No. 09-1713

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.

BRIEF OF PLAINTIFF-APPELLEE

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The Honorable John Siefert

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1713

Short Caption: John Siefert v. James C. Alexander, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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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:

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Michael D. Dean

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: _____ Date: 5/27/09

Attorney's Printed Name: Josiah Neeley

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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Attorney's Signature: _____ Date: 5/27/09

Attorney's Printed Name: Michael D. Dean

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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Pursuant to Federal Rule of Appellate Procedure 26, the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

None.

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Jurisdictional Statement

The Jurisdictional Statement in Appellants' brief is complete and correct.

Summary of the Argument

This Court should affirm the holding of the District Court striking down Wisconsin's bans on political party affiliation, public endorsements, and personal solicitation of campaign contributions by judicial candidates. Each of these provisions are content-based restrictions on the speech of judicial candidates, and thus are subject to strict scrutiny. None of the provisions, however, can pass strict scrutiny, as they are not narrowly tailored to a compelling government interest.

The political affiliation clause is not narrowly tailored to Wisconsin's interest in preserving judicial impartiality. The argument against allowing judges to associate with political parties will damage their impartiality differs only in form from the argument rejected in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that judges could not be allowed to announce their views on disputed legal and political issues as this would damage the judge's impartiality. The political affiliation clause is underinclusive of the State's interest in preserving judicial impartiality, as it applies only once the judge's candidacy is announced, and allows an exception for candidates who are partisan political officeholders. Further, to the extent that party membership does raise impartiality concerns, recusal provides a less restrictive means

of addressing those concerns than does a general ban.

Nor is the political affiliation clause narrowly tailored to any other compelling government interest. Wisconsin does not have a compelling interest in preserving judicial openmindedness, and even if it did the political affiliation clause is subject to the same defects regarding openmindedness as with judicial impartiality. The provision is not narrowly tailored to Wisconsin's interest in preserving the nonpartisan nature of judicial elections, as Judge Siefert is not challenging the ability of the state to hold nonpartisan judicial elections if it so chooses. And the provision is not narrowly tailored to Wisconsin's interest in preserving public confidence in the courts, as there is no evidence allowing judges to belong to political parties harms this confidence.

The endorsement clause is not narrowly tailored to any legitimate interest Wisconsin may have in preserving judicial impartiality. The fact that a judge has endorsed a candidate for a particular office does not imply that the judge is biased in favor of that candidate. Endorsements are inherently comparative in nature, and a person will often endorse a candidate not because they have a favorable opinion of the candidate as such, but simply because he views the other candidates as being worse. Further, even where a judicial candidate is biased in favor of the candidate he has endorsed, the endorsement does not create this bias but only reveals it. The

endorsement clause, therefore, does not further Minnesota's interest in limiting actual bias, as it can only serve to mask bias, rather than prevent it.

Nor can the endorsement clause be justified as a means of preventing the appearance of bias, as under *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) ("*White II*") concerns about the appearance of bias are best dealt with via recusal, and do not justify an outright prohibition on speech. The circumstances in which recusal is not a workable means of addressing Wisconsin's interest in avoiding the appearance of bias are quite rare at worst, and are no more common in the case of endorsements than in the case of other sorts of bias. The endorsement clause, therefore, is overinclusive and overbroad. Finally, even assuming that recusal is not a viable alternative to an endorsement ban for officeholders who frequently appear before a given judge, the candidates Judge Siefert seeks to endorse are not likely to be frequent litigants before him as judge, and thus the provision is unconstitutional as applied to him.

Wisconsin's solicitation clause is likewise not narrowly tailored to any compelling interest the state has in preserving judicial impartiality. Wisconsin does not have a compelling interest in preventing potential contributors from feeling pressured to contribute to a judicial campaign, and even if Wisconsin did have such an interest, To the extent that campaign contributions raise impartiality concerns, it

is the receipt of contributions, rather than their solicitation, that presents the real problem, and can be adequately addressed through the less restrictive means of contribution limits. Requiring that contributions be solicited through a committee, then, does not address the interest Wisconsin has in preserving judicial impartiality.

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), this Court 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 *White*, 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, 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." Restrictions on political party membership by judges have been declared unconstitutional by several federal courts. *White II*, 416 F.3d at 755, *Carey v. Wolnitzek*, No. 06-CV-36-KKC 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008).

The right to associate with a political party is "a particularly important political right" under the Constitution. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.") The political affiliation clause directly limits judicial candidates rights of free speech and association, and is therefore subject to strict scrutiny. *White II*, 416 F.3d at 749. To survive strict scrutiny, the law or regulation in question must be narrowly tailored to further a compelling

government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See*, *e.g.*, *Carey v. Brown*, 447 U.S. 455, 465 (1980). Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

For the reasons indicated below, the political affiliation clause is not narrowly tailored to any compelling government interest, and is thus 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.

The only recognized compelling interest justifying restrictions on judicial campaign speech and conduct is the state's interest in preserving judicial impartiality towards parties. *White*, 536 U.S. at 776.[1] This interest arises because of due process,

[1] *White* contrasted judicial impartiality as to parties with judicial impartiality as to issues, something which, according to the Court, was neither a possible nor a desirable quality in a judge. *White*, 536 U.S. at 777 (*quoting Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind at the time he joined the Court

which requires trial before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). While the Supreme Court found this interest compelling, it concluded that the announce clause was "barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues." *White*, 536 U.S. at 776.

A similar analysis should apply here. As noted by the Eighth Circuit, "the underlying rationale for the [prohibiting judicial candidates from belonging to political parties] – that *associating with a particular group* will destroy a judge's impartiality – differs only in form from that which purportedly supports the announce clause – that *expressing one's self on particular issues* will destroy a judge's impartiality." *White II*, 416 F.3d at 754. The fact that a judge belongs to a particular political party might warrant a judge's recusal in a case where that political party was a party.[2] But the political affiliation clause is overinclusive of this interest, in that it prohibits a judge or candidate from belonging to a political party altogether, instead of employing the less restrictive means of recusal in appropriate cases.

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was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias")).

[2] This is not to say, of course, that recusal would be warranted in every case involving a political party of which the sitting judge was a member. *See White II*, 416 F.3d at 755.

The Commission contends that the political affiliation clause is not overinclusive because "it does not prohibit activities necessary to run an effective campaign for election." (Comm. Brief at 28.) 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*, 548 U.S. at 256.

The Commission also challenges the idea that recusal provides a less restrictive means of achieving whatever state interests might be served by the political affiliations clause. According to the Commission, 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." (Comm. Brief at 32.) Thus, allowing judges to join political parties, it is claimed, would impede the administration of justice by requiring excessive recusals. 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. *See*, *e.g.*, *Sears v. Olivarez*, 28 S.W. 3d 611 (Tex. Ct. App. 2000) (holding that recusal was not required because a litigant's attorney was running for office on a political party ticket other than that of the judge); *see also Kozusek v. Brewer*, 546 F.3d 485, 490 (7th Cir. 2008) (stating that it does not "mak[e] sense" to conclude that "a party member aggrieved by an election can successfully sue under section 1983 simply because a rival party administered the election.")

In *Duwe*, the 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. Since whatever interests served by the political affiliation clause can be served via the less restrictive means of recusal, the provision must be deemed unconstitutional. *Rutan*, 497 U.S. at 75.

The political affiliation clause is also "woefully underinclusive" of the state's interest in preserving judicial impartiality towards parties, for two reasons. First, the clause is underinclusive in that it allows candidates to belong to and associate with political parties up until the day before they declare their candidacy. *White II*, 416 F.3d at 758 ("The partisan-activities clause bars a judicial candidate from associative activities with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for nonjudicial offices) up until the day he begins his run for a judicial seat."); *Carey*, 2008 WL 4602786 at *19 ("The political party affiliations of many candidates, however, are well known prior to the election. Even during and after the election, the political party affiliation of all candidates is readily discoverable through public records.") Prior to becoming a judge, Judge Siefert was an active member of the Democratic Party, and held office as a Democrat. While this prior political activity

has not caused Judge Siefert to be biased for or against any particular party, whatever risk to impartiality posed by his associating with the Democratic Party has already occurred. The political affiliation clause is therefore underinclusive. *White II*, 416 F.3d at 758; *Carey*, 2008 WL 4602786 at *19.

Second, 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). Since a judicial candidate is at least as likely to be biased for a political party when he holds partisan office as a member of that party than he is if he is simply a member of that party, SCR 60.06(2)(c)'s exemption for partisan officeholders serves to undercut any claim by the State that the political affiliation clause serves a compelling government interest. Thus, the political affiliation clause is not narrowly tailored to the State's interest in preserving judicial impartiality towards parties. *White II*, 416 F.3d at 766.

The Commission maintains 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." (Comm. Brief at 30) (*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." (A-App. 183.); *see also White II*, 416 F.3d at 758 (noting that "[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.")

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.")

The Commission argues that the Wisconsin Code of Judicial Conduct "limits

a judge's participation in other advocacy groups as it prohibits all extra-judicial activities that cast reasonable doubt on a judge's capacity to act impartially as a judge." (Comm. Brief at 31.) This is apparently a reference to 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.[3] And while the Commission does 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 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.[4]

The Commission also contends that membership in a political party "poses a far greater threat [than membership in other political organizations] because it is more

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

[4] 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.

pervasive." (Comm. Brief at 32.) ("Wisconsin has tried partisan judicial elections and the outcome was not satisfactory.") Yet according to the Commission own recounting, the ultimate outcome of Wisconsin's experiment with partisan elections in the Nineteenth Century was that voters ceased to care about which party a candidate belonged to. (Comm. Brief at 6.) 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. *See Carey*, 2008 WL 4602786 at *19 ("Permitting a candidate to reveal his political party in advertisements, speeches and discussions will not change the nominating structure of the election or appearance of the ballot.") Wisconsin's experience with partisan judicial elections in the Nineteenth Century is thus totally irrelevant to the merits of his constitutional claims.

B. The Political Affiliation Clause Is Not Justified by Wisconsin's Interest in Preserving Judicial Openmindedness.

In addition to preserving judicial impartiality towards parties, the *White* Court considered the possibility that states had a compelling interest in preserving judicial openmindedness. As defined by *White*, judicial openmindedness is the quality in a judge that "demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case," and "seeks to guarantee each

litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *White,* 536 U.S. at 778 (emphasis in original).

The Supreme Court did not hold that judicial openmindedness was a compelling state interest, holding that the announce clause was not narrowly tailored to this interest in any event. *Id.* ("It may well be that impartiality [in the sense of openmindedness] and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.") Nor should this Court. While openmindedness is no doubt valuable as an aspirational goal for judges, as a basis for prohibiting speech it is problematic.

Openmindedness is an improper standard by which to judge speech because it is inherently subjective. Openmindedness is an inner disposition, and as such it is extremely difficult to prove its presence or absence in a given case. Openmindedness does not preclude judges from having opinions on legal issues, even firmly held and strongly stated ones. *See id.* (openmindedness requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.") Judges often have strong legal opinions which can be forcefully stated. *See, e.g.*, *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989)

(Scalia, J., concurring) ("Justice O'Connor's assertion, that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); *Bush v. Gore*, 531 U.S. 98, 128-129 (2000) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.") Such statements do not, however, prove that a judge is not openminded, as a judge might have a strongly held view, and yet still be open to contrary arguments and evidence.

Because openmindedness is not a matter not of what a judge says but of his frame of mind, it cannot be adequately determined from a particular statement. The same statement, made by two different judges, may in one case be an expression that the judge is closeminded, while in the other it may not. Any attempt to restrict speech based on concerns about openmindedness would thus necessarily involve hypothesizing about the inner workings of a judge's psyche, and would, ironically enough, leave judges vulnerable to the biases and preconceptions of enforcement agencies. As the Supreme Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976), making the legitimacy of speech turn on the interpretation of third parties is

problematic, as it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43. Thus, Wisconsin's interest in preserving judicial openmindedness cannot be a compelling interest justifying the suppression of speech.

Nevertheless, even if Wisconsin does have a compelling state interest in preserving judicial openmindedness, the political affiliation clause is still unconstitutional, as it is "woefully underinclusive" as to that interest, for three reasons. *White*, 536 U.S. at 780. First, the clause is underinclusive in that it allows candidates to belong to and associate with political parties up until the day before they declare their candidacy. "The 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. Second, the political affiliation clause is underinclusive in that it bars only membership in a political party, while permitting a judge or judicial candidate to join other political organizations and groups. To the extent that being a member of a political party might threaten a judge's openmindedness on certain legal and political

issues, this threat is at least as present for judges who are members of other interest groups, if not more so. *See id.* 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.") Finally, as noted above, SCR 60.06(2)(c) exempts from the political affiliation clause "partisan political office holder[s] who [are] seeking election or appointment to judicial office or who is a judge-elect." As consequence, the political affiliation clause is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *White*, 536 U.S. at 780.

To the extent that the State does have a legitimate interest in preserving judicial openmindedness, this interest is better served through the election process itself. Voters expect a certain level of decorum in their judicial candidates, and do not want judges who do not have an open mind. Because of this, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 248 (1987); *see also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism,* 6 First Amend. L. Rev. 180, 190-91 (2007) (describing instances where judges have been

defeated in elections for making improper statements).[5]

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is also a danger that silence inspires the suspicion that they are hiding their views to mask their partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. Thus, "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941). For the reasons 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.

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

The Commission contends that "[a] nonpartisan judiciary and party membership for individual judges cannot co-exist." (Comm. Brief at 19.) The history of the Wisconsin courts, however, belies this claim. While Wisconsin formally began

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[5] Ironically, speech restrictions undercut the important role voters play in preserving judicial openmindedness. Preventing a judicial candidate from speaking on an issue will not keep a candidate from lacking an open mind on that issue, but it will keep voters from knowing that he is not openminded. *See* Alan B. Morrison, *The Judge Has Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 Ind. L. Rev. 719, 734 (2003).

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. (A-App. 112-13.) In fact, as the District Court noted, 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. (A-App. 111.) 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." (A-App. 113.) 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. (A-App. 113.) 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.

Wisconsin law provides that party designations for judicial candidates are not to be listed on ballots Wis. Stat. § 5.58-60. Judge Siefert 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. 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. *Carey*, 2008 WL 4602786 at *19 ("Permitting a candidate to reveal his political party in advertisements, speeches and discussions will not change the nominating structure of the election or appearance of the ballot.")

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.[6] 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*

[6] According to the American Judicature Society, at least a dozen states employ officially partisan elections for at least some judicial offices *See* American Judicature Society, "Methods of Judicial Selection" *available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cofm?state= (listing Alabama, Illinois, Kansas, Louisiana, Michigan, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia as states employing partisan elections for at least some judicial offices).

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).[7] 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.

The Commission notes that under Wisconsin law various government offices and positions aside from judge are non-partisan. (Comm. Brief at 25.) 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, the Commission does not indicate that the members of the non-partisan groups they cite are themselves prohibited from belonging to a political party. Indeed, the Commission is itself a non-partisan group. Yet the Wisconsin statutes governing the Commission do not appear to prohibit the members of the Commission from belonging to political parties.

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

The Commission next cites *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." (Comm. Brief at 26.) Yet the portions of these opinions cited by the Commission 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 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.

The Commission, citing *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), also tries 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. (Comm. Brief at 26.) 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*.

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

While the Commission does 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." (Comm. Brief. at 17.) 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.[8] Minnesota, for example, allows judges to belong to political parties. Yet a recent poll of Minnesota residents found widespread 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).[9] In fact, the evidence tends to suggest that,

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[8] *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.")

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

generally "the strictness of a state's code of judicial conduct does not significantly affect how impartially that state's judges are perceived." Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U.L. Rev. 781, 785 (2008).

As noted by the District Court, judicial elections have existed in Wisconsin since 1848. (A-App. 110.) 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. (A-App. 113.) 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*, 314 U.S. at 270-71 ("[A]n enforced silence, however limited, solely in the 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.

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."

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. During the 2008 campaign, Judge Siefert wished to publicly endorse candidates for public office, such as Barack Obama. In endorsing then-Senator Obama, Judge Siefert would have announced 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.*

The Eighth Circuit's decision in *White II* likewise supports a finding that the endorsement clause is unconstitutional. 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.[10] The same is not true, however, when a judge or candidate makes an endorsement. Endorsements primarily benefit the endorsee, not the endorser.[11] 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. Since candidates are free, under *White II*, to accept such

[10] 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.

[11] 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.

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.*

The Commission argues 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." (Comm. Brief at 36.) 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 as a litigant. Further, as the District Court rightly noted, even where a judge or candidate is biased in favor of the candidate he or she endorses "the prohibition on endorsements of partisan candidates can only mask a preference that a judge already has for a particular candidate. Forcing the judge to remain silent about his preference does not make his preference go away." (A-App. 155.)

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; see also* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 570 (2004) (arguing that the possibility of recusal as a "less-speech-restrictive alternative suggests that even the narrowest content-based prohibitions on truthful judicial campaign speech may be unconstitutional.")

Two federal district courts have upheld bans on endorsements by judicial candidates similar to the provision under consideration here. *Wersal v. Sexton*, 2009 WL 279935 (D. Minn. Feb. 4, 2009); *Yost v. Stout,* No. 06-4122 (D. Kan. November 16, 2008). In addition, several state courts have upheld endorsement bans against constitutional challenge. *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). As the District Court rightly noted, however, aside from *Wersal* "[m]issing from these decisions is any attempt to explain how the restriction furthered interests in eliminating bias or why recusal could not meet the state's interest." (A-App. 158.)

Wersal held that recusal was not a workable remedy in the context of the

endorsement clause "when a judge endorses an individual who is elected to a position where he or she is a frequent litigant" because "[i]n certain jurisdictions, particularly those with a small number of judges, this [would create] an insurmountable burden for the court system." *Wersal*, 2009 WL 279935 at *10. This argument, however, would at best only apply to a small proportion of endorsements banned by the endorsement clause. While there are certain officials, such as a sheriff or district attorney, who frequently appear in court, this is not true of most offices.[12] In particular, none of the offices for which Judge Siefert wishes to offer endorsements – President of the United States, Governor of Wisconsin, etc. – are frequent litigants before him.

In *White II*, the Eighth Circuit considered how membership in a political party might affect a judge's obligation to recuse should that party appear as a litigant in a case before the judge. *White II* acknowledged that recusal under such circumstances might sometimes be appropriate, such as, for example, where the case involved a redistricting dispute about how to draw the judge's own district. *Id.* In general, however, White II held that "the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case

[12] Nor are most jurisdictions limited to only one or two judges.

beyond simply having an 'R' or 'D,' or 'DFL' (denoting Minnesota's Democratic-Farmer-Labor Party) after his or her name." *Id.* The argument is also contrary to the position on recusal set forth in *White II*. *Id.* at 755 ("Through recusal, the same concerns of bias or the appearance of bias that Minnesota seeks to alleviate through the partisan-activities clause are thoroughly addressed.")

Likewise, if an election contest involving a candidate for sheriff endorsed by a particular judge were to come before that judge, recusal would be appropriate. But it is simply not the case, under *White II*, that a judge would be required to recuse herself from all cases involving the endorsed party as a litigant, let alone from all cases involving any arm of government that might somehow be associated with that candidate. As the District Court noted, taken to its logical conclusion this argument implies that "recusal standards should be abolished all together and replaced with prohibitions on judges' establishing any relationship that might later create a conflict." (A-App. 150-51.)

The presumption of impartiality on the part of judges is a fundamental principle of Anglo-American jurisprudence. *See* 3 William Blackstone, Commentaries 361 ("the law will not suppose the possibility of bias or favor in a judge"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 812, 820 (1986) ("the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and

whose authority greatly depends upon that presumption and idea.") Courts have accepted "the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect." *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) The arguments advanced in *Wersal* to justify the endorsement clause would replace this presumption of impartiality with a presumption of corruption.

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 the Commission, 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 than 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 numerous other state judicial canons. *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 *Vincent* between activities related to a candidate's own campaign and activities related to other campaigns was not based 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." Similar canons banning judicial candidates from making personal solicitations have been struck down by the Eighth and Eleventh Circuits, as well as by two federal district courts. *White II*, 416 F.3d at 766; *Weaver v. Bonner,*309 F.3d 1312, 1322 (11th Cir. 2002); *Yost,* No. 06-4122, 2007 at *18-23; *Carey*, 2008 WL 4602786at *17.

According to the Commission, the solicitation clause is not necessary because of any interest the state has in maintaining judicial impartiality. (Comm. Brief at 42) ("Appellee has argued 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 Commission 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." (Comm. Brief at 41.) 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." (A-App. 180.) The solicitation clause is therefore overinclusive and overbroad. *See White II*, 416 F.3d

at 766; *Weaver,*309 F.3d at 1322; *Yost,* No. 06-4122, 2007 at *18-23; *Carey*, 2008 WL 4602786at *17.

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; *Yost,* No. 06-4122, 2007 at *18-23; *Carey*, 2008 WL 4602786at *17.[13]

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[13] *See also* James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis, White, *and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 175, 201-206 (2008) (discussing constitutional difficulties involved in banning personal solicitation of campaign contributions by judicial candidates).

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. *See* C. Scott Peters, *Canons, Cost and Competition in State Supreme Court Elections,* 91 Judicature 27 (Jul.-Aug. 2007) (noting that "incumbents would likely benefit from less competitive elections if ethical restrictions make it more difficult for campaigns to communicate their views to voters.") 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. 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 affirm the District Court's ruling below.

Dated: May 27, 2009

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that this document, including all headings, footnotes and quotations, but excluding the corporate disclosure statement, table of contents, table of authorities, statement of related cases, statement of oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel, contains 10,540 words, as determined by the word count of the word-processing software used to prepare this document, specifically WordPerfect 12, which is no more than the 14,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(i).

Josiah Neeley

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format. The undersigned also certifies the disk/CD is virus free.

Josiah Neeley

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that he filed with the United States Court of Appeals, Seventh Judicial Circuit, 1 original, 14 copies, and 1 pdf on CD of the Brief of Appellees. Two copies and 1 pdf on CD of the Brief of Appellees were served upon the below-listed counsel of record by overnight express mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 27th day of May, 2009:

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Subscribed and sworn to before me
this 27th day of May, 2009.

_____ _____

Notary Public