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November 23, 2009

Governor Jim Doyle  
115 East, State Capitol  
P.O. Box 7863  
Madison, WI 53707

RE: Constitutional issues with Senate Bill 40

Dear Governor Doyle:

I wanted to bring to your attention an important misstatement made by Mike McCabe of Wisconsin Democracy Campaign in a recent letter sent to you regarding Senate Bill 40, also known as the Impartial Justice act. The issue in question was addressed in our previous letter to you, but due to the falsehoods contained in the Wisconsin Democracy Campaign letter I felt it important to ensure you had accurate information before you decide whether or not to sign SB 40 into law.

McCabe's letter states that "The most recent case addressing the trigger matching provisions is the Fourth Circuit's opinion in *North Carolina Right to Life v. Leake* which unanimously upheld a public funding program with triggered matching provisions for judicial races."

While McCabe correctly summarizes the Fourth Circuit ruling in *Leake*, he is incorrect when he states it is the "most recent case addressing... matching provisions."

*Leake* was decided in May of 2008, before the Supreme Court ruled in *Davis v. Federal Election Commission*. *Davis* struck down the "millionaire's amendment" in the Bipartisan Campaign Reform Act of 2002, which allowed candidates special fund-raising privileges if their opponent spent personal funds above a certain amount on their own campaign.

Since *Leake* and in the wake of *Davis*, two federal district court judges have ruled against matching funds. In August 2008, federal district Judge Roslyn Silver in Arizona ruled that Arizona's matching funds provision in their taxpayer-financed campaign program was likely unconstitutional according to the U.S. Supreme Court's *Davis* decision. A final decision from her court is still pending.

More recently, in August 2009, federal district Judge Stefan Underhill struck down Connecticut's entire public financing program, which included a matching funds provision. Judge Underhill found the matching funds provision to be unconstitutional after the *Davis* decision, writing: "I conclude that the trigger provisions place a substantial burden on the exercise of First Amendment rights and the state has failed to advance a compelling state interest that would otherwise justify that burden."

McCabe also neglects to mention in his letter that in *Davis*, the U.S. Supreme Court cited favorably in its opinion the 1994 ruling *Day v. Holahan*, an Eighth Circuit decision that struck down a matching funds scheme in Minnesota.

Disputes over the meaning and interpretation of court rulings and opinions are of course common, and the "leading campaign finance law attorneys" that McCabe boasts of may indeed believe that the *Davis* ruling does not impact matching funds. It is false, however, to claim that *Leake* is the most recent court case on the matter, and it is an extremely dubious position to imply that matching funds have consistently passed muster with the courts.

I hope this information helps to set the record straight and correct the false statements made by Wisconsin Democracy Campaign, and is helpful to you as you consider whether to sign SB 40 into law. If you would like more information or to discuss this issue with me further, you can reach me at (703) 894-6800 or [sparnell@campaignfreedom.org](mailto:sparnell@campaignfreedom.org).

Sincerely,



Sean Parnell  
President