No. 10-425

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

Reply Supporting Petition for a Writ of Certiorari

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Reply to Respondents' Brief in Opposition

I. This Case Presents A Genuine Constitutional Conflict That Leaves Petitioners Without Remedy.

Respondents contend that a writ of certiorari is not appropriate in this case because Petitioners present only theoretical arguments about the unconstitutional scope of the challenged judicial canons. Resp. at 15. This contention disregards that Petitioners themselves have been chilled from engaging in protected political speech. But more critically, it ignores that the effect of the Seventh Circuit's decision, unlike the Sixth, Eighth, and Eleventh Circuit judicial decisions, has been to confer broad, discretionary power to judicial conduct review boards to interpret overbroad, vague judicial canons, allowing pre-speech review of campaign speech on an ad hoc basis.

This is most clearly demonstrated in Petitioners' challenge to the commits clause. Respondents would have this Court believe that the clause only restricts pledges and promises of certain results in a particular case, a legitimate scope acknowledged by this Court in *Republican Party of Minnesota v. White,* 536 U.S. 765, 780 (2002) ("*White I*"), and by the Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Bd.,* 977 F.2d 224, 228 (7th Cir. 1993), which this Court affirmatively cites, *White I,* 536 U.S. at 773. Even if the language of the commits clause could credibly be interpreted so narrowly, the facts of this case simply do not support such an interpretation.

The questions asked in INRTL's questionnaire are undisputably announcements of views as understood in

White I. Judicial candidates are asked questions like whether they "think *Roe v. Wade* was wrongly decided," whether "abortion should be permitted to save the life of the mother," and whether "there is no provision in [the] current Indiana Constitution which is intended to protect a right to abortion." App. at 125-26a. The Seventh Circuit in its decision below recognized that these questions only ask for general views on disputed social and legal issues. App. at 97a.

Yet from the very beginning, the Commission has asserted that answering the questionnaire would violate the commits clause. In 2004, the Commission was advising inquiring judicial candidates not to answer the questionnaire. (Babcock Dep., Doc. 19, attached as Ex. 16 at 41:21-23.) Once sued, the Commission's position became that answering the questionnaire *might* violate the commits clause. The Commission submitted discovery responses asserting it hadn't decided what the scope of the questions were, but that the questions may elicit answers that may commit or appear to commit the respondent or constitute an improper pledge or promise. App. at 131a-150a. And in 2008, when INRTL again sent out an identical questionnaire to judicial candidates, the Commission's response was to simply restate the commits clause to inquiring judicial candidates, advise them to review the Commission's Preliminary Advisory Opinion #1-02[1], and notify them of forthcoming revisions to the

[1]This advisory opinion is vague and unhelpful to judicial candidates, asserting that the commits clause reaches "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

clauses that were to be adopted in 2009. (Comm. Resp., Doc. 19, attached as Ex. 3.)

The effect of this advice caused judicial candidates like Judge Certo to be chilled from answering the questionnaire because of the possibility of violating the commits clause. AC ¶ 32. And judicial candidates like Mr. Bauer became concerned about having answered the questionnaire because they had not consulted the Commission before answering. AC ¶ 28.

But even more crucially, the Commission's ever-evolving enforcement policy of the commits clause demonstrates two fundamental failings of the Seventh Circuit's willingness to give broad discretion to judicial disciplinary commissions.

First, if the Commission has its way and the Seventh Circuit's decision is left standing, First Amendment challenges to judicial speech canons could never be facial and would require judicial candidates during time-sensitive campaigns to submit requests for approval of their speech. Then, and only then, would candidates be able to bring a lawsuit seeking to engage in any denied, protected speech. *See* Resp. at 25. Even perfectly clear–though overbroad–rules like the solicitation clause and the party solicitation clause would require requests from judicial candidates to see if their speech might possibly be an exception to that rule. The procedural effect of the Seventh Circuit's ruling is to leave judicial candidates' speech at the mercy of state judicial conduct commissions. And the practical effect of that ruling on judicial candidates, who are busy running a campaign, is an unconstitutional chill,

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the 'promises' clause." (Advisory Opinion, Doc. 19, attached as Ex. 1 at 4.)

because they will likely avoid such untimely and unwieldy procedures and not engage in the desired political speech at all.

Second, the facts of this case demonstrate that the commissions themselves may not able to narrowly and constitutionally construe the meaning of vague canons and thereby offer meaningful guidance to judicial candidates in the form of a "yes" or a "no" on the canons' meaning. Canons so vague that their enforcers cannot articulate their scope even when asked in a particular and specific context reinforces that the canons should not be immune from facial review.

The only way to curb this broad, discretionary power–created in part through an improper standard of review and in part by unconstitutionally requiring judicial candidates to vet their speech with the Commission before uttering it–is for this Court to grant certiorari and establish a proper standard of review for judicial canons that affords judicial candidates an effective remedy for potential speech rights violations.

II.The Circuits' Conflict on the Standard of Review Is Likely Outcome Determinative.

Respondents contend that the circuits' disagreement on whether strict scrutiny applies is merely an "abstract tension in the legal standards applied by the lower courts" that is not cert-worthy. Resp. at 10. However, whether strict scrutiny applies is likely determinative of the outcome of not just this case, but of all challenges to judicial speech canons.

This was acknowledged in the en banc dissent to *Siefert v. Alexander*, 619 F.3d 776 (7th Cir. 2010).[2]

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[2]Respondents argue that en banc review, rather than

Writing for four judges, Judge Rovner observed that the Seventh Circuit's use of a different standard of review made the *Siefert* case an outlier among the federal circuits. *Id.* Moreover, she pointed out that the outcome of recent federal circuits' review under the strict scrutiny standard was to strike down the challenged canons under the First Amendment. *Id.* Every circuit court until the Seventh Circuit in *Siefert* and now *Bauer* has applied strict scrutiny, with the bulk of these decisions striking down the canons before them. *Id.* (*citing Wersal v. Sexton,* 613 F.3d 821 (8th Cir. 2010) (striking down a solicitation clause and an endorsement clause under strict scrutiny), *vacated by* 613 F.3d 821 (8th Cir. 2010 (granting en banc review); *Carey v. Wolnitzek,* 614 F.3d 189 (6th Cir. 2010) (striking down a personal solicitation clause and party affiliation clause under strict scrutiny); *Republican Party of Minnesota v. White,* 416 F.3d 738 (8th Cir. 2005) ("*White II*") (striking down a partisan activities clause and a solicitation clause under strict scrutiny); *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002) (striking down a solicitation clause and a false statement clause under strict scrutiny); *Stretton v. Disciplinary Bd.,* 944 F.2d 137 (3d 1991) (upholding the announce clause under strict scrutiny).

Because the standard of review has a very real and significant effect on the outcome of challenges to judicial campaign speech regulations, correcting it

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Supreme Court review, is the appropriate remedy for Petitioners. Resp. at 12. However, given the result in *Siefert*'s en banc review affirming a lesser standard of review, en banc review in this matter is not a meaningful remedy.

would reestablish uniformity among the federal courts and warrants Supreme Court review.

III. A Conflict Among The Circuits Remains.

Respondents assert that the facts of this case negate any circuit split on the substantive issues. Resp. at 24, 19. However, even if it were constitutional to restrict the speech Petitioners wish to engage in–which Petitioners do not concede–Petitioners still present valid overbreadth and vagueness challenges to these provisions. And unlike the Seventh Circuit, the Eighth, Eleventh and Sixth circuits have struck them and provisions substantially similar to them down as unconstitutional.

Respondents acknowledge that the decision below is in conflict with *Weaver*. Resp. at 21. But it characterizes this conflict as "shallow" because the *Wersal* case, now on en banc review in the Eighth Circuit would remedy whatever conflicts exist among the circuits through its forthcoming decision by overruling *White II*. Resp. at 20. But even if the Eighth Circuit agrees with Seventh Circuit as to the standard of review and constitutionality of the clauses before it, there will now be two circuits that are in conflict with the Eleventh Circuit. If the Eighth Circuit is in accord with its prior *White II* decision and the Eleventh Circuit decision, it will remain in conflict with Seventh Circuit. Respondents' "solution" posits no remedy at all to the circuit split on the issues in this case.

Moreover, the Sixth Circuit conflict remains. Respondents contend that because the Sixth Circuit's *Carey* decision did not conclude that Kentucky's

commits clause was unconstitutional, it is not in conflict with the Seventh Circuit's ruling in this case. Resp. at 13. Likewise, they argue that the personal solicitation clause was struck because of the nature of the solicitation at issue. Resp. at 19. But *Carey*, applying strict scrutiny, struck the personal solicitation clause facially. *Carey,* 614 F.3d at 207 ("The solicitation clause is overbroad and thus invalid on its face.") And the *Carey* court acknowledged a fundamental constitutional failing in the commits clause and, lacking a record on the matter, chose to afford the Commonwealth an opportunity to narrow the meaning of the clause to save it from facial unconstitutionality.[3] *Id.* at 208-9 ("The clause contains a serious level-of-generality problem. ... At this point it is not clear what the Commonwealth's position on the term ["issues"] is.") The Sixth Circuit's approach is in no way analogous to the Seventh Circuit's decision giving Respondents–which have had ample opportunity to interpret the challenged clauses–broad discretion in enforcing their canons and dismissing any facial challenge on those grounds. And the *Carey* decision remains in conflict on the larger issue of whether strict scrutiny applies to judicial campaign speech regulations.

A circuit split remains among the circuits as to the

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[3] In response to the *Carey* ruling, the Kentucky Supreme Court issued an emergency order immediately adopting new commits clause identical to the one at issue in this case, perhaps in an effort to give the clause some legitimacy using the decision below. *In re: Emergency Order Amending Rules of the Supreme Court,* No. 2010-11 (Dec. 15, 2010), *available at* http://courts.ky.gov/NR/rdonlyres/53634E0C-A5E5-4DC0-BE81-43ABE1E05695/0/201011.pdf.

constitutionality of the commits clause, the personal solicitation clause, the party solicitation clause, the party leadership clause, and the party advocacy clause. Petitioner's writ should be granted.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits.

Respectfully submitted,

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