No. 16-___

IN THE

Supreme Court of the United States

JOHN T. CHISHOLM, ET AL., *Petitioners*,
v.
TWO UNNAMED PETITIONERS, *Respondents*.

JOHN T. CHISHOLM, ET AL., *Petitioners*
v.
THE HONORABLE GREGORY PETERSON, AND EIGHT UNNAMED MOVANTS, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

PETITION FOR A WRIT OF CERTIORARI (REDACTED ORIGINAL)

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April 29, 2016

QUESTIONS PRESENTED

1. Do First Amendment principles of strict scrutiny apply to a state campaign finance statute which requires the public reporting of candidate-controlled expenditures made by third parties, which expenditures were made immediately prior to an election for the benefit of the candidate in the form of issue advertisements, or are such candidate-controlled expenditures properly treated as campaign contributions subject to a lesser standard of judicial review?
2. Does the objective bias rule of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), serve to disqualify a justice where [redacted]?
3. Is *Caperton* limited to circumstances where [redacted] or can other circumstances – [redacted] – combine to require recusal under the objective *Caperton* standards relating to bias?

4. Is the State as a litigant in an adversary proceeding entitled to a hearing before a panel of impartial justices, free of bias as required by *Caperton*?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the captions, the following parties are identified.

In the case of *Chisholm et al. v. Two Unnamed Petitioners,* the two petitioners below were Unnamed Movant nos. 6 and 7. The state court respondents were the Honorable Gregory A. Peterson and Special Prosecutor Francis D. Schmitz. District Attorneys Ismael R. Ozanne and Larry E. Nelson were intervenors below.

In the case of *Chisholm et al. v. the Honorable Gregory Peterson and Eight Unnamed Movants*, the original petitioner below was Special Prosecutor Francis D. Schmitz. District Attorneys Ismael R. Ozanne and Larry E. Nelson were intervenors below. The eight unnamed movants are identified as follows:

Movant No. 1 [Redacted];

Movant No. 2 [Redacted];

Movant No. 3 [Redacted];

Movant No. 4 [Redacted];

Movant No. 5 [Redacted];

Movant No. 6 [Redacted];

Movant No. 7 [Redacted]; and

Movant No. 8 [Redacted].

The above parties referenced in the redacted Petition will be referred to as "Unnamed Movant no." with the respective number and/or "UM no." with the respective number.

RULE 29.6 DISCLOSURE STATEMENT

The District Attorneys in three Wisconsin Counties, Dane, Iowa and Milwaukee, are the petitioners. They are not "nongovernmental corporations" within the meaning of Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Dane County District Attorney Ismael R. Ozanne, Iowa County District Attorney Larry E. Nelson and Milwaukee County District Attorney John T. Chisholm respectfully petition for a writ of certiorari to review the Wisconsin Supreme Court July 16, 2015 decisions and orders.

OPINIONS BELOW

The Wisconsin Supreme Court decision is published as *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis.2d 1, 866 N.W.2d 165. App. 1a. The decision on reconsideration is published as 2015 WI 103, 365 Wis.2d 351, 875 N.W.2d 49. App. 330a. Justice Michael Gableman's order denying the motion for his recusal is not published. App. 299a. Justice David Prosser's order and decision denying the motion for his recusal are not published. App 297a and 301a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257(a). The decision and order were entered July 15, 2015. Reconsideration was denied December 2, 2015. An application for an extension of time to file this petition was submitted on February 17, 2016. The time for filing was extended to April 29, 2016.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides that:

> Congress shall make no law . . . abridging the freedom of speech.

U.S. Const., amend. I.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state . . . [shall] deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const., amend. XIV, § 1.

STATUTORY PROVISIONS

Wis. Stat. §11.06(4)(d) (2013-14)[1] required[2] as follows:

> Reportable Contributions. A contribution, disbursement or obligation made or incurred to or for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee if it is made or incurred with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent.

An In-Kind contribution is defined to "mean[ ] a disbursement by a contributor to procure a thing of value or service for the benefit of a registrant [i.e., a campaign committee] who authorized the disbursement." Wis. Adm. Code § GAB 1.20(1)(e).

Wisconsin defined "contributions" and "disbursements" in terms of "political purposes." It defined "political purposes" as an act:

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[1] Unless otherwise noted, references to Wis. Stat. ch. 11 are to the 2013-14 statute edition.

[2] On December 16, 2015, the Wisconsin Legislature enacted 2015 Wis. Act 117, which amended Wisconsin's campaign finance law, limiting ch. 11 to express advocacy.

> done for the purpose of influencing the election . . . .
>
> * * *
>
> (a) Acts which are for "political purposes" include but are not limited to:
>
> i. [A]…communication which expressly advocates the election or defeat of a clearly identified candidate….

Wis. Stat. §11.01(16) (emphasis added).

INTRODUCTION

Described as the "end of campaign finance law,"[3] the July 16, 2015 Wisconsin Supreme Court decision rewrote First Amendment jurisprudence. The court ruled that *candidate-controlled* expenditures for issue ads promoting the candidate, but published in the name of an "independent" 501(c) organization, are entitled to First Amendment protection because these expenditures are "conduct which the state is not permitted to regulate." *Two Petitioners,* 2015 WI 85, ¶ 10, 363 Wis.2d 1, 29-30, 866 N.W.2d 165, 179 (2015). App. 8a. The decision permits unlimited candidate-controlled expenditures by 501(c) organizations funded with anonymous dollars; it is the very undoing of campaign disclosure requirements. "If campaigns tell potential contributors to divert money to nominally

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[3] Lincoln Caplan, *Scott Walker's Wisconsin and the End of Campaign-Finance Law*, The New Yorker, July 21, 2015, *available at* http://www.newyorker.com/news/news-desk/scott-walkers-wisconsin-and-the-end-of-campaign-finance-law (last visited April 19, 2016).

independent groups that have agreed to do the campaigns' bidding,…the requirement that politicians' campaign committees disclose the donors and amounts becomes useless." *O'Keefe v. Chisholm*, 769 F.3d 936, 941 (7th Cir. 2014) *cert. denied* 135 S. Ct. 2311 (2015).

This petition presents the opportunity to plainly state candidate-controlled issue ads are *not* truly "independent" and *not* worthy of First Amendment strict scrutiny protection. Expenditures for such ads must be disclosed as "disguised contributions." This is the teaching of forty years of precedent starting with *Buckley v. Valeo,* 424 U.S. 1 (1976) and continuing through *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

This petition also presents the opportunity to declare that fundamental fairness principles of *Caperton v. A.T. Massey Coal Co., Inc.*, apply to all proceedings, not just some, including those where the state is a litigant. 556 U.S. 868 (2009). Viewed objectively, two of the four justice majority should not have participated in the decision below. This is so for at least four reasons. First, certain respondents here were directly [redacted] Fourth, respondents Unnamed Movant no. 2 (run by Unnamed Movant nos. 6 and 7), Unnamed Movant no. 3 (also run by Unnamed Movant nos 6 and 7) and Unnamed Movant no. 4

together spent millions[4] in support [redacted].

STATEMENT

This case involves a criminal investigation commenced September 5, 2012 in Milwaukee County as a John Doe proceeding under Wis. Stat. § 968.26 (2013-14). A "John Doe" is held before a judge and is not unlike a "one-person" Grand Jury. The investigation concerned coordination between "independent" organizations and campaign committees during 2011 and 2012. This included the Unnamed Movant no. 1, a campaign committee, during the 2012 gubernatorial recall election campaign.

At that time, Wisconsin case law held that expenditures for issue advocacy " 'coordinated' with, or made 'in cooperation with or with the consent of a candidate … or an authorized committee' [are treated] as campaign contributions." *Wisconsin Coal. for Voter Participation v. State Elections Bd.*, 231 Wis.2d 670, 681, 605 N.W.2d 654, 660 (Wis. Ct. App. 1999) (quoting *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976)). A Wisconsin Government Accountability Board opinion was also in accord. *See* Wis. El. Bd. Op. 2000-02 (adopted June 21, 2000 and reaffirmed March 26, 2008). That agency is responsible for supervising elections; its formal opinions have legal

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[4] The groups spent $3.34 million dollars during the Prosser campaign, eight times pre-election campaign spending. [redacted]

force and effect. *See* Wis. Stat. § 5.05(6a)(a)2 (2015-16).

The investigation is not complete. On January 10, 2014, it was halted by the John Doe Judge. Prosecutors were ordered to cease examination of evidence.

I. Factual background

The John Doe record consists of affidavits and exhibits submitted in support of subpoenas and search warrants, including warrants for digital evidence held by Internet e-mail providers. *See, e.g.,* December 10, 2012 Affidavit reprinted at App. 466a (hereinafter referred to as "Affidavit"). Before the investigation was halted, prosecutors developed evidence that the Unnamed Movant no. 1 campaign committee controlled expenditures made by the Unnamed Movant no. 2. The UM no. 2 expenditures paid[5] for issue ads promoting [redacted] aired immediately before the June 2012 Recall Election. The UM no. 1 campaign committee, in effect, owned and controlled UM no. 2 because of "dual principals," *i.e.*, key operatives directing both UM no. 1 and UM no. 2. They were UM nos. 6 and 7. Affidavit, ¶¶19-20. App. 486a-487a. Although not a party here, [redacted] also served a dual role as fundraiser for both UM no. 1 and no. 2.

UM no. 6 was a pivotal campaign advisor to [redacted]. "[redacted]

[5] Millions were also provided to other 501(c) corporations who were the named publishers of issue ads. One such 501(c), Unnamed Movant no. 3, was controlled by Unnamed Movant nos. 6 and 7.

[redacted]),” wrote [redacted] in May 2011. App. 601a. UM no. 6 ran the UM no. 1 ad campaign during the Recall Election. App. 626a-640a.

Simultaneously, UM no. 6 ran operations for UM no. 2. App. 619a. In one 2010 e-mail , UM no. 6 flatly stated, “ .” App. 594a. App. 618a (. App. 593a. UM no. 6 described himself in press reports as a “key advisor” to UM no. 2. App. 597a.

E-mail exchanged in anticipation of the Recall shows the close-knit interaction between UM no. 1 and 2.

[redacted]."

Shortly before the June 5, 2012 Recall Election, UM no. 1/UM no. 2 fundraiser [redacted] wrote to a potential contributor. [redacted]

Beyond fundraising, [redacted] also helped decide whether funds – once received by UM no. 1/UM no. 2 fundraiser [redacted] – would be deposited into the (reportable) campaign account or the (undisclosed) UM no. 2 account. Affidavit ¶43. App. 507a and 602a.

Secret contributors received special favors. One was Gogebic Taconite LLC. As reported by the Milwaukee Journal Sentinel based on investigation records made public,

> [a]mong the funds that flowed into the Wisconsin Club for Growth was $700,000 from a company trying to

> build a massive open-pit iron mine in northern Wisconsin. Soon after the 2012 recall and general elections, Walker and Republicans eased environmental regulations, helping the firm.[6]

Another beneficiary was John Menard. Based on publicly released investigation records, his home improvement retail chain store gave $1.5 million to WiCFG. Subsequently, "Menard's company has been awarded up to $1.8 million in special tax credits from a state economic development corporation that Walker chairs, according to state records."[7]

Overall, the evidence established that, by virtue of dual agency, UM no. 1 was one and the same with UM no. 2. Because the "dual agents" (UM no. 6 and UM no. 7) – directly and indirectly – spent millions of UM no. 2 dollars promoting [redacted] for the Recall Election, this meant UM no. 1 itself, acting through its campaign strategists UM no. 6 and UM no. 7, expended these UM no. 2 funds for UM no. 1's

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[6] Patrick Marley, Dan Bice and Lee Berquist, "*Walker steered donors to group*," Milwaukee Journal Sentinel, August 22, 2014, page 1A, *available at* http://www.jsonline.com/news/statepolitics /walker-wanted-funds-sent-to-wisconsin-club-for-growth-b99336 519z1-272364371.html, (last visited April 15, 2016).

[7] Michael Isikoff, *Secret $1.5 Million Donation from Wisconsin Billionaire Uncovered in Scott Walker Dark-Money Probe*, https://www.yahoo.com/news/wisconsin-gov-scott-walker-photo-charlie-114429739886.html, March 24, 2015 (last visited April 18, 2016).

benefit. UM no. 1 failed to report any of these candidate-controlled expenditures as contributions.

II. John Doe proceedings

When commenced in Milwaukee County in September 2012, the John Doe investigation was assigned to Judge Barbara Kluka. On September 5, 2012, the proceeding was ordered to be secret. Prosecutors have faithfully honored the secrecy order. However, much information has become public. This is due to authorized disclosures in a Title 42 § 1983 civil lawsuit brought against prosecutors by WiCFG.[8] It is also because certain respondents have conducted a campaign of lies and disinformation intended to impugn the motives of the investigation.[9]

Others outside Milwaukee County were probable subjects of the investigation. A unique Wisconsin law gives politicians and political operatives the right to be prosecuted for election offenses in their home county by the (partisan) elected District Attorney there, not where the crimes occurred. *See* Wis. Stat. § 11.61(2). A total of four additional counties had potential jurisdiction because subjects resided there.

In January 2013, because of the scope of the investigation, the Milwaukee County District

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[8] See the public record in *O'Keefe v. Chisholm,* 769 F.3d 936 (7th Cir. 2014).

[9] *See*, e.g., "Confidential Documents" discussed at David French, *Wisconsin's Shame: The 'John Doe' Investigations*, Nat'l Review (October 7, 2015, 4:00 AM), http://www.nationalreview.com/article /425178/wisconsin-john-doe-investigations.

Attorney (a Democrat), tendered the entire investigation to the Wisconsin Attorney General (a Republican). On May 31, 2013, the Attorney General refused acceptance. He cited a conflict of interest due to his representation of [redacted] and apparent impropriety if he, a Republican, would determine that no charges were warranted against conservative politicians, political operatives and organizations.

The Attorney General recommended the Government Accountability Board (GAB) become involved. The GAB is a panel of six retired nonpartisan judges. The Board and its staff are the chief election officials in Wisconsin. *See* Wis. Stat. ch. 5 (2013-14). In June 2013, after reviewing the evidence, the nonpartisan GAB voted to join the investigation.

Thereafter (because prosecutorial authority rests with the District Attorney in the county of a defendant's residence) two Democratic District Attorneys and two Republican District Attorneys were consulted. Each examined the evidence and commenced John Doe investigations in their counties. Judge Kluka was assigned to oversee these proceedings. They were commenced on August 21, 2013.

With the recommendation of the five district attorneys, Attorney Francis Schmitz was appointed on August 23, 2013 as special prosecutor in the five counties. Special Prosecutor Schmitz is a retired federal prosecutor. He was a finalist considered by President George W. Bush for appointment as United States Attorney in Wisconsin. In 2014, he

publicly stated he voted for Governor Walker in the Recall Election.

On September 30, 2013, Judge Barbara Kluka issued subpoenas and search warrants. On October 5, 2013, subpoenas were served on respondents UM no. 1, UM no. 2, UM no. 3, UM no. 4, UM no. 5, and UM no. 8. Search warrants were served at the offices and homes of respondents UM no. 6 and UM no. 7.

On October 27, 2013, Judge Barbara Kluka recused herself for unspecified reasons. Judge Gregory Peterson replaced her.

In the following weeks, all respondents who received a subpoena filed motions to quash. Respondents UM no. 6 and UM no. 7 filed motions for return of property. They contended *inter alia* that their freedom of speech rights had been violated.

On January 10, 2014, Judge Peterson quashed the subpoenas and ordered the property returned. App. 435a. He concluded Wisconsin statutes and regulations must be interpreted to reach express advocacy only. App. 436a. A stay of the order pending appeal was granted January 27, 2014, but the judge ordered the "property seized pursuant to search warrants shall not be examined by the State." On February 25, 2014, that "no examination" order was expanded to "any material secured from any source by legal process."[10]

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[10] To defend against § 1983 lawsuits brought by certain respondents, this order was amended to allow examination of evidence identified prior to February 25, 2014.

III. Proceedings before the Wisconsin Supreme Court

On February 6, 2014, UM no. 6 and UM no. 7 filed a petition for an original action in the Wisconsin Supreme Court. The original action petition sought a declaration that, consistent with Judge Peterson's order, Wisconsin law must be interpreted to reach express advocacy only.

On February 21, 2014, Special Prosecutor Schmitz filed a Petition for Supervisory Writ with the Wisconsin Court of Appeals, seeking review of the January 10, 2014 decision quashing subpoenas and ordering the return of property. In April 2014, UM no. 6, UM no. 7, UM no. 2, and UM no. 1 moved to bypass the court of appeals, asking that the Wisconsin Supreme Court take the matter.

On December 14, 2014, the supreme court granted the petition for an original action and the April 2014 petitions for bypass. The court consolidated these two matters and a third.[11]

[11] A third case, 2013AP2504-2508-W, concerning the authority of the Special Prosecutor was also consolidated. That matter is not the subject of this petition.

Justice Gableman denied the motion without comment. App. 299a. Justice Prosser also denied the motion, App. 297a, and subsequently issued a decision. App. 301a. Further facts relating to the motion to recuse will be discussed below.

On July 16, 2015, the Wisconsin Supreme Court ruled, holding:

> the definition of "political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally overbroad and vague under the First Amendment to the United States Constitution and Article

> 1, Section 3 of the Wisconsin Constitution[12] because its language " 'is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate.' "
>
> ***
>
> Consequently, the investigation is closed. . . . [W]e order that the special prosecutor and the district attorneys involved in this investigation must cease all activities related to the investigation, return all property seized in the investigation from any individual or organization, and permanently destroy all copies of information and other materials obtained through the investigation.

Two Petitioners, 2015 WI 85 at ¶¶10-11, 363 Wis.2d 1 at 29-31, 866 N.W.2d 165 at 179 (emphasis added)(citations omitted). App. 8a-9a.

No party requested destruction of anything. A *sua sponte* order to destroy evidence is unprecedented in Wisconsin jurisprudence.[13] [redacted]

[12] The state court noted freedom of speech rights are coextensive under the Wisconsin and United States Constitutions. *Two Petitioners,* 2015 WI 85 at ¶10, n. 8, 363 Wis. 2d at 30, 866 N.W.2d at 179.

[13] The order was subsequently amended to require surrender to the court with destruction of all copies. See page 16.

[redacted]

As to the Supervisory Writ filed by the Special Prosecutor, the court wrote "Judge Peterson concluded that the subpoenas and search warrants do not provide a reasonable belief that the Unnamed Movants 'committed any violations of the campaign finance laws.'" *Id.* at ¶ 98, 363 Wis.2d at 77, 866 N.W.2d at 202. App. 59a. The court concluded "Reserve Judge Peterson [did not] violate[ ] a plain legal duty when he quashed the subpoenas and search warrants and ordered the return of all property seized by the special prosecutor." *Id.* at ¶136, 363 Wis.2d at 99, 866 N.W.2d at 212. App. 83a.

The third consolidated case, not presently before this Court,[14] concerned the appointment of Francis Schmitz as a special prosecutor. The state supreme court originally affirmed that appointment. *Id.* at ¶¶129-132, 363 Wis.2d at 95-97, 866 N.W.2d at 210-11. App. 78a-80a.

The Special Prosecutor moved for reconsideration on August 4, 2015. The Special Prosecutor indicated he intended to seek review before this Court.

On December 2, 2015, the court denied the motion, but made two significant changes to its initial mandate. First, it modified the order to destroy evidence to a "surrender and divest" order. The court ordered all documents and data be surrendered under seal to the Wisconsin Clerk of Supreme Court, with "divestment" of copies. *State ex*

[14] *See* note 11.

rel. Three Unnamed Petitioners, 2015 WI 103, ¶¶32-34, 365 Wis.2d 351, 372-75, 875 N.W.2d 49, 59-60 (Wis. 2015). App. 350a-352a.

The court also revisited its ruling validating Schmitz's appointment as a Special Prosecutor. The court reversed itself and ruled that Schmitz's appointment was invalid after all. *Id.* at ¶9, 365 Wis.2d 351 at 360, 875 N.W.2d at 53. App. 337a. The court disqualified Schmitz from all "future proceedings." *Id. at* ¶¶15-16, 365 Wis.2d at 363, 875 N.W.2d at 54-55. App. 340a-341a.

The District Attorneys were given an opportunity to intervene. *Id. at* ¶19, 365 Wis.2d at 366, 875 N.W.2d at 56. App. 343a. Three of five did so. They are the petitioners here.

The district attorneys secured *pro bono* representation by the law firm of Reed Smith LLP. On January 25, 2016, the petitioners sought leave to allow two attorneys and an administrative assistant from that firm to have access to the (otherwise secret) record for the proper preparation of a Petition for Writ of Certiorari.

The state supreme court denied the request, refusing to recognize the right of the district attorneys to be represented by counsel. The court wrote that no need had been shown by the petitioners, whose appellate experience is limited to traffic and misdemeanor matters in the state court of appeals.

REASONS FOR GRANTING THE PETITION

I. This petition affords an unprecedented opportunity, not likely to recur, to address First Amendment issues presented by coordination conduct in the form of direct control between a candidate committee and a third party during an election campaign.

The Court has never decided a controversy with a record demonstrating coordination, much less a record which includes special legislative favors to corporations making "disguised contributions."[15] This rare case must be accepted to apply these facts to First Amendment law.

This factual record has the advantage of being effectively undisputed. The respondents have not challenged that UM No. 6 and 7 directed UM no. 1 campaign activities and simultaneously controlled UM no. 2. Rather, their challenge to this investigation is in the nature of a demurrer. Consequently, there is no need here to decide exactly what constitutes conduct qualifying as "coordination" subject to regulation under the First Amendment. Indeed, this case represents the most extreme form of coordination conduct. The candidate's key principals *were* one and the same with the third party 501(c), making decisions for both UM no. 1 and 2.

With two exceptions, *FEC v. The Christian Coalition*, 52 F.Supp.2d 45, 48-49 (D.D.C. 1999) and *Wisconsin Coalition*, 231 Wis.2d at 680-81, 605 N.W.2d at 659-60, the petitioners are unaware of

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[15] *See* note 6.

any reported appellate case with a factual record involving the conduct of coordination. Coordination investigations are rare; reported decisions on coordination investigations are rarer.

II. In conflict with Court decisions on campaign finance regulation, the Wisconsin Supreme Court decided that candidate-controlled expenditures by third parties are not equivalent to contributions and need not be disclosed to the public as such.

Contrary to the state court holding, this Court has repeatedly written that candidate-controlled expenditures by third parties can be treated as contributions for purposes of campaign finance regulations. As such, these regulations are not subject to strict scrutiny analysis; they pass muster if closely drawn to match a sufficiently important interest. This investigation was premised on a statute requiring the reporting of candidate controlled expenditures as contributions. *See* Wis. Stat. § 11.06(4)(d). This Court has already upheld a materially identical federal statute.

The Supreme Court analyzes campaign contributions under one First Amendment standard, requiring that regulations be closely drawn to match a sufficiently important interest. *McConnell v. Federal Election Com'n*, 540 U.S. 93, 136 (2003) overruled in part on other grounds; *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 365-66 (2010). Contribution and disclosure regulations are sustained because they serve to prevent *quid pro quo* corruption or the appearance thereof. *Citizens United,* 558 U.S. at 357.

By comparison, the Court has treated expenditures for independent issue advocacy differently, applying a strict scrutiny standard. *Id.* at 339-340.

A *candidate-controlled* expenditure by a third party for an issue advertisement promoting the candidate is not "independent" speech. Beginning with *Buckley v. Valeo*, the Court has often stated that candidate-controlled expenditures by third parties are properly treated as campaign contributions since they are "disguised contributions."

> [C]ontrolled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than s. 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

424 U.S. at 46-47.

The Court has consistently affirmed this "disguised contribution" principle. In *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II),* this Court wrote "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are. . . . At least this is so where the spending is not coordinated with a candidate or his campaign." *Id.* at 440-41. In *McConnell*, the Court wrote, "it…[is] settled that

expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions…." 540 U.S. 93, 219. *Citizens United v. FEC* also affirmed *Buckley's* coordinated expenditure principle:

> The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. *By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.*

558 U.S. at 360 citing *Buckley,* 424 U.S. at 46 (emphasis added). Justice Kennedy further observed, "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 558 U.S. at 357 quoting *Buckley*, 424 U.S. at 47.

The Wisconsin Supreme Court did not distinguish, discuss or otherwise explain these established principles. Instead, the state court held the Wisconsin statutory scheme was dependent upon an unconstitutionally overbroad definition of "political purposes." *See* Wis. Stat. §11.01(16). The court wrote, "[W]e must engage in statutory interpretation of the phrase 'political purposes,' which includes all activities 'done for the purpose of influencing [an] election.' " *Two Petitioners*, 2015 WI 85 at ¶41, 363 Wis.2d at 44, 866 N.W.2d 165 at 186 (emphasis added). App. 23a-24a. The court

concluded the "political purposes / influencing an election" language was "unconstitutionally overbroad and vague if it is not given a limiting construction and applied to only express advocacy and its functional equivalent." *Id.*

The holding contradicts *Buckley* itself. *Buckley* sustained disclosure regulations premised on the *exact same* "influencing an election" statutory language. Wisconsin's "influencing an election" language, adopted by the legislature in 1980, mirrors the Federal Election Campaign Act (FECA).[16] *Buckley* addressed this FECA provision, substantially identical to Wisconsin law, and as applied to "contibutions" (versus expenditures), *Buckley* found the provisions to be constitutional, requiring no limiting construction. 424 U.S. at 23-35.

In a section labelled "Vagueness Problems," 424 U.S. at 76, the *Buckley* Court rejected objections to contribution limits and disclosure requirements under FECA, both framed in terms of conduct "influencing an election." This Court found no vagueness problems, unlike the Wisconsin Supreme Court. *Buckley* construed the term "contribution" to "include not only contributions made directly or indirectly to a candidate...but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of

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[16] Under FECA, "contribution" was defined as "anything of value made for the purpose of…influencing…[an] election…." *See Buckley*, 424 U.S. at 145 and 181 (reprinting 2 U.S.C. § 431(e) and 18 U.S.C. § 591(e)) (emphasis added).

the candidate." 424 U.S. at 78. Defined thusly, the Court continued, " 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." *Id.*

Because "contributions" are connected to a candidate or campaign, by definition, they "influence the election." *Id.*

As one respected District Court decision held, "the 'express advocacy' standard is not constitutionally required for statutory provisions limiting contributions." *Christian Coalition*, 52 F. Supp. 2d at 87. *Buckley* concluded "that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC v. National Conservative PAC*, 470 U.S. 480, 497 (1985). The Wisconsin court ignored this "fundamental constitutional difference" between "disguised contributions" and genuinely independent political speech.

Wisconsin Statutes Section 11.06(4)(d) plainly required that a contribution or disbursement made for the benefit of a candidate must be reported "if it is made…with the authorization, direction or control of or otherwise by prearrangement with the candidate or the candidate's agent." The state court ignored critical Supreme Court precedent upholding, on First Amendment grounds, language substantially identical to this key statutory provision.

In *McConnell*, the Court rejected a challenge to Section 214 of the Bipartisan Campaign Reform Act of 2002, concerning coordinated expenditures. 540

U.S. at 221. Section 214 of the BCRA is materially identical to Wisconsin Statutes section 11.06(4)(d). Section 214 provided, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 540 U.S. at 219 citing 2 U.S.C. §441a(a)(7)(B)(i). The *McConnell* Court considered whether this language was overbroad and vague. *McConnell* expressly rejected the argument that "a clear definition of 'coordination' [was required and] …any definition that does not hinge on the presence of an agreement cannot provide the 'precise guidance' that the First Amendment demands." 540 U.S. at 220. The substantially identical language of Section 11.06(4)(d) is also not impermissibly broad or vague. *See also Center for Individual Freedom v. Madigan*, 697 F.3d 464, 495-96 (7th Cir. 2012)(upholding language framed as "made *in concert or cooperation with* or at the *request, suggestion, or knowledge* of a candidate, a political committee, or any of their agents.")(emphasis in original).

III. The Wisconsin Supreme Court decision conflicts with this Court's decisions on coordinated issue advocacy and quid quo pro corruption.

Quid pro quo corruption is not prevented simply because words of issue – versus express – advocacy are used. Indeed, in the context of electioneering communications, this Court previously held that coordinated issue ads can be regulated as contributions.

The state court, however, wrote that "the United States Supreme Court has drawn an important distinction between discussion of issues and candidates and advocacy of election or defeat of candidates." *Two Petitioners*, 2015 WI 85 at ¶ 48 (internal quotation marks and citations omitted). App. 27a-28a. That "important distinction," however, is predicated on the principle that *independent* political speech deserves unqualified First Amendment protection. This is because *true* independence prevents the possibility of *quid pro quo* corruption.

No one seriously disputes that the conduct of coordination is fertile ground for *quid pro quo* corruption. It does not matter that the context for coordination is issue advocacy. This record supports that proposition, *i.e.*, the specter of corruption exemplified by special legislation passed for major, secret UM no. 2 contributors.[17]

In *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007), an issue advocacy case, Justice Antonin Scalia discussed a prior issue advocacy case, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). He focused on a suggestion in *Bellotti* at footnote 26 "that independent expenditures by corporations [to influence candidate elections] might someday be demonstrated to beget quid-pro-quo corruption." *Wisconsin Right to Life*, 551 U.S. at 490, n.4 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia wrote dryly, "That someday has never come." *Id.* He

[17] *See* text accompanying notes 6 and 7.

continued, "No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures." *Id.* (emphasis in original).

Justice Scalia's meaning is plain: (1) *coordinated* expenditures for issue advocacy *can* give rise to *quid pro quo* corruption; and (2) as such, this conduct is subject to legitimate regulation.

Consistent with Justice Scalia's comments, this Court previously sustained regulation of coordinated issue advocacy. In *McConnell v. FEC*, the Court reviewed the provisions of BCRA § 202. The Court noted that § 202 amended the Federal Election Campaign Act of 1971 to provide that disbursements for electioneering communications that are coordinated with a candidate or party are treated as contributions to, and expenditures by, that candidate or party. 540 U.S. at 202 citing 2 U.S.C. § 441a(a)(7)(C)(Supp. II). "Electioneering communications," of course, encompass issue advocacy.

The *McConnell* Court noted that the intent of the BCRA amendment was to make clear that coordination rules applied to electioneering communications, *i.e.*, issue advocacy. Recognizing *Buckley*'s narrowing construction applied to expenditures but not coordinated expenditures, the Court particularly noted "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." 540 U.S. at 203. The constitutionality of such issue

advocacy regulation was sustained. *Id.* Paraphrasing *McConnell,* there is no reason why Section 11.06(4)(d) may not regulate coordinated disbursements for issue advocacy in the same way it regulates all other coordinated expenditures.

IV. Granting this Petition will Clarify Case Law Concerning the Litigating State's Right to a Fair Hearing.

Notwithstanding *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), a series of this Court's cases stand for the principle that "justice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). These cases support the proposition that a State is entitled to a fair hearing before an objective tribunal and the principles of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), apply where the state is a litigant in an adversary proceeding. This is especially so where, as discussed below, some respondents successfully influenced the state court with extra-judicial information.

Under any reasonable reading of *Caperton*, *id.*, the special prosecutor did not receive a fair and impartial hearing below. [redacted]

[redacted]

Justice Prosser filed a decision on recusal. App. 301a. Justice Gableman did not.

A. Justice Prosser [redacted].

Justice Prosser elected to apply for and receive $400,000 in public campaign financing for his 2011 election. To qualify, he had to raise 1,000 "small dollar" donations. [redacted]

> We need to do a quick conference call at 2 PM tomorrow to discuss the Prosser race and his need for 1,000 low dollar donors by year end. [redacted].

App. 641a. [redacted]."

Justice Prosser explained that the assistance from [redacted] happened before his campaign hired a manager. App. 325a. [redacted]

[redacted]. By comparison, the Prosser campaign spent about $700,000 overall (that included *post*-election recount-related expenses), of which – under the public financing law – no more than $400,000 was spent on the primary and general election. App. 652a. [redacted] App. 661a.

[redacted] *Id.* However, in his decision on recusal, Justice Prosser stated he "did not know what [redacted] had done." App. 327a.

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[18] UM no. 2 and UM no. 3a (a second 501(c) controlled by UM no. 6 and 7 and funded by UM no. 2) together spent about $1.25 million. App. 643a.

No jurist "can be a judge in his own case…[or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

[19] 231 Wis. 2d 670, 605 N.W.2d 654.

That vote also overruled contrary case law, *viz.*, *Wisconsin Coalition*, *id.*

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The parallel to the circumstances in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) is unmistakable and undeniable. In *Lavoie*, Alabama Justice Embry, while a plaintiff in a bad-faith-refusal-to-pay lawsuit against an insurer, voted to sustain a bad-faith-refusal-to-pay verdict and in the process, clarified Alabama bad faith law in a manner generally favorable to plaintiffs. *Id.* at 816-17. In fact, all of the issues resolved by the court were issues in Justice Embry's pending lawsuit. *Id.* at 823. "Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 824.

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[redacted] The *Two Petitioners* decision changed all that. Overruling *Wisconsin Coalition*, 231 Wis.2d 670, 605 N.W.2d 654, it held all issue advocacy coordination to be beyond the reach of Chapter 11. [redacted]

B. Caperton, Murchison and Gibson principles disqualify Justice Gableman.

Justice Gableman cast his vote with the majority under circumstances where any reasonable judge would have been tempted to disregard neutrality. As with Justice Prosser, the question is not whether the judge was or was not influenced in fact. The proper constitutional inquiry is whether sitting on the case would offer a possible temptation to the average judge to lead him or her not to hold the balance nice, clear and true. *Caperton*, 556 U.S. at 879. Considering "all the circumstances of this case," *id.* at 872, the need for Justice Gableman's recusal was manifest.

Other than to deny it, Justice Gableman did not respond to the special prosecutor's Motion for Recusal based in part on the relationship he had with particular respondents. The facts are:

- [redacted]

- [redacted]; and
- Justice Gableman will face re-election in less than two years.

Recognizing the "degree or kind of interest…sufficient to disqualify a judge from sitting 'cannot be defined with precision,' " *Lavoie*, 475 U.S. at 822 quoting *Murchison*, 349 U.S. at 136, this controversy presents the issue of whether a confluence of circumstances constitutes objective bias within the meaning of *Caperton*. 556 U.S. at 883-84. It blends concerns about [redacted] *(Murchison),* [redacted] *(Caperton)* and a "sufficient substance" pecuniary interest (*Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)).

The *Murchinson* decision, [redacted] supports recusal here. In *Murchison*, the Court held that a witness testifying before a judge in a "one-man grand jury" may not thereafter be tried for contempt in a public proceeding presided over by that same judge. A judge's "recollection of [what took place previously] is likely to weigh far more heavily with him than any testimony given in the open hearings." 349 U.S. at 138.

[redacted]

[redacted]

As in *Murchison*, [redacted] is objectively substantial. The essence of *Murchison* is that certain prior relationships between a judge and a party may disqualify a judge from hearing a case. [redacted].

The *Caperton* decision also supports recusal. [redacted]

The *Gibson* decision is also instructive on the issue of recusal. In that case, the Alabama Board of Optometry was composed solely of optometrists in private versus corporate practice. On review of a

proceeding to revoke the professional licenses of optometrists working for a corporate competitor, Lee Optical Company, the Court held the Board was disqualified from passing on issues before it due to a pecuniary interest in the hearing's outcome. 411 U.S. at 578-79. Although not as "direct or positive" as a mayor-judge funding city revenue from fines in a mayor's court (*see Ward v. Village of Monroeville*, 409 U.S. 57 (1972)), this pecuniary interest "had sufficient substance to disqualify" the Board. 411 U.S. at 579.

Justice Gableman's term will end in 2018. Elections for his seat will be held in April that year. He is 49 years old.

Viewed objectively and without regard to what actually influenced him, Justice Gableman's pecuniary interest in the outcome of this case was substantial. The prospect [redacted] is, by any objective assessment, a pecuniary interest of "sufficient substance."

C. Supported with citations to a campaign of misinformation led by some of the respondents, the majority and concurring opinions' reliance on extra-judicial information indicates the majority justices were not objective.

The majority opinion, written by Justice Gableman, and concurring opinions themselves evidence a lack of objectivity. *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J. concurring) (finding bias based solely on the disposition in a contempt proceeding). The majority was influenced by an unrelenting media campaign

by particular respondents to discredit the investigation as a heavy-handed political witch hunt.[20]

The special prosecutor consistently denied these allegations to the extent they were made in filings with the state court. The justices nevertheless accepted – and then cited – media accounts of a witch hunt directed at the respondents, more than one of whom were powerful allies in their elections. This was all done without the benefit of any hearing. More than that, such references were beyond the scope of the First Amendment issues before the court. While impossible to know the exact reasons for this, viewed objectively, the relationship between the majority justices and certain respondents explains these circumstances.

An appellate court should not consider factual assertions that are not part of the record. *See U.S. v. Hoover*, 246 F.3d 1054, 1064 (7th Cir. 2001). However, without evidence, the majority justices

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[20] An Internet search for "National Review" and "Wisconsin's Shame" yields multiple examples such as David French, "*John Doe's Tyranny, Wisconsin conservatives have been subjected to secret baseless investigations,*" Nat'l Review, May 4, 2015 at 29-33 and David French, "*Wisconsin's Shame: "He Could Have Been Shot. Over Politics*," Nat'l Review, available at http://www.nationalreview.com/article/420766/wisconsins-shame-he-could-have-been-shot-over-politics-david-french, July 6, 2015 (last visited April 16, 2015).

incorporated into their decision misinformation from "media accounts" directly or indirectly produced by particular respondents or their allies. The majority justices referred to "pre-dawn," "para-military style home invasions." *Two Petitioners,* 2015 WI 85 at ¶ 68; App 42a. Such raids were accomplished with "flak jackets," "battering rams" and "bright floodlights." *Id.* at ¶ 307 (Ziegler, J. concurring); App 146a. The sources included propaganda pieces published by Wisconsin Watchdog.org, a site with ties to WiCFG's director Eric O'Keefe. *Id.* at ¶ 326, notes 12-14, 21; App 160a-162a.

Although Petitioner Chisholm first tendered the investigation to a Republican Attorney General and then to a Republican special prosecutor who ran it, some media sources regularly asserted the investigation was politically-driven. One majority justice relied heavily on such articles. *See, e.g.*, *id.* at ¶ 326, note 16 (Ziegler, J. concurring) (citing National Review's "Politicized Prosecution Run Amok in Wisconsin"). App. 162a. *See also id.* at notes 12-15 (citing Watchdog.org's "The Day John Doe Rushed Through the Door"). App. 161a-162a.

The majority justices accepted what they read outside the record and incorporated it into their decisions. In the face of denials by the special prosecutor, reliance on these "facts" evidences a lack of objectivity.

D. The State as a Litigant is Entitled to a Hearing Before an Impartial Panel of Justices.

The Due Process Clause requires a judge to "hold the balance nice, clear and true." *Tumey v. Ohio,* 273 U.S. 510, 532 (1927). That "Clause…speak[s] to the

balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). It makes little sense, in balancing the interests of the accused and the accuser under the Due Process Clause, to claim the Clause is irrelevant where the state is a litigant. This is especially true where the respondents, or some of them, have participated in a media campaign that has unfairly influenced the state court outside the record.

The principle of judicial fairness necessarily includes the notion of fairness to all litigants – not merely some – and it embraces a litigating government agency. Long ago the Court wrote that "impartiality requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

These case law principles stand in apparent conflict with *South Carolina v. Katzenbach*, 383 U.S. at 323-24. In that case, South Carolina contended the Voting Rights Act of 1965 denied it due process by employing an invalid presumption, by barring judicial review of administrative findings and by requiring litigation in a distant forum. *Id.* at 323. In deciding the due process claims, the Court wrote, "The word 'person' in the context of the Due Process Clause of the Fifth Amendment…[does not] encompass the States of the Union…." *Id.*

The petitioners recognize that federal circuit courts of appeal have not always supported the due process rights of a government litigant. *See e.g. Mississippi Com'n on Environmental Quality v. EPA*,

790 F.3d 138, 183, n. 28 (D.C. Cir. 2015); *South Dakota v. U.S. Dept. of Interior*, 665 F.3d 986, 990-91 (8th Cir. 2012); *Connecticut Dept. of Social Services v. Leavitt*, 428 F.3d 138, 147 (2nd Cir. 2005). However, the treatment of government litigants is not uniform. Some courts have given a State the benefit of such a right without analysis. *See Alberti v. Klevenhagen,* 46 F.3d 1347, 1360 (5th Cir. 1995). Others have granted due process rights to certain government agents, such as counties and school districts. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 765 (3rd Cir. 1989)(school districts); *County of Santa Cruz v. Sebelius*, 399 F. App'x 174, 175 (9th Cir. 2010)(counties).

While *Katzenbach* suggests a state has no due process rights whatsoever, one commentator has written:

> It would indeed seem rather odd to construe the 'person' protected by the Fourteenth Amendment as embracing a state, since the Amendment protects persons against the state. Nevertheless it would seem at least equally odd that a state as litigant should not be entitled to ordinary due process in either set of courts. The remark in *Katzenbach* seems doubtful vis-à-vis the process due the litigating state.

Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 Mich. L. Rev. 1631, 1636, n. 19 (2005).

Notwithstanding *Katzenbach*, a series of this Court's cases establish clear government "interests"

or procedural entitlements in adversary proceedings. These procedural entitlements represent the "process due the litigating state." Common to all these cases is a concept of fairness to both the defendant and to the state.

The state's "right" to a jury trial is an example. The state is entitled to refuse a criminal defendant's waiver of Sixth Amendment right to a jury. *Patton v. U.S.*, 281 U.S. 276, 312 (1930), abrogated on other grounds, *Williams v. Florida*, 399 U.S. 78 (1970). "[T]he Government, as a litigant, has a legitimate interest in seeing that cases . . . are tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. U.S.*, 380 U.S. 24, 36 (1965).

Likewise, in *Taylor v. Illinois*, this Court recognized that a defendant's Sixth Amendment right to compel the attendance of witnesses and present exculpatory evidence is "also the source of essential limitations on the right." 484 U.S. 400, 410 (1988). In *Taylor*, the defendant willfully failed to disclose a witness in pretrial discovery. The trial court excluded the testimony of the undisclosed witness. The exclusion was affirmed, as was the state's "right" to pretrial discovery.

> More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself.

Id. at 416.

In the sentencing phase of a capital crime, "if the State chooses to permit the admission of victim

impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In overruling prior case law forbidding such argument, the Court wrote:

> We reaffirm the view expressed by Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934): "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Id.

These cases establish that – as a counterpoint to a private litigant's constitutional rights – the state has a fundamental enforceable related interest. Just as the respondents had the right to procedural due process before the Wisconsin Supreme Court, the state – as litigant – has a related entitlement to a hearing by a fair and impartial panel. That entitlement is enforceable because it is fundamental to the nature of the adversary proceeding itself. The source of the entitlement is the Due Process Clause which requires a "balance of forces between the accused and his accuser." *Wardius,* 412 U.S. at 474.

An adversary's constitutional rights also give rise to "essential limitations" on that right. *Taylor v. Illinois*, 484 U.S. at 410. While the respondents enjoyed a Due Process right to a fair hearing before the state court, the boundaries of that right end at the point where extra-judicial information – for which they were responsible – influenced the court.

The respondents' Due Process rights cannot be used both as a sword and a shield. Having influenced the majority with extra-judicial information, the respondents cannot now be heard to complain that the State has no right to a fair hearing before impartial justices.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 29, 2016

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