In the
United States Court of Appeals
for the Seventh Circuit

THE HONORABLE JOHN SIEFERT,
Plaintiff-Appellee,

v.

JAMES C. ALEXANDER, LARRY BUSSAN, GINGER ALDEN, LEO BACH, JENNIFER ORALES, JOHN R. DAWSON, DAVID A. HANSHER, GREGORY A. PETERSON, WILLIAM VANDER LOOP, MICHAEL R. MILLER, and HAMES M. HANEY, in their official capacity as members of the Wisconsin Judicial Commission;

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
The Honorable **Barbara Crabb**, Judge Presiding.

PETITION FOR REHEARING *EN BANC*

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Appellate Court No: 09-1713

Short Caption: Siefert v. Alexander

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The Honorable John Siefert

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bopp, Coleson & Bostrom

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Attorney's Signature: Anita Y. Woudenberg Date: 6-28-10

Attorney's Printed Name: Anita Y. Woudenberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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Table of Contents

Table of Authorities

Cases

Statutes, Rules, and Constitutional Provisions

Introduction

In the judgment of counsel, the panel's decision in this matter overlooks material points of law and conflicts with the U.S. Supreme Court decision *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)(*White I*) and other decisions of other circuits as explained more fully below, warranting a rehearing en banc. Specifically, on June 14, 2010, this Court[1] reversed the District Court's decision, which found unconstitutional Wisconsin's endorsement clause—which prohibits judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf of [a political party's] causes or platforms"—and its personal solicitation clause—which bans judges and judicial candidates from "personally solicit[ing] . . . campaign contributions." Wisconsin Supreme Court Rule 60.06(2)(b)(4), 60.06(4). In arriving at its decision, the Court determined that a balancing test was the proper analysis for the endorsement clause and "closely drawn" scrutiny was appropriate for the solicitation clause. Because the decision applies the incorrect level of scrutiny to core political speech as established in *White I* and is in conflict with precedent from other circuits, this decision should be reheard en banc.

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[1]The panel in this matter was comprised of Judge Tinder, who issued the opinion; Judge Flaum, who joined the opinion; and Judge Rovner, who dissented from the panel's decision on the endorsement clause.

Argument

For this Circuit to consider a rehearing en banc, one of two criteria must be satisfied: 1) the decision must conflict with a United States Supreme Court decision or a Seventh Circuit decision and should be reviewed to preserve uniformity, or 2) the decision is one of exceptional importance. F.R.A.P. 35(b). As demonstrated below, each criterion is met.

I. This Case Conflicts With U.S. Supreme Court And Other Circuit Court Precedent And Thereby Adversely Affects A Rule of National Application For Which National Uniformity Is Needed.

Core 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). Yet in finding the endorsement clause constitutional, the Panel employed a balancing test applied to government employees. Slip op. at 21. Likewise with the solicitation clause, the Panel employed "closely drawn" scrutiny, relying on *Buckley*'s application of "less rigorous 'closely drawn' scrutiny" to restrictions on contributions. Slip op. at 27 (*quoting Buckley,* 424 U.S. at 25). In doing so, the Panel has adopted a standard inconsistent with the strict scrutiny standard established in *White I* and has placed the Seventh Circuit in direct conflict with both the Eighth and Eleventh Circuits on this issue.

The United States Supreme Court *White I* decision reviewed Minnesota's announce clause, which prohibited judicial candidates from stating their views on disputed legal and political issues. *White I,* 536 U.S. at 768. In analyzing the this judicial campaign canon, the Supreme Court applied strict scrutiny, recognizing that the announce 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." *Id.* at 774.

Addressing the remainder of the judicial canon challenges post-*White I* in *Republican Party of Minnesota v. White*, 416 F.3d 738 (2005) (*White II*), the Eighth Circuit reviewed numerous other judicial campaign speech canons, including Minnesota's solicitation clause, which stated: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." *Id.* at 746. The *White II* court, like the Supreme Court, recognized the judicial campaign canons' inherent content-based, political scope and applied strict scrutiny. *Id.* 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.

Likewise, in the Eleventh Circuit decision *Weaver v. Bonner,* 309 F.3d 1312

(11th Cir. 2002), the court reviewed challenges to various Georgia judicial campaign canons, including its solicitation clause, which precludes judicial candidates from "themselves solicit[ing] campaign funds, or solicit[ing] publicly stated support." *Id.* at 1315. Like the *White II* court, the *Weaver* court determined that strict scrutiny was the appropriate standard, *id.* at 1319, and determined that, under such review, the challenged canons failed to serve any interest in judicial impartiality. *Id.* at 1322, 1323.

The remaining circuit that has reviewed clauses like the solicitation clause is the Third Circuit in *Stretton v. Disciplinary Bd. of Supreme Ct. of Penn.,* 944 F.2d 137 (3d Cir. 1991). There, the court reviewed Pennsylvania's solicitation clause under a lower standard like that employed by the Panel in this matter. *Id.* Significantly, this decision preceded the United States Supreme Court's ruling in *White I.*[2]

Unlike *Stretton,* both *White II* and *Weaver* grounded their decisions in the *White I* decision. *White II,* 416 F.3d at 753-54; *Weaver,* 309 F.3d at 1319. Together, they reflect a growing consensus on the appropriate standard of review for judicial campaign canons, properly premised on their content-based nature. The Panel's

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[2] Indeed, in addition to upholding Pennsylvania's solicitation clause, *Stretton* upheld the state's announce clause, casting serious doubt on the continued validity of its analysis. *See Stretton*, 944 F.2d at 145.

decision's efforts to return jurisprudence in this area to pre-*White I* standards is misguided and undermines the national uniformity needed in this area of law. Rehearing en banc is appropriate.

II. This Case Involves A Question of Exceptional Importance.

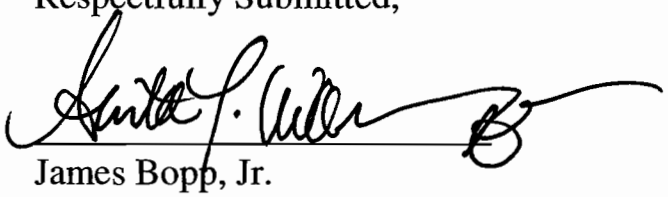
Establishing and maintaining uniform jurisprudential review of judicial canon challenges is of great national importance. As noted above, the Panel's decision is in conflict with the Court of Appeals decisions of the Eighth and Eleventh Circuits. *See White I,* 416 F.3d at 753-54; *Weaver,* 309 F.3d at 1319. Under Federal Rule of Appellate Procedure 35(b)(1)(B), a proceeding presents a question of exceptional importance "if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." The Panel's decision unnecessarily and incorrectly creates a conflict in the circuits. A rehearing en banc is therefore warranted.

Conclusion

For the foregoing reasons, the Honorable John Siefert, by counsel, respectfully requests that this Court grant his request for a rehearing en banc.

Dated: June 28, 2010

Respectfully Submitted,



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Certificate of Service

Undersigned counsel for the Honorable John Siefert hereby certifies that on June 28, 2010, two copies of their petition for rehearing *en banc*, were sent by U.S. Mail, proper postage pre-paid to:

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