No. 10-405

In The

Supreme Court of the United States

THE HONORABLE JOHN SIEFERT,
Petitioner,

v.

JAMES C. ALEXANDER, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether Wisconsin's rule prohibiting judges and judicial candidates from making partisan political endorsements is an unlawful infringement of the First Amendment.

2. Whether Wisconsin's rule prohibiting judges and judicial candidates from personally soliciting campaign contributions is an unlawful infringement of the First Amendment.

LIST OF PARTIES

The Honorable John Siefert,

Petitioner

James C. Alexander, *in his official capacity as the Executive Director of the Wisconsin Judicial Commission*;

Larry Bussan, *in his official capacity as administrative assistant for the Wisconsin Judicial Commission*;

Ginger Alden, Michael J. Aprahamian, John R. Dawson, James M. Haney, Cynthia Herber, Michael R. Miller, Emily S. Mueller, Paul F. Reilly *all in their official capacities as members of the Wisconsin Judicial Commission*,

Respondents

Pursuant to Fed. R. Civ. P. 25(d)(1) and Wis. Stat. § 803.10(4)(a), respondents Aprahamian, Herber, Mueller, and Reilly are automatically substituted, by operation of law, in place of former respondents Donald Leo Bach, Jennifer Morales, David A. Hansher, Gregory A. Peterson and William Vander Loop.

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STATEMENT OF THE CASE

In this case, petitioner John Siefert ("Judge Siefert")—who has served as a circuit court judge in Milwaukee County, Wisconsin, since 1999—seeks to invalidate two provisions of Wisconsin's Code of Judicial Conduct—codified in Chapter 60 of the Wisconsin Supreme Court Rules ("SCR")—on the

ground that they unlawfully infringe his free speech rights under the First Amendment to the United States Constitution. The challenged provisions are: (1) Wisconsin's partisan endorsement clause—SCR 60.06(2)(b)(4)—which prohibits a judge or judicial candidate from publicly endorsing another person's candidacy for partisan political office; and (2) Wisconsin's personal solicitation clause—SCR 60.06(4)—which prohibits a judge or judicial candidate from personally soliciting or accepting contributions for the judge's own election campaign.

The case was commenced under 42 U.S.C. § 1983 in the United States District Court for the Western District of Wisconsin on March 3, 2008. The named defendants were the individual members of the Wisconsin Judicial Commission and its executive director (hereafter collectively referred to as "respondents" or "the Commission"). The Commission is statutorily charged, among other things, with investigating the possible misconduct of a Wisconsin judge, which includes any willful violation of the Code of Judicial Conduct. *See* Wis. Stat. §§ 757.81(4)(a) and 757.85.[1] In addition to the

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[1]Under SCR 20:8.2(b), applicable provisions of the Code of Judicial Conduct apply not only to sitting judges, but also to judicial candidates who are lawyers but are not yet judges. Power to investigate misconduct by such candidates, however, resides not with the Commission, but with Wisconsin's Office of Lawyer Regulation, which is not a party in this case. *See* SCR 21.02.

endorsement and solicitation clauses already mentioned, the complaint also challenged the constitutionality of Wisconsin's party membership clause, which prohibited a judge or judicial candidate from being a member of a political party. SCR 60.06(2)(b)1.

On February 17, 2009, the District Court granted summary judgment in favor of Judge Siefert and final judgment was entered on February 23, 2009. *See Siefert v. Alexander*, 597 F.Supp.2d 860 (W.D. Wis. 2009). The effect of the decision was to enjoin the Commission from enforcing all three of the canons that had been challenged. *See id.* at 890.

Timely notice of appeal was filed by the Commission on March 18, 2009. The Seventh Circuit, on June 14, 2010, affirmed the invalidation of the party membership clause, but reversed the district court and upheld the validity of the endorsement and solicitation clauses. *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010). Judgment was entered by the Seventh Circuit on August 31, 2010.

Judge Siefert filed a Petition for a Writ of Certiorari with this Court on September 22, 2010, seeking review of the Seventh Circuit's ruling on the endorsement and solicitation clauses. The Commission has not filed a cross-petition to challenge the Seventh Circuit's ruling on the party membership clause. In its present posture,

therefore, this case only involves the validity of the endorsement and solicitation clauses.

REASONS TO DENY THE PETITION

Independence and impartiality are cornerstones of an effective judiciary in a democracy. The concern for promoting and protecting these values dates back at least to our nation's founding, when Alexander Hamilton wrote that "the complete independence of the courts of justice is peculiarly essential in a limited Constitution." *The Federalist No. 78* at 466 (Clinton Rossiter ed., 1961). There is thus broad agreement that states have a compelling interest in employing judges who are actually impartial and that due process requires judges to be impartial. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927). This Court has also recognized that maintaining the public's perception that the courts are fair is a critical requirement of due process, going beyond the requirement that courts be fair in fact. *See Mistretta v. U.S.*, 488 U.S. 361, 407 (1989) ("[T]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *see also Cox v. State of Louisiana*, 379 U.S. 559, 565 (1965) (a state may protect against the possibility of public misperception that judicial action "did not flow only from the fair and orderly working of the judicial process."). For the courts, then, more than for the other branches of government, "it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism

and civil strife." *Bauer v. Shepard*, ___ F.3d ___, 2010 WL 3271960 at *8.

In the early and mid 19th century, the framers of many state constitutions were concerned about the potential threats to judicial independence posed by the pursuit of appointive office. Accordingly, between 1846 and 1860, numerous states, including Wisconsin, provided in their constitutions for popular election of judges. *See* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 THE HISTORIAN 337 (1983); Wis. Const. art. VII, §§ 4 and 7. Proponents of popular election saw that practice as enhancing, rather than diminishing, the independence of the judicial branch of government. *Id.* at 343-45 and 349-50. In their view, the appointment of judges by governors or legislatures had led to the distribution of judgeships based on political service, rather than legal skill or judicial temperament. *Id.* at 347. That practice, they believed, was itself dangerous to judicial independence because it denied the judiciary its own claim to direct support from the sovereign people. *Id.* at 350.

The elective system was thus meant to insulate the judiciary from the control of the other branches of government by providing for direct popular support of judges. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AMERICAN JOURNAL OF LEGAL HISTORY 190, 205-06 (1993). This

view of the purpose of judicial elections was articulated in the constitutional debates in Wisconsin. *See Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, ¶ 26, 263 Wis. 2d 709, 666 N.W.2d 816 (quoting Milo Quaife, *The Convention of 1846* (1919) at 287-88).

Judicial elections are thus different than elections for legislators and executive officials. Members of those "political" branches of government are expected to be representative of and responsive to the interests of their electoral constituencies, whereas judges—even when popularly elected—are not representative officials, but rather are expected to be impartial and independent in applying the rule of law. *See Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[P]ublic opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."). Whether judges are placed in office by appointment or by election, their role is the same: to decide individual cases based on what the law is, not what they think it should be.

Accordingly, states with judicial elections have addressed the fear that the sway of popular politics might itself endanger the independence of the judiciary by establishing constitutional devices designed to insulate elected judges from excessive political influence by, for example, providing for district rather than state-wide elections for lower courts, giving judges fixed terms of office during good behavior and longer terms for higher courts, and

making elected judges ineligible for other offices during the term for which they were elected. Hall, *The Judiciary on Trial*, 45 THE HISTORIAN at 352; *see also, e.g.,* Wis. Const. art. VII, §§ 1, 6-7, and 10; *Wagner*, 263 Wis. 2d 709, ¶¶ 27-28.

In addition to such insulating mechanisms, most jurisdictions, including Wisconsin, have established codes of judicial conduct that serve an important function in ensuring that public confidence in the judiciary is not undermined by the behavior of judges and judicial candidates. *See Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2266 (2009) ("These codes of conduct serve to maintain the integrity of the judiciary and the rule of law."). Wisconsin's code of judicial conduct "governs judicial acts of a judge in his official capacity and certain personal conduct which interferes or appears to interfere with the proper performance of his judicial conduct." *In re Promulgation of a Code of Judicial Ethics*, 36 Wis. 2d 252, 254, 153 N.W.2d 873 (1967).

In the present case, Judge Siefert is not really seeking resolution of an actual and important conflict on a defined issue of constitutional law, but rather is asking the Court to strike out into new ground by broadly extending this Court's decision in *Republican Party of Minnesota v. White* ("*White I*"), 536 U.S. 765 (2002), in a way that would seriously erode the important differences between judicial elections and political branch elections. Whether to extend a prior decision of this Court into new

territory is certainly a question that can be addressed to this Court, but it is nonetheless one that ordinarily should not be taken up in this forum until such time as clearly conflicting alternative views have developed and have been carefully clarified and thoroughly studied in the lower courts. With regard to the claims raised here by Judge Siefert, that time has not yet arrived.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *WHITE I*.

In deciding whether to grant review of a Circuit Court decision, this Court will consider whether the Circuit Court "has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). Here, Judge Siefert contends that the Seventh Circuit decision for which review is sought conflicts with this Court's decision in *White I*, which held that the First Amendment was violated by a Minnesota judicial conduct canon that prohibited judges and judicial candidates from announcing their views on disputed legal and political issues. *Id.* at 788. Applying strict scrutiny, *White I* recognized a compelling state interest in preventing judicial bias for or against particular litigants, but nonetheless concluded that the challenged announce clause was not narrowly tailored to serve that interest. *Id.* at 776-77.

According to Judge Siefert, *White I* held that the First Amendment requires strict scrutiny of *all* restrictions on political speech by judges and judicial candidates. On that basis, he contends that the Seventh Circuit decision here conflicts with *White I* because it applied lower levels of scrutiny to Wisconsin's endorsement and solicitation clauses. *See Siefert*, 608 F.3d at 983-84 and 988-89.

Judge Siefert is incorrect, both because *White I* did not hold that the First Amendment requires strict scrutiny of all restrictions on judicial speech and because the announce clause at issue in *White I* is not materially similar to Wisconsin's endorsement and solicitation clauses.

A. *White I* Did Not Hold That the First Amendment Requires Strict Scrutiny of All Restrictions on Judicial Speech.

It is true that *White I* applied strict scrutiny to Minnesota's announce clause and noted that that clause restricted speech based on content and restricted core political speech. *See White I,* 536 U.S. at 774-75. *White I* did not, however, hold that the First Amendment requires campaigns for judicial office to be treated exactly the same as campaigns for political branch offices. *See id.* at 783. Rather, the parties in *White I* had all agreed that strict scrutiny was proper for the announce clause in that

case and the Court, accordingly, adopted that level of review without engaging in any analysis of the question of whether strict scrutiny would necessarily apply to regulations of other, different forms of judicial speech that did not prohibit the discussion of disputed legal and political issues by a judge or judicial candidate. *See id.*

On the contrary, the majority decision in *White I* disclaimed any intent to invalidate all restrictions on judicial campaign speech and expressly took no position on the validity of restrictions that were not before the Court in that case. *White I*, 536 U.S. at 770, 773 n. 5, and 783. *White I* thus left open the question of just how far the First Amendment allows states to go in regulating forms of political conduct by judges and judicial candidates other than the mere announcement of their positions on legal and political issues.

Moreover, Justice Kennedy, a member of the five-vote majority and author of a separate concurrence, expressly concluded that *White I* did not involve the validity of other restrictions on judicial speech and specifically left open the question of whether a different level of constitutional scrutiny could apply to restrictions on speech that is inconsistent with a judge's judicial function. *See id.* at 796 (Kennedy, J., concurring) ("This case does not present the question whether a State may restrict the speech of judges because they are judges"). "Nothing in the Court's opinion," he wrote, "should be read to cast doubt on the vital importance of" the

government's interest in "maintain[ing] the integrity of its judiciary." *Id.* at 793 (Kennedy, J., concurring). On the contrary, in Justice Kennedy's view, states are obligated to regulate the behavior of their judges in order to protect the integrity of their courts and state rules of judicial conduct are the necessary means by which states develop "independent-minded and faithful jurists." *Id.* at 794 (Kennedy, J., concurring).

Contrary to Judge Siefert's contention, then, *White I* did not hold that the First Amendment requires the automatic application of the same standard of constitutional scrutiny to all judicial conduct canons, but rather leaves courts free to take into account the interests that each individual canon serves and to recognize that different canons may merit different levels of scrutiny.

For similar reasons, this case also does not present the first of the Questions Presented suggested by Judge Siefert—*i.e.*, the question of whether the First Amendment uniformly requires strict scrutiny of all restrictions on judicial campaign speech. It is generally not appropriate for this Court to take a case merely for the purpose of resolving an abstract question about the general principles or legal standards to be used in a particular category of cases. *See* Eugene Gressman *et al.*, Supreme Court Practice, 241 (9th ed. 2007). What matters is whether the lower courts have decided the same legal issue in opposing ways under materially similar factual circumstances. *See id.* at 242.

Where review by this Court is warranted due to the existence of conflicting circuit court decisions regarding the constitutionality of a particular type of judicial canon, the Court will necessarily address the applicable legal standard in the course of determining that canon's validity. As shown in sections II and III of this brief, however, such review is not warranted in this case. Therefore, there is no valid justification for the Court to take this case merely in order to address abstract questions about the legal standards that may have been applied in a variety of distinguishable lower court decisions.

B. The Announce Clause At Issue In *White I* Is Not Materially Similar to Wisconsin's Endorsement or Solicitation Clauses.

The present case is also distinguishable from *White I* because it does not involve an announce clause and thus raises different issues than were before this Court in that case. Central to *White I* was the fact that communication of candidates' views on public issues enables voters to determine the qualifications of candidates for judicial office and to cast informed votes. *Id.* at 774. On that basis, the Court found the speech restricted by the announce clause to be "at the core of our First Amendment freedoms." *Id.* (citation and internal quotation marks omitted).

White I distinguished such speech about legal and political *issues*, however, from speech about potential *litigants*. Justice Scalia, writing for the Court, emphasized that the announce clause did "not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *Id.* at 776 (original emphasis). A judge's preconceived views about particular litigants directly implicates the due process right to a fair trial. *Id.* at 775-76. In contrast, it is desirable for a judge to have considered views on legal issues. *Id.* at 777-78. Therefore, while judicial candidates must be able to announce their views on legal and political issues in order to conduct robust electoral campaigns, announcing views on individuals who may come before the judge in particular cases poses a threat to judicial impartiality.

The Wisconsin endorsement and solicitation clauses at issue in the present case are far more confined than was the announce clause in *White I* and, unlike that clause, do not inhibit either a candidate's ability to speak about or the public's opportunity to learn about the candidate's opinions on the various issues of the day and the candidate's qualifications and suitability for judicial office. Rather, consistent with *White I*, Wisconsin's endorsement and solicitations clauses are narrowly targeted at specific activities that create threats to judicial impartiality far greater than any threats that were created by the announce clause.

Accordingly, in the present case, the Seventh Circuit carefully analyzed the question of the proper level of constitutional scrutiny and correctly concluded that Wisconsin's endorsement and solicitation clauses regulate different forms of political speech that are more limited in communicative value and thus are entitled to a more deferential level of constitutional scrutiny than was the core political speech at issue in *White I*. *Siefert*, 608 F.3d at 983-84 and 988-89. That conclusion does not conflict with *White I* and does not warrant further review by this Court.

1. The endorsement clause.

Wisconsin's endorsement clause directly targets a single, narrowly defined political activity that is especially partisan in nature: an endorsement of another person's candidacy for partisan office. *See Wersal v. Sexton*, 613 F.3d 821, 849 (8th Cir. 2010) (Bye, J., dissenting) (Minnesota "endorsement clause targets precisely the speech most likely to implicate Minnesota's compelling interests."), *rehearing en banc granted* (Oct 15, 2010). A judge who endorses a partisan candidate does not thereby announce his own views on legal or political issues, but rather conveys a bias in favor of a particular individual who may come before the judge's court either in person or via an agent or other close associate. *See Siefert*, 608 F.3d at 983-84. The act of endorsement thus creates a danger that the judge will not be or appear impartial. *Wersal*, 613 F.3d at 847 (Bye, J.,

dissenting). There is a risk that the judge will harbor or appear to harbor a bias in favor of the endorsed candidate and those who associate with or support that candidate. *Id.* Equally important, there is a risk that the judge will harbor or appear to harbor a bias against political opponents of the endorsed candidate and those who support such opponents. *Id.* Because every partisan endorsement carries such a risk of bias, or the appearance of bias, the endorsement clause precisely targets a type of speech that is especially likely to implicate the state's compelling interest in maintaining judicial impartiality and the appearance of impartiality. *Id.* at 849.

In addition to eliminating the appearance of judicial bias with regard to specific individuals, the endorsement clause also serves to prevent judges from lending the prestige of judicial office to the advancement of someone else's partisan political interests, thereby assuming a role as a political power broker. *See Siefert*, 608 F.3d at 984. Without restrictions on this type of judicial conduct, "judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement." *Id.* at 986 (citation and internal quotation marks omitted). "By moving past the role of mere participant in the political system to the role of political power broker trading on the currency of his position, a judge who gives political endorsements creates the appearance of a judicial branch beholden to political interests." *Wersal*, 613 F.3d at 847 (Bye, J., dissenting). Such direct

judicial involvement in the arena of partisan political pressures erodes the appearance of judicial impartiality and undercuts the state's compelling interest in maintaining both the appearance and the reality of a fair and neutral court system that is not embroiled in partisanship. *See* Charles G. Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 Geo. J. Legal Ethics 1259, 1267 (2008).

Although the endorsement clause is plainly aimed at restricting only speech that endorses particular candidates, Judge Siefert nonetheless reasons that, because a partisan endorsement may imply that the endorser shares the political views of the endorsee, restricting such endorsements amounts to restricting the expression of views on issues, in violation of *White I*. That is incorrect. If the mere presence of possible implied meanings were sufficient to transform speech about individuals into speech about issues for First Amendment purposes, then *White I*'s express distinction between those two forms of speech would be effectively nullified and rendered meaningless.

Furthermore, the suggestion that the endorsement clause somehow prevents judicial candidates from expressing their views on issues is simply wrong. If a judicial candidate wishes to convey that he has the same views on one or more issues as a candidate for partisan office, the judicial candidate need not endorse the partisan candidate as a proxy for those views, but rather is free to

announce the views directly. *Wersal v. Sexton*, 607 F.Supp.2d 1012, 1023 (D. Minn. 2009), *reversed by* 613 F.3d 821. The only thing the endorsement clause prevents the judicial candidate from doing is to endorse the election of the partisan candidate. Apart from the establishment of that particular political connection between endorser and endorsee, the entire universe of political speech remains freely available to the judicial candidate.

As the Seventh Circuit said: "An endorsement is a different form of speech that serves a purpose distinct from the speech at issue in *White I* . . . ." *Siefert*, 608 F.3d at 983. These distinctive characteristics justify a more deferential approach than strict scrutiny and the Seventh Circuit, accordingly, adopted the type of balancing analysis that had been suggested in Justice Kennedy's concurrence in *White I*. *Siefert*, 608 F.3d at 984-85. The Seventh Circuit's approach to the endorsement clause thus does not conflict with *White I* and does not warrant further review by this Court.

2. The solicitation clause.

Like the endorsement clause, the solicitation clause also differs from the announce clause in that it does not inhibit a judicial candidate's ability to communicate his views about public issues or his qualifications for office. Instead, the solicitation clause directly targets a particular financial transaction between a judicial candidate and a would-be campaign contributor by requiring that

transaction to be handled by a campaign committee, rather than by personal involvement of the candidate. *See* SCR 60.06(4) ("A candidate may . . . establish a committee to solicit and accept lawful campaign contributions.") *White I* addressed restrictions on judicial candidates' speech about legal and political issues, but did not deal with restrictions on the conduct of personally soliciting this type of financial transaction. This clearly distinguishes the solicitation clause at issue here from the announce clause that was invalidated in *White I.*

Furthermore, as with the endorsement clause, the specific conduct targeted by the solicitation clause poses heightened risks to both the appearance and reality of judicial impartiality:

> A contribution given directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge, or in response to a mass mailing sent above the judge's signature.

Siefert, 608 F.3d at 989; *see also White I*, 536 U.S. at 790 (O'Connor, J., concurring) ("[T]he mere possibility that judges' decisions may be motivated

by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.").

It is precisely the act of asking for money one-on-one that creates the appearance of bias and "no matter what course of action the potential donor chooses, the appearance of judicial impartiality is diminished." *Wersal*, 613 F.3d at 853 (Bye, J., dissenting). As the Seventh Circuit aptly stated, "[a] direct solicitation closely links the quid-avoiding the judge's future disfavor-to the quo-the contribution." *Siefert*, 608 F.3d at 989. Accordingly, "the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means." *Id.* at 989-90. As the Seventh Circuit has subsequently noted, *Siefert* recognized that personal solicitations create a "potential for actual or perceived mutual back scratching, or for retaliation against attorneys who decline to donate . . . ." *Bauer v. Shepard*, 2010 WL 3271960 at *4.

The prohibition on personal solicitation of campaign contributions also prevents a judge's personal reputation or the dignity of his office from being used in a way that—whether intentionally or not—would have a coercive effect on lawyers and potential litigants who might be asked to contribute to the judge's re-election campaign. *See Stretton v. Disciplinary Bd. of S. Ct. of PA.*, 944 F.2d 137, 146 (3rd Cir. 1991) ("[W]e cannot say that the state may not draw a line at the point where the coercive effect,

or its appearance, is at its most intense—personal solicitation by the candidate."). Such coercion not only harms the individuals who may be coerced into contributing, but also harms the reputation of the judiciary by directly connecting the person of the judge and the dignity of the judicial office with a financial transaction for the judge's personal political advantage. Even worse, the direct involvement of judges in such transactions may create the appearance in the eyes of the public that judges are willing to accept campaign contributions as payback for past favorable treatment in court or as consideration for future favorable treatment.

While it may be arguable whether a state has a truly compelling interest in preventing potential donors from feeling coerced, it cannot plausibly be denied that there is a compelling state interest in preventing the dignity of the judicial office from being misused in a coercive way that harms the judiciary's reputation for integrity and impartiality and has an interest in protecting the reputation of the judicial branch against the appearance of electoral corruption. The specific conduct regulated by the solicitation clause thus presents greater risks to judicial impartiality than did the conduct regulated by the announce clause in *White I*.

Because the solicitation clause does not restrict the amount or manner in which a judicial candidate can raise or spend campaign funds for the purpose of communicating the candidate's views on issues or qualifications, the Seventh Circuit correctly found

that the clause need not be subject to strict scrutiny. *Siefert*, 608 F.3d at 988; *see also Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam) ("A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.").

Such a restriction on the way campaign funds are raised, the Seventh Circuit reasoned, is really a campaign finance regulation, akin to the regulation of campaign contribution limits, which are reviewed under the framework of intermediate or closely drawn scrutiny set forth in *Buckley*. *Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 96). Although the solicitation clause regulates the solicitation of money, rather than the giving or receipt of money at issue in *Buckley*, the Seventh Circuit observed that this Court has extended the anti-corruption rationale recognized in *Buckley* to other federal-law bans on solicitations by candidates or office holders. *Id.* (citing *McConnell v. Federal Election Com'n*, 540 U.S. 93, 136-38 & n. 40, *overruled in part on other grounds by Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010)). Therefore, as with the endorsement clause, the Seventh Circuit's approach to the solicitation clause likewise does not conflict with *White I* and does not warrant further review by this Court.

II. THERE IS NO CIRCUIT CONFLICT JUSTIFYING REVIEW OF WISCONSIN'S ENDORSEMENT CLAUSE.

In deciding whether to grant review of a Circuit Court decision, this Court will also consider whether the Circuit Court "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" Sup. Ct. Rule 10(a). Here, Judge Siefert contends that the Seventh Circuit's decision regarding Wisconsin's endorsement clause conflicts with the Eighth Circuit's decision in *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010), *rehearing en banc granted* (Oct 15, 2010). In that case, a divided panel of the Eighth Circuit applied strict scrutiny and invalidated a Minnesota endorsement clause that, similar to Wisconsin's clause, prohibited judges and judicial candidates from endorsing or opposing candidates for other offices. *See id.* at 833-38.

The Eighth Circuit, however, has granted a petition for *en banc* rehearing of the *Wersal* case. The *Wersal* panel decision on which Judge Siefert relies, therefore, has been vacated pending the *en banc* review.[2] Accordingly, the purported conflict between the present case and *Wersal* no longer exists. Furthermore, apart from the now-vacated panel decision in *Wersal*, other state and federal

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[2]Oral argument in the *en banc* rehearing took place on January 10, 2011.

courts have not split on the constitutionality of restrictions on political endorsements by judges, but rather have uniformly upheld them. *See In re Matter of William A. Vincent, Jr.*, 172 P.3d 605, 606, 608-09 (N.M. 2007); *In re Matter of Ira J. Raab*, 793 NE.2d 1287, 1292 (N.Y. 2003)); *In re Code of Judicial Conduct (Canons 1, 2, and 7A(1)(b))*, 603 So.2d 494, 497-98 (Fla. 1992); *Yost v. Stout*, No. 06-4122-JAR, slip op. at 12 (D. Kan. Nov. 16, 2008).

Moreover, even if the *Wersal* panel decision had not been vacated, it still would not conflict with the Seventh Circuit's decision here in a way that would warrant review by this Court. First, the *Wersal* panel majority, in choosing to apply strict scrutiny to Minnesota's endorsement clause failed to consider the Seventh Circuit's views regarding the applicability of the more deferential standard used to evaluate restrictions on political activities by government employees that interfere with the effective performance of governmental functions. *See Siefert*, 608 F.3d at 984. Nor did the panel majority discuss or cite *Pickering v. Board of Ed. of TP. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968); *United States C. Serv. Com'n v. National Ass'n of Let. Car.*, 413 U.S. 548 (1973); or any of the other decisions of this Court concerning such restrictions on public employees' political activities. *See Bauer*, 2010 WL 3271960 at *8. The *Wersal* panel decision, therefore, does not reflect sufficiently close study of the applicable level of scrutiny to warrant review of that issue by this Court at the present time.

Second, in invalidating Minnesota's endorsement clause, the *Wersal* panel majority reasoned that an endorsement may be a "proxy for expressing [the candidate's] views" and therefore must be invalidated because it restricts speech for or against particular *issues* rather than speech for or against particular *parties*. *Wersal*, 613 F.3d at 835. As has already been shown in section I.B.1 above, however, that view of endorsements is itself inconsistent with *White I*'s express distinction between speech about issues and speech about litigants. *See White I*, 536 U.S. at 775-78. A conflict between a decision of the Eighth Circuit and a decision of this Court, might provide a reason for this Court to review the Eighth Circuit decision, but it is not a reason for this Court to review a Seventh Circuit decision that is itself consistent with Supreme Court precedent. In any event, this tension between *White I* and the *Wersal* panel decision may be one of the matters the Eight Circuit will address in the anticipated *Wersal en banc* decision. At the present time, however, this issue is not sufficiently developed to be in the best posture for consideration by this Court.

Third, the *Wersal* panel also found Minnesota's endorsement clause to be overbroad because it supposedly prevents endorsements of people who are unlikely to appear as litigants in the endorser's court, such as candidates from other states. *Wersal*, 613 F.3d at 835-36. As the Seventh Circuit has noted, however, "[l]aws need not contain exceptions for every possible situation in which the reasons for

their enactment are not present" because "[i]t is the nature of rules to be broader than necessary in some respects." *Bauer*, 2010 WL 3271960 at *4. Accordingly, this Court has held that a law will not be facially invalidated unless its overbreadth is not only real, but also is a substantial concern when judged in relation to the legitimate sweep of the statute as a whole. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 and 616 n. 4 (1973). In *Wersal*, the panel reached the conclusion that the Minnesota endorsement clause was fatally overinclusive, without specifically determining the substantiality of its overbreadth in relation to its legitimate sweep, as required under *Broadrick* and its progeny. *See Wersal*, 613 F.3d at 835. Once again, the failure of the *Wersal* panel to give proper weight to this Court's precedent hardly provides a reason for the Court to grant review of the present case.

In any event, Judge Siefert's parallel allegations of overbreadth in this case are themselves without merit. He indicates that he wished to endorse then-Senator Barack Obama's presidential candidacy and suggests that Wisconsin's endorsement clause is overinclusive to the extent that it prohibited such an endorsement, because Obama would be unlikely to appear as a litigant before him. That suggestion, however, is incorrect. Candidates for the national office of the presidency appear on electoral ballots in every state and thus may appear as litigants in election-related disputes in virtually any court in the nation.

For example, following the November 2000 presidential election, both Al Gore and George W. Bush appeared as litigants before a Florida circuit court, the Florida Supreme Court, and before this Court in litigation that ultimately determined the outcome of the national election. *See Bush v. Gore*, 531 U.S. 98 (2000) *reversing, Gore v. Harris*, 772 So.2d 1243 (Fla. 2000) *reversing, Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. Cir. Ct. Dec. 4, 2000). A case with such great political consequences inevitably threatens to undermine public confidence in the impartiality of the judiciary. In the litigation regarding the 2000 election, however, the judges involved in the Florida court proceedings had been prohibited from publicly endorsing or opposing either presidential candidate by Canon 7 of the Florida Code of Judicial Conduct. Likewise, the Justices of this Court had been prohibited from making such endorsements by Canon 5 of the Code of Conduct for United States Judges. It is disconcerting to contemplate the scope and depth of the damage to the appearance of judicial impartiality that might have been caused by such a case in the absence of those salutary restrictions on political endorsements by judges. Judge Siefert's suggestion that a presidential endorsement by a Wisconsin judicial candidate would not implicate the state's compelling interest in maintaining the reality and appearance of judicial impartiality is thus without merit.

Finally, the Seventh Circuit's decision regarding Wisconsin's endorsement clause also does not

conflict with *Republican Party of Minnesota v. White* ("*White II*"), 416 F.3d 738 (8th Cir. 2005), as Judge Siefert suggests. *White II* held that a judicial candidate must be allowed to associate with political parties and to engage in certain limited forms of solicitation of campaign contributions, but it did not address endorsements by judges, nor did it consider how such a political relationship between a judge and individual partisan candidates could affect the appearance of judicial impartiality or undermine public confidence in the judiciary. There is thus no direct conflict between the present case and *White II* regarding the constitutionality of a prohibition on partisan judicial endorsements.

It is true that *White II* did apply strict scrutiny to the canons at issue in that case and discussed the standard of review in terms which suggest that strict scrutiny could be uniformly applicable to all canons that restrict any political speech by judges or judicial candidates. *Id.* at 748-49. Nonetheless, in the absence of any considered analysis in *White II* of why strict scrutiny should or should not apply to an endorsement clause, any tension between that case and the Seventh Circuit's analysis of the issue in this case remains abstract. Moreover, in light of the pending *en banc* decision in *Wersal*, it is possible that the Eighth Circuit could be on the verge of reconsidering some or all of its prior legal analysis in *White II*, or at least of clarifying that analysis in light of the intervening legal analysis by the Seventh Circuit in the present case. Under these circumstances, it makes sense for this Court to

postpone review of the constitutionality of restrictions on judicial endorsements until it has the benefit of the full Eighth Circuit's further study of the issues.

III. LIMITED INTER-CIRCUIT TENSION RELATED TO THE CONSTITUTIONALITY OF WISCONSIN'S SOLICITATION CLAUSE IS INSUFFICIENT TO WARRANT REVIEW BY THIS COURT.

Judge Siefert also contends that the Seventh Circuit's decision regarding Wisconsin's solicitation clause—and, in particular, the adoption of a level of review lower than strict scrutiny—conflicts with decisions from the Sixth, Eighth, and Eleventh Circuits. *See Carey v. Wolnitzek*, 614 F.3d 189, 204-07 (6th Cir. 2010); *White II*, 416 F.3d 738, 763-66 (8th Cir. 2005); *Wersal*, 613 F.3d 821, 838-41 (8th Cir. 2010); and *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002). That contention, however, overlooks the fact that, "[t]o justify a grant of certiorari, the conflict must truly be direct and must be readily apparent from the lower court's rationale or result." Gressman, Supreme Court Practice, 250 (citing *U.S. v. Bass*, 536 U.S. 862, 864 (2002) and *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997)). Here, the purported conflicts to which Judge Siefert points either do not exist or, where there is some real tension, it is not clear and direct, but rather is presented in an

abstract or indirect fashion that is not optimal for consideration by this Court.

A. The Difference in Levels of Scrutiny Applied to Solicitation Clauses in Different Federal Circuits Does Not Warrant Review by This Court.

Judge Siefert first points to the fact that the Sixth, Eighth, and Eleventh Circuits all have applied strict scrutiny to bans on political solicitations by judicial candidates in Kentucky, Minnesota, and Georgia, respectively, whereas the Seventh Circuit, in this case, applied closely drawn scrutiny to Wisconsin's solicitation clause. According to Judge Siefert, the Court should take this case in order to review that inter-circuit conflict regarding the applicable level of constitutional scrutiny. Contrary to Judge Siefert's suggestion, however, this issue has not been sufficiently developed in the lower courts to merit review by this Court at the present time.

In the present case, the Seventh Circuit based its reasoning on the fact that a ban on the direct, personal solicitation of campaign contributions by a judicial candidate does not prevent such a candidate from expressing his own views on public issues or his qualifications for office, and does not restrict the amount or manner in which a judicial candidate can raise or spend campaign funds for the purpose of

communicating his views on issues or qualifications. *Siefert*, 608 F.3d at 988. On that basis, the Seventh Circuit concluded that Wisconsin's solicitation clause did not directly burden political speech in a way that would require strict scrutiny. *Id.* Instead, the Seventh Circuit found that the solicitation clause is really a restriction on the way campaign funds are raised and thus is analogous to the kind of contribution-related speech that *Buckley* held was entitled to closely drawn scrutiny, rather than strict scrutiny. *See Siefert*, 608 F.3d at 988 (citing *Buckley*, 424 U.S. at 20-21, 25).

In contrast, the Sixth, Eighth, and Eleventh Circuits all very quickly concluded that personal solicitations are core political speech entitled to strict scrutiny, while engaging in little or no analysis to support that conclusion as applied to personal solicitations and while giving little or no consideration to the kind of alternative view of personal solicitations that was discussed by the Seventh Circuit in this case. *See Carey*, 614 F.3d at 198-200; *White II*, 416 F.3d at 748-49; *Wersal*, 613 F.3d at 831-32; *Weaver*, 309 F.3d at 1319.[3] Because those circuits have not fully considered the aspects of personal solicitation speech analyzed by the Seventh Circuit, their decisions on this issue do

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[3]The Sixth Circuit did briefly consider and reject application of closely drawn scrutiny based on an analogy to other fundraising regulations, but even that decision did not specifically discuss or consider the Seventh Circuit's use of the rejected approach. *Carey*, 614 F.3d at 200.

not directly conflict with the Seventh Circuit's in a way that would be ripe for review by this Court. The question of what level of scrutiny should apply to personal solicitations by judicial candidates, therefore, still could benefit from further study in the lower courts before it is taken up by this Court.

B. Any Conflict in Different Circuits Regarding the Validity of Solicitation Clauses Is Not Sufficiently Clear and Direct or Sufficiently Developed to Warrant Review by This Court.

1. Sixth Circuit

The most recent conflicting decision to which Judge Siefert points is *Carey*, 614 F.3d 189 (6th Cir. 2010), in which the Sixth Circuit struck down three Kentucky judicial canons, including one that prohibited judicial candidates from personally soliciting or accepting campaign contributions. Applying strict scrutiny, the Court concluded that the Kentucky solicitation clause was not narrowly tailored to advance the state's compelling interest in preventing judicial bias for or against a litigant. *Id.* at 204-06. In particular, the Court found the solicitation clause to be overinclusive because it not only prohibited in-person solicitations and solicitations of people with pending court cases, but also prohibited speeches to large groups and signed

mass mailings. *Id.* at 205. The Court specifically reserved judgment on the question of whether the First Amendment would permit a narrower ban on in-person solicitations and solicitations of people with pending cases, but nonetheless invalidated the Kentucky solicitation clause in its entirety based on a finding of facial overbreadth. *Id.* at 206-07.

Because *Carey* facially invalidated a solicitation clause similar to Wisconsin's, that decision clearly is in tension with the Seventh Circuit's decision in the present case. Nevertheless, the two decisions are, to a certain degree, distinguishable and/or reconcilable.

Carey's analysis of the Kentucky solicitation ban focused on its invalidity as applied to solicitations made through speeches to large groups and signed mass mailings. In doing so, the Sixth Circuit expressly distinguished the present case, noting that the Seventh Circuit's decision in *Siefert* "focused on the problems associated with 'direct' solicitation and did not consider the validity of applying the canon to mass mailings and group solicitations—the most troubling scenarios here." *Carey*, 614 F.3d at 206. In contrast, *Carey* expressly did not decide the constitutionality of a solicitation clause "focused on one-on-one solicitations or solicitations from individuals with cases pending before the court . . . ." *Id.* As the Seventh Circuit subsequently observed, *Carey* "did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is greatest, but concluded that Kentucky's rule is substantially overbroad because it

covers solicitation by mass mailing." *Bauer*, 2010 WL 3271960 at *5.[4]

Any conflict between *Carey* and the present case, therefore, is partial and does not include a conflict regarding the heart of Wisconsin's solicitation clause—*i.e.*, its ban on those direct personal solicitations that pose the greatest and most immediate threat to the reality and appearance of impartiality. *Carey* thus does not present the kind of square, direct conflict that would warrant review by this Court. Moreover, because the Sixth and Seventh Circuits have not analyzed the Kentucky and Wisconsin solicitation clauses in relation to comparable factual situations, there is comparatively little risk that allowing the limited conflict between the *Carey* and *Siefert* decision to continue, pending further study in the lower courts, will lead to any serious lack of uniformity in the practical application of solicitation canons in different parts of the country.

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[4]Accordingly, an Ohio district court recently found that Ohio's solicitation clause, which contains exceptions for mass mailings and group solicitations, would probably be upheld under *Carey*. *See Ohio Council 8 American Fed'n of State, County, and Mun. Employees, AFL-CIO v. Brunner*, No. 1:10-cv-503, slip op. at 16-17 (S.D. Ohio Aug. 19, 2010) (finding that plaintiffs had not established probability of success entitling them to preliminary injunction).

2. Eighth Circuit

Judge Siefert also points to alleged conflicts between the Seventh Circuit's treatment of Wisconsin's solicitation clause and the Eighth Circuit's decisions in *White II* and *Wersal*. Once again, however, these purported conflicts either do not exist or are not clear and direct enough to warrant review by this Court.

a. *White II*

In *White II*, the Eighth Circuit, applying strict scrutiny, held that "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case." *White II*, 416 F.3d at 765. The Court nonetheless found that the solicitation clause was not narrowly tailored to that compelling interest to the extent that it prohibited candidates from soliciting contributions from large groups and transmitting personally-signed solicitation messages through campaign committees. *Id.* at 764-66. *White II* did not, however, hold that direct personal solicitations—as opposed to blanket solicitations—could not be restricted in order to protect judicial impartiality.

White II thus is not in direct conflict with the Seventh Circuit decision here because, as noted above, the issue in *White II* was not the validity of restrictions on direct, in-person solicitations by

judicial candidates, but rather was the validity of restrictions on blanket solicitations made by letter or speeches to large groups. Accordingly, *White II*, like *Carey* and for similar reasons, does not present the kind of direct conflict with the present case that would justify review by this Court.

b. Wersal

Following *White II*, Minnesota revised its solicitation clause to permit blanket solicitations made by letter or speeches to large groups, thereby addressing the problems that had been identified by the Eighth Circuit. The revised solicitation clause was again challenged in *Wersal*, 613 F.3d at 839. Again applying strict scrutiny, a divided panel of the Eighth Circuit this time struck down the clause in its entirety, concluding that, even with regard to direct, in-person solicitations, it was not narrowly tailored to serve the state's compelling interest in protecting judicial impartiality. *Id.* at 839-41.

As previously discussed, however, the *Wersal* panel decision has been vacated pending *en banc* review by the Eighth Circuit. At the present time, therefore, there is no conflict between *Wersal* and the present case that would warrant review by this Court. Moreover, the pending *en banc* review in *Wersal* equally negates any possible need to review this case in light of *White II*. Whatever tension may exist between the Seventh Circuit decision here and *White II* (or any other Eighth Circuit decisions) can be fully worked out in the *Wersal en banc*

proceeding, where the full Eighth Circuit can reverse circuit precedent, if it deems such action appropriate. Under these circumstances, it makes sense for this Court not to take up the issue of the constitutionality of direct solicitation bans until that issue has been more thoroughly considered in the lower courts.

3. Eleventh Circuit

The final conflicting decision to which Judge Siefert points is *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), in which the Eleventh Circuit invalidated a Georgia solicitation canon that prohibited judicial candidates from personally soliciting campaign contributions or personally soliciting public statements of political support.

While it cannot be denied that *Weaver* did invalidate a ban on direct, in-person solicitation by judicial candidates, the Georgia provision is nonetheless distinguishable from Wisconsin's solicitation clause because, unlike the latter, it applied not only to financial solicitations, but also to solicitations of statements of public support for the judicial candidate. *See Weaver*, 309 F.3d at 1315. The *Weaver* court's analysis did not differentiate between these two aspects of the Georgia solicitation clause, but treated that clause as a whole. *See id.* at 1322-23. Speech by a judicial candidate soliciting a public statement of support for his own candidacy however, is more closely related to speech about the

judicial candidate's own views and qualifications than is speech that only solicits a financial contribution. Accordingly, a higher level of scrutiny was more appropriate for Georgia's clause than is appropriate for Wisconsin's clause, which regulates only a financial transaction. It thus remains unclear whether the Eleventh Circuit would have applied the same analysis or reached the same result if it's solicitation clause, like Wisconsin's, had dealt only with financial solicitations. For this reason, too, the conflict between *Weaver* and the present case, like the other conflicts to which Judge Siefert points, is not sufficiently clear and direct to warrant review by this Court at the present time.

IV. THIS CASE DOES NOT PRESENT ANY AS-APPLIED CLAIMS THAT MERIT REVIEW BY THIS COURT.

Judge Siefert also asks the Court to grant review of his as-applied challenges to the endorsement and solicitation clauses. More specifically, he asks the Court to consider whether the endorsement clause is constitutional as applied to a judicial endorsement of a candidate for President of the United States and whether the solicitation clause is constitutional as applied to personal phone calls, signing fundraising letters, and personally inviting potential donors to fundraisers. Judge Siefert's Petition, however, fails to provide any reason why those as-applied claims are well-postured for review by this Court or why

consideration of those claims would advance or clarify important questions of law.

In his appellate brief before the Seventh Circuit, Judge Siefert asserted that both the endorsement clause and the solicitation clause were unconstitutional both facially and as applied to himself. That brief, however, did not separately argue or develop either of those as-applied claims in a way that was analytically distinct from the facial claims. Accordingly, the Seventh Circuit's decision facially upheld both clauses without separately or specifically analyzing or deciding any as-applied claims. *See Siefert*, 608 F.3d at 983-90. In the absence of full and complete development and analysis, those as-applied claims do not merit review by this Court.

For example, the application of the endorsement clause to an endorsement of a presidential candidate has not been developed in a way analytically distinct from the more general argument that the clause is facially overinclusive because it allegedly prohibits endorsements of persons unlikely to appear as litigants before the endorser. Likewise, with regard to the solicitation clause, Judge Siefert has not provided any analysis explaining why the application of that clause to *in-person* telephone solicitations or *personal* invitations to fundraising events would differ in any meaningful way from any other application of the clause to *direct, personal* solicitations. To the extent that these applications of the endorsement and solicitation clauses thus

collapse into the general consideration of their facial validity, the as-applied claims do not warrant separate attention from this Court.

As to the application of the solicitation clause to the signing of fundraising letters, there arguably could be a meaningful distinction between restricting direct, personal solicitations and restricting solicitations made through *mass mailing* of a fundraising letter containing the personal signature of a judicial candidate. *See Carey*, 614 F.3d at 205-06. Judge Siefert, however, has not argued this case in a way that adequately clarifies the potentially significant difference between such mass mailings and mailings of *personal* solicitation letters signed by a judicial candidate, nor did the Seventh Circuit discuss the latter distinction in the decision for which review is sought.

For all of these reasons, Judge Siefert's as-applied claims have not been sufficiently developed or analyzed to make them an appropriate vehicle for this Court's primary task of clarifying important issues of federal law on which a uniform interpretation is needed.

CONCLUSION

For all of the reasons discussed herein, the Court should deny Judge Siefert's Petition for a Writ of Certiorari. In the alternative, if the Court decides to grant the Petition, it should restate the questions presented as set forth herein.

Dated this 30th day of March 2011.

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