TABLE OF CONTENTS

Page

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

THE HONORABLE JOHN SIEFERT,

Plaintiff,

v. Case No. 08-C-0126-BBC

JAMES C. ALEXANDER,
LARRY BUSSAN,
GINGER ALDEN,
DONALD LEO BACH,
JENNIFER MORALES,
JOHN R. DAWSON,
DAVID A. HANSHER,
GREGORY A. PETERSON,
WILLIAM VANDER LOOP,
MICHAEL MILLER, AND
JAMES M. HANEY,,

Defendants.

DEFENDANTS' BRIEF OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING THEIR CROSS MOTION

Defendants, members of the Wisconsin Judicial Commission, by their legal counsel, J.B. Van Hollen, Attorney General, and Jennifer Sloan Lattis, Assistant Attorney General, submit their primary brief on the cross-motions for summary judgment.

STATEMENT OF THE CASE

The impartial judge is the keystone of a functioning judicial system and lies at the heart of the right to due process. "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J. concurring). Eliminating partisanship from the judiciary is Wisconsin's method of assuring that the judiciary is impartial and available to decide the significant matters presented to it while still permitting Wisconsin's citizens to select judges as they always have. Precluding candidates from directly raising campaign contributions, is the best and least inconvenient way of assuring that a judge never appears to be pressuring a donor for money in exchange for a specific ruling.

The plaintiff, Judge John Siefert, seeks to reverse these time-honored practices and fundamentally alter Wisconsin's judicial system by asserting that Wisconsin interferes with a judge's First Amendment rights if it forbids partisan affiliation, endorsement of partisan candidates, and direct fundraising by judges themselves. On June 2, 2008, this court rejected plaintiff's request for a preliminary injunction because doing otherwise "could cause significant disruption to the legal community of the state" (Doc. #30, at 4). Plaintiff subsequently moved for summary judgment. Pursuant to the court's scheduling order, the defendants now file their materials in opposition to plaintiff's motion and in support of their cross motion for summary judgment.

STATEMENT OF FACTS

Under separate cover and in accordance with this court's procedures, defendants provide a numbered statement of facts, and do not include an additional statement here.

STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is appropriate under Fed. R. Civ. P. 56 when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Once the moving party has set forth its affidavits and portions of the record that demonstrate the lack of any issue of material fact, the adverse party may not rest upon mere allegations or denials, but must set forth a specific showing that there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324. A dispute concerning facts not material to a determinative issue does not preclude summary judgment. *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir. 1988). No issue remains for trial unless significant evidence favoring the non-movant exists on which a jury could return a verdict for the non-movant. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

TEXT OF CHALLENGED RULES

Wisconsin Supreme Court Rule ("SCR") 60.06(2)[1]. Party Membership and Activities:

> (a) Individuals who seek election or appointment to the judiciary may have aligned themselves with a particular political party

[1]A copy of Supreme Court Rule 60 is attached to the Second Alexander Affidavit as Exhibit P.

and may have engaged in partisan political activities. Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of any political party.

2. Participate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of a political party or of a candidate for partisan office.

3. Make or solicit financial or other contributions in support of a political party's causes or candidates.

4. Publicly endorse or speak on behalf of its candidates or platforms.

(c) A partisan political office holder who is seeking election or appointment to a judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position.

(d) 1. Paragraph (b) does not prohibit a judge, candidate for judicial office or judge-elect from attending, as a member of the public, a public event sponsored by a political party or candidate for partisan office, or by the campaign committee for such a candidate.

2. If attendance at an event described in subd. 1. requires the purchase of a ticket or otherwise requires the payment of money, the amount paid by the judge, candidate for judicial office or judge-elect shall not exceed an amount necessary to defray the sponsor's cost of the event reasonably allocable to the judge's, candidate's, or judge-elect's attendance.

(3) Nothing in this subsection shall be deemed to prohibit a judge, judge-elect, or candidate for judicial office, whether standing for election or seeking an appointment, from appearing at partisan political gatherings to promote his or her own candidacy.

SCR 60.06(4) Solicitation and Acceptance of Campaign Contributions.

A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and

> accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

ARGUMENT

The plaintiff argues that his rights as a judge and/or judicial candidate to join a political party, make partisan endorsements, and personally solicit campaign contributions, were clearly established by the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (hereinafter "*White I*"). *White I* establishes no such rights. However, as defendants will demonstrate, this case raises entirely different issues than were before the United States Supreme Court in *White I*. The nature of the rights plaintiff seeks to assert go well beyond *White I*, the compelling interests Wisconsin sets forth to justify its system are different, and the Wisconsin restrictions are narrowly tailored to advance those compelling interests asserted.

I. THE UNITED STATES CONSTITUTION CANNOT AND SHOULD NOT BE READ TO PROHIBIT WISCONSIN FROM MAINTAINING A NON-PARTISAN JUDICIARY.

A. Wisconsin's rule on partisan affiliation serves long-standing and compelling state interests.

1. The Supreme Court has recognized that states have a compelling state interest in assuring an impartial judiciary.

The United States Supreme Court in *White I* recognized that assuring that litigants are provided with an impartial, detached judge constitutes a compelling state interest in specific ways. Foremost, "'impartiality' in the judicial context—sand of course its root meaning—is the lack of bias for or against either party to the proceeding" thus assuring "equal application of the law." *White I*, 536 U.S. at 775-76. The Wisconsin Judicial Code defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." SCR 60.01(7m). Impartiality in this sense, is both the essence of due process and a compelling state interest. The *White I* court also described the "third possible meaning" of "impartiality" as "open mindedness." *White I*, 536 U.S. at 778. This quality in a judge demands that he or she be willing to consider views that oppose preconceptions, and remain open to persuasion. *Id*.

However, having an unbiased judge is not enough to assure due process. The public confidence in the courts is as much affected by the appearance of bias as by actual bias. "There can also be a denial of due process when the risk of bias is impermissibly high." *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331

(1983), citing *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). "[O]ur system of law has always endeavored to prevent the probability of unfairness." *Id.* Permitting partisanship to enter the judiciary would lead to these impermissibly high risks as partisan affiliations threaten public confidence whether or not there is actual bias. Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson implores us to recognize that the "impartial and detached judge is not merely a virtuous, lofty ideal," but "the essence of due process, the keystone of our concept of justice." (DPFOF, ¶ 11, Exhibit H, Order No. 00-07 at 10). Every litigant who walks into court should believe he or she will receive a fair hearing from the judge. A judge who announces his or her political affiliation is poisoning that atmosphere.

"Political parties and the partisan executive and legislative branches of government (and members thereof) are frequent litigants [before the courts]." (DPFOF, ¶ 11, Exhibit H, Order No. 00-07 at 10 (Abrahamson, C.J. concurring)). This is the reality.[2] If a judge was actually a registered member of one political party or another, would the judge truly be able to decide a case without bias? Would the public believe such a judge to be unbiased? The judicial code adheres to long-standing Wisconsin tradition, since the original Constitutional Conventions,

[2]In recent years, for example, the Wisconsin courts faced such partisan questions as: (1) whether the Republican gubernatorial candidate had violated campaign finance laws, *Green for Wisconsin v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 723 N.W.2d 418; (2) whether partisan members of the Legislature committed misconduct in office, *State v. Chvala*, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880, and *State v. Jenson*, 2004 WI App 89, 272 Wis. 2d 707, 681 N.W.2d 230, (3) a challenge by Republican legislative leaders regarding the Democratic Governor's authority to enter into Indian gaming compacts, *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666, and (4) a redistricting dispute brought by the Speaker of the Wisconsin Assembly, *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537.

by keeping partisan politics out of the judiciary and the judiciary out of partisan politics (*See* DPFOF, ¶ 44).[3]

It would not be possible, as plaintiff has suggested, for Wisconsin both to maintain a nonpartisan judiciary, and allow plaintiff and others to join and advertise their membership in a political party. The reality is that once the first judge announces party membership, it could become the norm, and might be highly likely to happen in a county, such as Milwaukee, with a strong partisan identification (*See* DPFOF, ¶ 49-50). Once formal party membership occurs, the judiciary is no longer nonpartisan. A nonpartisan judiciary and party membership for individual judges cannot exist co-exist. This is an attack on the entire nonpartisan structure of the Wisconsin judiciary.

2. *White I* does not require Wisconsin to establish a partisan judiciary.

The United States Supreme Court did not prohibit states from maintaining a nonpartisan judiciary with its decision in *White I*, nor did it require that states

[3]While three Wisconsin justices dissented on the Code revisions, the dissents were narrowly drawn. Justice Prosser dissented to the extent that the rules applied to candidates for judges "who have not yet become judges . . . and may never become judges." (*Id.*, Order No. 00-07 at 14). Justice Prosser did not specifically object to the rule requiring that judges not be a member of a political party, but indicated his support for SCR 60.06(2)(a) which provides that a "'candidate for judicial office shall not appeal to partisanship.'" (*Id.*, Order No. 00-07 at 15). Justice Roggensack dissented largely out of concern that the rule would not pass strict scrutiny under the *White I* case, stating: "While I personally believe that a nonpartisan judiciary is the better choice, I am not convinced that a 'better choice' is sufficient reason to support a compelling state interest." (*Id.*, Order No. 00-07 at 19-20). Justice Butler and Justice Prosser also joined Justice Roggensack's dissent as to SCR 60.06(2). Thus, even the dissenters on the court expressed an interest in maintaining a nonpartisan judiciary in Wisconsin and their dissent seems largely rooted in a fear that *White I*, precluded that long-standing tradition—a fear that is unfounded.

permit party affiliation by members of its judiciary. Instead, the Court struck down a Minnesota judicial canon that broadly prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. *White I* was entirely limited to speech regarding issues associated with a campaign for office, which the Court found to be "'at the core of our First Amendment freedoms.'" *White I*, 536 U.S. at 774. Minnesota's canon could have operated to prevent the voters from making an informed decision about those issues. The Wisconsin rules at issue here are far more confined, and limit neither the public's right to know about a candidate's position on the various issues of the day, nor a candidate's right to speak about those issues and address his or her suitability for the post sought. Instead, the rules address the qualifications for serving in a position, which is an area where the government has traditionally had wide discretion. *See Moss v. Martin*, 473 F.3d 694, 699 (7th Cir. 2007).

The plaintiff relies heavily on an Eight Circuit Court of Appeals decision in *White II* to support his argument that he is likely to prevail here on the merits. But, an Eight Circuit decision is not binding on this court, and the decision was thoroughly divided. The *White II* dissenting judges argued vigorously that the Minnesota partisan activities prohibition served the compelling state interests of assuring judicial open-mindedness and avoiding the appearance of judicial bias that denies litigants due process of law.

White II is a far-reaching extrapolation of *White I*. This court should be reticent to adopt *White II*'s holdings given the effect such a holding would have on

Wisconsin's nonpartisan judiciary. Indeed, even *White I*'s scope has been questioned by a member of its own narrow majority. Retired Justice Sandra Day O'Connor has suggested that she would have voted the other way had she known the implications the decision would have had on judicial independence.[4]

3. Wisconsin's nonpartisan judiciary is a longstanding tradition and entitled to a presumption of constitutionality.

The *White I* case recognized that a "universal and long-established" tradition of prohibiting certain conduct creates "a strong presumption" that the prohibition is constitutional." *White I*, 536 U.S. at 785. Although the nonpartisan, elected state judiciary may not be a universal tradition in the United States,[5] it is certainly common, and is definitely a long-established tradition in Wisconsin (DPFOF, ¶ 47). Wisconsin tried a partisan judiciary early in its history, and rejected it as a poor experiment (DPFOF, ¶ 27-29). The federal courts should be loath to overturn such a long-standing and well-functioning practice of a fellow sovereign. *See White I*, 536 U.S. at 785, citing *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 377 (1995) (Scalia, J., dissenting).

---

[4]*See http://en.wikipedia.org/wiki/Republican_Party_of_Minnesota_v._White* (last visited 10/15/2008), and Paul Greenberg, *Justice Sandra Day O'Connor regrets her 2002 vote allowing judges expression of their political views in Minnesota v. White*, *http://news.lawreader.com/?p=451* (last visited 10/15/2008).

[5]At the time of the Supreme Court's decision in *White I,* thirty one States held popular elections for some or all judges, and slightly more than half of those held nonpartisan elections. *White I*, 536 U.S. at 792 (O'Connor, J. concurring).

Wisconsin's partisan affiliation clause was first codified as part of the Judicial Code in 1968, but the Wisconsin tradition of a non-partisan, non-politically affiliated judiciary, dates from the turn of the twentieth century. Although early Wisconsin constitutional debates over a popularly-elected judiciary included the concern that an openly partisan judiciary would be subject to corrupting influences, (DPFOF, ¶ 23-25), the first nominations to the Wisconsin Supreme Court were partisan (DPFOF, ¶ 26). During the 1850s and 1860s, Wisconsin Supreme Court candidates continued to be selected largely on a partisan basis and elections were often conducted based on partisan and political issues (DPFOF, ¶ 27-28). Following several controversies, an informal tradition developed to maintain a partisan balance on the Wisconsin Supreme Court (DPFOF, ¶ 29). In 1878, when the size of the Court was expanded from three to five justices, legislative caucuses of both parties arranged to nominate one Democrat and one Republican as consensus candidates for the new seats to achieve balance on the bench. *Id.* The last judicial election contest with overt partisan tones was held in 1895 when Justice Winslow, a Democrat, narrowly won re-election over his Republican opponent (DPFOF, ¶ 30).

As Chief Justice, in 1915, Winslow headed a committee confirming the opinion that partisan considerations had largely vanished from judicial elections, noting that the retention of judges without political considerations has "tended strongly to make them independent and fearless and has well nigh put an end to the judge with his ear to the ground." (DPFOF, ¶ 41). A Wisconsin State Bar

committee reached a similar conclusion in 1938, issuing a report stating the following:

> Thanks to our completely nonpartisan judicial elections, and to the conscientious manner in which our governors of all parties have, in the main, made their judicial appointments in the past, the Wisconsin judicial system is not in any dire need of change.

(DPFOF, ¶ 46).

During the 1890's, amid a movement to weaken party control over the election process in general, the Wisconsin Legislature enacted several laws putting judicial elections on a nonpartisan footing (DPFOF, ¶ 34). The Wisconsin Statutes for 1913 and succeeding years required nonpartisan judicial elections and ballots affixing the words, "A Nonpartisan Judiciary" after the name of every candidate for judicial office (DPFOF, ¶ 37-38). Wisconsin Stat. §§ 5.58-5.60 were amended to provide explicitly that only nonpartisan candidates could be placed on the spring primary ballot for judicial and other offices (DPFOF, ¶ 40).

In 1998, the Wisconsin Supreme Court established the Fairchild Commission to develop and update the Code of Judicial Conduct as regards judicial campaign, election, and political activities, chaired by former Supreme Court Justice and Seventh Circuit Court of Appeals Judge Thomas E. Fairchild (DPFOF, ¶ 8). The Commission's final report states that, "A substantial majority of the [Fairchild] commissioners favor[ed] retaining the existing prohibitions on political party membership, leadership, and active participation by judges." (DPFOF, ¶ 8; Exhibit G).

The Wisconsin Supreme Court considered the Fairchild Commission report during open administrative conferences from 2000 through 2004 (DPFOF, ¶ 9). Part of

the reason for such lengthy consideration was the intervening United States Supreme Court decision in *White I* (DPFOF, ¶ 10). Ultimately, Court Order No. 00-07 "In the matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct—Campaigns, Elections, Political Activity," 2004 WI 134, was issued and filed on October 29, 2004, with an effective date of January 1, 2005 (DPFOF, ¶ 11).

By contrast with the long-standing history of the Wisconsin nonpartisan judiciary, the "announce clause" at issue in the *White I* case had begun to take root only recently, and was still not followed by many states at the time it was reviewed, with even fewer states having restrictions as specific and limited as Minnesota's. *White I*, 536 U.S. at 786. The selection process for Wisconsin's nonpartisan judiciary is not "relatively new to judicial elections," as was the Minnesota's announce clause. *Id.* Rather, Wisconsin tried a partisan election scheme immediately after statehood and abandoned it after the 1895 elections in favor of the system in use ever since. Thus, defendants' expert witness, Legal Historian Ranney, concludes:

> Wisconsin's decision to reduce the role of political parties in nominations and elections for office from the 1890s onward, together with the comments of the Winslow Committee and State Bar discussed above and the Legislature's decision to mandate nonpartisan judicial elections which has continued in effect from 1913 to the present, all demonstrate that Wisconsin's policy since the 1890s has been that the state's judges should maintain a nonpartisan appearance and should take care not to be perceived as advocates of a particular political party.

(DPFOF, ¶ 47). For two-thirds of her history, Wisconsin has maintained a nonpartisan judiciary. That is a long-established tradition worthy of a strong presumption of constitutionality.

4. The partisan affiliation clause is consistent with Wisconsin's expectation for other government officials where impartiality is of paramount importance.

"When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedoms." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). A Wisconsin judge must avoid extra-judicial activities that cast reasonable doubt on his or her capacity to act impartially (DPFOF, ¶ 15). In a similar vein, the Wisconsin Legislature has also decreed that certain government offices and positions are "strictly nonpartisan." See, for example, the legislative service agencies: Wis. Stat. § 13.91 (Legislative Council), § 13.92 (Legislative Reference Bureau), § 13.93 (Revisor of Statutes), § 13.94 (Legislative Audit Bureau), § 13.95 (Legislative Fiscal Bureau), and § 13.96 (Legislative Technology Services Bureau). The same is true of staff of the Wisconsin Judicial Council. *See* Wis. Stat. § 758.13(3)(g)2. The enabling statutes of the newly created Government Accountability Board, which regulates lobbying, ethics, and elections (Wis. Stat. § 5.05) requires that each member must be a former, elected judge, Wis. Stat. § 15.60(3), and that no member may belong to a political party. Wis. Stat. § 15.60(5).

The recognition that nonpartisanship was a compelling interest necessary to avoid improper influences appears in *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976),

and more recently in *McConnell v. FEC*, 540 U.S. 93, 144, 150-54 (2003),[6] upholding portions of the McCain-Feingold campaign finance law. The same concerns over such influences affect this case. Once the judiciary is partisan, "the candidate may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on that litigant for any hope of success in future elections." *Republican Party of Minnesota v. White*, 416 F.3d 738, 768 (8th Cir. 2005) (Gibson, J. dissenting) (hereinafter "*White II*").

To avoid even the appearance of such improper influences, the Supreme Court has upheld those portions of the Hatch Act prohibiting subordinate federal executive agency employees from running for partisan political office or otherwise playing substantial roles in partisan political campaigns, on the grounds that partisan entanglements were inconsistent with employment involving the impartial execution of the laws. *See U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973). If such concerns over improper influences led to these results for subordinate federal executive officers, surely they apply with greater force to the judiciary. The Hatch Act restrictions were not seen as interfering with an individual's political freedoms. Similarly, the nonpartisanship requirements are reasonable qualifications for office, and the government has wide discretion to structure such qualifications. *See Moss v. Martin*, 473 F.3d 694, 699

[6]The *McConnell* decision was seriously limited by the U.S. Supreme Court in *Federal Election Comm'n v. Wisconsin Right to Life*, ___ U.S. ___, 127 S. Ct. 2652 (2007), but not as to the analysis quoted here.

(7th Cir. 2007). The structure of Wisconsin's nonpartisan judiciary is entitled to similar respect.

B. The partisan affiliation restriction is narrowly tailored to serve the compelling state interest of maintaining a judiciary that is, and appears to be, impartial.

"[T]he limitations on partisan political activity in the Code [are] minor inconveniences compared to the great and compelling public interest of having judicial candidates and the judiciary demonstrate an understanding of, and commitment to, the nonpartisan rule of law." (DPFOF, ¶ 11, Exhibit H, Order No. 00-07 at 10-11 (Abrahamson, C.J. concurring). The rules prohibit political party membership by judges and judicial candidates (unless a candidate currently serves in a partisan position), but do not require judges to lead lives of seclusion. Judges are free to attend public events, even those sponsored by political parties, so long as they do not appear to be endorsing partisan candidates or otherwise engaging in prohibited activity. *See* SCR 60.06(2), Cmt.

1. The partisan affiliation clause is not overly inclusive because it does not prohibit activities necessary to run an effective campaign for election.

White I is concerned with the discussion of campaign issues of a judge or judicial candidate for election. *See White I*, 536 U.S. at 768 ("The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues"). In contrast,

Wisconsin's partisan affiliation clause does not limit a candidate's ability to conduct an effective campaign, but merely states the various qualifications for office.

Judge Siefert himself does not want to appeal to partisan rhetoric in his judicial campaigns, in fact, he believes that doing so would be a bad thing (DPFOF, ¶ 53). He would be unlikely to list himself as a Democrat in advertising (DPFOF, ¶ 52), and does not desire to use membership in the Democratic Party as a shorthand for his political viewpoint (DPFOF, ¶ 54). In fact, Judge Siefert agrees that he is not prevented from conveying those positions he associates with Democratic Party membership, to wit: social justice for the poor, and peace (DPFOF, ¶¶ 55-56). Nor does Judge Siefert believe that raising money for a judicial campaign is hindered by a judge's being nonpartisan (DPFOF, ¶ 59).

Other than his intention to use a party affiliation in response to candidate questionnaires, Judge Siefert did not, in his deposition, cite to any campaign-related concerns with the partisan affiliation clause (DPFOF, ¶ 51). Instead, Judge Siefert is sensitive to the problems of overt partisanship in political campaigns.

> I think the current presidential campaign has grown far too partisan in its tone, and I don't think that kind of partisanship is good in judicial elections or in any elections, including presidential elections.

(DPFOF, ¶ 53).

By his own admission, the partisan affiliation clause does not interfere with Judge Siefert's or a judicial candidate's ability to conduct an effective campaign for the nonpartisan office of a judgeship. Further, a party affiliation designation is not

necessarily a meaningful summary of an individual candidate's views. Judge Siefert concurs, pointing out that he does not agree with every element of the Democratic Party platform (PPFOF, ¶ 34). Judge Siefert does not need to join a political party to express his views on issues he thinks are important to a judicial campaign.

2. The partisan affiliation clause is narrowly tailored, and not under inclusive.

a. The fact that judges may join some groups, but not others, demonstrates that the restriction is narrowly tailored to achieve its goals.

In *White II*, the Eight Circuit struck down Minnesota's judicial code forbidding partisan political affiliation on the grounds that the restriction was not narrowly tailored to meet the compelling interests asserted. The Court found that the partisan activities ban was under inclusive because it did not forbid judges from joining other groups that take political positions, *White II*, 416 F.3d at 759, nor from being members of a political party up until the day they sought election as a judge, *Id.* at 758. It also found that a more narrowly tailored approach would be to apply the proviso in the judicial canon that a judge is to "'disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.'" *Id.* at 755, citing 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 3, subd. D(1).

With regard to the question of "under inclusiveness," the United States Supreme Court has upheld speech restrictions on strict scrutiny review where the measure was "tailored to address only the most critical threat to the governmental

interest, even where some threat to the asserted interest remained unaddressed." *See White II*, 416 F.3d at 776-77 (Gibson, J., dissenting), citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (Michigan restrictions on corporate campaign expenditures upheld), and the campaign finance decision of *McConnell*, 540 U.S. 93. In *Austin*, the challengers complained that labor union campaign expenditures were unregulated, but the Supreme Court rejected the under inclusiveness argument because corporations enjoyed greater government-conferred legal advantages. *White II*, 416 F.3d at 777 (Gibson, J, dissenting), citing *Austin*, 494 U.S. at 665. In *McConnell*, the plaintiffs contended that the provision of McCain-Feingold campaign finance law prohibiting the use of corporate or union money to pay for TV and radio advertising was under inclusive because it did not include print media or Internet advertising. The Supreme Court rejected that challenge because evidence supported the conclusion that television was the greater threat. *White II*, 416 F.3d at 777 (Gibson, J., dissenting), citing *McConnell*, 540 U.S. at 207-08. In short, perfection should not be made the enemy of the desirable.

Here too, plaintiff argues that the restriction is under inclusive because judges may not join political parties, but may join other groups. However, the judicial code in Wisconsin also limits a judge's participation in advocacy groups as it prohibits all extra-judicial activities that cast reasonable doubt on a judge's capacity to act impartially as a judge (DPFOF, ¶ 15). The Wisconsin Judicial Commission has issued an advisory opinion holding that a reserve judge was

prohibited from serving as president of a civic organization whose mission is to advocate social goals through litigation and legislative action (DPFOF, ¶ 20). In sum, the code provisions operate to prohibit a Wisconsin judge from belonging to such organizations as "Mothers Against Drunk Driving, pro victim/witness domestic violence organizations, Sierra Club or other advocacy organizations that are dedicated to a particular legal philosophy or position that could have an adverse impact on the public's perception of the judge's impartiality" (DPFOF, ¶ 19). It is not the Judicial Code itself that is under inclusive, it is plaintiff's interpretation.

Moreover, partisan affiliation poses a far greater threat than membership in civic organizations, because it is so much more pervasive. Wisconsin has tried partisan judicial elections and the outcome was not satisfactory. In partisan elections, it is well known that battles often devolve from debates over qualifications to mere party identification. The *White II* majority's other point, that a recusal policy will take care of the problem in a less restrictive way, loses its force when major party affiliations are involved. A judge who is a member of a charitable organization, can recuse him or herself when the organization appears as a party or supports a particular outcome of a case before that judge. A judge who, as Judge Siefert intends to do, declares himself to be a member of one of the major political parties, might have to recuse himself on any case where one of the parties (or a party member) was a litigant, or where the political party is supporting a particular outcome. Given the breadth and scope of political parties in modern American society, such a restriction would render a judge unable to sit on many,

many cases. The judge might believe that he could fairly decide cases raising partisan issues, but the litigants and the citizenry might not. Just as television advertising posed a greater threat to perceived corruption in *McConnell*, so does partisanship pose the greater threat to an impartial judiciary in this case.

Recusal is not, in any event, a workable option in a state like Wisconsin where there are many counties with only one or two judges. Recusals are generally considered to be a last resort, and it is entirely up to the judge to decide. *See* Wis. Stat. § 757.19. A partisan judge may simply choose not to recuse, leading a resultant partisan decision. Indeed, Judge Siefert sees no reason to recuse himself from a case involving the administrative agency managed by a politician that he supported (DPFOF, ¶ 58). If the judiciary, or a large part of it is partisan, then the ability of the courts to consider those issues that have partisan considerations become much hampered.

b. The partisan affiliation clause is narrowly tailored to account for the realities of elections.

The Wisconsin Supreme Court has drafted the partisan activities limitations as narrowly as possible. "A partisan political office holder who is seeking election or appointment to a judicial office may continue to engage in the partisan political activities *required* by his or her present position." SCR 60.06(2)(c) (emphasis supplied). The Wisconsin Supreme Court did not find a compelling interest to prevent individuals currently serving in partisan office from seeking a judgeship. To avoid being overly inclusive, the court crafted an exception to allow such a

candidacy. The exception is a narrow one, however, as it provides only that the public official may engage in those partisan activities "required by his or her present position." Thus, a state legislator running for judge could still caucus with the party before an important vote. The provision does not mean that the office holder in question could run a partisan campaign for judge. Those who argue that it does have failed to read the text of the code.

As applied to judicial campaigning, the clause only prohibits the identification with partisan politics. Candidates "may have aligned themselves with a particular political party and may have engaged in partisan political activities" in the past. SCR 60.06(2). Judges are not prohibited from attending public events sponsored by political parties, SCR 60.06(2)(d), nor are they prohibited from attending partisan political gatherings to promote their own candidacies. SCR 60.06(2)(e). But judges and judicial candidates all check those partisan labels at the door when they ask the voters to make them a judge. The judge-elect, in order to both appear and be fair and impartial, leaves partisan politics behind. The partisan affiliation clause, taken as a whole, is narrowly tailored to meet the compelling interests asserted.

II. THE PARTISAN ENDORSEMENT CLAUSE IS CONSTITUTIONAL.

A. The partisan endorsement rule serves the compelling state interest of assuring an impartial judiciary.

The endorsement clause prohibits a judge from making an endorsement in a partisan campaign. In doing so, the endorsement clause serves the compelling state

interest of ensuring litigants an impartial judge. "[T]he assurance of impartiality… is the fundamental requirement of due process." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 at 831 (1986) (Brennan, J., concurring). The endorsement clause does not attempt to limit expression of views or political activities necessary for a judicial candidate's election. The *White I* decision distinguished a candidate's expressing views on a party, from expressing views on an issue, *White I* at 776, finding the latter to violate the First Amendment.

Endorsing a candidate, in contrast, is not a form by which a candidate for judicial office announces his views on legal or political issues. Instead an endorsement risks conveying one's bias in favor of a particular, partisan, individual. Judge Siefert would like to endorse in numerous partisan offices, such as for president, governor, or the state legislature (DPFOF 57). By making an endorsement, Judge Siefert would be announcing to all that he favors and recommends those candidates, thus posing a direct threat to the public perception of his independence and impartiality. Moreover, while Judge Siefert indicates he would not intend to endorse under the title of "judge" (DPFOF 57), others could do so, and persons familiar with endorsements would certainly connect the judge's name with his office. In that way, the judge would be lending the prestige of his office to advance partisan interests.

Wisconsin's limitation on endorsements by judges appears to be the norm. The American Bar Association's model judicial code has long prohibited judges from

endorsing candidates for office. *See Model Code Jud. Cond.* 4.1(3) (ABA 2007).[7] Such endorsements are also prohibited by the federal judicial code. *See Canon 7A(2), Code Cond. Fed. Judges*.[8] The majority of experts on this question are in agreement that such an open display of bias harms a judge's ability to appear impartial.

State courts considering the matter have upheld judicial codes prohibiting endorsements. For example, the New Mexico Supreme Court concluded that their endorsement clause was intended to promote the "undeniable compelling state interest in promoting the reality and appearance of impartiality of our judiciary, which in this case means eliminating the potential for bias, or the appearance of bias for or against the parties appearing before a judge." *In the Matter of William A. Vincent, Jr.*, 172 P.3d 605, 608 (N.M. 2007). An endorsement clause has also been upheld in New York, *see In re Raab*, 793 N.E.2d 1287, 1297 (N.Y. 2003) and Florida, *see In rel Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)),* 603 S. 2d 494, 497 (Fla. 1992) and *In re Kinsey*, 842 So. 2d 77 (Fla. 2003). To the best of our knowledge, no court has ever found an endorsement clause similar to Wisconsin's to be unconstitutional.

---

[7]Available at *http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf* (last visited 10/15/2008).

[8]Available at *http://www.uscourts.gov/guide/vol2/ch1.html*

B. The partisan endorsement rule is narrowly tailored to serve that compelling state interest.

The Wisconsin endorsement clause serves the compelling state interest of assuring the public of an unbiased, impartial judiciary as narrowly as possible. Nothing in the code prohibits a judge from making an endorsement in a nonpartisan election. A judge may endorse another judge. The endorsement clause does not inhibit a judicial candidate in campaigning. No evidence has been presented to suggest that the endorsement clause prevents or limits a candidate from effectively communicating his or her message. The endorsement clause does not, in any way, prevent judicial candidates from "publicly opposing their opponents in an election," as plaintiff has argued (Plaintiff's summary judgment brief, p. 15). Judge Siefert's desire to endorse partisan candidates goes beyond what is necessary or integral to his own campaign for office.

The plaintiff suggests that the partisan endorsement clause is under inclusive because it does not prohibit a judicial candidate from accepting an endorsement, but the two are quite plainly not the same thing. The code cannot restrict the speech of others, but a judge who publicly accepted, say in campaign literature, an overtly partisan endorsement, *e.g.*, "I [prominent partisan politician] endorse _____ for judge because I know that he [or she] is a true [party label] at heart," would run afoul of the Judicial Code requirement that a "candidate for judicial office shall not appeal to partisanship." SCR 60.06(2).

Similarly, the clause is not unconstitutional because it permits judges to make nonpartisan endorsements. As we have said, the goal of the rules, in general,

is to "keep the judiciary out of partisan politics and partisan politics out of the judiciary." Unless an endorsement in a nonpartisan election was, in reality, a prohibited appeal to partisanship, the endorsement would not detract from the goal. Again plaintiff confuses "under inclusiveness" with "narrow tailoring." The partisan endorsement clause *is* narrowly tailored.

As with partisan affiliation, recusal is not a workable alternative to the prohibition. It is troubling that Judge Siefert acknowledged he would see no particular need for recusing himself from a case involving the administrative agencies of a governor who he had personally endorsed (DPFOF, ¶ 58). By endorsing a successful candidate for governor, does not a judge advertise his or her bias against those persons who may be challenging a decision of that governor's administration? Much litigation before Wisconsin's courts involves review of the actions of government or its employees. If a candidate endorsed by a judge is elected, that judge will appear to be biased in his or her favor. No matter how well-crafted and thought-out a judge's decision on that candidate's policies, it will not appear as the work of an impartial adjudicator. This is why endorsements by judges are so widely prohibited. This Court should uphold Wisconsin's endorsement clause as constitutional.

III. THE FIRST AMENDMENT DOES NOT PROHIBIT THE FUNDRAISING LIMITATIONS.

A. The solicitation clause serves the compelling state interest of eliminating direct coercion.

SCR 60.06(4) prohibits a judicial candidate from personally soliciting campaign contributions. The "great and compelling public interest" served by this provision is "that no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns." (DPFOF, ¶ 9, Exhibit H, Order No. 00-07 at 11 (Abrahamson, C.J. concurring)). Judges have great power to affect individual lives in given cases. This restriction is a minor one, particularly since many candidates for major offices set up committees to handle campaign finances. *See* Wis. Stat. § 11.056(2g).

> A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity.

In re Fadeley, 802 P.2d 31, 40 (Or. 1990) (upholding prohibition on personal solicitation of funds), *see also In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003) ("It is exactly this activity [personal solicitation] that potentially creates a bias or the appearance of bias.").

The plaintiffs in *White II* did not challenge the campaign committee structure *per se*. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit struck down a judicial canon prohibiting personal solicitation of campaign funds, but that canon also prohibited judicial candidates from personally soliciting

publicly stated support, which the Wisconsin judicial code does not. The *Weaver* court considered the questions as one. *Id.* at 1322. Moreover, the *Weaver* defendants evidently did not advance the interest of eliminating the potential coercision of a contributor by a personal solicitation from a judge, nor does the *Weaver* decision address that concern.

B. The solicitation clause is narrowly tailored to serve compelling state interests.

Plaintiff argues that the solicitation clause is not narrowly tailored to further a compelling state interest because the clause does not prohibit judges from discovering who made contributions to them. But, that is not the compelling interest the clause seeks to serve. The solicitation clause is meant to address the direct or indirect coercion an individual could experience if a judge is asking the individual directly for a contribution. It is a minor restriction indeed and appropriately tailored, for any individual would feel more pressured when asked directly by the judge to make a contribution, than where an individual received the solicitation from a committee.[9] In the case of a committee solicitation, the individual is not put immediately on the spot before the judge to make a favorable or non-favorable response. Any response is likely one of many to the committee, and when the judge or judicial candidate reviews the list of donors, the individual

[9]The Wisconsin Judicial Code is internally consistent on the point, prohibiting, for example, a judge from "personally participating in the solicitation of funds or other fund-raising activities" for organizations for which he she is permitted to join. SCR 60.05(3)(c)2.a.

will either appear as one name among many, or not appear as one name among many more.

The threat to public confidence in the courts by unfettered fundraising was also noted by Justice O'Connor:

> Even if judges were able to refrain from favoring donors, the mere possibility that judge's decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

White I, 536 U.S. at 740 (O'Connor, J. concurring). And the Third Circuit Court of Appeals upheld a ban on personal solicitation by judges permitting the state to "draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate." *Stretton v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 944 F.2d 137, 146 (3rd Cir. 1991).

The solicitation clause is not over inclusive in the manner that plaintiff suggests. The clause does not prohibit candidates from accepting contributions from good friends or co-workers.[10] It only requires that those contributions go through the committee. A judge may appear at his or her fundraising events and nothing in the code prohibits the judge from personally seeking an individual's support or an endorsement. It is only the financial contribution that must be requested by and made to the committee. The code does, however, prohibit a judge from "accepting" voluntary contributions, and is therefore not under inclusive on

[10]Spousal contributions could raise potentially complex issues owing to Wisconsin's marital property laws. The code does not address how such contributions should be handled. This is not a surprise as "[I]t is not possible to address [in the code] every conceivable conduct of a judge that might erode public confidence." SCR 60, Preamble, ¶ 9.

the point as plaintiff suggests (Plaintiff's summary judgment brief, p. 16). The restriction is neither over nor under inclusive, it is narrowly tailored.

Realistically, it is possible for a judge to know who contributed to his or her campaign both because that information must be available publically under campaign financing laws, and to provide the judge with the necessary information to make a recusal decision. Again, this balancing of interests and pragmatic approach does not render the system unconstitutional, but demonstrates that it is as narrowly tailored as possible to still achieve its goals.

Perhaps it is harder to raise money through a committee than by personal buttonholing as Judge Siefert suggests because people expect to be asked personally and do not understand the rules (DPFOF, ¶ 60). Many campaign finance limitations make the money raising chore more difficult. But the committee structure is a minor burden indeed when compared with the compelling interest of assuring that no person feels pressure to contribute in order to buy justice. The pressure exerted by buttonholing is probably substantially higher than is fundraising by committee, that is why plaintiff wants to do it.

Judge Siefert admits that he can use committees for fundraising, has used them, and has attended fundraisers for other judicial candidates organized by committees (DPFOF, ¶ 61). It is possible to run and win a judicial election by receiving donations through committees as both Defendant Judge Peterson and Plaintiff Judge Siefert have done (DPFOF, ¶ 60, 63-64). Indeed, many judges do no fundraising at all (DPFOF, ¶ 66-67). The committee scheme is thus narrowly

tailored to serve compelling interests in judicial impartiality and avoid the appearance of impropriety.

CONCLUSION

The defendants urge the Court to recognize the compelling interest served by the partisan activities and campaign donation restrictions of the Wisconsin Code of Judicial Conduct, to deny the plaintiff's motion for summary judgment, and to grant their cross motion for summary judgment.

Dated this 15th day of October, 2008.

J.B. VAN HOLLEN
Attorney General

s/Jennifer Sloan Lattis
JENNIFER SLOAN LATTIS
Assistant Attorney General
State Bar #1000387

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519

spar cases\siefert\sj materials\sj brief (century).doc