

No. _____

**In The
Supreme Court of the United States**

TORREY BAUER, THE HONORABLE DAVID CERTO, AND
INDIANA RIGHT TO LIFE, *Petitioners*,

v.

RANDALL T. SHEPARD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

Petition for a Writ of Certiorari

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Questions Presented

This Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) established that the First Amendment protects judicial campaign speech and subjects regulation of such speech to strict scrutiny. Indiana, like many other states, has adopted judicial speech regulations that ban judicial candidates from personally soliciting campaign contributions, restrict certain partisan activities, and limit their campaign statements. The Seventh Circuit below reaffirmed its recent decision in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), rejected the strict scrutiny standard employed in *White* and by the Sixth, Eighth, and Eleventh Circuits, upheld all of the judicial candidate speech bans, and advised judicial candidates to pre-approve their campaign speech with the State.

- (1) Whether restrictions on judicial campaign speech are uniformly subject to strict scrutiny under the First and Fourteenth Amendments to the United States Constitution, which should be applied here;
- (2) Whether the personal solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
- (3) Whether the personal solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to personal solicitations of family members and close friends;
- (4) Whether the party leadership clause is unconstitutional under the First and Fourteenth

Amendments to the United States Constitution;

- (5) Whether the party leadership clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to serving as a delegate at a political party state convention;
- (6) Whether the party solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
- (7) Whether the party solicitation clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to encouraging individuals to become more politically involved by contributing for a political party;
- (8) Whether the party advocacy clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
- (9) Whether the party advocacy clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied to speaking at political club meetings on behalf of Republican judges and the Republican Party;
- (10) Whether the commits clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution;
- (11) Whether the commits clause is unconstitutional, under the First and Fourteenth Amend-

ments to the United States Constitution, as applied to judicial candidates answering the Indiana Right to Life questionnaire;

- (12) Whether vague or overbroad restrictions on judicial speech should be struck down as unconstitutional or should require the chilled speaker to seek government pre-approval instead;
- (13) Whether petitioners' challenge to the preliminarily enjoined but subsequently revised commitments clause is ripe;
- (14) Whether the commitments clause is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

Torrey Bauer, Judge David Certo, and Indiana Right to Life, Inc., *Plaintiffs-Appellants*;

Randall T. Shepard, Stephen L. Williams, Christine Neck, John C. Trimble, Mark Lubbers, Michael Gavin, John Feighner, Anthony M. Zappia, Sally Franklin Zweig, Catherine A. Nestruck, Corinne R. Finnerty, Fred Austerman, R. Anthony Prather, *Defendants-Appellees*;

Corporate Disclosure Statement

Petitioners have no parent corporation and are not a publicly held corporation. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioners Torrey Bauer, Judge Certo, and Indiana Right to Life, Inc. respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The order of the court of appeals affirming the district court is at WL 3271960. App. 1a. The district court opinion is at 634 F. Supp. 2d 912. App. 29a.

Jurisdiction

The court of appeals upheld the district court's decision on August 20, 2010. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 117a.
Indiana Canon 2.10(B) is at 117a.
Indiana Canon 4.1(A)(1), (2), (4), (8) and (13) is at 117a.

Statement of the Case

This case presents a constitutional challenge by Torrey Bauer, a 2008 judicial candidate who believes he will run again in a future judicial election; Judge David Certo, a sitting judge who anticipates running for reelection and a judicial candidate in Indiana's 2008 election; and Indiana Right to Life, Inc. ("INRTL"), a nonprofit organization who send out questionnaires to judicial candidates for its voter guide.

Judge Certo challenges Indiana's personal solicitation clause, party leadership clause, party solicitation

clause, and party advocacy clause, all found in Indiana Canon 4.1(A). These clauses ban personal solicitation of campaign contributions and political party involvement, prohibiting judicial candidates from engaging in such protected speech. Judge Certo claims these restrictions are unconstitutional on their face and as applied to the in-person solicitations and partisan activities Judge Certo wishes to engage in.

In addition, Plaintiffs Bauer, Certo and Indiana Right to Life also challenge the commits clause, found in both Indiana Canon 2.10 and Canon 4.1(A)(13), because it imposes a substantial burden on judicial candidates' political speech,¹ chilling Mr. Bauer and Judge Certo from announcing their views on disputed legal and political issues by answering Indiana Right to Life's questionnaire. It is unconstitutional on its face and as applied to Indiana Right to Life's questionnaire.

I. The Facts

Indiana Right to Life ("INRTL") is a non-profit educational organization that, among other things, collects and publishes data regarding judicial candidates' political philosophy and stance on disputed legal and political issues. AC ¶ 15. It has done this by sending out judicial candidate questionnaires. AC ¶ 21.²

¹ The case below also involved a challenge to Indiana's recusal clause. Indiana Canon 2.11(A). Petitioners are not seeking review of the Seventh Circuit's adverse ruling. App. 27a.

² Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Mr. Bauer, Judge Certo, and Mike Fichter, President of Indiana Right to Life,

In 2004, INRTL brought a legal challenge the promises and original commitments clause, Canon 5A(3)(d)(i) and (ii), and the general recusal clause, Canon 3E(1), because they were causing judicial candidates to decline to answer INRTL's questionnaire. *See Indiana Right to Life v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006) ("*Shepard I*"). Indiana Canon 5A(3) stated, in relevant part, that "A candidate for judicial office: . . . (d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" The promises and the original commitments clause were interpreted in Preliminary Advisory Opinion #1-02 ("Advisory Opinion"), after this Court's decision in *White*, to reach "broad statements relating to the candidate's position on disputed social and legal issues," because they "incur[] the risk of violating the 'commitment' clause and/or the 'promises' clause." (Doc. 19, Advisory Opinion, Ex. 1, at 4.) Ms. Babcock, as counsel to the Commission on Judicial Qualifications, also advised judicial candidates not to answer the 2004 INRTL Questionnaire, because doing so could violate these clauses. (Doc. 19, Babcock Dep., Ex. 16, at 41:21-23.)

The district court granted summary judgment against the Commission as to the former commitments clause. (Doc. 19, Judgment, Ex. 15.) However, on appeal, the Seventh Circuit determined that INRTL

Inc.

lacked standing to bring its suit because no clear evidence existed that a judicial candidate wanted to answer its Questionnaire. *Indiana Right to Life v. Shepard*, 507 F.3d 545, 549-550 (7th Cir. 2007).

In 2008, INRTL again solicited judicial candidates for responses to its identical 2008 Questionnaire. App. 123a. Judicial candidates who contacted the Commission about the propriety of answering this questionnaire were give identical answers:

In response to your question about a[sic] judicial candidates answering surveys, a candidate may not make pledges, promises, or commitments with respect to cases, controversies, or issues likely to come before the court on which the candidate will serve if elected or appointed. However, a candidate is free to express his or her views on social and legal issues.

(Comm. Resp., Doc. 19, attached as Ex. 3.) Attached to each response was Advisory Opinion #1-02, the commentary to a revised commits clause that was ultimately adopted, App. 122a, and an Advisory Memorandum from the National Ad Hoc Advisory Committee on Judicial Campaign Oversight. The memo advised judicial candidates to avoid citing the canons in responding to questionnaires like INRTL and offered sample language as to how to answer questionnaires. (Ad Hoc Memo, Doc. 19, attached as Ex. 5.)

Because so many candidates selected “decline” for their answer, INRTL did not publish the substantive responses it did receive, fearing that doing so would expose judicial candidates to discipline, AC ¶ 29, and brought this action, along with Plaintiffs Bauer and

Certo, against Defendants challenging the commitments clause. Mr. Bauer was a judicial candidate who risked potential discipline and answered the questionnaire. AC ¶ 28. Judge Certo was also a judicial candidate who declined to answer the questionnaire because of the commits clause. AC ¶ 32. Mr. Bauer lost his primary election in 2008, but Judge Certo was elected judge in the general election. Mr. Bauer expects he will run again in a future election. AC ¶ 28. Judge Certo will run to retain his judgeship in future elections. AC ¶ 32.

In addition, this case also included a challenge to Canon 5's personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on behalf of Judge Certo. Judge Certo wanted to personally solicit funds for his campaign from family members, former roommates and classmates—none of whom would affect his ability to be impartial any more than he is already affected. AC ¶¶ 40, 41. But Canon 5C(2) (the “personal solicitation clause”) prohibited judicial candidates from “personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support,” allowing them to instead form a committee for that purpose.

Judge Certo also desired to serve as a delegate to the Indiana State Republican Convention. AC ¶ 42, 43. He did not engage in these activities because Canon 5A(1) (the “party leadership clause”) prohibited judicial candidates from “(a) act[ing] as a leader . . . in a political organization.”

Judge Certo also wanted to but did not encourage participation in the political process by encouraging individuals to make contributions to the Republican

Party. AC ¶¶ 40, 41. But Canon 5A(1) (the “party solicitation clause”) prohibited judicial candidates from “solicit[ing] funds for, pay[ing] an assessment, slating fee or other mandatory political payment to, or mak[ing] a contribution to, a political organization or candidate.”

Last, Judge Certo wanted to speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature, a program designed to teach high-school students about Indiana’s legislature, with which he has participated in the past. AC ¶¶ 42, 43. And he wanted to speak at political club meetings on behalf of Republican judges and the Republican Party. AC ¶¶ 42, 43. But Canon 5A(1)(c) (the “party advocacy clause”) prohibited judicial candidates from “(c) mak[ing] speeches on behalf of a political organization.”

Judge Certo challenges the personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on their face. He also raises as applied challenges to them. He challenges the personal solicitation clause as applied to personal solicitations of family members and close friends. AC ¶¶ 90, 92. (Certo Decl., Doc. 50-2, ¶ 4.) He challenges the party leadership clause as applied to serving as a delegate at a political party state convention. AC ¶ 105. He challenges the party solicitation clause as applied to encouraging individuals to become more politically involved by contributing to a political party. AC ¶¶ 90, 92. (Certo Decl., Doc. 50-2, ¶5.) And he challenges the party advocacy clause as applied to encouraging students to become more politically involved in the Republican Party and to speaking at

political club meetings on behalf of Republican judges and the Republican Party. AC ¶ 105 (Certo Decl., Doc. 50-2, ¶3.)

Petitioners were given an injunction of the commitments clause on May 6, 2008. Relying on that injunction, INRTL recirculated its questionnaire, notifying judicial candidates of the injunction and published the results. AC ¶ 38.

Effective January 1, 2009, the Indiana Supreme Court amended the Indiana Code of Judicial Code. In light of this, the District Court directed Plaintiffs to amend their Complaint in relation to those new canons. (R. 64.) Because the revised canons were substantially identical to the prior canons, Plaintiffs incorporated the new canons into their constitutional challenge.

Canons 2.10(B) and 4.1(A)(13) (the new “commits clause”) prohibit judges and judicial candidates from, “in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” The Commentary to these clauses state that “[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.” App. 122a. Because of these canons, Judge Certo and Torrey Bauer will not answer any subsequent INRTL questionnaires and INRTL will not publish any responses it receives. AC ¶¶ 30, 32, 39.

The new Canon 4.1(A) retains substantively identical language from the original Canon 5 and prohibits judicial candidates from “(8) personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee” (the personal solicitation clause), “(1) act[ing] as a leader in or hold an office in a political organization” (the party leadership clause), “(4) solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office” (the party solicitation clause), and “(2) mak[ing] speeches on behalf of a political organization” (the party advocacy clause). Judge Certo continues to be prohibited from the personal solicitation, the party solicitation, the party leadership, and the party advocacy he desired to engage in under the old Code. AC ¶¶ 41, 43.

Petitioners suffer and will continue to suffer irreparable harm with no adequate remedy at law. AC ¶ 45.

II. The History of the Litigation.

In September 2004, Indiana Right to Life, Inc., Arline Sprau, and Mary P. Hall filed their Verified Complaint. *Indiana Right to Life v. Shepard*, 463 F. Supp. 2d 879, 881 (N.D. Ind. 2006). On November 14, 2006, the district court granted summary judgment to the Plaintiffs and declared the commitments clause unconstitutional. *Id.* On appeal, the Seventh Circuit ruled that plaintiffs lacked standing and dismissed the case. *Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007).

On April 18, 2008, Mr. Bauer, Judge Certo, and Indiana Right to Life filed their Complaint against

Canons 5A(3)(d)(i) and (ii) (the commitments clause) and 3E(1) (the general recusal clause). (Doc. 1.) Concurrently, they sought to preliminarily enjoin the commitments clause, which was granted on May 6, 2008. (Doc. 3, 23.) An Amended Complaint was filed on June 5, 2008, adding additional challenges to Canons 5A(1)(e) and 5C(2)—the personal solicitation clause and the party solicitation clause— and 5A(1)(a) and (c)—the party leadership clause and the party advocacy clause—on behalf of Judge Certo. (Doc. 25.)

Mr. Bauer, Judge Certo, and Indiana Right to Life sought summary judgment against all of the challenged canons on July 28, 2008. (Doc. 31.) The Court continued briefing for the motion on September 25, 2008, to allow for sixty days of discovery. (Doc. 37.) Because Judge Certo wished to engage in protected speech during the litigation, he sought a preliminary injunction against the personal solicitation clause, the party leadership clause, the party solicitation clause, and the party advocacy clause on October 1, 2008. (Doc. 39.) Both the summary judgment and preliminary injunction requests were denied as moot on March 23, 2009, in light of revisions to Indiana’s Code of Judicial Conduct. (Doc. 64.) At the District Court’s direction, Mr. Bauer, Judge Certo, and Indiana Right to Life filed a Second Amended Complaint to account for the changes to the Code, (Doc. 67), and refiled their Motion for Summary Judgment to reflect those changes on May 1, 2009. (Doc. 70.) They retained their challenge against the former commitments clause to ensure permanent protection for those who acted under the preliminary injunction previously granted by the District Court. The Commission also filed a Motion for

Summary Judgment on May 1, 2009. (Doc. 72.) The District Court ruled on the briefs, dismissing the former commitments clause claim as moot and uphold all provisions as constitutional under the First Amendment. (Doc. 83.)

Petitioners appealed the ruling on August 6, 2009. On August 20, 2010, the Seventh Circuit found Plaintiffs' claims against the former commitments clause to be unripe rather than moot, but otherwise affirmed the District Court decision, employing *Siefert's* holding and rationale to uphold the canons as constitutional.

Reasons for Granting the Petition

This case is an extension and expansion of the regime established by the Seventh Circuit in *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (petition for certiorari filed September 22, 2010), by approving the prohibition of ordinary, standard, and indeed, essential, campaign practices for judicial candidates, and by requiring judicial candidates to seek prior approval from the government before announcing their views on disputed legal and political issues. The Seventh Circuit reached this result by refusing to apply strict scrutiny to numerous restrictions on judicial candidate campaign speech and thereby upholding them as constitutional. This regime conflicts with this Court's holding in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and the Seventh Circuit has now extended that regime here to run afoul of *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*"), and *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

Not only is this regime—established in *Siefert*, expanded in *Bauer*—contrary to the Constitution and

this Court's First Amendment jurisprudence, but it also creates conflicts with those circuits that have applied strict scrutiny to strike restrictions on judicial candidate speech like those at issue here. This Court should grant a writ of certiorari to both Seventh Circuit cases and decide them on the merits.

I. This Case Involves The Important Question of Law of Whether Restrictions on Judicial Candidate Speech Are Subject to Strict Scrutiny, Which Should be Applied Here.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court applied strict scrutiny to Minnesota's announce clause to pronounce it unconstitutional. *Id.* at 774. This clause, which prohibited judicial candidates from stating their views on disputed legal and political issues, was not narrowly tailored to serve the State's compelling interest in impartiality. *Id.* at 776.

In reviewing Minnesota's announce clause, the *White I* court affirmatively cited *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), which had applied strict scrutiny to strike Illinois' announce clause. The Seventh Circuit acknowledged a conflict with the Third Circuit in *Stretton v. Pennsylvania*, 944 F.2d 137 (3d Cir. 1991), which had upheld Pennsylvania's announce clause, while applying strict scrutiny to it. *Id.* at 141, 146. But both cases applied strict scrutiny to the judicial campaign speech restrictions before them.

As more thoroughly demonstrated in the *Siefert* companion petition, circuit courts across the country have followed *White I*'s lead, applying strict scrutiny to

judicial campaign speech restrictions like those challenged here and in *Siefert*. See *Wersal v. Sexton*, WL 2945171 (8th Cir. 2010); *Carey v. Wolnitzek*, WL 2771866 (6th Cir. 2010); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (“*White II*”); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). (*Siefert* Pet. Cert., Part I.) The *Bauer* decision represents a continuation of the Seventh Circuit’s refusal to adhere to the principles articulated in *White I* and followed by other circuits and an expansion of the resulting regime to threaten the very speech this Court sought to protect in *White I*.

II. The Seventh Circuit Reiterates Its Unconstitutional Regime In Conflict With Decisions of This Court.

A. *Buckley*’s Lesser Scrutiny Is The Wrong Standard.

In analyzing the personal solicitation clause, the *Bauer* court adopted wholesale the rationale articulated in its recent *Siefert* case: that under *Buckley*’s lesser scrutiny, the personal solicitation clause was sufficiently tailored to support the state’s interest in impartiality, rendering it constitutional. App. 9a. But as the *Siefert* petition shows, this standard was for contribution limits, not direct, political speech. (*Siefert* Pet., Part II.A.) Applying anything less than strict scrutiny to judicial campaign speech continues to conflict with this Court’s jurisprudence.

B. A Balancing Test Is The Wrong Standard.

In upholding the party leadership clause, the party solicitation clause, and the party advocacy clause, the

court below extended its endorsement clause balancing analysis. App. 12a. For the reasons stated in the *Siefert* petition for writ of certiorari, the use of any standard but strict scrutiny conflicts with decisions of this Court and those circuits that have followed it. (*Siefert* Pet., Part I.B.) And indeed, the *Bauer* court acknowledges the conflict its balancing test creates but ultimately “remain[s] unpersuaded and [will] stick with *Siefert*’s analysis, which differentiates what judges can do in their own campaigns (the subject of *White I*) from how judges can participate in other persons’ campaigns (the subject of *Letter Carriers* and similar decisions).” App. 17a.

Because the wrong standards have been firmly established in the Seventh Circuit, this Court’s review is warranted.

III. The Decision Below Is In Conflict With Other Circuit Decisions On The Same Important Matter.

A. The Personal Solicitation Clause Is Unconstitutional.

Judge Certo would like to personally solicit campaign funds from family and friends. But Indiana’s personal solicitation clause prohibits judicial candidates from “personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee.” Canon 4.1(A)(8). Following *Siefert*, the court below applied *Buckley* to find it was sufficiently tailored to serve an important interest. App. 9a-10a.

As discussed in the *Siefert* certiorari petition, the Seventh Circuit’s decision to uphold the personal solicitation clause conflicts with that of the Sixth,

Eighth, and Eleventh. (See Siefert Pet. Cert. at Part II.A.) In fact, the *Bauer* court recognized it was reinforcing this conflict but reasoned that a circuit split already existed as to the solicitation clause's constitutionality and so saw little reason to deviate from *Siefert*. App. 11a. It derived this prior circuit split from *Stretton v. Disciplinary Bd. of Supreme Ct. of Penn.*, 944 F.2d 137 (3d Cir. 1991). In *Stretton*, the Third Circuit reviewed Pennsylvania's solicitation clause under strict scrutiny to conclude that the solicitation clause was constitutional because it served a compelling interest in minimizing coercion. *Id.* at 146.

Significantly, this decision preceded the United States Supreme Court's ruling in *White I*.³ So the Sixth, Eighth, and Eleventh Circuits—along with the Seventh—had the benefit of the *White I* decision, which recognized impartiality, not coercion, as a compelling interest. *White II*, 416 F.3d at 753-54; *Wersal*, WL 2945171 at *15; *Weaver*, 309 F.3d at 1319; *Carey*, WL 2771866 at *13. The Seventh Circuit's willingness to adopt *Stretton*'s analysis—though making every effort to make it appear that impartiality, not coercion, was the interest served—creates a post-*White I* circuit split that undermines the otherwise national uniformity established in this area of law. This conflict warrants Petitioners' writ to be granted.

³ Indeed, in addition to upholding Pennsylvania's solicitation clause, *Stretton* upheld the state's announce clause, casting serious doubt on the validity of its analysis in light of *White I*. See *Stretton*, 944 F.2d at 145.

B. The Party Leadership Clause Is Unconstitutional.

Judge Certo wants to be able to serve as one of the hundreds of delegates at the Indiana GOP Convention who nominate Republican candidates for election. However, Canon 4.1(A)(1) (the “party leadership clause”) prohibits judicial candidates from “act[ing] as a leader in or hold an office in a political organization.”

Having established a balancing test to review the endorsement clause in *Siefert*, the *Bauer* court extends the *Siefert* analysis to the party leadership clause, concluding that it is a constitutional exercise of the State’s “desire to prevent judges from using the prestige of office for other ends.” App.14a. According to the *Bauer* court, recusal for partisan involvement in party politics would be substantial, thus it is no solution to protecting this interest. App. 15a-16a.

This rationale conflicts with the fundamental premise of the Eighth Circuit’s analysis in *Wersal* and *White II*. That court acknowledged that “the underlying rationale for the party affiliation ban—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.” *Wersal*, WL 2945171 at *9 (quoting *White II*, 416 F.3d at 754 (emphasis in original)). And “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.” *Id.*

The same analysis is true of the party leadership clause. Involvement with the Republican Party is yet

another means of announcing views—both as the platform of the Party as well as to asserting views within the Party. While serving concurrently as a judge and as a state party chairman of a political organization might be trigger substantial impartiality concerns, the party leadership clause is not restricted to holding an office. Instead, it precludes leadership in any capacity. By virtue of being Republican judge, Judge Certo views himself as a leader in the Republican Party. His involvement in Republican Party as a delegate to announce his views within the party as to party nominations would not prevent him from being impartial should a case involving the Republican Party or its candidates come before him as judge. And in those rare instances where partiality might come into play, “recusal is the least restrictive means of accomplishing the state’s interest in impartiality articulated as a lack of bias for or against parties to the case.” *White II*, 416 F.3d at 754. The party leadership clause is not narrowly tailored and is overbroad.

Because of the *Bauer* court’s analysis conflicts with *White II*s, this Court should grant a writ of certiorari.

C. The Party Solicitation Clause Is Unconstitutional.

Judge Certo wants to be able to encourage individuals to financially support the Republican Party. However, the party solicitation clause prohibits judicial candidates from “solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office.” Canon 4.1(A)(4).

The *Bauer* court again extended the *Siefert* en-

dorsement clause analysis to the party leadership clause, concluding that it is a constitutional exercise of the State's "desire to prevent judges from using the prestige of office for other ends." App. 14a. According to the *Bauer* court, recusal for partisan involvement in party politics would be substantial, thus it is no solution to protecting this interest. App. 15a-16a.

And again, this rationale conflicts with the Eighth Circuit, which recognized that association and support of an organization was merely another form of announcing views. *Wersal*, WL 2945171 at *9 (quoting *White II*, 416 F.3d at 754 (emphasis in original)). It also recognized recusal as a sufficient means of addressing the rare instance of bias that would result from such association. *Id.*

The same analysis is true of the party solicitation clause. Advocating financial support for a political is a way to announce views both in line with and in support of the party. A judicial candidate might also indirectly support his own campaign, both through supporting the party on which he depends and through any financial support the party might direct his way during his campaign. And encouraging individuals to financially support the Republican Party, as Judge Certo wishes to do, would not prevent him from being impartial should a case involving the Republican Party or its candidates come before him as judge. In those rare instances where partiality might come into play, recusal continues to serve as the least restrict means of ensuring impartiality in the courts. *White II*, 416 F.3d at 754. The party solicitation clause fails strict scrutiny.

Because of the *Bauer* court's analysis conflicts with

*White II*s, this Court should grant a writ of certiorari.

D. The Party Advocacy Clause Is Unconstitutional.

Judge Certo wants to speak at political club meetings on behalf of Republican judges and the Republican Party and speak to students on behalf of the Republican Party. A particular passion of his is participating in the Eastern Indiana Model Legislature, a program designed to teach high-school students about Indiana's legislature and its politics, a program with which he has participated in the past. AC ¶¶ 42, 43. He would like to continue participating in the Model Legislature on behalf of the Republican Party. But he will not because Canon 4.1(A)(2)(c) (the "party advocacy clause") from prohibits judicial candidates "mak[ing] speeches on behalf of a political organization."

As it did with the other party-related clauses, the *Bauer* court extended *Siefert's* balancing test to conclude that the party advocacy clause is a constitutional exercise of the State's "desire to prevent judges from using the prestige of office for other ends." App. 14a. A narrower solution of recusal would not be adequate, because recusal motions would be substantial due to party involvement. App. 15a-16a.

This conflicts with *Wersal* and *White II*, which recognize that associating with a particular group is tantamount to announcing views. *Wersal*, WL 2945171 at *9 (quoting *White II*, 416 F.3d at 754 (emphasis in original)). Any claim of bias in such contexts must derive from more than "the bare fact that the judge had associated with that political party." *Id.*

The same analysis is true of the party advocacy clause. Speaking on behalf of a party at public functions is merely another form of announcing views. A judicial candidate's ability to agree with the policies of her political party by speaking out for that party are constitutionally protected, provided she does not go so far as to pledge or promise certain results in a particular case or class of cases. *White I*, 536 U.S. at 770. Judge Certo, as a leader within the Republican Party, is no more biased for the Republican Party by speaking on behalf of Republican judges and the Republican Party at political club meetings or with students than if he only stated his political affiliation with the party (which he is permitted to do). *See* Canon 4.1(C)(1) ("A judge in an office filled by partisan election, a judicial candidate seeking that office, and a judicial officer serving for a judge in office filled by partisan election may at any time: ... identify himself or herself as a member of a political party ..."). In the event partiality becomes an issue, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *White II*, 416 F.3d at 754. The party advocacy clause is not narrowly tailored to serve a compelling interest.

E. The Commits Clause Is Unconstitutional.

Mr. Bauer, Judge Certo, and other judicial candidates like them, would like to announce their views by answering INRTL's questionnaire without fear of penalty. The commits clause prohibits judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments

that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Canons 2.10, 4.1(A)(13). Comment 15 to Canon 4.1(A)(13) explains the scope of the rule, stating that “[t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.” App 122a. The Seventh Circuit’s ruling to uphold the commits clause is in conflict with the Sixth Circuit and its own jurisprudence and overlooks Petitioners’ as-applied challenge.

1. The Commits Clause Is Overbroad.

In reviewing the commits clause, the *Bauer* court focused on Petitioners’ overbreadth arguments. The court denied its application to INRTL’s questionnaire—though the Commission’s continued defense of the clause for six years of litigation might suggest otherwise—and suggested that, in as much as the clause might overreach, such overbreadth can be rectified through subsequent exceptions from the Commission and the Indiana Supreme Court. App. 24a.

This conflicts with the Sixth Circuit’s recent analysis in *Carey*. The *Carey* court reviewed Kentucky’s commits clause, which prohibited judicial candidates from “intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court.” *Carey v. Wolnitzek*, Nos. 08-6468, 08-6538, WL 2771866 (6th Cir. July 13, 2010) (*quoting* Kentucky Judicial Canon 5B(1)(c)). Despite being

narrower than Indiana’s commits clause—which has no scienter component—the *Carey* court expressed serious concerns about the scope of the commits clause before it. If the clause has only restricted itself to “judicial commitments with respects to cases and controversies,” the court would have been satisfied as to its constitutionality. *Carey*, WL 2771866 at *15. But it immediately recognized that the inclusion of “issues likely to come before the court” within its scope raised some serious ambiguities and had the potential to render it unconstitutional unless Kentucky could offer a sufficiently narrow construction to keep it outside the purview of *White I. Id.* at *16-17. While it did not enjoin the rule, it remanded consideration of the clause to the district court for further examination of the clause. *Id.* at *17. Lacking an narrower construction, the clause would fail constitutionally. *Id.* at *17.

Rather than rectify the fatal First Amendment flaws it recognized to exist in Indiana’s commits clause, the *Bauer* court dismisses those concerns, satisfied that the State can remedy them through advisory opinions and disciplinary proceedings. This remedy of the commits clause’s unconstitutional scope places the Seventh Circuit at odds with the Sixth Circuit. This Court should review the merits of that remedy.

2. The Commits Clause Is Unconstitutional As Applied To The Questionnaire.

Prior to this litigation, in Preliminary Advisory Opinion #1-02, the Commission formally stated that while “the Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their *general* views about disputed social and legal issues,” when

a judicial candidate makes more specific campaign statements relating to issues which maybe come before the court beyond, for example, the somewhat amorphous ‘tough on crime’ statement, or broad statements relating to the candidate’s position on disputed social and legal issues the candidate incurs the risk of violating the ‘commitment’ clause and/or the ‘promises’ clause.

(Advisory Op. #1-02, Doc. 19, at Ex. 1, pp. 2-3.) Throughout this litigation, the Commission has asserted that the questionnaire either falls under the purview of the commits clause or, at least, believes it is possible that it might---it hasn’t decided yet. *See, e.g.*, Admission Responses, at App 133a (“[the Commission] has not made a decision as to whether responding to the Questionnaire would constitute a promise or a pledge. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may constitute pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”); App. 132a ([the Commission] has not made a decision as to whether responding to the Questionnaire would constitute a commitment. Further, parts of the Questionnaire ask questions that may elicit answers which suggest the judicial candidate's predispositions on issues, which in turn, may commit or appear to commit the judge/judicial candidate to rule in a particular way if those issues are later presented to the judge.”) That it does or even could apply to the questionnaire renders the commits clause unconstitutional as-applied.

The questionnaire includes the following type

statements, to which the response can be “Agree,” “Disagree,” “Undecided,” “Decline,” “Refuse to Answer”:

I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.

...

I believe that abortion should be permitted only to prevent the death of the mother.

...

I believe that *Roe v. Wade* was wrongly decided.

...

I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.

App 124a-129a. Agreeing or disagreeing with any of these statements does not amount to anything more than an announcement of views on disputed legal and political issues. They do not ask the candidate to pledge or promise certain results in a particular case or class of cases, as is proscribed in *White I*. *White I*, 536 U.S. at 770. Instead, they solely seek the viewpoint of the candidate on disputed legal issues. In short, they fail directly within the scope of protected speech addressed in *White I*.

Indeed, while the *Bauer* court failed to acknowledge the continuing chill the commits clause’s vagueness imposes on candidates, a vagueness reinforced by the Commission’s contention that the commits clause applies or might apply to the questionnaire, the *Bauer* court concluded that the questionnaire only asks candidates to announce their views:

None of the nine questions calls for a “commit-

ment” or “promise” on any issue. A judge who answers yes to the first proposition (“I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development”) has not committed to defying *Roe v. Wade* and its sequels. The proposition concerns morals, not conduct in office. Statements of views on moral and legal subjects do not imply that the speaker will act in accord with his preferences rather than the law. ... *White I* holds that judges and judicial candidates are entitled to announce their views on legal and political subjects that will come before them as judges. 536 U.S. at 788. That’s all Indiana Right to Life’s questionnaire asks them to do.

App 18a-19a.

This conclusion not only places the questionnaire squarely under *White I*, it also should have dictated an unconstitutional ruling under a prior Seventh Circuit decision, *Buckley v. Illinois Judicial Inquiry Board*, 977 F.2d 224 (7th Cir. 1993). There, the Seventh Circuit struck down Illinois’ announce clause as an overinclusive regulation of constitutionally-protected speech. *Id.* at 229. Of greatest concern to the *Buckley* court was the breadth of proscribed speech under the announce clause:

The “announce” clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case ... it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict con-

structionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform. Cf. Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 86-87 (1990). All these are disputed legal or political issues.

Id. at 228. It is precisely these types of statements that the questionnaire inquires about. That the *Bauer* court would allow announced views to be chilled by a vague regulation conflicts with the *Buckley* decision.

Because the commits clause reaches announced views, the Seventh Circuit's failure to find the commits clause unconstitutional as applied to the questionnaire creates an intra-circuit split and conflicts with *White I*. Certiorari should be granted.

These circuit conflicts warrant a grant a writ of certiorari.

IV. The Seventh Circuit Expands Its Regime To Advocate Prior Restraint Of Judicial Campaign Speech In Conflict With This Court.

In reviewing the judicial canons at issue, the Seventh Circuit acknowledges the vagueness and overbreadth of three of the canons, but rather than strike the clauses as unconstitutional, the court directs

judicial candidates to solve this problem by engaging in a process fundamentally abhorrent to the Constitution: governmentally pre-approving speech.

A. The Seventh Circuit Acknowledges Facial Deficiencies.

In analyzing the personal solicitation clause, the party advocacy clause, and the commits clause, the Seventh Circuit recognized that the scope of the clauses were facially infirm, but rather than strike the clauses, it advises judicial candidates to seek advice from the Commission as the solution.

1. The Personal Solicitation Clause Is Overbroad.

Judge Certo asked the Seventh Circuit to allow him to personally solicit campaign funds from his family and from college friends. The personal solicitation clause prohibits judicial candidates from “personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee.” Canon 4.1(A)(8). Asserting that it has no reason to believe the state will act unreasonably in providing exceptions to the personal solicitation clause, the Seventh Circuit admonishes Judge Certo to “follow Indiana’s procedures for obtaining advice with respect to contributions from family members.” App. 10a.

2. The Party Advocacy Clause Is Vague.

Judge Certo also asked the court to allow him to speak out in support of the Republican Party at political club events and to students. But the party advocacy clause prohibits judicial candidates from “mak[ing] speeches on behalf of a political organization.” Canon 4.1(A)(2). The Seventh Circuit admits that the party advocacy clause is unclear as to its scope, but rather than find it unconstitutionally vague, it again admon-

ishes Judge Certo: “Indiana provides means of clarification. Judge Certo should use them.” App. 14a. It is enough for the *Bauer* court that, under *Siefert*’s balancing test, the principal justifications for the party advocacy clause are valid. App. 14a.

3. The Commits Clause Is Vague.

Judicial candidates like Mr. Bauer and Judge Certo wanted to announce their views by answering INRTL’s questionnaire. But the commits clause prohibits judges and judicial candidates from, “in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Ind. Canons 2.10, 4.1(A)(13). The Commentary to Canon 4.1(A)(13) states that “[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.” App. 94a.

The Seventh Circuit recognizes that the commits clause has an uncertain scope that may, in fact, proscribe announced views in contravention to *White I*. App. 23a-24a. But rather than declare the commits clause unconstitutional, the court recommends that the best way to ascertain that is “to wait and see.” App. 24a. After all, the Commission can issue advisory opinions or bring proceedings against judges that afford the state judiciary the opportunity to “make the rule more concrete.” App. 24a.

B. The Seventh Circuit Imposes Prior Restraint.

In each instance—with the personal solicitation clause, the party advocacy clause, and the commits clause—the Seventh Circuit is satisfied that the Commission can rectify Petitioners’ First Amendment harms. That judicial candidates should contact the Commission to either clarify a vague law or to secure exceptions to a clearly stated law is precisely the type of prior restraint abhorrent to the First Amendment.

In *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), this Court reaffirmed its longstanding view that “[t]he freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *WRTL*, 551 U.S. at 469 (*quoting Bellotti*, 435 U.S. at 776). The Court refused to establish a test that turned on the intent and effect of the speaker, reasoning that an intent test would “blanket[] with uncertainty whatever may be said,” and “offer[] no security for free discussion.” *Id.* at 468 (*quoting Buckley*, 424 U.S. at 43). Likewise, an effect test would “put[] the speaker ... wholly at the mercy of the varied understanding of his hearers.” *WRTL*, 551 U.S. at 468 (*quoting Buckley*, 424 U.S. at 43).

Indeed, this Court in *Citizens United v. FEC*, 130 S.Ct. 876 (2010) expressly disavowed such prior restraint: “The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.” *Id.* at 889. In *Citizens United*, the Court dismissed the FEC’s efforts to offer a limiting interpretation of BCRA’s corporate expenditure ban as unavail-

ing. It found the ban to be unconstitutional because “[p]roliferous laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’” *Id.* at 889 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). If such laws were allowed, the effect would be to vitiate pre-enforcement challenges and require speakers to either violate the law at the risk of an uncertain outcome, or remain unconstitutionally chilled.

Proscribing pre-enforcement challenges is precisely what the Seventh Circuit would have First Amendment jurisprudence do. Rather than adhere to this Court’s principles, the court below adopted an approach to the personal solicitation clause, the party advocacy clause, and the commits clause that is fundamentally at odds with *WRTL* and *Citizens United*.

Yet this is precisely what the Seventh Circuit advocates with regard to the personal solicitation clause, the party advocacy clause, and the commits clause. The Seventh Circuit’s approach encapsulates what the *WRTL* Court proscribed: a previous restraint in the form of Commission advisory opinions, or a fear of subsequent punishment through disciplinary proceedings. Neither is a constitutional solution to an otherwise infirm regulation.

Crucially, the Seventh Circuit failed to acknowledge that judicial candidates had already sought advice from the Commission with regards to the commits clause. The only assistance the Commission provided to judicial candidates in 2008 was to provide a near verbatim recounting of the relevant canon that the court acknowledges is vague, a copy of Advisory

Opinion #1-02—the vagueness of which formed the basis for the 2006 ruling striking the commitments clause, *Indiana Right to Life v. Shepard*, 469 F. Supp. 2d 879 (N.D. Ind. 2006)—and the equally vague commentary to the commitments clause that premises a violation on what a reasonable person would perceive. App. 122a. The only alternative, then, is for a candidate to risk both discipline and his good name to facilitate ascertaining the scope of the commitments clause. Such a remedy is contrary to *WRTL* and *Citizens United*.

Because the Seventh Circuit adopts a prior restraint approach to judicial campaign speech that is in conflict with this Court’s jurisprudence, this petition should be granted.

V. The Seventh Circuit Erred In Refusing To Review The Constitutionality Of The Commitments Clause.

A. The Commitments Clause Challenge Is Ripe.

On May 6, 2008, the district court issued a preliminary injunction of the commitments clause, which prohibits judicial candidates from “(i) mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court” Indiana Canon 5A(3)(d). In an effort to protect judicial candidates—including Judge Certo—who answered the questionnaire in light of the preliminary injunction, Petitioners have sought to have the commitments clause permanently enjoined. AC ¶¶ 38, 46-59.

The Seventh Circuit found the clause unripe. According to the Court, there are “too many unlikely steps [needed] to justify constitutional adjudication.” App. 7a. A candidate that responded to the questionnaire would need to be elected to the judiciary, be prosecuted by the Commission, and have the Indiana Supreme Court impose discipline. App 7a. And “[i]f the Commission ever hales ... anyone ... before the Supreme Court of Indiana on a charge of violating the former Canon 5A(3)(d), a defense based on the first amendment can be raised and adjudicated in the regular course.” App. 8a. In other words, no injury could be claimed unless the commitments clause is positively enforced.

Yet again, the Seventh Circuit seeks to subvert the pre-enforcement jurisprudence of this Court and undermine the chill component of constitutionally infirm laws. *See supra* Part II.B. The district court, in vacating her preliminary injunction, in effect upheld the commitments clause—which is essentially the new commits clause rearranged. So long as the commits clause is upheld, so too is the commitments clause. The threat of enforcement against those candidates acting under it is as real as it was when the district court decided it must enjoin it in the first instance.

Review of the constitutionality of the promises clause and the commitments clause is warranted.

B. The Commitments Clause Is Unconstitutional.

Mr. Bauer and Judge Certo want to answer INRTL’s questionnaire without threat of prosecution. Mr. Bauer responded to the 2008 questionnaire believing that the commitments clause was enjoined. AC ¶ 28. Judge Certo responded to the questionnaire under the

protection of the Court’s injunction. AC ¶ 38. However, the former commitments clause prohibits judicial candidates from “(i) mak[ing] pledges or promise of conduct in office other than the faithful and impartial performance of the duties of the office” and from “mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” Indiana Canon 5A(d)(i) and (ii). The clause has explicit in it the “appears to commit language” that makes it, like the commits clause, vague and overbroad, *see supra* Parts III.E.1 and IV.A.3, and cannot constitutionally be applied to the questionnaire, *see supra* Part III.E.2.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari, consolidate its consideration with the companion *Siefert* case, and decide this matter on the merits.

Respectfully submitted,

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