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November 19, 2009

Governor Jim Doyle
115 East, State Capitol
P.O. Box 7863
Madison, WI 53707

Dear Governor Doyle:

I am writing in response to the letter you received yesterday from the Center for Competitive Politics regarding Senate Bill 40, the Impartial Justice bill. The letter expresses the view that SB 40 may be unconstitutional based on the Center's interpretation of the U.S. Supreme Court's ruling in *Davis v. Federal Election Commission* in June 2008.

As SB 40 was working its way through the Legislature, we consulted with leading campaign finance law authorities including the national Campaign Legal Center and the Brennan Center for Justice at New York University School of Law about what ramifications, if any, the *Davis* decision might have for the Impartial Justice bill. Enclosed is an [analysis](#) by the Campaign Legal Center for your review.

The Brennan Center for Justice provided us with the following analysis:

Background

In *Davis*, the Supreme Court invalidated the "Millionaire's Amendment" of the Bipartisan Campaign Reform Act (BCRA). That part of the law raised the contribution limits of a candidate when that candidate's self-financed opponent spent over \$350,000 of his personal funds in the race. Because the contribution limits were raised only for the non-self-financed candidate while remaining the same for the self-financed candidate, the Court concluded that the provision created an "asymmetrical regulatory scheme" that burdened the First Amendment rights of the wealthy candidate. The Court further found that the provision did not serve the compelling government interest of preventing corruption or the appearance of corruption because it raised contribution limits, and instead was an attempt to "level the playing field" between the candidates.

Opponents of public funding systems are using the *Davis* decision to attack the "trigger matching funds" provisions of public funding systems in Arizona and Connecticut (that also are a feature of SB 40) and claim that these trigger provisions are analogous to the Millionaire's Amendment. Plaintiffs claim that the trigger matching provisions subject them to a de facto expenditure limit because independent expenditure groups and nonparticipating candidates with participating opponents will be discouraged from making expenditures in excess of the trigger threshold amount.

Key Points:

- **Trigger matching fund provisions are constitutional and have been repeatedly upheld by federal courts.** Every state to enact a full public funding system, including Florida, New Mexico, North Carolina, Maine, Arizona, Minnesota and New Jersey, have included triggered matching funds as an

integral part of the system. Federal courts in the First, Fourth, Sixth and Eighth Circuits have upheld the constitutionality of this feature as part of a public funding program.

The most recent case addressing the trigger matching provisions is the Fourth Circuit's opinion in *North Carolina Right to Life v. Leake* which unanimously upheld a public funding program with triggered matching provisions for judicial races. The Fourth Circuit opinion was decided prior to *Davis*. After *Davis*, plaintiffs in the North Carolina case appealed the Fourth Circuit's opinion to the Supreme Court arguing that *Davis* made trigger matching provisions unconstitutional. The Supreme Court in August 2008 denied review of the case, leaving the Fourth Circuit's decision upholding the constitutionality of the trigger provisions in place.

- **Davis does not apply to the very different context of public funding systems.** *Davis* addressed an asymmetrical contribution scheme between similarly situated *privately* financed candidates. In a voluntary *public* funding scheme, participating candidates and non-participating candidates are not similarly situated and are routinely treated differently. All public funding systems – including the presidential public funding system upheld by the Supreme Court in *Buckley v. Valeo* – necessarily distinguish between participating candidates and non-participating candidates in providing benefits. For example, participating candidates are bound by expenditure limits and other restrictions. Non-participating candidates are not.
- **Trigger matching provisions in a public funding program achieve several compelling state interests, while the Millionaire's Amendment did not.** In *Buckley v. Valeo*, the Supreme Court specifically found that public funding directly furthers the government's interest in preventing corruption because it "eliminate(s) the improper influence of large private contributions." In contrast, the *Davis* court found that the Millionaire's Amendment did not serve any anti-corruption purpose but instead attempted to level the playing field.

In a public funding program, the participating candidate agrees to receive a fixed grant amount and surrender almost all of their ability to raise private contributions. Without supplemental grants, candidates are therefore unable to effectively counter high-spending opponents or independent expenditure campaigns and are therefore at a marked disadvantage. Trigger provisions are necessary to incentivize participation in public funding programs. At the same time, since the cost of running a campaign differs from jurisdiction to jurisdiction or year to year, trigger matching provisions prevent the waste of public funds by allowing the state to tailor grant amounts as needed for each race.

- **Rather than condemn public funding systems, *Davis* reaffirmed the decision in *Buckley* that public funding schemes are constitutional.** Therefore, the basic structure of public funding of election campaigns is unaffected by the *Davis* decision and remains constitutionally sound.

I hope these insights from bonafide legal experts in this field are helpful to you, and on behalf of the Wisconsin Democracy Campaign I urge you to sign SB 40 into law. The Impartial Justice bill easily represents the most significant campaign reform in Wisconsin since 1977, and it addresses very real and growing concerns about the independence of our state Supreme Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike McCabe". The signature is fluid and cursive, with the first name "Mike" and last name "McCabe" clearly distinguishable.

Mike McCabe
Executive Director