IN THE SUPREME COURT OF WISCONSIN

Case Nos. 2013AP2504–2508-W
Case No. 2014AP296-OA
Case Nos. 2014AP417–421-W

Case Nos. 2013AP2504 – 2508-W

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

v.

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

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

BRIEF OF THE ETHICS AND PUBLIC POLICY CENTER AS *AMICUS CURIAE* RESPECTING THE MOTION FOR RECUSAL, SEEKING ITS DENIAL, IN SUPPORT OF NO PARTY

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Case No. 2014AP296-OA

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

v.

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

L.C.#s 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

Case Nos. 2014AP417 – 421-W

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

v.

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
Respondent,
and

EIGHT UNNAMED MOVANTS,
Interested Parties.

L.C.#s 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

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INTERESTS OF THE *AMICUS CURIAE*

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending America's founding principles, including respect for the inherent dignity of the human person, individual freedom and responsibility, justice, the rule of law, and limited government. As part of its activities, EPPC's program on The Constitution, the Courts and the Culture works against the politicization of the criminal justice system.

EPPC provides ongoing research and commentary on matters related to legal and judicial ethics and has participated as *Amicus Curiae* in matters before the United States Supreme Court including submissions in *Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014)*, *Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)*, and *Van Orden v. Perry, 545 U.S. 677 (2005)*.

Submitted with this Brief are The Affidavit of Michael Krauss in Support of Brief of Ethics and Public Policy Center as *Amicus Curiae* Respecting the Motion for Recusal, Seeking its Denial, In Support of No Party (hereinafter "Krauss

Affidavit") and The Affidavit of Ronald D. Rotunda in Support of Brief of Ethics and Public Policy Center as *Amicus Curiae* Respecting the Motion for Recusal, Seeking its Denial, In Support of No Party (hereinafter "Rotunda Affidavit"). Each is an expert in legal ethics and their background and qualifications are set-forth in their respective affidavits. Professor Rotunda was cited by the Brief of Professors of Legal Ethics as *Amici Curiae* in Support of Neither Party. *See* Brief of Professors of Legal Ethics as Amici Curiae in Support of Neither Party, Wisconsin ex rel. Three Unnamed Petitioners v. The Honorable Gregory A. Peterson, Nos. 2013AP2504- 2508-W, 2014AP296-0A, 2014AP417- 421-W, fn 2, p. 10 (brief filed March 2, 2015) [hereinafter "Brennan Center Brief"].

EPPC believes it is important to avoid the politicization of legal and judicial ethics and to respect the constitutional rights of free speech and due process embodied in the First and Fourteenth Amendments. Accordingly, EPPC submits this brief to contest the proposition that independent expenditures in support of a judge's

election can provide any possible basis for *the state* to seek recusal of that judge, particularly where there is no possible nexus between those contributions and the matter before the court. This Brief and the supporting Affidavits are respectfully submitted to provide the Court with that important perspective.

FACTUAL BACKGROUND

On October 3, 2013 armed officers raided the homes of conservative activists throughout Wisconsin. That is the first date conservative activists and independent groups could have known they were targets and that a case might someday come before this Court.

Each Justice identified publicly as subject to the pending Motion for Recusal, was elected prior to the raids on conservative homes--Justice Roggensack (April 2013), Justice Prosser (2011), Justice Gableman (2008) and Justice Ziegler (2007). It is, accordingly, factually indisputable that no independent expenditures, undertaken during the election of any Justice now subject to the Motion, took place at a time that the person or group making the expenditure could have intended to affect the outcome of these proceedings.

ARGUMENT

I. THIS COURT'S RULES UNEQUIVOCALLY REQUIRE THAT THE MOTION FOR RECUSAL BE DENIED.

A. Wis. SCR 60.04 (7) & (8) reject the notion that past expenditures during an election campaign are sufficient to disqualify a Justice.

Wis. SCR 60.04 (7) & (8) could not be more clear in demonstrating a commitment to free and open election of this Court's Justices. In acknowledging that campaign contributions made directly to a Justice's campaign committee and that sponsorship of independent expenditures or issue advocacy do not require disqualification, this Court understood the critical importance of free speech in the electoral process. Indeed, the Comments explaining those Rules leave no doubt about the underlying principles:

> A judge is not required to recuse himself or herself from a proceeding solely because an individual or entity involved in the proceeding has sponsored or donated to an independent communication. Any other result would permit the sponsor of an independent communication to dictate a judge's non-participation in a case, by sponsoring an independent communication. Automatically disqualifying a judge because of an

> independent communication would disrupt the judge's official duties and also have a chilling effect on protected speech.

Wis. SCR 60.04(8) (Comment).

So, too, this Court was prescient in its discussion of Wis. SCR 60.04(7) when it began that discussion with an unequivocal statement that the people of this state have, for more than 160 years, wholeheartedly endorsed an elected judiciary. In doing so, the Court acknowledged that disqualifying judges based on campaign contributions acts either implicitly or explicitly to "create the impression that receipt of a contribution automatically impairs the judges integrity." Wis. SCR 60.04 (7) (Comment). That "impression" cannot be tolerated if the judiciary is to honor a commitment to free speech and judicial elections. Justice Roggensack eloquently summarized the most pernicious nature of a recusal motion, "Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case." *In the matter of amendment of the Code of Judicial*

Conduct's rules on recusal. In the matter of amendment of Wis. Stat. ¶ 757.19, 2010 WI 73, ¶ 11 (Roggensack, J., concurring).

As Professor Ronald Rotunda concluded, Rule 60.04(8) states the appropriate standard in all but the 'exceptional case,' because "[i]ndividuals and corporations have a constitutional right to advocate in support of or against candidates for public office, and state law appropriately defines any conditions regarding such advocacy." Rotunda Aff. ¶ 5.

As the Brennan Center Brief describes *ad nauseum* that "high spending" is the culprit (Brennan Center Brief, p. 12-13), it places itself squarely at odds with both this Court's recusal Rules and the views of the people of this state that have uniformly supported an elected judiciary.

This Court must continue to support, through its actions generally and through the actions of individual Justices deciding on their recusal, a vigorous and open electoral process. Recusal based on mythical fears has no place in this Court.

B. There is no factual predicate even to consider recusal.

It is axiomatic that there must be a nexus between a contribution and an expected judicial action for there to be any cause for concern.[1] Yet, here there is not even an attempt by the Brennan Center Brief to relate the election of any Justice to an expenditure.

Indeed, if there was to be any relationship it would be solely with Chief Justice Abrahamson whose re-election in 2014 post-dated the disclosure that this case had begun. But, of course, the Brennan Center makes no such connection.[2] As to the other Justices, their elections predated the existence of this case and as a result there is no

[1] In campaign law parlance, there must be a "*quid pro quo"* for there to be a concern about corruption. *See, e.g., FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 478-79 (2007).

[2] The reasoning of those seeking recusal must be seen in a number of important lights. For example, an expenditure *against* a Justice (as might be anticipated by conservatives against a liberal judge) may be equally powerful in creating a bias by the Justice, albeit against that group. So too, as this Court itself recognized in the Rules, a group could spend money for or against a Justice for the sole purpose of obtaining a recusal—a particularly pernicious result of automatic recusal. Wis. SCR 60.04(8) (Comment) ("Any other result would permit the sponsor of an independent communication to dictate a judge's non-participation in a case, by sponsoring an independent communication.").

plausible relationship of an expenditure/contribution to this case. As such, there is no basis to consider potential recusal.

Interestingly, during the discussions about adoption of changes to Wis. SCR 60.04(7) & (8), Justice Bradley, speaking for the dissenting Justices, acknowledged that the new Rules allow for contributions from those with cases then pending before the Court. It was that critical component – a *pending case* – that drew their ire. Not even the dissenting Justices expressed a concern for expenditures or contributions that predated, as here, the existence of a pending matter. *In the matter of amendment of the Code of Judicial Conduct's rules on recusal. In the matter of amendment of Wis. Stat. ¶ 757.19*, 2010 WI 73, ¶ 29 (Bradley, J., dissenting).

In addition, Justice Bradley explicitly referenced the Brennan Center's position in those rule-making proceedings, a position this Court soundly rejected. The Brennan Center Brief now simply rebrands those same arguments as if nothing had changed. *Id.* ¶ 30. The Brennan Center's political agenda against the election of judges and against the public's participation in the electoral process through

contributions is here portrayed, *sotto voce*, through its discussion of the Recusal Motion. It must be soundly rejected as unhinged from any factual predicate.

II. *CAPERTON* HAS NO APPLICATION TO THIS MATTER.

A. *Caperton* is premised on due process rights and the state has no due process rights of its own to enforce—due process protects the citizens from the government, not the reverse.

By any standard, the *Caperton* case is certainly an "extreme" example of circumstances causing recusal. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009) (The Court itself referred to the "extreme facts" at issue). The suggestion, then, that *Caperton* has applicability here is fundamentally wrong. Setting aside the distasteful idea that a prosecutor would seek to disqualify a member of this Court recognizing that, unlike other Courts, this Court must rule on matters, (*See Laird v. Tatum*, 409 U.S. 824, 837-38 (1972)) the notion that a prosecutor may here seek recusal requires that the Court suspend the very principles of due process.

As the Supreme Court has clearly pointed out, "The word 'person' in the context of the Due Process Clause . . . cannot, *by any reasonable mode of interpretation*, be expanded to encompass the States of the Union . . . ." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966) (emphasis added). Professor Rotunda concludes, "*Caperton* has absolutely *no* application to the present case because the Due Process Clause only protects 'persons,' and the State of Wisconsin (in whose capacity Mr. Schmitz litigates) is not a "person" for purposes of the Due Process Clause." Rotunda Aff. ¶ 8.

C*aperton* relies wholly on Due Process as the basis for recusal, See 556 U.S. at 886–87, and is accordingly simply not a basis for the State, acting through a prosecutor, to seek recusal. Due process rights belong to individuals subject to prosecution by the State, not the reverse. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."). Indeed, "every court to consider the question has likewise recognized that the word 'person' as used in the Due Process

Clause of the Fourteenth Amendment does not encompass the states." Rotunda Aff. ¶ 8 (citations omitted). As one federal court memorably put it, "[C]onstitutional guaranties, ordinarily, at least, are not designed to protect one arm of the state from the body of the state, but are to protect individual and corporate citizens against the state, or arms of the state." *El Paso Cnty. Water Imp. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 906 (W.D. Tex. 1955).

Perhaps not surprisingly, the Brennan Center Brief makes no mention of the party making the Motion to Recuse, though they surely knew its source was the state itself. Any acknowledgment of the source would make the sum of their discussion of *Caperton* a meaningless exercise. Indeed, as that brief discusses the importance of an independent judiciary it repeatedly acknowledges "due process" as the source of a "litigant's" rights but fails to recognize that the state is no ordinary litigant. *See, e.g.*, Brennan Center Brief at 2-4, 7, 10. *Caperton* simply does not apply to this matter.

B. Application of *Caperton* requires a factual predicate that contributions/expenditures were temporally or otherwise related to the case, and there is no such relationship plausibly involved here.

The oft recited facts of *Caperton* describe a then pending case likely to be heard by the Justice up for election. *Caperton*, 556 U.S. at 872-74. There was a case pending, a judicial election underway and a known probability that the Justice would hear that case.

In contrast, here there was no pending case known until October 2013, there was no judicial election underway and there was no probability at any point prior to October 2013 that a Justice of this Court would hear the case. The indisputable facts describe something fundamentally different from *Caperton*, as here there was not even an election of any Justice (excepting the Chief Justice) after the investigation became public. *Caperton* requires recusal only if a party acts to "plac[e] the judge on the case…when the case was pending or imminent." *Caperton*, 556 U.S. at 884. But any organization or individual who might have made independent expenditures only learned about the secret John Doe investigation at issue *on or after*

October 3, 2013, which is when the warrants were executed and subpoenas served, There could be then no relationship of a contribution or expenditure and the decision by the Court to hear this matter because there is no temporal proximity.

Again, as with the requirements of due process, there is no mention in the Brennan Center Brief of these factual predicates. Instead, that brief simply asserts that a great deal of money is spent on judicial elections in Wisconsin and so, *ipso facto*, the money must have corrupted the judicial process. However, *Caperton* says nothing of the sort, relying instead on the "*extreme facts*" related to that West Virginia election to conclude recusal should have occurred. *Id.* at 886-87 (emphasis added); *See also* Rotunda Aff. ¶ 9.

This Court's express admonition that we must be careful not to equate contributions and expenditures, alone, with corrupting the process is seemingly forgotten at every turn by those arguing for recusal. *Caperton* must not be misunderstood or its conclusions applied when the factual predicates do not exist.

C. The special prosecutor's motion actually raises serious due process concerns.

Intuition indicates that there is something unusual when the state seeks to choose the judges before which it will try the rights of citizens. Indeed,

> [T]here is something unseemly, to say the least, about a prosecutor, exercising the power of the state attempting to influence the composition of the court that will consider the rights of the citizens that he has targeted. It is, after all, the rights of those subject to state action with which the due process clause is concerned, not the rights of the prosecutor or the state that he purports to represent.

Rotunda Aff. ¶ 12.

That intuition is supported by law. *See* Krauss Aff. ¶ 5.e. It raises serious due process issues when a prosecutor is allowed to choose the judges who will hear his case and determine the rights, vis-à-vis the state, of the accused. *See, e.g., State v. Simpson*, 551 So.2d 1303 (La. 1989) (holding that prosecutor's selection of judges violated accused's due process rights); *McDonald v. Goldstein*, 191 Misc. 863, 83 N.Y.S.2d 620 (N.Y. Sup. Ct. 1948), *aff'd*, 273 A.D. 649, 79 N.Y.S.2d 690 (1948) (same). *But see Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995) (rejecting claim that such right could be applied

through a *habeas corpus* case). At the least, the Court must interpret and apply its Rules to avoid potentially violating the due process rights of those who are the prosecutorial targets.

CONCLUSION

In a highly charged environment it is more important than ever that this Court not succumb to pressures for recusal that ultimately will leave the Judiciary without its most precious guarantee—impartial application of the law. Recusal has no place in this matter.

Respectfully submitted this 19th day of March, 2015.

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James R. Troupis
Amicus Counsel

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 2,651 words.

Dated at Cross Plains, Wisconsin this 19th day of March, 2015.

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

I hereby certify that this brief conforms to the rules contained in §§ 809.19(12)(f), Wis. Stats. 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 at Cross Plains, Wisconsin this 19th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief have been served in accordance with the rules on all parties of record

Dated at Cross Plains, Wisconsin this 19th day of March, 2015.

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