Justice at Stake
campaign

Testimony to the Wisconsin Special Committee on
Judicial Discipline and Recusal
Submitted October 14, 2010

Mr. Chairman, and members of the committee, my name is John Robinson, and I am the State Director for Justice at Stake. We are a nonpartisan organization working to keep our courts fair and impartial. We are part of a national coalition of concerned civic and legal leaders promoting substantive and procedural reforms. We seek in particular to reduce situations where judicial campaign conduct, campaign cash, or special interest pressure could cast the impartiality of judges into doubt. We have more than 50 partner organizations from across America and across the political spectrum, and our board consists of judges, academics, business and political leaders, both Democrats and Republicans.

We do not endorse candidates for judicial office, or any one system of selecting judges. But we do educate the public and work for reforms to keep politics and special interests out of the courtroom – so judges can do their job protecting our Constitution, our rights, and the rule of law. I should also note our views – and my testimony today – do not necessarily reflect the positions of all Justice at Stake partner organizations or board members.

Justice at Stake has been active in monitoring and reporting the rapid rise in spending on judicial elections. In the *New Politics Report*, which we published in collaboration with the Brennan Center and the National Institute on Money in State Politics, we noted that spending on supreme court candidates over the last ten years has skyrocketed to 206.9 million dollars. In Wisconsin, total spending on supreme court races in the 2007 and 2008 campaign cycle rose to over 8.5 million dollars. In light of these figures and in the aftermath of the landmark United States Supreme Court case, *Caperton v. A.T. Massey Coal Co.*, we have been urging states to adopt recusal reforms. In *Caperton*, the Court observed that the requirements of constitutional due process set "only the outer boundaries of judicial [recusal]," and many states have gone

further and implemented judicial reforms aimed to eliminate "even the appearance of partiality." We congratulate the committee for taking up this challenge.

We have urged states to adopt recusal standards that will reassure citizens that their courts will be fair and impartial, both in fact and in appearance. Strong recusal rules protect the courts and build public trust by removing even the appearance that justice might be up for sale. In its amicus brief in the *Caperton* case, the Conference of Chief Justices noted: "as judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled. [Recusal] is an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal." Based on this committee's prior discussions and the policy proposals compiled by the Legislative Council, we have three specific comments for you today.

First, we urge Wisconsin to adopt an objective standard of impartiality for evaluating judicial recusal requests. Currently, Wisconsin law requires recusal only when judges subjectively determine that they cannot act impartially. Wisconsin is a rare exception to an almost universal standard. Its rule is inconsistent with federal recusal rules, the American Bar Association's model recusal provisions, and the recusal rules of 48 other states. Adopting an objective standard, where judges are required by law to disqualify themselves whenever their impartiality might reasonably be questioned, would place Wisconsin in conformity with the prevailing standards across the country.

Adopting an objective standard would be consistent with the overwhelming views of the public. In its amicus brief in *Caperton*, the American Bar Association observed that "few actions jeopardize the public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor." Public opinion research has confirmed these concerns. In June 2010, we commissioned a poll by Harris Interactive that revealed that 71 percent of Americans believe campaign expenditures have a significant impact on court decisions. A stronger recusal rule, where judges must disqualify themselves whenever their impartiality might reasonably be questioned, will help courts earn public confidence. It shows that judges are deciding recusal requests based on standards shared throughout the legal system.

Second, we urge the Committee to recommend a recusal system that requires judges to write the reasons for overruling recusal requests, and that provides for prompt, de novo review of recusal decisions when they are denied. Written recusal decisions force judges to consciously grapple with recusal questions, and they comply with basic tenets of disclosure and openness that citizens expect from their government.

De novo review, meanwhile, permits an independent arbiter to have final say over recusal decisions. Michigan last year adopted a recusal rule that permits a litigant to request review by the entire supreme court when one of its justices refuses to recuse him or herself. Contrary to some predictions made at the time Michigan passed its rule, there has not been a flood of recusal appeals to the full court. Instead, only three cases have been heard by the full court in nearly a year, and a serial movant for recusal brought one of those three cases. Michigan's new rule has taught us that de novo review of recusal decisions, which promotes public confidence in decisions reached on recusal requests, is unlikely to overburden the courts with recusal appeals.

Third, we urge the Committee to consider requiring judges to recuse themselves when they have received campaign support above a stated cap. While we do not recommend a specific number that is suitable for Wisconsin, we believe the lesson of *Caperton* teaches that campaign expenditures above a certain amount automatically place a judge's impartiality in doubt.

The American people agree that campaign support above a certain threshold calls a judge's impartiality into question. In our June 2010 poll, 81 percent of Americans thought judges should not hear cases involving campaign supporters who spent 10,000 dollars or more toward their election. A similar poll in February 2009 revealed that 68 percent would doubt a judge's impartiality if one party to a case had spent 50,000 dollars to elect the judge. A poll conducted by USA Today and Gallup that same month found that 90 percent of Americans believe judges should be removed from a case if it involves an individual or group that contributed to the judge's election campaign. The spirit of *Caperton*, as well as public opinion, requires serious consideration of a meaningful cap.

These poll results demonstrate clear public concern that campaign spending might improperly influence judges. As an alternative to a precise numerical

cap, Wisconsin might consider adopting a recusal rule addressing campaign spending similar to the one recently adopted in Washington. There, judges must recuse themselves when campaign spending might reasonably call into question their impartiality based on a totality of the circumstances. In addition to the total amount of financial support, Washington's rule asks judges to consider several factors, including the timing of the campaign expenditures and the proportion of the expenditures in relation to the total financial support given to that judge.

We also believe that any measure designed to address campaign spending must include both direct campaign contributions and independent expenditures in favor of a candidate or against his or her opponent. In *Caperton*, for instance, the direct contribution was only 1,000 dollars, while the independent expenditures exceeded 3 million dollars. In light of that, a recusal rule ought to address all campaign expenditures, whether direct or indirect.

Finally, we would like to respond briefly to a variety of claims that have been made suggesting that recusal may infringe upon the right to vote for judges. As you are well aware, the Constitution protects many things, but there is no constitutional right to have a judge of one's choice presiding over a specific case. What the Constitution protects is due process, and when judges hear cases involving major campaign contributors, have final say over their own recusal motions, and refuse to recuse themselves when their impartiality might reasonably be questioned, due process is threatened both in appearance and in fact.

We congratulate the committee for the attention it has given to these important recusal issues. Of course, the issue of recusal is rapidly growing more complicated in Wisconsin, and the judicial election landscape could change in the face of new public financing legislation. Nevertheless, a robust recusal rule, containing such features as an objective standard for recusal and independent review of written recusal decisions, ensures that public confidence in the courts is not eroded. We encourage the committee to take seriously the proposals before it, and to adopt reforms that keep Wisconsin courts fair and impartial, both in fact and in appearance. Thank you for your time.