Common Cause in Wisconsin

152 W. Johnson Street * P.O. Box 2597 * Madison, WI 53701-2597 * (608) 256-2686
Jay Heck, Executive Director * www.commoncausewisconsin.org

Testimony of Jay Heck

Executive Director of Common Cause in Wisconsin

March 24, 2015

Assembly Committee on Campaigns and Elections
&
State Senate Committee on Elections and Local Government

Chair Bernier, Chair LeMahieu, and Members of both Committees.

Thank you for your invitation to appear before you today. I'm Jay Heck, the Director of Common Cause in Wisconsin, a non-partisan state reform advocacy organization with more than 3,000 members and activists from all over Wisconsin.

As you move to rewrite the campaign finance laws of Wisconsin in the weeks ahead, we urge you to keep in mind why we have campaign finance laws at all. Excessive political money in politics and in the public-policy making process can be, and has been, a corrupting influence in Wisconsin. When left uncontrolled and unregulated, this money has undermined the public trust in our democratic institutions and has demoralized our citizenry. It has led to corruption, scandal and the removal from office of top legislative leaders of both political parties. It has undermined and sullied Wisconsin's once proud and admired reputation as the national model for honest, clean and accountable state government -- uncorrupted by political money.

Just because some courts, in recent years, have moved--usually by a single vote majority in bitterly divided opinions--toward increased deregulation of campaign finance at the state and federal level, doesn't mean that the Wisconsin Legislature must move in that direction. Indeed, there is ample reason and justification to move toward increased limitation and to requiring

far more transparency of the political money from within and outside of Wisconsin that has increased to alarming and unprecedented levels in recent years, inundating Wisconsin elections and despoiling our political discourse.

While there may be philosophical disagreement about the role of political money within this Legislature and certainly among experts and advocates, there is little doubt that the vast majority of Wisconsinites believe there is too much money in our elections and that view is shared by voters of all ideological dispositions. Just ask them. Polling consistently underscores this underlying truth.

Contrary to the myths propagated by many opponents of campaign finance reform – the citizens of Wisconsin overwhelmingly want sweeping reform of the current system and have for a long time. In 2000, a state-wide advisory referendum asked whether citizens thought there should be spending limits in state elections and disclosure of the donors to campaigns. Just shy of 90 percent of the people of this state voted "yes." And in one county a further question was asked: "Do you support public financing of elections of state candidates who abide by spending limits?" The number of voters answering in the affirmative was also overwhelming – more than 80 percent. And no, that question was not asked in Dane County where such support for public financing might be expected. More than four out of five voters in bright red Waukesha County supported public financing of elections in Wisconsin.

Today, I want to make the case for a few basic elements of campaign finance that we believe you ought to include and make a central part of your construction of a revised Chapter 11 of the Wisconsin Statutes.

Contribution Limits

The current statutory contribution limits for statewide and legislative candidates were established thirty years ago and we understand that the cost of campaigns and running for office has increased dramatically over the years. Nevertheless, the $10,000 limit for contributions by individuals to statewide candidates seems to us to be very high, even today. A very tiny percentage of Wisconsin citizens have the ability, let alone the inclination, to be able to make a political contribution of any significant size, much less $10,000. Increasing that limit would only create an additional group of "elite

donors" with increased access to, and influence with, state elected officials. So we oppose increasing this current limit.

The $500 contribution limit for Assembly candidates and $1,000 limit for State Senate candidates also seems sufficient and, in fact, for many years we actively advocated reducing these amounts by 50 percent. We support keeping the current limits in place.

We recognize and regret that last year's U.S. Supreme Court decision in *McCutcheon* has opened the flood gates nationally and in Wisconsin for wealthy individuals to be able to make contributions without limit to political parties and political action committees (PACs). And indeed that process began last Fall in Wisconsin with million dollar individual contributions to each of the political parties. We believe this provides only the most wealthy in our society to be able to exercise outsize influence and power to influence elections through their six or seven figure contributions. That diminishes the voice of everyone else. But we note that *McCutcheon* was decided very narrowly -- 5 to 4 -- and look forward to a reversal of that decision in the near future. The previous $10,000 aggregate limit that was long in place prior to last year for party and PAC contributions seems to us to be reasonable and prudent.

Public Financing of Elections

The establishment of a voluntary system of partial public financing for statewide and legislative elections in Wisconsin in 1977 was a reform that was widely accepted and embraced by the citizens of Wisconsin and by many members of both major political parties. It worked very well for about a decade before failure to strengthen and update the funding mechanism caused it to wither and eventually die. It was defunded altogether in the 2011-12 biennium budget. But the rationale for public financing of elections remains strong and compelling in our judgment. In return for agreeing to abide by a spending limit, a candidate receives partial or all of their campaign funding, freeing them from burden of having to spend vast amounts of time and effort groveling for funds from special interest groups and wealthy individuals. Elections should be won or lost based on policy positions rather than who is able to raise and spend the most money to engage in negative advertising, including character assassination. In addition, with public financing, winning candidates are beholden to the public at large who funded their campaigns rather than a few wealthy individual donors and/or special interest groups who often come armed with

a policy agenda as well as dollars. This *quid pro quo* is rarely explicit. But there is no doubt it exists.

Likewise, a more recent reform, also repealed in 2011, should be revived and reinstated. The Impartial Justice Law, which passed with robust bipartisan support in the Legislature in 2009, provided full public financing to candidates for the Wisconsin Supreme Court who agreed to limit their spending to $400,000. In 2007, all seven Justices – conservatives and progressives alike – signed a public letter urging public financing for their own elections. In place for only one election – in 2011 -- both incumbent Justice David Prosser and challenger Joann Kloppenburg voluntarily agreed to abide by the spending limit, accepted the public financing and their campaigns did not have to engage in the troubling and conflicting exercise of raising campaign funds from the very people who argue before the court or who are party to decisions made by the court. The provision of the Impartial Justice law that was not in effect in that election was the "matching fund" provision that stipulated that a candidate who was the target of an outside expenditure, (or if his or her opponent was the beneficiary of such an expenditure) that candidate was eligible to receive up to three time the statutory spending limit of $400,000. The matching fund provision was the subject of a case involving Arizona's public financing law before the U.S. Supreme Court when the Prosser-Kloppenburg election occurred. And the Court, again on a narrow and fiercely contested 5 to 4 vote, struck down matching fund provisions such as the one in the Impartial Justice law in the *McComish* decision. Despite the evisceration of that key provision there would have been much value in retaining full public financing for Wisconsin Supreme Court candidates. Their campaigns would not have to be engaged in special interest fund raising, which has contributed to the now widely-held public perception that the decisions rendered by our state's highest court are influenced by political money.

Fortunately, there is no shortage of very good suggestions about what can be done and models that can be examined to come up with campaign finance system that makes sense for Wisconsin. Other states such as Maine, Arizona and Connecticut have all established 100 percent public financing systems that work well, that enjoy the high confidence and trust of their citizens and that have strong, bipartisan support.

Closer to home is our neighbor Minnesota, which actually modeled its campaign finance system after Wisconsin's in the late 1970's but, unlike

Wisconsin, continually tweaked and improved its system to keep pace with the increasing costs of campaigns and to make their system more attractive to candidates and to the public. In Minnesota, candidates are eligible to receive up to 50 percent public financing and there is still very robust participation of both Republican and Democratic candidates for statewide and legislative offices in their system, even in the wake of the unlimited outside spending unleashed by the *Citizens United* decision as well as the negative consequences of *McComish* and *McCutcheon*.

There are also public financing programs established in some cities around the nation in which a small donor is matched with public matching funds up to five times the amount of the small donation. In this way small donations rather than large campaign contributions are encouraged resulting in broader participation of citizens of more modest means in the campaign finance process. New York City and Albuquerque, New Mexico are models for this.

The source for public financing of elections need not only include general purpose revenue, although that is most desirable. But in Arizona, for example, rather than utilizing taxpayer dollars, revenue utilized for public financing comes from a surcharge on civil and criminal forfeitures. In Connecticut, the state's unclaimed assets fund provides the resources for public financing of campaigns. There are other non-GPR sources of revenue that can be explored including some proposed by former Wisconsin legislators such as State Senator Mike Ellis (R-Neenah).

Senator Ellis once famously said, (and I am paraphrasing), public financing is an insurance policy for Wisconsin taxpayers on the state budget to help protect it from the hooks of big outside special interest groups who seek to carve the budget up for their own selfish purposes at the expense of taxpayers.

Outside Spending - Disclosure

While the narrowly decided *Citizens United* decision in 2010 opened up the floodgates for unlimited corporate and union treasury money to be used by outside spending groups, reversing 100 years of settled law, it did not foreclose requiring disclosure for electioneering communications beyond those identified as "express advocacy." Indeed, eight of the nice U.S. Supreme Court Justices, including four who voted in the majority in Citizens United, encouraged Congress and the states to enact laws requiring the disclosure of campaign communications masquerading as issue advocacy.

Disclosure of electioneering communications, beyond only express advocacy, is a reform that Wisconsin has needed for many years. The amount of undisclosed "dark" money from both within and outside of Wisconsin has increased in each successive election and the right of Wisconsinites to know where that money is coming from and who is trying to influence their vote trumps the perceived need for anonymity. The U.S. Supreme Court is very clear on this point and any attempt to codify into Wisconsin law a provision that only "express advocacy" can be subject to disclosure ought to be rejected outright. Phony issue ads are the functional equivalent of express advocacy (the so-called "magic words") and should be treated as such under the law.

We support the disclosure of the donors for all widely disseminated electioneering communications which are made in the period of up to sixty days prior to an election.

Illegal Campaign Coordination

Under current Wisconsin law, money spent in coordination with a candidate for the purpose of influencing an election is deemed a contribution subject to limits and source restrictions, as well as disclosure obligations. This includes so-called "issue advocacy."

The goal of the Wisconsin law – and many similar laws at the federal and state levels – is to block attempts by big donors to purchase influence over candidates "through prearranged or coordinated expenditures amounting to disguised contributions," and thereby to prevent corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S.1, 47 (1976)

The U.S. Supreme Court has made it abundantly clear that regulation of coordinated spending can extend beyond express advocacy communications.

While *Buckley* obviously applied the express advocacy test to independent expenditures it left intact limitations on coordinated campaign spending. So have the Supreme Court decisions that have addressed outside spending issues since then. That includes the 2003 decision in *McConnell* that upheld the major provisions of the McCain-Feingold law, the 2007 *Wisconsin Right to Life* decision that narrowed the scope of what communications could be regulated: from "the functional equivalent of express advocacy" further to those communications that were "susceptible of no reasonable interpretation

other than an appeal to vote for or against a certain candidate." But at no point did the court say these tests were applicable to coordinated spending.

And just as the *Citizens United* decision up held challenged electioneering communications (phony issue ads) disclosure requirements, it did not support the use of an express advocacy standard in regulating coordinated spending.

Wisconsin's law is consistent with the Supreme Court's decisions and so too have been state court decisions with regard to coordinated spending.

In *Wisconsin Coalition for Voter Participation, Inc.* (WCVP), the Court of Appeals in 1999 ruled that an investigation was unfounded because WCVP's mailings did not contain express advocacy, but it also held that the communications were regulable "whether or not they constitute express advocacy." Why? Because they are considered contributions. In last year's *Wisconsin Right to Life, Inc. v. Barland* decision, the Seventh Circuit held that the express advocacy test applies to the regulation of independent spending, not the regulation of contributions and coordinated spending.

Narrowing Wisconsin law to define coordinated spending as only that outside spending which employs express advocacy would be a huge and tragic mistake. It would effectively eviscerate campaign contribution limits, which may be the objective of the proponents advocating for this change.

For example, If a statewide candidate's campaign can receive a maximum contribution of $10,000 from an entity and then be allowed to coordinate campaign activities with that same entity that engages in issue advocacy in behalf of that candidate (in the period of 60 days or less before and election) or against the candidate's opponent for, say, $100,000, that is essentially a $110,000 contribution from the entity to the candidate it is coordinating with and thus, rendering the $10,000 contribution limit meaningless.

This is, of course, the very heart of the matter of the John Doe II case currently before the Wisconsin Supreme Court and CC/WI has joined several other groups in an *amici* brief in defense of the current law.

Summary

CC/WI believes that rewriting Chapter 11 of the Wisconsin Statutes is needed and overdue. But far from agreeing with those who view this as an

opportunity to deregulate and dismantle all limitations on money in our elections, we view this as an opportunity instead, to strengthen our once effective and widely admired campaign finance laws and return Wisconsin elections and state government to the citizens to whom it ought to be accountable. Robust campaign finance laws are needed to deter corruption or the appearance of corruption. Wisconsin has always been a state that abhors and rejects political corruption in all of its forms. That's what made us unique and great. Let's keep it that way.

Thank you.