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

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

**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## Introduction

On March 3, 2008, Plaintiff John Siefert brought suit in this court against the members of the Wisconsin Judicial Commission and the Director of Wisconsin's Office of Lawyer Regulation. Plaintiff's suit challenged the constitutionally of SCR 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) (collectively, "the challenged Canons") of the Wisconsin Code of Judicial Conduct. On July 18, 2008, Judge Siefert filed a Motion for Summary Judgment on these claims, along with a supporting memorandum. On October 15, 2008, Defendants filed their Response opposing this Motion. Pursuant to this Court's Order requiring that Plaintiff file his Reply on or before October 27, 2008, Judge Siefert now timely files his Reply.

## Argument

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Federal courts have long been vigorous in protecting the free speech rights of political candidates, including judicial candidates. In *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993), the Seventh Circuit struck down on First Amendment grounds an Illinois canon prohibiting judges from making pledges or promises in their campaigns other than the impartial performance of their duties. In *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the U.S. Supreme Court invalidated a Minnesota judicial canons that prohibited judicial candidates from announcing their views on disputed political and legal issues. And in *Duwe v. Alexander,* 490 F. Supp. 2d 968 (W.D. Wis. 2007), the Western District of Wisconsin invalidated several Wisconsin judicial canons on First Amendment grounds. For the reasons given below and in Judge Siefert's initial memorandum, the challenged Canons are likewise unconstitutional.

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

The political affiliation clause of SCR 60.06(2)(b)(1) provides that no judge or judicial candidate may "[b]e a member of any political party." An exception to this provision is provided by SCR 60.06(2)(c), which states that "[a] partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position." For the reasons indicated below, the political affiliation clause is unconstitutional on its face and as applied to Judge Siefert.

### A. The Political Affiliation Clause Is Not Justified by Wisconsin's Interest in Preserving Judicial Impartiality.

In *White*, the Supreme Court held that the state had a compelling state interest in preserving judicial impartiality towards parties. Nevertheless, *White* struck down a Minnesota judicial canon prohibiting judicial candidates from announcing their views on disputed legal and political issues, holding that the judicial canon was "barely tailored" to any interest the state had in protecting judicial impartiality. In *Republican Party v. White,* 416 F.3d 738 (8th Cir. 2005) ("*White II*"), the Eighth Circuit struck down a Minnesota canon prohibiting candidates from belonging to a political party, concluding that it likewise was barely tailored to any state interest in preserving judicial impartiality towards parties. The relevance of these cases to Judge Siefert's challenge to the political affiliation clause was articulated at length in his *Memorandum Supporting Plaintiff's Motion for Summary Judgment*.

Subsequent to the filing of *Plaintiff's Motion for Summary Judgment*, however, another court has weighed in on the constitutionality of the political affiliation clause, and has ruled that restrictions on political party membership by candidates violate the First Amendment. *Carey v.*

*Wolnitzek*, No. 06-CV-36-KKC 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008), involved a constitutional challenge to Kentucky's political affiliation clause. Kentucky's political affiliation clause was less restrictive than the one at issue here. Judges and judicial candidates were not prohibited outright from belonging to a political party, but were simply prohibited from publicly stating their party affiliation unless in response to a direct question. *Carey*, at *17. Nonetheless, the district court concluded that Kentucky's political affiliation clause was an unconstitutional restriction on protected political speech, and was not narrowly tailored to Kentucky's interest in preserving judicial impartiality, nor to any other compelling government interest. *Id.* at *19-21. For the reasons given in *Carey*, as well as those expressed in *White* and *White II*, the political affiliations clause is not narrowly tailored to Wisconsin's interest in preserving judicial impartiality towards parties, and should be deemed unconstitutional.

**B. The Political Affiliation Clause Is Not Justified by Wisconsin's Interest in Maintaining Public Confidence in the Courts.**

While Defendants do not argue that the political affiliation clause is necessary to prevent actual bias on the part of judges, they contend that the provision is necessary in order for Wisconsin to preserve "public confidence in the courts." (Defs' Resp. at 6.) This argument is inaccurate, for several reasons. First, it is not at all clear that the activities prohibited by the challenged Canons, if allowed, would actually reduce public confidence in the judiciary.[1] Minnesota, for example, allows judges to belong to political parties. Yet a recent poll of Minnesota residents found widespread

[1] *See* Erwin Chemerinsky, *Restrictions On The Speech Of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 742-43 (2002) (arguing that "public confidence in the courts is [not] fragile; quite the contrary, it seems resilient and a product of over 200 years of American history.")

public confidence in the courts, with 74% of respondents saying that they had "a great deal" or "some" confidence in the courts, and 76% saying that they had "a great deal" or "some" confidence in judges (higher rates than for any other category except the medical profession).[2]

Judicial elections have existed in Wisconsin since the late 1840s. (Defs' Prop. Facts ¶ 25.) Yet it was not until 1968 that Wisconsin judges were prohibited from belonging to political parties, and non-judge candidates were prohibited from belonging to political parties only in 2004. (Defs' Prop. Facts ¶ 7.) Thus, for the large majority of their existence, judicial elections in Wisconsin have co-existed with political party membership for judges and judicial candidates, without any noticeable ill effect either on judicial impartiality or on the public's confidence in the judiciary.

Far from undermining confidence in the judiciary, judicial elections can actually increase the perceived legitimacy of the judiciary, by giving the public a stake in the selection of judges, rather than having them selected through a sometimes secretive and political appointment process. In order to "tap the energy and the legitimizing power of the democratic process," however, states "must accord the participants in that process . . . the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788 (*quoting Renne v. Geary,* 501 U.S. 312, 349, (1991) (Marshall, J., dissenting)). Restrictions on a judge's ability to state his party affiliation could undermine public confidence in the judiciary, since there is a danger that silence on the part of judicial candidates could inspire the suspicion that they are hiding their views to mask their partiality or bias. *Bridges v. California*, 314 U.S. 252, 270-71 (1941) ("[A]n enforced silence, however limited, solely in the

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[2] Decision Resources Ltd., *Justice at Stake Study, Minnesota Statewide,* Questions 9, 11 (January 2008), available at *http://www.justiceatstate.org/files/MinnesotaJusticeatStakesurvey.-pdf*.

name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.")

In addition, while maintaining public confidence in the judiciary is no doubt important, no court has ever suggested that the state is justified in suppressing core political speech in order to maintain a positive public perception of the judiciary. No doubt public confidence in the judiciary could be damaged by private criticism of judges, their decisions, or the court system as a whole by individual citizens. Yet it would be absurd to suggest that this fact would make it permissible to ban anything that might result in criticism of the courts. Rather, the underlying assumption of the First Amendment is that public confidence in our institutions is strengthened when free and open debate is the norm. As such, Wisconsin's interest is preserving public confidence in the judiciary does not justify the challenged Canons.

### C. The Political Affiliation Clause Is Not Justified by Wisconsin's Interest in Maintaining Non-Partisan Judicial Elections.

Defendants argue that the bans on party membership is necessary in order to maintain the non-partisan nature of Wisconsin's judiciary. (Defs' Resp. at 8.) This is inaccurate. Wisconsin law provides that party designations for judicial candidates are not to be listed on ballots Wis. Stat. § 5.58-60. Plaintiff does not challenge this provision, nor does he wish to run a partisan re-election campaign or appeal to partisanship as a candidate or as a judge. (Pl. Prop. Facts ¶ 33.) He does not challenge the non-partisan nature of Wisconsin's judicial elections, but only wishes to be able to join the Democratic party as a private citizen apart from his election campaign.

While Wisconsin formally began non-partisan elections in 1913 the state did not prohibit judges from belonging to political parties until 1968, and did not prohibit judicial candidates from

belonging to a political party until 2004. (Defs' Prop. Facts ¶ 15, 37.) In fact, as Defendants themselves note, partisan considerations ceased to have a major impact on Wisconsin judicial races before the formal adoption of non-partisan elections for judges in the early 20th century. (Defs' Prop. Facts ¶ 31.) Prior to the adoption of the original ban on political party membership by judges in 1968, Wisconsin's judicial elections maintained their non-partisan character despite the fact that judges could be and often were members of political parties. In 1915, a committee headed by Chief Justice John B. Winslow reported that an "unwritten code" had developed in Wisconsin "by which a circuit judge who shows his fitness for the office is retained in the service without regard to political considerations term after term, has been of great service in rendering our courts stable, learned and respected." (Defs' Prop. Facts ¶ 41.) Likewise, in 1938, the State Bar Committee on Judicial Selection of the Wisconsin State Bar issued a report concluding that because Wisconsin's judicial elections were already "completely nonpartisan," no reform of the judicial system was needed. (Defs' Prop. Facts ¶ 46.) Since invalidating the political affiliations clause would simply restore Wisconsin law to its state during this period, Judge's Siefert's challenge to the political affiliations clause does not risk creating an overly partisan judicial branch.

Many states currently hold non-partisan elections for various state or local offices, yet do not prohibit candidates in those races from affiliating with a political party. Nor could they do so without violating the First Amendment. *See e.g., California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996) (holding unconstitutional on First Amendment grounds a California provision prohibiting political parties from endorsing candidates in non-partisan races). *White II* is instructive in this regard. *White II* involved a Minnesota judicial canon that prohibited judicial

candidates from "identify[ing] themselves as members of a political organization, except as necessary to vote in an election." *White II*, 416 F.3d at 746. The defendants in *White II* attempted to justify this provision on the grounds that it was "necessary to protect Minnesota's tradition of non-partisan judicial elections." *Id.* at 779 (Gibson, J., dissenting).[3] The Eighth Circuit, however, rejected this argument, holding that the state's interest in maintaining an independent and non-partisan judiciary did not justify suppressing protected political speech. *Id.* at 753.

Defendants note that under Wisconsin law various government offices and positions aside from judge are non-partisan. (Defs' Resp. at 14.) The relevance of this fact to Judge Siefert's challenge to the political affiliations clause is unclear. It should be noted, however, that aside from the newly created Government Accountability Board, Defendants do not indicate that the members of the non-partisan groups they cite are themselves prohibited from belonging to a political party. Indeed, the Wisconsin Judicial Commission is itself a non-partisan group. Yet the Wisconsin statutes governing the Wisconsin Judicial Commission do not appear to prohibit the Defendants who make up that organization from belonging to political parties.

Defendants next cite *Buckley v. Valeo*, 424 U.S. 1 (1976) and *McConnell v. FEC*, 540 U.S. 93 (2003), for the proposition that "nonpartisanship [is] a compelling interest necessary to avoid improper influences." (Defs' Resp. at 14.) Yet the portions of these opinions cited by Defendants do not mention nonpartisanship at all, let alone declare it to be a compelling government interest. Instead, those opinions deal with the potentially corrupting influence of large campaign contributions on legislative elections, a subject far removed from the circumstances of this case. *See*

[3] Like Wisconsin, Minnesota's judicial elections are non-partisan. M.S.A. § 204B.06.

*Buckley*, 424 U.S. at 26-27; *McConnell*, 540 U.S. at 144, 150-54. If due process were, in fact, compromised by allowing judges and judicial candidates to be members of political parties, then partisan elections would be unconstitutional.

Defendants, citing *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), also try to analogize the restrictions placed on judicial speech by the political affiliation clause to the restrictions placed on the speech of government employees by the Hatch Act. (Defs'. Resp. at 15.) This analogy fails badly: It is one thing to restrict the political speech and association of government employees; it is quite another to restrict the speech and associations of candidates for elective office. The voters have an obvious and constitutionally compelling interest in associating with and understanding the positions of candidates for office, while they have no such interest in the political views of non-elected governmental employees.

*Letter Carriers* upheld the Hatch Act because of concern that the federal workforce would become "a powerful, invincible, and perhaps corrupt political machine" and that "employees [must be] free from pressure and from express or tacit invitation to vote in a certain way in order to curry favor with their superiors." *Letter Carriers* 413 U.S. at 565, 566. In contrast, there is no concern that judges will build a "corrupt political machine" within Wisconsin's judicial branch absent the political affiliation clause.

As the U.S. Supreme Court noted in *White*, the role of judges is closer to the role of legislators than executive branch bureaucrats fulfilling ministerial functions in our jurisprudential system. Unlike executive branch functionaries, "[n]ot only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular." *White*, 536 U.S. at 78. From

this perspective, it is no more rational to forbid judicial candidates from belonging to a political party than it would be to forbid elected legislative or executive branch candidates from doing so. Rather than attempting to analogize this case to areas of constitutional law involving very different constitutional issues, this Court should follow the analysis for evaluating the constitutionality of state judicial canons set out in *White*, *Buckley*, and *Duwe*.

### D. The Political Affiliation Clause Is Not Narrowly Tailored to Any Compelling Government Interest.

Defendants contend that the political affiliation clause is not overinclusive because "it does not prohibit activities necessary to run an effective campaign for election." (Defs. Resp. at 16.) Nothing in *White* suggests that judges are protected by the First Amendment only in their directly campaign related activities. The right to associate with a political party is "a particularly important political right" under the Constitution, and remains so regardless of whether it is to the electoral advantage of a particular judicial candidate. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006); *see also Lungren*, 919 F. Supp. 1401.

Defendants next maintain that any underinclusiveness in the political affiliation clause does not render the provision unconstitutional, as it is "tailored to address only the most critical threat to the government interest, even [though] some threat to the asserted interest remain[s] unaddressed." (Defs' Resp. at 19) (*quoting White II*, 416 F.3d at 776-77) (Gibson, J., dissenting). This is incorrect. The political affiliation clause allows a "partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect" to remain a member of a political party. *See* SCR 60.06(2)(c). Judicial candidates are at least as likely to be biased for a political party when they hold partisan office as a member of that party as when they are simply members of that party. As

Judge Prosser noted in his dissent from the order amending the political affiliation clause, "[i]f the new rule actually serves 'a compelling state interest,' it is unfathomable why only some non-judge judicial candidates are required to follow it." Wisconsin Supreme Court Order 00-07 at 16.

Defendants contend that this exception is due to the fact that "the Wisconsin Supreme Court did not find a compelling interest to prevent individuals currently serving in partisan office from seeking a judgship." (Defs' Resp. at 19.) Plaintiff agrees. As the Eighth Circuit noted in *White II*, "[t]he few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity." *White II*, 416 F.3d at 758. Defendants offer no explanation, however, as to why allowing judicial candidates who are not partisan officeholders to belong to political parties poses a more "critical threat" to a compelling state interest than allowing judicial candidates who are partisan officeholders to do so.

The Wisconsin Code of Judicial Conduct explicitly provides that a "judge shall not become a candidate for a federal, state, or local nonjudicial elective office without first resigning his or her judgship." SCR 60.06(1m). If allowing judicial candidates to be members of political parties did pose a critical threat to a vital state interest, Wisconsin could have similarly required partisan officeholders to resign before becoming a judicial candidate, or it could have simply not included SCR 60.06(2)(c)'s exception, which would have had the same effect. Requiring partisan officeholders to resign before running for judicial office would no doubt have been inconvenient for some potential judicial candidates, just as the judicial resign-to-run rule is inconvenient potential judges turned candidates for partisan office. But if mere inconvenience leads a state to make exceptions to an otherwise applicable rule, this suggests that the state interest justifying that rule

cannot be that compelling. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Cf. White*, 536 U.S. at 780 ("As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

Aside from the exception for partisan officeholders, the political affiliation clause is also underinclusive in that it bans only political party membership, while allowing judges and judicial candidates to be members of other political organizations and groups, such as Mothers Against Drunk Driving or the Sierra Club, even though the risk to judicial impartiality associated with belonging to a political party is no greater than the risk that comes from belonging to other political organizations or groups. *See White II*, 416 F.3d at 759 ("A judicial candidate's stand . . . on the importance of the right to keep and bear arms may not be obvious from her choice of political party. But, there can be little doubt about her views if she is a member of . . . the NRA.")

Defendants contend that membership in such groups is banned by SCR 60.05(1)(a), which provides that "A judge shall conduct all of the judge's extra-judicial activities" so as to not "[c]ast reasonable doubt on the judge's capacity to act impartially as a judge." On its face, however, SCR 60.05(1)(a) does not speak to whether a judge can belong to an organization like Mothers Against Drunk Driving or the Sierra Club.[4] And while Defendants do cite an advisory opinion by the Judicial Conduct Advisory Committee prohibiting a reserve judge from serving as the president of an advocacy organization, the rationale of this opinion would seem to apply only to judges serving

[4] In certainly does not prohibit membership in these groups by judicial candidates, unlike the political affiliations clause.

in leadership roles in political organizations, and nothing in the opinion indicated that mere membership in an organization such as Mothers Against Drunk Driving or the Sierra Club was prohibited by the Code.[5]

Defendants also contend that membership in a political party "poses a far greater threat [than membership in other political organizations] because it is more pervasive." (Defs' Resp. at 20.) ("Wisconsin has tried partisan judicial elections and the outcome was not satisfactory.") Yet as Defendants themselves have conceded, the ultimate outcome of Wisconsin's partisan elections was that voters ceased to care about which party a candidate belonged to. (Defs' Prop. Facts ¶ 31.) Further, as noted above, Judge Siefert is not challenging the non-partisan nature of Wisconsin's judicial elections. He only wishes to be a member of the Democratic party. Wisconsin's experience with partisan judicial elections in the 19th Century is thus totally irrelevant to the merits of his constitutional claims.

Finally, Defendants challenge the idea that recusal provides a less restrictive means of achieving whatever state interests might be served by the political affiliations clause. According to Defendants, a "judge who, as Judge Siefert intends to do, declares himself 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." (Defs. Resp. at 20.) This is inaccurate for several reasons. First, it is not true that a judge would be required to recuse in a case simply because it involved an issue on which the party he belonged to had taken a position, let alone because he was a member of the same party as one of the litigants. In *Duwe*, the

[5] It should also be noted that, in *Duwe*, the court construed SCR 60.05(1)(a) narrowly in order to find it constitutional under *White*. *Duwe*, 490 F. Supp. 2d at 974.

Western District of Wisconsin declared unconstitutional the portion of Wisconsin's recusal canon that required candidates to disqualify themselves in cases involving issues on which they had previously announced their views. *Duwe*, 490 F. Supp. 2d at 977. If the fact that a judge has himself taken a position on an issue cannot be grounds for mandatory recusal, then the fact that the judge belongs to an organization that has taken a position on that issue cannot be grounds for mandatory recusal either.

Second, even in cases where a political party was a litigant, recusal would not be required as a matter of course, but would depend on the particular circumstances of the case. As the Eighth Circuit noted in *White II*, "even [when a political party was a litigant], any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party." *White II*, 416 F.3d at 755. Given the limited circumstances in which recusal can be required, Defendants have presented no compelling reason why it is more dangerous to allow judges to belong to political parties than it is for them to belong to other political organizations. Accordingly, the political affiliation clause must be deemed unconstitutional.

## II. The Endorsement Clause Is Unconstitutional Both Facially And As Applied to Judge Siefert.

The endorsement clause of SCR 60.06(2)(b)(4) provides that no judge or judicial candidate may "[p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." An exception to these provisions is provided by SCR 60.06(2)(c), which states that "[a] partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position." For the reasons indicated below, the endorsement clause is unconstitutional on its face and as

applied to Judge Siefert.

Defendants argue that the endorsement clause is necessary to protect judicial impartiality because "an endorsement risks conveying one's bias in favor of a particular, partisan, individual." (Defs. Resp. at 23.) The fact that a judge or judicial candidate has endorsed another candidate for political office does not necessarily mean that he would be biased in favor of that candidate. Even where a judge or candidate is biased in favor of the candidate he or she endorses, the endorsement would not be the cause of the bias, but would at best simply be evidence of that the bias already existed. Because the act of making an endorsement does not cause a judge or candidate to become any more biased than he was previously, prohibiting judges from making endorsements can at most only serve to hide a judge's bias, rather than to limit it. A judge or candidate who wants to endorse another candidate because he is biased in favor of that candidate but who is prevented from doing so by the Canons is no less biased than if he were able to make the endorsement. The only difference is that without the Canon voters and potential litigants would be better able to take the possibility of bias into account. Thus, although the endorsement clause does address speech for or against particular parties, it does not further at all the state's interest in preventing judicial bias towards parties.

Since the act of making an endorsement does not cause a judge or candidate to become biased, any justification for the endorsement clause must turn on the appearance of bias that the endorsement creates. "Concern about the mere *appearance* of bias," however, is best dealt with via recusal. *White II*, 416 F.3d at 755. As the Eighth Circuit noted in *White II*, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against a party to the case." *Id.*

While it is true that no federal court has yet addressed the constitutionality of the endorsement clause, the Supreme Court's decision in *White* and the Eighth Circuit's holding in *White II* compel the conclusion that the endorsement clause is unconstitutional. In *White*, the Supreme Court held that judicial candidates had the constitutional right to announce their views on disputed legal and political issues. *White*, 536 U.S. at 780. Judge Siefert wishes to publicly endorse candidates for public office, such as Barack Obama. (Plain. Prop. Facts ¶ 40.) In endorsing Senator Obama, Judge Siefert would be announcing his position on a disputed political issue, namely whether Senator Obama should be elected President. In addition, when a judicial candidate associates himself with another candidate, such as by means of an endorsement, this often serves as a "shorthand for the views a judicial candidate holds." *White II*, 416 F.3d at 754. As such, the endorsement clause serves to prohibit judicial candidates like Judge Siefert from announcing their views on disputed legal and political issues, and so must be deemed unconstitutional. *Id.*

Likewise, in *White II*, the Eighth Circuit held that judicial candidates had the right to receive endorsements. *Id.* at 754. Yet 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 become biased in favor or the endorsing party, as the endorsement has conferred a benefit on the candidate which he may feel pressured to repay. (Plain. Prop. Facts ¶ 48.) [6] The same is not true, however, when a judge or candidate makes an endorsement. Endorsements primarily benefit the endorsee, not

[6] In the same way, a judge who is appointed to the bench by a partisan political official such as a governor is more likely to feel gratitude and be biased in favor of or lack openmindedness in cases involving that governor than if the judge had simply endorsed a particular gubernatorial candidate. (Plain. Prop. Facts ¶ 49.)

the endorser. (Plain. Prop. Facts ¶ 47.)[7] In fact, endorsing another candidate is often politically dangerous, as by doing so one may alienate potential supporters who are opponents of the endorsed candidate, and may run the risk of being held responsible by the voters for the positions, statements, and actions of the endorsed candidate beyond the endorser's control. (Plain. Prop. Facts ¶ 46.) Since candidates are free, under *White II*, to accept such endorsements, they must be free to make such endorsements as well. *Id.*

The Eighth Circuit in *White II* also held that judicial candidates had the constitutional right to be a member of a political party, stating that "the underlying rationale for [a state provision banning the acceptance 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." The same reasoning applies to the endorsement clause. A judge or candidate's 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 than expressing himself on particular issues. In fact, associating with a party would have a greater potential impact on a judicial candidate's impartiality than associating with one or several individual candidates. Yet, such association cannot be prohibited under *White* and *White II.* Since candidates are free, under *White II*, to associate themselves with other candidates and issues by joining a political party, they must be free to make endorsements as well. *Id.*

[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.

Defendants cite several state court decisions that have upheld similar endorsement clauses against First Amendment challenges. *See In the Matter of William A. Vincent, Jr.*, 172 P.3d 605 (N.M. 2007); *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003); *In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b))*, 603 So.2d 494 (Fla. 1992). (Defs'. Resp. at 24.) Further examination of these cases, however, shows them to be of little persuasive value here.

*In re Code* is a pre-*White* decision whose analysis is not in keeping with *White*. While the Florida Supreme Court held that the endorsement clause furthered the state's interests in impartiality, it did not distinguish between the different senses of impartiality articulated in *White*, nor did it elaborate on how making endorsements implicated that interest. *See In re Code*, 603 So.2d at 499 (Kogan, J., dissenting) ("the majority takes as its 'compelling' interest a list of abstractions so poorly related to the present case as to be utterly beside the point.")

*Kinsey*, also cited by Defendants, does not involve a state judicial canon involving endorsements, but rather centered on a Florida canon prohibiting judicial candidates from "appear[ing] to commit" themselves regarding disputed legal issues. *See Kinsey*, 842 So. 2d at 80. Not only did *Kinsey* involve a different canon that the ones at issue in this case, but its holding is inconsistent with the Western District's decision in *Duwe*, which struck down a Wisconsin recusal canon because it used the "appear to commit" language. *Duwe*, 490 F. Supp. 2d at 977. *Kinsey* is relevant to this case only in that, as with the other cases cited by Defendants, it is one of a number of state cases that have attempted to limit the holding of *White*. Unlike here, "[t]hese state court cases all involve a disciplinary action against a judicial candidate for violation of the states' judicial canons" and are therefore of little persuasive value. *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d

1209, 1265 (D. Kan. 2006).

The other two state cases to examine the constitutionality of a state endorsement clause, *Raab* and *Vincent*, are similar both factually and in legal analysis. *Raab* involved a judge who had participated in a "phone bank" for the New York Working Families Party, calling prospective voters and, without using his name or identifying himself as a judge, urging them to support a particular legislative candidate running under the Working Families Party ticket. *Raab,* 793 N.E. 2d at 1288. After being charged with violating New York's endorsement clause, Judge Raab claimed his actions were protected under *White*. The *Raab* court rejected this argument, holding that *White* was limited to "conduct integral to a judicial candidate's own campaign" and did not apply to "activity in support of other candidates or party objectives." *Id.* at 1292.

*Vincent* involved a New Mexico state magistrate judge who was reprimanded for endorsing a candidate for mayor in his local newspaper. *Vincent*, 172 P.3d at 605-606. On appeal, Judge Vincent admitted that his conduct violated New Mexico's endorsement clause, but claimed that he was immune from discipline under *White*. *Id.* at 606. The New Mexico Supreme Court, however, held that *White* was distinguishable on two grounds. First, the court held that *White* was distinguishable because it "involved the announce clause, whereas this case involves what is often referred to as an endorsement clause." *Id.* at 607. Second, the court held that *White* was distinguishable because it "examined the free speech rights of a judicial candidate involved in his own election, whereas this case involves the free speech rights of a sitting judge to endorse another's political candidacy." *Id.*

These attempts to distinguish *White* fail. While it is true that only the announce clause was at issue in *White*, federal courts have subsequently applied the decision to state judicial canons

generally. *See*, *e.g.*, *White II*, 416 F.3d at 755 (striking down political activities and solicitation clauses under *White*). As such, the mere fact that the endorsement clause was not at issue in *White* will not serve to render the clause constitutional.

In addition, the distinction made by *Raab* and *Vincen*t between activities related to a candidate's own campaign and activities related to other campaigns has not basis either in *White* or in subsequent federal caselaw. The line between activities related to a judge or candidate's election and those related to the election of other candidates is not an easy one to draw. For example, Judge Raab participated in the Working Families Party phone bank in the hope that by doing so, he would increase his chances of receiving the Working Families Party endorsement during his next election campaign. *Raab,* 793 N.E. 2d at 1288. His actions, therefore, were related to his election, albeit indirectly. Nothing in *White* suggests that judges are protected by the First Amendment only in their directly campaign related activities. Just the opposite. As the *White* court noted, speech concerning the qualifications of candidates for public office is "at the core of our first amendment freedoms." *White*, 536 U.S. at 774 (*quoting Republican Party of Minnesota v. Kelly*, 247 F. 3d 854 (8th Cir. 2001)). Endorsements most certainly involve speech concerning the qualifications of candidates for public office. Any argument to the effect that endorsements are not speech protected by *White* must therefore be rejected.

Further, the *Raab* court's attempt to limit *White* to activities directly related to a candidate's campaign was implicitly repudiated by *White II*'s invalidation of Minnesota's political affiliation canon. Judges in Minnesota are elected on a non-partisan basis, and as such the ability to join a political party is not integral to a candidate's own campaign. Nevertheless, the court in *White II* struck down the political affiliation clause as being in violation of *White*. *White II*, 416 F.3d at 755.

The legal analysis provided by *Raab* and *Vincent* is contrary to the Eighth Circuit's decision in *White II*, and the cases are thus of little persuasive value in this case.

**III. The Solicitation Clause Is Unconstitutional Facially And As Applied to Judge Siefert.**

The solicitation clause of SCR 60.06(4) provides that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." According to the Defendants, the solicitation clause is not necessary because of any interest the state has in maintaining judicial impartiality. (Defs' Resp. at 28) ("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.") Rather, according to the Defendants the "great and compelling public interest" served by the solicitation clause is "that no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns." (Defs' Resp. at 27.) Preventing potential contributors from feeling pressure, however, is not a sufficiently compelling interest to justify restriction First Amendment rights. The state does have an interest in preventing corruption, and therefore could justifiably prohibit contributions that were solicited as part of a *quid pro quo*, it cannot ban solicitations simply to safeguard the subjective feelings of a potential contributor. *See Carey*, 2008 WL 4602786 at *16 ("It may also be more difficult for a solicitee to decline to contribute where the judge makes the solicitation himself rather than through an agent. However, the state does not have a compelling interest in simply making it more comfortable for solicitees to decline to contribute to judicial campaigns.")

Nevertheless, even assuming that the state does have a compelling interest in preventing coerced feelings, the solicitation clause still fails strict scrutiny, as it is not narrowly tailored to that

interest. Wisconsin's solicitation clause is not limited to cases where potential contributors feel or are likely to feel coerced by a solicitation. It applies broadly to all solicitations, regardless of context. As Justice Prosser noted in his dissent from the adoption of the rule, the solicitation clause prohibits "a candidate from personally accepting a check from the candidate's own spouse . . . [or] from personally accepting a contribution from a best friend or co-worker whose contribution was spontaneous and completely altruistic." Wisconsin Supreme Court Order 00-07 at 13. The solicitation clause is therefore overinclusive and overbroad. *See White II*, 416 F.3d at 766; *Weaver v. Bonner,*309 F.3d 1312, 1322 (11th Cir. 2002).

It should also be noted that this interest is in no way confined to contributions solicited by candidates for judicial election. A person may "feel directly or indirectly coerced" when solicited by a legislative candidate just as much as when solicited by a judicial candidate. In fact, the felt coercion could be greater in the case of legislative candidates, since it is generally unknown prior to an election whether a judge will ever sit on a case involving a potential contributor, whereas legislators have the authority to influence the law on whatever matters they so choose. So, if Wisconsin's purported interest in avoiding feelings of coercion does justify a ban on personal solicitation by judicial candidates, then it would equally justify a ban on personal solicitation by legislative candidates. But Wisconsin does not prohibit legislative candidates from personally soliciting campaign contributions. As such, the solicitation clause on its face and as applied to Judge Siefert is underinclusive and fails strict scrutiny. *See White,* 536 U.S. at 779-80; *White II,* 416 F.3d at 757.

To the extent that personal solicitation by candidates raises impartiality concerns, these concerns are inherent in the state's decision to elect judges in the first place. As the Eleventh Circuit

observed in *Weaver*:

> It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of be elected.

*Weaver* 309 F.3d at 1320.

Likewise, " [c]ampaigning for elected office necessarily entails raising campaign funds." *Id.* at 1322; *see also White*, 536 U.S. at 789-90 (O'Connor, J., concurring) ("Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.") The "fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected." *Weaver*, 309 F.3d at 1322. But even if some members of the public assume this is the case, this is ultimately a consequence inherent in the state's decision to elect its judges. *See White*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges").

While the solicitation clause does not further Wisconsin's interest in preserving judicial impartiality, it does serve the interests of incumbents. Because incumbents tend to have higher name recognition than challengers, and are more likely to have developed donor lists and contacts, it is easier for an incumbent to raise money through an intermediary than for a challenger to do so. (Plain. Prop. Facts ¶ 61.) As Justice Scalia noted in *McConnell*, an election "is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the

same quantity of electioneering, incumbents are favored." *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part and dissenting in part). If the only way for a challenger to defeat an incumbent is, as is often the case, to outraise and outspend him, restrictions on personal solicitation will serve eliminate the one advantage a potential challenger may have over an incumbent opponent.

## Conclusion

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

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Respectfully Submitted,

s/Michael D. Dean

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