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

Reply In Support of Petition for a Writ of Certiorari

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Reply to Respondents' Brief in Opposition

I. The Seventh Circuit's Decision Conflicts With This Court's Jurisprudence.

Respondents contend that the decision below is not in conflict with this Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002) ("*White I*") because *White I* did not establish strict scrutiny as the standard of review for all judicial regulations. Resp. at 9-12. Specifically, they argue that strict scrutiny is the standard only for the announce clause and not for the endorsement or personal solicitation clauses. Resp. at 12-14.

Respondents are not the first to assert this argument. Most recently, the Sixth Circuit in *Carey v. Wolnitzek,* 614 F.3d 189 (6th Cir. 2010), addressed and rejected this argument. The *Carey* court observed that the *White I* court's brevity on the matter of the standard of review "may suggest . . . that the counter-argument has little to support it." *Id.* at 198. It went on to point out that "[n]ot one of the Justices, not even one of the dissenters, objected to the application of strict scrutiny." *Id.* at 198. There would have been very little purpose for the Supreme Court to review the *White I* case if it was not to establish the standard of review and proper analysis for judicial canons. *Id.* at 198.

Even if *White I* itself were silent on the appropriate standard of review in this case, this Court's jurisprudence plainly points to strict scrutiny. As Judge Rovner discusses in her dissent, "[l]aws and regulations that restrict speech on the basis of content are subject to the high hurdle of the strict scrutiny test." App. at 33a. *See also Carey,* 614 F.3d at 199

(discussing this Court's consistent application of strict scrutiny to content-based speech restrictions). These laws are presumed invalid unless the government can rebut that presumption by demonstrating that the regulations at issue are narrowly tailored to serve a compelling interest. App. at 33a-34a (*citing United States v. Stevens,* 130 S. Ct. 1577, 1584 (2010); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989). This Court has carved out exceptions to this rule in the case of obcenity, defamation, fraud, incitement, and speech integral to criminal conduct, *see Stevens,* 130 S.Ct. at 1584, but none of these apply to or encompass judicial candidates' speech. App. at 34a. The *White I* court's application of strict scrutiny to a content-based judicial speech regulation was the logical extension of this well-established legal standard that should have been employed by the Seventh Circuit in this case, as well. That the Seventh Circuit chose to instead apply the *Pickering/Letter Carriers* balancing test—used for non-candidate government employees—to the endorsement clause and *Buckley*'s closer drawn scrutiny—used for campaign contribution regulations—to the personal solicitation clause is in direct conflict with this Court's jurisprudence.

II. A Conflict Among The Circuits Remains.

Allowing the Seventh Circuit's standards of review to remain good law also prevents uniformity among the circuits because those circuits that have reviewed judicial canons have consistently applied strict scrutiny to them. *See Carey,* 614 F.3d 189 (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).

It is true that the only circuit that has reviewed and struck down the endorsement clause is the Eighth Circuit in *Wersal v. Sexton,* 613 F.3d 821 (8th Cir. 2010), which was vacated and has en banc review pending. But Respondents read too much into that en banc review, asserting it removes any circuit split on the constitutionality of the endorsement clause, with that court now having the opportunity to apply the Seventh Circuit's alternative standards. Resp. at 22-23. The Eighth Circuit has already, in its en banc *White II* decision, established strict scrutiny as its standard of review for judicial canons. *White II,* 416 U.S. at 749 ("Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail [political speech]"). And the Eighth Circuit has previously reviewed and expressly dismissed the application of the balancing test used for regulation of government employees to judicial canons even before the *White I* case was resolved. *See Republican Party of Minnesota v. Kelly,* 247 F.3d 854, 864 (8th Cir. 2001), *reversed by White I,* 536 U.S. 765. In *Kelly*, the Eighth Circuit held that the judicial canons challenged there were

> different from the Hatch Act provisions challenged in *Letter Carriers* because, while

> the Hatch Act restrained political activity of government employees, Canon 5 restrains the activity of candidates engaged in an election contest. . . . the public's interest in free speech is greater where the person subject to restrictions is a candidate for public office, about whom the public is obliged to inform itself. Therefore, we will invoke strict scrutiny and examine the restrictions at issue to determine whether they are narrowly tailored to serve a compelling state interest.

Kelly, 247 F.3d at 864. This seems to suggest a long-standing inclination on the part of the Eighth Circuit to apply strict scrutiny to judicial speech regulations and an unlikelihood that the *Wersal* en banc court's ruling will prevent a conflict with the Seventh Circuit by adopting using a balancing test as the standard of review for the endorsement clause.

But whatever the outcome of *Wersal,* the larger issue involved in both this case and *Bauer v. Shepard,* 620 F.3d 704 (7th Cir. 2010), would remain unresolved: whether strict scrutiny uniformly applies to review of judicial campaign speech regulations. Pet. Br. at 5-8.

In her dissent from the denial of en banc review in this case, Judge Rovner observed that the Seventh Circuit's use of a different standard of review made this case an outlier among the federal circuits. App. at 109a. 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. (citing Wersal, 613 F.3d 821 (8th Cir. 2010) (striking down a solicitation clause and an endorsement clause under strict

scrutiny)(en banc review granted)); Carey, 614 F.3d 189 (striking down a personal solicitation clause and party affiliation clause under strict scrutiny); White II, 416 F.3d 738 (striking down a partisan activities clause and a solicitation clause under strict scrutiny); Weaver, 309 F.3d 1312 (striking down a solicitation clause and a false statement clause under strict scrutiny); Stretton, 944 F.2d 137 (3d 1991) (upholding the announce clause under strict scrutiny). Given the outcome determinative nature of applying the correct standard of review, correcting the Seventh Circuit's novel approach to bring it in line with the remaining circuits would reestablish uniformity among the federal courts. Supreme Court review is warranted.

Respondents attempt to distinguish the personal solicitation clause cases by emphasizing the factual disparities that gave rise to each circuit court's facial concerns that rendered the clauses unconstitutional.[1] Resp. at 31-37. All of these cases involved broad, facial challenges to identical or substantially similar personal solicitation clauses. The Eighth Circuit struck Minnesota's personal solicitation clause as insufficiently tailored because candidates could not

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[1]Respondents also argue that no as-applied challenges are properly before this Court. To preclude Petitioner from raising as-applied challenges seems disingenuous given Respondents' efforts to distinguish the relevance and applicability of the personal solicitation clause cases based on their facts. But in any event, while an as-applied challenge has not been Petitioner's primary focus, he both pled it in his complaint and argued it in his briefing before the district court and Seventh Circuit.

know who ultimately gave or did not give as a result of a direct, personal solicitation and thus the solicitation could not affect the openmindedness or create party bias in a judge. *White II,* 416 F.3d at 765-66. The Sixth Circuit struck Kentucky's personal solicitation clause as overbroad because it prohibited a broad range of solicitations, including speeches to large groups and signed mass mailings. *Carey,* 614 F.3d at 204-207. And the Eleventh Circuit struck Georgia's personal solicitation clause as insufficiently tailored because allowing a committee to do what a candidate could not did not lessen the risk that a judge would be tempted to rule one way or another based on a solicitation. *Weaver,* 309 F.3d at 1323. That these courts found different aspects of the clause to be the source of the clauses' demise on its face does not negate the fact that they were all found facially unconstitutional.

A split remains among the circuits as to the standard of review for and, in turn, the constitutionality of the endorsement clause and the personal solicitation 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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