No. 09-1713

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN SIEFERT,

Plaintiff-Appellee,

v.

JAMES C. ALEXANDER, in his official capacity as the Executive Director of the Wisconsin Judicial Commission, et al.,

Defendants-Appellants.

Appeal from a Judgment of the United States District Court
for the Western District of Wisconsin
Case No. 08-CV-00126-bbc
Judge Barbara B. Crabb, Presiding

BRIEF AND SHORT APPENDIX OF DEFENDANTS-APPELLANTS

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JURISDICTIONAL STATEMENT

This case raises claims under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. The District Court for the Western District of Wisconsin had jurisdiction pursuant to 28 U.S.C. § 1331 & 1343(a)(3). The Court of Appeals for the Seventh Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

Defendants-appellants seek review of a final judgment of the district court entered on February 23, 2009. The timely notice of appeal was filed on March 18, 2009.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Wisconsin's state constitution provides for the election of its trial and appellate judges. The Supreme Court of Wisconsin maintains a code of judicial conduct assuring that Wisconsin's judiciary is unbiased and adheres to certain ethical obligations. The following questions are presented:

1. Whether Wisconsin's rule prohibiting judges and justices from joining political parties is an unlawful infringement of their first amendment rights of speech and affiliation.

2. Whether Wisconsin's rule prohibiting judges and justices from making partisan political endorsements is an unlawful infringement of their first amendment speech rights.

3. Whether Wisconsin's rule prohibiting judges and justices from

directly soliciting campaign funds is an unlawful infringement of their first amendment speech rights.

STATEMENT OF THE CASE

The plaintiff-appellee John Siefert, is a circuit court judge in Milwaukee County, Wisconsin. The defendants-appellants are the individual members of the Wisconsin Judicial Commission and its executive director. All were sued in their official capacity in a 42 U.S.C. § 1983 first amendment challenge filed on March 3, 2008.

The district court denied plaintiff's motion for a preliminary injunction on June 2, 2009 (Dkt. #30). On February 17, 2009, the district court granted plaintiff's motion for summary judgment and denied defendants' cross motion for summary judgment (Appellants' Appendix ("A-App."), at 103-167; Dkt. #71). The effect of the decision was to enjoin defendants from enforcing the three Wisconsin Supreme Court rules at issue in the case. This timely appeal followed.

STATEMENT OF FACTS

Judge John Siefert, has served as a Milwaukee County Circuit Court Judge since August 1, 1999 (Dkt. #19, ¶ 5). Appellant, James C. Alexander, is the executive director of the Wisconsin Judicial Commission since August 1, 1990 (hereinafter "the commission") (*Id.*, ¶ 1). Defendants Alden, Bach, Dawson, Hansher, Peterson, Vander Loop, Miller, and Haney are members of the commission (Dkt. #51, ¶ 8). The commission investigates the possible misconduct or permanent disability of a Wisconsin judge or court commission. Wis. Stat. § 757.85. "Misconduct," in this context, is defined by the Wisconsin statutes and includes the "[w]illful violation of a rule of the code of judicial ethics." Wis. Stat. § 757.81(4)(a) (Dkt. #19, ¶ 2). The code of judicial ethics is codified as the "Code of Judicial Conduct" in the Wisconsin Supreme Court Rules Chapter 60 (*Id.*, ¶ 3).

A. Text of the Challenged Rules

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

> (a) Individuals who seek election or appointment to the judiciary may have aligned themselves with a particular political party and may have engaged in partisan political activities. Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

[1]A complete copy of Supreme Court Rule 60 is in A-App. at 195-264; see also Dkt. #51, Exhibit P.

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

1. Be a member of any political party.

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

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

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

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

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

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

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

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

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

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

B. History of Wisconsin's Non-Partisan Judiciary

In early Wisconsin constitutional debates over a popularly-elected judiciary, concerns were expressed that an openly partisan judiciary would be subject to corrupting influences. Nevertheless, the first nominations to the Wisconsin Supreme Court were partisan (Dkt. #20, ¶ 5). During the 1850s and 1860s, Wisconsin Supreme Court candidates were selected largely on a partisan basis and elections were often conducted based on partisan and political issues. For example:

> a. In *In re Booth*, 3 Wis. 54 (1854) the Supreme Court held by a 2-1 vote, with Justice Samuel Crawford dissenting, that the federal Fugitive Slave Act of 1850 was unconstitutional. Following the Court's decision, Wisconsin defied federal efforts to enforce the law. Justice Crawford was defeated for re-election in 1855 largely because of his dissent in *Booth* and not because of concerns about his legal abilities.
>
> b. In *Ableman v. Booth*, 21 How. (62 U.S.) 514 (1859), the United States Supreme Court reversed the Wisconsin court's 1854 *Booth* decision. The Wisconsin Supreme Court then voted not to file the United States Supreme Court's decision, with Chief Justice Luther S. Dixon dissenting. *Ableman v. Booth*, 11 Wis. 501 (1859). Although Dixon was a Republican and his legal abilities were highly respected, the 1860 Republican convention refused to nominate him for re-election because of his dissent. Dixon was nominated by an independent convention and was narrowly re-elected.
>
> c. During the late 1840s and early 1850s, many Wisconsin farmers purchased railroad stock by giving promissory notes secured by mortgages on their land in order to obtain railroad service for their communities. Following a depression in 1857, many railroads went

> into receivership and financiers to whom they had sold the farmers' promissory notes attempted to foreclose on the mortgages. The Wisconsin Legislature enacted a series of laws promoting debtor relief, most of which the Wisconsin Supreme Court declared unconstitutional. During the early 1860s, many farmers and their supporters formed a Grand State League to promote debtor relief. The Democratic party, with the League's support, several times nominated Supreme Court candidates to oppose sitting justices up for re-election; the opposing candidates ran largely on a platform of debtor relief. No sitting justice was defeated, but the results were often quite close.

(Dkt. #20, ¶ 7).

As a result of the controversies described above, an informal tradition developed that there should be a partisan balance on the Wisconsin Supreme Court. In 1878, when the size of the Court was expanded from three to five justices, legislative caucuses of both parties arranged to nominate one Democrat and one Republican as consensus candidates for the new seats to achieve balance on the bench. *See* John Bradley Winslow, *The Story of a Great Court*, Chicago: T.H. Flood & Co. 1912, p. 380 (*cited in* Dkt. #20, ¶ 8, Exhibit D, and Dkt. #54, ¶ 3). The last judicial election contest with overt partisan tones was held in 1895 when Winslow, a Democrat, narrowly won re-election over his Republican opponent. (*Id.*, p. 382, *cited in* Dkt. #20, ¶ 9).

In 1909, the election of Justice John Barnes created an apparent Democratic majority on the Wisconsin Supreme Court despite the fact that voters consistently elected Republican governors and legislatures during this time and the Democratic party was very weak. Little attention was paid to Barnes' party affiliation or to partisan affiliations of the justices, demonstrating "the absolute disappearance of partisan

considerations" by that time. *See* Winslow, p. 385 (*cited in* Dkt. #20, ¶ 10, Exhibit D).

A committee headed by Chief Justice John B. Winslow considered possible improvements to the Wisconsin court system and submitted a report to the Legislature in 1915. The Committee confirmed Winslow's opinion that partisan considerations had largely vanished from judicial elections, stating:

> The unwritten code which has so happily developed in this state, 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. It has also tended strongly to make them independent and fearless and has well nigh put an end to the judge with his ear to the ground.

(Dkt. 54, ¶ 13, Exhibit M).

In 1913, the Legislature enacted a law that judicial elections must be held on a non-partisan basis (Laws of 1913, chapter 492, § 2). The law provided in pertinent part that: "No candidate for any judicial or school office shall be nominated or elected upon any party ticket, nor shall any designation of party or principle represented be used in the nomination or election of any such candidate" (Dkt. #54, ¶ 9). In 1965, the law was superseded by Laws of 1965, chapter 666 (Wis. Stats. 1967, §§ 5.58, 5.60). The 1965 law, which remains in effect today, provides that no party designation is to appear on the spring primary and general election ballots for judicial and certain other offices. (Dkt. #54, ¶¶ 11-12).

After completing a study, a 1938 Wisconsin State Bar Committee submitted a report stating:

> There will be no disagreement on the proposition that judicial office should be filled by those persons in the community who are best fitted through ability, experience, temperament and character to hold such office. In an electoral free-for-all, other and quite irrelevant considerations are pressed upon the voters. . . . Thanks to our completely non-partisan judicial elections, and to the conscientious manner in which our governors of all parties have, in the main, made their judicial appointments in the past, the Wisconsin judicial system is not in any dire need of change."

(Dkt. #54, ¶¶ 17-18). The Committee then recommended that no further action be taken beyond continuing to discuss the topic of methods of judicial selection (*Id.*, ¶ 18).

In Legal Historian Joseph A. Ranney's opinion, Wisconsin's decision to reduce the role of political parties in nominations and elections for office from the 1890s onward, together with the comments of the Winslow Committee and State Bar discussed above and the Legislature's decision to mandate non-partisan judicial elections which has continued in effect from 1913 to the present, all demonstrate that Wisconsin's policy since the 1890s has been that the state's judges should maintain a non-partisan appearance and should take care not to be perceived as advocates of a particular political party (Dkt. #54, ¶ 19).

C. The Wisconsin Code of Judicial Conduct

The Code of Judicial Conduct that took effect on January 1, 1968,

contained the first code provision prohibiting partisan political membership in the Wisconsin Judiciary (Dkt. #19, ¶ 4). In 1998, the Wisconsin Supreme Court established the Fairchild Commission to develop and update the Code of Judicial Conduct as regards judicial campaign, election, and political activities, chaired by former Supreme Court Justice and Seventh Circuit Court of Appeals Judge Thomas E. Fairchild. The report of the Fairchild Commission was filed on June 4, 1999, and a public hearing was held on November 7, 1999. The Fairchild report recommended continuing the code provision prohibiting partisan political membership (Dkt. #19, ¶ 6, Exhibit G).

The provision of the code that forms the basis for this lawsuit was enacted by Wisconsin Supreme Court Order No. 00-07 "In the matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct—Campaigns, Elections, Political Activity," 2004 WI 134, was filed October 29, 2004, with an effective date of January 1, 2005 (A-App. at 168-193; Dkt. #19, ¶ 9, Exhibit H). The order followed open administrative conferences from 2000 through 2004 (*Id.*, ¶ 7). Part of the reason for such lengthy consideration was the intervening United States Supreme Court decision of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), finding unconstitutional a Minnesota cannon of judicial conduct (Dkt. #19, ¶ 8,).

Wisconsin Supreme Court Rule ("SCR") 60.05, limits a Wisconsin judge's extra-judicial obligations, and, in particular, prohibits extra-judicial activities that cast reasonable doubt on the judge's capacity to act impartially as judge.

(SCR 60.05(1)(a), A-App. at 210, and Dkt. #51, ¶ 1, Exhibit P). The rule specifically prohibits a full-time judge from appearing at a public hearing in matters other than those related to the law, the legal system or the administration of justice or when acting *pro se* in a matter involving the judge or the judge's interests. (SCR 60.05(3)(a), A-App. at 210). However, the rule permits a judge to "serve as an officer, director, trustee or nonlegal advisor . . . of a nonprofit educational, religious, charitable, fraternal, sororal or civil organization. . . ." subject to limitations. (SCR 60.05(3)(c), A-App. at 211; Dkt. #51, ¶ 2). SCR 60.03(2) provides that a judge may not allow social, political, or other relationships to influence the judge's judicial conduct or judgment, nor lend the prestige of the judicial office to advance the private interests of others, or permit the impression by others that they are in a special position to influence the judge (A-App. at 200; Dkt. #51, ¶ 3). The Comment to SCR 60.03(1) provides that ". . . a judge must accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." (A-App at 199; Dkt. # 51, ¶ 4).

These code provisions taken as a whole operate to prohibit a Wisconsin judge from belonging to such organizations as Mothers Against Drunk Driving, pro victim/witness domestic violence organizations, Sierra Club or other advocacy organizations that are dedicated to a particular legal philosophy or position that could have an adverse impact on the public's perception of the judge's impartiality (Dkt. #51, ¶ 5). The Judicial Conduct Advisory Committee

has held that a reserve judge is prohibited from serving as president of a civic organization whose mission is, in substantial part, to advocate social goals through litigation and legislative action (Dkt. #51, ¶ 6, Exhibit Q; Opinion 00-5, 1/8/2002).

C. Judge Siefert's Complaint

Appellee, Judge Siefert, wishes to join the Democratic Party so that he may explore running for partisan office as a Democrat (Dkt. #46, p. 6, ll. 5-16), apply for U.S. Marshall as a Democrat (*Id*., p. 7, ll. 16-25), serve as a delegate to the Democratic National Convention (*Id*., p. 23, ll. 23-25), and be involved in the politics of participation (*Id*., p. 13, ll. 19-25).

As a judicial candidate, Judge Siefert would like to list his membership in the Democratic Party in response to candidate questionnaires (Dkt. #46, p. 9, ll. 1-5; p. 17, ll. 3-7). Judge Siefert does not know with certainty whether he would list himself as a Democrat in advertising (*Id*., p. 9, ll. 12), but believes that he most likely would not do so because he would not want to stress partisanship in his re-election campaign (*Id*., p. 16, ll. 20-21; p. 17, ll. 1-2). In particular, Judge Siefert would not want to appeal to overheated rhetoric of a partisan nature (*Id*., p. 17, ll. 11-17): "I think the current presidential campaign has grown far too partisan in its tone, and I don't think that that kind of partisanship is good in judicial elections or in any elections including presidential elections." (*Id*., p. 51, ll. 16-20). Judge Siefert does not necessarily desire to use membership in the Democratic

Party as a shorthand for his political viewpoint which is, most importantly, a desire for social justice for the poor, and for peace (*Id.*, p. 13, ll. 8-13; p. 14, ll. 12-17; p. 15, ll. 5-18). Nor does Judge Siefert agree with every element of the Democratic Party platform (Dkt. #34, ¶ 13).

There were no Republican candidates on the partisan ballot in Milwaukee County, where Judge Siefert serves, in the 2008 elections because Milwaukee is a Democratic county (Dkt. #46, p. 32, ll. 3-17). Thus, in judicial races in Milwaukee it is more common that both of the candidates, if they could profess a party affiliation, would profess a Democratic Party affiliation (*Id.*, p. 32, ll. 3-6).

Judge Siefert would have liked to endorse Barak Obama for president, though not using his "Judge" title (Dkt. #46, p. 26, ll. 12-19). He would like to endorse in other partisan offices such as Governor or the Legislature (*Id.*, p. 27, ll. 13-16). If he had endorsed a gubernatorial candidate for office, Judge Siefert would see no particular need for recusing himself from a case involving that governor's administrative agencies (*Id.*, p. 27, ll. 21-22).

Judge Siefert understands that he can use committees for fundraising, has used them, and has attended fundraisers for other judicial candidates organized by committees (Dkt. #46, p. 34, ll. 13-19; pp. 10-19). Indeed, many Wisconsin judicial candidates raise only small amounts of money for campaigns (Dkt. #52, ¶¶ 2-3 and Dkt. #54, ¶¶ 2-3).

SUMMARY OF ARGUMENT

The impartial judge is the keystone of a functioning judicial system and lies at the heart of the right to due process. Wisconsin has chosen, since statehood, to elect its judges, and since the early twentieth century those elections, and the Wisconsin judiciary itself, have been nonpartisan. Eliminating partisanship from the judiciary is the best, and perhaps only way, to assure that the judiciary is impartial and available to decide the significant matters presented to it while still permitting Wisconsin's citizens to select judges through election as we always have. This action seeks to reverse this essential and century-long practice by asserting that Wisconsin interferes with a judge's First Amendment rights if it forbids partisan activities. The defendants ask this court not to force Wisconsin down a path of such radical change.

The Wisconsin Judicial Code provisions at issue do not inhibit a judicial candidate's ability to communicate his opinions and qualifications for elected office. Wisconsin has a compelling interest in the code of judicial conduct that should withstand first amendment strict scrutiny. Judicial impartiality, when defined as a lack of bias for or against a party, is a compelling state interest as is maintenance of the appearance of impartiality. Moreover, the code provisions relating to a judge's partisan activities and campaign fundraising create a tight fit between this compelling interest and the means to assure it.

ARGUMENT

Judge Siefert argues that his rights as a judge and/or judicial candidate to join a political party, make partisan endorsements, and personally solicit campaign contributions, were clearly established by the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (hereinafter "*White I*"). But *White I* does not establish the particular rights asserted. This case raises entirely different issues than were before the United States Supreme Court in *White I*. The compelling interests Wisconsin sets forth to justify its system are different from those in *White I*, and the Wisconsin restrictions are narrowly tailored to advance those compelling interests asserted.

I. Standard of Review.

This Court reviews *de novo* the district court's grant of summary judgment in a first amendment case. *See Vargas-Harrison v. Racine Unified School Dist.*, 272 F.3d 964, 970 (7th Cir. 2001). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

II. The United States Constitution Cannot and Should Not Be Read to Prohibit Wisconsin from Maintaining a Non-Partisan Judiciary.

A. The speech at issue here must be distinguished from *White I*.

In *White I*, the speech at issue was prohibited by Minnesota's "announce" clause.[2] "[T]he announce clause both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedom's'—speech about the qualifications of candidates for public office." *White I*, 536 U.S. at 774 *citing Republican Party v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001).

> In deciding White I, the Court signaled a strong defense for speech on political issues: "the notion that the special context of electioneering justifies an abridgement of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Id. at 781. The Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." Id. at 782. It did recognize, however, a distinction between judicial elections and legislative elections. The Court counseled that White I was meant "neither [to] assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."

Wersal v. Sexton, ___ F. Supp. ____, 2009 WL 279935, *6 (D. Minn., 2009) (February 4, 2009).

[2]The Minnesota announce clause allowed a candidate to discuss such topics as character, education, work habits, and how he or she would handle administrative duties if elected, but also served as a blanket prohibition "on any specific nonfanciful legal question within the province of the court for which he [or she was] running." *White I*, 536 at 773.

The partisan activities rules at issue are unrelated to electioneering, but instead relate to associations Judge Siefert wants to maintain irrespective of his campaign activities. Indeed, Judge Siefert himself does not want to appeal to partisan politics or use party membership as a shorthand for views related to his qualifications to be elected judge. Judges are not simply perennial candidates for political office. They are judges and a variety of restrictions exist on their speech. They may not promise certain results as a political candidate or a political office holder can (and indeed must) do (SCR 60.06(3)(b), A-App at 222). In the same way, they should not "associate" with one political party over another.

If candidates for judicial office seek voters through partisan appeal, they risk becoming, in effect, a second legislature, stripped of their independence and the perception of independence from partisan office. For this reason, the compelling interests asserted here should be analyzed differently than they were in *White I*. This court should weigh carefully the rights of the citizenry to due process and the impartial judge both in reality and in appearance.

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

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

The United States Supreme Court in *White I* recognized that assuring that litigants are provided with an impartial, detached judge constitutes a compelling state interest in specific ways. Foremost, "'impartiality' in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding" thus assuring "equal application of the law." *White I*, 536 U.S. at 775-76. The Wisconsin Judicial Code defines "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge" (SCR 60.01(7m), A-App. at 198). Impartiality in this sense, is both the essence of due process and a compelling state interest. The *White I* court also described the "third possible meaning" of "impartiality" as "open mindedness." *White I*, 536 U.S. at 778. This quality in a judge demands that he or she be willing to consider views that oppose preconceptions, and remain open to persuasion. *Id*.

However, having an unbiased judge is not alone enough to assure due process. The public confidence in the courts is as much affected by the appearance of bias as by actual bias. There can also be a denial of due process when the risk of bias is impermissibly high, and our system of law

has always endeavored to prevent the probability of unfairness. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Permitting partisanship to enter the judiciary would lead to impermissibly high risks as partisan affiliations threaten public confidence whether or not there is actual bias. Thus, Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson implores us to recognize that the "impartial and detached judge is not merely a virtuous, lofty ideal," but "the essence of due process, the keystone of our concept of justice." (Dkt. #20, ¶ 9, Exhibit H, Order No. 00-07 at 10, A-App. 177). Every litigant who walks into court should believe he or she will receive a fair hearing from the judge. A judge who publicly claims a political affiliation is poisoning that atmosphere. "Political parties and the partisan executive and legislative branches of government (and members thereof) are frequent litigants [before the courts]." (Dkt. #20, ¶ 9, Exhibit H, Order No. 00-07 at 10, A-App. 177 (Abrahamson, C.J. concurring)). This is the reality.[3] If a judge was actually a registered and declared member of one political party or another, would the judge truly be able to decide a case of

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

political importance without bias? Would the public believe such a judge to be unbiased? The present judicial code adheres to long-standing Wisconsin tradition, by keeping partisan politics out of the judiciary and the judiciary out of partisan

politics.[4]

It would not be possible, as the district court decided, for Wisconsin both to maintain a nonpartisan judiciary, and allow Judge Siefert and others to join and advertise their membership in a political party. Non-partisanship is about more than labels on the ballot sheet or the timing of elections. The reality is that once the first judge announces party membership, it could become the norm, and might be highly likely to happen in a county, such as Milwaukee, with a strong partisan identification. Once formal party membership occurs, the judiciary is no longer nonpartisan. A nonpartisan judiciary and party membership for individual judges cannot co-exist. This case is not merely about one judge's desire to be a Democrat. This is an

[4]While three Wisconsin justices dissented on the Code revisions, the dissents were narrowly drawn. Justice Prosser dissented to the extent that the rules applied to candidates for judges "who have not yet become judges . . . and may never become judges." (Order No. 00-07 at 14, A-App. at 181). Justice Prosser did not specifically object to the rule requiring that judges not be a member of a political party, but indicated his support for SCR 60.06(2)(a) which provides that a "'candidate for judicial office shall not appeal to partisanship.'" (*Id.* at 15, A-App. at 182). Justice Roggensack dissented largely out of concern that the rule would not pass strict scrutiny under the *White I* case, stating: "While I personally believe that a nonpartisan judiciary is the better choice, I am not convinced that a 'better choice' is sufficient reason to support a compelling state interest." (*Id.*, at 19-20, A-App. at 186-187). Justice Butler and Justice Prosser also joined Justice Roggensack's dissent as to SCR 60.06(2). Thus, even the dissenters on the court expressed an interest in maintaining a nonpartisan judiciary in Wisconsin and their dissent seems largely rooted in a fear that *White I*, precluded that long-standing

attack on the entire nonpartisan structure of the Wisconsin judiciary.

2. Neither *White I* nor the United States Constitution require Wisconsin to establish a partisan judiciary.

The United States Supreme Court did not prohibit states from maintaining a nonpartisan judiciary with its decision in *White I*, nor did it require that states permit party affiliation by members of its judiciary. Instead, the Court struck down a Minnesota judicial canon that broadly prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. *White I* was entirely limited to speech regarding issues associated with a campaign for office, which the Court found to be "'at the core of our First Amendment freedoms.'" *White I*, 536 U.S. at 774. Minnesota's canon could have operated to prevent the voters from making an informed decision about those issues. The Wisconsin rules at issue here are far more confined, and limit neither the public's right to know about a candidate's position on the various issues of the day, nor a candidate's right to speak about those issues and address his or her suitability for the post sought. Instead, the rules address the qualifications for serving in a position, which is an area where the government has traditionally had wide discretion. *See Moss v. Martin*, 473 F.3d 694, 699 (7th Cir. 2007). The government as an employer has far broader powers under the First Amendement than does the government as a sovereign.

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tradition—a fear that is unfounded.

Waters v. Churchill, 511 U.S. 661, 671 (1994).

States should have the right to construct their own judiciary. The United States Constitution does not require judges to be appointed. Neither should it be read to mandate a partisan judiciary as a necessary component of an elected judiciary, but that is exactly where the district court's interpretation leads to in Wisconsin.

Judge Siefert has relied heavily on *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (*"White II"*) the decision following remand of *White I* to support his arguments. But *White II* was a divided decision which appellants contend was wrongly decided. The *White II* dissenting judges argued vigorously that the Minnesota partisan activities prohibition served the compelling state interests of assuring judicial open-mindedness and avoiding the appearance of judicial bias that denies litigants due process of law.

White II is a far-reaching extrapolation of *White I*. This court should be reticent to adopt *White II*'s holdings given the effect such a holding would have on Wisconsin's nonpartisan judiciary. Indeed, even *White I*'s scope has been questioned by a member of its own narrow majority. Retired Justice

Sandra Day O'Connor has suggested that she would have voted the other way had she known the implications the decision would have had on judicial independence.[5]

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

The *White I* case recognized that a "universal and long-established" tradition of prohibiting certain conduct creates "a strong presumption" that the prohibition is constitutional." *White I*, 536 U.S. at 785. Although the nonpartisan, elected state judiciary may not be a universal tradition in the United States,[6] it is certainly common, and is definitely a long-established tradition in Wisconsin. Wisconsin has maintained a nonpartisan judiciary since the turn of the century, and codified the accepted practice into the Judicial Code in 1968. Indeed, Wisconsin employed a partisan judiciary early in its history, but rejected the practice as a poor experiment. The federal courts should be loath to overturn such a long-standing and well-

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[5] See *http://en.wikipedia.org/wiki/Republican_Party_of_Minnesota_v._White* (Last visited 4/22/2009) and Paul Greenberg, "Justice Sandra Day O'Connor regrets her 2002 vote allowing judges expression of their political views in *Minnesota v. White*," *http://news.lawreader.com/?p=451* (lasted visited 4/22/2009).

[6]At the time of the Supreme Court's decision in *White I,* thirty-one States held popular elections for some or all judges, and slightly more than half of those held nonpartisan elections. *White I*, 536 U.S. at 792 (O'Connor, J. concurring). Today only twelve states officially employ partisan elections for judicial offices. (District court decision, at 32, A-App. at 134, *citing* "Methods of Judicial Selection" available at *http://www.judicialselection.us/judicial_selection-/methods/selection_of_judges.cfm?state=*.

functioning practice of a fellow sovereign. *See White I*, 536 U.S. at 785, citing *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 377 (1995) (Scalia, J., dissenting).

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

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

(Dkt. #54, ¶ 19).[7] For two-thirds of her history, Wisconsin has maintained a

[7]The district court characterized this as Attorney/Historian Ranney's opinion regarding the importance of the policy. The testimony is not presented in that way, rather it was offered to establish the lengthy history of Wisconsin's nonpartisan system.

nonpartisan judiciary. That is a long-established tradition worthy of a strong

presumption of constitutionality. It does not matter that some states have successfully maintained a partisan judiciary. Wisconsin's rules should be analyzed in light of her own unique history and with respect for her choices.

4. The partisan affiliation clause is consistent with Wisconsin's expectation for other government officials where impartiality is of paramount importance, and a reasonable qualification for judicial office.

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

The recognition that nonpartisanship was a compelling interest necessary to avoid improper influences appears in *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976), and more recently in *McConnell v. FEC*, 540 U.S. 93, 144, 150-54 (2003),[8] upholding portions of the McCain-Feingold campaign finance law. The same concerns over such influences affect this case. Once the judiciary is partisan, "the candidate may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on that litigant for any hope of success in future elections." *White II*, 416 F.3d at 768 (8th Cir. 2005) (Gibson, J. dissenting).

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

The structure of Wisconsin's nonpartisan judiciary is entitled to

[8]The *McConnell* decision was seriously limited by the U.S. Supreme Court in

similar respect. The nonpartisanship requirements are reasonable qualifications for judicial office, and state government should have wide discretion to structure such qualifications in order to bridge the inherent tensions between "the ideal character of the judicial office and the real world of electoral politics." *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). Thus, states may and have had qualifications for judicial office that would never apply to other elected offices. In Wisconsin, for example, judges serve a longer term than other elected officials: ten years for supreme court justices, Wis. Const. Art. VII, § 4(1), and six years for the court of appeals and circuit court judges. *Id.* § 5(c) and § 7. They are also constitutionally prohibited from seeking elective office unless they resign. Wis. Const. Art. VII, § 10. The partisan activities portion of the judicial code of conduct is, like these other restrictions, codification of the understanding that judges are not like partisan legislatures, and that states may reasonably set different qualifications for them.

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

"[T]he limitations on partisan political activity in the Code [are] minor inconveniences compared to the great and compelling public interest of having judicial candidates and the judiciary demonstrate an understanding

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Federal Election Comm'n v. Wisconsin Right to Life, 551 U.S. 449 (2007), but not as

of, and commitment to, the nonpartisan rule of law." (Order No. 00-07 at 10-11, A-App. at 177-78 (Abrahamson, C.J. concurring)). The rules prohibit political party membership by judges and judicial candidates (unless a candidate currently serves in a partisan position), but do not require judges to lead lives of seclusion. Judges are free to attend public events, even those sponsored by political parties, so long as they do not appear to be endorsing partisan candidates or otherwise engaging in prohibited activity. *See* SCR 60.06(2), Cmt., A-App. at 221.

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

White I is concerned with the discussion of campaign issues of a judge or judicial candidate for election. *See White I*, 536 U.S. at 768 ("The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues"). In contrast, Wisconsin's partisan affiliation clause does not limit a candidate's ability to conduct an effective campaign, but merely states the various qualifications for office.

Judge Siefert himself does not want to appeal to partisan rhetoric in his judicial campaigns. He would be unlikely to list himself as a Democrat in

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to the analysis quoted here.

advertising, and does not desire to use membership in the Democratic Party as a shorthand for his political viewpoint. In fact, Judge Siefert agrees that he is not prevented from conveying those positions he associates with Democratic Party membership, to wit: social justice for the poor, and peace. Nor does Judge Siefert believe that raising money for a judicial campaign is hindered by a judge's being nonpartisan.

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

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

(Dkt. #46, p. 51, ll. 16-20).

The partisan affiliation clause does not interfere with Judge Siefert's (or any judicial candidate's) ability to conduct an effective campaign for the nonpartisan office of a judgeship. Further, a party affiliation designation is not necessarily a meaningful summary of an individual candidate's views. Judge Siefert concurs, pointing out that he does not agree with every element of the Democratic Party platform. Judge Siefert does not need to join a political party to fully express his views on issues he thinks are important to his judicial campaign and his qualifications for judicial office.

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

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

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

With regard to the question of "under inclusiveness," the United States Supreme Court has upheld speech restrictions on strict scrutiny review where the measure was "tailored to address only the most critical threat to the governmental interest, even where some threat to the asserted interest remained unaddressed." *See White II*, 416 F.3d at 776-77 (Gibson, J., dissenting), citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652

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

Here too, it is suggested that the restriction is under inclusive because judges may not join political parties, but may join other groups. However, the judicial code in Wisconsin also limits a judge's participation in 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. The Wisconsin Judicial Commission has issued an advisory opinion holding that a reserve judge was prohibited from serving as president of a civic organization whose mission is to advocate social goals through litigation and

legislative action. In sum, the code provisions operate to prohibit a Wisconsin judge from belonging to such organizations as "Mothers Against Drunk Driving, pro victim/witness domestic violence organizations, Sierra Club or other advocacy organizations that are dedicated to a particular legal philosophy or position that could have an adverse impact on the public's perception of the judge's impartiality." It is not the Judicial Code itself that is under inclusive.

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

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

b. Recusal is not a reasonable alternative

Recusal is not, in any event, a workable option. A judge who allies himself with a particular political party and has a bias on certain issues of importance, should, in order to maintain both the appearance of, and actual impartiality, probably recuse him or herself whenever matters of importance to that political party are presented. But, recusals are generally considered to be a last resort, and it is entirely up to the judge to decide what to do. *See* Wis. Stat. § 757.19, and SCR 60.04(4), A-App. at 207-209. A partisan judge may simply choose not to recuse, leading a resultant partisan decision. Indeed, Judge Siefert sees no reason to recuse himself from a case involving the administrative agency managed by a politician that he supported. If the judiciary, or a large part of it is partisan, then the ability of the courts to consider and appear impartial on those issues that have partisan considerations become much hampered.

Serious problems with recusal as the sole option to prevent bias or the appearance of bias are identified in *Caperton v. Massey Coal Company, Inc.*, U.S. Supreme Court Case No. 08-22, submitted after oral argument on

March 3, 2009. In this case a state supreme court justice did not recuse himself even though his election may have been insured by significantly large spending on his behalf by one of the litigants. If the probability of bias, or at least the appearance of bias, is so high that the judge cannot consider the matter with an open mind, or equally, that the judge appears to have a closed mind, then a state should be permitted to do something to remedy the situation other than allowing the apparently biased judge to hear the case by his own choice. The partisan activities restriction prevents just such an appearance of bias favoring one political party over another.

In smaller counties in Wisconsin with one or few judges, recusal could also become a heavy burden on the court system. *See Wersal*, at *10. Moreover, frequent recusals interfere with the public's right to have the judge they elected hear cases. The matter is compounded further on the appellate courts where the judge's or justice's recusal may deprive the voters of their chosen jurist on the weighty issues of the day.

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

The Wisconsin Supreme Court has drafted the partisan activities limitations as narrowly as possible. "A partisan political office holder who is seeking election or appointment to a judicial office . . . may continue to engage in partisan political activities *required* by his or her present position." SCR 60.06(2)(c) (emphasis supplied), A-App. at 221. The Wisconsin

Supreme Court did not find a compelling interest to prevent individuals currently serving in partisan office from seeking a judgeship. To avoid being overly inclusive, the court crafted an exception to allow such a candidacy. The exception is a narrow one, however, as it provides only that the public official may engage in those partisan activities "required by his or her present position." Thus, a state legislator running for judge could still caucus with the party before an important vote. The provision does not mean that the office holder in question could run a partisan campaign for judge. Those who argue that it does have failed to read the text of the code.

As applied to judicial campaigning, the clause only prohibits the identification with partisan politics. Candidates "may have aligned themselves with a particular political party and may have engaged in partisan political activities" in the past. SCR 60.06(2)(a), A-App. at 220. Judges are not prohibited from attending public events sponsored by political parties, SCR 60.06(2)(d), A-App. at 221, nor are they prohibited from attending partisan political gatherings to promote their own candidacies. SCR 60.06(2)(e), A-App. at 254. But judges and judicial candidates all check those partisan labels at the door when they ask the voters to make them a judge. The judge-elect, in order to both appear and be fair and impartial, leaves partisan politics behind. The partisan affiliation clause, taken as a whole, is narrowly tailored to meet the compelling interests asserted.

III. The Partisan Endorsement Clause is Constitutional.

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

The endorsement clause prohibits one narrowly defined type of speech: the ability of a judge to endorse a candidate for partisan office. In doing so, the endorsement clause serves the compelling state interest of ensuring litigants an impartial judge. "[T]he assurance of impartiality . . . is the fundamental requirement of due process." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 at 831 (1986) (Brennan, J., concurring). It also eliminates the concern of a *quid pro quo*. The endorsement clause does not attempt to limit expression of views or political activities necessary for a judicial candidate's own election. The *White I* decision distinguished a candidate's expressing views on a party, from expressing views on an issue, *White I* at 776, finding the latter to violate the First Amendment.

Endorsing a candidate is not a form by which a candidate for judicial office announces his views on legal or political issues. Instead an endorsement risks conveying one's bias in favor of a particular, partisan, individual who may come before the judge either in person or by agent. Judge Siefert would like to endorse in numerous partisan offices, such as for president, governor, or the state legislature. By making an endorsement, Judge Siefert would be announcing to all that he favors and recommends those candidates, thus posing a direct threat to the public perception of his

independence and impartiality. Moreover, while Judge Siefert indicates he would not intend to endorse under the title of "judge" others could do so, and persons familiar with endorsements would certainly connect the judge's name with his office. Either way, the judge would be lending the prestige of his office to advance partisan interests.

Wisconsin's limitation on endorsements by judges appears to be the norm. The American Bar Association's model judicial code has long prohibited judges from endorsing candidates for office. *See Model Code Jud. Cond.* 4.1(3) (ABA 2007).[9] Such endorsements are also prohibited by the federal judicial code. *See Canon 7A(2), Code Cond. Fed. Judges.*[10] The majority of experts on this question are in agreement that such an open display of bias harms a judge's ability to appear impartial.

In *Wersal*, the Minnesota district court upheld the endorsement prohibition of Minnesota's judicial code. The court found that the link between supporting a candidate and taking a position to be too attenuated to run afoul of *White I*. *See Wersal*, 2009 WL 279935 at *9. In Minnesota, as in Wisconsin, judicial candidates can state their positions on issues; they do not need to make partisan endorsements as a proxy for doing so. *See Id.*, at *10.

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[9]Available at *http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf* (last visited 4/22/2009).

[10]Available at *http://www.uscourts.gov/guide/vol2/ch1.cmf#7* (last visited 4/24/2009)

And a district court in Kansas found that its endorsement clause only "restricts a judge or judicial candidate from publicly endorsing other candidates for public office; it does not restrict speech concerning disputed political issues." *Yost v. Stout*, No. 06-4122-JAR, slip. op. at 12 (November 16, 2008).

State courts considering the matter have also upheld judicial codes prohibiting endorsements. For example, the New Mexico Supreme Court concluded that their endorsement clause was intended to promote the "undeniable compelling state interest in promoting the reality and appearance of impartiality of our judiciary, which in this case means eliminating the potential for bias or the appearance of bias for or against the parties appearing before a judge." *In the Matter of William A. Vincent, Jr.*, 172 P.3d 605, 608 (N.M. 2007). Similar endorsement canons have been upheld in New York, *See In re Raab*, 793 N.E.2d 1287, 1297 (N.Y. 2003) and Florida, *See In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b)),* 603 So. 2d 494, 497 (Fla. 1992) and *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

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

The Wisconsin endorsement clause serves the compelling state interest of preventing bias and the appearance of bias for or against a litigant, and it does so as narrowly as possible. Nothing in the code prohibits a judge from making an endorsement in a nonpartisan election. A judge may endorse another judge. The endorsement clause does not inhibit a judicial candidate

in campaigning. No evidence has been presented to suggest that the endorsement clause prevents or limits a candidate from effectively communicating his or her message. The endorsement clause does not, in any way, prevent judicial candidates from publicly opposing their opponents in an election. Judge Siefert's desire to endorse partisan candidates goes beyond what is necessary or integral to his own campaign for office.

The appellee has suggested that the partisan endorsement clause is under inclusive because it does not prohibit a judicial candidate from accepting an endorsement, but the two are quite plainly not the same thing. The code cannot restrict the speech of others, but a judge who publicly accepted, say in campaign literature, an overtly partisan endorsement, *e.g.*, "I [prominent partisan politician] endorse ________ for judge because I know that he [or she] is a true [party label] at heart," would run afoul of the Judicial Code requirement that a "candidate for judicial office shall not appeal to partisanship." SCR 60.06(2), A-App. at 220.

Similarly, the endorsement clause is not rendered unconstitutional because it permits judges to make nonpartisan endorsements. As we have said, the goal of the rules, in general, is to "keep the judiciary out of partisan politics and partisan politics out of the judiciary." Unless an endorsement in a nonpartisan election was, in reality, a prohibited appeal to partisanship, the endorsement would not detract from the goal. Again the argument confuses "under inclusiveness" with "narrow tailoring." The partisan

endorsement clause *is* narrowly tailored.

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

IV. The first amendment does not prohibit the fundraising limitations.

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

SCR 60.06(4) prohibits a judicial candidate from personally soliciting campaign contributions. The "great and compelling public interest" served by this provision is "that no person feel directly or indirectly coerced by the

presence of judges to contribute funds to judicial campaigns." (Order No. 00-07 at 11 (Abrahamson, C.J. concurring), A-App. at 178). Judges have great power to affect individual lives in given cases. This restriction is a minor one, particularly since many candidates for major offices set up committees to handle campaign finances. *See* Wis. Stat. § 11.056(2g).

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

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

The plaintiffs in *White II* did not challenge the campaign committee structure *per se*. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit struck down a judicial canon prohibiting personal solicitation of campaign funds, but that canon also prohibited judicial candidates from personally soliciting publicly stated support, which the Wisconsin judicial code does not. The *Weaver* court considered the questions as one. *Id*. at 1322. Moreover, the *Weaver* defendants evidently did not advance the interest of eliminating the potential coercision of a contributor by a personal solicitation from a judge, nor does the *Weaver*

decision address that concern.

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

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. The solicitation clause is meant to address the direct or indirect coercion an individual could experience if a judge is asking the individual directly for a contribution. It is a minor restriction indeed and appropriately tailored, for any individual would feel more pressured when asked directly by the judge to make a contribution, than where an individual received the solicitation from a committee.[11] In the case of a committee solicitation, the individual is not put immediately on the spot before the judge to make a favorable or non-favorable response. Any response is likely one of many to the committee, and when the judge or judicial candidate reviews the list of donors, the individual will either appear as one name among many, or not appear as one name among many more.

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

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

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

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

The solicitation clause is not overly inclusive. The clause does not prohibit candidates from accepting contributions from good friends or co-workers.[12] It only requires that those contributions go through the committee. A judge may appear at his or her fundraising events and nothing in the code prohibits the judge from personally seeking an individual's support or an endorsement. It is only the financial contribution that must be requested by and made to the committee. The code does, however, prohibit a judge from accepting voluntary contributions, and is therefore not under inclusive on the point. The restriction is neither over nor under inclusive, it is narrowly tailored.

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[12]Spousal contributions could raise potentially complex issues owing to Wisconsin's marital property laws. The code does not address how such contributions should be handled. This is not a surprise as "[I]t is not possible to address [in the code] every conceivable conduct of a judge that might erode public confidence." SCR 60, Preamble, A-App. at 196.

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

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

Judge Siefert admits that he can use committees for fundraising, has used them, and has attended fundraisers for other judicial candidates organized by committees. It is possible to run and win a judicial election by receiving donations through committees as Judge Siefert has done. Indeed, many judges do no fundraising at all. The committee scheme is thus narrowly tailored to serve compelling interests in judicial impartiality and avoid the appearance of impropriety.

CONCLUSION

The appellants urge the Court to recognize the compelling interest served by the partisan activities and campaign donation restrictions of the Wisconsin Code of Judicial Conduct, and to reverse the decision of the district court granting appellee's motion for summary judgment and denying the appellant's cross-motion for summary judgment.

Dated this ___ day of April, 2009.

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Case Number: No. 09-1713

CERTIFICATION

I certify that this brief conforms to Circuit Rule 32 for a brief produced using the following font:

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Case Number: No. 09-1713

CIRCUIT RULE 30(d) STATEMENT

I certify that all material required by Circuit Rule 30(a) and (b) are included in the short appendix, that additional appendix materials are provided in the extended appendix, and that the appendix material is not excessive.

Dated this ______ day of April, 2009.

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Case Number: No. 09-1713

CIRCUIT RULE 31(e) CERTIFICATION

I certify 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.

Dated this ______ day of April, 2009.

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Case Number: 09-1713

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