 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 442, 446 (2001) ("*Colorado II*")). The Wisconsin court's decision to unilaterally discard this longstanding approach essentially leaves the state without any meaningful contribution limits whatsoever.

Second, did the "objective risk of actual bias" on the part of one or more of the justices who decided this case necessitate recusal? Just this month, this Court reaffirmed that "[w]hen the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless." *See Williams v. Pennsylvania*, No. 15-5040, slip op. at 13 (U.S. June 9, 2016). Whether it was one justice, two or four who had a conflict of interest of constitutional significance in this case,

their failure to recuse cannot be allowed to stand if principles of fairness and judicial integrity are to survive in Wisconsin.

For these reasons, the Writ should be granted and the decision of the Wisconsin Supreme Court should be overturned.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT ITS PRECEDENT ALLOWS REGULATION OF COORDINATED EXPENDITURES AND TO ENSURE THAT STATES MAY PREVENT CORRUPTION THROUGH CAMPAIGN CONTRIBUTION LIMITS.

The Wisconsin Supreme Court's holding that coordination laws may only apply to communications containing express advocacy or its equivalent puts it squarely in conflict with *Citizens United* and this Court's other holdings over the past forty years.[6] Indeed, the Wisconsin court's approach renders the central premise of *Citizens United* concerning independent expenditures virtually meaningless, and throws open the door to circumvention of contribution limits and disclosure laws designed to prevent corruption and its appearance. Certiorari should be granted to correct its blatant error of law.

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[6] While the Wisconsin court decided this aspect of the case under both the federal and state Constitutions, it noted that freedom of speech rights under the Wisconsin Constitution and the federal Constitution are coextensive. *Two Unnamed Petitioners v. Peterson*, 363 Wis.2d. 1, 30, n. 8 (2015).

A. The Wisconsin Supreme Court's decision directly contravenes this Court's holdings that the government may treat a coordinated expenditure as a contribution regardless of whether the resulting communication contains express advocacy or its functional equivalent.

As Petitioners explain, the ruling below flies in the face of decades of this Court's precedent on the permissible scope of direct contribution limits, which the Court explicitly reaffirmed in both *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*") and *Citizens United v. FEC*, 558 U.S. 310 (2010). Those cases curtailed only the government's ability to regulate *independent* campaign spending.[7] Indeed, the *Citizens United* Court repeatedly emphasized that it is because of the "absence of prearrangement and coordination" that independent expenditures have a tenuous link to quid pro quo corruption. 558 U.S. at 345 (quotation marks omitted).

In this respect, *Citizens United* did not overturn, but instead reaffirmed, decades of precedent holding

[7] "Express advocacy" and its functional equivalent consist of so-called "magic words" like "vote for," "elect," "support," "defeat," and other expressions that are "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70 (Roberts, C.J., controlling opinion); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). *WRTL* applied the "express advocacy" standard to the federal law banning corporate electioneering communications — its reasoning applied solely to *independent* spending, and had no bearing on coordinated spending, which may be treated as a contribution. Three years after *WRTL*, the federal corporate electioneering communications ban was invalidated in *Citizens United*, displacing *WRTL*'s express advocacy test.

that coordinated expenditures "made after a 'wink or nod' often will be 'as useful to the candidate as cash,'" and thus may be regulated like direct contributions. *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431, 442, 446 (2001) ("*Colorado II*")).

Similarly, in *FEC v. National Conservative Political Action Committee*, Justice Rehnquist's majority opinion explained that the absence of coordination "undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo*." 470 U.S. 480, 498 (1985).

In *McConnell*, seven justices voted to uphold the federal law applying coordination rules to electioneering communications, which by definition are not limited to express advocacy or its equivalent. *See* 52 U.S.C. § 30104(f)(3). As Justice Kennedy concluded, that law "satisf[ied] *Buckley*'s anticorruption rationale" by "treat[ing] electioneering communications expenditures made by a person in coordination with a candidate as hard-money contributions to that candidate." *McConnell*, 540 U.S. at 319 (Kennedy, J., concurring in the judgment and dissenting in part) (also noting that the coordination limitation "regulates conduct that poses a *quid pro quo* danger—satisfaction of a candidate's request"); *see also FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999) (concluding that "importing the 'express advocacy' standard into [the] contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and

perceived corruption that can flow from large campaign contributions").

The Wisconsin Supreme Court's ruling is wholly at odds with these longstanding decisions,[8] as well as the holding of the U.S. Court of Appeals in this very same case. *O'Keefe v. Chisholm*, 769 F.3d 936, 942 (7th Cir. 2014) ("No opinion issued by the Supreme Court, or by any court of appeals, establishes ('clearly' or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an *inquiry* into that topic.").

In fact, by importing the express advocacy limitation into its analysis of contribution limits, the court below is doing what the *Citizens United* Court made clear it was *not*: opening the door to unlimited *coordinated* spending. *See* 558 U.S. at 357 (noting that lack of coordination "alleviates the danger" of corruption).[9]

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[8] *See* Brent Ferguson, *A New Threat to the Viability of Campaign Contribution Limits*, 65 EMORY L.J. ONLINE 2020, 2025-29 (2016), http://law.emory.edu/elj/elj-online/volume-65/essays/new-threat-viability-campaign-limits.html.

[9] The Wisconsin court purported to rest its decision partially on vagueness grounds, yet this Court and others have consistently rejected vagueness challenges to identical laws. The law invalidated by the Wisconsin Supreme Court regulated payments made "for the purpose of influencing [an] election." *Peterson*, 363 Wis.2d at 44. In *Buckley*, this Court upheld contribution limits that defined "contribution" using the same "for the purpose of influencing" language; that language was too vague only as applied to independent expenditures. 424 U.S. at 23-30, 44. In *McCutcheon v. FEC*, the Court found it unnecessary to "revisit *Buckley*'s distinction between contributions and independent expenditures," reiterating *Buckley*'s holding that

B. The Wisconsin Supreme Court's approach eviscerates contribution limits and disclosure protections.

The Wisconsin Court's misapplication of this Court's precedents is not just a question of arid doctrine; its reasoning eviscerates contribution limits and transparency protections in that state and will do the same if adopted in other jurisdictions. Already, too much super PAC and other outside spending is closely coordinated with candidates and is anything but transparent. The Wisconsin Court's approach takes an already troubling situation and makes it exponentially worse.

Citizens United concluded that corporate independent expenditures "do not give rise to corruption or the appearance of corruption" because such expenditures are free of "prearrangement and coordination" with candidates. 558 U.S. at 357. The Court also recognized the value of transparency, noting that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Id.* at 370. Nonetheless, since *Citizens United*, a great deal of outside spending has been neither truly independent nor transparent.[10]

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there is a risk of corruption posed by contributions. 134 S. Ct. 1434, 1445 (2014).

[10] *See, e.g.,* CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES (2014), https://www.brennancenter.org/publication/after-citizens-united-story-states.

The Wisconsin court's holding in this case ignores the reasoning of *Citizens United* and creates an exception that swallows the rule. If coordination laws only apply to communications containing express advocacy, then a candidate or candidate committee may solicit unlimited and undisclosed contributions, including from otherwise illegal sources, for political committees or nonprofits that perform traditional campaign functions in close coordination with the candidate, as long as those groups steer clear of express advocacy.

Since political ads generally avoid express advocacy anyway,[11] this means Wisconsin no longer has any meaningful limit on campaign contributions, that its longstanding prohibition on corporate and union campaign contributions has been rendered ineffective, and that the state's disclosure laws will only reach a fraction of the political spending in future elections. At least one other court and one state regulator has made the same mistake as the court below;[12] wider adoption of the *Peterson* rule will

[11] In *McConnell*, the Court noted that "campaign professionals testified that the most effective campaign ads . . . should, and did, avoid the use of the magic words [of express advocacy]," and that express advocacy was used in 5% or less of candidate ads in the 1998 and 2000 elections. 540 U.S. at 127, 127 n.18. More recent studies have reached the same conclusion that political ads generally avoid express advocacy. Erika Fowler, *A Brief Word on 'Magic' Words*, WESLEYAN MEDIA PROJECT (Oct. 18, 2010), http://mediaproject.wesleyan.edu/2010/10/18/magic-word-update/ (finding that, with respect to independent group advertisements in 2010, only approximately one in ten advertisements in U.S. Senate races and one in three advertisements in U.S. House races used "magic words" of express advocacy).

[12] *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861 (E.D. Wis. 2014); Ariz. Citizens Clean Elections Comm'n, Tr. of Public Meeting

threaten contribution limits and disclosure laws throughout the nation.

Though federal and state elections show how creative some candidates and groups can be in order to circumvent limits, recent elections in Florida demonstrate that adoption of the *Peterson* rule would create a much broader problem. Florida's campaign laws allow candidates to fully coordinate with super PACs and other groups supporting them as long as the groups avoid express advocacy. *See* Fla. Stat. Ann. § 106.011(8)(c).[13] The results have been stark: gubernatorial candidates raise and spend millions for unencumbered shadow campaigns run through such organizations.

In 2014, the Florida Governor's race was the most expensive election in the country as measured by television advertisement spending, with over $98 million spent.[14] The overwhelming cost of the race was fueled by the candidates' ability to evade the state's $3,000 contribution limits and use super PACs

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14-16 (Oct. 22, 2010) (explaining belief that "*Wisconsin Right to Life* and other Supreme Court cases" disallow application of coordination rules to any communication that does not contain express advocacy or its equivalent).

[13] *See also Scott v. Roberts*, 612 F.3d 1279, 1284-85 (11th Cir. 2010) (explaining parties' belief that Florida candidates could permissibly coordinate with groups that spend unlimited money on electioneering communications).

[14] Michael Beckel, Reity O'Brien & Kytja Weir, *Who's Calling the Shots in State Politics? Nearly 100,000 negative ads helped turn tide in Florida elections*, CTR. FOR PUB. INTEGRITY (Nov. 14, 2014), https://www.publicintegrity.org/2014/11/14/16274/nearly-100000-negative-ads-helped-turn-tide-florida-elections. State residents also saw 96,600 attack ads, which was the most in the nation and more than the total number of political ads that ran in 39 states. *Id.*

and parties as shadow campaign committees. The two principal candidates for governor spent a combined $5.9 million, about six percent of the $98 million spent on the race.[15] The main super PAC supporting Democratic candidate Charlie Crist spent almost three times as much as the Crist campaign, mostly on television ads attacking Republican candidate Rick Scott.[16] Scott's super PAC spent more than twice as much as his campaign committee, and also used Scott's campaign slogan, "Let's Get to Work," as its name.[17] The super PAC did little to hide its collaboration with Scott, running an ad called "Grandpa," in which Scott and his grandson starred.[18]

Florida's experience is not anomalous. As history shows, candidates and special interests will exploit any opportunity the law allows. Indeed, as this Court recognized in *Buckley*, "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 45.

Of course, Florida's rule is the result of a law passed by its elected representatives, while Wisconsin's is based on a misinterpretation of precedent. If

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[15] *Who's calling the shots?: State ad wars tracker, Florida*, CTR FOR PUB INTEGRITY (Dec. 8, 2014), https://www.publicintegrity.org/who-calls-shots/florida.

[16] *Id.*

[17] *Id.*

[18] Let's Get to Work, *Grandpa*, YOUTUBE (May 16, 2014), https://www.youtube.com/watch?v=EkZuYnN97so.

Wisconsin's *Peterson* rule is applied more broadly, blatant coordination would become much easier due to an error of law, and that error would prevent citizens from enacting contribution limits and other common sense laws to provide an effective check on quid pro quo corruption.

* * *

The Court should grant *certiorari* to clarify the conflict created by the Wisconsin Supreme Court and to allow states to protect the effectiveness of their longstanding campaign finance rules. Contribution limits and disclosure help maintain the integrity of our public institutions. Those institutions, including the courts, will suffer if the Wisconsin court's grave misinterpretation of law goes uncorrected, allowing interest groups and candidates to circumvent even the most basic of anti-corruption rules.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE REFUSAL OF TWO JUDGES TO RECUSE THEMSELVES DEPRIVED PETITIONERS OF A FAIR TRIBUNAL AND DEMEANED THE REPUTATION AND INTEGRITY OF THE WISCONSIN SUPREME COURT, DAMAGING PUBLIC CONFIDENCE IN THE COURTS.

A. Judicial integrity requires recusal where there is a serious risk of actual bias and the perception thereof.

A fair trial in a fair and independent tribunal is a bedrock of American democracy and "'essential' to our form of government." *N.C. Right to Life Comm.*

Fund v. Leake, 524 F.3d 427, 441 (4th Cir. 2008) (quoting The Federalist No. 78 (Alexander Hamilton)). Where unfairness is found in the highest level of a state judicial system, this Court's review offers the only means of mitigating the damage done to judicial integrity.

Fairness and impartiality constitute the fulcrum upon which interests in the adversarial process are balanced. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, No. 15-5040, slip op at 13 (U.S. June 9, 2016). Every litigant—and the public at large—requires impartial courts as a condition precedent to the legitimate administration of justice. A biased tribunal is likewise inimical to the republican form of government.[19]

This Court has consistently held that states have a "compelling interest in judicial integrity" that is "of the highest order." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015); *Republican Party of Minn. 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." *Republican Party of Minn.*, 536 U.S. at 793.

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[19] This Court may also safeguard petitioners' interest in a fair trial through the constitution's Guarantee Clause under which the United States shall assure each state a "a Republican Form of Government … " U.S. CONST. art. IV, § 4, cl. 1. Where, as here, a state court has failed to address a conflict of interest that fundamentally affects the ability of the tribunal to render a fair process, the United States must guarantee a remedy that addresses the impediment and restores fairness. Luke Bierman, *Comment on Paper by Cheek and Champagne: The Judiciary as a "Republican" Institution*, 39 Willamette L. REV 1385 (2003).

That interest is no less compelling at the federal level and is implicit in deeply rooted notions of judicial independence. The importance of a judiciary free from outside political influence was recognized in the Declaration of Independence and embedded in Article III of the U.S. Constitution. *See* U.S. Const. art. III; The Declaration of Independence para. 11 (U.S. 1776) ("[King George] has made Judges dependent on his will alone").

Because our courts ultimately rely on the public's confidence,[20] judicial integrity requires that adjudicators be neutral in both fact and appearance. "As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'" *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954)).

For this reason, it is axiomatic that no judge may "be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). When a judge has a personal interest in the outcome of a case, that judge must step aside.

Similarly, a fair tribunal is universally recognized as an indispensable aspect of the 14th Amendment Due Process guarantee. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *In re Murchison*, 349 U.S. at 136; *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (stating that State power to set procedures is limited where it "offends some principle of justice so rooted in the traditions and conscience of our people as to be

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[20] "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment." *Williams-Yulee*, 135 S. Ct. at 1666 (quoting THE FEDERALIST NO. 78, p. 465 (Hamilton)).

ranked as fundamental.") (internal quotation marks omitted); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (finding "a powerful and independent constitutional interest in fair adjudicative procedure.").

That fundamental principle of justice is compelling on both sides of the adversarial process. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) ("It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("But justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true.").

As this Court held in *Caperton*, recusal is mandatory when, considering the circumstances of the case, there is a "serious risk of actual bias." 556 U.S. at 884.

B. The exceptional extent of the movants' role in electing two justices to the Wisconsin Supreme Court, and the justices' personal involvement with the movants, created a serious risk of actual bias that harmed judicial integrity.

If the constitutional guarantee of a proceeding that is fair in appearance and in fact is to have any meaning, a judge who has both significantly benefitted from litigant support, been personally involved in matters closely relating to the case before him, and likely has a stake in the outcome of the case, cannot then be the adjudicator of that case. Publicly available facts indicate that at least two justices received significant

financial support from the litigants in the case and had a personal stake in the outcome of the underlying investigation. It is difficult to imagine facts that more acutely raise a "serious risk of actual bias."

1. According to publicly available facts, movants spent so extensively to promote the election of Justices Prosser and Gableman as to necessitate judicial recusal in this case.

As this Court recognized in *Caperton*, campaign spending by litigants, including independent expenditures, can contribute to circumstances where the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This is particularly so when someone with a "personal stake" in a case played a "significant and disproportionate" role in getting a judge on that case elected. *Id*. at 884.

In *Caperton*, Don Blakenship, president and CEO of Massey Coal Co., had spent $3 million to promote the election of Judge Brent Benjamin, who subsequently voted to reverse a $50 million verdict against Massey. Blankenship supported Benjamin's campaign while Massey's case was pending and likely to be reviewed by the West Virginia Supreme Court, and Blankenship's support may have been determinative in Benjamin's election victory.

The spending by movants in this case to elect two justices to the Wisconsin Supreme Court was comparable. In 2011, Justice Prosser was elected to office by just 7,000 votes, after an expensive recount, in a

race widely viewed as a referendum on Governor Walker's controversial bill ending collective bargaining for public sector workers' legislation. The movants and the shadow groups they funded poured $3.5 million into expenditures into promoting Justice Prosser's election, five times the $701,000 spent by Prosser's campaign.[21] The expenditures were made during the same time period and involved the same players as the actions under investigation in this case.

Similarly, Justice Gableman was elected to office in 2008 by a narrow margin after a hotly contested race. The movants and their offshoots spent a combined total of $3.2 million to support his election, nearly eight times the $411,000 spent by Gableman's campaign.[22]

Shortly after the recall elections, one of the movants, Wisconsin Manufacturers & Commerce (WMC), put out a press release boasting of the $6.75 million it had spent on the previous three Supreme Court elections, and that its ads and the "fortitude of

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[21] *David T. Prosser, Jr. Wisconsin State Supreme Court*, WISCONSIN DEMOCRACY CAMPAIGN, http://www.wisdc.org/pro11-100823.php (Nov. 8, 2013); WISCONSIN MANUFACTURERS & COMMERCE, *WMC: Big Stakes for Supreme Court Election* (Jan. 7, 2013), www.prwatch.org/files/wmc_big_stakes_for_supreme_court_election_wmc.pdf.

[22] *Michael J. Gableman Wisconsin State Supreme Court*, WISCONSIN DEMOCRACY CAMPAIGN, http://www.wisdc.org/pro08-103914.php (Jan. 30, 2009); WISCONSIN MANUFACTURERS & COMMERCE, *WMC: Big Stakes for Supreme Court Election* (Jan. 7, 2013), www.prwatch.org/files/wmc_big_stakes_for_supreme_court_election_wmc.pdf; WISCONSIN CLUB FOR GROWTH FORM 990 (2008), www.sourcewatch.org/images/6/6a/Club_for_Growth_WI_2008_Tax_form_990.pdf.

the Wisconsin business community" were largely responsible for Justice Gableman unseating the first incumbent justice since 1967.[23]

Under any objective standard, the "significant and disproportionate influence" of the movants' spending to place the justices on the bench created the possibility of a debt of gratitude that presents an "unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. Not only were the justices put in a position of making rulings that could cost their biggest campaign supporters millions in civil fines, but upholding the district attorneys' theory of prosecution could have sent those supporters to jail. *See id.* at 886.

As in *Caperton*, the amount spent by the movants and the organizations they controlled "eclipsed" the amount spent by other supporters of Prosser and Gableman, as well as the amount spent by their own campaign committees. *Id.* at 884. In Justice Benjamin's case, Blankenship spent $3 million, more than "300% the amount spent by Benjamin's campaign committee." *Id.* For Prosser and Gableman, spending by the movants in this case was 500% and 785% what their own campaign committees spent, respectively.

And while many of the facts in this case have been sealed, it is clear that the movants' campaign support played a disproportionate role in the justices' elections, at a time when movants may have had reason to believe their allegedly illegal coordination could result in prosecution.

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[23] *WMC: Big Stakes for Supreme Court Election* WISCONSIN MANUFACTURERS & COMMERCE, (Jan. 7, 2013), www.prwatch.org/files/wmc_big_stakes_for_supreme_court_election_wmc.pdf.

The millions spent to promote those justices' election and assist with their campaigns "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). And "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public's confidence in the judiciary." *Williams-Yulee*, 135 S.Ct. at 1667 (quoting *Republican Party of Minn.*, 536 U.S. at 790 (O'Connor, J., concurring)).

2. Recusal was required because two of the justices appear to have benefitted from coordination between the movants in this case, and further investigation may have revealed coordination between movants and the justices' campaigns.

But this case is not just about the impact of large campaign expenditures on a judge's ability to meet an objective standard of impartiality. Here, as in *Williams v. Pennsylvania*, two justices also appear to have had "significant, personal involvement" in the case by virtue of their relationships, communications, and possible coordination with the subjects of the criminal investigation. *Williams*, slip op. at 9.

Beyond the *Caperton*-type outsized role of the movants in placing justices on the bench, here there is reason to believe that two justices directly benefitted from the same type of behavior by the subjects of the

underlying criminal investigation that the prosecutors allege violated Wisconsin law. In addition to owing a "debt of gratitude" to the movants in this case, the justices or their agents may well have found themselves on the wrong side of the law had the investigation continued. *Caperton*, 556 U.S. at 882.

The precise facts at play here are shrouded by the Wisconsin Supreme Court's extensive redactions, a censoring of the public record that Justice Abrahamson vigorously objected to, and that seem designed as much to protect the court from public scrutiny as the "John Doe" defendants. *See Two Unnamed Petitioners v. Peterson*, 363 Wis.2d 1, 190 (Wis. 2015) ("The extent of secrecy this court has imposed is unwarranted.")(Abrahamson, J. dissenting). However, the nature of the recusal request is clear.

In his recusal motion, Special Prosecutor Schmitz argues that "serious ethical issues now arise because several of these individuals and entities [under investigation] also had significant involvement in the election of particular Justices to the Wisconsin Supreme Court." Appendix N at 4. Schmitz then goes on to list seven of the eight unnamed movants in this litigation.

Schmitz notes that the movants provided "financial support during the last four Supreme Court elections . . . to the benefit of four current Justices"; that two of the movants had "direct involvement" with the reelection campaign of one justice; that the treasurer of Walker's campaign committee was also associated with the campaign committee of one justice; and that one justice's campaign had a "close connection" with more than one movant. *Id*. at 4, 9-10, 14-16.

With respect to one of the justices, Schmitz concludes that "there is a potential overlap between the activities" of his campaign "during the…election which is within the scope of the investigation now before this court." *Id*. at 16 (emphasis added). Justice Prosser was reelected in 2011, the same year as the Senate recall campaigns.

The investigation also appears to have turned up at least one interaction with a justice's campaign that "gave rise to a reportable contribution as a coordinated expenditure"—the activity at the heart of the case and the court's decision. *Id*. at 20.

As a result of that activity, "the Justices will be deciding issues that may well reflect back on their own campaign committees and any interaction that may have taken place between these committees" and movants in the case. *Id*. at 21.

The special prosecutor noted that with the investigation halted and the evidence sealed, information concerning the justices' activity "would remain . . . unknown, possibly forever." *Id*. Indeed, the court's subsequent decision to terminate the investigation and its *sua sponte* order to return and destroy the evidence gathered forecloses any risk that facts that could reflect poorly on the justices, or implicate them in any violations of law, will ever see the light of day—unless this Court intervenes.

Based on the foregoing, two Wisconsin justices had "significant, personal involvement" with movants in the case before the court and have a direct personal stake in the outcome of the case. *Id*. at 23; *see Williams*, slip op. at 11; *In re. Murchison,* 349 U.S. 133; *Lavoie*, 475 U.S. 813.

It is bad enough that the public might reasonably interpret the Wisconsin Supreme Court's decision as a "get out of jail" card repaying a debt of gratitude to litigants who had a disproportionate influence putting some of the justices on the bench. It is even worse that the public might reasonably think those justices also dealt themselves and their campaign committees the same card.

CONCLUSION

For the foregoing reasons, the court should grant *certiorari* to the petitioners.

Respectfully submitted,

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