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# FREE SPEECH FOR JUDGES AND DUE PROCESS FOR LITIGANTS: THE ELIMINATION OF FIRST AND FOURTEENTH AMENDMENT MUTUAL EXCLUSIVITY IN *SIEFERT V. ALEXANDER*

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## I. INTRODUCTION

When judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior.<sup>1</sup>

To Judge John Siefert of the Wisconsin Circuit Court, his role is that of an elected official. He believes that he is ultimately accountable to the voters, rather than to the state of Wisconsin, as his employer.<sup>2</sup> Previously an active member of the Democratic Party, Judge Siefert had to abandon his political affiliation when he was elected to the Milwaukee County Circuit Court in 1999<sup>3</sup>

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\* JD, The John Marshall Law School, May 2013. Maggie would like to thank the editors of the *Law Review* for all of their hard work in preparing this comment for publication, especially Paul and Brian. She would also like to thank her friends and family for their continued love and support, particularly her mother for always believing in her.

1. *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010) (citing *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010)). In *Citizens United*, the Supreme Court notes that while political speech restrictions are subject to strict scrutiny, “a narrow class of speech restrictions” are constitutionally permissible if “based on an interest in allowing governmental entities to perform their functions.”

2. *Siefert*, 608 F.3d at 984. This is not an uncommon view. See Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 736 (2002) (stating that “[t]he vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents” and that “[b]y making this choice, the states . . . are turning judges into politicians”); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002) (noting that “elected judges . . . always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.”); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 272 (2008) (arguing that Americans are conflicted about the role of judges who are protectors of constitutional rights and deep-seated values against majority encroachments, yet who are still deferential to the political branches).

3. *Siefert*, 608 F.3d at 977; see also *Judge-Elect John Siefert, Milwaukee County Circuit Court, New Branch 47*, THIRD BRANCH 19 (Spring 1999),

because Wisconsin's Code of Judicial Conduct ("Code") has prohibited elected judges in the state from joining a political party since its adoption in 1968.<sup>4</sup>

Wishing to communicate his political views with the voting public, but not wanting to violate the Code and face disciplinary action, Judge Siefert filed suit under 42 U.S.C. § 1983<sup>5</sup> in March 2008, seeking declaratory and injunctive relief against the members of the Wisconsin Judicial Commission, the body that enforces the Code.<sup>6</sup>

This Comment begins in Part II by explaining the Seventh Circuit's decision in *Siefert v. Alexander*, which struck down the Code's prohibition on judicial party affiliation, yet upheld its bans on political endorsements and campaign fundraising.<sup>7</sup> Part III examines the importance of judicial independence with respect to separation of powers and, in turn, due process concerns.<sup>8</sup> It then

<http://www.wicourts.gov/news/thirdbranch/docs/spring99.pdf> (reporting Judge Siefert's election to the Milwaukee County Circuit Court in 1999).

4. *Siefert*, 608 F.3d at 978; see also Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 3-4 (1999) (discussing the adoption of the 1968 Wisconsin Code of Judicial Conduct by the Wisconsin Supreme Court in response to a request from the State Bar Association's Board of Governors).

5. This section of the U.S. Code provides a civil action for the deprivation, under color of law, of any rights, privileges, or immunities secured by the Constitution or other laws. 42 U.S.C. § 1983 (2006).

6. *Siefert*, 608 F.3d at 977. The specific portions of the Code that Siefert was worried about violating are found at WIS. SUP. CT. R. 60.06(2)(b)1., (b)4., and 60.06(4). See also WIS. SUP. CT. ORDER 00-07, 2004 WI 134 (Oct. 29, 2004), available at <http://www.jamesmadisoncenter.org/cases/files/2011/04/Exhibit-to-Complaint1.pdf> (explaining the Wisconsin Supreme Court's amendment to the Code to extend a number of rules to cover judicial candidates in addition to sitting judges, including the prohibitions on party membership, partisan endorsements, and personal solicitation of campaign contributions).

7. *Siefert*, 608 F.3d at 983-90; see also Harvard Law Review Association, *Constitutional Law—First Amendment—Seventh Circuit Upholds Endorsement and Personal Solicitation Clauses of Wisconsin Code of Judicial Conduct*.—*Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), 124 HARV. L. REV. 1090, 1090 (2011) (discussing the Seventh Circuit's decision to uphold restrictions on the ability of judicial candidates to make political endorsements and personally solicit campaign contributions).

The Seventh Circuit's decision in *Siefert* also created a circuit split. Compare *Siefert*, 608 F.3d at 977 (upholding endorsement and personal solicitation restrictions), and *Bauer v. Shepard*, 620 F.3d 704, 710-11 (7th Cir. 2010) (upholding the same), with *Carey v. Wolnitzek*, 614 F.3d 189, 203-04 (6th Cir. 2010) (striking down endorsement and personal solicitation restrictions), and *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002) (striking down personal solicitation restriction).

8. See *O'Donoghue v. United States*, 289 U.S. 516, 532 (1933) (quoting Chief Justice John Marshall in the course of the debates of the Virginia State Convention of 1829-1830: "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent

explains the Supreme Court's narrow decision in *Republican Party of Minnesota v. White*, which explored the scope of First Amendment limits on state regulation of judicial campaign conduct.<sup>9</sup> It will argue that courts relying on *White* to strike down restrictions on judicial speech have misinterpreted *White*'s limited result and that the Seventh Circuit's decision in *Siefert* was not only consistent with *White*, but also reconciled *White* with other strains of First Amendment law.<sup>10</sup>

Part IV proposes that the more deferential tests the Seventh Circuit adopted in *Siefert* should be implemented by other circuits to evaluate judicial speech restrictions.<sup>11</sup> Such tests are appropriate first because the government in each state is the employer of its judiciary and second because the government has a duty to protect its citizens' due process rights.<sup>12</sup>

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Judiciary"); *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 281 (2d ed. 1829) (stating that "[i]n a very early period of our history, it was said, in words as true to-day as they were then, that if they [the people] value and wish to preserve their Constitution, they ought never to surrender the independence of their judges").

9. *White*, 536 U.S. at 765; *see also* Kathleen M. Sullivan, *Republican Party of Minnesota v. White: What Are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327, 1328-30 (stating that "the Court's reasoning in *White* . . . does not preclude all efforts by states to strike a balance in judicial elections between First Amendment interests and the countervailing constitutional interests in due process, separation of powers, and the fair and impartial administration of justice").

10. *Siefert*, 608 F.3d at 980-81; *see also* Sullivan, *supra* note 9, at 1332-33 (noting that some lower courts have read *White* to prohibit virtually all judicial election regulations that concern First Amendment interests); *Republican Party of Minn. v. White*, 416 F.3d 738, 755-56 (8th Cir. 2005) (en banc) (invalidating state bans on partisan political activities and personal solicitation of contributions by judicial candidates on First Amendment grounds); *Weaver*, 309 F.3d at 1322-23 (holding that the Court's decision in *White* prohibits all restrictions upon personal solicitation by judicial candidates); *but see* *In re Dunleavy*, 838 A.2d 338, 349-51 (Me. 2003) (upholding prohibition on contributing to or soliciting funds for political organizations); and *In re Raab*, 793 N.E.2d 1287, 1290-93 (N.Y. 2003) (upholding prohibition on partisan political activities).

11. *Siefert*, 608 F.3d at 984; *see generally* *White*, 536 U.S. at 796 (Kennedy, J., concurring) (stating that "whether the rationale of [*Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968)] . . . could be extended to allow a general speech restriction on sitting judges - regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here").

12. *Pickering*, 391 U.S. at 568 (finding that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"); *see also* *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (providing that "the government as employer indeed has far broader powers than does the government as sovereign"); Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651, 696 (2005) (stating that "it is desirable for

## II. BACKGROUND

In Wisconsin, the state judiciary is elected through a series of nonpartisan elections that are distinct from the elections for partisan political offices.<sup>13</sup> These elections “are nonpartisan in the sense that all candidates . . . appear on the ballot without party identification.”<sup>14</sup>

Ballots in Wisconsin’s judicial elections have not reflected the candidates’ party affiliation since 1913.<sup>15</sup> However, judges were not expressly forbidden from joining a political party in Wisconsin until 1968, when the state adopted a comprehensive Code of Judicial Conduct.<sup>16</sup> In October 2004, the Wisconsin Supreme Court added several rules to the Code to govern the conduct of judicial candidates in addition to sitting judges.<sup>17</sup> These new rules included prohibitions on party membership, partisan endorsements, and personal solicitation of campaign contributions.<sup>18</sup>

In *Siefert v. Alexander*, the Seventh Circuit considered three clauses of the Wisconsin Code of Judicial Conduct.<sup>19</sup> The first clause provided that no judge, candidate for judicial office, or judge-elect may be a member of any political party.<sup>20</sup> The second

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executive branch employees to be independent of politics” and that “[t]he implications of that interest, therefore, are directly applicable to the implications of the interest in judicial independence; in both cases, it is appropriate to restrict partisan political activity”).

13. *Siefert*, 608 F.3d at 978 (explaining that “Wisconsin conducts two sets of elections; one set . . . is held in the spring for positions filled through nonpartisan elections and the other is held in the fall for the partisan elected positions”). “Nonpartisan officeholders include judges of the circuit courts, court of appeals, and supreme court, as well as the state superintendent of public instruction, county board members, county executives, and municipal and school district officers.” *Id.* Voting for offices filled through partisan elections, including sheriff and district attorney, includes a primary election to choose a single candidate for each of the two major parties, followed by a partisan general election. *Id.*

14. *Id.*; WIS. CONST. art. VII, § 9 (providing that “there shall be no election for a justice or judge at the partisan general election for state or county officers”); WIS. STAT. § 5.58 (2010) (stating that “only [candidates] names shall appear on the official spring ballot”); WIS. STAT. § 5.60 (stating that “no party designation may appear on the official ballot”).

15. *Siefert*, 608 F.3d at 978; see generally JOHN BRADLEY WINSLOW, THE STORY OF A GREAT COURT (1912) (Kessinger Publishing Company 2009) (chronicling the history of judicial elections in Wisconsin and compiling a comprehensive history of the legal system in Wisconsin).

16. *Id.*; see Clausen, *supra* note 4, at 2-3 (stating that, until 1968, Wisconsin judges had no compilation of ethics rules specifically governing their behavior as judges).

17. *Siefert*, 608 F.3d at 978; WIS. SUP. CT. ORDER 00-07 2004 WI 134 (Oct. 29, 2004).

18. *Siefert*, 608 F.3d at 978.

19. *Id.* at 978; WIS. SUP. CT. R. 60.06(2)(b)1., (b)4., 60.06(4).

20. WIS. SUP. CT. R. 60.06(2)(b)1.; *Siefert*, 608 F.3d at 978.

clause prohibited judges and judicial candidates from publicly endorsing or speaking on behalf of a political party's candidates or platforms.<sup>21</sup> The third clause stated that no judge or judicial candidate could personally solicit or accept campaign contributions.<sup>22</sup>

Judge John Siefert, prior to being elected to the Wisconsin Circuit Court in 1999,<sup>23</sup> was a registered member of the Democratic Party.<sup>24</sup> He also took part in a number of partisan endeavors.<sup>25</sup> Most notably, he "served as a delegate to the Democratic National Convention, twice ran as a Democrat for the state legislature, twice ran as a Democrat for county treasurer, holding that office from 1990 to 1993, and served as an alternate elector for President Bill Clinton in 1992."<sup>26</sup>

In 2008, Judge Siefert sought to rejoin the Democratic Party, which he had left prior to his 1999 election to the bench.<sup>27</sup> He also wanted to publicly endorse other political candidates for office and solicit contributions for his 2011 campaign "by making phone calls to potential contributors, by signing his name to fundraising letters, and by personally inviting potential donors to fundraising events."<sup>28</sup> Because Judge Siefert wanted to engage in these activities without incurring disciplinary action from the Wisconsin Judicial Commission, he filed an action under 42 U.S.C. § 1983 to enjoin the Commission from enforcing the clauses of the Code that prohibited such conduct.<sup>29</sup> The District Court for the Western District of Wisconsin looked to the Supreme Court's decision in *Republican Party of Minnesota v. White* to declare all three clauses of the Wisconsin Judicial Code unconstitutional.<sup>30</sup>

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21. WIS. SUP. CT. R. 60.06(2)(b)4.; *Siefert*, 608 F.3d at 978.

22. WIS. SUP. CT. R. 60.06(4); *Siefert*, 608 F.3d at 978.

23. *Siefert*, 608 F.3d at 977; see generally THIRD BRANCH, *supra* note 3, at 19 (discussing Judge Siefert's election to the Milwaukee Circuit Court in 1999 following his work as an assistant district attorney and as a member of the Milwaukee Police Department).

24. *Siefert*, 608 F.3d at 977; see generally Marie Rohde, *Why Siefert Wants to Be a Democrat*, MILWAUKEE J. SENTINEL (June 3, 2008), <http://www.jsonline.com/blogs/news/31892489.html> (describing Judge Siefert's activism in the Democratic Party).

25. *Siefert*, 608 F.3d at 977.

26. *Id.*

27. *Id.*; see also Dee J. Hall, *Is the Stage Set for Judicial Elections to Become More Partisan in Wisconsin?*, WIS. ST. J. (Feb. 13, 2010), [http://host.madison.com/wsj/news/local/govt\\_and\\_politics/article\\_ed085c50-18e1-11df-a456-001cc4c002e0.html](http://host.madison.com/wsj/news/local/govt_and_politics/article_ed085c50-18e1-11df-a456-001cc4c002e0.html) (referring to Judge Siefert's statement that judges had to "conceal [their] party identity").

28. *Siefert*, 608 F.3d at 977; see also Hall, *supra* note 27 (describing Judge Siefert's claim that he had a constitutional right to directly solicit money for his campaign and to voice his support for then-presidential candidate, Barack Obama).

29. *Siefert*, 608 F.3d at 977.

30. *Siefert v. Alexander*, 597 F. Supp. 2d 860, 889-90 (W.D. Wis. 2009);

In *White*, the Supreme Court invalidated a canon of Minnesota's Code of Judicial Conduct that prohibited candidates for judicial office from announcing their views on disputed legal or political issues.<sup>31</sup> The Court stated that this "no-announce" rule was subject to strict First Amendment scrutiny because it was aimed directly at prohibiting speech on the basis of its content.<sup>32</sup> As such, the Minnesota law needed to be narrowly tailored to serve a compelling government interest.<sup>33</sup> Justice Scalia, writing for the Court, held that the "no-announce" rule did not satisfy this test because it could not be narrowly tailored to an interest in judicial impartiality toward either party to the proceeding.<sup>34</sup> Furthermore, judicial impartiality toward a particular legal view is not a compelling interest,<sup>35</sup> and, by failing to regulate other public commitments to legal positions that judges or judges-to-be

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*White*, 536 U.S. at 775.

31. *White*, 536 U.S. at 788; MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i); Harvard Law Review Association, *supra* note 7, at 1090 (noting that the Supreme Court used strict scrutiny to invalidate a Minnesota law prohibiting state judicial candidates from publicly expressing their views on legal and political issues in *White*); *see also* Sullivan, *supra* note 9, at 1328 (stating that in *White*, the Supreme Court declined to treat judicial elections as categorically outside the realm of uninhibited public debate); *see generally* Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 629 (2005) (arguing that the Supreme Court "fundamentally altered the landscape of state judicial elections" by making it clear that "the States would need to ensure that their Codes of Judicial Conduct allowed sufficient latitude to protect the First Amendment rights of judicial candidates while still insulating the courts from undue or excessive political influence").

32. *White*, 536 U.S. at 774.

33. *Id.* at 775; *see* *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (stating that when a challenged law burdens rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and that it is narrowly tailored to serve that interest).

34. *White*, 536 U.S. at 776. The Court stated:

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is 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*.

*Id.* (emphasis in original).

35. *White*, 536 U.S. at 777-78. The Court found that

Impartiality in th[e] sense [of lack of preconception in favor of or against a particular legal view] may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires, . . . [because] it is virtually impossible to find a judge who does not have preconceptions about the law . . . [and] even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.

*Id.* at 778. (emphasis in original).

undertake, the “no-announce” rule was underinclusive.<sup>36</sup>

Thus, relying on *White*, the district court in *Siefert* subjected all three provisions of the Code to strict scrutiny, thereby placing the burden on the Wisconsin Judicial Commission to prove that the restrictions were narrowly tailored to serve a compelling government interest.<sup>37</sup> While acknowledging that judicial impartiality is a compelling government interest, the court nevertheless struck down all three provisions of the Code as not being narrowly tailored to serve that interest.<sup>38</sup> The court determined that, because the restrictions did not prohibit judicial involvement in other special interest groups, they were underinclusive.<sup>39</sup> Likewise, the court determined that the Commission failed to show that the provisions were the least restrictive means the state could use to eliminate partisan bias or at least the appearance of partisan bias in judicial decisions.<sup>40</sup>

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36. *Id.* at 778-79 (opining that “statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that [serving the compelling interest in open-mindedness, or at least in the appearance of open-mindedness] is implausible.”).

37. *Siefert*, 597 F. Supp. 2d at 867; *see, e.g.*, *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (explaining the narrow tailoring requirement of a strict scrutiny analysis); *White*, 416 F.3d at 478-79 (applying strict scrutiny to restrictions on partisan activities of judges and judicial candidates); *Carey v. Wolnitzek*, 2008 WL 4602786, at \*5 (E.D. Ky. 2008) (same).

38. *Siefert*, 597 F. Supp. 2d at 871-72 (recognizing that the interests advanced by Wisconsin’s prohibition on announcing one’s political party can be defined as (1) the absence of bias toward particular political parties that appear before the court or toward litigants who are members of a political party; (2) the absence of improper influence by a political party or a political party’s ideology; and (3) the public’s perception that judges are not biased or influenced by these improper influences); *see also* Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 3 (2003) (stating that “[a]lthough the phrase is hard to define, the term ‘judicial independence’ embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll”).

39. *Siefert*, 597 F. Supp. 2d at 878 (finding that many groups to which a judge belongs may have an influence on his judicial philosophy and interpretation of the laws); *see also* RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 120 (Harvard Univ. Press 2003) (citing DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 203 (Cambridge Univ. Press 2003) to discuss a study which found that Roman Catholic judges are eleven percent more likely to rule against gay rights than Protestant judges and twenty-five percent more likely to do so than Jewish judges).

40. *Siefert*, 597 F. Supp. 2d at 883 (stating that to the extent the state wishes to eliminate partisan bias or its appearance in judicial decisions, the Code of Conduct includes rules tailored to address these concerns); *see also* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 570 (2004)

The district court's decision was affirmed in part and reversed in part by the Seventh Circuit.<sup>41</sup> In its opinion, the circuit court first noted the tension between two competing strains of cases found within First Amendment law.<sup>42</sup> While cases such as *White* demonstrate that judges are free to communicate their ideas to voters,<sup>43</sup> cases such as *Pickering v. Board of Education* allow the government some leeway to proscribe certain categories of speech among citizens in order to promote the efficient performance of governmental functions.<sup>44</sup> Instead of strict scrutiny, *Pickering* employed a balancing test to evaluate the constitutionality of speech restrictions on public employees: the employee's free speech interest was weighed against the government's interest in providing efficient public services.<sup>45</sup> Thus, the court's decision in *Siefert* attempted to "harmonize these two strains of First Amendment law."<sup>46</sup>

First, the Seventh Circuit determined that the Code's ban on party affiliation fell within the first strain of cases.<sup>47</sup> Just as in

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(arguing that "[t]he possibility of this less-speech-restrictive alternative suggests that even the narrowest content-based prohibitions on truthful judicial campaign speech may be unconstitutional"); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 707-11 (2007) (highlighting the pros and cons of using recusal as a means to balance judicial candidates' free speech rights with litigants' due process right to an impartial forum).

41. *Siefert*, 608 F.3d at 977.

42. *Id.* at 981.

43. *Id.* at 980-81; *see, e.g., Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007) (applying strict scrutiny to public censure order against state court judge); *Weaver*, 309 F.3d at 1319 (applying strict scrutiny to restriction on candidate's speech during election campaign for state supreme court); *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006) (applying strict scrutiny to judicial code provisions forbidding judicial candidates from making pledges and promises, and forbidding them from committing to issues likely to come before court); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1025 (D.N.D. 2005) (same).

44. *Siefert*, 608 F.3d at 980-81; *see, e.g., Citizens United*, 130 S. Ct. at 899 (stating that "there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (restricting students' use of vulgar terms at school); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (restricting state employees' speech about working conditions); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 131-32 (1977) (restricting prisoners' union-organizing activity); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (restricting military members' dissent); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (restricting federal employees' political activity); *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973) (restricting state employees' political activity); *Pickering*, 391 U.S. at 568 (restricting public school teachers' speech).

45. *Pickering*, 391 U.S. at 568.

46. *Siefert*, 608 F.3d at 980-81.

47. *Id.* at 981.

*White*, the party affiliation ban prohibited speech on the basis of its content, a category of speech that is at the core of First Amendment freedoms.<sup>48</sup> Therefore, the court subjected the provision to strict scrutiny and found that it failed because it was underinclusive and the compelling interest it served could be better addressed through recusal.<sup>49</sup>

Next, the court examined the Code's endorsement clause.<sup>50</sup> It found that, unlike affiliation with a political party, the endorsement of other candidates "is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as a political powerbroker."<sup>51</sup> Such endorsements are more partisan political activities than mere expressions of views, which justify a more deferential approach to the government in their prohibition.<sup>52</sup> The court therefore balanced Judge Siefert's interest in endorsing other candidates against Wisconsin's interest in upholding the appearance of fairness and justice in its court system and concluded that the state's interest was weightier.<sup>53</sup>

According to the court, use of the *Pickering* balancing test was appropriate for two reasons.<sup>54</sup> The first concerned Judge Siefert's

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48. *Id.*; *White*, 536 U.S. at 774 (holding that "the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is at the core of our First Amendment freedoms – speech about the qualifications of candidates for public office") (internal citation and quotation marks omitted).

49. *Siefert*, 608 F.3d at 982-83. The court found that "[t]he state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy." It also stated that "[w]ithout some specific, individualized relationship, the affiliation between a judge who is a member of a political party and other members of that political party is simply too diffuse to make it reasonable to assume that the judge will exhibit bias in favor of his fellow party members."

50. *Id.* at 983-88.

51. *Id.* at 984. Judge Siefert noted in his brief that "[e]ndorsements primarily benefit the endorsee, not the endorser" and endorsements may be exchanged between political actors on a quid pro quo basis. Brief for Appellee at 37 & n.11, *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (No. 05-1631).

52. *Siefert*, 608 F.3d at 984; *see also Letter Carriers*, 413 U.S. at 556 (upholding the government's authority to forbid federal employees from organizing a political party or club; actively participating in fundraising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention); *see also Biller v. U.S. Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir. 1988) (noting that the Supreme Court has drawn a careful line between "partisan political activities" and "mere expressions of views").

53. *Siefert*, 608 F.3d at 987.

54. *Id.* at 984-85.

status as an employee of the state of Wisconsin.<sup>55</sup> Although elected judges “receive job evaluations from the voting public,” they are nevertheless employed by the state to carry out the day-to-day task of operating the judicial system.<sup>56</sup> Secondly, the *Pickering* balancing test allowed Wisconsin to uphold its duty to promote the efficiency of the public services it performs.<sup>57</sup> Because inefficient performance of Judge Siefert’s public function as a member of the judiciary could violate due process, there was a sufficient basis for granting deference to the state to restrict certain suspect categories of judicial speech.<sup>58</sup>

The court also upheld the Code’s ban on the personal solicitation of contributions by judges and judicial candidates.<sup>59</sup> By categorizing the solicitation clause as a campaign finance regulation, and therefore subjecting it to closely drawn scrutiny,<sup>60</sup> the court concluded that the solicitation ban was drawn closely enough to Wisconsin’s interest in preserving impartiality and preventing corruption to be considered constitutional under the First Amendment.<sup>61</sup>

### III. ANALYSIS

#### A. *The Countervailing Constitutional Concern for Judicial Independence*

In order to understand the significance of the Seventh Circuit’s departure from strict scrutiny in *Siefert*, it is first crucial to comprehend the government’s countervailing interest in an independent judiciary. Judicial impartiality and the appearance of impartiality have long been recognized as state interests of the highest order.<sup>62</sup> Alexander Hamilton wrote that “liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”<sup>63</sup> By insulating judges from the influence of the political branches,<sup>64</sup> an independent judiciary preserves the

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55. *Id.*

56. *Id.*

57. *Id.* at 984.

58. *Id.*

59. *Id.* at 990.

60. *Id.* at 988.

61. *Id.* at 990.

62. See *White*, 536 U.S. at 793 (Kennedy, J., concurring) (noting that “the power and prerogative of a court” to elaborate principles of law in the course of resolving disputes “rests upon the respect accorded to its judgments”); see also Sullivan, *supra* note 9, at 1333-34 (finding that judicial independence serves three compelling ends, “each itself of constitutional magnitude”).

63. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64. *O’Donoghue*, 289 U.S. at 532 (referring to Chief Justice John

separation of powers,<sup>65</sup> which in turn safeguards two important due process concerns.<sup>66</sup>

First, judicial independence prevents unjustified or mistaken deprivations of life, liberty, or property<sup>67</sup> by ensuring that courts decide cases based on the law and facts alone, and not judges' political allegiances, financial obligations, or other improper pressures.<sup>68</sup> Second, judicial independence encourages those individuals affected by the proceeding to participate in the decision-making process.<sup>69</sup> By ensuring that no person is deprived of any interest without first having the opportunity to present his case in a forum where the judge is not already inclined to find against him,<sup>70</sup> judicial impartiality preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done."<sup>71</sup> This is because people's faith in the judiciary ultimately depends on its reputation for neutrality and detachment.<sup>72</sup>

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Marshall's aversion to a dependent judiciary); *see also* RAWLE, *supra* note 8 (stating that "if [the people] value and wish to preserve their Constitution, they ought never to surrender the independence of their judges").

65. *See* Sullivan, *supra* note 9, at 1334 (arguing that restrictions on state judicial election procedures designed to ensure judicial independence serve a compelling interest in preserving the separation of powers, one of the most important values the United States has urged upon newly emerging democracies); *see also* White, 536 U.S. at 803 (noting that the political branches "represent 'the People'; the judge represents the Law – which often requires him to rule against the People").

66. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (stating that under the due process clause, a person is entitled to "an impartial and disinterested tribunal in both civil and criminal cases" and that "this requirement of neutrality in adjudicative proceedings safeguards [the] central concerns of procedural due process").

67. *Id.*

68. Sullivan, *supra* note 9, at 1334.

69. *Marshall*, 446 U.S. at 242; *see* *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (stating that due process is meant to protect persons "not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property" and that it enables people "to contest the basis upon which a State proposes to deprive them of protected interests").

70. *Marshall*, 446 U.S. at 242.

71. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

72. *See* *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (holding that the mere presence of a particular judge as the presiding officer in a trial or under a judicial system may violate due process); *see, e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-23 (1986) (finding that a justice could not participate in an appeal of a bad faith refusal to pay judgment against an insurance company when that justice had a similar suit against a different insurance company pending in a lower court); *Ward v. Monroeville*, 409 U.S. 57, 59 (1972) (reversing a conviction when a mayor whose village was financed by fines collected in his court presided at trial); *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (holding that a judge could not try a defendant for contempt after losing a suit to the defendant); *In re Murchison*, 349 U.S. 133,

### B. The Supreme Court's Narrow Holding in *White*

In *Republican Party of Minnesota v. White*, the Supreme Court did not consider in any depth the importance of judicial impartiality when it invalidated the Minnesota Canon of Judicial Conduct that prohibited judicial candidates from announcing their political and legal views.<sup>73</sup> The Court simply assumed that the government has an interest in preserving judicial independence, but because it determined that the content-based speech restriction at issue was subject to strict scrutiny,<sup>74</sup> it invalidated the no-announce clause on narrow-tailoring grounds without exploring the deeper constitutional values and policies served by keeping judges separate from ordinary politics.<sup>75</sup>

This interest in judicial independence as a due process requirement was not the only constitutional issue that the Court declined to consider in its *White* analysis.<sup>76</sup> For example, the Court expressed no opinion on a clause in the Minnesota Judicial Code prohibiting judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”<sup>77</sup> Because the “pledges or promises” ban on speech could never be constitutionally imposed on candidates for political office,<sup>78</sup> the Court did not rule out the possibility that the First Amendment may allow for more speech restrictions to be placed on judicial candidates than on other political candidates,<sup>79</sup> potentially triggering a different First

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138-39 (1955) (holding that a judge who indicts a defendant cannot also conduct the trial); *Offutt v. United States*, 348 U.S. 11, 13-14 (1954) (holding that a judge who became personally entangled with counsel during a trial could not preside over the contempt proceedings against that attorney); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (holding that a judge whose salary depends on fines collected upon conviction cannot try a defendant).

73. See *White*, 536 U.S. at 775 (finding that “[t]he Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary”).

74. *Id.* at 774.

75. *Id.* at 776 (“We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality)”).

76. See Phillips & Poll, *supra* note 40, at 698 (asserting that *White* was “hardly a remarkable decision, as it affected only one obsolete provision that seemed patently overbroad”).

77. *White*, 536 U.S. at 770 (stating that the “pledges or promises” clause was “a prohibition that is not challenged here and on which we express no view.”); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002).

78. See *White*, 536 U.S. at 812-14 (Ginsberg, J., dissenting) (emphasizing that the constitutionality of “pledge or promise” clauses was not challenged or placed in doubt by *White*’s ruling, and insisting that such clauses serve vital due process interests).

79. *Id.* at 783 (stating that “[w]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those

Amendment analysis.<sup>80</sup>

By leaving these First Amendment issues untouched in *White*, the Court actually reached a very narrow decision. It simply held that judicial elections are not categorically outside the domain of First Amendment protections.<sup>81</sup>

### C. *The Overzealous Interpretation of White by Lower Courts*

Despite the narrow holding of *White*, some lower courts have used the Court's decision to prohibit virtually all judicial election regulations that touch upon judges' First Amendment interests. For example, in *Weaver v. Bonner*, the Eleventh Circuit held that *White* prohibits all restrictions on personal solicitation by judicial candidates.<sup>82</sup> At issue in *Weaver* was a canon forbidding judicial candidates from personally soliciting campaign contributions and publicly stated support.<sup>83</sup> The court found that the distinction between judicial elections and other types of elections had been greatly exaggerated, and that the distinction did not justify greater restrictions on speech during judicial campaigns than during other types of campaigns.<sup>84</sup> Thus, because solicitation restrictions would be unconstitutional in other public election contexts, the court found that they were also unconstitutional in the judicial election context.<sup>85</sup>

Likewise, in *Carey v. Wolnitzek*, the Sixth Circuit struck down clauses in Kentucky's Code of Judicial Conduct that prohibited judges and judicial candidates from soliciting campaign funds and

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for legislative office").

80. See also Sullivan, *supra* note 9, at 1331 (noting that because *White* only concerned the rights of new candidates for judicial office, "it did not discuss or reach the limitations that might be placed upon incumbent judges running for retention or reelection while already sitting on the bench").

81. See *id.* at 1329 (arguing that the Court's reasoning in *White* does not preclude all efforts by states to strike a balance in judicial elections between First Amendment interests and other countervailing constitutional interests). Specifically, "Justice Scalia noted that the Minnesota Judicial Code contained a clause prohibiting judicial candidates from 'making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,' and expressly stated that that was a prohibition that is not challenged here and on which we express no view." *Id.* at 1331 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)). "The *White* dissenters also emphasized that the constitutionality of 'pledge or promise' clauses was not challenged or placed in doubt by the ruling in the case, and insisted that such clauses serve vital due process interests." *Id.* (citing *White*, 536 U.S. at 812-14 (Breyer, Ginsburg, JJ., dissenting)).

82. *Weaver*, 309 F.3d at 1322-23.

83. GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (providing that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support").

84. *Weaver*, 309 F.3d at 1321.

85. *Id.*

from disclosing their party affiliation.<sup>86</sup> The court found that the clauses violated judges' free speech and associational rights because, among other things, they suppressed too much speech to advance the government's interest in an unbiased judiciary.<sup>87</sup>

Even the Eighth Circuit, when it considered *White* again on remand, invalidated two additional clauses of Minnesota's Code of Judicial Conduct.<sup>88</sup> The first prevented judicial candidates from identifying themselves as members of a political organization and accepting political endorsements.<sup>89</sup> The second barred judicial candidates from personally soliciting financial contributions.<sup>90</sup> The court found that both restrictions violated judges' First Amendment rights by burdening judges' political speech and associational rights.<sup>91</sup> A number of federal district courts have used *White* to strike down similar clauses found in their states' judicial codes.<sup>92</sup>

However, all of these rulings read *White* more broadly than required by its holding. They extend the scope of First Amendment liberties farther than may be appropriate in the judicial election context and fail to afford adequate weight to the states' due process interest in judicial impartiality.

#### D. Siefert v. Alexander: A Harmonization of Modern First Amendment Jurisprudence

The Seventh Circuit's examination of the Wisconsin Judicial Code provisions at issue in *Siefert v. Alexander* marked an attempt to return to a faithful interpretation of the Supreme Court's First Amendment analysis of judicial speech restrictions in *White*.<sup>93</sup> By

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86. *Carey*, 614 F.3d at 203-04; KY. SUP. CT. R. 4.300, Canon 5(A)(2), 5(B)(2); KY. JUDICIAL ETHICS OP. JE-105 (2004) (prohibiting judges and candidates from disclosing their party affiliation "in any form of advertising, or when speaking to a gathering," except in answer to a question by a voter in one-on-one or "very small private informal" settings and prohibiting judicial candidates from "solicit[ing] campaign funds," a restriction that extends to all fundraising by the candidate, including in-person solicitations, group solicitations, telephone calls and letters).

87. *Carey*, 613 F.3d at 203-04.

88. *White*, 416 F.3d at 738.

89. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a) (2002).

90. *Id.* at (B)(2).

91. *White*, 416 F.3d at 788.

92. *See Stout*, 440 F. Supp. 2d at 1232-33 (limiting the application of canons that forbid candidates from promising to rule in a particular manner or to commit themselves in advance on legal issues); *accord* Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) (invalidating a similar provision in Alaska code); *N.D. Family Alliance*, 361 F. Supp. 2d at 1038-39 (striking down two provisions of the North Dakota code). *But see* *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003) (upholding pledges and promises clause).

93. *Siefert*, 608 F.3d at 979 (finding that "*White* left open some of the

restricting *White* to what it actually held, the *Siefert* court was able to apply a more sophisticated First Amendment analysis to the contested restrictions by considering other strains of First Amendment jurisprudence.<sup>94</sup> Such an analysis more accurately represented states' competing interest in due process.<sup>95</sup>

First, the Seventh Circuit recognized that the type of speech restriction the Supreme Court considered in *White* forbade speech on the basis of its content and burdened a category of speech that is at the core of First Amendment freedoms:<sup>96</sup> speech about the qualifications of candidates for public office.<sup>97</sup> The *Siefert* court found that the first contested provision of the Wisconsin Judicial Code was also a content-based restriction.<sup>98</sup> By prohibiting all judges and candidates for judicial office from affiliating with any political party,<sup>99</sup> the restriction prevented Judge Siefert from speaking about both his political views and his qualifications for office.<sup>100</sup> Because this provision fell squarely within the ambit of the Supreme Court's analysis in *White*, it was properly subject to strict First Amendment scrutiny.<sup>101</sup>

By contrast, the second contested provision of the Wisconsin Judicial Code, which prohibited judges and judicial candidates from publicly endorsing or speaking on behalf of any partisan candidate or platform,<sup>102</sup> served a purpose distinct from the speech at issue in *White*.<sup>103</sup> The *Siefert* court found that "endorsements are not simply a mode of announcing a judge's views on an issue, or shorthand for that view."<sup>104</sup> Rather, the offering of an endorsement is a judge's effort to affect a separate political campaign,<sup>105</sup> and thereby trade on the prestige of the judicial office

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questions we deal with today"); *see also White*, 536 U.S. at 794 (Kennedy, J., concurring) (noting that states may regulate the behavior of their judges to protect the integrity of their courts).

94. *Siefert*, 608 F.3d at 981 (stating that "[m]uch of our discussion involves our attempt to harmonize two strains of First Amendment law"); *see Pickering*, 391 U.S. at 568 (balancing public employees' right to speak out on matters of public concern against the government's interest in "promoting the efficiency of the public services it performs through its employees").

95. *Siefert*, 608 F.3d at 984 (asserting that "restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause").

96. *White*, 536 U.S. at 774.

97. *Siefert*, 608 F.3d at 981.

98. *Id.*; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (defining a content-based restriction as one that "focuses only on the content of the speech and the direct impact that speech has on its listeners").

99. WIS. SUP. CT. R. 60.06(2)(b)1.

100. *Siefert*, 608 F.3d at 981.

101. *Id.*

102. WIS. SUP. CT. R. 60.06(2)(b)4.

103. *Siefert*, 608 F.3d at 983.

104. *Id.*

105. *Id.* at 984; *see also ABA MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 4* (2007) (justifying the restriction on endorsements based on the danger

to advance other political ends.<sup>106</sup> Thus, there is a clear distinction between a political endorsement and speech about a judge's own campaign.<sup>107</sup>

Indeed, the Supreme Court has recognized similar distinctions and has accordingly drawn a careful line "between partisan political activities and mere expressions of views."<sup>108</sup> Into the latter category fall cases like *White*, which subject "viewpoint" speech restrictions to strict scrutiny.<sup>109</sup> Into the former category, however, fall cases like *Pickering*, which grant governmental entities more leeway to proscribe certain categories of speech in order to promote the efficient performance of governmental functions.<sup>110</sup>

Because public endorsements are often exchanged between political actors on a quid pro quo basis,<sup>111</sup> they may interfere with the judicial branch's ability to carry out the impartial administration of justice.<sup>112</sup> A more deferential approach to governmental prohibition of endorsements is therefore justified.<sup>113</sup> Accordingly, the Seventh Circuit subjected the endorsement

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of "abusing the prestige of judicial office to advance the interests of others").

106. *Siefert*, 608 F.3d at 983.

107. *Id.* at 983; see *Letter Carriers*, 413 U.S. at 555 (explaining that the government is "empowered to prevent its employees from contributing energy as well as from collecting money for partisan political ends"); see also *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100 (1947) (stating that "[e]xpressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success").

108. *Biller*, 863 F.2d at 1089; see also *Mitchell*, 330 U.S. at 100 (upholding the constitutionality of the Hatch Act because it forbade only partisan political activity, "active participation in political management and political campaigns" is proscribed).

109. See *White*, 536 U.S. at 774 (concluding that the correct test to be applied to analyze the constitutionality of content-based speech restrictions is strict scrutiny); see *Playboy*, 529 U.S. at 813 (subjecting content-based speech restriction to strict scrutiny, and stating that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative").

110. See *Pickering*, 391 U.S. at 568 (finding that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); see also *Mitchell*, 330 U.S. at 96 (finding that "[a]gain this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government.").

111. *Siefert*, 608 F.3d at 984.

112. *Id.* at 985 (stating that the Court's justification for the government restriction in *Pickering* was related to the government's duty to ensure that public services are performed efficiently).

113. *Id.* at 984.

provision of the Wisconsin Judicial Code to a test that balances the state's interest in ensuring that the judicial branch performs its function both efficiently and in accordance with due process requirements, against Judge Siefert's interest in endorsing a candidate for political office.<sup>114</sup>

Finally, the *Siefert* court considered the final portion of the Wisconsin Judicial Code, which banned judges and judicial candidates from personally soliciting campaign contributions.<sup>115</sup> Recognizing that, like public endorsement restrictions, solicitation bans were another issue that the Supreme Court did not reach in *White*,<sup>116</sup> the Seventh Circuit looked to other First Amendment jurisprudence to determine the appropriate framework under which such restrictions should be reviewed.<sup>117</sup> In *Buckley v. Valeo*, the Supreme Court reasoned that restrictions on raising campaign funds were typically less burdensome to speech than restrictions on spending campaign funds.<sup>118</sup> Thus, while restrictions on spending by candidates and parties are reviewed under strict scrutiny, restrictions on contributions are reviewed under less rigorous closely drawn scrutiny,<sup>119</sup> which requires that the

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114. *Id.* at 985-86 (“as in *Pickering*, we have to find the balance between the state's interest and the judge's.”). The court explained the *Pickering* approach:

Under the *Pickering* approach, narrow tailoring is not the requirement; the fit between state interest and regulation need not be so exact. Instead, the state's interest must be weighed against the employee's interest in speaking. The state's interest in the endorsement regulation is a weighty one. Due process requires both fairness and the appearance of fairness in the tribunal.

*Id.*

115. WIS. SUP. CT. R. 60.06(4).

116. *Id.* at 988-90.

117. *Siefert*, 608 F.3d at 988; see *Stretton v. Disciplinary Bd. of Sup. Ct. of Penn.*, 944 F.2d 137, 144-45 (3d Cir. 1991) (upholding Pennsylvania's personal solicitation ban under a standard more deferential to government than strict scrutiny because the collection and expenditure of money for campaigns “invites abuses that are inconsistent with the ideals of an impartial and incorruptible judiciary.”).

118. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (recognizing a compelling state interest in preventing corruption or the appearance of corruption in elections through some campaign finance regulation and therefore creating a two-tiered scheme of review for campaign finance regulations); see also *Siefert*, 608 F.3d at 988 (stating that “at heart, [a] solicitation ban is a campaign finance regulation.”).

119. *Buckley*, 424 U.S. at 25; *Siefert*, 608 F.3d at 988; see also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136-38 (2003), *overruled on other grounds* by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (applying closely drawn scrutiny to a solicitation ban in the Bipartisan Campaign Finance Reform Act because it did not restrict the amount or manner in which a judicial candidate could spend money on his or her campaign); *Citizens United*, 558 U.S. at 909 (noting and reinforcing the distinction between independent expenditures on behalf of candidates and direct contributions to candidates); but see *White*, 416 F.3d at 765-66 (applying strict scrutiny to a

government use methods that are closely drawn to further a sufficiently important interest.<sup>120</sup> Because the Wisconsin Judicial Code's solicitation ban did not limit the amount or way that a judicial candidate can spend money on his or her campaign, it was appropriately subject to closely drawn scrutiny.<sup>121</sup>

#### IV. PROPOSAL

The Supreme Court declined to grant certiorari on *Siefert v. Alexander*.<sup>122</sup> Nevertheless, the Court regularly receives appeals challenging the constitutionality of judicial codes of conduct.<sup>123</sup> Given that the constitutionality of judicial endorsement and solicitation bans have caused splits between the various circuit courts in just the past year,<sup>124</sup> the Supreme Court may well decide to hear another case involving judicial codes of conduct in the near future. A grant of certiorari will undoubtedly include both endorsement and solicitation ban challenges.<sup>125</sup>

In order to preserve judicial impartiality, the Supreme Court should adopt the test laid out by the Seventh Circuit in *Siefert* to evaluate the constitutionality of endorsement and solicitation bans. By using the *Pickering* balancing test on endorsement restrictions and the *Buckley* test on solicitation restrictions, the

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solicitation ban).

120. *Buckley*, 424 U.S. at 25.

121. *Siefert*, 608 F.3d at 990 (concluding that “the solicitation ban is drawn closely enough to the state’s interest in preserving impartiality and preventing corruption to be constitutional” and finding that “[t]he fact that a judge might become aware of who has or has not contributed to his campaign does not fatally undercut the state’s interest in the ban - the personal solicitation itself presents the greatest danger to impartiality and its appearance”).

122. *Siefert v. Alexander*, 131 S. Ct. 2872 (2011).

123. See, e.g., *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003) (deciding a challenge to three New York judicial codes of conduct), *cert. denied*, 541 U.S. 1085 (2004); *In re Kinsey*, 842 So. 2d 77, 80 (Fla. 2003) (per curiam) (rendering judgment on a challenge to a judicial canon that prohibited judicial candidates from making statements that appeared to commit the candidate to a particular side of a contested issue), *cert. denied sub. nom. Kinsey v. Fla. Judicial Qualifications Comm’n*, 540 U.S. 825 (2003).

124. Compare *Carey*, 614 F.3d at 207 (holding that the judicial solicitation ban fails a strict scrutiny analysis because it is not narrowly tailored to a compelling government interest), with *Siefert*, 608 F.3d at 990 (concluding that judicial endorsement ban is constitutional under the *Pickering* balancing test because the state’s interest in judicial impartiality outweighs the judge’s interest in giving an endorsement and that the judicial solicitation ban is constitutional under the *Buckley* framework because it is closely drawn to an important government interest).

125. See Rules of the Supreme Court of the United States, Rule 10, 5-6 (2010) (stating that one of the factors the Court considers in deciding whether to grant certiorari is if “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

Court will enable states to avoid serious due process problems.<sup>126</sup>

A. *The Pickering Balancing Test: The Way of the Future for Judicial Endorsement Restrictions*

In *Pickering*, the Supreme Court recognized that governmental entities have some leeway to proscribe certain categories of speech among their citizens in order to promote the efficient performance of governmental functions.<sup>127</sup> Thus, under *Pickering*, narrow tailoring is not the requirement.<sup>128</sup> Rather, the state's interest in prohibiting speech must be weighed against the citizen's interest in speaking.<sup>129</sup>

Bans on political endorsements found in judicial codes of conduct should be subject to the more deferential balancing test that the Supreme Court articulated in *Pickering*, rather than strict scrutiny, for two reasons. First, a judge's public endorsement of a partisan political candidate poses a risk that judges will abuse the prestige of their office in order to advance the interests of others.<sup>130</sup> This is because, unlike a judge's affiliation with a political party or discussion about legal issues,<sup>131</sup> an endorsement is not simply a means for the judge to express a viewpoint on a particular issue. Rather, endorsements may be exchanged between the judge and the endorsee on a quid pro quo basis,<sup>132</sup> which undermines impartiality and the appearance of impartiality in the judiciary.<sup>133</sup> This difference between an endorsement and speech about a judge's own campaign justifies the *Pickering* test's more deferential approach to government prohibition of these endorsements.<sup>134</sup>

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126. See Aimee Priya Ghosh, *Disrobing Judicial Campaign Contributions: A Case for Using the Buckley Framework to Analyze the Constitutionality of Judicial Solicitation Bans*, 61 AM. U. L. REV. 125, 149-50 (2011) (arguing that judicial solicitation bans resemble a class of speech restrictions that are upheld in the interest of keeping the court system functioning in an efficient and objective manner).

127. *Pickering*, 391 U.S. at 568; see also *Citizens United*, 130 S. Ct. at 899 (noting that while political speech restrictions are subject to strict scrutiny, "a narrow class of speech restrictions" are constitutionally permissible if "based on an interest in allowing governmental entities to perform their functions.").

128. *Pickering*, 391 U.S. at 568; *Bridges v. Gilbert*, 557 F.3d 541, 549 (7th Cir. 2009).

129. *Siefert*, 608 F.3d at 985.

130. ABA MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 4 (2007).

131. *Citizens United*, 130 S. Ct. at 898 (citing *Eu*, 489 U.S. at 223); see also *White*, 536 U.S. at 774 (noting that "speech about the qualifications of candidates for public office" is "at the core of our First Amendment freedoms").

132. *Siefert*, 608 F.3d at 984.

133. *Id.* at 985. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

134. *Letter Carriers*, 413 U.S. at 556; *Mitchell*, 330 U.S. at 99; see also

Second, the *Pickering* balancing test should be used to evaluate the constitutionality of judicial endorsement restrictions because elected judges are more akin to government employees than they are to legislative actors.<sup>135</sup> Although elected judges receive job evaluations from the voting public in the form of re-elections, they are employed in the essential day-to-day task of operating a judicial system that must not only be fair and impartial, but must also appear to the public to be fair and impartial.<sup>136</sup> After all, it is a “small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election.”<sup>137</sup> Therefore, states must be able to implement safeguards to ensure that judges are accountable, not just to the voters, but to their responsibilities under the Fourteenth Amendment as well. As due process requires both fairness and the appearance of fairness in the tribunal,<sup>138</sup> the *Pickering* test is more appropriate than strict scrutiny because it allows states more leeway to prevent judges from undermining the appearance of impartiality by speaking on behalf of partisan political candidates.

Furthermore, the *Pickering* balancing test is the more suitable test because the risk of bias that occurs when parties that the judge has endorsed appear in the judge’s court is not mitigated by the remedy of recusal.<sup>139</sup> Both the volume of litigation involving the government and the small number of judges in most circuit courts make recusal impracticable in the case where a judge endorses a prosecutor or sheriff.<sup>140</sup> Partisan law enforcement officials appear frequently before state courts, particularly prosecutors and sheriffs, who are involved in litigation nearly every day.<sup>141</sup> Because the *Pickering* test merely balances the need for the endorsement restriction against the judge’s interest in speaking instead of subjecting the restriction to strict scrutiny, it would allow the government to combat more due process violations caused by endorsements when other less restrictive remedies, like

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*Biller*, 863 F.2d at 1089 (noting that the Supreme Court has drawn a careful line between “partisan political activities” and “mere expressions of views”).

135. *Siefert*, 608 F.3d at 984-85; see also *Jenevein*, 493 F.3d at 558 (recognizing that the position of an elected judge resembles that of a government employee).

136. *Siefert*, 608 F.3d at 985.

137. *Id.*; see also *White*, 536 U.S. at 794 (Kennedy, J., concurring) (asserting that “state rules fill the gap between elections in order to develop the fair jurists to whom each litigant is entitled.”).

138. See *Offutt*, 348 U.S. at 14 (arguing that judges should not preside over cases in which they are unable to be impartial).

139. *Siefert*, 608 F.3d at 987.

140. See Phillips & Poll, *supra* note 40, at 707-08 (stating that in most jurisdictions, existing recusal standards are too restrictive to be effective in attaining an independent and impartial judicial branch).

141. *Siefert*, 608 F.3d at 987.

recusal, are not viable.

*B. The Buckley Test: The Best Way to Restrict the Solicitation of Campaign Contributions by Judges*

If the Supreme Court decides to hear a challenge to a judicial solicitation ban, it should establish the *Buckley* framework as the appropriate method of analysis for the ban.<sup>142</sup> Because the *Buckley* framework articulates an anti-coercion rationale,<sup>143</sup> subjecting solicitation bans to *Buckley*'s closely drawn scrutiny instead of strict scrutiny acts to preserve judicial impartiality.

In states that have enacted solicitation bans, judges and judicial candidates are prohibited from directly asking lawyers, businesses, lobbyists, or unions for money.<sup>144</sup> This prevents people from feeling directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns.<sup>145</sup> Furthermore, 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.<sup>146</sup>

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142. See Ghosh, *supra* note 126, at 152 (positing that state solicitation bans pass constitutional muster under the *Buckley* framework); see also *Siefert*, 608 F.3d at 988 (stating that *Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates); see generally Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 290-92 (2010) (explaining that in *Buckley*, the Court upheld certain limitations on contributions, finding that "a limitation upon the amount that can be contributed to a candidate 'entails only a marginal restriction' upon the contributor's expressive rights because a contribution communicates only general support for a candidate and his views and not 'the underlying basis of that support'").

143. *White*, 416 F.3d at 769 (Gibson, J., dissenting) (stating that "[o]pen-mindedness, in Justice Scalia's terminology, is in reality simply a facet of the anti-corruption interest that was recognized in [*Buckley*] and subsequent campaign finance cases").

144. See ABA MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (providing a model prohibition preventing judicial candidates from directly soliciting contributions from any source); see also GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (providing that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support"); Thomas K. Byerley, Focus on Professional Responsibility – The Ethics of Judicial Campaigns, MICHIGAN BAR JOURNAL, Vol. 79, No. 6 (July 2000) available at <http://www.michbar.org/journal/article.cfm?articleID=101&volumeID=9&viewType=archive> (explaining that under the Michigan Code of Judicial conduct, a judicial campaign committee may not solicit contributions of more than one hundred dollars from a lawyer).

145. *Siefert*, 608 F.3d at 989.

146. *Id.* at 989-90.

Despite the due process danger of partiality posed by direct solicitations, courts have declined to recognize a compelling state interest in protecting potential contributors from feeling coerced.<sup>147</sup> As a result, these solicitation bans would always fail strict scrutiny.

Yet, it is undeniable that the perceived coerciveness of direct solicitations is closely related to their potential impact on impartiality.<sup>148</sup> As the *Siefert* court noted, “[a] direct solicitation closely links the quid - avoiding the judge’s future disfavor - to the quo - the contribution.”<sup>149</sup> Additionally, because judicial campaigns are often largely funded by lawyers,<sup>150</sup> it would be unworkable for judges to recuse themselves in every case that involved a lawyer from whom they had previously solicited a contribution.<sup>151</sup> Thus, the *Buckley* framework is more appropriate than strict scrutiny because it would allow states to preserve judicial impartiality by enabling them to enact solicitation bans that would not be immediately struck down under a more rigorous constitutional analysis.

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147. See, e.g., *id.* at 989 (refusing to recognize a compelling state interest in preventing campaign contributors from feeling coerced).

148. See *id.* at n.6 (stating that “[l]egislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them”). “In addition, legislators can only act with the support of their colleagues. Judges—particularly trial court judges—exercise wide and largely unreviewable discretion over discrete cases involving specific parties and lawyers.” *Id.*

149. *Id.* at 989.

150. See Thomas K. Byerley, Focus on Professional Responsibility – The Ethics of Judicial Campaigns, MICHIGAN BAR JOURNAL, Vol. 79, No. 6 (July 2000) *available at* <http://www.michbar.org/journal/article.cfm?articleID=101&volumeID=9&viewType=archive> (discussing the amount of money that lawyers may contribute to the campaign committee of a judicial candidate); see, e.g., Anna Gorman, *Too Many Cases, Too Few Judges*, L.A. TIMES, July 21, 2008, at B1, B7 (reporting that the caseload at the Los Angeles Immigration Court has risen substantially in recent years, but the number of judges has stayed the same, causing delays); Finis Williams, *With Too Few Judges, Civil Cases Languish*, CONCORD MONITOR (Jan. 27, 2009), <http://www.concordmonitor.com/article/with-too-few-judges-civil-cases-languish> (lamenting that there are not enough judges in New Hampshire to deal with the civil case load at the county court).

151. See, e.g., Carrie Johnson, *Judge Recusals May Hinder Gulf Oil Spill Lawsuits*, NPR (June 8, 2010), <http://www.npr.org/templates/story/story.php?storyID=127560878&ft=1&f=127560878> (reporting that so many judges recused themselves due to conflicts of interest that litigation has been seriously delayed).

## V. CONCLUSION

Restrictions on the endorsement of partisan political candidates and the direct solicitation of campaign funds by judges are entirely different from the restriction that the Supreme Court struck down in *White*. They therefore merit the more flexible First Amendment analysis that the Seventh Circuit articulated in *Siefert* because such an analysis properly values the competing concerns shared by both states and litigants for judicial impartiality and due process.

