

In the
United States Court of Appeals
for the **Seventh Circuit**

WISCONSIN RIGHT TO LIFE POLITICAL ACTION COMMITTEE,
GEORGE MITCHELL and THE WISCONSIN CENTER FOR
ECONOMIC PROSPERITY,

Plaintiffs-Appellants,

v.

MICHAEL BRENNAN, WILLIAM EICH, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND and GORDON MYSE,
each in their official capacities as members of the Government Accountability Board,
DAWN MARIE SASS, in her official capacity as Wisconsin State Treasurer,
JOHN T. CHISHOLM, in his official capacity as Milwaukee County District Attorney,
and BRAD SCHIMEL, in his official capacity as Waukesha County District Attorney,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:09-cv-00764-wmc.
The Honorable **William M. Conley**, Judge Presiding.

**BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE,
THE CAMPAIGN LEGAL CENTER, THE COMMITTEE FOR ECONOMIC
DEVELOPMENT, THE CENTER FOR GOVERNMENTAL STUDIES, CHICAGO
APPLESEED, DEMOCRACY 21, DEMOCRACY NORTH CAROLINA, THE FUND FOR
MODERN COURTS, HEARTLAND DEMOCRACY, THE ILLINOIS CAMPAIGN FOR
POLITICAL REFORM, JUSTICE FOR ALL, THE LEAGUE OF WOMEN VOTERS OF
WEST VIRGINIA, THE MICHIGAN CAMPAIGN FINANCE NETWORK, NORTH
CAROLINA CENTER FOR VOTER EDUCATION, OHIO CITIZEN ACTION, THE OHIO
VALLEY ENVIRONMENTAL COALITION, PENNSYLVANIANS FOR MODERN
COURTS, PUBLIC CAMPAIGN, TEXANS FOR PUBLIC JUSTICE, TRANSPARENCY
INTERNATIONAL-USA, THE WEST VIRGINIA CITIZEN ACTION GROUP, AND
WEST VIRGINIA CITIZENS FOR CLEAN ELECTIONS
IN SUPPORT OF DEFENDANTS-APPELLEES**

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Appellate Court No: 11-1769

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Heartland Democracy,
The Illinois Campaign For Political Reform,
Justice For All,
The League Of Women Voters Of The United States,
The League Of Women Voters Of West Virginia,
The Michigan Campaign Finance Network,
North Carolina Center for Voter Education,
Ohio Citizen Action,
The Ohio Valley Environmental Coalition,
Pennsylvanians For Modern Courts,
Public Campaign,
Texans For Public Justice,
Transparency International-USA,
The West Virginia Association For Justice,
The West Virginia Citizen Action Group, and
West Virginia Citizens For Clean Elections

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae represent 24 organizations committed to preserving judicial independence and integrity. Pursuant to their motion for leave to file under Fed. R. App. P. 29, *amici curiae* respectfully submit this brief in support of Defendants-Appellees.¹

Amici curiae believe that democracy depends on fair and impartial courts that can protect individual rights, guarantee equal justice, and make decisions based solely on the facts and the law, without fear of intimidation or demands for special treatment. Justice at Stake, its partners, and its allies have come together to help Americans keep special interests and political pressure out of the courtroom. Restricting the ability of state governments to promote public financing for judicial elections could have unintended consequences for the judiciary.

The majority of state judges are subject to some form of election process, and *amici curiae* believe that public financing of judicial elections is one of the best ways to protect the courts from corruption and, more importantly, the public perception of corruption. Public financing thereby protects the government's compelling interest in maintaining an independent and well-respected judiciary. Because this Court's decision could affect the quality of public financing systems for judicial elections in

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Wisconsin and other states, *amici curiae* write to underline the risks posed to the judiciary if the portions of Wisconsin's Impartial Justice Act at issue in this case are overturned.

While *amici* share a commitment to protecting judicial integrity and independence, their diversity should not be overlooked. *Amici* include eight national and sixteen state and regional groups, and reach from the east coast to the west coast and from the north to the south. Many engage in public education and advocacy to promote citizen participation in their government. Several are dedicated to campaign finance reforms that reduce the appearance of corruption created by the pervasive influence of money in politics. Together, they work to protect the impartiality of the courts, to promote the voices of ordinary citizens in their government, and to assure access to the courts. In addition to Justice at Stake, *amici curiae* include the following groups:

- The Campaign Legal Center
- The Committee for Economic Development
- The Center for Governmental Studies
- Chicago Appleseed
- Democracy 21
- Democracy North Carolina
- The Fund for Modern Courts
- Heartland Democracy
- The Illinois Campaign for Political Reform
- Justice for All (Arizona)
- The League of Women Voters of the United States
- The League of Women Voters of West Virginia
- The Michigan Campaign Finance Network
- North Carolina Center for Voter Education

Ohio Citizen Action
The Ohio Valley Environmental Coalition
Pennsylvanians for Modern Courts
Public Campaign
Texans for Public Justice
Transparency International, USA
The West Virginia Association for Justice
The West Virginia Citizen Action Group
West Virginia Citizens for Clean Elections

SUMMARY OF THE ARGUMENT

In response to the rising tide of money flooding judicial elections, *amici* write to emphasize that invalidating the triggered matching funds provision of Wisconsin's Impartial Justice Act would harm Wisconsin's public financing system and could help embroil judicial candidates in an environment of partisan political rancor that creates an appearance of impropriety in Wisconsin's courts. These ill effects would trickle into other states that have implemented similar systems.

A deluge of special interest money in judicial elections is eroding public trust in America's courts. The public is increasingly skeptical of justice rendered by a system where the litigants are often the primary donors to the judges' election campaigns and believes that campaign contributions directly impact the way judges decide cases. The flood of money injected into judicial elections has dangerously politicized judicial races and has therefore threatened the integrity of the judiciary. More and more, both the winning and losing candidates in Wisconsin's judicial elections walk away covered in

mud. In response to this situation, Wisconsin enacted the Impartial Justice Act to combat the perception of a compromised judiciary in 2009.

Public financing under the Impartial Justice Act is one of the most powerful reforms shielding courts from special-interest influence. With public financing, judges no longer must rely on support from large-dollar, special interest contributors who frequently have cases in front of the court. In Wisconsin, as in other states where public financing has been used, there is no evidence that such programs have chilled anyone's free speech rights. Moreover, because of the unique role judges play in protecting individual rights and safeguarding due process for all litigants, judicial elections are distinguishable from elections for representative office and certain limits on free expression in judicial elections are appropriate to assure impartial justice and freedom from the appearance of corruption. The Impartial Justice Act promotes free expression while protecting the integrity of the judiciary.

ARGUMENT

I. Public Concerns About the Rising Cost of Judicial Elections in Wisconsin and Across the Country Led Wisconsin to Adopt the Impartial Justice Act.

A. Wisconsin Has a Long History of Distinguishing Its Judicial Elections from Other Statewide Elections.

Wisconsin has used a system of judicial elections since its Supreme Court was established in 1852.² However, the framers of the Wisconsin Constitution sought to distance judicial elections from those for executive and legislative office. They prohibited judicial elections from occurring simultaneously with, or within 30 days before or after, general elections for state or county officers.³ In doing so, they separated judicial elections “from the excitement and turmoil of the general election,” giving judges the space to conduct a different kind of campaign.⁴ In 1903, a constitutional amendment adopted the current court structure of seven justices who serve 10 year terms.⁵ A 1913 statute specified that judicial candidates could not be nominated or elected on a party ticket, codifying a nonpartisan custom that had been in effect since

² Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 MARQ. L. REV. 593, 598 (2002).

³ PORTRAITS OF JUSTICE: WISCONSIN SUPREME COURT 1848-1998 vii (Trina E. Gray et al. eds., 2nd ed., 1998) [hereinafter “Portraits of Justice”]; Wis. Const. art VII, § 9. An 1858 statute specified that judicial elections shall occur on the first Tuesday in April. Portraits of Justice at ix; *see also* Wis. Stat. § 5.02(21), § 5.60(1)(ag) (2005).

⁴ Michael Koehler, *Baseball, Apple Pie, and Judicial Elections: An Analysis of the 1967 Wisconsin Supreme Court Race*, 85 MARQ. L. REV. 223, 225 (2001) (citing John B. Winslow, *THE STORY OF A GREAT COURT* 385 (1912)).

⁵ Portraits of Justice, *supra* note 3, at vii.

the 1870s.⁶ The design of state judicial elections has remained unchanged since that time.

Judicial elections are not unique to Wisconsin. Thirty-nine states currently use some form of judicial election for their appellate or trial courts,⁷ and the majority of the country's approximately 10,000 state judges are selected or retained through some variety of election.⁸ Including Wisconsin, thirteen states use nonpartisan elections, in which judicial candidates cannot associate themselves with a political party.⁹ Nine states select high-court judges through traditional partisan elections.¹⁰ Sixteen states appoint high-court judges and then use retention elections after a specified term, allowing voters to choose whether to reject or retain each judge; if judges are not retained, the state appointment commission typically nominates replacements for the governor to choose from.¹¹

⁶ *Id.* at ix; see also Wis. Stat. § 5.60(1)(ar).

⁷ See generally American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm; see also American Bar Ass'n Standing Comm. on Judicial Independence, *Public Financing of Judicial Campaigns* 5 (2002); Deborah Goldberg, Brennan Center for Justice at NYU School of Law, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4–5 (2002), available at <http://www.brennancenter.org/page/-/d/ji3.pdf>.

⁸ Roy Schotland, *Republican Party of Minn. v. White: Should Judges Be More Like Politicians?*, 41 JUDGES' J. 7, 9 (2002).

⁹ American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts: Initial Selection: Courts of Last Resort*, available at http://www.judicialselection.us/uploads/documents/Summary_Initial_Selection_1196092501390.pdf.

¹⁰ *Id.*

¹¹ *Id.*

B. Spending in Wisconsin Judicial Elections Has Skyrocketed in the Last Decade.

Despite Wisconsin's long-standing intent to differentiate judicial elections from partisan elections for executive and legislative offices, candidate fundraising and independent spending in Wisconsin's judicial elections have skyrocketed in recent years. The immense spending on these elections has created the appearance that justices are beholden to the interests of those who helped them reach the bench. As a result, the public holds the impartiality of Wisconsin's courts in doubt.

Spending in Wisconsin Supreme Court races significantly increased in the ten years between 1989 and 1999. The average amount raised by each candidate increased more than threefold over the course of the decade, from \$194,642 to \$656,202.¹² The 1999 Wisconsin Supreme Court race, in which Chief Justice Shirley S. Abrahamson sought reelection, marked the high tide of the 1990s. The race was the first in which the candidates' combined expenditures exceeded \$1 million, and the total expenditures were more than 50% greater than the most expensive previous state judicial campaign.¹³ The growing role of money also fueled—and reflected the beginning of—an open political divisiveness in the court: a majority of the sitting justices criticized

¹² Samantha Sanchez, CAMPAIGN CONTRIBUTIONS AND THE WISCONSIN SUPREME COURT (2001), available at <http://www.followthemoney.org/press/WI/20020501.pdf>.

¹³ Kearney & Eisenberg, *supra* note 2, at 607-08. Total expenditures in the race were \$1,361,929. Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 15 (1999).

Abrahamson for her administration of the state court system, and three sitting justices expressly endorsed Abrahamson's opponent.¹⁴

The trend established in the 1990s escalated dramatically in the 2000s. From 2000 through 2009, candidates for the Wisconsin Supreme Court raised nearly \$7 million.¹⁵ In addition to this increase in candidate fundraising, a new phenomenon—independent expenditures—further politicized the Wisconsin Supreme Court. During that period, non-candidate television spending totaled over \$4.8 million.¹⁶ Total spending on judicial elections in the decade exceeded \$11.5 million.¹⁷

The rising tide of spending in Wisconsin Supreme Court campaigns reached an alarming level in the 2007 and 2008 elections. Spending from all sources totaled a staggering \$8.5 million—seven times as much as the combined spending for the 2000 through 2006 elections.¹⁸ In the 2008 Wisconsin Supreme Court election, third-party interest groups outspent candidates four-to-one.¹⁹ Outside interest groups 95% of

¹⁴ Kearney & Eisenberg, *supra* note 2, at 608.

¹⁵ James Sample *et al.*, *The New Politics of Judicial Elections 2000-2009* 6 (2010), available at http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 6, 12.

¹⁸ *Id.* at 15.

¹⁹ Stacy Forster, *Spending in Supreme Court Race Just Under \$6 Million*, MILWAUKEE J. SENTINEL, Jul. 22, 2008, <http://www.jsonline.com/blogs/news/31992584.html>.

television advertising.²⁰ In fact, special interest groups were responsible for almost nine out of every ten dollars spent during the campaign.²¹

The pattern of spending in Wisconsin corresponds to a dramatic increase in spending on judicial elections across the country. Nationally, state supreme court candidates raised and spent over \$206.9 million in judicial elections from 2000 to 2009.²² That amount is more than double the \$83.3 million raised for the same purpose from 1990 to 1999.²³ State-specific judicial election spending records were smashed during the past decade. All but two of the 22 states with contestable supreme court elections had their costliest-ever contests.²⁴

The tenor of judicial campaigns in Wisconsin deteriorated along with this increase in spending. The acrimony that emerged in the 1999 campaign rose to new levels in 2008, when Judge Michael Gableman's campaign ran television advertisements suggesting incumbent Justice Louis Butler had helped free a child rapist on a technicality when he worked as a public defender.²⁵ In reality, Butler lost an appeal on

²⁰ Press Release, Brennan Center for Justice *et al.*, *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), available at http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf.

²¹ Press Release, Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), available at http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin.

²² Sample, *supra* note 15, at 1.

²³ *Id.* at 8.

²⁴ *Id.* at 1.

²⁵ Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, MILWAUKEE J. SENTINEL, Mar. 26, 2008, <http://www.jsonline.com/blogs/news/31985659.html>.

behalf of the client, and unrelated to Butler's representation, the client was later released on parole.²⁶ It was then that Butler's former client assaulted an eleven-year-old girl.²⁷ Justice Butler was ultimately unseated.²⁸ And one corporate group mimicked the message of Gableman's campaign, referring to Justice Butler in television advertisements as "Loophole Louie" and accusing him of preferring criminals over the police.²⁹

By 2008, the corrosive effect of politics had seeped into judicial races. In addition to tarnishing the candidates themselves, these advertisements increased the appearance that the candidates were corrupt and beholden to the special interests paying for the advertisements.

C. The Skyrocketing Costs of Judicial Elections Create an Appearance of Bias that Erodes Judicial Integrity and Independence.

Dramatic increases in spending in judicial elections invite suspicions of bias and corruption. As the tide of money rises in judicial elections, concerns that contributions to judicial campaigns affect judicial decision-making become more perilous. A 2008

²⁶ Sample, *supra* note 15, at 32.

²⁷ *Id.*

²⁸ Patrick Marley & Stacy Forster, *Gableman Victorious*, JOURNAL SENTINEL, Apr. 2, 2008, <http://www.jsonline.com/news/wisconsin/29406414.html>.

²⁹ Forster, *supra* note 25.

survey in Wisconsin found that 78% of voters thought campaign contributions have at least some influence on judges' decisions.³⁰

The concerns expressed by Wisconsin voters mirror those of the public nationally. Data repeatedly show that the public firmly believes that campaign contributions and expenditures influence judicial outcomes:

- A 2010 Harris poll found that 71% of those surveyed thought campaign contributions had at least some influence on judges' decisions.³¹
- A February 2009 USA TODAY/Gallup poll found that 89% of those surveyed believed that the influence of campaign contributions on judges' rulings is a problem, and 52% considered it a "major" problem.³²
- A survey conducted in 2007 for the Annenberg Public Policy Center showed that 69% of the public believe that raising money for elections affects a judge's rulings to a moderate or great extent, and over 90% of those surveyed thought judges should be removed from cases involving an individual or group that contributed to the judge's campaign.³³

³⁰ American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* (January 2008), at 4, available at http://www.justiceatstake.org/resources/justice_at_stake_polls.cfm.

³¹ *The Harris Poll National Quorum Justice at Stake Campaign, June 9–13, 2010* at 6, 12, available at http://www.justiceatstake.org/media/cms/The_Harris_Poll_National_Quorum_Jus_F847FF6BF6CD0.pdf.

³² Joan Biskupic, *Supreme Court Case With The Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

³³ Annenberg Public Policy Center, *Public Understanding of and Support for the Courts 3* (2007), available at

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These concerns have been voiced consistently throughout the last decade. For example, in 2004, 70% of those surveyed believed that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, and in 2001, 76% of those surveyed believed campaign contributions influence judges' decisions.³⁴ The public's concern has not waned over time.

Business leaders and judges share the public's concerns. A report by 250 business leaders and educators observed that "[t]he need for judges to appeal to voters and seek campaign contributions to finance their quests for office is antithetical to the ideal of an independent and impartial judiciary."³⁵ In addition, opinion surveys of judges and business leaders illustrate their concerns:

- A 2007 Zogby International poll of 200 business leaders found that 79% thought campaign contributions had at least some influence on judges' decisions.³⁶

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<http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoc1707.pdf>.

³⁴ Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), available at <http://faircourts.org/files/ZogbyPollFactSheet.pdf>; Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire 4* (2001), available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

³⁵ Committee for Economic Development, *Justice for Hire: Improving Judicial Selection 2* (2002), available at http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf.

³⁶ Zogby Int'l, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 4* (May, 2007), available at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf.

- A 2001 survey of state judges revealed that almost half agreed that campaign donations influence courtroom decisions by some judges, and most elected high court justices reported experiencing pressure to raise campaign money during their election years.³⁷

This pressure was put particularly plainly by Ohio Justice Paul E. Pfeifer: “I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race. They mean to be buying a vote. . . . Whether they succeed or not, it’s hard to say.”³⁸

None of this should be surprising. Perceptions of a biased judiciary precipitate from spending on judicial campaigns and lead to public distrust. Justice Ming W. Chin of the California Supreme Court explained, “When judges have to rely on campaign donors to get or keep their jobs, there is an inevitable public perception of judicial bias or favoritism.”³⁹ These growing concerns of bias, in turn, undermine the ability of courts to deliver justice. The perception that positive outcomes are being purchased by litigants diminishes the integrity of all judicial decisions.

³⁷ Bert Brandenburg, *Big Money And Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 210 (2010).

³⁸ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. Times, Oct. 1, 2006, <http://www.nytimes.com/2006/10/01/us/01judges.html> (quoting Justice Paul E. Pfeifer).

³⁹ Justice Ming W. Chin, *Judicial Independence Under Attack Again?*, 61 HASTINGS L. J. 1345, 1348 (2010).

D. The Impartial Justice Act Was Intended to Remedy the Perception of a Judiciary Beholden to Special Interests.

The Impartial Justice Act (the “Act”) developed as a direct response to the flood of money that was changing the character of judicial elections in Wisconsin. The state offered partial public financing for state offices beginning in 1976.⁴⁰ Support for full public financing grew steadily, and 76% of Wisconsin citizens supported full public financing of state elections by 1999.⁴¹ The legislature first debated the Act in 2007, and while the senate passed the bill, the assembly failed to vote on it.⁴² In late 2007, Governor Jim Doyle called a special session of the legislature to address campaign finance reform and specifically asked the legislature to “establish a fully-funded public campaign finance system for Wisconsin Supreme Court candidates.”⁴³

In December 2007, all seven members of the Wisconsin Supreme Court wrote to the governor and the legislature to express their support for “realistic, meaningful

⁴⁰ American Judicature Society, *Judicial Campaigns and Elections*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

⁴¹ Press Release, Wisconsin Citizen Action, New Poll Shows 76.2% Support in Wisconsin for Full Public Funding of Elections (February 19, 1999), *available at* http://www.justiceatstake.org/media/cms/WI_Citizen_Action_Poll_3AF16A84D5FEC.pdf.

⁴² Wisconsin Democracy Campaign, *Impartial Justice 2007*, http://www.wisdc.org/impartial_justice_2007.html.

⁴³ Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lake States, 2000-2008* 29 (ed. Jesse Rutledge) (2008).

public financing for Supreme Court elections to facilitate and protect the judicial function.”⁴⁴ The justices called attention to the fact that

[the] risk inherent in any non-publicly funded judicial election for this court is that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign. Judges must not only be fair, neutral, impartial and non-partisan but also should be so perceived by the public.⁴⁵

By early 2008, 72% of Wisconsin voters agreed that reforming judicial campaign financing would help avoid corruption scandals.⁴⁶ Moreover, 77% agreed that the legislature and governor needed to take action on judicial campaign reform before the next election and 65% favored passage of the Act.⁴⁷

The state legislature promulgated the Act to address the concerns voiced by the public and the justices. State Senator Dave Hansen succinctly summarized the legislature’s intent: “This is about clean elections and fair elections.”⁴⁸ Representative Mark Pocan went further: “Average people don’t give to the [Supreme Court]

⁴⁴ Letter from Justices of Wisconsin Supreme Court to Governor Jim Doyle and Wisconsin legislature, Dec. 10, 2007, *available at* <http://www.wicourts.gov/news/archives/2007/docs/campaignfinanceletter.pdf>.

⁴⁵ *Id.*

⁴⁶ American Viewpoint, Inc., *Justice at Stake Wisconsin Statewide Poll* (January 2008), at 4, *available at* http://www.justiceatstake.org/resources/justice_at_stake_polls.cfm.

⁴⁷ *Id.* at 3, 5.

⁴⁸ Adam Korbitz, State Bar of Wisconsin, *Legislature Passes Impartial Justice Bill; Governor Expected to Sign* (Nov. 6, 2009), <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentId=87363>.

campaigns. It's the people who want something. It's the special interests."⁴⁹ As Governor Jim Doyle stated, the Act would "assure people of the state that justice is not political."⁵⁰

Court observers and supporters of the legislation emphasized the Act's purpose to restore the public's faith in the judiciary. Former Wisconsin Supreme Court Justice Janine Geske stated that "The Impartial Justice Bill will play a major role in restoring peoples' trust that Wisconsin cases will be decided solely on the merits without influence from any particular special interest group."⁵¹

The State Bar Association of Wisconsin was a significant supporter of the Act. Bar President Diane Diel stated that the Impartial Justice Bill was "the most direct and visible way to maintain the integrity of Wisconsin's courts and bolster public confidence in them."⁵² Past Bar President Thomas Basting testified that public financing offers "a means to avoid even the perception that contributions to the election campaigns of

⁴⁹ Greg Bump, "Impartial Justice passed JFC," *Wis. Politics Budget Blog*, available at <http://budget.wispolitics.com/2009/11/impartial-justice-passed-jfc.html>.

⁵⁰ Patrick Marley & Lee Bergquist, "Doyle signs high court election bill," *JOURNAL SENTINEL*, Dec. 1 2009, <http://www.jsonline.com/news/statepolitics/78230432.html>.

⁵¹ Korbitz, *supra* note 48.

⁵² Diane Diel, State Bar of Wisconsin, State Bar Statement in Support of Senate Bill 40, the 'Impartial Justice Bill,' <http://www.wisbar.org/AM/Template.cfm?Section=News&template=/CM/ContentDisplay.cfm&contentid=77826>.

judicial candidates could influence their decisions.”⁵³ The Act was intended to reverse the growing appearance of corruption in judicial elections.

E. Other States Have Successfully Employed Public Financing to Curb Perceptions of Corruption in the Judiciary and Improve the Tenor of Judicial Campaigns.

Wisconsin is one of four states employing public financing to protect the judiciary from perceptions of bias. North Carolina⁵⁴ and New Mexico⁵⁵ currently provide public financing for judicial elections.⁵⁶ West Virginia will begin offering public financing in the 2012 election.⁵⁷ Each state has turned to public financing to address the issues discussed here. For example, West Virginia’s system is designed to “protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.”⁵⁸ The programs in each state also include triggering provisions similar to those in the Act.

⁵³ Thomas Basting, State Bar of Wisconsin, State Bar of Wisconsin Support for Assembly Bill 65 and Senate Bill 40 (May 27, 2009), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Legislative_Advocacy&Template=/CM/ContentDisplay.cfm&ContentID=81016.

⁵⁴ North Carolina Public Campaign Fund, N.C. Stat. 163.278.61 *et seq.* (West 2011).

⁵⁵ New Mexico Voter Action Act, N.M. Stat. Ann. § 1-19A-1 *et seq.* (West 2011). *See also* American Judicature Society, *Judicial Campaigns and Elections*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

⁵⁶ *See generally* *Public Financing of Judicial Campaigns*, *supra* note 77, at 30; Brennan Center for Justice, *State Judicial Elections*, http://www.brennancenter.org/content/section/category/state_judicial_elections; Committee for Economic Development, *supra* note 35.

⁵⁷ West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. VA. Code § 3-12-1 *et seq.* (West 2011); West Virginia H.B. 4130, 79th Leg., 2d Sess. (2010).

⁵⁸ W. Va. Code § 3-12-2(9).

North Carolina has the oldest full public financing system for judicial elections; it was enacted in 2002 and took effect in 2004.⁵⁹ The program is a response to the skyrocketing fundraising that occurred during the 1980s and 1990s, which is “especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.”⁶⁰ In fact, in 2000, North Carolina saw record-breaking spending in its supreme court elections, with combined spending exceeding \$1 million.⁶¹

Since public financing became available in 2004, 77% of all North Carolina judicial candidates have enrolled in the program, with 64% qualifying to receive public funds.⁶² Of the 22 current judges and justices sitting on North Carolina’s appellate courts, 17 were elected with public financing.⁶³ Meanwhile, the total contributions to judicial candidates from attorneys dropped from 44% in 2002 to about 14% in 2008.⁶⁴ This drop has dramatically reduced the appearance of impropriety created when attorneys appear in court before judges they have helped to elect.

⁵⁹ N.C. Ctr. for Voter Educ., Fact Sheet: The Public Campaign Fund, http://www.ncjudges.org/media/fact_sheet_pcf.html.

⁶⁰ *Id.*

⁶¹ Center for Governmental Studies, *Public Campaign Financing: North Carolina Judiciary* 11 (2009), available at <http://www.policyarchive.org/handle/10207/bitstreams/20313.pdf>.

⁶² Press Release, Democracy North Carolina, *Special-Interest Funding Declines In State Court Elections As 77 percent Of The Top Judges Qualify For Public Funds* 1 (December 21, 2010), available at <http://www.democracy-nc.org/downloads/JudicialPublicFinPRDec2010.pdf>.

⁶³ *Id.*

⁶⁴ National Institute on Money in State Politics, North Carolina 2008 Candidates, http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=NC&y=2008&f=J.

Public financing also has limited the presence of special-interest donors in North Carolina’s judicial campaigns. Among the eight candidates who used public financing in the 2010 election cycle, more than 71% of their campaign spending came from public financing.⁶⁵ Of the money that came from private sources, 88% was in the form of small, qualifying contributions, which averaged only \$100.⁶⁶ All told, publicly financed candidates received less than \$60,000—a mere 3.5 percent of their total campaign money—from large donors contributing over \$500.⁶⁷ Meanwhile, like in Wisconsin, major donors remain free to spend independently on North Carolina’s judicial elections. To date, they simply have chosen not to do so.

North Carolina Court of Appeals Judge Wanda Bryant explained that she “chose to run under the new public financing system because the system is such that [she] could focus on talking with voters about [her] legal experience and qualifications instead of spending countless hours dialing for dollars.”⁶⁸ Public financing promotes a dialogue between judicial candidates and voters while minimizing partisan rancor and the appearance that candidates are indebted to future litigants.⁶⁹

⁶⁵ Democracy North Carolina, *supra* note 62, at 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Wanda Bryant, *Publicly Finance Judicial Elections*, Seattle Post-Intelligencer, Mar. 20, 2007, available at 2007 WLNR 5330089.

⁶⁹ Judicial candidates “report that full public funding allowed them to concentrate on connecting with voters rather than on soliciting campaign contributions.” Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L. J. 95 (2003).

II. Wisconsin's Impartial Justice Act Has Helped Its Justices Avoid the Appearance of Corruption Without Chilling Speech.

The Impartial Justice Act took effect for the 2011 election, with three of the four supreme court candidates in the primary election, and both of the final two candidates in the general election, participating in the public financing program.⁷⁰ As provided under the Act, the publicly funded candidates each received \$100,000 in financing for the primary election; the final two candidates received an additional \$300,000 for the general election.⁷¹ Independent groups spent on express advocacy too, with spending totaling about \$155,550.⁷² This amount came nowhere near levels that would trigger matching funds. These spending totals show that, in the only election affected by the Act so far, neither the candidates' speech, nor the speech of express advocacy groups, was chilled in any way.

The presence of public financing did not chill any independent speech, either. In the 2011 Wisconsin Supreme Court race, non-candidate groups spent just under \$3.6 million on issue ads on television, exceeding the previous Wisconsin record that had been set during the 2008 race.⁷³ In one ad, a special interest group accused Justice David

⁷⁰ Brennan Center for Justice, *Judicial Public Financing in Wisconsin—2011* (April 5, 2011), http://www.brennancenter.org/content/resource/judicial_public_financing_in_wisconsin_2011.

⁷¹ Wis. Stat. §§ 11.511(2), (3).

⁷² Wisconsin Government Accountability Board, *Supreme Court—Summary of Independent Disbursements Reported In Support or Against Candidates (For Spring Election) (2011)*, available at <http://gab.wi.gov/campaign-finance/public-funding/democracytrustfund-distributions>.

⁷³ Press Release, Brennan Center for Justice, *Final Numbers: Special Interest Spending Near \$3.6 Million in Wisconsin* (April 6, 2011).

Prosser of failing to investigate abuse allegations aggressively against a Catholic priest while he worked as a district attorney.⁷⁴ The ad insinuated that Prosser was protecting the priest from prosecution.⁷⁵ Because such ads did not contain specific instructions to vote for or against a candidate, they were not considered express advocacy under the Act and did not trigger matching funds.⁷⁶ The fact that they were run, however, shows that independent speech was not chilled.

The 2011 race demonstrated that public financing has not yet improved the tenor of independent spending in Wisconsin's judicial elections, but it has permitted candidates to avoid the appearance of impropriety by insulating them from major donors who may appear before them in court. It also freed them to run positive campaigns based on their character and qualifications. Unlike the 2008 election, where special interest groups echoed the vicious ads run by Judge Gableman against Justice Butler, public financing permitted both candidates in 2011 to focus on their credentials, leaving only the special interests to sling mud. By permitting the candidates to stay

⁷⁴ Evan McMorris-Santoro, *Mother Of All Negative Ads Dropped On WI Judicial Race*, TALKING POINTS MEMO, Mar. 25, 2011, <http://tpmdc.talkingpointsmemo.com/2011/03/welcome-to-the-wisconsin-judicial-race-home-of-the-negativiest-tv-ad-ever-video.php>.

⁷⁵ Patrick McIlheran, *The Cure For Dirty Politics Is Truth About What Prosser Did*, JOURNAL SENTINEL, Mar. 25, 2011, <http://www.jsonline.com/blogs/news/118689644.html>.

⁷⁶ Larry Sandler & Patrick Marley, *Ad Won't Trigger Additional Funds for Court Candidates*, JOURNAL-SENTINEL, Feb. 11, 2011, <http://www.jsonline.com/news/statepolitics/116017414.html> (noting that the advertisements would not trigger any additional money because they did not use phrases like "vote for," "support," or "elect").

above the fray, public financing therefore helped each candidate avoid any appearances of corruption or impropriety.

Public financing systems in other states have yielded similar results. For example, North Carolina's public financing system has succeeded in encouraging, rather than chilling, speech in judicial elections. Accordingly, the Fourth Circuit rejected a challenge to the constitutionality of North Carolina's public financing system. *North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*, 524 F.3d 427, 441 (4th Cir. 2008), *cert. denied* 129 S. Ct. 490 (2008). The court held that the system's triggered matching funds provision was not coercive and that candidates who do not participate in public financing "remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Id.* at 436, 441. Moreover, the court noted that the goals of the system reflected traditional and long-held values: "The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding. . . . [T]he provisions challenged today. . . are within the limits placed on the state by the First Amendment." *Id.* at 441.

The challenged provisions in the Act are similar to those in the North Carolina law reviewed by the Fourth Circuit in *Leake*. They are not coercive and have been designed to permit candidates and non-candidate groups to engage in as much political speech as they desire. Indeed, that is exactly what happened in the 2011 election: the

Act promoted the impartiality and independence of the judiciary without placing limits on the expression of outside groups.

III. Judicial Elections Are Distinct from Elections for Other Offices and Treating Them As Such Comports with the Requirements of Free Expression and Due Process.

A. Judicial Elections Must Be Evaluated Differently Than Legislative Elections Because Judges Do Not Function as Representatives of the Electorate.

Judicial elections were originally intended, even as conceived in the early nineteenth century, to be different from elections for representative offices. They developed in response to corruption in the courts, and sought to secure a judiciary “free from the corrosive effects of politics and able to restrain legislative power.”⁷⁷ Wisconsin also aimed to distance its judicial elections from the politics of partisan elections, requiring judicial elections to be held in the spring rather than the fall and prohibiting candidates from running under the auspices of a political party.⁷⁸ In constructing its system this way, Wisconsin recognized that judicial office is fundamentally different from representative office.

It is no surprise that judicial elections were conceived and treated differently from other elections, because the courts have a fundamentally different role in our constitutional government. Judges, unlike legislators, are not advocates who represent

⁷⁷ Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 HISTORIAN 337, 338–39 (1983).

⁷⁸ Wis. Stat. §§ 5.02(21), 5.60(1).

constituents, and they are not free to make campaign promises about how they will rule.⁷⁹ Rather than partisan actors, judges are “independent constitutional officers” who “must make decisions based only on the Constitution and law, applied to the facts of each case.”⁸⁰ While voters expect legislators to be partisan advocates interested in specific outcomes, they expect judges to be fair and impartial arbiters of the law. Indeed, judges are asked to apply the law impartially even when the result may not be popular with voters.⁸¹

The United States Supreme Court recently confirmed the differences between judicial and other offices. Writing for the majority in *Nevada Comm’n on Ethics v. Carrigan*, No. 10-568 (U.S. June 13, 2011) at 6, Justice Scalia noted: “There are of course differences between a legislator’s vote and a judge’s” In his concurrence, Justice Kennedy elaborated:

The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.

⁷⁹ See Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1490–91 (2001).

⁸⁰ Robert K. Rouse, Jr., *My Word: Judicial Election Ideas Flawed*, ORLANDO SENTINEL, Sep. 9, 2010, http://articles.orlandosentinel.com/2010-09-09/news/os-ed-judicial-elections-myword-0909120100908_1_judicial-elections-circuit-judge-endorsements-of-judicial-candidates.

⁸¹ Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1472 (2001).

Id. at 4 (Kennedy, J., concurring). The Court has made clear that these different offices may merit different treatment. The Court stated in *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002), that it would “neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” Even though First Amendment considerations arise in the context of judicial elections, the public financing provisions of the Act comprise the kind of legitimate restrictions Justice Kennedy references in *Nevada Comm’n on Ethics*. Wisconsin’s public financing system has been designed to ensure that judicial elections do not look like legislative elections, without limiting free expression, so that judges may avoid any appearance of impropriety.

As the district court noted, the United States Supreme Court currently is reviewing the constitutionality of the triggered matching funds provisions under Arizona’s public financing law. Opinion and Order, Doc. 110 [hereinafter “Opinion”], at 25, 33 (citing *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (2010), *argued* March 29, 2011). The pending outcome of *McComish*, however, is not dispositive of this case. The Arizona program provides public financing to candidates for representative offices but not to judicial candidates.⁸² In contrast, Wisconsin’s public financing system specifically applies only to judicial elections. As the district court stated, “Wisconsin’s interest in safeguarding even an appearance of bias is

⁸² Arizona Citizens Clean Elections Act. Ariz. Stat. § 16-940 *et seq.*

stronger than any of the public financing statutes considered by courts to date. The Act covers *only* campaigns for a seat on the state’s highest court.” Opinion at 33. Wisconsin thus has the most compelling of interests in creating a public financing system that includes triggered matching funds for judicial elections—namely, protecting the integrity of the judiciary. *See* Opinion at 25, n.15.

B. Judicial Elections Must Be Evaluated Differently Than Legislative Elections Because of Due Process Considerations.

As federal courts repeatedly have recognized, judges play a crucial role in protecting individual rights and in ensuring that all litigants are afforded due process of law. To ensure due process, judges not only must avoid actual financial interest in a case, but also must avoid the perception that they are not impartial.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2265 (2009), the Supreme Court held that a judge’s recusal can be required where an extremely large independent expenditure made on behalf of a judicial candidate gives rise to a potential violation of due process, even where there is no actual proof of bias. For that reason, the Court concluded that due process required a justice of the West Virginia Supreme Court of Appeals to recuse himself from a case involving a company whose president spent approximately \$3 million to support independent expenditures in favor of the justice’s campaign while the company’s appeal was pending. *Id.* at 2257. Under “these extreme facts the probability of actual bias rises to an unconstitutional level.” *Id.* at 2266.

Because the independent expenditure in *Caperton* was made in the context of a judicial election, it gave rise to an impermissible risk of actual bias.

The result of *Caperton* is readily distinguishable from that of *Citizens United*, in which the Court stated that independent expenditures made in the context of *legislative* elections do *not* give rise to corruption or the appearance of corruption. *Citizens United v. FEC*, 130 S.Ct. 876, 908-11 (2010). In the context of a legislative election, the Court said “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” *Id.* at 910. The Court seemed to suggest that we have come to expect our non-judicial officers to act in the best interest of their campaign supporters and contributors.

Quite the opposite is true for judges: they cannot fulfill their basic constitutional role if they are—or are even viewed as—beholden to campaign supporters and contributors. Due Process requires otherwise. As the Court observed, “any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.” *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968). The Act safeguards against the appearance of bias while promoting free expression.

C. Judicial Elections Must Be Evaluated Differently Than Legislative Elections Because the Appearance of Corruption Undermines the Legitimacy of the Judiciary.

The basic functioning of the judicial system relies on the absence not only of corruption, but also of the appearance of corruption. But the judiciary's reputation for impartiality and nonpartisanship has been seriously undermined by the flood of money in judicial elections. Wisconsin's public financing system seeks to protect judges and courts from the perception of corruption that has accompanied that flood.

The Supreme Court has recognized that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). This reputation is vital because "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Caperton*, 129 S.Ct. at 266 (citing *White*, 536 U.S. at 779 (Kennedy, J., concurring)).

The Seventh Circuit has recognized this principle, as well. For example, the Court noted that "[t]he judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife." *Bauer v. Shepard*, 620 F.3d 704, 712 (7th Cir. 2010). Thus, the Court has recognized the importance of "rules that keep judges out of active politics." *Id.* It also has recognized that "states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop, these

independent-minded and faithful jurists.” *Siefert v. Alexander*, 608 F.3d 974, 979-80 (7th Cir. 2010), *cert. denied*, 2011 WL 1631092 (U.S. May 2, 2011).

Even James Bopp, Jr., who represents the Appellants here, has acknowledged that “[b]ecause courts have neither the power to levy taxes nor to command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice rather than mere political actors.”⁸³ Wisconsin had these core interests of the judiciary in mind when it created its public financing system. The Act protects judges from the perception that they are mere political actors by promoting a campaign environment that focuses on candidate qualifications rather than on the bombardment of spending fueled by special interests. Its provisions are constitutional in the context of judicial elections because the reputation of the judiciary is integral to its ongoing viability. Even if triggered matching funds are invalidated for legislative elections, the Act imposes reasonable limits to restore the judiciary’s reputation and assure impartial justice.

CONCLUSION

The rising tide of money flowing into judicial elections nationally shows no sign of abating. As that tide rises, so too does public skepticism regarding the impartiality of the judiciary. The Act promotes vigorous, competitive judicial elections while

⁸³ James Bopp, Jr. and Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DEN. U. L. REV. 195, 198 (2008).

protecting judicial independence. This Court should affirm the district court's order of summary judgment and find the challenged provisions of the Wisconsin Impartial Justice Act to be constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 6788 words in compliance with the 7000-word limit imposed on amicus briefs by Fed. R. App. P. 29(b).

I further certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) and Seventh Circuit Rule 32(a)-(b). This brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 12-point Palatino Linotype for the main text and 11-point Palatino Linotype for footnotes.

Dated this 17th day of June 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, the foregoing Brief Of *Amici Curiae* Justice At Stake, The Campaign Legal Center, The Committee For Economic Development, The Center For Governmental Studies, Chicago Appleseed, Democracy 21, Democracy North Carolina, The Fund For Modern Courts, Heartland Democracy, The Illinois Campaign For Political Reform, Justice For All, The League Of Women Voters Of The United States, The League Of Women Voters Of West Virginia, The Michigan Campaign Finance Network, North Carolina Center for Voter Education, Ohio Citizen Action, The Ohio Valley Environmental Coalition, Pennsylvanians For Modern Courts, Public Campaign, Texans For Public Justice, Transparency International–USA, The West Virginia Association For Justice, The West Virginia Citizen Action Group, and West Virginia Citizens For Clean Elections In Support Of Defendants-Appellees was filed via the appellate CM/ECF system with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit. The participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that the following participant in the case is not registered CM/ECF users. On June 17, 2011, two copies of the Brief Of *Amici Curiae* were sent via first-class mail, postage prepaid to the following non-CM/ECF participant:

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