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

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner

Blank Page

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 Amendments 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 the chilled speaker be required to seek government pre-approval instead;

(13) Whether petitioners' challenge to the preliminarily enjoined but subsequently revised promises and commitments clauses are ripe;

(14) Whether the promises and commitments clauses are 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. Nestrick, 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.

Table of Contents

Table of Authorities

Cases

Constitution, Statutes, Regulations & Rules

Blank Page

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.

Indiana Canon 5A(3)(d)(i) and (ii).

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 sends out questionnaires to judicial candidates for its voter guide.

Judge Certo challenges Indiana's personal solicita-

tion 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.

Finally, Plaintiffs continue to challenge the constitutionality of the promises clause, Canon 5A(d)(3)(i), and the commitments clause, Canon 5A(d)(3)(ii). The clauses prohibit 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," (the promises clause), and from "(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," (the commit-

---

[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.

ments clause). Judicial candidates, including Mr. Bauer and Judge Certo, responded to the questionnaire when the promises clause and the commits clause were in force. Their responses remain grounds for disciplinary proceedings unless enjoined.

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]

In 2004, INRTL brought a legal challenge to the original promises and commitments clauses, 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 original promises and commitments clauses were

---

[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, Inc.

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." (Advisory Opinion, Doc. 19, attached as 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. (Babcock Dep., Doc. 19, attached as Ex. 16 at 41:21-23.)

The district court granted summary judgment against the Commission as to the former promises and commitments clauses. (Judgment, Doc. 19, attached as Ex. 15.) However, on appeal, the Seventh Circuit determined that INRTL 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 promises and commitments clauses. Mr. Bauer was a judicial candidate who risked potential discipline because he had already answered the questionnaire. AC ¶ 28. Judge Certo was also a judicial candidate but he had declined to answer the questionnaire because of the promises and commitments clauses. 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 which 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 "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 preliminary injunction against the promises and commitments clauses 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 and retained their challenge to the promises and commitments clauses.

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 to the original Canon 5 and prohibits its 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 promises and commitments clauses 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 preliminary enjoin the promises and commitments clauses, 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 promises and commitments clauses 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 promises and commitments clauses 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 promises and commitments clauses 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)(*White I*), 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 *White,* 536 U.S. at 765, 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 repre-

sents 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 v. Valeo*'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 and the decisions of other circuits.

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 be 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, the *Stretton* decision preceded this 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.

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 state-wide 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

---

[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.

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 some impartiality concerns, the party leadership clause is not restricted to holding a political party office. Instead, it precludes leadership in any capacity. By virtue of being Republi-

can judge, Judge Certo views himself as a leader in the Republican Party. His involvement in Republican Party as a delegate would allow him to announce his views within the party as to who should receive party nominations and 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 his impartiality might be reasonably questioned, "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 overbroad and not narrowly tailored.

Because the *Bauer* court's analysis conflicts with this Court's precedent and with *White II*, this Court should grant review.

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).

Advocating financial support for a political party 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 his impartiality might be reasonably questioned, 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 decisions of the Court and with *White II*, 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") prohibits judicial candidates "mak[ing] speeches on behalf of a political organization."

As it did with the other political 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 was found to be inadequate, 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. A judicial candidate's agreement with the policies of her political party by speaking out for that party is another form of announcing her views, provided she does not pledge or promise certain results in a particular case or class of cases. *White I,* 536 U.S. at 770. Judge Certo 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 his impartiality would be reasonably questioned, "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.

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

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 discipline. The new commits clause,however, 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 decisions of this Court, the Sixth Circuit's decision in *Carey*, the Seventh Circuit's decision in *Buckley* 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 other-

wise—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. 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. Carey*, WL 2771866 at *16-17. While it did not enjoin the rule, it remanded consideration of the clause to the district court for further examination. *Id.* at *17. Lacking a narrower construction, the clause would fail constitutionally. *Id.* at *17.

Rather than rectify the fatal First Amendment flaws it recognized in Indiana's commits clause, the *Bauer* court dismissed those concerns, satisfied that

the State can remedy them through advisory opinions and disciplinary proceedings. *See infra* Part IV. This result places the Seventh Circuit at odds with the Sixth Circuit.

Furthermore, this analysis conflicts with the Seventh Circuit's prior decision in *Buckley v. Illinois Judicial Inquiry Board,* 977 F.2d 224 (7th Cir. 1993), where the court struck down Illinois' announce clause as an overinclusive restriction on 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 constructionist, 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.

Because of the *Bauer* court's analysis conflicts with decisions of the Court and with *Carey* and *Buckley*, this Court should grant review.

2. The Commits Clause Is Unconstitutional As Applied To INRTL's Questionnaire.

After this Court's decision in *White* and prior to this litigation,, the Commission formally stated in Preliminary Advisory Opinion #1-02 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.) (emphasis in original). 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 questioned in *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 in *White I*.

Indeed, the *Bauer* court agreed that the questionnaire only asks candidates to announce their views:

> None of the nine questions calls for a "commitment" 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 the protection of *White I*, but it also should have dictated an unconstitutional ruling, as applied to the INRTL questionnaire. However, it did not.

Because the commits clause reaches announcing views, the Seventh Circuit's failure to find the commits

clause unconstitutional as applied to the questionnaire conflicts with *White I* and creates both an inter-circuit and an intra-circuit split. A writ of certiorari should be granted.

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 her problem by seeking government pre-approval of her speech – a process fundamentally abhorrent to the Constitution.

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 facial infirm, but rather than strike the clauses, it advises judicial candidates to seek advice from the Commission before speaking.

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 all "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 admonishes Judge Certo: "Indiana provides means of clarification. Judge Certo should use them." App. 14a.

3. The Commits Clause Is Vague.

Finally, 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 required Mr. Bauer and Judge Certo "to wait and see," App. 24a, since 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. Rather Than Strike the Speech Restrictions, The Seventh Circuit Imposes a Prior Restraint on Judicial Candidates.

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 II,* 551 U.S. at 469 (*quoting First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978)). 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 II,* 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 unavailing. It found the ban to be unconstitutional because "[p]rolix 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 has done. The Seventh Circuit's approach encapsulates what the *WRTL II* and *Citizens United* decisions proscribed: a prior restraint in the form of required seeking of Commission advisory opinions, or a continued chill because of fear of subsequent punishment through disciplinary proceedings. Neither is a constitutional solution to an otherwise infirm speech restriction.

Crucially, the Seventh Circuit failed to acknowledge that judicial candidates *had already sought* advise from the Commission with regarding the INRTL questionnaire. 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 promises and commitments clauses, *Indiana Right to Life v. Shepard,* 469 F. Supp. 2d 879 (N.D. Ind. 2006)—and the equally vague commentary to the commits clause that premises a violation on what a reasonable person would perceive. App. 122a. Furthermore, during this litigation, the Commission has claimed that "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," *see, e.g.,* Admission Responses, at App 133a, and "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." *Id.* at App 132a. The only alternative, then, is for a candidate to risk both discipline and his good name to facilitate ascertaining the scope of the commits clause. Such a remedy is contrary to *Buckley*, *WRTL* and *Citizens United.*

Because the Seventh Circuit adopts a prior restraint approach to restrictions of 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 Promises and Commitments Clauses and Strike It Down.

A. The Promises and Commitments Clauses Challenge Is Ripe.

On May 6, 2008, the district court issued a preliminary injunction against the promises and commitments clauses, 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, and Mr. Bauer, who had answered the questionnaire before the issuance of the preliminary injunction, Petitioners have sought to have the promises and commitments clauses permanently enjoined. AC ¶¶ 38, 46-59.

The Seventh Circuit found Petitioners' challenge to the clauses 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 promises and commitments clauses are positively enforced.

Yet again, the Seventh Circuit subverts the pre-enforcement jurisprudence of this Court and undermines the chill component of constitutionally infirm laws. *See supra* Part II.B. The district court, in refusing to issue a permanent injunction against the promises and commitments clauses, now allows both Mr. Bauer and Judge Certo to be disciplined for violating the clauses because they answered the questionnaire. The threat of enforcement against those candidates is as real now as it was when the preliminary injunction was issued.

B. The Promises and Commitments Clauses Are Unconstitutional.

Mr. Bauer and Judge Certo want to answer INRTL's questionnaire without threat of prosecution. Mr. Bauer responded to the 2008 questionnaire erroneously believing that the promises and commitments clauses had already been enjoined. AC ¶ 28. Judge Certo responded to the questionnaire under the protection of the lower court's preliminary injunction. AC ¶ 38.

The promises clause 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." This clause is facially infirm. It is overbroad because it reaches promises the State has no interest in restricting, such as a pledge "to be a strict constructionist, or for that matter a legal realist," or a "promise a better shake for indigent litigants or harried employers." *Buckley,* 977 F.2d at 228. It is vague, as conceded by the Commission, because not even the Commission knows whether

announcing views violates the clause. App 132-33a. And it fails strict scrutiny because it unconstitutionally reaches announced views when a more narrowly tailored proscription of pledging or promising certain results in a particular case or class of cases would suffice. *White I,* 536 U.S. at 770.

It also fails as applied to INRTL's questionnaire. The questionnaire only seeks announcements of views. App. 18a. Such announcements are protected in *White I.* That the Commission thinks it is possible to prohibit judicial candidates from answering the questionnaire renders the promises clause unconstitutional as applied to the questionnaire.

The commitments clause prohibits judicial candidates from "(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 ...." The commitments clause is unconstitutional since it contains 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 it cannot be constitutionally be applied to the questionnaire. *See supra* Part III.E.2. And, like the commits clause, the commitments clause fails strict scrutiny. *See Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Commission*, 388 F.3d 224, 228 (6th Cir. 2004) (affirming a preliminary injunction of Kentucky's commitments clause because "Kentucky views Canon 5B(1)(c) as the functional equivalent of an announce clause" and that " the State is unlikely to succeed in light of the binding precedent in *White.*").

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

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,

James Bopp, Jr.
Counsel of Record
Anita Y. Woudenberg
Josiah Neeley
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434 (voice)
812/235-3685 (facsimile)
jboppjr@aol.com (email)
Counsel for Petitioner