

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

THE HONORABLE JOHN SIEFERT,

Plaintiff,

v.

JAMES C. ALEXANDER, et al.,

Defendants.

CIVIL ACTION NO. 3:08-CV-126-BBC

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

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Introduction

On March 3, 2008, Plaintiff John Siefert brought suit in this court against the members of the Wisconsin Judicial Commission and the Director of Wisconsin's Office of Lawyer Regulation. Plaintiff's suit challenged the constitutionality of SCR 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) (collectively, "the challenged Canons") of the Wisconsin Code of Judicial Conduct. On the same day, Plaintiff filed a Motion for Preliminary Injunction and a supporting memorandum. On May 15, 2008, Defendants filed their Response in Opposition to Plaintiff's Motion for Preliminary Injunction. Pursuant to this Court's Order requiring that Plaintiff file his Reply on or before May 23, 2008, Plaintiff now timely files his Reply.

Facts

Plaintiff reasserts the facts of this case as articulated in their Verified Complaint.

Standard of Review

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 respectfully asks this Court to grant preliminary injunctive relief.

Argument

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

A. The Political Affiliation Clause and Endorsement Clause Are Unconstitutional.

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.” 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 these provisions 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.”

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” Federal courts have long been vigorous in protecting the free speech rights of political candidates, including judicial candidates. In *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993), the Seventh Circuit struck down on First Amendment grounds an Illinois canon prohibiting judges from making pledges or promises in their campaigns other than the impartial performance of their duties. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court invalidated a Minnesota judicial canon that prohibited judicial candidates from announcing their views on disputed political and legal issues. And in *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007), the Western District of Wisconsin invalidated several Wisconsin judicial canons on First Amendment grounds. For the reasons given below and in Plaintiff’s initial memorandum, the challenged Canons likewise violate the First Amendment and must be enjoined.

1. The Political Affiliation Clause and Endorsement Clause Are Not Justified by Wisconsin's Interest in Maintain Non-Partisan Judicial Elections.

Defendants argue that the bans on party membership and endorsements are necessary because judicial elections in Wisconsin are non-partisan. (Defs' Resp., at 4-9.) This is inaccurate. Whether an election is non-partisan is determined by how a candidate is nominated, whether he can run on a party ticket, and how his name appears on the ballot, not by whether the candidate has any affiliation with a political party. Non-partisan judicial elections existed in Wisconsin for many years before there was any prohibition on party membership by either judges or judicial candidates.¹

As the affidavit of attorney Joseph Ranney notes, partisan considerations have played little role in the election of Wisconsin judges for the last 100 years. (Ranney Aff. ¶ 5.) This change came about not because of any change in the law, but because the voters paid "[l]ittle attention . . . to partisan affiliations of the justices." *Id.* Contrary to Defendants' argument that allowing party membership and endorsements would politicize the judiciary, therefore, the historical evidence suggests that even when Wisconsin judges ran in partisan elections voters gave little weight to their party affiliation when deciding for whom to vote.

Many states hold non-partisan elections for various state or local offices, yet do not prohibit candidates in those races from affiliating with a political party. Nor could they do so without violating the First Amendment. *See e.g., California Democratic Party v. Lungren*, 919 F. Supp. 2d

¹ *See State ex rel. Binner v. Buer*, 174 Wis. 120, 124 182 N.W. 855 (1921) ("No candidate for any judicial, school, member of county board in counties having a population of two hundred fifty thousand or more, or elective city office shall be elected upon any party ticket, nor shall any designation of party or principle represented be printed on the ballot used at the election of any such candidate.") (*quoting* Wis. Stat. § 5.24) Wisconsin judges were not prohibited from belonging to political parties until 1968, and judicial candidates were not prohibited from doing so until 2004. (Alexander Aff. ¶ 4.)

1397 (N.D. Cal. 1996) (holding unconstitutional on First Amendment grounds a California provision prohibiting political parties from endorsing candidates in non-partisan races).

Republican Party of Minnesota v. White, 416 F.3d 754 (8th Cir. 2005) (“*White II*”) is instructive in this regard. *White II* involved a Minnesota judicial canon that prohibited judicial candidates from “identify[ing] themselves as members of a political organization, except as necessary to vote in an election.” *White II*, 416 F.3d at 746. The defendants in *White II* attempted to justify this provision on the grounds that it was “necessary to protect Minnesota’s tradition of non-partisan judicial elections.” *Id.* at 779 (Gibson, J., dissenting).² The Eighth Circuit, however, rejected this argument, holding that the state’s interest in maintaining an independent and non-partisan judiciary did not justify suppressing protected political speech. *Id.* at 753.

Defendants cite *Buckley v. Valeo*, 424 U.S. 1 (1976) and *McConnell v. FEC*, 540 U.S. 93 (2003), for the proposition that “nonpartisanship [is] a compelling interest necessary to avoid improper influences.” (Defs’ Resp. at 8.) Yet the portions of these opinions cited by Defendants do not mention nonpartisanship at all, let alone declare it to be a compelling government interest. Instead, those opinions deal with the potentially corrupting influence of large campaign contributions on legislative elections, a subject far removed from the circumstances of this case. *See Buckley*, 424 U.S. at 26-27; *McConnell*, 540 U.S. at 144, 150-54. If due process were, in fact, compromised by allowing judges and judicial candidates to be members of political parties, then partisan elections would be unconstitutional. Rather than attempting to analogize this case to areas of constitutional law involving very different constitutional issues, this Court should follow the

² Like Wisconsin, Minnesota’s judicial elections are non-partisan. M.S.A. § 204B.06.

analysis for evaluating the constitutionality of state judicial canons set out in *White, Buckley*, and *Duwe*.

2. The Political Affiliation Clause and Endorsement Clause Are Not Justified by Wisconsin's Interest in Maintaining Public Confidence in the Judiciary.

Defendants also argue that the political affiliation clause and endorsement clause are necessary in order for Wisconsin to preserve “public confidence in the courts.” (Defs’ Resp. at 13.) This argument is incorrect, for several reasons. First, it is not at all clear that the activities prohibited by the challenged Canons, if allowed, would actually reduce public confidence in the judiciary.³ As the affidavit of attorney Joseph Ranney notes, judicial elections have existed in Wisconsin since the late 1840s. (Ranney Aff. ¶ 4.) Yet, as noted in the affidavit of Defendant James C. Alexander, it was not until 1968 that Wisconsin judges were prohibited from belonging to political parties, and non-judge candidates were prohibited from belonging to political parties only in 2004. (Alexander Aff. ¶ 4.) Thus, for the large majority of their existence, judicial elections in Wisconsin have co-existed with political party membership for judges and judicial candidates, without any noticeable ill effect either on judicial impartiality or on the public’s confidence in the judiciary.

Laws are made through an explicitly partisan and highly political process. Yet the public does not for that reason treat the law with less deference and respect. Far from undermining confidence in the judiciary, judicial elections can actually increase the perceived legitimacy of the

³ See Erwin Chemerinsky, *Restrictions On The Speech Of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 742-43 (2002) (arguing that “public confidence in the courts is [not] fragile; quite the contrary, it seems resilient and a product of over 200 years of American history.”)

judiciary, by giving the public a stake in the selection of judges, rather than having them selected through a sometimes secretive and political appointment process.

By contrast, restrictions on a judge's ability to state his party affiliation or make endorsements could undermine public confidence in the judiciary, since there is a danger that silence on the part of judicial candidates could inspire the suspicion that they are hiding their views to mask their partiality or bias. *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (“[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”)

While maintaining public confidence in the judiciary is no doubt important, no court has ever suggested that the state is justified in suppressing core political speech in order to maintain a positive public perception of the judiciary. No doubt public confidence in the judiciary could be damaged by private criticism of judges, their decisions, or the court system as a whole by individual citizens. Yet it would be absurd to suggest that this fact would make it permissible to ban anything that might result in criticism of the courts. Rather, the underlying assumption of the First Amendment is that public confidence in our institutions is strengthened when free and open debate is the norm. As such, Wisconsin's interest in preserving public confidence in the judiciary does not justify the challenged Canons.

3. The Political Affiliation and Endorsement Clauses are not Narrowly Tailored to Any Compelling Government Interest.

Defendants appear to concede that the political affiliation clause and endorsement clause are underinclusive. (Defs' Resp. at 15.) Nevertheless, Defendants maintain that this underinclusiveness does not render these provisions unconstitutional, as they are “tailored to address only the most

critical threat to the government interest, even [though] some threat to the asserted interest remain[s] unaddressed.” (Defs’ Resp. at 15) (*quoting White II*, 416 F.3d at 776-77) (Gibson, J., dissenting). Of course, in *White* the Supreme Court found the announce clause unconstitutional precisely because it was underinclusive. *White*, 536 U.S. at 780. And since *White*, a variety of federal courts have struck down state judicial canons on the grounds that they were underinclusive with regard to any compelling government interest. *See, e.g., Indiana Right to Life v. Shepard*, 463 F. Supp. 879, 889 (N.D. Ind. 2006), *reversed on other grounds*, 507 F.3d 545 (7th Cir. 2007); But even granting Defendants’ premise, the political affiliation clause and endorsement clause are still unconstitutional, as they are not “tailored to address only the most critical threat to the government interest.” *White II*, 426 F.3d at 776-77 (Gibson, J., dissenting).

The political affiliation clause 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). Judicial candidates are at least as likely to be biased for a political party when they hold partisan office as a member of that party as when they are simply members of that party. 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.” Wisconsin Supreme Court Order 00-07 at 16. In addition, the political affiliation clause bans only political party membership, while allowing judges and judicial candidates to be members of other political organizations and groups. Yet the risk to judicial impartiality associated with belonging to a political party is no greater than the risk that comes from belonging to other political organizations or groups. *See White II*, 416 F.3d 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.”) Thus, the political affiliation clause is not only underinclusive, but it is not even “tailored to address only the most critical threat to the government interest.” *Id.*

Similarly, the endorsement clause prohibits judges and judicial candidates from making endorsements, but it does not prevent candidates from receiving endorsements, even though the risk to judicial impartiality that comes from receiving endorsements is at least as great as the risk to impartiality that comes from making them. Since the endorsement clause is not only under inclusive, but is not even “tailored to address only the most critical threat to the government interest,” it, like the political affiliation clause, must be declared unconstitutional.

According to the Defendants, membership in a political party “poses a far greater threat [than membership in other political organizations] because it is more pervasive.” As the Defendants state the matter:

A judge who is a member of the National Rifle Association (“NRA”), can recuse him or herself when the NRA appears as a party or supports a particular outcome of a case before that judge. A judge who, as Judge Siefert intends to do, declares himself to be a member of one of the major political parties, might have to recuse himself on any case where one of the parties (or a party member) was a litigant, or where the political party is supporting a particular outcome. Given the breadth and scope of political parties in modern American society, such a restriction would render a judge unable to sit on many, many cases.

(Defs’ Resp. at 16-17.)

This is inaccurate for several reasons. First, it is not true that a judge would be required to recuse in a case simply because it involved an issue on which the party he belonged to or a candidate he had endorsed had taken a position. In *Duwe*, the Western District of Wisconsin declared unconstitutional the portion of Wisconsin’s recusal canon that required candidates to

disqualify themselves in cases involving issues on which they had previously announced their views. *Duwe*, 490 F. Supp. 2d at 977. If the fact that a judge has himself taken a position on an issue cannot be grounds for mandatory recusal, then the fact that the judge belongs to an organization or has endorsed a candidate who has taken a position on that issue cannot be grounds for mandatory recusal either.

Second, even in cases where a political party or an endorsed candidate was a litigant, recusal would not be required as a matter of course, but would depend on the particular circumstances of the case. As the Eighth Circuit noted in *White II*, “even [when a political party was a litigant], any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party.” *White II*, 416 F.3d at 755. Given the limited circumstances in which recusal can be required, Defendants have presented no compelling reason why it is more dangerous to allow judges to belong to political parties than it is for them to belong to other political organizations, nor why it is more dangerous to allow judges to make endorsements than to allow them to receive them. Accordingly, the political affiliation clause and endorsement clause must be deemed unconstitutional.

B. The Solicitation Clause Is Unconstitutional.

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.” According to the Defendants, the solicitation clause is not necessary because of any interest the state has in maintaining judicial impartiality. (Defs’ Resp. at 19) (“Judge Siefert argues that the solicitation clause is not narrowly tailored to further a compelling state interest because the clause does not prohibit judges from discovering who made contributions to them. But, that is not the compelling

interest the clause seeks to serve.”) Rather, according to the Defendants, the solicitation clause is necessary so “that no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns.” (Defs’ Resp. at 18.)

Defendants do not cite any authority supporting its view that the state has a compelling interest in insuring that people do not “feel directly or indirectly coerced” by personal solicitations of campaign contributions, nor has any court held this to be a compelling government interest. The state does have an interest in preventing corruption, and therefore could justifiably prohibit contributions that were solicited as part of a *quid pro quo*. Whether the state has an interest in banning solicitations based on people’s subjective feelings, however, is another matter entirely.

Nevertheless, even assuming that the state does have a compelling interest in preventing coerced feelings, the solicitation clause still fails strict scrutiny, as it is not narrowly tailored to that interest. Wisconsin’s solicitation clause is not limited to cases where potential contributors feel or are likely to feel coerced by a solicitation. It applies broadly to all solicitations, regardless of context. As Justice Prosser noted in his dissent from the adoption of the rule, the solicitation clause prohibits “a candidate from personally accepting a check from the candidate's own spouse . . . [or] from personally accepting a contribution from a best friend or co-worker whose contribution was spontaneous and completely altruistic.” Wisconsin Supreme Court Order 00-07 at 13. The solicitation clause is therefore overinclusive and overbroad. *See White II*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002).

It should also be noted that this interest is in no way confined to contributions solicited by candidates for judicial election. A person may “feel directly or indirectly coerced” when solicited by a legislative candidate just as much as when solicited by a judicial candidate. In fact, the felt

coercion could be greater in the case of legislative candidates, since it is generally unknown prior to an election whether a judge will ever sit on a case involving a potential contributor, whereas legislators have the authority to influence the law on whatever matters they so choose. So, if Wisconsin's purported interest in avoiding feelings of coercion does justify a ban on personal solicitation by judicial candidates, then it would equally justify a ban on personal solicitation by legislative candidates. But Wisconsin does not prohibit legislative candidates from personally soliciting campaign contributions. As such, the solicitation clause on its face and as applied to Plaintiff is under-inclusive and fails strict scrutiny. *See White*, 536 U.S. at 779-80; *White II*, 416 F.3d at 757.

To the extent that personal solicitation by candidates raises impartiality concerns, these concerns are inherent in the state's decision to elect judges in the first place. As the Eleventh Circuit observed in *Weaver*:

It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of being elected.

Weaver 309 F.3d at 1320.

Likewise, “[c]ampaigning for elected office necessarily entails raising campaign funds.” *Id.* at 1322; *see also White*, 536 U.S. at 789-90 (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.”) The “fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected.” *Weaver*,

309 F.3d at 1322. But even if some members of the public assume this is the case, this is ultimately a consequence inherent in the state's decision to elect its judges. *See White*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges").

II. Plaintiff Will Suffer Irreparable Injury Without the Injunction.

Defendants argue that, because "Judge Siefert is not faced with re-election for several years . . . [t]he 'harm' asserted [by Plaintiff] is therefore years ahead." (Defs' Resp. at 20.) The challenged Canons, however, apply to Judge Siefert throughout his term as judge, and not merely during election years. Plaintiff seeks to do three things: (1) to join the Democratic party; (2) to endorse candidates for political office; and (3) personally solicit money for his re-election campaign. The first two of these activities are not specifically tied to Judge Siefert's re-election campaign, and thus the fact that this campaign has not yet started in earnest does not change the injury those provisions work on his First Amendment rights. And while any contributions Judge Siefert receives would be tied to his 2011 re-election campaign, candidates for public office begin fundraising long before the actual election.

As noted in Plaintiff's initial Memorandum, loss of First Amendment rights is automatically considered irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest.") For this reason, numerous federal courts have found irreparable injury where a judge or

judicial candidate's First Amendment rights are abridged by state judicial canons. *See e.g. Bauer v. Shepard*, 2008 WL 19994868 at *19 (N.D. Ind. May 6, 2008). Therefore, this required element for preliminary injunctive relief is met.

III. The Public Interest Supports Granting an Injunction.

Defendants also contend that granting an injunction would harm the public interest because it would “in one stroke, change more than 100 years of Wisconsin tradition in maintaining a nonpartisan judiciary.” (Defs’ Resp. at 21.) Plaintiff, however, does not seek to prevent Wisconsin from holding nonpartisan elections and nothing in the requested preliminary injunction would have that effect. If an injunction is granted, Wisconsin will still be able to hold nonpartisan elections, separate and apart from its partisan elections. Judicial candidates will still be selected on an independent basis, will still not be able to run on a party ticket, and will still not have their party affiliations listed on the ballot. The only difference is that a judge or candidate, if he chooses, will be able to join a political party, to make endorsements, and to personally solicit campaign contributions. Wisconsin judges were prohibited from belonging to political parties only in 1968, and non-judge candidates were not prohibited from belonging to political parties until 2004. (Alexander Aff. ¶ 4.) The types of activities Plaintiff wishes to engage in co-existed for many years with nonpartisan elections in Wisconsin, and are allowed today in many states with nonpartisan elections. The idea that allowing such activities would now undermine the nonpartisan character of Wisconsin elections when this has not happened in other states and did not happen in Wisconsin historically is not terribly plausible.

As the Seventh Circuit has noted, “injunctions protecting First Amendment freedoms are always in the public interest.” *Walker*, 453 F.3d at 859. Further, allowing Judge Siefert to join a

political party, make endorsements, and personally solicit contributions not only serves the public interest by protecting First Amendment rights, it allows voters to be better informed about candidates on election day. The public interest would therefore be served by an injunction against the offending Canons. *See ACLU*, 744 F. Supp. at 1099; *Kansas Judicial Watch*, 440 F. Supp. 2d at 1239.

IV. Certification is Not Appropriate.

Finally, Defendants argue that this Court should certify questions as to the meaning of the challenged Canons to the Wisconsin Supreme Court. In support of this request, Defendants cite *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008), a recent Tenth Circuit decision in which questions regarding the meaning of certain provisions of the Kansas Code of Judicial Conduct were certified. (Defs' Resp. at 21.) The court in *Stout* concluded that certification in that case was proper because the canons at issue in the case were ambiguous, and it was not clear whether plaintiffs' proposed conduct in that case would actually have violated the judicial code.

Here, by contrast, there is no serious question either as to the meaning of the challenged Canons, or to their applicability to Judge Siefert's proposed conduct. Judge Siefert wishes to belong to a political party. The political affiliation clause provides that no judge or judicial candidate may "[b]e a member of any political party." Judge Siefert wishes to publicly endorse candidates for public office. The endorsement clause provides that no judge or judicial candidate may "[p]ublicly endorse or speak on behalf of [a political party's] candidates or platforms." Judge Siefert wishes to personally solicit campaign contributions. The solicitation clause provides that a "judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions."

None of these canons are "readily susceptible of an interpretation that 'would avoid or substantially

modify the federal constitutional challenge to the statute.” *Bellotti v. Baird*, 428 U.S. 132, 148 (1976). As such, certification is inappropriate.

Conclusion

SCR 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: May 23, 2008

Respectfully Submitted,

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