UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 09-1713

HONORABLE JOHN SIEFERT,

Plaintiff-Appellee,

v.

JAMES ALEXANDER *et al.*,

Defendants-Appellants.

On Appeal from the
United States District Court, Western District of Wisconsin,
Honorable Barbara B. Crabb, Presiding

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, INC. IN SUPPORT OF PLAINTIFF-APPELLEE

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DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26 and 7TH CIR. R. 26.1, counsel for amicus curiae informs the Court that amicus did not appear in the United States District Court. On appeal, Erik R. Guenther of Hurley, Burish & Stanton, S.C., 33 East Main Street, Suite 400, Madison, Wisconsin 53703, represents the amicus curiae. Laurence J. Dupuis, ACLU of Wisconsin Foundation, Inc., 207 E. Buffalo Street, Suite 325, Milwaukee, Wisconsin 53202, appears as co-counsel.

Dated:_____

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INTEREST OF AMICUS CURIAE

The appellants and appellee consent to the filing of this amicus curiae brief by the American Civil Liberties Union of Wisconsin Foundation, Inc. ("ACLU Wisconsin Foundation"), which provides the basis under FED. R. APP. 29(a) for its filing.

The ACLU Wisconsin Foundation is a charitable, nonprofit organization. It seeks to protect civil liberties, including the freedoms of association, press, religion, and speech, for everyone in Wisconsin, including public employees who wish to remain engaged in political life and speak on core matters of conscience and public interest. The ACLU Wisconsin Foundation is affiliated with the American Civil Liberties Union, which has a national membership of over 500,000 people.

Since its founding in 1920, the ACLU has worked to secure the free speech and free association rights enshrined in the First Amendment. The ACLU and its affiliates long have participated, as counsel, as parties, or as amici curiae, in cases concerning the rights of political speech and association that lie at the heart of this case. The ACLU and the ACLU of Minnesota submitted a brief as amici curiae to the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the leading case on the First Amendment rights of judicial candidates. The ACLU also has participated in some of the leading associational rights cases of

the past century, including *Whitney v. California*, 274 U.S. 357 (1927), *DeJonge v. Oregon*, 299 U.S. 353 (1937), and *In re Primus*, 436 U.S. 412 (1978).

The ACLU Wisconsin Foundation believes that when a state chooses popular election of judges, as Wisconsin does, unfettered political speech and freedom of association of candidates for judicial office, as for any other public office, is the First Amendment's fundamental guarantee.

SUMMARY OF ARGUMENT

Political association – including the association among members of organized political parties – is fundamental to the functioning of democratic government. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Political party affiliation has communicative value for candidates for office and for voters. It greatly reduces the transaction costs that voters face in ascertaining the likely views of candidates for public office across a wide swath of the day's important policy questions. The very act of announcing party affiliation is speech of deeply political quality.

The freedom to associate in political parties also has value to democracy independent of its communicative value. Like-minded individuals band together

to advance their policy preferences and political goals. Not all of these party members are candidates for public office or even open about their party membership. Much of their associational activity in pursuit of their goals takes place away from the tumult of a campaign for political office, but is no less important to democracy's marketplace of ideas. The anonymous party functionary doing the necessary work of addressing envelopes – as well as the party's standard bearer making the speeches – contributes to the voice of the party and the choices of the polity.

Wisconsin's Code of Judicial Conduct, a chapter of its state Supreme Court Rules, improperly forbids judges and judicial candidates that freedom of speech and association when it probably matters most: during an election campaign. It also denies judges the associational right of party membership at any time. In doing so, it denies voters and the entire citizenry information of the very sort that the First Amendment to the United States Constitution serves most to protect. It also denies political parties, their members, and judges of the benefits of association to advance their political goals, and deprives the public of the most vigorous and robust debate of public issues possible.

ARGUMENT

Judge Siefert wishes to associate with a political party and then speak of his political views and associations. He wishes to tell prospective voters what he believes, with whom he stands, and whom he endorses. He proposes to do so by stating forthrightly his political party membership and by endorsing other candidates for public office.

In often chaotic campaign seasons, voters use that very information to decode political rhetoric, with considerable accuracy, and to reduce otherwise substantial transaction costs in ascertaining the true beliefs and values of competing candidates who seek their votes. The speech and association that Judge Siefert proposes is, and must be, the heart of the First Amendment's concern. It is why the Framers insisted that Congress make "no law" forbidding freedom of speech, press, religion and association. U.S. CONST. amend. I.

I. THE PUBLIC SHARES JUDGE SIEFERT'S FIRST AMENDMENT INTEREST IN JOINING A POLITICAL PARTY, DISCLOSING HIS MEMBERSHIP, AND ENDORSING CANDIDATES.

Wisconsin citizens have an undeniable interest in casting votes for the candidates they think most suitable for public office. In a state like Wisconsin that chooses popular election of judges in open elections, that interest extends to

candidates for judicial office. A law that prohibits truthful political speech by candidates for public office offends the First Amendment interests of the candidates in their free speech and association.

It also offends the public interests that the First Amendment exists to protect. Professor Chemerinsky put it well:

> Judges, like all elected officials, must make decisions and frequently have discretion in choosing. Judges, like all elected officials, come to their role with views that are likely to affect their decisions. Voters in judicial elections, like all elections, should evaluate candidates based on their views, as well as their professional qualifications, experience and suitability for the role. All of these similarities justify treating the speech of judicial candidates like that of all other politicians.

Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 IND. L. REV. 735, 746 (2002).

The Wisconsin Supreme Court Rules that Judge Siefert challenges prohibit him from being "a member of any political party," WIS. SCR 60.06(2)(b)1, and from "[p]ublicly endors[ing] or speak[ing] on behalf of its candidates or platforms." WIS. SCR 60.06(2)(b)4. In doing so, not just judges and judicial candidates lose what the First Amendment promises. When government silences the speaker, it deafens the audience, too; the crowd cannot hear what it gathered to learn. That audience loses the benefit of information that intelligent voters would use to choose the candidate who best suits them.

Political expression "occupies the core of the protection afforded by the First Amendment," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), and the First Amendment interest in protecting political speech is at its very peak during election campaigns. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971). Indeed, an election campaign is "a means of disseminating ideas." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979). The Supreme Court has held that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976) (per curiam).

The First Amendment does not leave judges and judicial candidates outside its protection. That amendment forbids government from pursuing impartiality in judicial elections "by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). "The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose." *Id.* at 793 (Kennedy, J., concurring).

Appellants contend that the First Amendment permits regulation of judicial election campaigns that it would not tolerate in legislative campaigns. As a narrow matter, the Supreme Court has not foreclosed that contention. *Id.* at 783; *Weaver v.*

Bonner, 309 F.3d 1312, 1320-21 (11th Cir. 2002). But "the difference between judicial and legislative elections" has been "greatly exaggerate[d]." *White,* 536 U.S. at 784. The Eleventh Circuit has rejected greater restrictions on speech during judicial campaigns than during other campaigns. *Weaver*, 309 F.3d at 1321.

Wisconsin's rule is a poor match to the goal of judicial impartiality. As the Eighth Circuit observed rightly, "a regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness." *Republican Party of Minnesota v. White*, 416 F.3d 738, 758 (8th Cir. 2005). The rule requires a judge or judicial candidate to withhold candor to the media and voters. Instead of candor, the judicial candidate must resort to deceit under compulsion of state rule: he or she must pretend to be apolitical, a forced lie for some candidates.

Judge Siefert does not want the public to have to guess. He wishes to speak truthfully about his political affiliation and join a political party. The Constitution protects this associative right. *Buckley v. Valeo*, 424 U.S. at 15 ("The First Amendment protects political association as well as political expression"). In addition to its independent value, association is an important form of speech, particularly in the political arena. *Boy Scouts of America v. Dale*, 530 U.S. 640, 655-56 (2000).

The appellants argue that, "Judge Siefert *does not need to* join a political party to fully express his views on issues he thinks are important to his judicial campaign and his qualifications for judicial office." (Appellants' Brief at 29). Setting aside the question of whether governments may meter out speech by the criterion of what a governmental body thinks that speakers or the broader citizenry "need," the fact is that political party affiliation is very valuable information to voters. It allows them to identify a candidate immediately with a set of values, ideas, and party platform planks. This reduces voters' transaction costs significantly during both primary and general election seasons, when they often must sort the claims of competing candidates for several public offices, including in races featuring three or more seekers of a single job. Unlike a parliamentary system, the American model is winner-take-all: one candidate wins, and the other (or others) lose. In a binary system like ours, the emergence of two dominant, stable political parties, and no more, may be inevitable. *See generally* Charles E. Merriam, THE AMERICAN PARTY SYSTEM: AN INTRODUCTION TO THE STUDY OF POLITICAL PARTIES IN THE UNITED STATES 382-410 (MacMillan 1923); *but see also* Theodore J. Lowi, *Toward a Responsible Three-Party System: Prospects and Obstacles*, in Theodore J. Lowi & Joseph Romance, REPUBLIC OF PARTIES? DEBATING THE TWO-PARTY SYSTEM 3-30 (1998). A candidate's decision to group himself in one dominant party, the other, or in neither (as an

independent or as a member of a smaller political party) is valuable information to the public in exercising the franchise intelligently.

The fact of a candidate's membership in a political party — or his choice to stand independent of any party — has great communicative effect for voters. The fact that a particular candidate is a Republican, by his own identification, allows voters to decode accurately a whole range of probable political values and leanings of that candidate. Party affiliation, or non-affiliation, is a relatively reliable shorthand by which voters obtain information about candidates.

The contention that voters in theory might obtain all of the same information the hard way, in longhand to continue the metaphor, blinks reality. The transaction costs to voters of obtaining, sorting, and decoding the specific views of candidates on a whole range of public policy issues is overwhelming. What does it mean *really*, for example, that a candidate professes herself a believer in "local control" or in "individual responsibility"? Voters reasonably may decode phrases like these differently when they have the additional information of political party affiliation.

Judge Siefert does not seek to *require* that judicial candidates announce a party affiliation, of course. He simply wishes the freedom to make that choice himself. Candidates may choose not to announce a party affiliation, just as they may decline to express their personal religious beliefs or decline to answer any other question. But to say that a candidate may speak or keep his peace as his conscience dictates

is not to say that the government may dictate his conscience. The former approximates the thesis of the First Amendment; the latter, its antithesis.

Judge Siefert also wishes to endorse candidates for political office. "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Buckley*, 424 U.S. at 52. This is the essence of freedom of association for purposes of speech and advocacy that the First Amendment implicitly promises. *NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The United States Supreme Court has noted that "the great controversy over the Sedition Act of 1798, 1 Stat. 596, . . . first crystallized a national awareness of the central meaning of the First Amendment": that the people have a right to criticize their government and government officials. *New York Times v. Sullivan*, 376 U.S. 254, 273-274 (1964). If "the central meaning of the First Amendment" is the ability to criticize government officials, the affirmative counterpart of endorsing a candidate for office is just as central.

Endorsements allow the public to discern the shades of hue that party affiliation alone may obscure. Suppose that the public wishes to understand the views of Candidate *A*, a Democrat who seeks election as a judge. Suppose also that Candidates *B* and *C* both are Democrats and seekers of a seat in the United States

House of Representatives. The voting public may understand that *A* shares at least some ideas and values with *B* and *C*, perhaps more than *A* shares values with Candidates *D* and *E*, who both are Republican candidates for Congress. But has *A* the greater affinity with *B's* ideas or with *C's*? An endorsement answers the question, quickly and accurately. The alternative — comparing the statements of *A*, *B* and *C* on specific issues — is far more costly, in the sense of consuming the voter's time, and less reliable.

II. THE PUBLIC ALSO SHARES JUDGE SIEFERT'S FIRST AMENDMENT INTEREST IN POLITICAL ASSOCIATION INDEPENDENT OF ITS COMMUNICATIVE VALUE.

"[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986); *see also Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121 (1981).

This right of political association exists, of course, independent of its direct communicative value to voters. In fact, the right of association includes a right to refuse disclosure of that association and to keep private an organization's

membership list. *See Tashjian*, 479 U.S. at 215 n.5; *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960).

The fact that one has a constitutional right to associate *privately* for purposes of political advocacy does not mean that there is no *public* value when one chooses to do so. A party benefits from the contributions (in the form of money, time or expertise) of even its silent members, and thereby increases its ability to advance its aims. The party's improved ability to advance its ideas enhances the vigor in the marketplace of ideas out of which beneficial public policy emerges.

The Supreme Court long ago held that public employment could not be conditioned on *dis*association with even a fringe party. In striking down a state loyalty oath that punished public employees who were Communist Party members, the Court said "[t]his Act threatens the cherished freedom of association protected by the First Amendment." *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). The Court recognized that such conditions on employment deter potentially qualified candidates from seeking public employment: "[P]ublic employees of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom. *Elfbrandt*, 384 U.S. at 18 (internal quotations and citations omitted).

The challenged Supreme Court Rules unconstitutionally infringe upon Judge Siefert's First Amendment rights by conditioning employment as a judge on

"abjuring future, associational activities with constitutional protection." *Cole v. Richardson*, 405 U.S. 676, 680 (1972). But the Rules do not harm Judge Siefert alone. They harm the political parties that could benefit from the membership of judges and threaten to diminish the vigorous debate among political parties that serves the public interest. By deterring judicial candidates who wish to remain politically engaged, they impoverish the ranks of qualified judges from which voters may choose.

Because the Code "burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 225 (1989). As the District Court correctly concluded, the challenged provisions of the code cannot withstand this strict scrutiny.

CONCLUSION

The Wisconsin Supreme Court Rules at issue here violate the First Amendment. That amendment does not permit the government to dictate what political speech a candidate may not utter, what information voters may not know, or who may associate freely with whom. The district court opinion below, *Siefert v.*

Alexander, 597 F. Supp.2d 860 (W.D. Wis. 2009), was correct. This Court should affirm the judgment of the district court.

Dated at Madison, Wisconsin, June 4, 2009.

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that he has filed electronically, pursuant to 7TH CIR. R. 31(e), this amicus brief.

Erik R. Guenther

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), counsel for amicus curiae certifies compliance with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B). This brief contains no more than 7,000 words. Specifically, all portions of the brief other than the disclosure statement, table of contents, table of authorities, and certificates of counsel contain 3,023 words, as counted by the properties feature of WordPerfect 10.0.

Dated: _____

Erik R. Guenther