UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
MADISON DISTRICT

THE HONORABLE JOHN SIEFERT, ***Plaintiff*,** ***v.*** **JAMES C. ALEXANDER, *et al.*,** ***Defendants*.**	**CIVIL ACTION NO. 3:08-CV-126-BBC**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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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), the Supreme Court reaffirmed the protected nature of political and campaign speech in the judicial context, invalidating a Minnesota judicial canons that prohibited judicial candidates from announcing their views on disputed political and legal issues.

The federal courts have vigorously enforced the First Amendment protections found in *White* and have struck down numerous judicial canons since 2002. *See Republican Party v. White,* 416 F.3d 738 (8th Cir. 2005) ("*White II*"); *Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm'n*, 388 F.3d 244, 227 (6th Cir. 2004) (order denying stay of preliminary injunction); *Weaver v. Bonner,* 309 F.3d 1312, 1320, 1322 (11th Cir. 2002); *Bauer v. Shepard*, 2008 WL 1994868 (N.D. Ind. May 6, 2008); *Duwe v. Alexander,* 490 F. Supp. 2d 968 (W.D. Wis. 2007); *Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006), *reversed on other grounds*, 507 F.3d 545 (7th Cir. 2007); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1232 (D. Kan. 2006); *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *reversed on other grounds*, 504 F.3d 840 (9th Cir. 2007); *North Dakota Family Alliance v. Bader,* 361 F. Supp. 2d 1021 (D. N.D. 2005); *Family Trust Foundation of Kentucky v. Wolnitzek,* 345

F. Supp. 2d 672 (E.D. Ky. 2004).[1]

In like manner, Plaintiff will demonstrate that Wisconsin Supreme Court Rule 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) are unconstitutional both facially, and as-applied to Judge Siefert.

Facts

The facts of this case are set out in Plaintiff's Verified Complaint for Declaratory and Injunctive Relief and in Plaintiff's Statement of Proposed Findings of Fact, filed simultaneously with Plaintiff's Motion for Summary Judgment.

Argument

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Based on the facts set forth in Plaintiffs' Statement of Proposed Findings of Fact, SCR 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) both facially and as applied to Judge Siefert, violate the First Amendment. Because there are no disputed issues of material fact, Plaintiffs are entitled to judgement in their favor as a matter of law.

I. The Political Affiliation Clause Is Unconstitutional On Its Face and As Applied to Judge Siefert.

The political affiliation clause of SCR 60.06(2)(b)(1) provides that no judge or judicial candidate may "[b]e a member of any political party." An exception to the political affiliation clause is provided by SCR 60.06(2)(c), which states that "[a] partisan political office holder who is seeking

[1] Also of note is *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224 (7th Cir. 1993), a pre-*White* case striking down an Illinois state judicial canon on First Amendment grounds.

election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position." A similar Minnesota provision barring judicial candidates from belonging to a political party was deemed unconstitutional by the Eighth Circuit. *White II,* 416 F.3d at 766. For the reasons indicated below, the political affiliation clause is likewise unconstitutional on its face and as applied to Plaintiff.

A. The Political Affiliation Clause Fails Strict Scrutiny.

The right to associate with a political party is "a particularly important political right" under the Constitution. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("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.") The political affiliation clause directly limits judicial candidates rights of free speech and association, and is therefore subject to strict scrutiny. *White II*, 416 F.3d at 749. To survive strict scrutiny, the law or regulation in question must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). 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 openmindedness. *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.

A similar analysis should apply here. As noted by the Eighth Circuit, "the underlying rationale for the [prohibiting judicial candidates from belonging to political parties] – 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. The fact that a judge belongs to a particular political party might warrant a judge's recusal in a case where that political party was a party.[2] But the political affiliation clause is overinclusive of this interest, in that it prohibits a judge or candidate from belonging to a political party altogether, instead of employing the less restrictive means of recusal in appropriate

[2] 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.")

cases.

The political affiliation clause is also "woefully underinclusive" of the state's interest in preserving judicial impartiality towards parties, for two reasons. First, the clause is underinclusive in that it allows candidates to belong to and associate with political parties up until the day before they declare their candidacy. *White II*, 416 F.3d at 758 ("The partisan-activities clause bars a judicial candidate from associative activities with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for nonjudicial offices) up until the day he begins his run for a judicial seat.") Prior to becoming a judge, Judge Siefert was an active member of the Democratic Party, and held office as a Democrat. (Siefert Aff. ¶¶ 3-4.) While this prior political activity has not caused Judge Siefert to be biased for or against any particular party, whatever risk to impartiality posed by his associating with the Democratic Party has already occurred. The political affiliation clause is therefore underinclusive. (*Id.*)

Second, the political affiliation clause allows a "partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect" to remain a member of a political party. *See* SCR 60.06(2)(c). Since a judicial candidate is at least as likely to be biased for a political party when he holds partisan office as a member of that party than he is if he is simply a member of that party, SCR 60.06(2)(c)'s exemption for partisan officeholders serves to undercut any claim by the State that the political affiliation clause serves a compelling government interest. As Judge Prosser noted in his dissent from the order amending the political affiliation clause, "[i]f the new rule actually serves 'a compelling state interest,' it is unfathomable why only some non-judge judicial candidates are required to follow it." *See* Wisconsin Supreme Court Order 00-07, at 16. Thus, the political affiliation clause is not narrowly tailored to the State's interest in preserving judicial impartiality towards parties. *White*

II, 416 F.3d at 766.

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"). Because this interest is not compelling, it cannot serve to justify the political affiliation clause.

The final definition of impartiality considered by *White* is impartiality as judicial openmindedness. As defined by *White*, judicial openmindedness is the quality in a judge that "demands, 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," and "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." *White,* 536 U.S. at 778 (emphasis in original).

The Supreme Court did not hold that judicial openmindedness was a compelling state interest, holding that the announce clause was not narrowly tailored to this interest in any event. *Id.* ("It may well be that impartiality [in the sense of openmindedness] and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.") Nor should this Court. While openmindedness is no doubt valuable as an aspirational goal for judges, as a basis for prohibiting speech it is problematic.

Openmindedness is an improper standard by which to judge speech because it is inherently subjective. Openmindedness is an inner disposition, and as such it is extremely difficult to prove its

presence or absence in a given case. Openmindedness does not preclude judges from having opinions on legal issues, even firmly held and strongly stated ones. *See id.* (openmindedness 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.") Judges often have strong legal opinions which can be forcefully stated. *See, e.g.*, *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) ("Justice O'Connor's assertion, that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); *Bush v. Gore*, 531 U.S. 98, 128-129 (2000) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.") Such statements do not, however, prove that a judge is not openminded, as a judge might have a strongly held view, and yet still be open to contrary arguments and evidence.

Because openmindedness is not a matter not of what a judge says but of his frame of mind, it cannot be adequately determined from a particular statement. The same statement, made by two different judges, may in one case be an expression that the judge is closeminded, while in the other it may not. Any attempt to restrict speech based on concerns about openmindedness would thus necessarily involve hypothesizing about the inner workings of a judge's psyche, and would, ironically enough, leave judges vulnerable to the biases and preconceptions of enforcement agencies. As the Supreme Court noted in *Buckley*, making the legitimacy of speech turn on the interpretation of third parties is problematic, as it "puts the speaker . . . wholly at the mercy of the varied understanding of his

hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43. Thus, Wisconsin's interest in preserving judicial openmindedness cannot be a compelling interest justifying the suppression of speech.

Nevertheless, even if Wisconsin does have a compelling state interest in preserving judicial openmindedness, the political affiliation clause is still unconstitutional, as it is "woefully underinclusive" as to that interest. *White*, 536 at 780. The political affiliation clause is "woefully underinclusive" as to the State's interest in preserving judicial openmindedness, for three reasons. First, the clause is underinclusive in that it allows candidates to belong to and associate with political parties up until the day before they declare their candidacy. "The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity." *White II*, 416 F.3d at 758. Second, the political affiliation clause is underinclusive in that it bars only membership in a political party, while permitting a judge or judicial candidate to join other political organizations and groups. To the extent that being a member of a political party might threaten a judge's openmindedness on certain legal and political issues, this threat is at least as present for judges who are members of other interest groups, if not more so. *See id.*, at 759 ("A judicial candidate's stand . . . on the importance of the right to keep and bear arms may not be obvious from her choice of political party. But, there can be little doubt about her views if she is a member of . . . the NRA.") Finally, as noted above, SCR 60.06(2)(c) exempts from the political affiliation clause "partisan political office holder[s] who [are] seeking election or appointment to judicial office or who is a judge-elect." As consequence, the political affiliation clause is "so

woefully underinclusive as to render belief in that purpose a challenge to the credulous." *White*, 536 U.S. at 780.

To the extent that the State does have a legitimate interest in preserving judicial openmindedness, this interest is better served through the election process itself. Voters expect a certain level of decorum in their judicial candidates, and do not want judges who do not have an open mind. Because of this, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 248 (1987); *see also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism,* 6 First Amend. L. Rev. 180, 190-91 (2007) (describing instances where judges have been defeated in elections for making improper statements).[3]

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is also a danger that silence inspires the suspicion that they are hiding their views to mask their partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. Thus, "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

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[3] Ironically, speech restrictions undercut the important role voters play in preserving judicial openmindedness. Preventing a judicial candidate from speaking on an issue will not keep a candidate from lacking an open mind on that issue, but it will keep voters from knowing that he is not openminded. *See* Alan B. Morrison, *The Judge Has Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 Ind. L. Rev. 719, 734 (2003).

B. The Political Affiliation 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.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins ex rel. Hodgkins v. Peterson,* 355 F. 3d 1048, 1056 (7th Cir. 2004).

The political affiliation clause is substantially overbroad. Membership in a political party might, in some circumstances, necessitate recusal if that party was a litigant in a case before the judge. This does not justify a complete ban on judges or candidates from exercising protect speech by associating themselves with like-minded individuals and groups. Consequently, the political affiliation clause is facially overbroad.

II. The Endorsement Clause Is Unconstitutional On Its Face and As Applied to Judge Siefert.

The endorsement clause of SCR 60.06(2)(b)(4) provides that no judge or judicial candidate may "[p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." An exception to the endorsement clause is provided by SCR 60.06(2)(c), which states that "[a] partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position." In *White II*, the Eighth Circuit struck down a Minnesota provision barring candidates from accepting endorsements. *White II*, 416 F.3d at 766. For the reasons indicated below, the endorsement clause is likewise unconstitutional on its face and as applied to Plaintiff.

A. The Endorsement Clause Fails Strict Scrutiny.

Political speech concerning the qualifications of candidates for public office is "at the core of our first amendment freedoms." *White*, 536 U.S. at 774 (*quoting Republican Party of Minnesota v. Kelly*, 247 F. 3d 854 (8th Cir. 2001)). Because the endorsement clause is a content-based regulation of core political speech, it is subject to strict scrutiny. *White II*, 416 F.3d at 763-64.

Both facially and as applied to Judge Siefert, the endorsement clause is not narrowly tailored to further the State's interest in judicial impartiality, regardless of how "impartiality" is defined. *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, and a candidate's decision to endorse another candidate may serve as a "shorthand for the views a judicial candidate holds." *White II*, 416 F.3d at 754. As such, judicial candidates cannot constitutionally be prohibited from announcing their views on through an endorsement.

If the endorsement clause is meant to further the state's interest in preserving judicial impartiality towards parties, the provision is underinclusive, for three reasons. First, while the endorsement clause prohibits judges and judicial candidates like Judge Siefert from making endorsements, it places no restrictions on the ability of a judge or candidate to accept endorsements, or to make use of them in their campaign. Accepting endorsements, however, is at least as great a threat to judicial impartiality towards parties as is making endorsements. In the case of a candidate who receives an endorsement there may be a risk, however slight, that the candidate will feel indebted to the endorser and that this will cause the judge to be biased

in favor of that endorser should he or she ever come before the judge as a litigant.[4] This risk is not present, though, where a candidate makes an endorsement, as the candidate is not the beneficiary of the endorsement. Because the endorsement clause allows judicial candidates such as Judge Siefert to receive endorsements, the provision is underinclusive.

Second, the endorsement clause allows a "partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect" to remain a member of a political party. *See* SCR 60.06(2)(c). Any risk to judicial impartiality towards parties that comes from allowing judicial candidates to make endorsements is just as present in the case of a candidate who is also a sitting partisan officeholder. The fact that sitting partisan political officeholders are exempted from the endorsement clause undercuts any claim that the provision serves the state's interest in judicial impartiality towards parties. *See* Wisconsin Supreme Court Order 00-07, at 16 (Prosser, J., dissenting) ("[i]f the new rule actually serves 'a compelling state interest,' it is unfathomable why only some non-judge judicial candidates are required to follow it.")

Finally, the endorsement clause is underinclusive in that it allows judges and judicial candidates to endorse candidates for non-partisan races, and only forbids endorsement of a political party's "candidates or platforms." Yet the danger of bias that comes from endorsing a partisan candidate is no greater than the danger of bias that comes from endorsing a non-partisan candidate. The endorsement clause is, thus, underinclusive.

As noted previously, Wisconsin does not have a compelling interest in preserving judicial

[4] Likewise, a judge who is appointed to the bench by a political official may feel gratitude toward that official, and be biased in favor of him in cases where he is a litigant, whereas the likelihood that a judge will feel gratitude towards a political official for accepting his endorsement is rather slight.

impartiality. Even if this interest were compelling, however, the endorsement clause would still be unconstitutional as it is not narrowly tailored to that interest, because Judge Siefert and other judicial candidates can still receive endorsements that are at least as likely to affect their openmindedness. *See White,* 536 at 779-80. Judicial candidates who are sitting partisan political officeholders are also exempted from the clause's prohibition, casting doubt on whether the endorsement clause was actually designed to further openmindedness. As consequence, the endorsement clause is underinclusive.

To the extent that the State does have a compelling interest in preserving judicial impartiality, less restrictive means are available to protect this interest. First, as noted above, the election process itself can serve as a check on improper conduct by judicial candidates. Snyder, 35 UCLA L. Rev. at 248 (1987); Bopp, 6 First Amend. L. Rev. at 190-91. One candidate endorsing another is often politically dangerous, as the endorsing candidate risks alienating potential supporters who are opponents of the endorsed candidate, and may run the risk of being held responsible by the voters for the positions, statements, and actions of the endorsed candidate. Thus, judicial candidates such as Judge Siefert are likely to be judicious in making endorsements, and the electoral process inherently limits the likelihood that judicial candidates will make endorsements that will impair their ability to be impartial. (Siefert Aff. ¶ 15.)

In addition, judges themselves also serve as a natural restraint to preserve judicial impartiality. *See Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("Some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time, for instance, upon trial after a remand. Still, we accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous

matters is one of the requisites of judicial office.") (internal citations and quotations omitted).

Finally, to the extent that making endorsements may cause impartiality concerns, these concerns are best dealt with through recusal, rather than an outright prohibition. *See White II*, 416 F.3d 755 ("recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case.") Judge Siefert, for example, wishes to endorse Barack Obama for President in the 2008 presidential election. (Siefert Aff. ¶ 10.) Endorsing Senator Obama would not cause Judge Siefert to be biased for or against any particular party or class of parties, nor would it impair his ability to be openminded in any particular case or class of cases. (*Id.* at ¶ 13.) Nevertheless, Judge Siefert has stated that in the unlikely event Senator Obama appeared before him as a litigant in a case he would recuse himself from hearing that case. (*Id.* at. ¶ 14.) Thus, a blanket prohibition on endorsements is not necessary for Wisconsin to safeguard its interest in preserving judicial impartiality, however defined. *White II*, 416 F.3d at 755.

B. 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.'" *Morales*, 527 U.S. at 52 (*quoting Broadrick*, 413 U.S. at 615). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins,* 355 F. 3d at 1056.

The endorsement clause sweeps constitutionally protected speech within its scope. Specifically, the endorsement clause prohibits more speech than is necessary to achieve its goal. Even assuming that Wisconsin has an interest in preventing judicial candidates from making endorsements in some races (for example, in races for local prosecutor), that interest does not go so far as to prevent a judicial

candidate from endorsing a candidate for President of the United States. The impact of such an endorsement hardly seems relevant to Wisconsin's interest in impartiality. Yet, this is precisely what the endorsement clause prohibits. Likewise, judicial candidates cannot publicly oppose their opponent in an election. Consequently, the endorsement clause is facially overbroad.

III. The Solicitation Clause Is Unconstitutional on Its Face And As Applied To Judge Siefert.

The solicitation clause of SCR 60.06(4) provides that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." 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,* 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at *29; *Stout*, 440 F. Supp. 2d at 1237.[5] For the reasons indicated below, the solicitation clause is likewise unconstitutional on its face and as applied to Plaintiff.

A. The Solicitation Clause Fails Strict Scrutiny.

Wisconsin's solicitation clause prohibits judicial candidates from personally requesting funds for their campaign. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15 (1976) (internal quotations omitted) Soliciting contributions is an essential part of any election campaign. *See Weaver,* 309 F.3d at 1322 ("Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community."); *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

[5] The district court's injunction in *Stout* was later vacated on standing grounds. *Kansas Judicial Review v. Stout,* 519 F.3d 1107, 1122 (10th Cir. 2008). Nevertheless, the decision remains persuasive authority for this Court.

independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising."). Because the solicitation clause is a content-based regulation of core political speech, it is subject to strict scrutiny. *White II,* 416 F.3d at 763-64; *Weaver*, 309 F.3d at 1322.

The solicitation clause is not narrowly tailored to Wisconsin's compelling interest in preserving judicial impartiality towards parties, nor is it even narrowly tailored to the State's non-compelling interest in preserving judicial openmindedness. The solicitation clause is not narrowly tailored to further either of these interests as it does not prevent judicial candidates such as Judge Siefert from knowing who has contributed to their campaigns, but instead merely prohibits a candidate from personally soliciting funds. Whatever bias or effect on openmindedness is likely to result from a candidate receiving campaign contributions will thus occur just as if the solicitation clause did not exist. *Weaver,* 309 F.3d at 1322-23; *Stout,* 440 F. Supp. 2d at 1236. The clause also fails to consider funds voluntarily offered to the candidate without solicitation. A judge's openmindedness and impartiality towards parties can be affected by funds secured from those who approach the candidate of their own volition and offer financial support.

In addition, the clause is overinclusive in that, read literally, it would prohibit candidates from personally accepting contributions from good friends and co-workers, or even a spouse. As Justice Prosser noted in his dissent from the order amending the solicitation clause, the rule is also "inconsistent because it allowed judges and candidates to establish fundraising committees but pretended that the fundraisers thus recruited were not also being invited to give money" and "so unrealistic that inadvertent or unavoidable violations were commonplace." *See* Wisconsin Supreme Court Order 00-07, at 13 (Prosser, J., dissenting). For these reasons, the solicitation clause on its face

and as applied to Judge Siefert is underinclusive and fails strict scrutiny. *See White,* 536 U.S. at 779-80; *White II,* 416 F.3d at 757.

Arguably, the solicitation clause is designed to preserve impartiality by preventing undue influence over judges because of financial support given to them during their campaign. *White II,* 416 F.3d at 764. However, like the solicitation clause challenged in the Eighth Circuit in *White II,* the Wisconsin solicitation clause is not drafted to reflect such an interest because it does not prohibit judicial candidates from knowing from whom their financial support comes, but instead merely prohibits the candidate from personally making solicitations. The solicitation clause on its face and as applied to Judge Siefert is thus not narrowly tailored to further such an interest. *Id.*

To the extent that personal solicitation of campaign contributions does raise impartiality concerns, such concerns are inherent in the state's decision to elect judges in the first place. "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, are of Indiana's own making, the state cannot use these concerns as a grounds for restricting core political speech. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at *29; *Stout*, 440 F. Supp. 2d at 1237.

Finally, to the extent that personal solicitation of campaign contributions does raise impartiality concerns, less restrictive means are available to safeguard that interest. Currently, Judge Siefert instructs anyone soliciting funds on his behalf not to approach anyone who either has or is likely to have a case in front of his court, and it is his policy to disqualify himself if a litigant appearing before him has contributed to any of his past campaigns, whether for partisan or non-partisan office. (Siefert Aff. ¶ 26.) And were absent the solicitation clause, he would continue to adhere to the same policy. (Siefert Aff. ¶ 27. Any potential danger to impartiality from his personally soliciting contributions is therefore dealt with without recourse to an outright ban on solicitation. And to the extent that relying on voluntary recusal is insufficient, the state could safeguard its interest in impartiality through mandatory recusal. *See White II*, 416 F.3d 755 ("recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case.") The solicitation clause, therefore, must be deemed unconstitutional. *Id.* at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at *29; *Stout*, 440 F. Supp. 2d at 1237.

B. The Solicitation 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.'" *Morales*, 527 U.S. at 52 (*quoting Broadrick* , 413 U.S. at

615). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins,* 355 F. 3d at 1056.

The solicitation clause regulates constitutionally protected speech by restricting judicial candidates from personally soliciting funds for their campaign. This restriction has no legitimate basis. 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. Because the solicitation clause reaches far more speech than Wisconsin has an interested in regulating, the solicitation clause is substantially overbroad, and must be deemed unconstitutional. *White II*, 416 F.3d at 766; *Weaver,*309 F.3d at 1322.

Conclusion

60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) are all unconstitutional both facially and as applied to Judge Siefert. Judge Siefert therefore respectfully asks this Court to grant Plaintiff's Motion for Summary Judgment.

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Respectfully Submitted,

s/Michael D. Dean

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