No. 15-1416

IN THE

Supreme Court of the United States

JOHN T. CHISHOLM, ET AL.,
Petitioners,

v.

TWO UNNAMED PETITIONERS,
Respondents.

(*caption continued on inside cover*)

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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JOHN T. CHISHOLM, ET AL.,

Petitioners,

v.

THE HONORABLE GREGORY PETERSON, AND EIGHT UNNAMED MOVANTS,

Respondents.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections provided by the Fourteenth Amendment's Due Process Clause.

SUMMARY OF ARGUMENT

Central to the constitutional guarantee that all persons are entitled to "due process of law" is a commitment to an impartial justice system. Indeed, this Court has long recognized—and reiterated just seven years ago—that "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Because this case presents judicial conflicts of interest so extreme that they contravene that fundamental commitment to impartial justice, this Court's review is warranted.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

In 2012, Milwaukee County prosecutors began investigating possible illegal coordination between Wisconsin Governor Scott Walker's campaign committee and certain independent 501(c)(4) interest groups. The Wisconsin Government Accountability Board, a panel of six retired nonpartisan judges, subsequently joined the investigation. Further, following the commencement of similar investigations in four other counties, a former anti-terrorism investigator at the U.S. Department of Justice under President George W. Bush was appointed to serve as special prosecutor. In September 2013, Judge Barbara Kluka granted subpoenas permitting thousands of pages of documents to be collected, but the next month she recused herself, and in January 2014, her replacement, Judge Gregory Peterson, granted motions to quash the subpoenas and ordered that all the documents that had already been collected be returned. According to Judge Peterson, the Wisconsin laws at issue should be interpreted to apply only in cases involving express advocacy. Pet. App. 436a.

After further proceedings that are not here relevant, the case ended up before the Wisconsin Supreme Court. At that point, the special prosecutor filed a motion seeking the recusal of Wisconsin Supreme Court Justices David Prosser and Michael Gableman (and raising concerns about two others). Pet. App. N. Although the motion itself is heavily redacted, one of the primary grounds for recusal appears to have been that the very same interest groups that were the subject of the investigation at issue in the case had spent more than $6 million to help elect Justices Prosser and Gableman to the Wisconsin Supreme Court. Brendan Fischer, *Justices in Walker Criminal Probe Face Conflicts of Interest*, PR Watch (Oct. 6, 2014),

http://www.prwatch.org/news/2014/10/12617/justices-walker-criminal-probe-face-conflict-interest.
Moreover, although the redactions make it impossible to determine the exact nature of the allegations, the special prosecutor also raised concerns that there might be even more direct connections between the Justices and the interest groups whose electoral activities they were being asked to judge. Pet. App. N.

Despite the fact that these Justices were being asked to determine whether interest groups that had played a critical role in their own elections (and with which they may have had even more direct involvement) had engaged in illegal conduct, they refused to recuse themselves. Then, with Justice Gableman writing the court's opinion and Justice Prosser concurring, the Wisconsin Supreme Court proceeded to significantly limit Wisconsin's campaign finance law, *see* Pet. App. 173a (Abrahamson, J., concurring in part, dissenting in part) ("[W]ithin the realm of issue advocacy, the majority opinion's theme is 'Anything Goes.'" (footnote omitted)), to halt the investigation, and to order that all of the evidence that had been collected be returned and destroyed, even though no party had requested that remedy, Pet. 15; *see id.* (noting that "[a] *sua sponte* order to destroy evidence is unprecedented in Wisconsin jurisprudence").[2] By deciding to participate in a case in which they were being asked to judge the conduct of organizations that had, at minimum, made significant and dispropor-

[2] On December 2, 2015, following the special prosecutor's filing of a motion for reconsideration, the court retracted its order that all the evidence be destroyed and instead ordered that "all documents and data be surrendered under seal to the Wisconsin Clerk of Supreme Court, with 'divestment' of copies." Pet. 16.

tionate expenditures that were critical to their own elections, these Justices created conflict of interests so extreme that they violate the Due Process Clause's promise of an impartial justice system, threaten public confidence in judicial integrity, and warrant this Court's review.

By the time our nation's Founders drafted our enduring Constitution, the importance of impartial adjudicators was already a bedrock principle of the common law and one reflected in many of the early state constitutions. When the Founders drafted the Constitution, they expanded upon this heritage and fully embraced the importance of impartial adjudication as central to a fair justice system, incorporating into the Fifth Amendment the promise that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

This commitment was magnified in the years after the Civil War as the Framers of the Fourteenth Amendment witnessed, among other things, widespread maladministration of justice in the South that meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. As a result, the Framers of that Amendment renewed the constitutional promise of due process, providing in that Amendment that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Representative Bingham, the principal drafter of Section 1 of the Amendment, explained it this way: the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court has repeatedly reaffirmed that promise, recognizing that the Due Process Clause's proscription on biased judges encompasses all cases in

which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). As this Court has explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.*

The Due Process Clause requires such a stringent standard because "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. "[T]o perform its high function in the best way," this Court has said, "'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Thus, to determine whether any given judicial conflict violates the Due Process Clause, this Court asks whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The interest in this case plainly does, which is why this Court's review is warranted. Both Justice Prosser and Justice Gableman were elected in closely contested elections (Justice Prosser won by just 7,000

votes after an extensive recount[3]) after the very groups under investigation in this case spent significant sums in support of their elections—sums that Justice Prosser acknowledged were critical to his own reelection campaign given the significant spending directed to unseating him. Pet. App. 314a-15a, 321a-23a. Moreover, the interest groups made these expenditures to help ensure Justice Prosser's re-election at exactly the same time that they were engaging in the very electoral activity that was the subject of the investigation at issue in this case—electoral activity that, at minimum, raised significant legal questions under Wisconsin law. Pet. App. 172a (Abrahamson, J., dissenting) (concluding that the majority opinion upholding the interest groups' activity "adopt[ed] an unprecedented and faulty interpretation of Wisconsin's campaign finance law and of the First Amendment"); *id.* at 173a (arguing that the majority "disregard[ed]" the "letter" and the "spirit" of Wisconsin's campaign finance law). Thus, at the time of their expenditures, these interest groups might have believed that their concurrent activities in the Walker reelection campaign would become the subject of an investigation that might ultimately make its way to the very Justice whose campaign they were so strongly supporting.

Given these circumstances, it is no insult to these Justices to say that "'under a realistic appraisal of psychological tendencies and human weakness,' the [conflicts of interest in this case] 'pose[] such a risk of actual bias or prejudgment that the practice

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[3] Patrick Marley et al., *Prosser Wins Recount in Wisconsin Supreme Court Race*, Milwaukee-Wisconsin J. Sentinel (May 20, 2011), http://archive.jsonline.com/news/statepolitics/122364728. html.

must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton,* 556 U.S. at 870 (quoting *Withrow*, 421 U.S. at 47). As this Court recognized earlier this year, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). To ensure the "public legitimacy of judicial pronouncements and . . . the rule of law itself," this Court's review is warranted.

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES BOTH THE REALITY AND THE PERCEPTION OF A FAIR AND IMPARTIAL JUSTICE SYSTEM

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. Const. amends. V, XIV § 1. These Amendments' explicit embrace of "due process of law" reflects our national commitment to an impartial judicial system, one in which judges "hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532.

A. The History of the Due Process Clause Shows a Particular Concern for Ensuring Unbiased Decisionmakers.

By the time the Framers drafted our enduring Constitution, the idea that judges should be impartial was already well-established. Dating at least as far back as the early seventeenth century, English common law recognized that impartial adjudicators were essential to the fair administration of justice, allowing disqualification in cases in which judges had a di-

rect pecuniary interest in a case. *See, e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P. 1610); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). One English jurist argued that an even broader conception of bias would better ensure the fair and impartial administration of justice, stating that a "judge should disqualify . . . if he is related to a party, if he is hostile to a party, if he has been counsel in the case." Frank, *supra*, at 610 n.13.

This commitment to fair and impartial adjudicators was reflected in state constitutions adopted prior to the drafting of the U.S. Constitution. The Maryland Declaration of Rights of 1776, for example, stated that "the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people." Yale Law School, The Avalon Project, Constitution of Maryland—November 11, 1776, at art. XXX, http://avalon.law.yale.edu/17th_century/ma02.asp (last visited Dec. 2, 2015). Similarly, the Massachusetts Declaration of Rights of 1780 provided that "[i]t is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." National Humanities Institute, Constitution of Massachusetts 1780, at art. XXIX, http://www.nhinet.org/ccs/docs/ma-1780.htm (last visited Dec. 2, 2015).

Building and expanding upon this English common law heritage, the Framers fully embraced the importance of impartial adjudication as central to a fair justice system. *See, e.g.*, Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 Iowa L. Rev. 181, 183 (2011) ("[t]he notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice"). As James Madison wrote in *The Federalist*, "[n]o man is

allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999). Indeed, the Article III provision of life tenure for members of the federal judiciary was one manifestation of this belief in the importance of impartial and independent adjudicators. U.S. Const. art. III § 1.

This interest in securing impartial justice was of particular concern to the drafters of the Fourteenth Amendment's Due Process Clause because they acted at a time when widespread maladministration of justice in the South meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (1866) (remarks of Rep. Bingham); *id.* at 1263 (remarks of Rep. Broomall); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (remarks of Sen. Trumbull) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty or property").

Moreover, the drafters of the Fourteenth Amendment were also keenly aware of the injustices wrought in the North by the federal Fugitive Slave Act of 1850. Under that law, the commissioner who decided whether the person brought before him was a fugitive slave received $10 for returning a purported slave, but only $5 for declaring him free. *See* Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850); Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) (remarks of Sen. Sumner) ("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him

to freedom, his dole is $5."); Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) (remarks of Rep. Bingham) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power . . . to irresponsible commissioners . . . tendering them a bribe of five dollars if . . . he shall adjudge a man brought before him on his warrant a fugitive slave"); *see generally* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 40 (1986).

Because the Fugitive Slave Act deprived black defendants of basic fair-trial rights, including "an unbiased decision-maker," this issue "heightened abolitionists' sensitivity to fair procedure." Akhil Reed Amar, The Bill of Rights 278 (1998); *see also* Akhil Reed Amar, America's Constitution: A Biography 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850"). Thus, the drafters of the Fourteenth Amendment renewed the national commitment to impartial justice and imposed its proscriptions on the states by including in that Amendment the guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As Representative Bingham, principal drafter of Section 1 of the Fourteenth Amendment, explained, the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

B. This Court's Precedents Confirm That the Due Process Clause Requires Impartial Adjudicators.

This Court has long applied the Due Process Clause to guarantee the impartial adjudicators the Framers of the Fourteenth Amendment found lacking

in some Civil War-era courts. In so doing, this Court has recognized that the Due Process Clause's proscription extends more broadly than the common law prohibition on judges serving in cases in which they have a direct pecuniary interest, but rather encompasses those cases in which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. As this Court explained in *Caperton*, "[a]s new problems have emerged that were not discussed at common law . . . the Court has identified additional instances which, as an objective matter, require recusal. These are 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.'" 556 U.S. at 877 (quoting *Withrow*, 421 U.S. at 47).

In *Tumey v. Ohio*, the Court considered a situation in which the judge had a financial interest, albeit a small one, in the outcome of the case because he would receive a supplement to his salary if he convicted the defendant. There, the Court held that the judge should have been disqualified "both because of his direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village." 273 U.S. at 535 (emphasis added). As the Court explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532. Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the

state and the accused denies the latter due process of law." *Id.*

In a subsequent case, the Court underscored that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). Again, the Court emphasized that "the test" is whether the judge might be tempted "'not to hold the balance nice, clear, and true.'" *Id.* (quoting *Tumey*, 273 U.S. at 532). Thus, in that case, the Court held that it violated the Due Process Clause for a mayor to convict a defendant of traffic offenses where the fines from those offenses would help support the village of which he was mayor. *Id.* at 59; *see id.* at 60 ("that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court"). Any other result, the Court concluded, would have denied the defendant the "neutral and detached judge" to which he was entitled. *Id.* at 62.

In *In re Murchison*, the Court considered a case in which the judge had no financial interest in the matter, but was nonetheless too interested in the outcome to participate in its adjudication consistent with the requirements of the Due Process Clause. In that case, the question was whether a judge who acted as a "'one-man grand jury'" and questioned a witness in that capacity could then preside over a contempt hearing that arose out of that grand jury proceeding. 349 U.S. at 133. The Court said no and elaborated at length on why the Due Process Clause prohibits judicial conflicts of interest that involve not just the reality, but also the appearance, of bias.

As the Court explained, "[a] fair trial in a fair tribunal is a basic requirement of due process," and "our

system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136. This is why "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* The Court recognized that "[t]hat interest cannot be defined with precision. Circumstances and relationships must be considered." *Id.*

To be sure, the Court acknowledged, "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt*, 348 U.S. at 14); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("We make clear that we are not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama '"would offer a possible temptation to the average . . . judge to . . . lead him to not . . . hold the balance nice, clear and true."'" (quoting *Ward*, 409 U.S. at 60) (first two alterations in original)); *Withrow*, 421 U.S. at 47 ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (quoting *In re Murchison*, 349 U.S. at 136)). The reason for this emphasis on the appearance of justice is simple: as this Court has explained, "[t]he power and the prerogative of a court to [elaborate principles of law] rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."

Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002).

In *Caperton*, this Court reiterated that the common law proscription on judges serving in cases in which they have a direct pecuniary interest does not identify the outer limits of the Due Process Clause's protections. Nor is the application of the Due Process Clause limited to cases involving actual bias. 556 U.S. at 883 ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias"). There, the Court held that it violated the Due Process Clause for a judge to participate in a case when "a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 884.

As the Court explained in *Caperton*, and reiterated just last Term in *Williams*, "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Id.* at 883; *see Williams*, 136 S. Ct. at 1905 ("Bias is easy to attribute to others and difficult to discern in oneself."). Thus, in deciding whether a judicial conflict violates the Due Process Clause, the question the Court asks is whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton,* 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47); *id.* at 884 (holding that

the Due Process Clause was violated where "there is a serious risk of actual bias—based on objective and reasonable perceptions"); *see Williams*, 136 S. Ct. at 1905. It plainly does in this case, as the next Section discusses.

II. THIS COURT'S REVIEW IS WARRANTED BECAUSE THE JUDICIAL CONFLICTS OF INTEREST IN THIS CASE WERE SO EXTREME AS TO VIOLATE THE DUE PROCESS CLAUSE'S GUARANTEE OF AN IMPARTIAL ADJUDICATOR.

As just discussed, a conflict of interest inquiry under the Due Process Clause asks whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47). The judicial conflicts at issue in this case were so extreme that there can be no doubt that they posed such a risk in violation of the Due Process Clause's guarantee of an impartial justice system and this Court's review is thus warranted.

During their most recent elections to the Wisconsin Supreme Court, Justices Prosser and Gableman both received significant support from certain independent interest groups. Those interest groups spent an estimated $3.5 million in support of Justice Prosser's election (five times the amount spent by Prosser's campaign),[4] and $3.2 million in support of

[4] These figures come from estimated spending figures made available by Wisconsin Democracy Campaign, *see* David T. Prosser, Jr., Wisconsin State Supreme Court (Nov. 8, 2013), http://wisdc.org/pro11-100823.php, as well as self-reported

Justice Gableman's election (nearly eight times the amount spent by his campaign).[5] Indeed, one of those groups—Wisconsin Manufacturers & Commerce (WMC)—emphasized its role in the campaigns, noting that it spent $2 million on Prosser's race and $2.25 million on Gableman's race. According to WMC, "[t]he historic defeat of [Gableman's incumbent opponent] . . . was in large measure a testament to the steadfast fortitude of the Wisconsin business community to establish a rule-of-law high court." Pugh, *supra*.[6]

In denying the special prosecutor's motion that he be recused, Justice Prosser himself made clear

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spending by Wisconsin Manufacturers & Commerce, *see* Jim Pugh, *WMC: Big Stakes for Supreme Court Election* (Jan. 7, 2013),
http://prwatch.org/files/wmc_big_stakes_for_supreme_court_election_wmc.pdf.

[5] These figures come from estimated spending figures made available by Wisconsin Democracy Campaign, *see* Michael J. Gableman, Wisconsin State Supreme Court (Jan. 30, 2009), http://wisdc.org/pro08-103914.php, as well as self-reported spending by Wisconsin Manufacturers & Commerce, *see* Pugh, *supra*.

[6] WMC made these expenditures in Justice Prosser's race after having successfully urged the Wisconsin Supreme Court to adopt, just a year after this Court's decision in *Caperton*, a recusal rule that provides that "[a] judge shall not be required to recuse himself . . . where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication . . . by an individual or entity involved in the proceeding," *see* Wis. Sup. Ct. R. 60.04(8); *see also* Jonathan Blitzer, *Vanishing Recusal Prospects in Wisconsin* (Jan. 26, 2010), https://www.brennancenter.org/blog/vanishing-recusal-prospects-wisconsin (discussing WMC's drafting of recusal rule).

how critical these expenditures were to his campaign, explaining that because of the nature of Wisconsin's public financing system, "a candidate for the supreme court was extremely vulnerable to third-party expenditures, especially if those expenditures were limited to issue advocacy. The only practical and lawful response to issue advocacy attacks on a candidate taking public funding had to come from other issue advocacy." Pet. App. 315a. Justice Prosser went on to explain: "[t]here was going to be a major effort to challenge my re-election," *id.* at 316a; *id.* at 322a ("[w]ell over a million dollars was spent by third parties on issue advocacy distorting or misrepresenting my record"), and "Wisconsin law provided no practical means for my committee to respond to the misrepresentations because I participated in a publicly funded campaign," *id.* Indeed, Prosser acknowledged that "it can be argued that independent communications supporting my campaign were 'significant and disproportionate,'" but he explained that "there was no alternative under Wisconsin law for people who believed I had done a good job and wanted me to continue." *Id.*

The interest groups that made these expenditures that were so critical to Justice Prosser and Justice Gableman's elections to the Wisconsin Supreme Court were the very same organizations whose spending in the Scott Walker recall election those same Justices were supposed to review. Moreover, in the case of Justice Prosser, these groups made these significant expenditures at exactly the same time they were engaging in the conduct now under investigation—electoral activity that, at minimum, raised significant legal questions under Wisconsin law. Pet. App. 172a (Abrahamson, J., dissenting) (concluding that the majority opinion upholding the interest

groups' activity "adopt[ed] an unprecedented and faulty interpretation of Wisconsin's campaign finance law and of the First Amendment"); *id.* at 173a (arguing that the majority "disregard[ed]" the "letter" and the "spirit" of Wisconsin's campaign finance law). Thus, at the time of their expenditures, these interest groups might have believed that their concurrent activities in the Walker reelection campaign would become the subject of an investigation that might ultimately make its way to the very Justice whose campaign they were so strongly supporting.

These facts alone are sufficient to warrant these Justices' recusals for the reasons this Court made clear in *Caperton*. There, the Court explained that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." 556 U.S. at 870. As the Court further elaborated, "[t]he inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 884. Given that the interest groups at issue spent roughly 500% and 800% what the Justices' campaigns themselves spent, their expenditures were plainly "significant and disproportionate." *See Caperton*, 556 U.S. at 884 (noting that "contributions [of the party in the case] eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by [the Justice's] campaign committee"). "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Caperton*,

556 U.S. at 883 (internal quotations omitted), it is difficult to imagine that Justices Prosser and Gableman could have put out of their mind the significant and, in Justice Prosser's view, essential support they were given by the very organizations appearing before them.

Further, although the redactions in this case make it impossible to present all of the facts that might be relevant to the recusal issue, *cf.* Pet. App. 182a (Abrahamson, J., concurring in part, dissenting in part) ("the extent of the secrecy this court has imposed is unwarranted"), it bears emphasis that the special prosecutor was concerned about facts—beyond the significant independent expenditures—that might have created the reality or the appearance of bias. Among other things, Justice Prosser's written explanation of his refusal to recuse suggests that the special prosecutor was concerned that Prosser's "campaign treasurer also serves as the campaign treasurer for one of the many targets of his investigation," Pet. App. 324a, and that two of the unnamed parties "'were actively involved'" in his campaign, *id.* at 325a.[7] Significantly, based on the facts then available to him, the special prosecutor expressed concern that "the Justices will be deciding issues that may well reflect back on their own campaign committees and any interaction that may have taken place be-

[7] Justice Prosser responded to some of these concerns, noting, for example, that the fact that "[his] campaign treasurer also serves as the campaign treasurer for one of the many targets of [the] investigation" is "mostly coincidence," Pet. App. 324a, and that certain e-mails which suggested that movants in the case were active in his campaign "are little more than evidence of the fact that some targets of the investigation . . . engaged in expenditures that, under all the circumstances, were very valuable to my campaign," *id.* at 325a-26a.

tween those committees" and the movants in the case. Pet. App. N, at 21. These allegations, too, make this Court's review all the more critical.

As this Court has recognized, "to perform its high function in the best way justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136 (internal quotations omitted). It did not do so here, and this Court's review is warranted.

CONCLUSION

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

Respectfully submitted,

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