In the Supreme Court of Wisconsin

State of Wisconsin *ex rel.* Three Unnamed Petitioners, Two Unnamed Petitioners, and **Francis Schmitz,** ***Petitioners*** ***v.*** **Gregory Peterson *et al.*,** ***Respondents***	Case Nos.: 2013AP2504- 2508-W 2014AP296-OA 2014AP417- 421-W

Amicus Brief of the James Madison Center for Free Speech in Support of Respondent Gregory Peterson Regarding Recusal

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Amicus James Madison Center for Free Speech files this brief in support of Respondent Gregory Peterson and specifically, in opposition to the *Brief of Professors of Legal Ethics as* Amici Curiae *in Support of Neither Party* (hereinafter "the Professors"), filed March 2, 2015, which supports recusal of Justices in this case.

I. C*aperton* Establishes A Narrow, Fact-Specific Test for Recusal.

The Professors argue that *Caperton* "did not lay out a specific test" but instead provided guidance that made "[p]articularly central [ ] the amount of spending, . . ." (The Professors Br. at 5.) This is erroneous in two respects.

First, Justice Kennedy, authoring the decision of the Court, did establish a test: "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." *Caperton v. A.T. Massey Co.*, 566 U.S. 868, 884 (2009). The Court supplements the test with factors that weigh into this analysis: "the contribution's relative size in comparison

to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.*

The narrow scope of the test is reinforced throughout the decision. Repeatedly, the opinion emphasizes the exceptional and extreme nature of this case: "this is an exceptional case, " *id.*; "[a]lthough 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 stake in the outcome," *id.* at 886; "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level," *id.* at 886; "[o]ur decision today addresses an extraordinary situation where the Constitution requires recusal," *id.* at 887; "[t]he 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; "[t]his Court's recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision,'" *id.* at 887; "[t]he Court was careful to distinguish the

extreme facts of the cases before it from those interests that would not rise to a constitutional level," *id.* at 887; and "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances," *id.* at 889. And from the very outset of the decision, Kennedy is clear from the outset that it is "in all the circumstances of this case" that "due process requires recusal," suggesting that anything less may not. *Id.* at 872. *See* James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of* Caperton v. Massey, 60 Syracuse L. Rev. 305, 328-29 (2010).

Caperton delineates a specific recusal test.

II. The *Caperton* Test Requires A Pending Case.

Second, The Professors' brief is in error when it focuses on the independent spending as the key point of reference: "*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." (The Professors Br. at 9) In fact, the point of reference for the Court in *Caperton* was the imminent pendency of a case which the spender sought to influence.

In support of their view, the Professors characterize *Caperton* to be about the supplemental factors to the *Caperton* test, rather than the test itself, asserting that "recusal in cases where a litigant was a key support of a judge is vital to preserving the integrity of the judiciary," (The Professors Br. at 11), with "the 'temporal relationship between the campaign contributions, the justice's election, and the pendency of the case'" relegated to "relevant." (The Professors Br. at 6.) The point of reference for the Professors is campaign spending. This turns *Caperton* on its head.

This is obvious from the Court's characterization of recusal under *Caperton*, being "rare." If, as the Professors assert, the critical fact for mandatory recusal is significant independent expenditures, (The Professors Br. at 9), then recusal would not be "rare" or only in "extreme cases," *Caperton,* 566 U.S. at 887, 889, but would be frequent, because, as the Professors point out, significant independent spending has become frequent in judicial races. (The Professors Br. at 12-13.) Under the Professors' approach, any "significant" independent expenditures (however that is defined) made years ago would trigger mandatory recusal

today in any case just filed. But both the *Caperton* test and the Court's express expectations with regard to that test make clear that such circumstances are not contemplated. The lynchpin is instead whether a case is pending in that Court or imminently impending, with independent expenditures or contributions made in an effort to influence the outcome of that case.

For this reason, Wisconsin Supreme Court Rule 60.04(8) does not run afoul of *Caperton* and indeed, respects the "rare" and "extreme" parameters established in *Caperton*. The Rule establishes that mandatory recusal is not imposed "based solely on the sponsorship of an independent expenditure or issue advocacy communication . . . by an individual or entity involved in the proceeding." Wis. SCR 60.04(8). More is needed: a pending case. *Caperton*, 566 U.S. at 884.

III. Recusal Based on Campaign Spending Is Not Required In This Case.

Based on news reports, the spending on which the pending recusal motion rests is independent expenditures made during several judicial election campaigns several years ago. *See* Patrick Marley, *John Doe Prosecutor Asks One or More Justices to Step*

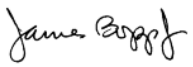
Aside, Milwaukee Wisconsin Journal Sentinel (Feb. 15, 2015), *available at* http://www.jsonline.com/news/statepolitics/john-doe-prosecutor-asks-one-or-more-justice-to-step-aside-b99444515z1-291866271.html. They were not made to influence a justice of this Court to resolve this case in their favor; indeed, they precede not only the appeals of these cases—which were granted in December 2014—but in some cases, before even the initiation of these cases. *Id*. (reporting that the relevant independent expenditures occurred in 2007, 2008, 2011, and 2013). Without a case before this Court, such campaign spending, like the announcement of views in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), can at best relate to judicial philosophy.

It is true that "pledging or promising certain results in a particular case" can be proscribed, and so could establish grounds for recusal. *White*, 536 U.S. at 812, 816. Likewise, making public comment on a pending case when it could affect the outcome of or fairness in a proceeding can also be proscribed. *See* Wis. SCR 60.04(1)(j). But simply advancing a judicial philosophy, without more, creates no threat to impartiality or its appearance. *White*, 536 U.S. at 775-77. Independent spending, without a pending

case which the spender is attempting to influence, does not satisfy the *Caperton* test.

Since the independent expenditures at issue in the recusal motion were not made to influence a pending case, recusal under *Caperton* is not required here.

Respectfully submitted,



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I certify that this brief conforms to the rules in Section 809.19(8)(b) and (c) for a brief with proportional serif font. This brief has 1,236 words. *See* WIS. STAT. 809.19(8)(b), (c), (d). The text of the electronic and paper copies of this brief are identical. *See id.* 809.19(12)(f); *cf. id.* 809.19(13)(f).

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March 19, 2015

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I certify that today the Lex Group will send 22 copies to the clerk's office *via* commercial carrier for overnight delivery. *See* WIS. STAT. 809.80(4). Per the suggestion of the clerk's office, I further certify that the Lex Group will serve copies on counsel for the parties, as indicated on the Court's docket sheets. *Cf. id.*

/s/ Michael D. Dean
Michael D. Dean

March 19, 2015