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MEMORANDUM

To: Members, Assembly Committee on Elections and Campaign Reform
Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

From: Thomas J. Basting, Sr.
Immediate Past President
State Bar of Wisconsin

Date: May 27, 2009

Re: State Bar of Wisconsin Support for Assembly Bill 65 and Senate Bill 40

Good afternoon. My name is Thomas Basting, and I am the immediate past president of the State Bar of Wisconsin. I want to express the State Bar's strong support for the provision of general purpose revenue to fund public financing of Supreme Court election campaigns. The enactment of Assembly Bill 65 and Senate Bill 40 is long overdue. I commend Representative Hintz and Senator Kreitlow for spearheading this effort.

The State Bar of Wisconsin recognizes the inherent benefit public campaign financing for Wisconsin judicial elections offers as a means to avoid even the perception that contributions to the election campaigns of judicial candidates could influence their decisions. This reflects the unique and critical role that the justice system plays in our system of government.

The State Bar's Board of Governors specifically addressed the issue of public financing for Supreme Court campaigns and concluded that such a reform would "help maintain the integrity and independence of Wisconsin's courts, where even the perception of bias destroys public trust and confidence in the justice system."

The escalating cost of Supreme Court election campaigns in Wisconsin, highlighted by recent record-setting expenditure levels, has alarmed many observers concerned that the infusion of such large amounts into a judicial campaign poses a threat to both judicial neutrality and public trust in the justice system.

Assembly Bill 65 and Senate Bill 40 offer the Legislature an opportunity to build public trust and confidence in Wisconsin's justice system. On behalf of the State Bar of Wisconsin, I strongly urge legislators to affirm the fundamental principle that Wisconsin's highest court is and will remain fair, neutral, impartial and nonpartisan.

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Testimony of Jay Heck, Executive Director
Common Cause in Wisconsin

In Support of

Senate Bill 40/Assembly Bill 65
State Supreme Court Election Financing

And

Senate Bill 43/Assembly Bill 63
Disclosure and Regulation of Campaign Communications
Masquerading as Issue Advocacy

Before the Assembly Committee on Campaigns and Elections
and the Senate Committee on Judiciary, Corrections, Insurance
Campaign Finance Reform and Housing

May 27, 2009

Representative Smith, Senator Taylor and Members of Both Committees:

This public hearing today is historic because it is the first time both chambers of the Wisconsin Legislature have taken a significant step forward toward accomplishing the long and needed task of reforming and make effective again, Wisconsin's campaign finance law -- which has been deteriorating and spiraling downward, out of control in almost virtual freefall -- since at least the mid 1980's. Not even the Legislative Caucus Scandal in 2002, which brought down the top leaders of both legislative chambers in both political parties for felony misconduct in public office related to illegal campaign fund raising, was enough to bring about much needed campaign finance reform. But now, finally, I am encouraged that this long-needed reform can and will happen and today is the first big step forward in restoring citizen trust in what used to be the cleanest and most trusted state government in the nation.

The hearing today on two extremely significant and important campaign finance measures follows in the wake of the most negative, expensive, demoralizing and special interest money-tainted election for Governor--in 2006-- in Wisconsin's history. That was followed, almost without pause, by the two most negative, expensive, demoralizing and

special interest money-tainted elections for seats on the State Supreme Court--in 2007 and 2008. The Supreme Court election earlier this year, while not in the same category in terms of spending and negativity as the previous two, is likely just a brief respite and absent reform, the next one in 2010 is likely to be a replay of 2007 and 2008.

Common Cause in Wisconsin strongly supports both campaign finance reform measures being considered by these two committees today. We have long supported the so-called "Impartial Justice" legislation -- Senate Bill 40 and Assembly Bill 65 -- that would provide one hundred percent public financing for candidates for the Wisconsin Supreme Court who agree to limit their campaign spending to $400,000. Obviously, after the horrendous $6 million or more spent on the Ziegler-Clifford election in 2007 and the Gableman-Butler election in 2008 -- most of it undisclosed and unregulated money -- a dramatic alternative to the current system of financing State Supreme Court elections is needed in Wisconsin before the next one occurs. Enactment of SB 40/AB 65 will provide a new, much cleaner and better way to finance such races. I will leave it to others to talk more about the need for this legislation. I ***will*** say that the funding mechanism in these measures is excellent and we support it. But we also stand by, ready and willing, to explore other funding mechanisms and indeed, we believe that public financing of elections ought to rely on several different sources for funding so that in times of economic distress and budget deficits, such as the current one, public financing can stand a better chance of surviving. If funding is provided by several different sources of revenue -- such as the current one hundred percent public financing system in place in North Carolina. -- then it will be stronger.

* * *

We are equally if not even *more* concerned -- and have been for more than twelve years – about the disclosure and regulation of the campaign ads masquerading as issue advocacy -- for not just Supreme Court elections — but for *all* state elections in Wisconsin.

Senate Bill 43 and Assembly Bill 63 have impressive bipartisan and bicameral support and if enacted into law, would close the single largest, gaping loophole in Wisconsin's loop-hole ridden campaign finance law. It is a measure that has been in the making since 1997 when Common Cause in Wisconsin first proposed a similar version to the old State Elections Board after Wisconsin Manufacturers & Commerce first widely utilized phony issue ads to attack incumbent Democratic legislators. Now, as the utilization of phony issue ads has become the common practice of both Republican-leaning and Democratic-leaning outside special interest groups, it should be an absolute no-brainer for Democrats and Republicans alike, to embrace and support this measure. Furthermore, it won't cost a dime to the taxpayers when it is enacted into law. There is no fiscal note and it would not have to clear the Joint Finance Committee. It doesn't violate the first amendment, it doesn't stifle free speech, and it doesn't prevent any group from criticizing the government, as its opponents and critics deceivingly claim. It is constitutional and similar laws at the state and federal level have been upheld by the courts—including the nation's very highest court -- twice since December of 2003. Indeed, the Chief Justice of the United States Supreme Court, John Roberts, said in June of 2007 that if a so-called

issue ad is the "functional equivalent" of a campaign communication then it can and should be subject to regulation and to reporting requirements -- a statement that was roundly condemned by Justice Antonin Scalia who favors no regulations or reporting requirements.

SB 43/AB 63 would do at the state level what the McCain-Feingold law has accomplished at the federal level which is simply to put teeth back into an existing, more than a century-old law that prohibits unlimited, unregulated and undisclosed corporate soft money to be used – primarily for widely disseminated broadcast ads – to influence the outcome of state elections. The phony issue ads that now proliferate our statewide and legislative elections have undermined a 1906 Wisconsin law that prohibited the use of corporate treasury money to influence elections and SB 43/AB63 would extend that prohibition not only to corporations, but also to the use of union treasury money and money from the general treasuries of Native-American Tribes and other entities. Because these phony issue ads avoid using a few "magic words" such as "vote for" or "defeat:, or "elect" or "support," they have escaped regulation and disclosure requirements even as they have had the same effect on elections as communications that use such "magic words." All of us know these ads are a charade and it is well past time that they be brought under control in Wisconsin.

As I said before, this legislation ought to be a no-brainer for Democrats and Republicans alike to embrace and support. You all know that the undisclosed, unregulated phony issue ads not only undermine our elections but they also gravely undermine the public policy-making process that follows elections because the specter of that political money hangs over many of the critical policy decisions made in this building.

SB 43/AB43 simply stipulates that groups that utilize widely disseminated broadcast communications that depict or mention the name of a candidate within 60 days of that candidate's primary or general election must use regulated, restricted and disclosed "hard" money to pay for the communications – just as candidates must do at all times. A similar provision in the federal McCain-Feingold law was upheld by the United States Supreme Court in December of 2003. And similar phony issue ad regulation and disclosure laws have been on the books at the state level for many years, including in Connecticut and even in corrupt and lawless Illinois. If Illinois can require disclosure and regulation of all of its political ads, then surely Wisconsin can and must do as much.

Twelve years ago, Common Cause in Wisconsin first proposed a measure very similar to SB 43/AB 63 for adoption by the State Elections Board in the wake of the first extensive use of phony issue ads by Wisconsin Manufacturers & Commerce during the 1996 state legislative elections. But the old State Elections Board was too partisan and too divided to do the right thing and could not agree on an administrative rule. The current non-partisan Government Accountability Board, which replaced the State Elections Board, has wisely and prudently written and unanimously passed on to the Legislature an administrative rule that would have essentially the same effect as SB 43/AB 63 in requiring the disclosure and regulation of phony issue ads.

In 2000, Common Cause in Wisconsin, working with Senator Judy Robson (D-Beloit) and Representative Steve Freese (R-Dodgeville), put forward another measure very similar to SB 43/AB 63. The measure received strong bipartisan support in passing the Joint Committee for the Review of Administrative Rules and on January 30, 2001, Senate Bill 2 passed overwhelmingly with a strong bipartisan vote of 23 to 10 in the State Senate. The following month it came within a single vote of passing in the State Assembly.

Now, more than eight years after that near victory for this measure, there have been millions of dollars more expended for undisclosed, unregulated phony issue ads. In 2001, phony issue ads were considered to be primarily a tool utilized to support Republican candidates and against Democrats. Today, the are a plague on both of your parties with groups like the Greater Wisconsin Committee and the Native-Americans just as likely to pour hundreds of thousands or even millions of dollars of undisclosed, unregulated money into ads attacking Republicans as Wisconsin Manufacturers & Commerce is to savage Democrats.

Why would you allow outside groups to continue to use undisclosed and unregulated money for campaign ads when *you* must utilize only disclosed and regulated money? That's like preparing to run a race with your feet tied together. This is a simple matter of fairness for candidates running for legislative and statewide office. And it's a simple matter of fairness for the citizens of Wisconsin to be able to know who is paying for the communications they are forced to endure at election time.

Consideration, passage and enactment into law of both the "Impartial Justice" legislation (SB40/AB 65), and the "Phony Issue Ad Disclosure and Regulation" legislation (SB 43/AB 63) is critical to the process of beginning to restore citizen trust and confidence in Wisconsin's elections, in our public policy-making process and in state government. I urge you to stand up and face down the tremendous pressure that special interest groups will exert upon you to vote against these long needed reforms. Your children and grand children will be grateful to you for doing the right thing. The prospects for campaign finance reform have not been brighter than they are right now since the late 1970s.

Common Cause in Wisconsin urges you to seize this opportunity and run with it.

Thank you.

wisconsin DEMOCRACY campaign

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Testimony of the Wisconsin Democracy Campaign on Senate Bill 40/Assembly Bill 65 and Senate Bill 43/Assembly Bill 63

Assembly Elections and Campaign Reform Committee
and the
Senate Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing Committee

May 27, 2009

Thank you for holding this hearing. The Wisconsin Democracy Campaign strongly supports both the Impartial Justice bill (SB 40/AB 65) and the Electioneering Disclosure bill (SB 43/AB63).

Our justice system is built on the bedrock principle that judges aren't supposed to belong to anyone. Not political parties. Not special interest groups. Not big campaign donors. The bedrock is cracking and the idea that judges are accountable only to the law and the constitution is on very shaky ground.

Wisconsin's Supreme Court elections have become auctions, and we need to turn them back into elections. That's what the Impartial Justice and Electioneering Disclosure bills together would do. They go hand in hand and both reforms are sorely needed.

The people of Wisconsin deserve and our state's system of justice needs Supreme Court elections where:

1) Candidates consistently matter and are not mere bystanders in special interest-dominated campaigns;
2) All candidates have the means to get their message out to voters so there is a true competition of ideas; and
3) Candidates can wage successful campaigns without compromising their ability to serve as independent and impartial judges.

By these standards, all of the last three Supreme Court elections in Wisconsin fell far short of the mark and left a great deal to be desired.

Our state has been electing Supreme Court justices for over 150 years. But it's just been in the last few years that something has gone totally haywire. The last few Supreme Court elections make it clear that wealthy interests aim to take control of our state courts and bend justice to serve their purposes. In 2007, $5.8 million was spent on that year's Supreme Court race, which is four times more than had ever been spent on a high court election before. Both general election candidates broke the all-time record for fundraising and spending, but ended up being outspent by a handful of interest groups. The 2008 race was even more expensive, with at least $6 million in total spending. While the candidates were outspent by

interest groups in 2007, they were overwhelmed in 2008. Four interest groups did 90% of the TV advertising in that race.

Although many breathed a sigh of relief that there was not a repeat performance in 2009, calling this year's contest an improvement only serves as a painful reminder of how bad the 2007 and 2008 races were. Once a final accounting of campaign fundraising and spending is made, it is virtually certain that a new record for candidate fundraising will have been set. But what was most notably wrong with this year's race was the fact that one candidate – the incumbent chief justice – had almost all the money and special interest backing while her opponent had virtually none. The voters were shortchanged again.

The Impartial Justice bill would create a far more competitive environment while at the same time freeing Supreme Court candidates and their campaign committees from the money chase and enabling candidates to run for this office without undermining the public's trust and faith in their ability to serve honorably once elected.

While this legislation has been well crafted and we applaud the bill's authors for their work, we do ask you to consider making three changes.

First, we believe the number of required qualifying contributions to become eligible for public grants under the bill is too high. As it is currently written, a candidate would need to receive small contributions from 1,000 different donors to qualify. In North Carolina, where a system similar to the one proposed in the Impartial Justice bill is already in place, the number is around 350. Moreover, under Wisconsin's old WECF system, the first $100 received from any contributor from July 1 of the year preceding the election through the day of the primary is counted toward meeting the qualifying threshold for candidates who wish to participate in the system. It is worth mentioning that a review of contributions to two Wisconsin Supreme Court candidates – Michael Gableman, who won in 2008, and Randy Koschnick, who lost this year – shows that Gableman had received 316 such donations by the February 19, 2008 primary and Koschnick received 112 by the February 17, 2009 primary. It is important to require candidates who wish to receive public financing to demonstrate that they are serious candidates who have a base of support around the state. But setting the qualifying threshold too high may suppress participation. We believe you should lower the number of required qualifying contributions under the Impartial Justice bill to somewhere in the range of 300 to 500.

Second, this bill has been creatively fashioned to prevent the waste of taxpayer money by including a trigger mechanism that provides public funds to candidates only when they need it. Candidates receive relatively small basic grants but are eligible for larger matching grants if they face opponents – either candidates or interest groups – who are spending larger sums of money. This is an excellent feature of this legislation. However, the initial grants candidates are eligible to receive need to be large enough to enable them to reasonably mount a modest statewide campaign. We believe these basic grant amounts – $100,000 in the spring primary and $300,000 for the general election – should be somewhat higher to create an adequate incentive for candidates to participate in the system. We recommend setting the basic grant levels at $150,000 for the primary and $450,000 for the general.

Third, there is no declaration of policy or legislative intent in the bill as it is written, and adding such language would be useful. We propose the following language as an addition to section 11.001 of the Wisconsin statutes:

"*The legislature finds and declares that an impartial and independent judiciary is vital to the success of our democratic system of government and the rule of law. The legislature finds that the prominent role that large private contributions play in Wisconsin Supreme Court elections undermines the integrity of*

the judiciary by giving rise to corruption or by creating the appearance that judges are beholden to large donors. Accordingly, a public funding program is established to provide an alternative, non-corrupting, source of campaign finance for State Supreme Court candidates who demonstrate public support and voluntarily accept strict fundraising and spending limits."

While enactment of the Impartial Justice bill would be a huge step forward, this new system's impact will not be as great as citizens hope for unless something is done to make sure that interest groups follow the same rules as candidates and abide by longstanding disclosure requirements and campaign contribution limits in Wisconsin law. Currently, voters are being kept in the dark about who is trying to influence the outcome of elections. Four interest groups did 90% of the TV advertising in the 2008 Supreme Court race and controlled most of what voters heard about the candidates because the sponsors of so-called "issue ads" are operating totally outside the law, using money from sources that are off limits to candidates while concealing the origins of that money from the public.

This is why it is so important that the new system created under the Impartial Justice bill be accompanied by the reforms laid out in the Electioneering Disclosure bill. As previously mentioned, these reforms go hand in hand. Neither will work nearly as well in isolation as they do in tandem.

Of course, the problem the Electioneering Disclosure bill addresses is not only a serious threat to the integrity of state Supreme Court elections but also to all other state elections in Wisconsin. Smear campaigns secretly funded by outside interest groups have become commonplace in races for governor and attorney general as well as in a growing number of Senate and Assembly races. In fact, Wisconsin just saw its first million-dollar Assembly race in 2008 and spending in one Senate race a few years ago reached $3 million. In both cases, interest groups considerably outspent the candidates.

The public has a right to know who is trying to influence the outcome of state elections. Senate Bill 43 and Assembly Bill 63 restore real meaning to that right.

Thank you once again for this opportunity to offer testimony on these campaign reform proposals. Enacting the Impartial Justice and Electioneering Disclosure bills would represent the most far-reaching and significant campaign reform in Wisconsin in at least 30 years. You have a once-in-a-generation opportunity and you have it in your power to make history. We urge you to do it, and we look forward to working with you as you do.

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May 27, 2009

To: Assembly Committee on Elections and Campaign Reform
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

Re: Support of Impartial Justice and Special Interest Electioneering Disclosure bills

The League appreciates very much this chance to communicate our support of full public financing of Supreme Court elections (SB 40, AB 65) and full disclosure of the sources of funds for all campaign communication and media activities (SB 43, AB 63).

It has been more than 30 years since our state membership agreed upon the positions from which we support these bills, and such reform has been a League action priority all this time. We concluded in 1977 that adequate public financing for campaigns allows all candidates and issues equitable access to the electorate, without reliance on personal wealth or excessive special interest support or threat of such by opponents or independent committees. This Impartial Justice bill guarantees the funds with cost-of-living adjustments, and it provides, if necessary, supplemental funds to counter unlimited spenders. The provision of supplemental funds should completely eliminate the latter. The bill also adequately increases spending limits, while reducing contribution limits and their built-in advantage for monied special interests.

The Special Interest Electioneering Disclosure bill, SB 43/AB 63, effectively brings those claiming to produce doing "issue ads" while referencing candidates positively or negatively during campaigns into the regulations for independent spenders. While speech should not be restricted, the electorate has a right to know the funding sources of these campaign activities.

Passage of these two bills would once again allow Wisconsin citizens to have confidence in the electoral process behind our elected officials. We dare to hope that these bills will be promptly enacted this year.

Thank you.

COMMUNITY SHARES OF WISCONSIN