

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
MADISON DIVISION**

THE HONORABLE JOHN SIEFERT,)	
)	
Plaintiff,)	
)	
)	
v.)	
)	Civil Action No. _____
)	
JAMES C. ALEXANDER, et al.,)	
)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

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Introduction

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (“*White II*”), the federal courts reaffirmed the protected nature of political and campaign speech in the judicial context, invalidating Minnesota judicial canons that prohibited judicial candidates from announcing their views on disputed political and legal issues, belonging to a political party, receiving endorsements from political groups, or personally soliciting campaign contributions. In like manner, Plaintiff will demonstrate that Wisconsin Supreme Court Rule 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) are unconstitutional both facially, and as-applied to Judge Siefert.

Facts

The facts of this case are set out in Plaintiff’s Verified Complaint for Declaratory and Injunctive Relief and in Plaintiff’s Statement of Proposed Findings of Fact, filed simultaneously with Plaintiff’s Motion for Preliminary Injunction.

Argument

Four factors govern preliminary injunctions:

a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has “no adequate remedy at law” and will suffer “irreparable harm” if preliminary relief is denied . . . the court must then consider: (3) the irreparable harm the non-moving party will suffer if

preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest.

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). Plaintiff meets these requirements and thus, preliminary injunctive relief should be granted.

I. Plaintiff Has a Substantial Likelihood of Success on the Merits.

A. The Political Affiliation Clause Is Unconstitutional On Its Face and As Applied to Plaintiff.

The political affiliation clause of SCR 60.06(2)(b)(1) provides that no judge or judicial candidate may “[b]e a member of any political party.” An exception to the political affiliation clause is provided by SCR 60.06(2)(c), which states that “[a] partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position.” A similar Minnesota provision barring judicial candidates from belonging to a political party was deemed unconstitutional by the Eighth Circuit. *White II*, 416 F.3d at 766. For the reasons indicated below, the political affiliation clause is likewise unconstitutional on its face and as applied to Plaintiff.

1. The Political Affiliation Clause Fails Strict Scrutiny.

The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley*, 424 U.S. at 15 (1976) (internal quotations omitted) The political affiliation clause directly limits judicial candidates rights of free speech and association, and is therefore subject to strict scrutiny. *White II*, 416 F.3d at 749. To survive strict scrutiny, the law or regulation in question must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not

implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980). Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

Restrictions on judicial campaign speech and conduct are often rationalized on the grounds that such restrictions are necessary to preserve judicial impartiality. In *White*, the Supreme Court considered three possible definitions of this impartiality interest: impartiality as lack of bias towards the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as open-mindedness. *White* 536 U.S. at 775-80.

The first definition of impartiality considered in *White* was judicial impartiality towards parties. *Id.* at 776. This interest arises because of due process, which requires trial before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). While the Supreme Court found this interest compelling, it concluded that the announce clause was "barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues." *White*, 536 U.S. at 776.

A similar analysis should apply here. As noted by the Eighth Circuit, "the underlying rationale for the [prohibiting judicial candidates from belonging to political parties] – 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." *White II*, 416 F.3d at 754. The fact that a judge belongs to a particular

political party might warrant a judge's recusal in a case where that political party was a party.¹ But the political affiliation clause is over-inclusive of this interest, in that it prohibits a judge or candidate from belonging to a political party altogether, instead of employing the less restrictive means of recusal in appropriate cases.

Further, the political affiliation clause is underinclusive, in that it allows a "partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect" to remain a member of a political party. *See* SCR 60.06(2)(c). Since a judicial candidate is at least as likely to be biased for a political party when he holds partisan office as a member of that party than he is if he is simply a member of that party, SCR 60.06(2)(c)'s exemption for partisan officeholders serves to undercut any claim by the State that the political affiliation clause serves a compelling government interest. As Judge Prosser noted in his dissent from the order amending the political affiliation clause, "[i]f the new rule actually serves 'a compelling state interest,' it is unfathomable why only some non-judge judicial candidates are required to follow it." *See* Wisconsin Supreme Court Order 00-07, at 16. Thus, the political affiliation clause is not narrowly tailored to the State's interest in preserving judicial impartiality towards parties. *White II*, 416 F.3d at 766.

The second definition of impartiality considered by *White* was impartiality defined as a lack of preconceptions on legal issues. *White*, 536 U.S. at 777. This interest is not compelling, as having a judge with no preconceptions on any legal issue is neither possible nor desirable. *See Laird v.*

¹ This is not to say, of course, that recusal would be warranted in every case involving a political party of which the sitting judge was a member. *See White II*, 416 f.3d at 755 ("In the case of a political party involved in a redistricting dispute . . . the fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an 'R' or 'D' . . . after his or her name.")

Tatum, 409 U.S. 824, 835 (1972) (“Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias”). Because this interest is not compelling, it cannot serve to justify the political affiliation clause.

The final definition of impartiality considered by *White* is impartiality as judicial openmindedness. This definition of impartiality requires of a judge “not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.” *White*, 536 U.S. at 778. Judicial openmindedness “seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.” *Id.* (emphasis in original). The Supreme Court did not hold that judicial openmindedness was a compelling state interest.² Nonetheless, the Court held that even if the interest was compelling, the announce clause did not pass strict scrutiny because it was not narrowly tailored to that interest. *Id.*, at 780.

A similar analysis applies here. The political affiliation clause is “woefully underinclusive” as to the State’s interest in preserving judicial openmindedness, for three reasons. First, the clause is underinclusive in that it allows candidates to belong to and associate with political parties up until the day before they declare their candidacy. “The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.” *White II*, 416 F.3d at 758. Further, the political

² Indeed, there would seem to be some issues, such as whether conviction of a crime requires proof beyond a reasonable doubt, where judicial open-mindedness on the issue is undesirable.

affiliation clause is underinclusive in that it bars only membership in a political party, while permitting a judge or judicial candidate to join other political organizations and groups. To the extent that being a member of a political party might threaten a judge's openmindedness on certain legal and political issues, this threat is at least as present for judges who are members of other interest groups, if not more so. *See Id.*, at 759 ("A judicial candidate's stand . . . on the importance of the right to keep and bear arms may not be obvious from her choice of political party. But, there can be little doubt about her views if she is a member of . . . the NRA.") Finally, as noted above, SCR 60.06(2)(c) exempts from the political affiliation clause "partisan political office holder[s] who [are] seeking election or appointment to judicial office or who is a judge-elect." As consequence, the political affiliation clause is "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *White*, 536 U.S. at 780.

2. The Political Affiliation Clause Is Unconstitutionally Overbroad.

The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F. 3d 1048, 1056 (7th Cir. 2004).

The political affiliation clause is substantially overbroad. Membership in a political party might sometimes be grounds for recusal if that group was a party in litigation before the judge. In general, however, the State has no interest in preventing judges or candidates from associating themselves with like-minded individuals and groups. Consequently, the endorsement clause is facially

overbroad.

B. The Endorsement Clause Is Unconstitutional On Its Face and As Applied to Plaintiff.

The endorsement clause of SCR 60.06(2)(b)(4) provides that no judge or judicial candidate may “[p]ublicly endorse or speak on behalf of [a political party’s] candidates or platforms.” An exception to the endorsement clause is provided by SCR 60.06(2)(c), which states that “[a] partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position.” In *White II*, the Eighth Circuit struck down a Minnesota provision barring candidates from accepting endorsements. *White II*, 416 F.3d at 766. For the reasons indicated below, the endorsement clause is likewise unconstitutional on its face and as applied to Plaintiff.

1. The Endorsement Clause On Its Face and As Applied to Plaintiff Is Not Narrowly Tailored to Further a Compelling State Interest.

The endorsement clause forbids judicial candidates from endorsing other political officials. Consequently, the endorsement clause is a content-based regulation of core political speech that is subject to strict scrutiny. *Id.* at 763-64.

Both facially and as applied to Plaintiff, the endorsement clause is not narrowly tailored to further the State’s interest in judicial impartiality, regardless of how “impartiality” is defined. *See White*, 536 U.S. at 775-80. If impartiality concerns a judge’s impartiality towards parties, then the endorsement clause does not reflect that interest as it permits judicial candidates like Plaintiff to receive endorsements and only prohibits them from himself making an endorsement. The threat to judicial impartiality to parties is greater when a judicial candidate receives endorsements from potential litigants than when the candidate makes endorsements. *See id.* at 779-80. If impartiality

means no preconceptions, then the endorsement clause evidences no support for and likely would not serve such an interest as no judge is completely without preconceptions. *See White*, 536 U.S. at 777-78. If impartiality is defined as judicial open-mindedness, then the endorsement clause does not serve this interest and is under-inclusive because Plaintiff can still receive endorsements that are at least as likely to affect their impartiality. *See id.* at 779-80. As consequence, the endorsement clause on its face and as applied to Plaintiff is not narrowly tailored to serve a compelling interest and is an unconstitutional regulation of protected political speech in violation of the First and Fourteenth Amendment.

2. The Endorsement Clause Is Unconstitutionally Overbroad.

The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’” *Morales*, 527 U.S. at 52 (*quoting Broadrick*, 413 U.S. at 615). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins*, 355 F. 3d at 1056.

The endorsement clause sweeps constitutionally protected speech within its scope. Specifically, the endorsement clause prohibits more speech than is necessary to achieve its goal. Even assuming that Wisconsin has an interest in preventing judicial candidates from making endorsements in some races (for example, in races for local prosecutor), that interest does not go so far as to prevent a judicial candidate from endorsing a candidate for President of the United States or the local dog catcher. The impact of such an endorsement hardly seems relevant to Wisconsin’s interest in impartiality. Yet, this is precisely what the endorsement clause prohibits. Likewise, judicial candidates cannot publicly oppose their opponent in an election. Consequently, the endorsement

clause is facially overbroad.

C. The Solicitation Clause Is Unconstitutional on Its Face And As Applied To Plaintiff.

The solicitation clause of SCR 60.06(4) provides that a “judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions.” Similar canons prohibiting judicial candidates from making personal solicitations have been struck down by the Eighth and Eleventh Circuits, as well as by two federal district courts. *White II*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002); *Carey v. Wolnitzek*, 2006 WL 2916814 at *29 (E.D. Ky. Oct. 10, 2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1237 (D. Kan. 2006). For the reasons indicated below, the solicitation clause is likewise unconstitutional on its face and as applied to Plaintiff.

1. The Solicitation Clause On Its Face and As Applied to Plaintiff Is Not Narrowly Tailored to Further a Compelling State Interest.

Wisconsin’s solicitation clause prohibits judicial candidates from personally requesting funds for their campaign. The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley*, 424 U.S. at 15 (1976) (internal quotations omitted). Soliciting contributions is an essential part of any election campaign. *See Weaver*, 309 F.3d at 1322 (“Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community.”); *see also, White* 536 U.S. at 789 (O’Connor, J., concurring) (“Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.”). Because the solicitation clause

is a content-based regulation of core political speech, it is subject to strict scrutiny. *White II*, 416 F.3d at 763-64; *Weaver*, 309 F.3d at 1322.

The solicitation clause is not narrowly tailored to further any legitimate interest Wisconsin has in either preserving judicial impartiality towards parties, or in preserving judicial open-mindedness. The solicitation clause is not narrowly tailored to further either of these interests as it does not prevent judicial candidates such as Plaintiff from knowing who has contributed to their campaigns, but instead merely prohibits a candidate from personally soliciting funds. Whatever bias or effect on open-mindedness is likely to result from a candidate receiving campaign contributions will thus occur just as if the solicitation clause did not exist. *Weaver*, 309 F.3d at 1322-23; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1236. The clause also fails to consider funds voluntarily offered to the candidate without solicitation. A judge's open-mindedness and impartiality towards parties can be affected by funds secured from those who approach the candidate of their own volition and offer financial support. In addition, the clause is overinclusive in that, read literally, it would prohibit candidates from personally accepting contributions from good friends and co-workers, or even a spouse. The rule is also "inconsistent because it allowed judges and candidates to establish fundraising committees but pretended that the fundraisers thus recruited were not also being invited to give money" and "so unrealistic that inadvertent or unavoidable violations were commonplace." For these reasons, the solicitation clause on its face and as applied to Plaintiff is underinclusive and fails strict scrutiny. *See White*, 536 U.S. at 779-80; *White II*, 416 F.3d at 757.

Arguably, the solicitation clause is designed to preserve impartiality by preventing undue influence over judges because of financial support given to them during their campaign. *White II*, 416 F.3d at 764. However, unlike the solicitation clause challenged in the Eighth Circuit by *White*, the Wisconsin solicitation clause is not drafted to reflect such an interest because it does not prohibit judicial candidates from knowing from whom their financial support comes, but instead merely prohibits the candidate from personally making solicitations. The solicitation clause on its face and as applied to Plaintiff is thus not narrowly tailored to further such an interest.

2. The Solicitation Clause Is Unconstitutionally Overbroad.

The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’” *Morales*, 527 U.S. at 52 (*quoting Broadrick*, 413 U.S. at 615). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins*, 355 F. 3d at 1056.

The solicitation clause regulates constitutionally protected speech by restricting judicial candidates from personally soliciting funds for their campaign. This restriction has no legitimate basis. While judges should not solicit funds as a quid pro quo, the solicitation clause is not limited to such cases. Instead, the solicitation clause broadly prohibit candidates from personally accepting contributions from good friends and co-workers, or even a spouse. Because the solicitation clause reaches far more speech than Wisconsin has an interested in

regulating, the solicitation clause is substantially overbroad, and must be deemed unconstitutional. *White II*, 416 F.3d at 766; *Weaver*, 309 F.3d at 1322.

II. Plaintiff Will Suffer Irreparable Injury Without the Injunction.

Plaintiff is currently unable to make endorsements or personally solicit campaign contributions. Without injunctive and declaratory relief, Judge Siefert will continue to be irreparably harmed. Judge Siefert would like to immediately join the Democratic party, make endorsements, and begin making personal solicitations for campaign contributions. Loss of First Amendment rights is automatically considered irreparable harm: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for temporary and preliminary injunctive relief is met. See *ACLU v. The Florida Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla 1990); *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

III. The Benefits Of Injunction To Plaintiff Outweighs Any Harm to Defendants.

While Judge Siefert has been irreparably harmed because he cannot join a political party, make endorsements, or personally solicit contributions, no harm will come from Judge Siefert engaging in these activities. Voters will instead be informed in time for election day. Judge Siefert’s harm substantially outweighs any harm to Defendants. See *ACLU*, 744 F. Supp. at 1099; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

IV. The Injunction Furthers The Public Interest

The public has an interest in making informed voting decisions. Even more important, however, is the public’s interest in preserving First Amendment rights of free speech and association.

No greater free speech interest exists than that of political speech. It is in the public interest for citizens to know who is personally seeking a candidate's support through campaign contributions, and to know the candidates views on disputed legal and political issues as expressed through endorsements and membership in a political party. Therefore, the requested injunctive relief serves the public interest. *See ACLU*, 744 F. Supp. at 1099; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

Conclusion

60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) are all unconstitutional both facially and as applied to Plaintiff. All the required elements for preliminary injunctive relief are met. Plaintiff respectfully asks this Court to expeditiously grant the requested injunctive relief.

Dated: February 25, 2008

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