No. 09-1713

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN SIEFERT,

Plaintiff-Appellee,

v.

JAMES C. ALEXANDER, in his official capacity as the Executive Director of the Wisconsin Judicial Commission, et al.,

Defendants-Appellants.

Appeal From A Judgment Of The United States District Court
For The Western District Of Wisconsin,
Case No. 08-CV-00126-bbc,
Judge Barbara B. Crabb, Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS

J.B. VAN HOLLEN
Attorney General

JENNIFER SLOAN LATTIS*
Assistant Attorney General
State Bar #1000387

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lattisjs@doj.state.wi.us

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

RULES CITED

OTHER AUTHORITIES CITED

No. 09-1713

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN SIEFERT,

Plaintiff-Appellee,

v.

JAMES C. ALEXANDER, in his official capacity as the Executive Director of the Wisconsin Judicial Commission, et al.,

Defendants-Appellants.

Appeal From A Judgment Of The United States District Court
For The Western District Of Wisconsin,
Case No. 08-CV-00126-bbc,
Judge Barbara B. Crabb, Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS

ARGUMENT

This lawsuit is not about a candidate's right to speak about his qualifications for public office, nor is it about the public's right to hear from him. Nothing in Wisconsin's judicial code prevents Judge Siefert, or any judicial candidate, from telling people why they should elect him nor from raising the funds necessary to enable his speech. Instead, this case is truly about preserving the political independence of Wisconsin's third branch of Wisconsin's government, and avoiding a court system with judges who function as legislators or executives where partisan concerns underpin decision making.

The United States Supreme Court recognized a potential compelling state interest in preserving judicial open-mindedness or the appearance of the same in a state judiciary. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 778 (2002) ("*White I*") ("It may well be that impartiality in this sense [open-mindedness], and the appearance of it, are desirable in the judiciary.") The state surely has a compelling interest in maintaining public confidence in judicial fairness. *See Carey v. Wolnitzek*, 2008 WL 4602786 *9 (E.D. Ky., Oct. 15, 2008) ("[I]f the public comes to perceive judges as officials that are not willing to consider certain views at all and are completely close-minded on particular issues, then judges will no longer fulfill the necessary role of impartial arbiter and the legitimacy and acceptance of their decisions

will be undermined.") These are the interests Wisconsin asserts in support of its judicial code.

In its recent decision on the judicial recusal standfard, the United States Supreme Court cited with approval the Amicus Brief of the Conference of Chief Justices as follows:

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order. "

Caperton et al. v. A.T. Massey Coal Co., Inc., 556 U.S. ___, 2009 WL 1576573 *14 (June 8, 2009) (additional citations omitted). Just as these important objectives underpin the decision in *Caperton*, so the need for public confidence in the judiciary serves as Wisconsin's compelling state interest here.

In his arguments, Judge Siefert minimizes Wisconsin's interest in the public perception of judicial impartiality, and focuses on a judge's ability to speak about strongly held views and the public's right to hear about them. But the Wisconsin judicial code does not prevent judges from having or expressing strongly held views. Rather, the point of a non-partisan judiciary is to give recognition and visibility to the principle that when a judge dons judicial robes he or she sheds the

perception that personal views are placed above the rule of law. Announcing one's strongly held views, at least on legal issues or approaches to judging, is now clearly permitted under *White I*. Announcing such views, however, is distinct from declaring a partisan affiliation. A judge who declares a partisan affiliation, no matter how open-minded the judge may be in reality, creates the perception of a bias in favor of a large organization whose sole purpose is to affect the conduct and composition of the government.

The Supreme Court in *Caperton*, understood the problem of public perception, and the potential for bias. "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton* at *1 *citing Mayberry v. Pennsylvania,* 400 U.S. 455, 465-66 (1971).

To support his argument, Judge Siefert cites polls indicating that Minnesotans are comfortable with their (new) partisan court system (appellee brief, p. 33), but the data are misleading and inapplicable to this case. Poll respondents were not, evidently, asked the question or provided the context that allowed them to consider whether they approved of the recently imposed partisan nature of the courts, nor

report on their comfort level with the courts apart from comparisons with the other branches of government.

Moreover, Minnesota is not Wisconsin. Wisconsin experimented with a partisan court in the late 19th century and rejected it. (Dkt. 20, ¶ 10). Since the turn of the twentieth century, Wisconsin's judiciary has been non-partisan (Dkt. 54, ¶¶ 11-18). Wisconsin has communities with a history of partisanship (Dkt. 46, p. 32, ll. 3-17) such that a judiciary in those areas would likely become immediately partisan should party affiliation be permitted. Without additional evidence and background, anecdotal data from Minnesota adds little to the debate about Wisconsin's judiciary.

It is true that the Wisconsin Supreme Court did not formerly enact a judicial code prohibiting partisan political membership until 1968 (Dkt. 19, ¶ 4). But that code only served to codify the practice that had existed for decades because partisanship had long before disappeared from Wisconsin courts. There is no evidence in the record establishing that Wisconsin judges were members of political parties between approximately 1900 and the present. Instead, the evidence shows that in 1915 Wisconsin Supreme Court Justice Winslow spoke about an "unwritten code" of non-partisan judges in Wisconsin (Dkt. 54, ¶ 13). There is no evidence of any departure, since that time, from that

unwritten code. Indeed, the Wisconsin State Bar so noted the fact in 1938, "Thanks to our *completely* non-partisan judicial elections . . . the Wisconsin judicial system is not in any dire need of change." (Dkt. 54, ¶ 17, emphasis supplied). All of the record evidence shows that Wisconsin's judicial elections and judiciary have been non-partisan for two-thirds of Wisconsin's statehood.

Judge Siefert's suggestion that the judiciary and judicial elections can or would remain non-partisan even if judges were permitted to join political parties must be rejected because there is neither evidence nor argument to support it. If judges are allowed to join political parties and appeal to partisanship, then the judiciary and judicial elections are, in fact, partisan. Wisconsin cannot have it both ways. No matter how pure Judge Siefert's personal intentions, the fact is that his success on this claim will lead inevitably to a partisan judiciary in Wisconsin.

Joining a political party and appealing to partisanship based upon membership in a political party, are nothing less than the judge's declaration that he or she is not impartial on partisan issues. These acts harm the compelling state interests of preventing bias and the appearance of bias against parties. A judge who asserts membership in a political party risks an appearance of partiality in a case involving

political partisans. Partisan politics already permeate modern governance in the executive and legislative branches. The judiciary ought to be the one place where all litigants appear to have an equal chance that their judge will be impartial and non-partisan in deciding their case.

B. Because Wisconsin's judicial elections are non-partisan, joining a political party is not an essential part of campaign speech.

The Supreme Court held that restrictions on a judicial candidate's expression of a position on legal issues "burdens a category of speech that is 'at the core of our First Amendment freedoms'" because it constitutes "speech about the qualifications of candidates for public office." *White I*, at 774, *citing Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001). However, the Court also observed that the First Amendment may permit greater regulation of judicial campaigns than legislative campaigns. *White I*, at 783. In this case, the record is devoid of evidence that the partisan activities restriction burdens judicial campaigning at all. Judge Siefert does not wish to engage in an appeal to partisanship, does not really intend to use party affiliation in advertising, and does not suggest that use of the partisan label would allow him to raise more campaign funds (Dkt. 46,

pp. 9, 16-20). In his brief, it is asserted that, he "only wishes to be able to join the Democratic party as a private citizen apart from his election campaign." (Appellee brief, p. 29). The only thing he wanted to do related to campaigning was use the party label in responding to candidate questionnaires (Dt. 46, p. 9).

It is established that Judge Siefert may state his position on the legal issues of the day, so long as he does not make pledges, promises, or commitments that are inconsistent with the impartial performance of his judicial duties. *See Duwe v. Alexander*, 490 F.Supp.2d 968, 976 (W.D. Wis. 2007) (Upholding the constitutionality of Wisconsin Supreme Court rule SCR 60.06(3)(b)). Judge Siefert is not prohibited from answering questionnaires on issues. *Id.* at 976-77. He is only prohibited from joining a political party and appealing to partisanship. There is no evidence in this record that such a restriction limits Judge Siefert's ability to speak about his qualifications for public office. He does not even wish to use the "Democrat" label as a shorthand for his views (Dkt. 46, p. 13). The effect of the restriction upon Judge Siefert's, or indeed upon any Wisconsin judicial campaign is minimal.

The centerpiece of this lawsuit is Judge Siefert's desire to be a partisan individual. He wants to donate to the Democratic Party, attend its conventions, serve as a delegate, apply for jobs as a partisan,

etc. These activities have nothing to do with a campaign for judicial office. Rather they are related to how Judge Siefert conducts himself as a judge. State governments can and should be permitted to establish non-partisanship as a qualification for certain public positions.[1] Judicial officers must maintain the appearance of impartiality. Wisconsin judges "must [ ] accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." (SCR 60.03(1); A-App at 199).

Only *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir.2005) ("*White II*") has held that a state must permit active judges to join political parties, and it did so without analyzing any distinction between the judge as a candidate (where, as we have seen, party affiliation is not shown to be of any moment) and the judge as judge. Other cases on the point differ, and instead refer to a political party's own right of speech. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (Striking down limits on party donations to candidates), and

[1]Contrary to appellee's argument, Wisconsin does, in fact, prohibit certain classes of employees, other than members of the Government Accountability Board, from joining political parties by requiring that persons in those positions be "strictly nonpartisan." *See*, Wis. Stat. § 13.91 (Legislative Council), § 13.92 (Legislative Reference Bureau), § 13.93 (Reviser of Statutes), § 13.94 (Legislative Audit Bureau), § 13.95 (Legislative Fiscal Bureau), § 13.96 (Legislative Technology Services Bureau), and Wis. Stat. § 758.13(3)(g)2. (Wisconsin Judicial Council). Arguing to the contrary is yet another example of appellee's attempt to devine distinctions between the phrases "nonpartisan" and "political party membership" that Wisconsin law does not support.

California Democratic Party v. Lundgren, 919 F.Supp. 1397 (N.D. Cal. 1996) (Striking down limits on party endorsements). This Court should recognize the distinction.

C. The partisan activities clause is neither over nor under inclusive.

Judge Siefert argues that the partisan activities clause is under inclusive because it permits judicial candidates currently serving in office to engage in partisan activities. The assertion either misstates or misunderstands the exception. "A partisan political office holder who is seeking election or appointment to a judicial office . . . may continue to engage in partisan political activities *required* by his or her present position." SCR 60.06(2)(c) (emphasis supplied). The exception is very limited. It does not allow partisan political office holders to appeal to partisanship or to engage in partisan activities other than those actually required by the present position. The restriction is an effort to narrowly tailor the restriction such that persons presently holding political office are not prohibited from seeking a judicial position. The restriction also serves the compelling state interest in the public's perception of judicial impartiality. Once a partisan office holder decides to seek a judgeship, he or she must put aside partisan labels.

Judge Siefert misunderstands the Wisconsin judicial code's restrictions on membership in advocacy groups. It is true that the rules, on their face, do not specifically prohibit judges from joining advocacy groups like Mothers Against Drunk Driving, but, of course, the code does not attempt ". . . to address every conceivable conduct of a judge that might erode public confidence in the integrity, independence, and impartiality of the judiciary . . ." (Preamble to SCR 60, A-App. 196). However, Judicial Commission Director James Alexander has provided his interpretation of the various code provisions supporting his conclusion that advocacy group membership is prohibited (Dkt. 51, ¶¶ 1-7). His conclusion makes sense in the entire context of the code. The code clearly prohibits social relationships to influence a judge's judicial conduct or judgment or "permit the impression by others that they are in a special position to influence the judge." (SCR 60.03(2); A-App. 200). Membership in an advocacy organization, such as Mothers Against Drunk Driving, would certainly give the impression that the judge holds the positions advocated by the organization and would/could taint his or her ability to sit impartiality on a drunk driving case. By joining such a group, a judge may appear that he or she may not be open-minded on the matters of fundamental

importance to the group. For these reasons, the judicial code prohibits such membership. It is not under inclusive on that score.

Moreover, as defendants have demonstrated, membership in political parties is far more pervasive in government and society as a whole than membership in single issue advocacy groups. Even if the Wisconsin Judicial Code were interpreted to permit judges to join advocacy groups, the partisan activities clause would still pass constitutional muster because of this pervasiveness.

> Political parties and the partisan executive and legislative branches of government (and members thereof) are frequent litigants. Individuals and groups take positions on cases based upon (or coincidental with) substantive positions taken by partisan political parties or partisan candidates for office.

(Wis. Sup. Ct. Order 00-07, p. 10, Abrahamson concurring; A-App. 177). A state should be permitted to address the most critical threat to its compelling interests without having the regulation rejected because it does not address lesser threats.

The other argument asserted is that the code provisions are over-inclusive because silence is the bigger threat to the independence of the judiciary. The argument is baseless. If Judge Siefert wants to announce his strongly held views on monetary policy, for example, he can do so. The public can ask about Judge Siefert's opinions and he can give

an answer. Expressing an opinion is a far cry from brandishing a party affiliation. Membership in a political party telegraphs adherence to a political program and alignment with other government offices. Stating a party affiliation signals a bias in favor of one party and against another, but provides little concrete information on a judge's personal opinions. The partisan activities restriction is narrowly tailored on that score.

II. The Court should Uphold the Wisconsin Rule Prohibiting Partisan Endorsements.

The *White I* decision did not address the question of whether a judge can be restricted from endorsing partisan candidates for judicial office. Courts have upheld similar restrictions in *Wersal v. Sexton*, 607 F.Supp.2d 1012, 2009 WL 279935 *11 (D. Minn. 2009) (Minnesota endorsement clause narrowly tailored to serve the compelling state interest of preventing bias and the appearance of bias); *Carey v. Wolnitzek*, 2006 WL 2916814 *14 (E.D. Ky. 2006) (Endorsement challenge not ripe for judicial review); *In re Matter of William A. Vincent, Jr.*, 143 N.M. 56, 172 P.3d 605, 606-09 (2007) (New Mexico judicial canon prohibiting endorsements serves a compelling interest in a judiciary impartial in fact and appearance); *In re Matter of Ira J. Raab*, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1292 (2003);

(Endorsement clause ancillary to judicial campaign and therefore not in violation of *White I*); *Yost v. Stout*, No., 06-4122 JAR, slip. op. at 12 (D. Kan. 2008) (Endorsement clause does not restrict speech concerning disputed political issues). In addition, as noted in Wisconsin's original brief, prohibitions on judges making endorsements appear in the federal judicial code and the American Bar Association's Model Judicial Code (See Canon 7A(2), Code Cond. Fed. Judges, and Model Code Jud. Cond. 4.13 (ABA 2007)).

It is neither a necessary or integral part of a judicial campaign for a judge to make partisan endorsements. The endorsement clause does not implicate "core" First Amendment rights regarding speech over one's own qualifications for office, and is only tangentially related to one's campaign. A whole realm of campaign speech remains available to the judicial candidate including the ability to indicate agreement with a partisan candidate on the issues of the day.

The endorsement clause serves the compelling state interest of maintaining a non-partisan judiciary that is and appears to be unbiased and impartial. A legitimate impartiality concern is created when a judge endorses a candidate whose policies or agents may come before that judge in a judicial capacity. The courts begin to seem like

another political branch and not the impartial cornerstone of government that they should be.

> The third branch of the Arizona government has tried very hard over the years to remind the public that the third branch is not a political branch, but consists of neutral dispassionate judges who apply the rule of law impartially. Any candidate for judicial office who wants to publicly endorse a candidate for public office . . . is likely to cause the public to believe that the third branch of government is just another political branch.

Wolfson v. Brammer, 2008 WL 4372459 *2 (D. Ariz., 2008).

Judge Siefert argues that the endorsement clause does not further the state's interest in preventing judicial bias towards parties. This ignores the crux of defendants' argument that the clause furthers the state's compelling interest in maintaining the public perception of a judiciary that is free of the risk of political bias.

There is a distinction between a judge's announcing a position on issues and endorsing partisan candidates. *White I* recognized a similar distinction when the Court discussed the difference between expressing opinions on parties rather than opinions on issues. *See White I* at 776. A judge's endorsement of a partisan candidate expresses an opinion on the worthiness of a potential party. Beyond causing the public to believe the judiciary is just another political branch, it specifically

highlights a judge's bias in favor of a potential litigant or group of litigants.

Recusal is not a realistic alternative to address the matter. Many Wisconsin counties have very few judges, such that recusal creates a burden on neighboring counties. State government and administrative agencies are so frequently parties to litigation that a partisan judiciary could mean there would be very few judges available to hear highly significant cases. Additionally, recusals are generally considered to be a last resort, and it is entirely up to the judge to decide when recusal is appropriate. *See* Wis. Stat. § 757.19.

Caperton holds that, in exceptional circumstances, the due process clause to the constitution is violated by a judge's refusing to recuse himself. *See Caperton,* at *2. That case involved campaign contributions, so it is not known how the principle would apply to a case involving partisan endorsements. If partisan endorsements do constitute grounds for recusal, either under due process or via a legislated judicial code, then the possibility exists that some cases will lack sufficient judicial resources where no unbiased judge is available. If partisan endorsements are not grounds for recusal then a partisan judge could chose not to step off the case leading to a decision that appears partisan, and potentially denies due process. By way of

example, Judge Siefert has indicated that he would see no particular need for recusing himself in a case involving state administrative agencies even if he had endorsed the Governor who oversaw them (Dkt. 46, p. 27, ll. 21-22). Yet, Judge Siefert would not appear to be unbiased on a case that came before him involving a policy of that same Governor.

Accepting and making a political endorsement are not equivalent activities as the appellee suggests. Prohibiting the receipt of endorsements would necessarily require the Wisconsin Supreme Court to regulate the speech of others over whom the courts have no control. A judge's public acceptance of an endorsement that includes a partisan appeal would already be prohibited by SCR 60.06(2)(a) (A-App. 253). More importantly, however, the Constitution should not be read to permit a judge to engage in partisan endorsement activities just because others may have endorsed him.

The remainder of Judge Siefert's argument on endorsements lies in his assertion that this court should ban endorsement clauses under the eighth circuit decision of *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) ("*White II*"). This is surprising because not only does *White II* not bind this Court, but *White II* did not discuss endorsements by judges. Rather the case largely concerned

associations in the form of political party membership. The Minnesota district court that recently upheld Minnesota's endorsement canon explained the distinction as follows:

> Unlike the partisan-activities clause that prohibited a large range of political speech and specifically, "speech about the qualifications of candidates for public office," the endorsement clause does not circumscribe such a broad array of First Amendment rights but rather one specific right because it conflicts with the state's interest in impartial, unbiased judges. *White I*, 536 U.S. at 774. Accordingly, the link between engaging in partisan-activities, such as attending a political rally, and taking a position on an issue is not nearly as attenuated as the link between supporting a candidate and taking a position on an issue. While undoubtably instances may arise in which endorsement of a particular candidate might serve as a proxy for a position on an issue, this connection lacks the force and immediacy society applies to the political organization-political issue link. Moreover, to the extent that what Wersal seeks is the ability to comment on an issue, he can state his position without running afoul of the endorsement clause. If, for example, he wishes to state that the cause of the current financial crisis was hyper-regulation, he can publically take that position and does not need to endorse Congresswoman Michelle Bachmann as a proxy for that position.

Wersal, 2009 WL 279935 *9.

White II was largely limited to judicial campaign activities. We have established that the making of endorsements is not an activity necessary or related to campaigning. Judge Siefert has never suggested that he needs to make partisan endorsements in order to better explain his qualifications for a judgeship. And *White II* did not

address how relationships with individual party members could affect the appearance of open-mindedness or undermine public confidence in the judiciary. A judge's personal endorsement of a particular partisan candidate is an even greater threat to those compelling state interests than a judge's associating him or herself with a political party.

III. The Solicitation Clause is Narrowly Tailored to Serve the Compelling State Interest of Avoiding the Appearance of Coercion.

The "great and compelling state interest" served by the Wisconsin Judicial Code's ban on direct solicitation is that "no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns." (Order 00-07, p. 11, Abrahamson concurring. *See* First Alexander Affidavit, Exhibit H). The majority in *White II* recognized the interest. "Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case." *White II*, 416 F.3d at 765. *White II* never struck down a campaign committee structure similar to Wisconsin's, but instead permitted campaign fundraising activities, like addressing large groups, that are not prohibited by Wisconsin Supreme Court rule.

This court should reject appellee's various arguments on the solicitation clause. First, Justice Prosser's dissent notwithstanding, there is no specific limitation on a candidate's directly accepting a spouse's donation, nor are contributions from other family or friends prohibited; they should just be made through the committee structure.

Second, the comparison Judge Siefert draws to legislative candidates is inapposite. Legislators are partisan and are expected to have a political agenda; the public expects as much, and a legislator need never be or appear to be impartial the way a judge must be. Indeed, citizens elect legislators for partisan reasons and on account of their biases. If anything, the argument points out the chief problem with this entire lawsuit—the attempt to turn the third branch of government into a partisan, political branch.

Third, Judge Siefert presented no evidence that the committee structure impedes the fundraising of non-incumbents any more than the inherent difficulties involving lack of name recognition that often plague a challenger. A challenger who wishes to out-raise and out-spend an incumbent can do so under the committee system and avoid making any potential litigant feel coerced—just as the incumbent must and can do. Both have the same restrictions on raising funds.

The committee fundraising restriction is a minor burden on judicial candidates, indeed. Many political candidates make use of such a structure, so there is no reason any judge's supporter ought to find the use of one unusual or off-putting. The Court should uphold the structure in favor of the interest in avoiding any appearance of coercion.

CONCLUSION

The Court should recognize the compelling interests of the State of Wisconsin in maintaining an unbiased and impartial judiciary that are served by the Wisconsin Code of Judicial Conduct. We ask that the Court reverse the decision of the district court, and return integrity and confidence in an impartial administration of justice in our state.

Dated this 10th day of June, 2009.

J.B. VAN HOLLEN
Attorney General

JENNIFER SLOAN LATTIS*
Assistant Attorney General
Wisconsin State Bar #1000387

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lattisjs@doj.state.wi.us

**Counsel of Record*

CERTIFICATION

I certify that this brief conforms to Circuit Rule 32 for a brief produced using the following font:

> Proportional Century Schoolbook Font: Minimum printing resolution of 300 dots per inch, 12 point body text, 12 point for quotations and 11 points for footnotes, lead of min. 2 points, maximum of 60 characters per full line of body text. Microsoft Word 2003 was used. The length of this brief is 4,410 words.

Dated this ___ day of June, 2009.

_____

JENNIFER SLOAN LATTIS
Assistant Attorney General

Counsel for Appellants

CIRCUIT COURT RULE 31(E) CERTIFICATION

I certify that I have filed electronically, pursuant to Circuit Rule 21(e), a non-scanned PDF format version of the brief.

Dated this ____ day of June, 2009.

_____

JENNIFER SLOAN LATTIS
Assistant Attorney General

Counsel for Appellants

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 10, 2009, she caused two true and correct bound copies of Appellants' Reply Brief to be served by First Class Mail on:

James Bopp, Jr.
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre haute, IN 47807

John S. Skilton
PERKINS COLE LLP
1 East Main Street, Suite 201
Madison, WI 53703-5118

Gregory F. Zoeller
Attorney General
OFFICE OF THE INDIANA ATTORNEY GENERAL
302 West Washington Street
Indianapolis, IN 46204

Eric Guenthes
HURLEY, BURISH & STANTON
Post Office Box 1528
Madison, WI 53701-1528

The undersigned further certifies that in accordance with Fed. R. App. P. 25(d)(2), the required number of paper copies and an electronic copy of the foregoing Brief of Amicus Curiae were filed with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit on June 10, 2009.

_____

JENNIFER SLOAN LATTIS
Assistant Attorney General
Wisconsin State Bar #1000387

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 267-2223 (fax)
lattisjs@doj.state.wi.us