STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP2711-CR
(Walworth County Case No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

MOTION FOR RECUSAL OF JUSTICE MICHAEL GABLEMAN ON CONSTITUTIONAL GROUNDS

Petitioner, Donald J. McGuire, by undersigned counsel, respectfully moves this Court pursuant to the Fourteenth Amendment to the United States Constitution, and Article I, §§1 & 8 of the Wisconsin Constitution, for the entry of an Order recusing Justice Michael Gableman from any and all participation in the consideration and decision in this matter on the grounds that: (1) as a candidate for the office of Justice of the Wisconsin Supreme Court, Candidate Gableman relied upon an agenda of promoting the interests of the prosecutorial arm of state government while denigrating both the legal rights of those accused of crimes and their counsel, (2) Justice Gableman has defended against the judicial ethics complaint against him in part on the grounds that attorneys who previously represented those charged with crimes are unqualified to sit on this Court and that, by zealously representing such clients, those attorneys demonstrate a willingness to "subvert our system of . . . bringing criminals into account," and (3) Candidate Gableman received an estimated $3 million in support from third-party special interests in the form of advertisements promoting the same

type of agenda. That agenda and Justice Gableman's defense to the judicial ethics complaint demonstrate both actual bias in favor of the prosecution and against those, such as McGuire, accused of a crime, and the impermissible probability or appearance of bias.

Because this motion addresses McGuire's rights to due process, it is directed to the Court as a whole. *See* Argument, Section B, *infra* (explaining why this Court's Internal Operating Procedure §II,L,1 cannot apply to deny McGuire a decision by the entire court on his constitutional recusal motion). By separate motion directed specifically to Justice Gableman, McGuire requests that he recuse himself pursuant to Wis. Stat. §757.19(2)(g), SCR60:04(4), and this Court's Internal Operating Procedures §II,L,1. Should Justice Gableman recuse himself in this matter, this motion would then be moot. Should Justice Gableman decline to recuse himself, however, this motion would be subject to possible amendment to include an additional claim under the limited procedures explicated in *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 443 N.W.2d 662 (1989), for review of a judge's decision under §757.19 by the entire Court.

Given the significance of this matter, not only to McGuire, but to future litigants subjected to the same bias and appearance of bias, as well as to future candidates for judicial office weighing the effect of the exercise of their First Amendment rights on their abilities to sit in judgment on particular cases, McGuire requests that the Court order full briefing and argument on this motion should Justice Gableman decline to recuse himself in this matter. Moreover, because participation by a justice disqualified by law renders the Court's judgment void, *American TV*, 151 Wis.2d at 179; *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, *reh'g granted*, 74 N.W. 220 (1898), McGuire moves that the Court hear and decide the matter of recusal before briefing on the legal issues on which review was granted.

Finally, McGuire notes that the same arguments have been raised by undersigned counsel on behalf of the petitioner in *State v. Aaron Antonio Allen*, Appeal No. 2007AP795. This motion tracks much of the language in Allen's constitutional motion, although it also incorporates discussion of the impact of *Caperton v. A. T. Massey Co., Inc.,* 129 S.Ct. 2252 (2009), as well as the effect of Justice Gableman's defense to the judicial ethics complaint

against him for publishing a false campaign advertisement. Those additional points are addressed in Mr. Allen's Supplemental Motion for Recusal of Justice Michael Gableman Directed to the Court as a Whole.

Although Justice Gableman denied Allen's statutory and ethical motion for recusal on September 10, 2009, Allen's Motion for Recusal of Justice Michael Gableman on Constitutional Grounds and his Supplemental Motion remain pending before this Court. The state, although objecting to recusal, agreed with Allen that briefing, argument, and resolution of this issue prior to briefing on the merits was appropriate.

BACKGROUND AND STATEMENT OF FACTS

This is a direct appeal from McGuire's convictions based on charges brought in 2005 alleging that he took "indecent liberties" with two young men between 1966 and 1968 in violation of Wis. Stat. §944.11(2) (1965). After the Court of Appeals affirmed his conviction, McGuire sought review from this Court on the grounds that the 36-year delay in bringing these charges denied him due process and a fair opportunity to defend himself, and that he was denied the effective assistance of counsel.

By Order dated September 10, 2009, the Court granted McGuire's petition for review and scheduled briefing. Pursuant to that Order, McGuire's opening brief currently is due by October 10, 2009. By separate motion, McGuire seeks an extension of the briefing deadline.

The 2008 Supreme Court Election

A. Candidate Gableman's Campaign

When then-Judge Gableman announced his candidacy for the Wisconsin Supreme Court in October, 2007, he originally sought to emphasize his judicial philosophy and his intent to be fair to all sides. *See* Gableman for Supreme Court Website (Attachment E-1 at

5-7).[1] However, although he also sought to portray his opponent, Justice Louis Butler, as a "judicial activist," the primary focus of Candidate Gableman's subsequent campaign was to distinguish himself by attacking Justice Butler as an ex-public defender who consistently sided with "criminals" and applied "loopholes" or "technicalities" to interfere with law enforcement while portraying himself as an ex-prosecutor who could be counted upon to support law enforcement positions on the Court.

In the "Headlines" section of Candidate Gableman's campaign website, six of the seven headlines posted concerned his handing out a lengthy sentence, denying a defendant's motion, or otherwise coming down hard against a defendant. (Attachment E-1 at 11-13).

The "Campaign News" section of the website contains a number of press releases, the vast majority of which tout Candidate Gableman's prior experience as a prosecutor and his support from elected law enforcement officials. (Attachment E-1 at 22-83). One press release is entitled "FOP: Law Enforcement can 'Trust' Judge Gableman." (*Id.* at 22).

The press releases often identify Candidate Gableman's opponent disparagingly as a "long-time criminal defense lawyer" and "anti-law enforcement,"in contrast to Gableman's prosecutorial experience (Attachment E-1 at 22, 28, 30, 32, 37, 48, 49, 69, 72, 75). Many also include references along the lines that Justice Butler has "sided" with criminals or created "loopholes" to make law enforcement more difficult:

> [T]he current Court [including Justice Butler] . . . has shown a general bias against good honest law enforcement, and against the victims of crime, in favor of criminals and defense lawyers.
>
> Simply put, the current Court has made it more difficult for law enforcement to protect the public from criminals.

(Attachment E-1 at 29 ("Sheriff Maury Straub on Judge Gableman versus Louis Butler")).

Gableman for Supreme Court campaign consultant Darrin Schmitz says Butler

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[1] Attachments identified by number are paper copies concurrently filed with this motion. Attachments identified as "E-__" are digital exhibits contained in the attached compact disc.

Attachment E-1 is a PDF copy of Candidate Gableman's campaign website as of early April, 2008, shortly after the election. The website apparently is no longer available on-line.

> is refusing to debate because he cannot defend his record of anti-law enforcement decisions and the phony numbers he's been spinning to the media regarding cases taken up by the Court.
>
> "Louis Butler is running away from his record and attempting to hide," said Schmitz. "In the ultimate April Fools joke, Louis Butler has been spinning phony statistics hoping to trick voters on election day. Louis Butler needs to come clean as to why he's been misleading the public and the media about his record of siding with criminals."
>
> ..."The Butler campaign's lies have been revealed. They've known all along their spin was phony. It's a shameless attempt to fool the media and voters about his real soft on crime record," said Schmitz.

(Attachment E-1 at 30 ("Butler Dodges Debates, Spins False Record")).

> Judge Gableman said the large number of law enforcement endorsements reinforces his message that voters desire a Justice that will not create loopholes for criminal defendants to exploit.

(Attachment E-1 at 32 ("50 Police Chiefs Endorse Judge Gableman")).

> Butler's appointment to the Court and subsequent activist votes have resulted in a series of controversial criminal case rulings and opinions. In fact, studies have shown that Butler sides with criminals in nearly 60 percent of the cases taken up by the Supreme Court. Just one example is:
>
> ***State v. Stenklyft:*** Butler's vote reversed a state law that gave prosecutors the right to veto an inmate's petition for early release. The ruling prohibits prosecutors from using this tool to keep violent criminals, drug dealers, sex offenders and other criminals from being released early.

(Attachment E-1 at 37 ("Nearly Twice As Many DA Endorsements For Gableman As Butler")); (*id.* at 48 ("Prosecutors say Judge Gableman Best Choice for Supreme Court")).

> Darrin Schmitz, Gableman for Supreme Court campaign consultant, said the GWC [Greater Wisconsin Committee] is purposefully peddling a lie regarding Judge Gableman's record because Louis Butler's anti-law enforcement decisions are indefensible.
>
> "Louis Butler cannot defend his decision to strip prosecutors of the ability to keep dangerous inmates behind bars or his vote to ban police officers from

> asking a witness to ID a suspect near a crime scene," said Schmitz. "The men and women of law enforcement should be the ones doing the handcuffing. But Louis Butler has handcuffed their efforts to fight crime with activist rulings and legal loopholes."
>
> Louis Butler was a criminal defense lawyer before becoming a judge and was appointed to the state's highest court after losing the 2000 Supreme Court election by a 2-1 margin. His appointment and subsequent activist votes resulted in a series of controversial criminal case rulings and opinions:
>
> ***State v. Stenklyft:*** Butler's vote reversed a state law that gave prosecutors the right to veto an inmate's petition for early release. The ruling prohibits prosecutors from using this tool to keep violent criminals, drug dealers, sex offenders and other criminals from being released early.
>
> ***State v. Dubose:*** Butler's vote prohibited law enforcement from asking crime victims and witnesses to identify a suspect at or near a crime scene unless it was "necessary". His decision makes it more difficult for police officers to investigate crimes.

(Attachment E-1 at 49 ("The GWC Smear Ad")).

> Wisconsin voters can trust that Judge Gableman won't look for loopholes for criminals to wiggle through.

(Attachment E-1 at 61 ("Wisconsin Sheriffs and Deputy Sheriffs Association PAC Endorses Judge Mike Gableman for Wisconsin Supreme Court")), (*id.* at 67 ("Congressmen Sensenbrenner, Petri, and Ryan Endorse Judge Gableman for Supreme Court")).

> Judge Gableman, who served as a district attorney prior to becoming a judge, is the only candidate for the Supreme Court with prosecutorial experience. The other candidate for the court was a long-time criminal defense lawyer.
>
> "I am incredibly honored to have the support of these brave police chiefs in my run for the state's highest court," said Judge Gableman. "I believe the job of a Supreme Court justice is to apply the plain meaning of the law to the specific facts of a case – not to look for loopholes to put criminals back on our streets."

(Attachment E-1 at 72 ("More Police Chiefs Endorse Judge Gableman")).

> "Unlike Judge Gableman, Louis Butler has repeatedly sided with the violent criminals and drug dealers in his rulings," Rock County Assistant District

Attorney Jerry Urbik said.

(Attachment E-1 at 78 ("Prosecutors Line Up in Support of Judge Gableman for Supreme Court")).

* * *

In a fundraising letter, the Gableman campaign asserted that Butler "provided the deciding vote to overturn a sexual predator decision by a circuit court, resulting in the release of the predator into Milwaukee County." However, when confronted with the fact that the letter was false – the individual never was released – Candidate Gableman refused to retract it. Moreover, when asked what was incorrect about the Court's decision, Candidate Gableman refused to say. Hall, Dee J., *Gableman Won't Retract Letters*, Wisconsin State Journal :: LOCAL :: D1 (2/26/08), available at http://www.madison.com/archives/read.php?ref=/wsj/2008/02/26/0802250316.php (Attachment E-2). *See also* FactCheck.org, *Judgment Day in Wisconsin* (3/7/08), available at http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html (Attachment E-3).

Responding to a Butler ad demonstrating his own support by law enforcement, Gableman spokesman Darrin Schmitz responded that the ad was "a fraud" and asserted that "The majority of Wisconsin sheriffs and district attorneys have endorsed Judge Gableman, due in part to Louis Butler's record of tying the hands of law enforcement and siding with criminals." Forster, Stacy, *Butler TV spot responds to allegations*, Journal Sentinel (Posted: Mar. 19, 2008), available at http://www.jsonline.com/news/wisconsin/29505149.html (Attachment E-4).

The Gableman campaign made a central issue the claim that his opponent voted for criminals 60% of the time while on the Supreme Court, which in fact was false, *see* Bauer, Scott, *Butler denies claim he sides with criminals 60 percent of time*, The Associated Press, (3/12/2008), http://www.lacrossetribune.com/articles/2008/03/12/wi/09wi0312.txt

(Attachment E-5).

Responding to criticism that the claim was false, Gableman spokesman Darrin Schmitz said that "Butler and his allies are trying hard to distract voters from learning the truth about his record of tying the hands of law enforcement." (*Id.*)

The campaign persisted in asserting that Justice Butler consistently sided with criminals over law enforcement even after the Wisconsin Judicial Campaign Integrity Committee ("WJCIC") advised it that such allegations ignore the role of the Court as an impartial arbiter that does not take "sides" and that the use of such inflammatory language adds to the public perception that judges "take sides" and should be evaluated by voters based on whose "side" they are on. December 20, 2007 WJCIC letter available at http://www.wifaircourts.com/story3.html (Attachment 1).

Candidate Gableman aired two television ads during the course of the campaign. In one, he cited his law enforcement endorsements and stated that, "[a]s a district attorney and judge, Michael Gableman has spent his life fighting crime and holding offenders accountable." It placed a photo of his opponent in judicial robes next to photos of men in orange prison jumpsuits walking through an open prison cell door with the words "Defended Criminals." The narrator then states that "Louis Butler was a longtime criminal defense lawyer, working to set criminals free." (Attachments 2 & E-7).

In its second ad, Candidate Gableman's campaign asserted that, as a judge and district attorney, he "has committed his life to locking up criminals to keep families safe, putting child molesters behind bars for over a hundred years." In contrast, "Louis Butler worked to put criminals on the street." The ad then showed the mug shot of convicted rapist Reuben Lee Mitchell next to a photo of Butler. Both are African-American. The ad claimed that "Butler found a loophole. Mitchell went on to molest another child," (Attachments 3 & E-8), strongly implying that Mitchell was free to reoffend because of something Butler did.

In fact, Butler was acting as a public defender and was not a judge at the time, though the ad pictured him in a judge's robes. Furthermore, he failed to win his client's release. Instead, Butler prevailed in an initial appeal of the man's conviction but lost when the case

went to the state's highest court. The man remained locked up. He committed his next assault only after he had served his sentence. Now, he is behind bars again.

Most neutral (and even "conservative") observers agreed that the ad also debased the role of criminal defense counsel. *See, e.g.*, the analysis at FactCheck.org, *Wisconsin Judgment Day, the Sequel* (3/21/08) available at http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html (Attachment E-9); Sykes, Charlie, "Not Racist, but Misleading" (3/18/08) available at http://www.620wtmj.com/shows/charliesykes/16778101.html; Esenberg, Rick, "Supreme Court ads," Shark and Shepard Blog (3/17/08) available at http://sharkandshepherd.blogspot.com/2008/03/supreme-court-ads.html.

In response to the ad, Dodge County District Attorney Steven G. Bauer withdrew his endorsement of Gableman on the grounds that the ad was misleading and mocked the constitutional right of the accused to have an effective defense attorney. Bauer, Scott, *Dodge DA Won't Back Gableman*, The Capital Times, Metro, C1 (3/21/08), available at http://www.madison.com/archives/read.php?ref=/tct/2008/03/21/0803210293.php (Attachment 4).

However, when asked to respond to the fact that 34 Wisconsin judges had signed a letter condemning the ad as undermining public confidence in the fairness and integrity of the courts, Gableman campaign adviser Darrin Schmitz issued this statement: "Butler and his supporters are trying to distract voters from the strong contrast between the candidates. As a prosecutor Mike Gableman worked to put criminals behind bars, while as a criminal defense attorney Louis Butler was working to free sex offenders and rapists." Walters, Steven, *Gableman ad criticized by 34 current, former judges* (3/28/08), available at the Journal Sentinel Online, http://www.jsonline.com/blogs/news/31985874.html (Attachment E-11).

Based on the false allegations in the ad, the Wisconsin Judicial Commission found probable cause to believe that then Judge Gableman had violated the Code of Judicial Conduct by knowingly or recklessly misrepresenting facts about his opponent in violation

of SCR 60:03(3)(c). (Attachment E-12). Justice Gableman's responses to the complaint allege that each statement in the ad technically is true. He asserts that the purpose of the ad was to "contrast[] Justice Gableman's history as a prosecutor and judge with Louis Butler's willingness to represent and find legal loopholes for criminals like Reuben Lee Mitchell." *See* Responsive Statement of Facts filed April 1, 2009 (Attachment E-13 at 2).

According to the Wisconsin Democracy Campaign, the Gableman Campaign raised approximately $441,000 and spent approximately $411,000 in the Supreme Court election. *See* http://www.wisdc.org/wdc_supreme_fin_summary.php#2008

B. Pro-Gableman Third Party Activities

Three main special interest groups spent substantial amounts of money, estimated at nearly $3 million, promoting Candidate Gableman's pro-law enforcement agenda. Although there is no suggestion that those organizations violated Wisconsin law by coordinating their activities with the Gableman Campaign, undersigned counsel has found no indication that Candidate Gableman repudiated their claims.[2]

1. Wisconsin Manufacturers and Commerce

Wisconsin Manufacturers and Commerce ("WMC") refuses to disclose the amount of money raised and spent on political "issue ads." However, the amount WMC spent supporting what it termed Candidate Gableman's "crime fighting agenda" has been estimated variously at between $1.2 million solely on its television spending in the state's top five markets according to the Brennan Center for Justice at New York University,[3] and a total of

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[2] All of the third-party ads, both pro-Gableman and pro-Butler are available at http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin

[3] *See High Court Race Spending Set Record*, Wisconsin State Journal, Local, Page B2 (April 10, 2008), http://www.madison.com/archives/read.php?ref=/wsj/2008/04/10/0804100032.php

$1.72 million by the Wisconsin Democracy Campaign.[4]

Although not directly relevant to this motion, WMC began its support of Candidate Gableman's campaign with a number of pro-Gableman videos mainly distributed among WMC members and a YouTube video that claimed a majority of the seven-member court had made numerous anti-business rulings in recent years, many with Butler's support. *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, http://www.wisdc.org/hijackjustice08issueads.php#wmc.

WMC's efforts, however, soon turned to support of Candidate Gableman's pro-prosecution, anti-criminal defendant, anti-criminal defense attorney agenda. WMC sponsored a 60-second radio ad released statewide in late February, 2008, that said Gableman was qualified to be on the high court because he had the support of 51 county sheriffs who considered Gableman "their ally in the war on crime." (*See* Attachments 5 & E-14).

WMC sponsored a 30-second pro-Gableman television ad entitled "Ally" the second week in March, 2008. It featured upbeat music and crime scene- and courtroom-related film footage. It touted Gableman's endorsements by some of the state's sheriffs and district attorneys, as well as his experience as prosecutor. "Crime is an important issue in Wisconsin and we should thank judges like Michael Gableman who have been allies in the war on crime," the narrator says. The ad touts Gableman's support from law enforcement and his refusal to "look for loopholes." (*See* Attachments 6 & E-15). The WMC press release announcing the ad noted the importance of the public hearing "the truth about Judge Gableman's crime fighting agenda." (Attachment 7).

In mid-March, 2008, WMC sponsored a 60-second radio ad promoting Gableman, and a 30-second television ad attacking Butler. The radio ad portrayed Gableman as a tough circuit court judge whose rulings had helped keep neighborhoods and people safe by putting criminals in jail "where they belong" and by not looking for "loopholes." The ad further

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[4] *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, http://www.wisdc.org/hijackjustice08issueads.php#wmc

stated that most of Wisconsin's district attorneys and sheriffs supported Gableman. (Attachment 8 & E-16). The WMC press release announcing the radio ad again emphasized "Judge Gableman's crime fighting agenda." (Attachment 9).

The business group's television ad attacked Butler for his lone dissenting vote in the nationally watched "letter from the grave" case, *State v. Jensen*, 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518, which concerned a man who was convicted of poisoning his wife after the state showed the jury a letter in which the victim said she suspected her husband of trying to poison her. The ad attacked Butler for not using "practical common sense to keep violent criminals behind bars" by allowing admission of evidence desired by the prosecution, and urged viewers to call Butler and "[t]ell him to stand up for victims, not technicalities." (Attachment 10 & E-17)

As pointed out by FactCheck.org, the issue raised in the case in fact deals, not with technicalities, but a defendant's Sixth Amendment right to confront witnesses against him. *See* http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html (Attachment E-9). Moreover, Justice Butler's legal position, that WMC attacked as inappropriate, subsequently was adopted by the United States Supreme Court in *Giles v. California*, ___ U.S. ___, 128 S.Ct. 2678 (2008).

The "technicalities" ad appeared 1,350 times. FactCheck.org, *Winning Ugly in Wisconsin*, http://www.factcheck.org/elections-2008/winning_ugly_in_wisconsin.html ("*Winning Ugly*") (Attachment E-18).

WMC sponsored its third television ad a week before the election on April 1, 2008. The 30-second spot referred to Butler several times as "Loophole Louie" and claimed that he "sides with criminal[s] who threaten our safety" by using "loophole[s]" to suppress critical evidence. The ad briefly cited two murder cases in which Justice Butler's purported view of some of the evidence in the cases could have jeopardized prosecution of the defendants. (Attachment 11 & E-19).

The "Loophole Louie" ad ran 1,719 times. *Winning Ugly, supra* (Attachment E-18).

WMC also was responsible for two full-color, direct mail postcards promoting

Candidate Gableman's pro-prosecution agenda. The first was boldly labeled "Judge Michael Gableman: An ally in the war on crime!" and showed photos of a crime victim, an apparent arson, a man in a ski mask pointing a gun at the viewer, and a person behind bars. On the opposite side under a banner headline reading "Judge Gableman is tough on crime!" are various references to Candidate Gableman's support from law enforcement and the direction to call Gableman and tell him to "Keep working to win the war on crime!" (Attachment 12 & E-20).

The second WMC postcard is again boldly labeled on one side: "Judge Michael Gableman: looking for justice ... not loopholes!" The opposite side repeats the text of WMC's second radio ad. (Attachment 13 & E-21).

WMC's pro-Gableman campaign ads and brochures are available at their website: http://www.wmc.org/display.cfm?ID=1753.

2. Coalition for America's Families

Like the WMC, the Coalition for America's Families ("CFAF") refuses to disclose information on its electioneering expenses. However, the amount CFAF spent supporting Candidate Gableman has been estimated at between $381,881 solely on its television spending in the state's top five markets according to the Brennan Center for Justice,[5] and a total of $480,000 by the Wisconsin Democracy Campaign.[6]

CFAF launched two 30-second television ads in early March, 2008, criticizing Butler for decisions in two murder cases. CFAF first attacked Butler's separate opinion in the *Jensen* case, claiming that "Butler sides with criminals nearly sixty percent of the time," and told viewers to "[t]ell Louis Butler victims, not criminals, deserve justice." (Attachments 14

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[5] *See High Court Race Spending Set Record*, Wisconsin State Journal, Local, Page B2 (April 10, 2008), available online at http://www.madison.com/archives/read.php?ref=/wsj/2008/04/10/0804100032.php

[6] *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, http://www.wisdc.org/hijackjustice08issueads.php#wmc

& E-22).

The second ad concerned this Court's decision in *State v. Armstrong*, 2005 WI 119, 283 Wis.2d 639, 700 N .W.2d 98, in which the Court, including Butler, ordered a new trial in a 1981 Madison murder because advances in DNA technology undercut the evidence relied upon by the state to tie Armstrong to the murder. Once again, the ad claimed that "Butler sides with criminals nearly sixty percent of the time," and told viewers to "[t]ell Louis Butler victims, not criminals, deserve justice." (Attachments 15, E-23, & E-24).

The latter ad ran 526 times. *Winning Ugly*, *supra* (Attachment E-18).

FactCheck.org's discussion of the misleading nature of the CFAF ad is available at http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html (Attachment E-3).

Although adopted by the Gableman Campaign, the allegation that "Butler sides with criminals nearly sixty percent of the time" was false. *(See* E-5).[7]

The Wisconsin Democracy Campaign also reported that CFAF "made robocalls accusing Butler of using legal technicalities when he was a public defender in the 1980s to suppress key evidence in cases and overturn convictions of dangerous criminals " *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, available at http://www.wisdc.org/hijackjustice08issueads.php#wmc.

3. Club for Growth Wisconsin

Estimates of the amounts the Club for Growth Wisconsin ("CFGW") spent supporting Candidate Gableman are between $443,139 solely on its television spending in the state's top

[7] Although not directly relevant to this motion, CFAF sponsored a 60-second radio ad less than a week before the election that said Butler accepted more than $30,000 in campaign contributions from lawyers with cases before the Supreme Court. However, the ad did not tell listeners Butler publicly disclosed those donations to parties with cases before the court – a practice that goes beyond Court requirements and what most of the other justices do. *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, http://www.wisdc.org/hijackjustice08issueads.php#wmc.

five markets according to the Brennan Center for Justice,[8] and a total of $507,000 by the Wisconsin Democracy Campaign.[9]

CFGW ran a single television ad attacking judges "who return [criminals] to the street," while promoting the endorsement of sheriffs and DAs who view Candidate Gableman as an "ally" who has gone "toe to toe" with criminals "who belong in jail." (Attachments 16 & E-25).

C. Justice Gableman's Defense to the Judicial Ethics Complaint

On September 16, 2009, the panel presiding over the Wisconsin Judicial Commission's complaint against Justice Gableman for a campaign advertisement that misrepresented his opponent's conduct as a state public defender held a hearing on Justice Gableman's motion for summary judgment. A video recording of that hearing and the subsequent news conference, which McGuire incorporates as part of this motion, is available at Wisconsin Eye, "09.16.09 | Judicial Commission v. Justice Gableman," http://wisconsineye.com/wisEye_programming/ARCHIVES-courts.html#2582.[10] A copy of the official transcript of the hearing is contained in Attachment 17.

At that hearing, Justice Gableman's attorney, James Bopp, argued that the panel should not give the campaign ad at issue its plain meaning in context, which concededly was false. Rather, the panel should construe the ad as merely an attack on then-Justice Butler on the grounds that he had been a public defender willing to present legal arguments on behalf of someone as vile as his client, Reuben Lee Mitchell. Although Bopp conceded that the legal objection Butler raised on behalf of Mitchell was valid (Attachment 17 at 17-18), albeit ultimately deemed harmless by this Court, Bopp construed Candidate Gableman's ad as

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[8] *See High Court Race Spending Set Record*, Wisconsin State Journal, Local, Page B2 (April 10, 2008), http://www.madison.com/archives/read.php?ref=/wsj/2008/04/10/0804100032.php

[9] *See* Wisconsin Democracy Campaign, *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, http://www.wisdc.org/hijackjustice08issueads.php#wmc

[10] Because the video recording is copywritten, McGuire can only provide the URL for it.

arguing that Butler was unqualified to sit on this Court because he was willing to make such an argument for such a horrible person:

> JUDGE DEININGER: Is there any other reasonable conclusion that a reader or hearer of those words could reach?
>
> MR. BOPP ; Of course. Ant that is, to focus on Butler's willingness to find loopholes. He is willing to find a loophole for a person so evil that he raped an 11-year-old girl with learning disabilities. And that he's so evil, that once he got out of jail, he went on to molest another child. So the focus is on Butler's willingness to find loopholes for even people that are as despicable as this person is, and known to be as despicable as he was, because he raped an 11-year-old girl with a learning disability. . . .

(Attachment 17 at 13-14).

When asked about the final line of the advertisement ("Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"), Bopp defined the intent of the advertisement as follows:

> In other words, would you feel safe having somebody on the Supreme Court that is willing to find a loophole for a scumbag like Reuben Lee Mitchell, who would rape an 11-year-old girl with learning disabilities, and once he got out of jail would rape children again.
>
> * * *
>
> MR. BOPP: He is willing to find a loophole, whatever the result that manifests. It may result in his release. Which is of course, what Butler was seeking. He was seeking the release of Mitchell by finding this loophole. Now, and the Court of Appeals granted that. If Butler had gotten his way, Mitchell would have been released. . . . This is not about Mitchell; this is about Butler, what he is willing to do, what advocacy is he willing to make, and who is he willing to find loopholes for. And if he's willing to find a loophole for someone like him, if he's in the State Supreme Court reviewing criminal charges, you just have to wonder, is that somebody you want on the Supreme Court, that is willing to find a loophole for someone like this, like him.

(*Id.* at 16-17). *See also id.* at 23 ("I would expect that most people in Wisconsin to look at this and say, wow, you know, this guy is willing to find a loophole for such an evil person,

do we really want him on the State Supreme Court if that's his mind-set?"); *id.* at 25 ("And the people of Wisconsin would view [Mitchell's conduct] to be quite evil. And that's what is the power, it seems to me, of the ad, because it's talking about Butler's willingness to do something that would – that could – see, it doesn't say whether or not he got out of jail as a result of this, but certainly could result in this person getting out of jail, whether it caused him to get out or not.").

At an impromptu news conference immediately following the hearing, Bopp expanded on Justice Gableman's position. In their view, Butler's actions as a public defender in raising concededly meritorious arguments on behalf of a client not only disqualified him from sitting on this Court, but demonstrated "his willingness to subvert our system of criminal, uh, bringing criminals into account."[11] When confronted with the fact that Butler was merely

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[11] The official transcript of the hearing contained in Attachment 17 does not cover the subsequent news conference contained in the Wisconsin Eye video recording. The complete question and answer from that recording follow, in an unofficial transcription:

> REPORTER: Let me ask you first of all, [regarding] the contention from [the Wisconsin Judicial Commission] that it really hinges on that final statement that Mitchell went on to rape again. Without the argument that using the word "loophole" implies that he was set free because of Justice Butler in some way, what does that final statement have to do with Louis' defense [sic]?
>
> MR. BOPP: Well, it's the type of person that he was willing to represent and the type of person that he was willing to find a loophole for. It had all – everything to do with Justice Butler's judgment, that he was willing to find a loophole to let such a heinous — or to release such a heinous criminal from responsibility for his crime, whatever that meant in terms of finding a loophole.
>
> Justice Butler at the time, as a criminal defense lawyer, was urging that Mitchell get – be released. And, in fact the Court of Appeals ordered him to be released based upon this loophole. And – and so it has to do with [Butler's] judgment and his willingness to subvert – our system of criminal – bringing criminals into account. That's what it has to do with.

(Attachment 18 at 2-3).

> REPORTER: You were arguing the difference between misleading and misrepresentation. Was this ad misleading?
>
> MR. BOPP: I don't think it was misleading at all. It – because the focus of the ad

(continued...)

doing his job as a defense attorney in Mitchell's case, Justice Gableman's attorney persisted in their position that Butler's willingness to assert valid challenges to the conviction of such a person is inconsistent with the role of a judge.[12]

ARGUMENT

JUSTICE GABLEMAN'S OWN CAMPAIGN STATEMENTS, THE CAMPAIGN STATEMENTS OF SUPPORTERS WHICH HE REFUSED TO REPUDIATE, AND HIS OWN STATEMENTS IN DEFENSE OF THE JUDICIAL ETHICS COMPLAINT REFLECT HIS ACTUAL OR APPARENT BIAS IN FAVOR OF THE STATE AND AGAINST THOSE ACCUSED OF CRIMES, MANDATING HIS RECUSAL AS A MATTER OF DUE PROCESS

As a candidate, Michael Gableman chose to exercise his First Amendment rights by

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[11](...continued)
was on Justice – was then Mr. Butler's willingness to find a loophole for such a heinous criminal.

REPORTER: You also –

MR. BOPP: And it had to do with his judgment and how – and how he is willing to conduct himself. I mean, Mitchell raped an 11-year-old girl with learning disabilities. He didn't have to take that – represent that criminal. He could have walked. I mean, don't you have standards?

(*Id.* at 5). *See generally* http://wisconsineye.com/wisEye_programming/ARCHIVES-courts.html#2582

[12]

REPORTER: The defense attorney doing his job should be held accountable for the decision to take that case?

MR. BOPP: I think a lawyer using his talents should be expect – be expected to be held accountable in what decisions he makes. And – and you know, Justice Butler could defend representing Mitchell, which I'm sure he did at the time. You know, every scumbag criminal is entitled to legal defense.

And, you know, my job is to look for loopholes. And I don't care how heinous the person – you know, the crime is, but I'm going to look for loopholes. And well, I mean, that's his position. He can continue to be a criminal defense lawyer, but the people now have to make the decision whether or not they want him as a judge, if that's the way he's going to conduct himself. He didn't have to run for – to be judge.

(Attachment 18 at 11-12). *See* http://wisconsineye.com/wisEye_programming/ARCHIVES-courts.html#2582

focusing much of his campaign on an agenda promoting the interests of the prosecutorial arm of state government and denigrating both the legal rights of those accused of crimes and their attorneys. Candidate Gableman also received (and failed to repudiate) an estimated $3 million in support from third-party special interests in the form of advertisements promoting a similar, if not more radical, pro-prosecution agenda. Moreover, Justice Gableman's defense to the judicial ethics complaint against him reflects the view that it is inappropriate, and indeed "subvert[s] our system of . . . bringing criminals into account" for someone to raise even legally valid challenges to a criminal conviction, at least where the defendant was convicted of molesting a child.

Given these circumstances, "might not a defendant with reason say that he feared he could not get a fair [hearing] from one who would have so strong a motive" not to provide him one? *Tumey v. Ohio*, 273 U.S. 510, 533 (1927). The resulting strong probability or appearance of bias (if not actual bias) in favor of the party to this litigation with whom Candidate Gableman chose to ally himself so closely and vigorously during the campaign mandates recusal as a matter of due process because McGuire otherwise cannot "present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980).[13]

A. Applicable Legal Standards

Different standards and procedures for recusal (sometimes called disqualification) in Wisconsin are governed by court rule, by statute, and by the constitutional right to due process. Although this motion is based only on the constitutional grounds for recusal, a brief discussion of the other grounds is necessary to place McGuire's constitutional claims in

[13] Although Candidate Gableman and the third party special interests may have had a First Amendment right to promote their pro-prosecution/anti-accused agenda during the campaign, *see Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), Justice Gableman has no First Amendment right to carry out such an agenda as a Justice of this Court. The exercise of one's First Amendment rights does not immunize one from the necessary consequences of that exercise. *E.g.*, *Siefert v. Alexander*, 597 F.Supp.2d 860, 882 (W.D. Wis. 2009) (availability of strong recusal standards is sufficient alternative to restricting speech of judicial candidate that may evidence partiality or bias).

context.

1. Code of Judicial Conduct

As relevant here, the Code of Judicial Conduct provides:

> 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*:
>
> > (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > * * *
> >
> > (f) The judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following:
> >
> > 1. An issue in the proceeding.
> > 2. The controversy in the proceeding.

SCR 60:04(4) (emphasis added).

SCR 60:04(4) thus establishes both a subjective standard (whether the judge has a personal bias concerning a party or party's lawyer) and an objective standard (whether "well-informed persons . . . would reasonably question the judge's ability to be impartial").

In *State v. Asfoor*, 75 Wis.2d 411, 249 N.W.2d 529 (1977), this Court applied the then-current Code of Judicial Ethics to assess whether a judge should have recused himself based on comments concerning the defendant's guilt. Although concluding that the judge had acted fairly, the *Asfoor* Court noted that "[t]he judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned." 75 Wis.2d at 436.

In *State v. Walberg*, 109 Wis.2d 96, 325 N.W.2d 687 (1982), this Court concluded that the trial court judge erred by declining to recuse himself given the judge's animosity toward defense counsel. The Court applied a subjective test based on the judge's determination of his or her impartiality and an objective test based on whether the judge's impartiality "can reasonably be questioned." 109 Wis.2d at 106. Although finding that the trial court's actions and statements against defense counsel created the appearance of partiality against the defendant, the Court held that the failure to recuse was harmless.

Although *Walberg* did not identify the source of the standard it applied, this Court subsequently inferred that it had applied the Code of Judicial Ethics standard from *Asfoor*. *American TV*, 151 Wis.2d at 185. This Court further concluded that violation of the Code of Judicial Ethics, although subjecting the offending judge to discipline, "has no effect on their legal qualification or disqualification to act." *Id.*

2. Wis. Stat. §757.19(2)

Wisconsin Statute §757.19(2) provides a similar but not co-extensive standard:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

In *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 443 N.W.2d 662 (1989), this Court construed §757.19(2)(g) as directed entirely to the judge in question:

> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification, as the State contends, in a situation in which the judge's impartiality "can reasonably be questioned" by someone other than the judge.

151 Wis.2d at 183. "Accordingly, the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make" under that statute. *Id.*

Once a judge has acted under §757.19(2)(g), review of that decision is quite limited:

> [B]ecause the basis for disqualification is subjective, requiring the judge's determination of an actual or apparent inability to act impartially, there is no standard to apply on review other than an objective one limited to establishing whether the judge made a determination requiring disqualification.

American TV, 151 Wis.2d at 186.

In light of this Court's interpretation of recusal under §757.19(2)(g) as being entirely subjective on the part of the judge in question, its Internal Operating Procedures likewise provide for that decision to be made by that justice alone:

> 1. *Recusal or Disqualification of Justices*. A justice may recuse himself or herself under any circumstances sufficient to require such action. The grounds for disqualification of a justice are set forth in Wis. Stat. §757.19. The decision of a justice to recuse or disqualify himself or herself is that of the justice alone . . ..

Internal Operating Procedure II,L,1.

3. Due Process

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see State v. Carprue*, 2004 WI 111, ¶59, 274 Wis.2d 656, 683 N.W.2d 31. "A neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). *See also Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process"). Due process thus "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the

decision-making process." *Marris v. City of Cedarburg*, 176 Wis.2d 14, 25-26, 498 N.W.2d 842 (1993).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Thus, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). *See also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness"); *Murchison*, 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice" (internal quotation marks omitted)); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias"). The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance . . .'" *Taylor v. Hayes*, 418 U.S. 488, 501 (1974 (citation omitted).

In assessing the circumstance where a judge was also the mayor and received court costs only in the case of conviction, the Supreme Court did not consider whether that judge was actually biased, but instead decided that the probability of bias was too great for the Constitution to countenance:

> [T]he 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. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . 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.

Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Of course, the due process requirement to avoid even the appearance of bias is critical, not merely to ensure that the particular litigants are assured of a fair hearing, but to the legitimacy of this Court's judgments as well. "The power and the prerogative of a court to

perform [its] function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for the judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). In other words, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *United States v. Mistretta*, 488 U.S. 361, 407 (1989).

Although a judge is presumed to be fair, impartial, and capable of ignoring any biasing influences, that presumption is rebuttable. *Franklin v. McCaughtry*, 398 F.3d 955, 959 (7th Cir. 2005); *Carprue*, ¶46.

The Court of Appeals in *State v. Gudgeon*, 2006 WI App 143, 295 Wis.2d 189, 720 N.W.2d 114, summarized the relevant standards for assessing judicial bias as follows:

> ¶20 . . . When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences. That presumption, however, is rebuttable. The test for bias comprises two inquiries, one subjective and one objective. Either sort of bias can violate a defendant's due process right to an impartial judge. Judges must disqualify themselves based on subjection bias whenever they have any personal doubts as to whether they can avoid partiality to one side. . . ..
>
> ¶21 The second component, the objective test, asks whether a reasonable person could question the judge's impartiality. Actual bias on the part of the decision maker certainly meets this objective test. Sometimes, however, the appearance of partiality can also offend due process.

Gudgeon, ¶¶20-21.

On the latter point, the Court of Appeals explained that "the appearance of bias offends constitutional due process principles whenever a reasonable person – taking into consideration human psychological tendencies and weaknesses – concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." *Id.* ¶24. This point must be resolved "on what a reasonable person would concluded from" the circumstances, "not what a reasonable trial judge, a reasonable appellate judge, or even a reasonable legal practitioner would conclude." *Id.* ¶26.

The United States Supreme Court's recent decision in *Caperton v. A. T. Massey Co., Inc.,* 129 S.Ct. 2252 (2009), reaffirms the principle that due process is violated, not only where the judge is actually or subjectively biased in favor of one party to litigation or against another, but also where there exists, as here, an impermissible likelihood or reasonable appearance of such bias. The Supreme Court there held that due process required recusal of a judge where, even in the absence of actual prejudice or bias, the circumstances created "a serious risk of actual bias-based on objective and reasonable perceptions." *Id.* at 2263.

> The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 2262.

Caperton also makes clear that the due process right to an unbiased judge does not turn solely on the judge's own perception of whether the circumstances create an impermissible likelihood or reasonable appearance of bias. Rather, *Caperton* reflects the Court's obligation to conduct an independent, objective evaluation of the circumstances to assess the likelihood or appearance of bias.

> The 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 action against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

129 S. Ct. at 2263 (citations omitted).

Because the Constitution trumps contrary state laws or procedures, the right to recusal as a matter of due process thus exists wholly separate from, and unaffected by, state recusal statutes and codes of judicial ethics and whatever statutory or regulatory procedures for implementing them. *See, e.g.*, *State v. Harrell*, 199 Wis.2d 654, 671, 546 N.W.2d 115 (1996)

(Abrahamson, Ch.J., concurring); *id.* at 673 (Bradley & Geske, JJ., concurring). Thus, "the judge's own word for the presence or absence of bias is never enough" to mandate denial of recusal on due process grounds. *Franklin*, 398 F.3d at 961.

Finally, although this motion is made prior to briefing and argument on McGuire's appeal, it is important to note that the violation of due process by the failure to recuse can never be harmless. *E.g.*, *Franklin*, 398 F.3d at 961 (granting habeas relief to Wisconsin inmate, in part on grounds that state authority was contrary to established Supreme Court precedent). *See also American TV*, 151 Wis.2d at 179-80 ("Where a justice who participated in a case was disqualified by law, the court's judgment in that case is void," even if the disqualified judge's vote was not necessary to the decision (citing *Case*, 100 Wis. at 356-57)).

B. McGuire is Entitled to Decision by the Entire Court on His Constitutional Recusal Motion

McGuire has carefully separated his recusal motions between those grounds which this Court has deemed solely a matter for decision by the individual justice against whom recusal is sought, and those constitutional grounds raised in this motion on which he is entitled to decision by the entire Court. Thus, consistent with this Court's decision in *American TV, supra*, McGuire has directed his claims that recusal is required under Wis. Stat. §757.19(2)(g), and that the failure to recuse under the circumstances presented here would violate the Code of Judicial Conduct, directly to Justice Gableman. *See* McGuire's Motion for Recusal of Justice Michael Gableman on Statutory Grounds. However, because McGuire is entitled to a decision by the entire Court on his constitutional grounds for recusal, *Caperton*, *supra*, the present motion is directed to the entire Court.

McGuire understands that, under this Court's Internal Operating Procedure II,L,1, motions for recusal generally are directed to, and decided by, only the justice against whom recusal is sought. That makes sense when the grounds for recusal are limited to those set forth in §757.19(2)(g) or SCR 60:04(4) because, as this Court held in *American TV*, *supra*,

the statutory standard is based on a subjective determination by that justice and because the Code of Judicial Conduct creates only a basis for discipline and not independently enforceable grounds for recusal.

The issue here, however, is whether recusal is mandated as a matter of due process and thus goes directly to the legitimacy of the proceedings in this Court as a whole. As this Court recognized in *American TV*, "[w]here a justice who participated in a case was disqualified by law, the court's judgment in that case is void," even if the disqualified judge's vote was not necessary to the decision. 151 Wis.2d at 179-80, *citing Case*, 100 Wis. at 356-57. *See also Franklin*, 398 F.3d at 961 (under controlling Supreme Court authority, due process violation resulting from failure to recuse can never be harmless). Because the decision whether Justice Gableman must be recused on due process grounds necessarily affects this Court as a whole, it must be decided by this Court as a whole. *E.g.*, *Caperton*, *supra*.

McGuire also notes that, assuming Justice Gableman does not recuse himself, consideration by the entire Court of his recusal on constitutional grounds is almost certainly not a question of whether, but when. Should the Court defer the matter to Justice Gableman and should he refuse to recuse himself, any resulting judgment by this Court could be subject to a motion for reconsideration on the grounds that his participation in the case violated due process and thus rendered the resulting decision void under *American TV*, *supra*, and *Case*, *supra*. Such a motion is decided by the Court as a whole. Internal Operating Procedure II,J.[14]

Finally, since it is the question of Justice Gableman's actual or apparent bias that is at issue here, abdicating this Court's role by delegating the constitutional decision solely to him would itself create a constitutionally impermissible appearance of bias in violation of the

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[14] Indeed, given that the due process requirement of a fair and impartial judge is not subject to harmless error analysis and any judgment entered by a court containing a member who is disqualified by law is void, such a reconsideration motion conceivably could be filed by the state, despite being the beneficiary of the actual or apparent bias here, should it lose before this Court.

principle that no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *Murchison*, 349 U.S. at 136.

It is not enough to state, as this Court did in *State v. Harrell*, 199 Wis.2d 654, 665, 546 N.W.2d 115 (1996), that "[t]o imply that the judges or justices of this state are not able to make such a determination honestly, openly and fairly is a great disservice to the quality men and women who serve this state in a judicial capacity." There is no doubt that the judges of this state, on the whole, are of the highest honesty and integrity. However, that has never been deemed adequate cause to negate a litigant's right to appellate review.

Nor does that observation undermine the fact that "[b]ias . . . might exist in the mind of one . . . who was quite positive that he had no bias." *Crawford v. United States*, 212 U.S. 183, 196 (1909). In other words, the judge in question may not know, or may be unable to acknowledge, his or her biases. Although a natural human tendency, biases are viewed as bad, especially in a judge who is expected by society to be impartial. Acknowledging bias or partiality thus often is viewed, not as an honest admission to the human failings we all share, judges and non-judges alike, but a moral failing. It is therefore often difficult, if not impossible, for someone in that position to admit (even to themselves) his or her biases.[15]

For these reasons, therefore, McGuire is entitled to consideration and decision on his constitutional recusal claim by the entire Court should Justice Gableman refuse to recuse himself on statutory or ethical grounds. *See also Caperton*, 129 S.Ct. at 2263 (absent independent review under objective rules, "there may be no adequate protection against a

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[15] As explained in the September, 2008 Draft Report of the Judicial Disqualification Project of the ABA Standing Committee on Judicial Independence:

> Simply put, disqualification for bias implies a judge's failure to live up to the centurys-old expectation that he be able to "set aside [his] own passions" (footnote omitted)– a failure that judges are understandably hesitant to admit even to themselves, let alone others. Indeed, judges encumbered by serious biases can be among those least able or willing to acknowledge them.

Draft Report at 14 (citing Chris Guthrie, Jeffrey Rachinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Corn. L. Rev. 777 (2001)), available at www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf.

judge who simply misreads or misapprehends the real motives at work in deciding the case").

C. Candidate Gableman's Own Actions Demonstrate Either Actual Bias or the Appearance of Bias, Mandating His Recusal as a Matter of Due Process

Whether phrased in terms of actual bias, probability of bias, or appearance of bias, due process mandates recusal where the circumstances are as extreme as they are here. This is not a case where a litigant seeks to infer bias from a few statements taken out of context or from contributions to a candidate that are minimal in the context of the campaign as a whole. Rather, recusal is mandated here as a matter of due process because Candidate Gableman's entire campaign was focused on (1) portraying the appearance of a judge who will support the prosecution over the defense in criminal cases and (2) portraying attorneys who represent those accused of crimes or judges who uphold the legal rights of those accused of crimes as somehow acting improperly. This is exactly the type of bias in favor of one party to litigation and against the other that due process prohibits. *E.g.*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-76 (2002) ("One meaning of 'impartiality' in the judicial context – and of course its root meaning – is the lack of bias for or against either *party* to the proceeding. . . . It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process." (citations omitted)).

Candidate Gableman's public statements and actions – which is all we have to rely upon – clearly demonstrate just such a bias in favor of the prosecution and against those accused of crimes. While many of the following factors likely would not alone reflect bias and mandate Justice Gableman's recusal, the cumulative effect is to demonstrate such bias:

- Candidate Gableman's repeated attacks on his opponent for "siding with criminals."

Candidate Gableman's repeated attacks on his opponent for allegedly "siding with criminals" while a member of this Court demonstrates bias on any number of levels. First,

as this Court is well aware, courts and judges do not "side" with anyone. They decide cases before them consistent with their views of the law and the relevant facts.

Second, and more important for the issue here, a person properly may be labeled a "criminal" only after a full and fair determination of guilt, either at trial or by plea. By insisting on labeling as "criminal" individuals whom this Court has authoritatively determined were *not* provided such full and fair process, Candidate Gableman has again expressed his bias against those merely accused of crimes. The fact that he continued to do so after being expressly advised of the inappropriateness of doing so (*see* Attachment 1) only enhances the appearance of bias.

The bias reflected by such statements is further exacerbated by the fact that Candidate Gableman's campaign focused almost exclusively on the *party* to be supported (whether law enforcement by Gableman, or "criminals" by his opponent) rather than the particular legal issues addressed in this Court's decisions that he attacked. Thus, he publicly attacked his opponent's votes in criminal cases, not because they were legally wrong, but because Justice Butler agreed with the criminal defendant's arguments rather than the attorney general's.

- Candidate Gableman attacked as inappropriate his opponent's compliance with his ethical obligation to zealously represent his clients as a public defender.

In Candidate Gableman's infamous "Unbelievable" ad, which resulted in his pending charges for violating the Judicial Code of Conduct, he attacked his opponent for "defend[ing] criminals," "work[ing] to put criminals on the street," and finding a "loophole" that allegedly resulted in the release of an individual "to molest another child." (Attachments 3 & E-8). Not only is this ad demonstrably false – this Court upheld the individual's conviction and he only reoffended after having served his entire sentence – but Candidate Gableman's vicious and unfounded attack on the role of defense counsel is wholly incompatible with the role of unbiased decision-maker in a criminal case. The appearance of bias, if not the inference of actual bias, is only enhanced by the fact that Candidate Gableman insisted on running the ad even after its misleading, unethical, and biased nature was pointed out to him.

- Candidate Gableman's repeated labeling of basic constitutional and legal rights as "loopholes" or "technicalities."

Candidate Gableman's ads, website, and public statements repeatedly asserted that his opponent relied upon "loopholes" or "technicalities" to free "criminals" from jail. As this Court is well-aware, however, the constitutional and legal rights applied by this Court and by Justice Butler are critical to a fair assessment of the guilt or innocence of the accused or the appropriateness of his or her punishment. To label such fundamental rights as mere "loopholes" or "technicalities" reflects an apparent willingness to denigrate those rights to the detriment of those accused of crimes and to the benefit of the state.

- Candidate Gableman's repeated emphasis on his prior role as a prosecutor as opposed to his opponent's prior role as a public defender.

Obviously, a candidate's prior role as a prosecutor (or as a defense attorney, for that matter) does not alone give rise to an inference of bias. Rather, the inference of bias here results from Candidate Gableman's joining of the emphasis of his prior role as showing his support for law enforcement in direct contrast to his opponent's role in representing "criminals," and using that contrast to promote the theme that Candidate Gableman could be counted upon to continue supporting the prosecution rather than "criminals" as Justice Gableman.

- Candidate Gableman's failure to repudiate the third-party attack ads.

The attack ads produced by WMC, the CFAF, and CFGW repeatedly labeled basic constitutional rights as "loopholes" or "technicalities," attacked Justice Butler as "siding with criminals," and called upon Butler to "provide justice for victims, not criminals." While Candidate Gableman could not legally put a stop to such ads, given the bar to coordination between candidates and third parties, he did not make even a minimal effort to repudiate them. The necessary inference, therefore, is that he agreed with them, or at least did not

object to being associated with their message. In either event, such assertions, and Candidate Gableman's refusal to repudiate them, demonstrate bias or the appearance of bias in favor of the state and against those accused of crimes and their attorneys.

- Candidate Gableman's failure to repudiate the third-party statements and ads promoting Gableman as a trusted "ally" of law enforcement and waging his own "war on crime."

In addition to attacking his opponent as using "loopholes" to side with "criminals," the third-party advertisers portrayed Candidate Gableman as a strong advocate of the state in legal proceedings and an "ally" of law enforcement, willing to "go toe to toe" with criminals in his own "war on crime." Of course, none of these is appropriate or consistent with the judicial role as a neutral and detached magistrate. The judicial role is not to be a foot soldier in the "war on crime," and especially not an officer in such a war. Nor is the judicial role to be an "ally" of one party to litigation. Rather, the judicial role mandated by the constitution is just the opposite, that of a "neutral and detached judge," *Ward*, 409 U.S. at 62, neither having, nor showing, any bias for or against any party, *White*, 536 U.S. at 775-76.[16]

Once again, however, Candidate Gableman failed or refused to repudiate the claims of one-sided support for a particular litigant: the state. Again, the necessary inference from his failure to do so is that Candidate Gableman either agreed with the representations or did not object to his candidacy being associated with them. In either event, the ads' assertions of Candidate Gableman's allegiance to a particular party to litigation and his failure to repudiate that allegiance further supports the overall sense that he sought to portray himself as someone who could be counted upon to support the prosecution and not the defense.

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[16] The "war on crime" rhetoric is especially damaging in a judge given that it tends to assume that "criminals" are the only ones swept up in such a "war." *See United States v. Pardue*, 765 F.Supp. 513, 531 (W.D. Ark.. 1991) ("This court recognizes that the war on crime which is being waged in this country is an important one with high stakes, but every person concerned with freedom and justice should recognize that, as in most wars, innocent persons are sometimes irreparably harmed"), *rev'd on other grounds*, 983 F.2d 835 (8th Cir. 1993).

- Candidate Gableman's emphasis on his record as a judge who is "tough on crime."

Once again, the fact that Candidate Gableman had given stiff sentences as a circuit court judge alone would not justify recusal. Such sentences often are justified. The inference of bias for the state and against criminal defendants arises, not from the existence of such sentences, but from Candidate Gableman's choice of these particular sentences out of the many sentences he had imposed over the years to emphasize, and from the fact that he emphasized sentences at all while running for a position on an *appellate* court. The necessary inference, once again, is that Candidate Gableman could be counted upon to treat those charged with crimes harshly.

- Candidate Gableman's repeated emphasis on his support from law enforcement.

While support from members of law enforcement (or from the criminal defense bar, for that matter) does not alone suggest any bias, it is Candidate Gableman's repeated emphasis on this support in the context of his overriding pro-prosecution/anti-defendant/anti-defense counsel campaign agenda that adds weight to the inference of bias in this case. It is also important that Candidate Gableman received and emphasized support from a significant majority of Wisconsin's district attorneys, who are primarily involved, not in front-line law enforcement, but in representing a particular party in the litigation of cases in court.

* * *

Reviewed in artificial isolation, some of these factors alone would neither suggest bias on the part of a judge nor call for recusal. In combination and in context, however, these factors demonstrate a candidate for judicial office who chose to portray himself solidly on the side of the prosecution and against those accused of crimes, even to the extent of

denigrating as somehow improper the actions of those who fulfill the critical, constitutionally-mandated role of "counsel to the accused."

Whether viewed as evidence establishing actual bias or merely as showing the overwhelming appearance of bias, the result is the same. A judge who has so closely allied himself to one party in the litigation cannot, consistent with due process, be allowed to sit in judgment of a case involving that litigant. *E.g.*, *Peters v. Kiff*, 407 U.S. at 502 ("even if there is no showing of actual bias in the tribunal . . . due process is denied by circumstances that create the likelihood or the appearance of bias").

D. The Activities of Third Party Special Interests in Support of Candidate Gableman Also Mandate his Recusal as a Matter of Due Process

The massive third-party expenditures by WMC, CFAF, and CFGW on behalf of Candidate Gableman, totaling more than seven times his own campaign expenditures, also require his recusal as a matter of due process. The actions of those third-party groups are relevant to this motion to recuse for two reasons.

First, although Candidate Gableman could not legally coordinate his campaign with that of the third-party special interest groups, and there is no suggestion that he did so, he also did nothing to repudiate their claims that, as a judge, he was an "ally" of law enforcement in pursuing a "war on crime," and that he had a "crime fighting agenda." Nor did he repudiate their call that only victims, and not those accused of crimes, deserve justice, or their arguments that fundamental constitutional rights are merely "technicalities" or "loopholes" that properly should be ignored by the Court. Indeed, Candidate Gableman pursued a parallel agenda. The symbiotic nature of the campaigns thus enhanced the pre-existing appearance or probability of bias arising from his own campaign's statements.

Second, this Court cannot ignore the fact that the third-party, pro-Gableman agenda of promoting a judicial "war on crime" in alliance with law enforcement, siding with the prosecution rather than "criminals," and promoting justice only for victims and not those accused of crimes, was backed by nearly $3 million dollars in advertising. Thus, more than

80% of the *total* expenditures on behalf of Gableman's candidacy came from these third-party special interests promoting Candidate Gableman's activism on behalf of the prosecution in criminal cases.

Even in a situation where a candidate has not expressed a predisposition to side with one party over another, such an overwhelming financial investment in a particular judicial agenda cannot be dismissed as insignificant. The third parties obviously believed that their investment in Candidate Gableman would pay off in his support for their stated goals of elevating the interests of law enforcement over the legal rights of defendants and limiting justice to victims and not "criminals." A reasonable person viewing that investment from the outside understandably would be concerned that they could be right. *Cf.*, *Kyles v. Whitley*, 514 U.S. 419, 448 (1995) ("If a police officer thought so, a juror would have, too" (footnote omitted)).

Indeed, just as it is human nature for a judge to be biased *against* a criminal defendant whose conviction would benefit the judge financially, *see*, *e.g*, *Tumey*, *supra*, it is equally a part of human nature for a judge to be biased in *favor* of positions promoted by those who facilitated his election through massive campaign expenditures that exceeded his own campaign expenditures by a factor of seven. Given that Justice Gableman won his election by a minuscule, 51% to 49%, margin, and was the first Wisconsin Supreme Court candidate to defeat an incumbent in 41 years, there can be little doubt that the third-party advertisements promoting his positions and candidacy had a direct and substantial effect on the election results.

As Justice O'Connor has observed,

> relying on campaign donations may have judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

Republican Party of Minnesota v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) (citations omitted). For the latter proposition, Justice O'Connor cited studies

showing that 76% of registered voters believe that campaign contributions influence judicial decisions. *See also FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 127 S Ct. 2652, 2672 (2007) (opinion of Roberts, Ch. J.) ("in some circumstances, large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions" (internal quotation marks omitted)).

Caperton once again confirms McGuire's entitlement to relief here. Although the Court noted there that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," it expressly held that due process requires recusal where someone with a significant interest in particular litigation (even if a non-party to that litigation) has a "significant and disproportionate influence" in achieving the judge's election. *Id.* at 2264-65. As the Court noted,

> [t]he inquiry centers on the contributor'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 a contribution had on the outcome of the election.

Id. at 2265.

Of course, the third-party special interests here expressed exactly such an interest in criminal litigation in promoting Candidate Gablemans's pro-prosecution/anti-defendant agenda, and the size of the pro-prosecution/anti-defendant campaign represented a far greater percentage of the total expenditure promoting Candidate Gabelman's election and agenda than did that deemed constitutionally unacceptable in *Caperton*.

This does not mean, of course, that judicial elections are inherently unconstitutional or that any contribution to a judicial candidate by a litigant or lawyer would require recusal. Rather, the point is that, in a case this extreme, where nearly $3 million dollars, representing more than 80% of the funding for a judicial candidate, was provided by three organizations promoting an agenda of bias in favor of the prosecution and against those accused of crimes, due process simply cannot condone the resulting probability or appearance of bias. The question is not how judges "of the greatest honor and self-sacrifice may respond." Rather,

in such a case, the overwhelming "temptation to the average man as a judge . . . 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." *Tumey*, 273 U.S. at 532.

E. Justice Gableman's Defense in the Judicial Ethics Proceedings Also Mandate his Recusal as a Matter of Due Process

Even if Justice Gableman's prior statements did not demonstrate a clear or apparent bias in favor of the prosecutorial arm of the state and against those charged with crimes and their attorneys, the defense he presented at the hearing on his motion to dismiss the judicial ethics charges against him (and his attorney's subsequent elaboration of that defense) remove any possible doubt on that score. (*See* Attachments 17 & 18). There, his defense was that the campaign ad should not be construed as alleging that Justice Butler was responsible as a public defender for achieving the release of a child molester who then was able to reoffend. Rather, it should be construed as asserting Candidate Gableman's position that Butler was disqualified from sitting on this Court because he was willing, while fulfilling his role as constitutionally required legal counsel, to raise valid legal arguments that could result in the release of an "evil" person charged with a crime. (Attachment 13-14, 17-17, 23, 25).

In other words, in the view of Attorney Bopp and Justice Gableman, it is inappropriate for an attorney to raise legally valid claims on behalf of an accused child molester. Of course, if it is inappropriate even for an attorney to raise such claims, it necessarily follows from their view that a judge such as Justice Gableman likewise can never appropriately rule in favor of such a claim, no matter how valid the claim may be. The distinction raised by the ad and by Justice Gableman's defense is between people such as Butler, who are willing to apply valid legal arguments in criminal cases, even if they result in the release of someone deemed a criminal by the public, and Justice Gableman, who, by necessary implication, is not.

As such, Justice Gableman's views and defense in his judicial ethics proceeding, as expressed through his attorney, reflect an absolute inability to be impartial in a criminal appeal such as this. If a judge's views and biases make it inappropriate to rule in favor of

one party to litigation, no matter how valid that party's arguments, that judge is, by definition, not impartial.

Further solidifying the fact or probability of Justice Gableman's inability to be impartial in a criminal case is his attorney's statement of their position immediately following the hearing. According to Bopp, speaking on behalf of Justice Gableman, an attorney who is performing the ethically and constitutionally mandated role of representing someone accused of a crime by raising legitimate challenges to a conviction necessarily is "subvert[ing] our system of . . . bringing criminals into account" and not appropriate to fill the role of a judge. (Attachment 18 at 2-3, 5, 11-12; *see* http://wisconsineye.com/wisEye_programming/ARCHIVES-courts.html#2582).

Once again, if Justice Gableman views criminal defense attorneys as "subvert[ing] our system of . . . bringing criminals into account" by raising meritorious challenges to a conviction or sentence, and that judges somehow act inappropriately by crediting such challenges, how can he possibly be expected to fulfill the constitutionally mandated roll as an impartial arbiter in a criminal case such as this? The answer is clear: he cannot.

Although the statements at the hearing and subsequent news conference were made by his attorney rather than by Justice Gableman himself, those statements and views necessarily are attributable to Justice Gableman. He has not repudiated his attorney's defense to the ethics complaint and presumably authorized it. The Court of Appeals has recognized that "[t]he attorney-client relationship is one of agent to principal, and as an agent, the attorney must act in conformity with his or her authority and instructions and is responsible to the principal if he or she violates this duty." *State v. Divanovic*, 200 Wis. 2d 210, 224-25, 546 N.W.2d 501 (Ct. App. 1996). We therefore can assume that Attorney Bopp, the agent, uttered words approved by and therefore attributable to Justice Gableman, the principal. An attorney is the client's "speaking agent" for comments made within the scope of the representation. *See, e.g.*, Blinka, *Wisconsin Evidence* §801.503 (3d ed. 2008).

CONCLUSION

For these reasons, Donald J. McGuire respectfully asks that the Court order full briefing and argument on this motion and, following such argument, order that Justice Michael Gableman be recused as a matter of due process from sitting in judgment in this case.

Dated at Milwaukee, Wisconsin, October 2, 2009.

Respectfully submitted,

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