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JUDICIAL ELECTIONS AND ISSUE ADVERTISING: A TWO STATE STUDY

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I. INTRODUCTION

In 2010, the U.S. Supreme Court curbed Congress's ability to limit campaign finance in *Citizens United v. Fed. Election Comm'n*.[1] The *Citizens United* decision immediately set off a debate over the underlying principle of the decision; namely, can money become a corrupting force in politics during a political campaign?[2] Justice Kennedy's opinion rejected the notion that campaign donations were potential sources of corruption in most cases. Writing for the majority, the court held that not only did "few if any contributions to candidates . . . involve quid pro quo arrangements,"[3] but that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[4]

Justice Stevens, in a lengthy dissent, painted a different picture, arguing "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the nation."[5] He goes on to argue, "[t]he legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting 'issue ads' to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over."[6]

Just a year earlier, Justice Kennedy had taken a different view when examining the potential of outside advertising in judicial races. In *Caperton*

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1. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010).
2. Molly J. Walker Wilson*, Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 Cardozo L. Rev. 2365, 2367 (2010).
3. *Citizens United*, 558 U.S. at 356–58.
4. *Id.* at 357.
5. *Id.* at 396.
6. *Id.* at 454–55.

v. A.T. Massey Coal Co.,[7] Justice Kennedy wrote the majority opinion in a 5-4 decision, which held a plaintiff's due process rights were violated under the 14th Amendment when a state supreme court justice failed to recuse himself in an appeal where he received more than $3 million in campaign donations from the chief executive officer (CEO) of the defendant corporation in the matter.[8] In fact, evidence pointed to the CEO raising money for the judicial candidate with the knowledge that the judge would eventually hear an appeal on this case.[9]

Justice Kennedy found, based on two prior Court decisions, the responsibility of judges to recuse themselves went beyond the traditional common law standard of a judge having a direct financial interest in a party.[10] Instead, he wrote, citing *Withrow v. Larkin*,[11] that recusal was necessary when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable."[12]

In *Caperton*, the Court rejected the plaintiff's petition for recusal on four different occasions; the plaintiff argued he did not have to step down from the case absent objective evidence of bias.[13] Justice Kennedy rejected this argument, holding that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[14]

Justice Kennedy noted the $3 million donation to the judge by the defendant's CEO was more than all of the judge's other donations combined, and that the timing of the donations reflected an effort to influence the very case for which the recusal was sought.[15] The Court found that while judges would not always have to recuse themselves when they received campaign contributions from parties to a suit, in this case, the "extreme facts" meant that there was a "probability of actual bias," which rose "to an unconstitutional level."[16]

It should be noted that Justice Kennedy took pains to describe the facts in *Caperton* as "an extraordinary situation where the Constitution requires recusal."[17] Nevertheless, he accepted the proposition that a presumption of a

7. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).
8. *Id.* at 873–74.
9. *Id*. at 873.
10. *Id.* at 877–79.
11. Withrow v. Larkin, 421 U. S. 35, 47 (1975).
12. *Caperton*, 556 U.S. at 877(quoting Winthrop v. Larkin, 421 U.S. 35, 47 (1975)).
13. *Id.* at 882.
14. *Id.* at 884.
15. *Id.* at 884–85.
16. *Id.* at 886–87.
17. *Id.* at 887.

likelihood of bias could be created by campaign contributions to a judge from a party to a lawsuit.[18]

In this paper, we continue to explore the relationship between outside groups and judicial candidates, a relationship we argue should not be taken lightly. In two earlier articles,[19] the authors examined non-candidate issue advertisements on Milwaukee radio stations to empirically examine whether any changes in the employment of the advertisements or the ads themselves were visible during the times of the changes in campaign finance law brought about by the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA) and the *Citizens United* decision. We found close correlations between the changes in the law and the number of entities buying issue advertisements, the amount of money spent, and the number of candidate mentions made in the advertisements.[20] In a third article, we expanded our analysis to include issue advertising during judicial elections in Wisconsin.[21] Using our previous research as a starting point, here we examine the judicial advertising during elections in the spring of 2016 in two states, Wisconsin and Arkansas. Part II examines the Supreme Court's requirement for quid pro quo corruption to limit independent political spending, and Part III summarizes the state of political advertising and the law. We lay out our research questions and method in Part IV, as we look for potential influence on judicial elections in Arkansas and Wisconsin, and we lay out the results of our inquiry in Part V. Part VI discusses the meaning of the results, while we sum up the findings and offer thoughts on how to move forward in Part VII.

II. RECUSAL AND QUID PRO QUO CORRUPTION

Past research has shown that there is a demonstrable correlation between donations to justices in Wisconsin and favorable rulings in favor of campaign supporters in more than 50 percent of cases. [22] Additionally, an

18. *Caperton*, 556 U.S. at 884.

19. Christopher Terry & Mitchell T. Bard, *Citizens United, Issue Ads, and Radio: An Empirical Analysis*, 20 COMM. L. CONSPECTUS 307 (2012) [hereinafter *Empirical Analysis*]; Christopher Terry & Mitchell T. Bard, *Milwaukee Radio Public File Data, 1998-2011: An Empirical Analysis of Issue Advertising After the BCRA and Citizens United*, 24(1) U. OF FLA. J.L. & PUB. POL'Y 157 (2013) [hereinafter *Milwaukee Radio*].

20. *Milwaukee Radio, supra* note 19.

21. Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption? An Empirical Analysis of Issue Advertising in Wisconsin Judicial Races Before and After Citizens United*, 16 J. APP. PRAC. & PROCESS 305 (2015).

22. *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors* (Oct. 20, 2013), http://www.wisconsinwatch.org/2013/10/20/wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/ ("[i]n instances where a contribution came in before a case was decided, justices favored those attorneys' clients 59 percent of the time.").

analysis of the Wisconsin State Supreme Court revealed that the justices failed to recuse themselves in at least 98 percent of cases in which one or more of the participants have donated to one or more of the justices' election campaigns.[23] As a result, an empirical examination of issue advertisements in races for judges, where the potential for something approaching Justice Kennedy's quid pro quo benchmark for corruption is great, provides an important opportunity for a focused, empirical inquiry.

In the matter of judicial elections, to empirically examine the effect of issue advertising, we need to examine the third-party spending—freed by the decisions in *Citizens United* (dealing with the content of issue advertising) and *McCutcheon v. FEC* (which dealt with spending limits).[24] Issue advertising made up the bulk of campaign spending in Wisconsin judicial races during our initial period of study.[25] While the relationship between outside groups and candidates for political office is subject to some debate, the potential for outside groups to influence an election in favor of a friendly judicial candidate increases the potential for corruption substantially, which Justice Kennedy recognized in *Caperton*.[26]

So far, the Supreme Court majority has limited the government interest in regulating campaign contributions to the narrow area of "quid pro quo arrangements."[27] That is, unless a donor receives an agreed-upon benefit in exchange for a contribution, the donation cannot rise to the level of being a corruptive influence sufficient to justify congressional regulation of the free speech rights of a corporation, union, or other entity providing campaign money.[28] For the current Supreme Court to uphold any limitation on campaign finance, the government will need to be able to demonstrate that the law in question limits quid pro quo corruption. General influence of the type Justice Stevens was concerned with in his *Citizens United* dissent will not suffice.

Our previous Wisconsin-based research demonstrated that prior to *Citizens United*, the only non-candidate political ads mentioning a judicial candidate at any level between 1998 and 2009 were a series of spots run in 2006 encouraging people to support the confirmation of Justice Samuel Alito's

23. *Id.*

24. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

25. Terry & Bard, *supra* note 14.

26. *See supra* note 14.

27. *Citizens United*, 558 U.S. at 355.

28. *See* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. Rev. 1425, 1455 (2015). Stephanopoulos argues that with the Supreme Court limiting the government's interest in preventing corruption to quid pro quo arrangements, campaign finance reform legislation will need to rely on government interests beyond preventing corruption. He proposes the interest in ensuring that public policy aligns with the wishes of the electorate.

nomination to the U.S. Supreme Court.[29] Given the completeness of the archive we were working from, we interpreted this as indication that issue advertising in judicial elections was limited.[30] While the archive contained entries for candidate advertising in several local and state-level judicial elections, the public file data suggests that issue groups had only become involved in judicial elections after the changes to the electioneering communication standards in the *Citizens United* decision.[31] The removal by *Citizens United* of the limits as to when issue ads could mention candidates appears to have played a substantial role in introducing third-party advertisements to judicial races.

While issue advertising in judicial races in Wisconsin was limited prior to *Citizens United*, our previous research supports the conclusion that the decision had a powerful effect on advertising in judicial races in Wisconsin, opening the door for third-party groups to make significant investments in ads attacking one candidate and/or supporting another.[32] The quantity of issue advertising exploded in the 2011 Wisconsin supreme court race in the first full year after *Citizens United* after more than a decade of no issue ads being run in judicial elections in Wisconsin.[33] Without the changes in the law brought about by the decision, many of the issue ads (including all of the judicial ads, which identified the candidates within thirty days of a primary or sixty days of a general election) run in 2011 would not have been permissible under federal law and/or the station's policies.[34] Just two years later, in 2013, during the next statewide judicial race, there was more advertising by outside groups than by both of the candidates combined.[35] As such, the media debate (which, clearly, looms large in shaping the overall debate in a race) in the judicial election was not primarily set by the candidates, but was in the hands of outside groups.

The environment for potential quid pro quo corruption in this arrangement became a reality during a series of the legal challenges to the John Doe investigation of illegal campaign coordination during Governor Scott Walker's recall election.[36] Outside groups implicated in the investigation had

29. *See Milwaukee Radio, supra* note 19.

30. *Id.*

31. Terry & Bard, *supra* note 13. A check of the data we had for other in-market stations in our study of issue advertising changes between 2006 and 2010 also supports the finding that outside groups were not purchasing issue ads for judicial elections prior to *Citizens United*.

32. *See Milwaukee Radio, supra* note 19.

33. *See* Terry & Bard, *supra* note 21.

34. *See Empirical Analysis*, *supra* note 19.

35. Terry & Bard, *supra* note 21.

36. Although the legal wrangling around the John Doe investigation of Wisconsin Governor Scott Walker was largely secret and sealed, a leak of key documents was reported on by The Guardian, including requests for at least two of the Wisconsin Supreme Court Judges to

spent significant amounts of money on issue advertising during both political and judicial elections in Wisconsin before becoming parties to a lawsuit that ultimately halted the investigation of their allegedly illegal campaign activities.[37]

III. POLITICAL ADVERTISING AND THE LAW

Political advertising in broadcasting is divided into two major categories. Campaign advertising, advertising that originates with the official campaign of a legally qualified candidate, is governed by rules contained within sections 312/315 of the Communications Act of 1934.[38] Provisions within the Act require broadcasters to carry campaign advertisements from candidates for federal office, provide equal opportunity to advertising by opposing candidates upon request, and to offer advertisement availability to a candidate at the lowest unit rate.[39]

The second category of political advertising, non-candidate political advertising (often referred to simply as "issue ads"), covers any other advertising that discusses a political issue. Non-candidate political advertising does not originate from the official campaign of a candidate for office. Instead, the advertising comes from outside parties such as individuals, unions, corporations, or even political parties. One of the provisions of the BCRA that was invalidated by *Citizens United* is the limits on "electioneering communications,"[40] a standard which prevented issue ads from identifying candidates in commercials within thirty days of a primary contest or sixty days of a general election.[41] In regulatory terms, issue ads are not given the same protections under federal law as campaign advertisements. Stations are not required to sell or air issue ads, and because a station can choose which, if any, issue ads it will run, the station assumes legal responsibility for the content of the ads that it airs.[42]

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recuse themselves because of their relationships with parties being investigated in the case. Ed Pilkington, *Because Scott Walker Asked*, GUARDIAN (Sept.14, 2016), https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics; s*ee also* Dee J. Hall, *Justices Face Questions as 'John Doe' Probe Lands in Supreme Court*, WIS. ST. J. (Oct. 6, 2014), http://host.madison.com/wsj/news/local/govt-and-politics/justices-face-questions-as-john-doe-probe-lands-in-supreme/article_b082257c-3b2d-5ac9-b7ee-63bc64286beb.html.

37. Grant of Petition for Review, *Three Unnamed Petitioners v. Peterson,* No. 013AP2504-2508-W (Wis. Sup. Ct. Dec. 14, 2017), http://media.jrn.com/documents/2013AP2504and2014AP296and2014AP417.pdf.

38. 47 U.S.C. § 315 et seq. (2012).

39. *Id.* § 315(2)(b).

40. 52 U.S.C. § 30104(f)(3) (2012) (originally enacted as Communications Act of 1934, 2 U.S.C. § 434(f)(3)).

41. *Id.*

42. 47 U.S.C. § 315(a) (2012).

Assuming a broadcast radio or television station is willing to sell issue advertising, it will typically make a decision to carry issue ads at a pre-specified rate, and will then publish a rate card that identifies the prices for issue advertising sales. This information will be available, along with a list of advertisers buying issue ads, within a station's public file.[43] Radio and television broadcasters are required by law to maintain political advertising information in their public files for a period of two years.[44] As public file data on political advertising includes pricing information, typically stations will remove material periodically to keep information in line with the two-year requirement and to remove proprietary information on advertising rates.[45] Even though the data within a station's public file is relatively easy to access,[46] these databases can be challenging to navigate without some broadcast industry knowledge and/or previous experience with them. Professor Terry is a former radio producer with significant experience in handling station public files, having been in charge of regulatory compliance duties during his professional career. Our previous research was developed using a unique archive of public file data from a cluster of radio stations based in Milwaukee, WI, that we were able to access through professional connections.[47]

For this research, we follow the lines of our earlier research, expanding our attention to contemporary public file data on the non-candidate political advertising as it relates to judicial races and candidates that ran on local television stations in Arkansas and Wisconsin ahead of the statewide Spring elections in 2016. The use of public file data presents a complete picture of the spending and running of political advertising; therefore, it is possible to directly examine the spending of the candidates and outside groups in judicial elections.

IV. RESEARCH QUESTIONS AND METHOD

The majority's holding in *Citizens United* made assumptions about the effects of corporate money (on corruption, influence and advertising) without considering empirical evidence. The Court then chose not to hear arguments in *American Tradition Partnership, Inc. v. Bullock,*[48] instead issuing a per curiam decision reversing a Montana supreme court decision upholding

43. *Id.* § 315(e).
44. 47 C.F.R. § 73.3527(e)(5) (2017).
45. 47 U.S.C. § 315(e)(3).
46. *See Public Inspection Files*, FED. COMM. COMMISSION, https://publicfiles.fcc.gov/ (last visited Sept. 11, 2017). For television stations, a database of each station's public file is now online and available through the FCC's website.
47. *See supra* note 19.
48. Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516 (2012) (per curiam).

the state's campaign finance statute, citing the *Citizens United* decision.[49] The arguments in *American Tradition Partnership* would have included historical and empirical data on the effects of corporate political spending in that state.[50]

We renew our premise that empirical data provides the best opportunity to assess the decision in *Citizens United* without political or ideological bias. We continue to argue that to ignore the available empirical evidence is a mistake, no matter where the data takes the argument. Past research has demonstrated a correlation between direct contributions to justices and favorable rulings.[51] Spending on behalf of (friendly) judicial candidates, especially in lower—turnout spring elections, like the statewide judicial races in Arkansas and Wisconsin, has the potential to have more influence on a voter than similar spending in larger political campaigns. With an incentive to "stack the bench," for example, industry groups opposed to environmental or workplace regulations can support anti-regulation candidates, potentially spending unlimited amounts of money to advertise on their behalf; far more than any judicial candidate would spend individually. With a demonstrable history of state supreme court justices unwilling to recuse themselves from cases on ethical grounds,[52] corporations, lobbies, and other groups that know pending legislation, legal liabilities, or regulations will end up under judicial review could view spending money on issue advertising as a practical, effective investment in influencing the candidate to rule in their favor. This premise was recognized by Justice Kennedy's majority opinion in *Caperton*.

For this paper, we are interested in developing data that compared the campaign spending by the judicial candidates to the money spent by outside groups on advertising in the races. Relying on Justice Kennedy's opinion in *Caperton*,[53] we set out to assess which groups, if any, may have had a "disproportionate influence" on the elections in either state.

To develop this analysis, we are interested in the number of issue ads related to the judicial elections in each state, the number of those ads that mention a candidate in the judicial election, whether those mentions are related to a positive endorsement or negative attack, and the total spending amount.

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49. *Id.*

50. *See* Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 MONT. L. REV. (2013) (containing a history of the Montana Corrupt Practices Act).

51. Terry & Bard, *supra* note 21.

52. *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors*, *supra* note 22.

53. "The inquiry, centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 884 (2009).

On the surface, Wisconsin and Arkansas might appear to be an odd combination of states for a comparison study of judicial advertising. With our previous research geographically tied both to our archive and our physical location, we assumed the difference in the states would provide an interesting contrast as an empirical test. Surprisingly, the states actually had more in common than we had initially anticipated. Before 2016, both Arkansas and Wisconsin had experienced a blitz of issue ads in statewide judicial elections. Wisconsin's experience with judicial race issue ads started shortly after the *Citizens United* decision with a race in 2011.[54] Arkansas's first taste came in the 2014 judicial election, where an outside advertiser, The Law Enforcement Alliance of America, ran a large quantity of attack issue ads in the Wynne-Cullen election.[55]

A complete list of commercial television broadcast stations was assembled for each state, and then the FCC's online public file database was searched by call letter for each station. Inside of the public file of each station, the political tabs for 2015 and 2016 were examined. Data on advertising by the official campaign of the candidates in each state as well as the advertising by outside groups in the judicial campaign was collected and coded.

V. RESULTS

There was a large volume of issue advertising in both states leading up to the statewide spring elections. In Arkansas, we identified a total of 2,627 television ads that were run related to the 2016 statewide judicial election, representing a total spending of $1,069,369. Of these totals, issue advertising represented 1,386 spots, which was 52.8 percent of the total volume, and $585,268, which was 54.4 percent of the total spent. Notably, while outside advertising exceeded the spending of all of the official candidates combined, our data demonstrated only one issue advertiser that was active in the election cycle, the Judicial Crisis Network, an advocacy group based in Washington, D.C. that was supporting Dan Kemp.

In Wisconsin, we saw another active cycle of issue advertising related to a statewide judicial race. In total, 9,725 advertisements were run, representing $2,454,164.65 in spending. Issue advertising represented 4,004 of the spots, making up 41 percent of the total volume, and totaled $1,685,370, which was 68 percent of the total amount spent on the race. In Wisconsin, two advertisers bought issue ads. The Wisconsin Alliance for Reform organization ran 3,339 advertisements, which made up 83 percent of all issue ad-

54. *See Milwaukee Radio, supra* note 19.

55. *See* Eugene Kiely, *Mudslinging in Arkansas Judicial Race*, FACTCHECK.ORG (May 15, 2014), http://www.factcheck.org/2014/05/mudslinging-in-arkansas-judicial-race/.

verting in the race and 34 percent of all of the advertisements related to the election, and the group spent $1,326,220.65, which made up 78 percent of issue ad spending and 54 percent of total spending in the race; all to support the conservative incumbent, Rebecca Bradley. The Greater Wisconsin Committee ran 665 ads, which was 17 percent of issue advertising and 7 percent of all election-related advertising, spending $359,150, which was 22 percent of issue ad spending, and 14 percent of all spending in the race, which supported the challenger, Joanne Kloppenburg.

VI. DISCUSSION

Ultimately, the center of our research is based on the contention that courts should look at the empirical evidence of changes in issue advertising when considering the balance between free speech and regulating political contributions. On this point, there can no longer be any debate that the *Citizens United* decision has radically altered the landscape for political advertising. While we remain skeptical of the outcomes of the decision as they relate to political races, the current research we have completed has given us significant concerns about the future of an impartial justice system.

Wisconsin and Arkansas are, in many ways, very different states. They sit in different regions of the country, with different economic standing and industries, and have different population demographics. Wisconsin has nearly double the number of residents of Arkansas. Despite the differences between the states, our data demonstrates that the states share some common post-*Citizens United* outcomes in election-related spending on statewide judicial races in 2016. In Arkansas, the last two state supreme court races have been dominated by just one group purchasing issue ads. As a result, a well-funded, but otherwise apparently unconnected, group from outside of the state bought and ran a large quantity of attack ads in order to influence the race. With limited local ties, questions should be asked about the actual interests represented by an issue group like the Judicial Crisis Network, based in Washington, D.C., that outspent and ran more advertisements than all of the candidates combined.

Likewise, in Wisconsin, where issue groups have been fighting an on-air advertising war over judicial elections since 2011, and have outspent the candidates by substantial margins in each of the statewide judicial elections since *Citizens United*, questions linger about the intents of the various organizations spending large sums of money. Presumably, the goal is to influence policy in the state. While the diversity of the groups in Wisconsin running the issue advertising has been reduced, the message has not changed. Like Arkansas, none of the judicial election advertising we examined was in the form of positive support for a candidate. Almost universally, the issue advertising comprises attack ads. Negative ads have become a form of judi-

cial-election currency since *Citizens United*, and that currency is being invested with increasing frequency.

While conservative-leaning judicial candidates appear to be benefiting the most from issue advertising, there seems to be another underlying thread. According to our dataset, none of the groups identified in this 2016 election study were running ads that attacked candidates on their perceived judicial stances on contemporary or controversial social issues. In fact, a key element of ads attacking Courtney Goodson in Arkansas was her opposition to, and decision to overturn, the state's tort reform law. While we have not empirically shown why this issue was featured by the advertisers, our research has found media reporting that suggests the groups supporting conservative candidates in both statewide judicial elections are drawing financial resources from a common network of donors.[56] In fact, in both states, the groups running the advertising appear to be funded primarily by industry groups, which then use the issue groups as "fronts" to control the discussions about the candidates.[57] This tactic has been performed openly by pro-industry groups in Wisconsin in earlier judicial elections. In 2016, just one group, which had not run a single advertisement before this election, was running attack ads against the more liberal candidate Kloppenburg, supporting the incumbent Bradley who was perceived to be more pro-business.[58]

Logically, a $500,000 covert investment in a judicial election could be money well spent by an industry if a favorable candidate is put on, or remains on, the bench before a potentially high-dollar liability or expensive regulation case is going to be heard. In both states, as the issue groups run more ads and far outspend the actual candidates, it provides an opportunity to apply Justice Kennedy's inquiry from *Caperton*. Problematically, as the issue advertising is being conducted by outside groups on behalf of industries or individuals, there is limited disclosure of the actual parties trying to influence races. As a result, there is virtually no way to ascertain the actual source of the political speech or the intent of the speaker in the issue ads. The absence of meaningful accountability logically creates a near-perfect environment for potential corruption.

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56. Peter Overby, Viveca Novak & Robert Maguire, *Secret Persuasion: How Big Campaign Donors Stay Anonymous*, NAT'L PUB. RADIO: MORNING EDITION (Nov. 6, 2013), http://www.npr.org/2013/11/06/243022966/secret-persuasion-how-big-campaign-donors-stay-anonymous.

57. Peter Overby, Viveca Novak & Robert Maguire, *Wellspring's Flow: Dark Money Outfit Helped Fuel Groups on Political Front Lines*, NAT'L PUB. RADIO: MORNING EDITION (Nov. 5, 2013). https://www.opensecrets.org/news/2013/11/wellsprings-flow/.

58. Molly Beck, *With Rebecca Bradley, Conservatives Increase Their Majority on the Supreme Court,* WIS. ST. J. (Apr. 7, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/with-rebecca-bradley-conservatives-increase-their-majority-on-the-supreme/article_1a51d9bd-430b-587d-ac39-42228cdb66c5.html.

VII. CONCLUSION

The data examined in this study empirically establishes a set pattern for the 2016 judicial races in Arkansas and Wisconsin. In both cases, the overwhelming majority of advertisements and money spent on advertising came from a very small group of outside groups rather than the campaigns themselves. Further, knowledge of the identity of the parties funding the advertising is limited, as is their motives. While we cannot empirically say why the groups opted to expend hundreds of thousands of dollars on state judicial races, we can say that a rational actor would do so only if that actor expected some kind of return on that investment. With one or two groups seeking to play an outsize role in placing or keeping a judge in a position to positively rule in the groups' favor, it seems that the situations in Arkansas and Wisconsin have edged close to, if not firmly within, Justice Kennedy's "probability of actual bias on the part of the judge or decision-maker" that "is too high to be constitutionally tolerable."[59]

The impartiality of the nation's judges lies at the heart of our legal system and our democracy. The data in this study indicates that this impartiality is under threat by the kind of unlimited issue advertising legalized by *Citizens United*. At the very least in the arena of judicial elections, the Court should use empirical research to calibrate its balance between free speech and the regulation of political advertising so that it is clear that no group can buy the allegiance of a judge.

59. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 877 (2009) (quoting Winthrop v. Larkin, 421 U.S. 35, 47 (1975)).