

**United States District Court  
District of Minnesota**

<p><b>GREGORY WERSAL</b></p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p><b>JAMES DEHN, <i>et al.</i></b></p> <p style="text-align: right;"><i>Defendants.</i></p>	<p>Civil Action No. _____</p>
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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

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## **Introduction**

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (“*White II*”), the federal courts reaffirmed the protected nature of political and campaign speech in the judicial context, invalidating Minnesota judicial canons that prohibited judicial candidates from announcing their views on disputed political and legal issues, belonging to a political party, receiving endorsements from political groups, or personally soliciting campaign contributions. In similar fashion, Plaintiff will demonstrate that Canons 5A(1)(b), 5A(1)(d), and 5B(2) of the Minnesota Code of Judicial Conduct do not survive a facial or as-applied challenge under the First Amendment. Because these provisions deprive Plaintiff of his First Amendment rights, they cause the Plaintiff irreparable harm, and must be preliminarily enjoined.

## **Statement of the Case**

The facts of this case are set out in the Verified Complaint for Declaratory and Injunctive Relief and verified there by Gregory Wersal. Plaintiff will briefly summarize those facts here.

Plaintiff, Gregory Wersal, is a candidate for the office of Justice of the Minnesota Supreme Court in the 2008 judicial election, and he intends to run in future judicial elections thereafter. As such, he meets the definition of a judicial candidate set out in Canon 5F, which provides that a “person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support.”

Gregory Wersal wishes to publicly endorse and publicly oppose certain political candidates for public office who are not candidates running for his judicial office. However, Canon 5A(1)(b) provides that a judge or judicial candidate may not “publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office.” Because of this Canon, Wersal risks discipline if he exercises his First Amendment rights by making endorsements.

Gregory Wersal would also like to begin personally soliciting funds for this campaign. (Complaint ¶ 13.) Specifically, he would like to personally solicit funds from those non-attorneys who wish to support him by going door-to-door, and making personal phone calls asking for financial support. Several provisions of the Minnesota Code of Judicial Conduct, however, prevent him from doing so. Canon 5A(1)(d) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization . . . .” Canon 5D provides that “[f]or purposes of Canon 5 the term ‘political organization’ denotes an association of individuals under whose name a candidate files for partisan office.” Likewise, Canon 5B(2) provides, in relevant part, that “a candidate

shall not personally solicit or accept campaign contributions . . . .” Canon 5B(2) goes on to provide that a “candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.” Because of these Canons, Wersal risks discipline if he exercises his First Amendment rights by making personal solicitations of campaign contributions.

Unless Canon 5A(1)(b) is preliminarily enjoined, Gregory Wersal will be unable to make endorsements during the course of his 2008 election campaign and thereafter. Similarly, unless Canons 5A(1)(d) and 5B(2) are preliminarily enjoined, Wersal will be unable to make personal solicitations in anticipation of his 2008 campaign. As a result, he will be deprived of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and will suffer irreparable harm. He has no adequate remedy at law.

### **Argument**

A motion for preliminary injunction requires the district court to consider four factors: (1) the probability of success on the merits, (2) the threat of irreparable harm to the movant, (3) the balance between the harm and the injury that granting the injunction will inflict on other interested parties, and (4) the public interest. *Lankford v. Sherman*, 451 F. 3d 496 (8th Cir. 2006). Plaintiff meets these requirements. Thus, preliminary injunctive relief should be granted.

## **I. Plaintiff Is Likely to Succeed on the Merits.**

### **A. The Endorsement Clause Is Unconstitutional On Its Face and As Applied to Gregory Wersal.**

Canon 5A(1)(b)'s endorsement clause provides that a judicial candidate shall not "publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office." The provision is parallel to the political activities clause struck down in *White II*, which said that judicial candidates could not "identify themselves as members of a political organization . . . [or] seek, accept, or use endorsements from a political organization." *White II*, 416 F.3d at 745. As explained below, Canon 5A(1)(b)'s endorsement clause infringes on judicial candidates' rights of free speech and association under the First Amendment, and based on *White* and *White II*, should be found unconstitutional on its face and as applied to Plaintiff.

#### **1. The Endorsement Clause On Its Face and As Applied to Gregory Wersal Fails Strict Scrutiny**

The endorsement clause forbids judicial candidates from endorsing other political officials. Consequently, the endorsement clause is a content-based regulation of core political speech that is subject to strict scrutiny. *Id.* at 763-64. To survive strict scrutiny, a law must be narrowly tailored to further a compelling government interest. *Id.* at 774. A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980).

Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

Restrictions on judicial campaign speech and conduct are often rationalized on the grounds that such restrictions are necessary to preserve judicial impartiality. In *White*, the Supreme Court considered three possible definitions of this impartiality interest: impartiality as lack of bias towards the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as open-mindedness. *White*, 536 U.S. at 775-80.

The first definition of impartiality considered in *White* was judicial impartiality towards parties. *Id.* at 776. This interest arises because of due process, which requires trial before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). While the Supreme Court found this interest compelling, it concluded that the announce clause was “barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues.” *White*, 536 U.S. at 776.

The second definition of impartiality considered by *White* was impartiality defined as a lack of preconceptions on legal issues. *White*, 536 U.S. at 777. This interest is not compelling, as having a judge with no preconceptions on any legal issue is neither possible nor desirable. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) (“Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias”).

The final definition of impartiality considered by *White* is impartiality as judicial openmindedness. This definition of impartiality requires of a judge “not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.” *White*, 536 U.S. at 778. Judicial openmindedness “seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.” *Id.* (emphasis in original). The Supreme Court did not hold that judicial openmindedness was a compelling state interest.<sup>1</sup> Nonetheless, the Court held that even if the interest was compelling, the announce clause did not pass strict scrutiny because it was not narrowly tailored to that interest. *Id.*, at 780.

Likewise, in *White II*, the Eighth Circuit held that a political activities clause that barred judicial candidates from declaring a political affiliation or accepting endorsements was not justified by any of the three impartiality interests discussed in *White*. According to the Eighth Circuit, “the underlying rationale for the partisan-activities clause – that *associating with a particular group* will destroy a judge’s impartiality – differs only in form from that which purportedly supports the announce clause – that *expressing one’s self on particular issues* will destroy a judge’s impartiality.” *White II*, 416 F.3d at 754 (emphasis in original). As such, the court found that the clause was subject to the same defects that rendered the announce clause unconstitutional.

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<sup>1</sup> Indeed, there would seem to be some issues, such as whether conviction of a crime requires proof beyond a reasonable doubt, where judicial open-mindedness on the issue is undesirable.

These decisions compel the conclusion that Minnesota’s endorsement clause is unconstitutional. *White* held that judicial candidates had the right to announce their views on disputed legal and political issues. *White*, 536 U.S. at 780. Whether a given candidate should be elected is a disputed political issue. Therefore, judicial candidates cannot constitutionally be prohibited from announcing their view on this issue through an endorsement. *White II*, 416 F.3d at 754 (“the Supreme Court’s analysis of the announce clause under this meaning of ‘impartiality,’ to wit judicial bias, is squarely applicable to the partisan-activities clause.”) Further, whatever impartiality concerns are present when a judicial candidate endorses another candidate are at least equally present in the case where the judicial candidate is endorsed by a third party. Since candidates are free, under *White II*, to accept such endorsements, a fortiori they must be free to make such endorsements as well. As consequence, the endorsement clause as applied to Plaintiff is not narrowly tailored to serve a compelling interest and is an unconstitutional regulation of protected political speech in violation of the First and Fourteenth Amendment. *Id.*

## **2. The Endorsement Clause Is Unconstitutionally Overbroad.**

The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.” *Republican Party of Minnesota v. Klobuchar*, 381 F.3d 785, 791 (8th Cir. 2004). “The aim of facial overbreadth analysis is to eliminate the deterrent or chilling effect an overbroad law may have on those contemplating conduct protected by the First Amendment.” *Id.* (quoting *Turchick v. United States*, 561 F.2d 719, 721 (8th Cir. 1977)).

The endorsement clause is substantially overbroad. While the fact that a judge has endorsed a given candidate might be grounds for recusal if that candidate was a party in litigation before the judge,<sup>2</sup> the State has no general interest in preventing judges or candidates from associating themselves with like-minded individuals and groups. *White II*, 416 F.3d at 745. Thus, it is not simply the case that the unconstitutional applications of the endorsement clause are substantial when compared to its constitutional applications. The clause has no legitimate applications whatsoever. Consequently, the endorsement clause is facially overbroad. *Id.*

**B. The Solicitation Clauses Are Unconstitutional On Their Face And As Applied To Gregory Wersal**

Minnesota has two solicitation clauses. The first, Canon 5A(1)(d), provides in relevant part that a judge or candidate shall not “solicit funds for . . . a political organization . . . .” As Canon 5D makes clear, this prohibition extends to solicitations by a candidate for his own campaign. Canon 5D (“[f]or purposes of Canon 5 the term ‘political organization’ denotes an association of individuals under whose name a candidate files for partisan office.”) The second such provision, Canon 5B(2), provides in relevant part that “a candidate shall not personally solicit or accept campaign

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<sup>2</sup> This is not to say, of course, that recusal would be warranted in every case involving a political party of which the sitting judge was a member. *See White II*, 416 F.3d at 755 (“In the case of a political party involved in a redistricting dispute . . . the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an ‘R’ or ‘D’ . . . after his or her name.”)

contributions . . . .” The Canon goes on to provide that a “candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”

Similar canons prohibiting judicial candidates from making personal solicitations have been struck down by the Eighth and Eleventh Circuits, as well as by two federal district courts. *White II*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002); *Carey v. Wolnitzek*, 2006 WL 2916814 at \*29 (E.D. Ky. Oct. 10, 2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1237 (D. Kan. 2006). For the reasons indicated below, the solicitation clauses are likewise unconstitutional on their face and as applied to Plaintiff.

**1. The Solicitation Clauses On Their Face and As Applied to Plaintiff Fail Strict Scrutiny.**

The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Soliciting contributions is an essential part of any election campaign. *See Weaver*, 309 F.3d at 1322; *see also White*, 536 U.S. at 789 (“Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.”) A solicitation clause “depends wholly upon the subject matter of the speech for its invocation.” *White*

*II*, 416 F.3d at 763. As such, the solicitation clauses are content-based regulations of core political speech, and subject to strict scrutiny. *Id.* at 763-64; *Weaver*, 309 F.3d at 1322.

“Campaigning for elected office necessarily entails raising campaign funds,” and “the fact that judicial candidates require financial support . . . to run successful campaigns does not suggest that they will be partial if they are elected.” *Id.*, at 1322. On the contrary, to the extent that judicial candidates soliciting campaign contributions raises impartiality concerns, “are created by the State's decision to elect judges publicly.” *Id.* As noted by Justice O’Connor in *White*:

Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

*White*, 536 U.S. at 792 (O'Connor, J., concurring); *see also White*, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349, (1991) (Marshall, J., dissenting)) (“If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”) Because the impartiality concerns, if any, created by judicial candidates personally soliciting funds are the result of the State’s decision to elect judges, the solicitation clauses are not narrowly tailored to further the State’s interest in preserving judicial impartiality. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at \*29; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1237.

The solicitation clauses are not narrowly tailored to further any legitimate interest Minnesota has in either preserving judicial impartiality towards parties, or in preserving judicial openmindedness. Under Canon 5B(2), a judicial candidate may “make a general request for campaign contributions when speaking to an audience of 20 or more people.” If Minnesota has a compelling interest in preventing personal solicitations made to groups of 19 people, it is hard to see why this interest would not also apply to preventing personal solicitations to groups of 20, in which case the provision would be underinclusive, and thus does not serve that interest. On the other hand, if the state does not have a compelling interest in preventing judicial candidates from making personal solicitations to groups of 20, then it is hard to see how it could have a compelling interest in preventing solicitation from groups of 19, in which case the provision is overinclusive and is not narrowly tailored to any compelling government interest. In either case, the provision fails strict scrutiny, and must be deemed unconstitutional.

## **2. The Solicitation Clauses Are Unconstitutionally Overbroad.**

In addition to failing strict scrutiny, the solicitation clauses are invalid on overbreadth grounds. The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep.” *Klobuchar*, 381 F.3d at 791. “The aim of facial overbreadth analysis is to eliminate the deterrent or chilling effect an overbroad law may have on those contemplating conduct protected by the First Amendment.” *Turchick*, 561 F.2d at 721.

The solicitation clauses regulate constitutionally protected speech by restricting judicial candidates from personally soliciting funds for their campaigns. While judges should not solicit funds as a quid pro quo, the solicitation clause is not limited to such cases. Instead, the solicitation clause broadly prohibit candidates from personally accepting contributions from good friends and co-workers, or even a spouse. Campaigning for elective office “necessarily entails raising campaign funds,” and any impartiality concerns raised by such practices are inherent in a state’s decision to elect judges in the first place. *Weaver*, 309 F.3d at 1322-23; *see also White*, 536 U.S. at 789 (O’Connor, J., concurring) (“Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.”) The solicitation clauses create an unnecessary and substantial prohibition upon judicial candidates’ protected speech. For this reason, the solicitation clauses are unconstitutionally overbroad. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at \*29; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1237.

## **II. Plaintiff Will Suffer Irreparable Injury Without the Injunction.**

Without injunctive and declaratory relief, Plaintiff will continue to be irreparably harmed. Gregory Wersal would like to make endorsements, and begin making personal solicitations for campaign contributions in the upcoming election. However, because of the endorsement clause and solicitation clauses, he is prevented from doing so. Loss of First Amendment rights is automatically considered irreparable harm: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for temporary and preliminary injunctive relief is met. *See ACLU v. The Florida Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla 1990); *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

### **III. The Benefits Of Injunction To Plaintiff Outweighs Any Harm to Defendants.**

While Gregory Wersal has been irreparably harmed because he cannot make endorsements or personally solicit contributions, no harm will come to the Defendants from his engaging in these activities. Voters and judicial candidates will instead be better informed and more “able to fully participate” in the election process. Thus, Wersal’s harm substantially outweighs any harm to Defendants. *See ACLU*, 744 F. Supp. at 1099; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

### **IV. The Injunction Furthers The Public Interest**

The public has an interest in making informed voting decisions. Even more important, however, is the public’s interest in preserving First Amendment rights of free speech and association. No greater free speech interest exists than that of political speech. It is in the public interest for citizens to know who is personally seeking a candidate’s support through campaign contributions, and to know the candidates views on disputed legal and political issues as expressed through endorsements and membership in a political party. Therefore, the requested injunctive relief serves the public interest. *See ACLU*, 744 F. Supp. at 1099; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

## Conclusion

Minnesota Judicial Canons 5A(1)(b), 5A(1)(d), and 5B(2) are unconstitutional facially, and as applied to Plaintiff. All the required elements for preliminary injunctive relief are met. This Court should expeditiously grant the requested injunctive relief.

Dated: March 3, 2008

Respectfully submitted,

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