

REDACTED

SUPREME COURT OF WISCONSIN
Case No. 2013AP2504 - 2508-W
Case No. 2014AP296-OA
Case No. 2014AP417 - 421-W

REDACTED

FILED
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CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN *ex rel.* THREE UNNAMED PETITIONERS,

Petitioner,

v.

Case Nos. 2013AP2504 - 2508-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,
THE HONORABLE GREGORY POTTER, Chief Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

STATE OF WISCONSIN *ex rel.* TWO UNNAMED PETITIONERS,

Petitioner,

v.

Case No. 2014AP296-OA

THE HONORABLE GREGORY A. PETERSON, John Doe Judge, and
FRANCIS D. SCHMITZ, Special Prosecutor

Respondents,

L.C. Nos. 2012JD23, 2013JD1, 2013JD6, 2013JD9, 2013JD11

**MOTION FOR RECUSAL AND NOTICE OF ETHICAL
CONCERNS RELATED TO SCR 60.03 and SCR 60.04**

[CAPTION CONTINUED ON FOLLOWING PAGE]

STATE OF WISCONSIN *ex rel.* FRANCIS D. SCHMITZ, Special Prosecutor,

Petitioner,

v.

Case Nos. 2014AP417 - 421-W

THE HONORABLE GREGORY A. PETERSON, John Doe Judge,

Respondent,

and

EIGHT UNNAMED MOVANTS,

Interested Parties.

L.C. Nos. 2013JD11, 2013JD9, 2013JD6, 2013JD1, 2012JD23

The Special Prosecutor, Francis D. Schmitz, hereby moves for the recusal of [REDACTED] from all further proceedings in this matter based upon the information set forth herein. Additionally, based upon this same and additional information, notice is provided to the court pursuant to Wisconsin Stat. §797.19, SCR 60.03, 60.04(1) and (4), so that other Justice(s) of the court may make individual appropriate determinations of whether the Code of Judicial Ethics should or would preclude their further participation in the above entitled appeals.

I. INTRODUCTION

After a John Doe investigation was halted over one year ago, this court is now being called upon to make important rulings, inter alia, related to the legal consequences of the control exercised by a [REDACTED], the [REDACTED], over the operations of [REDACTED] and [REDACTED].¹ For the most part, [REDACTED] [REDACTED] [REDACTED] [REDACTED].² Those individuals (and consequently those entities) also worked closely with [REDACTED] [REDACTED] during those elections.³ A critical issue before the court in this matter is whether this control and interdependence gave rise to reporting obligations under Wisconsin campaign finance laws. Although the work of the Special Prosecutor is far from complete, it is the position of the Special Prosecutor that the evidence gathered and reviewed thus far establishes, inter alia, that [REDACTED] was a

¹ [REDACTED] and [REDACTED] are tax exempt corporations under I.R.S. code §501(c)(4). They are "social welfare" organizations that may be involved in "limited" political activity, provided that supporting or opposing candidates does not become the organizations primary purpose. See Vol. III, Schmitz Affidavit dated February 14, 2014 (Case No. 14AP417), Pg. 345 - ¶76; Pg. 321 - ¶19; and Vol. II., Pg. 148 - ¶16.

² See Vol. II., Schmitz Affidavit dated February 14, 2014 (Case No. 14AP417), Pgs. 155 - 156, ¶41-44; Vol. III, Pgs. 35-36, ¶67-68.

³ [REDACTED] is a trade organization that used its 501(c)(4) organization, the [REDACTED], to fund advertisements during the recall and Supreme Court elections. Both are parties to the present proceedings.

functional extension of [REDACTED] and a part of [REDACTED] personal campaign committee during the recall elections.⁴ See Wisconsin Stat. §11.05(15).

In the opinion of the Special Prosecutor serious ethical issues now arise because several of these individuals and entities also had significant involvement in the election of particular Justices to the Wisconsin Supreme Court. Those individuals and entities are: the [REDACTED] - Unnamed Movant No. 2), [REDACTED] - Unnamed Movant No.3), [REDACTED] and its [REDACTED] -- Unnamed Movants No. 4 and 5), [REDACTED] (Unnamed Movant No. 6), and [REDACTED] (Unnamed Movant No. 7).

With regard to financial support during the last four Supreme Court elections, [REDACTED] spent [REDACTED] to the benefit of four current Justices: [REDACTED] [REDACTED] also spent at least [REDACTED] on behalf of [REDACTED]. Furthermore, [REDACTED] also spent a total of [REDACTED] to the benefit of the above [REDACTED] during the last [REDACTED] Supreme Court elections.

Of further significance with regard to [REDACTED] is the fact that for the last several years, [REDACTED] has served as the treasurer of [REDACTED]. Through her

⁴ These statements are qualified, of course, by the observation that, in this halted investigation, only limited facts are known at this point in time.

company, [REDACTED] has been associated with the campaign and other committees established for [REDACTED] as well.

The amounts contributed / controlled by several of the movants to individual Justices is alone cause for concern. Together with other information set forth herein, the recusal of [REDACTED] and [REDACTED] is clearly warranted. The close involvement of the individuals and entities set forth above in the elections of the aforementioned Justices, implicates Due Process and ethical considerations that warrants the recusal of these Justices from any further participation in this case under the provisions of SCR 60.03, 60.04(1) and Wis. Stat. §797.19.

II. LEGAL STANDARDS

As set forth in *Storms v. Action Wisconsin Inc.*, 2008 WI 110 ¶30, 314 Wis.2d 510, 529, 754 N.W.2d 480, 490, motions addressing recusal “must be raised in a timely fashion.” This provides the court or individual justice(s) with the opportunity to determine the legitimacy of such concerns *before a decision* on the merits of a particular case. *Id.* at ¶30.

The Special Prosecutor is mindful of the sensitive and contentious nature of this motion; however the Special Prosecutor is obligated to provide the court with information in his possession which could assist members of the court in complying with applicable rules of the court. Because the individual Justice(s) cannot make such determinations in a vacuum, the information provided will

hopefully allow them to make a subjective determination of whether in fact or in appearance, the particular Justice(s) cannot act in an impartial manner. *Id.* at ¶24.⁵

Relevant to a consideration of the issues raised in this notice, the “Code of Judicial Conduct” provides that “a judge shall perform the duties of judicial office impartially and diligently. See SCR 60.04. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities. See SCR 60.03.

SCR 60.04 (1) provides that:

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

(a) A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under section 757.19 of the statutes and except when judge substitution is requested and granted.

Finally SCR 60.04 (4) provides:

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or *when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial . . .* (emphasis added).

The comment to SCR 60.04 notes that, “Under this rule, a judge must recuse himself or herself whenever the facts and circumstances the judge knows

⁵ The information provided may also be useful as it will enable particular Justices make their own

or reasonably should know raise reasonable question of the judge's ability to act impartially, regardless of whether any of the specific rules in SCR 60.04 (4) applies." This comment underscores both the subjective nature of this determination and the obligation of the parties to the court to disclose relevant circumstances known to the party.⁶ The comment to this section also notes that, "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of recusal, even if the judge believes there is no real basis for recusal." For this reason, the respective Justices have a corresponding obligation to disclose to the parties facts and circumstances relating to the issues raised in this motion or the underlying litigation that bear on the relevant constitutional and ethical considerations.

In addition to the above determinations, the United States Supreme Court has held that the Due Process Clause incorporated the common-law rule that recusal is required – not only when a judge has "a direct, personal, substantial, pecuniary interest" in a case, but also – in those circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." See *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868, 876-877, 129 S.Ct. 2252, 2259 (2009). In

inquiry into the workings of their campaigns.

⁶ For example in the present case, Justice Bradley determined that her son's employment as an attorney with one of the law firms representing [REDACTED] (Unnamed Movant No. 7) necessitated her recusal in order to avoid any appearance of impropriety. Justice Bradley did this even though her son had no involvement in the present litigation. That decision by Justice Bradley

Caperton, the United States Supreme Court held that the Due Process Clause required Justice Brent Benjamin of the West Virginia Supreme Court to recuse himself from participation in an case where the appellant (a company for which Don Blankenship was the chairman, CEO and president) had recently contributed \$2.5 million to a §527 organization that supported the election of Justice Benjamin.⁷ The \$2.5 million spent was *triple* the amount spent by the Justice Benjamin campaign during that election. Blankenship himself also spent \$500,000 in support of Justice Benjamin during that election. *Id.* at 873.

The Special Prosecutor is aware that SCR 60.04(7) and (8) explicitly do not require recusal *solely* based upon the receipt of a campaign contribution from an individual or entity involved in the proceeding, nor from the sponsorship of an “*independent*” expenditure or issue advocacy communication by an entity involved in the proceeding. However, the above rules are tempered by the Due Process Clause and related considerations as detailed in *Caperton*. Here, the facts set forth in the Petition and Memorandum in Support of a Supervisory Writ undercut any claim of “independence” of any expenditure that may be asserted by the [REDACTED], and principals of those entities. In fact, given the history of control, collaboration and coordination of those individuals and entities with political campaign committees that may potentially

was a consequence of a self-examination of her obligations under SCR 60.04(4) and Wis. Stat. §797.19. See Justice Bradley’s letter of March 19, 2014, Case No. 14AP296-OA.

include judicial candidates, the provisions of SCR 60.04(7) and (8) are possibly rendered irrelevant due to the lack of "independence."

III. DISCUSSION

A. Introduction

The Petition for Supervisory Writ and Writ of Mandamus establishes that the principals [REDACTED]

As established in the affidavit supporting that petition, "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 8 9

B. [REDACTED]

Evidence gathered during the investigation and examined thus far also establishes that besides the Recall elections, [REDACTED] and [REDACTED] were involved in the [REDACTED] Wisconsin Supreme Court election in which [REDACTED] was

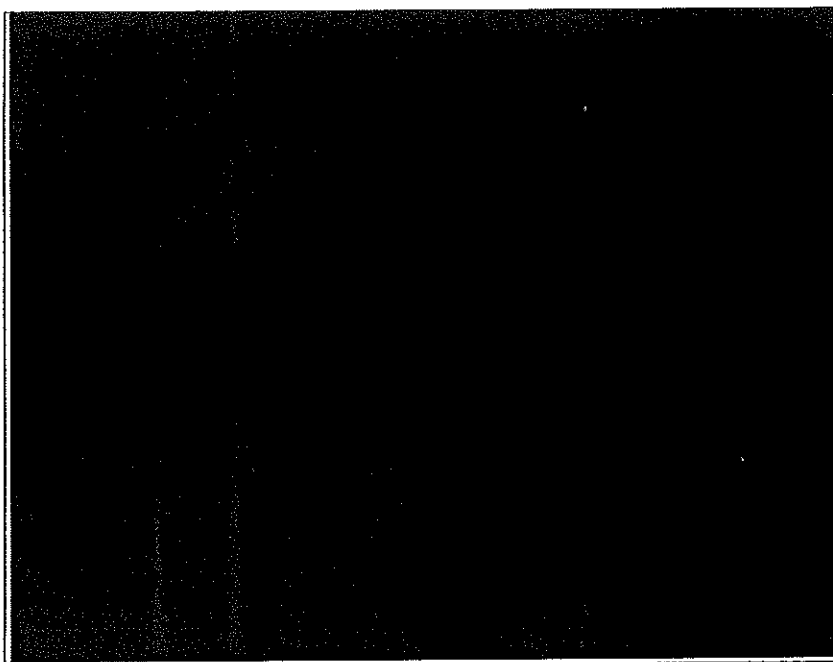
⁷ A 26 U.S.C. §527 organization is a tax exempt organization formed primarily to influence an election of a candidate for office.

⁸ [REDACTED]

See Vol. II, Schmitz Affidavit dated February 14, 2014, Pg. 149 (Case No. 14AP417).

⁹ See Petition for a Supervisory Writ, pgs. 10-11, and pg. 15 (Case No. 14AP417).

running for re-election to the Wisconsin Supreme Court. Significantly, [REDACTED]
[REDACTED] were actively involved in the [REDACTED]
[REDACTED] re-election campaign, as exemplified by a [REDACTED]
[REDACTED]¹⁰ In that e-mail,¹¹ [REDACTED]
[REDACTED].



¹⁰ The [REDACTED] email is attached as Exhibit 1. The Special Prosecutor would note that the email referenced in this filing came to the attention of prosecutors during a review of evidence because that email was relevant to the issue of control exercised by [REDACTED] over [REDACTED]. A comprehensive search for e-mail related to the Supreme Court elections has not been conducted, and there may be other communications relevant to the issue of recusal in evidence that has not yet been examined.

¹¹ The recipients of the e-mail included [REDACTED]
[REDACTED]
[REDACTED].

The importance of the involvement of [REDACTED] and [REDACTED] in the [REDACTED] campaign cannot be overstated. [REDACTED]

[REDACTED].¹² At the same time, [REDACTED] ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]) spent approximately [REDACTED] during the primary elections to the benefit of [REDACTED] or against [REDACTED] opponents.¹³

Within a month after the above [REDACTED] [REDACTED] campaign email, [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴ [REDACTED]
[REDACTED]

[REDACTED]

¹² After the primary, the [REDACTED] [REDACTED]

¹³ [REDACTED]

(Exhibit 2)

¹⁴ See Vol. III, Schmitz Affidavit dated February 14, 2014, Pg. 366 (Case No. 14AP417).

At that time, [REDACTED] also believed [REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁷

In other words, acting through the non-profit corporations they controlled,

[REDACTED] were directly responsible for well over [REDACTED]
[REDACTED] in election spending related to the campaign of [REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁸ [REDACTED]

[REDACTED]¹⁹

¹⁵ [REDACTED] opponent in the [REDACTED] Supreme Court election.

¹⁶ See Vol. III, Schmitz Affidavit dated February 14, 2014, Pg. 354 (Case No. 14AP417).

¹⁷ See footnote 13.

¹⁸ [REDACTED] (Exhibit 3);

¹⁹ See [REDACTED] included as Exhibit 7.

Additionally, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] (Unnamed Movant No. 5), spent [REDACTED]

[REDACTED] 20

[REDACTED]

[REDACTED]

[REDACTED] 21

The importance of these expenditures, especially in light of [REDACTED]

[REDACTED], was recognized by a key representative of the [REDACTED]

campaign. In an email dated [REDACTED]

[REDACTED] - [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] 22

[REDACTED]

[REDACTED]

[REDACTED] 22

²⁰ See [REDACTED]

[REDACTED] (Exhibit 4)

[REDACTED] (Exhibit 16)

²² The email of [REDACTED] as Exhibit 5.

A final concern is the fact that [REDACTED], the treasurer of the [REDACTED] campaign committee, has also been associated with [REDACTED] campaign committee as well as [REDACTED]. According to reports filed with the GAB, [REDACTED], has been paid fees for work done for the committee as well. Since [REDACTED] personal campaign committee first filed reports in [REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

This relationship is noteworthy because [REDACTED] has also been listed as the treasurer for [REDACTED] committee, [REDACTED], in registration reports filed from the [REDACTED] reporting period through the "[REDACTED]" reporting period which was filed on [REDACTED]. The concern of course is the fact that one of the moving parties in these matters before the court is the [REDACTED]. While the Special Prosecutor stops well short of saying [REDACTED] is [REDACTED] [REDACTED] nevertheless has a central role in the investigation inasmuch as a

main premise of the investigation is [REDACTED]

The close connection of [REDACTED] campaign with [REDACTED] (and consequently movant [REDACTED]), is also worth pointing out. This was demonstrated when the [REDACTED] campaign director stated:

"[REDACTED]"
"23"

Placing all of these facts in perspective – the evidence of the involvement of [REDACTED]; the involvement of [REDACTED] and the entities under their effective control - [REDACTED]; the estimated [REDACTED] contributed by the combined entities to the benefit of the [REDACTED]; the same Due Process considerations warranting recusal exist here as existed in *Caperton*. There, the court did not take issue with Justice Benjamin's subjective findings of impartiality, or whether there was actual bias. Rather, the court framed the question as to whether "there was a serious objective risk of actual bias that required Justice Benjamin's recusal." *Id.* at 886. This was based upon "objective

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[REDACTED] (Exhibit 6).

and reasonable perceptions.” *Id.* at 884. In making that determination, the court examined “whether, ‘under a realistic appraisal of psychological tendencies and human weakness’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Id.* at 883-884, citing *Withrow v. Larkin*, 421 U. S. at 47.

With respect to the [REDACTED] re-election, several identical factors present the same serious risk of actual bias based upon “objective and reasonable perceptions.” The first is the *direct involvement* of [REDACTED] [REDACTED] with [REDACTED] campaign. As a consequence of their involvement, there is a potential overlap between the activities of the [REDACTED] campaign, [REDACTED] and [REDACTED] during the [REDACTED] election which is within the scope of the investigation now before this court. Second, the fact that as parties to this appeal, the entities [REDACTED] (controlled by principals [REDACTED]), directed substantial funding to the benefit of the [REDACTED]. Third, as demonstrated by the [REDACTED] [REDACTED],²⁴ [REDACTED] [REDACTED], also a party to this appeal, alone spent [REDACTED], which was nearly [REDACTED] [REDACTED] campaign received.²⁵ Fourth, the overall

²⁴ See footnote 10.

²⁵ In *Caperton*, the inquiry into the significance of the campaign funding was evaluate on the following: the “relative size” of the contribution by the litigant, in comparison to 1) the total

significance of the above conduct by the parties to this appeal to the re-election of [REDACTED], who [REDACTED]. Fifth, is the fact that [REDACTED] - [REDACTED] [REDACTED], is also associated with [REDACTED].

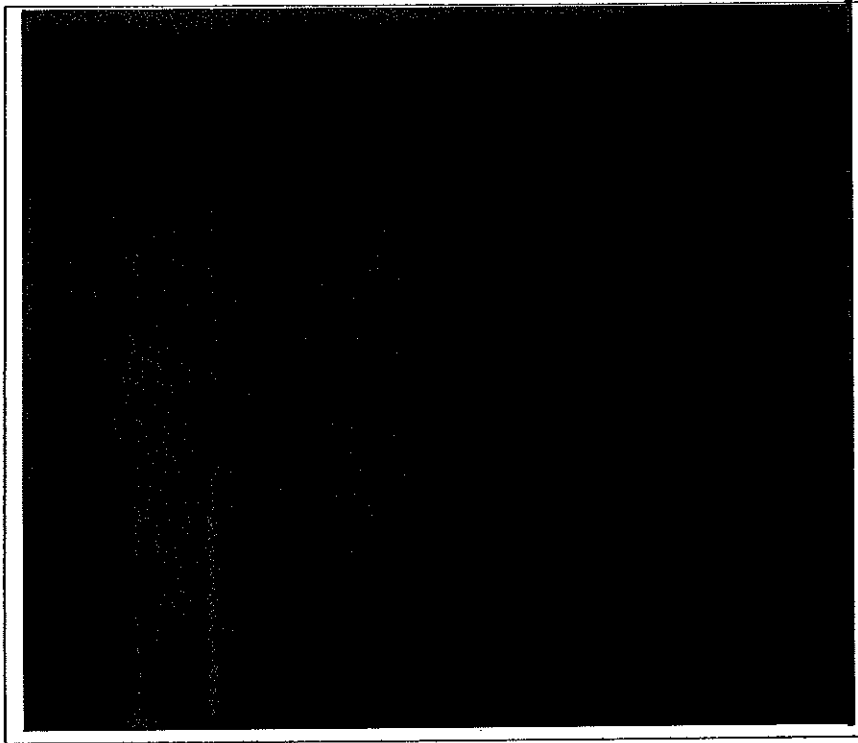
C. Justice [REDACTED]

Turning to the election of [REDACTED] to the Wisconsin Supreme Court, evidence gathered and examined thus far similarly demonstrated that [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],²⁶

amount contributed to the campaign and 2) the total amount spent during the election, and 3) the apparent effect such contribution had on the outcome.

²⁶ The email [REDACTED] is included as Exhibit 7.



[REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]. This statement is consistent with reports that during [REDACTED] that [REDACTED].²⁷ Of even more significance is the fact that [REDACTED] to the benefit of [REDACTED].²⁸ It is also reported that [REDACTED] which received funding from [REDACTED], spent [REDACTED] supporting [REDACTED]

²⁷ See [REDACTED]. (Exhibit 8)

²⁸ See footnotes 13 and 19.

[REDACTED] during the election.²⁹ In perspective, the [REDACTED] spent by [REDACTED] and [REDACTED] [REDACTED] campaign during the election. [REDACTED]

[REDACTED]³⁰

D. [REDACTED]

Although the Special Prosecutor is not moving for recusal of [REDACTED] [REDACTED], we provide the following additional information for their consideration.

Evidence the special prosecutor has been able to examine thus far also tends to establish that [REDACTED]

[REDACTED] as well. In [REDACTED]

[REDACTED]³¹

Furthermore, [REDACTED] reportedly spent [REDACTED] to the benefit of [REDACTED]

[REDACTED]³² [REDACTED] also spent [REDACTED] on [REDACTED]

[REDACTED]³³ Those amounts were

²⁹ [REDACTED]
[REDACTED] (Exhibit 9); IRS Form 990 filings reflect that [REDACTED]

³⁰ [REDACTED] votes compared to [REDACTED] votes for [REDACTED]. State Elections Board results, [REDACTED]

[REDACTED] (Exhibit 10).

³¹ The [REDACTED] is included as Exhibit 11.

³² [REDACTED]
[REDACTED] (Exhibit 12)

³³ See footnote 19.

approximately *twice* the [REDACTED] spent by the [REDACTED] campaign on [REDACTED] re-election.

Finally, [REDACTED] benefited from an estimated [REDACTED] spent during the [REDACTED] election by [REDACTED] and [REDACTED] spent by [REDACTED].³⁴ [REDACTED] campaign spent approximately [REDACTED] during the campaign.

E. Additional Considerations

There is a more subtle issue that the Special Prosecutor asks the Justices to consider. Based upon information developed during the investigation [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. I will argue that this

interaction gave rise to a reportable contribution as a coordinated expenditure.

And of course, the Justices remaining on this proceeding will decide.

³⁴ Id., [REDACTED] (Exhibit 13)

In a sense then, the Justices will be deciding issues that may well reflect back on their own campaign committees and any interaction that may have taken place between these committees, [REDACTED] and/or the [REDACTED]. Indeed, with significant evidence ordered sealed and not yet examined, the extent of any such interaction beyond that disclosed here remains unknown, possibly forever if the investigation is not allowed to continue. It is human nature to disassociate one's self from conduct that others may find improper or objectionable (in this context, "campaign coordination with supposedly independent entities"). A ruling by the Justices that all such interaction is outside the scope of ch. 11 and was in the exercise of Free Speech does exactly that, holding -- in effect -- that any interaction between a particular [REDACTED] committee and [REDACTED], [REDACTED] and/or the [REDACTED] was done in the proper exercise of statutory and constitutional rights.

These concerns are not speculative because [REDACTED] and [REDACTED] [REDACTED] continued to [REDACTED] through [REDACTED], despite questions regarding its legality. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]




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Further, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 36

ethical rules were part of a joint proposal [REDACTED]

Whatever the actual facts, the appearance is that ██████ spent millions of dollars to

36 In an email [REDACTED] (Exhibit

³⁷ In the matter of amendment of the Code of Judicial Conduct's rules on recusal. In the matter of amendment of Wis. Stat. § 757.19, 2010 WI 73.

help elect like-minded Justices to the Court and by [REDACTED]

[REDACTED]
Accordingly, particular Justices must address the potential conflict of interest [REDACTED]
[REDACTED]

and the consideration of issues presented here.

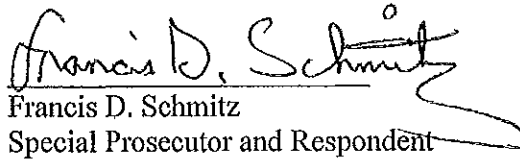
In conclusion, the information provided herein shows the importance that [REDACTED], [REDACTED], [REDACTED], [REDACTED] [REDACTED] had in the elections of several members of this court. Since these individuals and entities are not merely involved in the underlying John Doe investigation, but are in fact movants in the proceedings now under consideration by this court, in the opinion of the Special Prosecutor there are compelling reasons to provide this information to the court, and good cause for the recusal of certain Justices from participation in the present appeals.

WHEREFORE the Special Prosecutor respectfully files this motion for the recusal of [REDACTED], and further provides notice of such circumstances and facts for consideration by other Justices so that they may perform the duties of the judicial office impartially and diligently, consistent with Code of Judicial Ethics noted above.

WHEREFORE the Special Prosecutor also requests the court to accept this filing under seal, consistent with the orders of December 16, 2014 and January 21, 2015.

Dated this 11th day of February, 2015.

Respectfully Submitted,


Francis D. Schmitz

Special Prosecutor and Respondent
State Bar No. 1000023

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