No.____

In The
Supreme Court of the United States

THE HONORABLE JOHN SIEFERT, *Petitioner,*
v.
JAMES C. ALEXANDER, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for a Writ of Certiorari

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Questions Presented

This Court in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002) established that the First Amendment protects judicial campaign speech and subjects regulation of such speech to strict scrutiny. Wisconsin, like many other states, has adopted judicial speech restrictions that ban judicial candidates from personally soliciting campaign contributions and from endorsing other candidates for public office. The Seventh Circuit below rejected the strict scrutiny standard that was employed in *White* and that has been employed by the Sixth, Eighth, and Eleventh Circuits. Instead, it upheld these judicial candidate speech restrictions by applying intermediate scrutiny reserved for contribution limits to the personal solicitation clause and a balancing test traditionally used in the context of federal employees to the endorsement clause. Based on this decision, in *Bauer v. Shepard,* No. 09-2963, WL 3271960 (7th Cir. Aug. 20, 2010), for which a writ of certiorari has also been sought, the Seventh Circuit has now also upheld prohibitions on other common and essential judicial campaign activities, ultimately requiring judicial candidates to seek government permission to announce their views on disputed political issues, which this Court in *White* held could not be constitutionally required.

(1) Whether restrictions on judicial campaign speech are uniformly subject to strict scrutiny under the First and Fourteenth Amendments to the United States Constitution, which should be applied here;

(2) Whether the prohibition on judicial candidates soliciting funds for their own campaign is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

(3) Whether the prohibition on judicial candidates soliciting funds for their own campaign is unconstitutional as applied to personal phone calls, signing fundraising letters, and personally inviting potential donors to fundraisers, in violation of the First And Fourteenth Amendments to the United States Constitution;

(4) Whether the prohibition on judicial candidates endorsing other candidates for public office is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

(5) Whether the prohibition on judicial candidates endorsing other candidates for public office is unconstitutional as applied to endorsing Presidential candidates, in violation of the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

The Honorable John Siefert, *Plaintiff-Appellee*;

James C. Alexander, Larry Bussan, Ginger Alden, Leo Bach, Jennifer Orales, John R. Dawson, David A. Hansher, Gregory A. Peterson, *Defendants-Appellants*.

Corporate Disclosure Statement

The Petitioner is not a corporation, has no parent corporation, and has no publicly held stock. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioner Judge Siefert respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The order of the court of appeals affirming in part and reversing in part the district court is at 608 F.3d 974. App. 1a. The district court opinion is at 597 F. Supp. 2d 860. App. 45a. Denial of rehearing en banc is at 2010 WL 3397459. App. 107a.

Jurisdiction

The court of appeals upheld the district court's decision on June 14, 2010. App. 1a. Petitioner's Petition for Rehearing En Banc was denied August 31, 2010. App. 107a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 110a.
Wisconsin Supreme Court Rule 60.06(2)(b)1 is at 110a.
Wisconsin Supreme Court Rule 60.06(2)(b)4 is at 110a.
Wisconsin Supreme Court Rule 60.06(4) is at 111a.

Statement of the Case

This case presents a constitutional challenge by Judge Siefert, a sitting judge and judicial candidate in Wisconsin's 2011 election, to Wisconsin's judicial personal solicitation and endorsement clauses, Wisconsin Supreme Court Rules ("SCR") 60.06(4), 60.06(2)(b)(4), because the clauses impose a substantial and unconstitutional limit on his political speech by banning his personal solicitation of campaign

contributions and his endorsement of other candidates for public office.[1] Specifically, Wisconsin prohibits judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions," SCR 60.06(4), and from "publicly endors[ing] or speak[ing] on behalf of its candidates or platforms," SCR 60.06(2)(b)(4). These provisions limit Judge Siefert's ability to engage in protected political speech and are unconstitutional on their face and as applied to the endorsements and solicitations he desires to make.

I. The Facts.

Wisconsin state court judges are selected through a process of non-partisan judicial elections. Regulation of judicial conduct, as well as the conduct of candidates for judicial office, is governed by the Wisconsin Code of Judicial Conduct ("the Canons"), found in Chapter 60 of Wisconsin's Supreme Court Rules. SCR 60.01 *et seq*. The Code's solicitation clause provides that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." SCR 60.06(4). And the endorsement clause bans judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). These clauses, amended in 2007, were recognized by three Wisconsin Supreme Court justices to be constitutionally infirm under the First Amendment, who dissented from their adoption. AC ¶ 16 and Ex. 1.

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[1] The case below also involved a challenge to Wisconsin's partisan affiliation ban. SCR 60.06(2)(b)1. The Seventh Circuit found the ban unconstitutional, App. 11a-16a. This ruling has not been appealed by the state.

The Petitioner, Judge John Siefert, has served as a Milwaukee County Circuit Court Judge since August 1, 1999. AC ¶ 18.[2] He is up for reelection in 2011. AC ¶ 18. As a judge, he is bound by the Canons and potentially subject to discipline for his conduct. AC ¶ 18.

Judge Siefert wanted to make personal phone calls and personal invitations to fundraising events, and sign letters seeking contributions to his upcoming 2011 election campaign. AC ¶ 21. He would also like to endorse then-Senator Obama for President in 2008 and would like to endorse candidates during the upcoming 2011 election cycle. AC ¶ 20. Despite the fact that none of these activities would bias him for or against a particular party or class of parties, nor impair his ability to be openminded, Judge Siefert is prohibited from engaging in such political speech and fears discipline if he violated the clauses' prohibitions. AC ¶ 21.

Respondents, as members of Wisconsin's Judicial Commission, are charged with investigating possible misconduct of Wisconsin judges. Wis. Stat. § 757.85. "Misconduct" includes the "[w]illful violation of a rule of the code of judicial ethics." Wis. Stat. § 757.81(4)(a). AC ¶ 7. Judge Siefert seeks to permanently enjoin their enforcement of the clauses. AC ¶ 48.

II. The History of the Litigation

Judge Siefert filed his Verified Complaint on March 3, 2008. On February 17, 2009, on cross-motions for summary judgment, the district court declared the

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[2] Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Judge Siefert.

challenged canons unconstitutional. Respondents appealed the decision on March 18, 2009, resulting in a reversal of the district court's ruling on the endorsement and solicitation clauses on June 14, 2010. Judge Siefert sought rehearing on banc, which was denied with Judges Rovner, Wood, Williams, and Hamilton dissenting, on August 31, 2010. App. 108a.

Reasons for Granting the Petition

The Seventh Circuit's ruling in this case, compounded by its subsequent ruling in *Bauer v. Shepard,* No. 09-2963, WL 3271960 (7th Cir. Aug. 20, 2010), has vitiated the important First Amendment protections for judicial campaign speech established in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*White I*"). In so doing, the Seventh Circuit establishes a regime where ordinary, standard, and indeed, essential, campaign practices of judicial candidates are prohibited and where judicial candidates will be required to seek government approval before announcing their views on disputed legal and political issues. This result is contrary to this Court's holdings in *White I*, *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007) ("*WRTL*"), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

This new regime also conflicts with decisions of several other circuits that have reviewed restrictions like those at issue here, including decisions of the Sixth, Eight and Eleventh Circuits and arguably the Third and a previous decision of the Seventh. This Court should grant certiorari and decide this case on the merits.

I. This Case Involves An Important Question of Law Whether Restrictions on Judicial Candidate Speech Are Subject to Strict Scrutiny, Which Should be Applied Here.

Political speech traditionally enjoys the greatest constitutional protection under the First Amendment of the United States Constitution, with restrictions on it subject to strict scrutiny. *See Buckley v. Valeo,* 424 U.S. 1, 15 (1976).

In *White I,* this Court reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues and applied strict scrutiny to it, recognizing that the clause "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." 536 U.S. at 774.

In reviewing Minnesota's announce clause, the *White I* court affirmatively cited *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), which had applied strict scrutiny to strike Illinois' announce clause. In doing so, the Seventh Circuit acknowledged a conflict with the Third Circuit in *Stretton v. Pennsylvania,* 944 F.2d 137 (3d Cir. 1991), which had upheld Pennsylvania's announce clause, while applying strict scrutiny to it. *Id.* at 141, 146. While *White I* resolved the conflict by effectively overruling the *Stretton* case and upholding the Seventh Circuit *Buckley* case*,* both cases applied strict scrutiny to the judicial campaign speech rstrictions before them.

Likewise, on remand from the *White I* decison, the

Eighth Circuit in *Republican Party of Minnesota v. White*, 416 F.3d 738 (2005) (*White II*) applied strict scrutiny. The en banc *White II* court reviewed numerous other judicial campaign speech canons, including Minnesota's personal solicitation clause, which stated: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." *Id.* at 746. Adopting the *White I* rationale, that court recognized judicial campaign canons are inherent content-based and applied strict scrutiny. 416 F.3d at 749, 763-64. Under strict scrutiny review, the canons were held unconstitutional because they failed to protect litigants from purported partiality concerns. *Id.* at 754, 765-66.

This holding was reinforced in the recent Eighth Circuit decision *Wersal v. Sexton,* No. 09-1578, 2010 WL 2945171 (8th Cir. July 29, 2010). There, the Eighth Circuit again followed *White I* as well as *Citizens United* by applying strict scrutiny to Minnesota's personal solicitation and endorsement clause. *Wersal,* 2010 WL 2945171 at *3. Significant to the *Wersal* court was this Court's view in *Citizens United* that "'political speech simply cannot be banned or restricted as a categorical matter.'" *Id.* at *3 (*quoting Citizens United*, 130 S.Ct. at 898). Under strict scrutiny, both the personal solicitation clause and the endorsement clause failed. *Id.* at *12, *15.

In *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit reviewed challenges to various Georgia judicial campaign canons, including its personal solicitation clause, which precluded judicial candidates from "themselves solicit[ing] campaign funds, or solicit[ing] publicly stated support." *Id.* at

1315. Like the *White II* and *Wersal* court, the *Weaver* court applied strict scrutiny, *id.* at 1319, and found that the challenged canons failed to serve any compelling interest in judicial impartiality. *Id.* at 1322, 1323.

The Sixth Circuit recently weighed in on this issue in *Carey v. Wolnitizek,* Nos. 08-6468, 08-6538, 2010 WL 2771866 (6th Cir. July 13, 2010). Reviewing a challenge to a commits clause, a party affiliation clause, and a personal solicitation clause, the court held that "[s]trict scrutiny applies to all three aspects of this First Amendment challenge. *White,* for one, suggests as much." *Id.* at *6. The court noted that "[n]ot one of the Justices, not even one of the four dissenters, objected to the application of strict scrutiny," and that, if it did not broadly apply to all judicial campaign speech, "it is difficult to understand why the Court exercised its discretion in reviewing *White*, given that virtually the entire analysis is premised on the applicability of strict scrutiny and given that the outcome of the case under a lower level of scrutiny is far from clear." *Id.* at *6. Recognizing the content-based nature of the challenged clauses, *id.* at *7, the Sixth Circuit went on to find the partisan affiliation and personal solicitation clauses facially unconstitutional, remanding ambiguities in the scope of the commits clause to the district court for further consideration. *Id.* at *17.[3]

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[3]Efforts to narrow *White I*'s application by looking to this Court's judicial recusal case *Caperton v. A.T. Massey Coal Company*, 129 S.Ct. 2252 (2009) has gained limited traction. *See, e.g., Bauer v. Shepard*, 634 F. Supp. 2d 912

Despite *White I* and the circuits' consistent application of the strict scrutiny standard to restrictions on judicial campaign speech, the Seventh Circuit has now determined that other, more forgiving standards apply. In finding the personal solicitation clause constitutional, the Panel employed "closely drawn" scrutiny, relying on *Buckley*'s application of "less rigorous 'closely drawn' scrutiny" to campaign contribution limits. App 27a (*quoting Buckley,* 424 U.S. at 25). And in finding the endorsement clause constitutional, the Seventh Circuit employed a balancing test applicable to restrictions on political speech by government employees. App. 17a. The resulting effect has been to outlaw ordinary and essential campaign speech by judicial candidates.

II. The Seventh Circuit Establishes A Regime That Conflicts With this Court.

In analyzing the clauses before it, the *Siefert* court attempts to harmonize what it perceives as two conflicting Supreme Court precedents. App. 11a. It acknowledges that in *White I*, this Court applied strict scrutiny to judicial speech regulations. App. 8a. But then it contends that *White I* left open the possibility that the balancing test applicable to government employees might apply, App. 8a, and that this Court uses a lower standard of review for restrictions on contributions than on spending in *Buckley*. App. 27a. Because the personal solicitation clause relates to

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(N.D. Ind. 2009). This Court in *Citizens United*, 130 S.Ct. 876 has firmly closed that door: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." *Id.* at 910.

contributions, the lower court applied *Buckley*'s "closely drawn" scrutiny rather than strict scrutiny. App. 27a. And because it reasoned that the endorsement clause reached a "different form of speech that serves a purpose distinct from the speech at issue in *White I*," it adopted the balancing approach used for government employee speech in *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548 (1973), *Garcetti v. Ceballos,* 547 U.S. 410 (1951), and *Pickering v. Bd. Of Ed. Of Twp. High School. Dist. 205, Will County, Ill.,* 391 U.S. 563 (1968). App. 17a.

The use of anything but strict scrutiny to analyze these canons conflicts with this Court's jurisprudence.

A. Closely Drawn Scrutiny Is The Wrong Standard.

The personal solicitation clause prohibits judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions." SCR 60.06(4). The Seventh Circuit applied intermediate scrutiny, reasoning that since it was "dealing with regulation of campaign contributions, we therefore proceed with the analysis under *Buckley,*" which distinguished "restrictions on spending by candidates and parties [and] reviewed [them] with strict scrutiny," from "restrictions on contributions [that] are reviewed under less rigorous 'closely drawn' scrutiny." App 27a-28a.

In *Buckley,* this Court held that contribution limits are subject to lesser scrutiny than spending restrictions, 424 U.S. at 25, because contributions are more an exercise of associational rights than speech rights. Contributions can be limited, provided they are not too low, *Randall v. Sorrell,* 548 U.S. 230, 232

(2006), and serve a sufficiently important interest. *McConnell v. FEC*, 540 U.S. 93, 135 (2003). However, the personal solicitation clause limits speech, not contributions, based on the topic and the speaker. *See Carey*, WL 2771866 at *8.

This Court's precedent has consistently held that content-based speech regulations are subject to strict scrutiny. *See, e.g., United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813 (2000); *Rosenberger v. Rector,* 515 U.S. 819, 828-29 (1995). That the Seventh Circuit applied less that strict scrutiny to a content-based speech restriction conflicts with that precedent, warranting review.

B. A Balancing Test Is The Wrong Standard.

The endorsement clause prohibits judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). The Seventh Circuit reasoned that, because the clause's purpose is distinct from announcing views, it would use the governmental employee "balancing approach, not strict scrutiny, [a]s the appropriate method of evaluating the endorsement rule." App. 17a.

This Court established a balancing test to review government employee speech regulations, reasoning that, when public employees are engaged in their official duties, they are not acting as citizens and so their speech is not protected by the First Amendment. *Garcetti*, 547 U.S. at 421. Instead, their speech rights are balanced against the state's interest in performing its important governmental function. *Id.* at 420. Thus the district attorney in *Garcetti* who, during the

exercise of his duties, wrote a disposition memo advising his superior on a course of action could legitimately be disciplined for the content of the memo.

However, the state cannot force an employee to relinquish her constitutional rights as a citizen in order to secure public employment. *Pickering,* 391 U.S. at 568. Thus, teachers cannot be dismissed because of speech they engaged in outside of their employment, absent a showing of defamation or other constitutionally-recognized circumstance. *Id.* at 574.

Indeed, the *Letter Carriers* decision, which addressed the Hatch Act's political speech restriction on government employees, was directed towards "protect[ing] employees' rights, notably their right to free expression," *United States v. National Treasury Employees Union,* 513 U.S. 454, 471 (1976), by preventing ranking officials from making "advancement in the Government service ... depend on political performance." *Letter Carriers,* 413 U.S. at 566; *see also Elrod v. Burns,* 427 U.S. 437, 366-67 (1976).

None of these cases have ever stood for the proposition that elected officials' speech, including judicial candidates' speech, could likewise be restricted. *See* App. 35a (Rovner, J., dissenting). It is one thing to regulate the speech of unelected public employees who only answer to the government as their employer; it is quite another to regulate the campaign speech of public officials, who are required to stand for election, who are beholden to the public at large. App. 35a.

Indeed, the fundamental purpose of the First Amendment's speech clause is to protect political speakers during campaigns: "'The role that elected

officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *White I*, 536 at 781 (*quoting Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 222-223 (1989)). Thus, "'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'." *White I,* 536 U.S. at 788 (*quoting Renne v. Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). Requiring a judicial candidate to run for office, but then prohibiting her from campaigning, violates the First Amendment.

Even if the government employee cases were not exclusively directed at the peculiarities of unelected, government employees, judicial campaign speech restrictions present another problem: They apply to all judicial candidates, whether incumbent or challenger. At most, the balancing test could apply only to judges' speech, effectively establishing two speech standards, depending on the speaker. Such discriminatory speech standards contravene this Court's holding in *Davis v. FEC,* 128 U.S. 2759 (2008), which unequivocally denounced asymmetrical campaign restrictions among competing candidates. *Id.* at 2764 ("This Court has never upheld the constitutionality of a law that imposes different ... limits for candidates competing against each other."). A balancing test is thus not only inapplicable; it is unconstitutional.

III. The Seventh Circuit Decision Conflicts With Other Circuit Decisions On the Same Important Matter.

As evidenced above, the Seventh Circuit's decision to apply a lesser standard of review to the personal solicitation clause and an balancing test to the endorsement clause conflicts not only with *White I* but with numerous other circuits that have applied *White I* in other judicial speech contexts. This fundamental error resulted in a improper conclusion that also conflicts with those circuits: That the personal solicitation clause and the endorsement clause are constitutional. This Court should grant the writ to harmonize the Seventh Circuit's ruling with those of other circuits.

A. The Personal Solicitation Clause Is Unconstitutional.

Judge Siefert wants to make personal phone calls asking for funds, to make personal invitations to potential donors to his campaign's fundraising events, and to sign letters seeking contributions to his upcoming 2011 election campaign. (Siefert Decl., Doc. 34, ¶ 24.) He is prohibited by Wisconsin's personal solicitation clause, which states that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." SCR 60.06(4). Similar canons prohibiting judicial candidates from making personal solicitations have been struck down by the Sixth, Eighth and Eleventh Circuits. *Wersal,* 2010 WL 295171; *White II*, 416 F.3d at 766; *Weaver v. Bonner,* 309 F.3d 1312, 1322 (11th Cir. 2002); *Carey*, 2010 WL 2771866. *But see Stretton v. Disciplinary Board of the Supreme Court of Penn.,*

944 F.2d 137, 146 (3d Cir. 1991) (upholding Pennsylvania's personal solicitation clause before *White I*).

The Eleventh Circuit in *Weaver* held Georgia's solicitation clause unconstitutional. Georgia's Code of Judicial Conduct provided that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support." *Id.* Canon 7(B)(2). The *Weaver* court reasoned that, under strict scrutiny, any impartiality interest of the state was not served by the clause because

> even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support.

Id. at 1322-23. The clause prohibits a candidate's speech while "hardly advancing the state's interest in judicial impartiality at all." *Id.* at 1323.

In *White II,* the Eighth Circuit struck down Minnesota's personal solicitation clause because it was not narrowly tailored to serve a compelling interest in impartiality. *Id.* at 765-66. Minnesota's judicial code only permitted a candidate's committee to receive contributions, with the committee itself prohibited from informing the candidate who had solicited and

who had not. *Id.* at 765; 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 5(B)(2). That bias for or against a party or judicial closedmindedness would presumptively result if a contributor or non-contributor appear before him would be a "'challenge to the credulous.'" *Id.* at 766 (*quoting White I,* 536 U.S. at 780).

In *Wersal*, the Eighth Circuit considered Minnesota's revised solicitation clause. The new clause, while banning personal solicitations, Minn. Stat. Ann., Code of Judicial Conduct, Canons 4.1(A)(6) & 4.1(A)(4)(a), allowed judicial candidates to ask for funds from audiences greater than 20 people; to sign letters soliciting contributions; and to solicit from family members, significant others, and judges over which the candidate has no supervisory or appellate authority. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(B)(3). The court, recognizing that the canon was at least more narrowly tailored than the personal solicitation clause struck down in *White II*, *Wersal,* WL 2945171 at *14, still found the clause failed strict scrutiny because, as in *Weaver,* a candidate's campaign committee could solicit on her behalf—and it is the act of soliciting, not the identity of the solicitor, that is relevant to the State's interest in preserving impartiality. *Id* at *14. Moreover, less restrictive means already existed to preserve that interest: Minnesota prohibits judicial candidates from knowing the source of contributions to their campaign, 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(A)(5), and recusal, in cases of clear bias, was always available to litigants. *Wersal,* WL 2945171 at *14. The court dismissed any coercive aspect to face-to-face solicitation, asserting that "it [is] highly unlikely

that after such a fleeting encounter, a candidate will remember which solicited person indicated a likelihood of contributing to the campaign or indicated a refusal to do so." *Id.* at *14.

Following the Eighth and Eleventh Circuits, the Sixth Circuit in *Carey* found Kentucky's personal solicitation clause unconstitutional because it reached not only in-person solicitations by judges and solicitation of parties currently before the court, but also signing letters and solicitation for large groups. *Carey,* WL 2771866 at *13. That it allowed a candidate to send thank-you notes also was problematic to the court. *Id.* All these omissions, said the Sixth Circuit, "suggest[] that the only interest at play is the impolitic interpersonal dynamics of a candidate's request for money, not the more corrosive reality of who gives and how much." *Id.*

The only circuit that has upheld the personal solicitation clause is the Third Circuit in *Stretton*, 944 F.2d 137. Decided prior to *White I,* the Third Circuit found that the personal solicitation clause served a compelling interest in preventing "the appearance of coercion or expectation of impermissible favoritism." *Id.* at 146. Significantly, the *White I* court recognized impartiality, not coercion, as a compelling interest. *White I,* 536 U.S. at 774. And more crucially, the *Stretton* court analyzed the clause only as to face-to-face solicitations without properly analyzing the larger scope—and thereby the narrow tailoring—of the clause. *Stretton*, 944 F.2d at 145-46; *see Carey,* WL 2771866 at *13 (discussing the overinclusiveness of the personal solicitation clause). Its value is dubious.

Despite the post-*White I* consensus among the circuits, the Seventh Circuit again chose to deviate, by finding the personal solicitation clause constitutional.[4] *See* App. 109a (Rovner, J., dissenting) ("both the Sixth and Eighth circuits have struck down as unconstitutional states statutes that restricted the First Amendment rights of judge and judicial candidates. ... Our divergent opinion on this issue is an outlier.").

Relying on *Buckley*, the court below concluded that because personal solicitations related to raising funds rather than spending funds for campaigns, "closely drawn" scrutiny applied. Yet regardless of the level of scrutiny, it contended that the solicitation clause survives. App. at 28a. Disavowing coercion as a compelling state interest, App. at 30a, the Seventh Circuit nevertheless held that "the personal solicitation itself presents the greatest danger to impartiality and its appearance." App. at 31a. That candidates can review the source of their funds and that the clause reaches beyond quid pro quo corruption to ban personal solicitation of family members was not enough for the court to find the clause inadequately tailored.[5]

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[4]The Seventh Circuit cites *Stretton* for support of its lesser standard of review. App. at 27a. This is misplaced. *See Stretton,* 944 F.2d at 146 ("A compelling state interest is present and the means currently employed are narrowly tailored to it. ... Accordingly, we agree with the district court's determination that Canon 7(B)(2) [—the personal solicitation clause—] does not offend the Constitution.")

[5]The court also entirely ignores Judge Siefert's as-applied challenge, which seeks an exception to the ban in

This analysis is fundamentally at odds with the Sixth, Eighth, and Eleventh Circuit, which recognized that it is the contribution, not the solicitation, that triggers any compelling state interest and as a result, struck down the solicitation clause. *See Wersal,* WL 2945171 at *14; *Carey,* WL 2771866 at *13; *Weaver,* 309 F.3d at 1322-23; *White II*, 416 F.3d at 766.

It is also at odds with the Sixth Circuit because it fails to address Judge Siefert's as-applied claims. Even if a categorical ban of personal solicitations is constitutional, whether Judge Siefert's personal phone calls, personal invitations to fundraisers, or signatures on fundraising letters amount to the type of solicitation that the Seventh Circuit found so offending is unlikely. While the *Carey* court found that the inclusion of such indirect solicitations made the clause facially underinclusive, *Carey,* WL 2771866 at *13, at minimum, an exception for Judge Siefert's desired solicitations is warranted.

To reconcile these inter-circuit conflicts, this Court should grant this writ.

B. The Endorsement Clause Is Unconstitutional.

In 2008, Judge Siefert wanted to endorse then-Senator Obama for President. As a judicial candidate in Wisconsin's upcoming 2011 election cycle, he would likewise like to endorse candidates to announce his position on disputed political issues, both as to whether Senator Obama should be elected President and as a

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the form of personal phone calls, signing of fundraising letters, and personally inviting potential donors to fundraising events.

means by which to state his own views as a candidate. (Siefert Decl., Doc. 34, ¶ 18.) However, the endorsement clause provides that no judge or judicial candidate may "[p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." SCR 60.06(2)(b)(4). An exception to this provision allows partisan political office holders seeking election or appointment, as well as judge-elects to "continue to engage in partisan political activities required by his or her present position." SCR 60.06(2)(c). Because the endorsements Judge Siefert desires to make are not required by his position, they are prohibited.

The endorsement clause Judge Siefert challenges is similar to the clause challenged in *Wersal*. The endorsement clause there prevented a judicial candidate from "publicly endors[ing] or, except for the judge or candidate's opponent, publicly oppos[ing] another candidate for public office." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(3). Mr. Wersal wanted to endorse a candidate for Minnesota's Supreme Court, a District Court judge, and a candidate for Congress. *Wersal,* 2010 WL 2945171 at *1. Applying *White I*'s strict scrutiny analysis because the "restriction depends wholly upon the subject matter of the speech for its invocation" and "burdens core political speech," *id.* at *8, the Eighth Circuit found the clause overinclusive because, rather than solely preventing public displays of favoritism that might demonstrate bias for or against a party, it also undermines the endorser's ability to "denote[] a particular subset of issues and policies with which the endorsing candidate may subscribe." *Id.* at *9. It also found the clause underinclusive because it allows endorsements

of public officials and of acts or policies of non-candidates. *Id.* at *10. The court ruled the clause facially unconstitutional.

In support of its conclusion, the *Wersal* court followed *White II*, which held that judicial candidates had the right to receive endorsements. *Id.* at 754. And indeed, it is hard to see how, if accepting endorsements is consistent with judicial impartiality, making endorsements would not be so. In the case of a judge or candidate who receives an endorsement, there is a risk, however slight, that the judge or candidate will be grateful to the endorsing party, as the endorsement has conferred a benefit on the candidate.[6] The same is not true, however, when a judge or candidate makes an endorsement, and simply makes public a preference the candidate already has. Endorsements primarily benefit the endorsee, not the endorser—the primary benefit to the endorser is a short hand way to announce her views.[7] Since candidates are free, under *White II*, to accept such endorsements, they must be free to make such endorsements as well. *Id.*

Likewise, the *Wersal* court found compelling the *White II* court's recognition that "'the underlying rationale for [a state provision banning the acceptance

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[6] In the same way, a judge who is appointed to the bench by a partisan political official such as a governor is also likely to feel gratitude.

[7] While a judge may make an endorsement in exchange for some political benefit from the endorsed party, this does not implicate judicial impartiality, as making an endorsement is not itself an exercise of the judicial office and does not affect how a judge may rule in any case.

of endorsements and membership in a political party]—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 754-55." *Wersal,* 2010 WL 2945171 at *9. A judge or candidate associating with another candidate by means of an endorsement is no more of a threat to judicial impartiality than is that judge or candidate associating with a political party or political interest group, or expressing himself on particular issues.

Just like Mr. Wersal, Judge Siefert wished to publicly endorse candidates for public office, in his case, candidates like Barack Obama. The purpose of his endorsement was to announce his position on a disputed political issue, both as to whether Senator Obama should be elected President and as a means by which to state his own views as a candidate. (Siefert Decl., Doc. 34, ¶ 18.) Because his endorsement served as a "shorthand for the views a judicial candidate holds," *White II*, 416 F.3d at 754, *Wersal,* 2010 WL 2945171 at *9, the endorsement clause prohibits judicial candidates from announcing their views in violation of *White I.*

Again, the Seventh Circuit chose to embark on its own analysis, concluding that the endorsement clause is constitutional because judges who publicly endorse undermine the State's interest in impartiality. App. 25a-26a. Moreover, the court determined that an endorsement is of limited value, and thus warrants less constitutional protection. App. 23a. That endorsements in nonpartisan elections are permitted under the

clause was not underinclusive enough for "the scales to tip in favor of the plaintiff's right to speak." App. at 24a.[8] *But see* App. at 44a (Rovner, J. dissenting) ("Once Wisconsin greased the slope for non-partisan endorsements, it should not have been surprised that partisan endorsements could come sliding after. Wisconsin has failed to demonstrate that its endorsement ban is narrowly tailored to prevent the harm it asserts.").

Even if a categorical ban on endorsements were constitutional, the Seventh Circuit also failed to consider Judge Siefert's as-applied claims. An endorsement of then-Senator Obama cannot credibly create sufficient impartiality concerns to warrant proscribing it. The likelihood of Senator Obama appearing in Judge Siefert's court after successfully running for President are slim, and in the event he did so appear, any credible bias claim could be examined and addressed through recusal. *See Wersal,* 2010 WL 2945171 at *10-11 (contending that recusal is the least restrictive means of addressing the impartiality concerns purportedly advanced through the endorsement clause).

The *Siefert* court's conclusions directly conflict with the Eighth Circuit, warranting this Court's review.

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[8]Notably, the Seventh Circuit recognized that this underinclusiveness could make the endorsement clause unconstitutional. *See* App. at 24a ("Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality.")

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits.

Respectfully submitted,

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