

Wisconsin Democracy Campaign  
203 S. Paterson St.  
Madison, WI 53703

March 27, 2017

The Honorable Patience D. Roggensack  
Chief Justice  
Wisconsin Supreme Court  
P.O. Box 1688  
Madison, WI 53701-1688

Re: rule Petition 17-01: In re Rule for Recusal

Dear Chief Justice Roggensack:

The Wisconsin Democracy Campaign is submitting this comment in favor of Rule Petition 17-01.

The Wisconsin Democracy Campaign, founded in 1995, is a nonpartisan 501(c)(3) organization, based in Madison, that tracks money in politics and advocates for clean and transparent government.

Before we get into our arguments for supporting this worthy petition, we'd like to urge you to hold a public hearing on this matter. The Wisconsin Supreme Court is a public institution, and the citizens of this state have a right to a public airing of this crucial issue, which strikes at the heart of the Court's integrity. The public has a right to see the justices wrestle with this question, just as it does with actual cases that come before the Court. So let's bring this out in the open and have the hearing in public, in the light of day, and televised on Wisconsin Eye for all to see. This is what open and transparent government should look like.

The Wisconsin Democracy Campaign supports this petition for the following four reasons:

### **1. The reputations of the retired judges submitting it.**

In an unprecedented move, 54 retired judges with a combined service of more than 1,100 years on the Wisconsin bench have issued this petition. These judges have had extremely distinguished careers. The list includes two former justices of the Wisconsin Supreme Court, 11 chief judges, several judges who've been named "judge of the year" by the Wisconsin Bar Association, and two judges who've received a "lifetime achievement award." You'd be hard-pressed to find a weightier group of judges.

### **2. The tattered reputation of the Wisconsin Supreme Court stems largely from the 2010 recusal rule the Court adopted and applied.**

You yourself have bemoaned the reputational blows that the Wisconsin Supreme Court has been receiving. As you noted in your recent speech at Marquette Law School, "We must maintain and protect the institutional legitimacy of our courts."

But many of these blows stem from the adoption and application of the recusal rule that the Court pushed through in 2010.

First of all, the Court accepted the wording provided by Wisconsin Manufacturers and Commerce and the Wisconsin Realtors Association, two of the most powerful business groups in this state. And WMC has been the biggest spender in support of the conservative justices on the Wisconsin Supreme Court over the years.

So your very adoption of the lax recusal rule carried a bad odor.

And the application of that rule, especially in the John Doe II case known as *Unnamed Petitioners v. Peterson*, illustrated the reputational harm that flows directly from it.

The conservative majority benefited enormously from the expenditures by three groups that were being investigated by the John Doe II prosecutor: WMC, Wisconsin Club for Growth, and Citizens for a Strong America. Together, these three groups spent approximately \$8,350,000 on advertisements and other electioneering to help elect you and Justices Gableman, Prosser, and Ziegler. When you and the three other justices then closed down the John Doe II case with a novel interpretation of the First Amendment that no U.S. Supreme Court campaign

finance ruling had ever embraced (and which actually ran counter to U.S. Supreme Court precedent on the subject), the eyebrows on any objective observer's face jumped several inches. Two of the justices, Prosser and Gableman, had actually been asked by the John Doe II prosecutor explicitly to recuse themselves, and they both rejected that request. To the objective observer, it was quite clear: The fix was in.

### **3. The Court's rationale for its recusal rule has been undermined by its own decision in the John Doe II case and subsequent legislation.**

In 2010, the Court justified its lax recusal rule in part by noting that corruption by issue advocacy groups was unlikely since expenditures and communications by such groups "must be completely independent of the judge's campaign, as required by law, to retain their First Amendment protection." But in the Court's decision to shut down the John Doe II investigation, the Court said that the First Amendment prohibits the State of Wisconsin from banning coordination between candidates and issue advocacy groups. So now that these expenditures and communications need no longer "be completely independent of the judge's campaign," the risk of corruption rears its ugly head.

Then in 2015, the Wisconsin legislature, in a reckless rewrite of our campaign finance law, codified that candidates could coordinate with issue advocacy groups.

So now any justice on the Wisconsin Supreme Court running for reelection, or any other candidate for the bench, can work with these outside issue advocacy groups and decide which ads to run and how many times to run them, and then we're supposed to believe that the justice can remain impartial when deciding a case involving the very issue advocacy group that helped get that justice elected?

This is mind-boggling in its brazenness, and in the gullibility the Court imputes to the citizenry of Wisconsin.

### **4. The Court's recusal rule is at odds with the U.S. Supreme Court's instructions.**

As the Brennan Center and the Campaign Legal Center have noted exhaustively in their comments on this petition, the recusal rule adopted by the Wisconsin Supreme Court is grossly at odds with the U.S. Supreme Court's instructions on recusal that have been spelled out in several court cases. These include the *Caperton* case, *Williams v. Pennsylvania*, *Rippo v. Baker*, and *Williams-Yulee v. Florida Bar*. In the latter case, the U.S. Supreme Court ruled:

“Even 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.”

Since you have expressed your concern about “the public’s confidence in the judiciary” and you don’t want to see it undermined, you have an obligation to rectify the defects of the Wisconsin Supreme Court’s 2010 recusal rule. Adopting the proposed rule by the 54 retired judges would get that job done.

The Wisconsin Democracy Campaign appreciates the opportunity to submit this letter, and we’re grateful for your consideration.

Sincerely,

Matt Rothschild  
Executive Director  
Wisconsin Democracy Campaign