SIEFERT V. ALEXANDER: THE SEVENTH CIRCUIT ERRONEOUSLY FOUND THE ENDORSEMENT CLAUSE CONSTITUTIONAL IN AN EFFORT TO CONFRONT THE ETHICAL DILEMMAS OF JUDICIAL ELECTIONS

I. INTRODUCTION

In Siefert v. Alexander,1 the United States Court of Appeals for the Seventh Circuit held that John Siefert, a Wisconsin County Circuit Court judge, was prohibited from publicly endorsing other political candidates during his judicial campaign.2 The Seventh Circuit prohibited Siefert from endorsing political candidates by determining that Wisconsin's Endorsement Clause,3 a code of judicial ethics that banned judicial candidates from endorsing other candidates during elections, was constitutional.4 Instead of applying strict scrutiny, the level of review established in Republican Party of Minnesota v. White5 (White I), the Seventh Circuit determined the Endorsement Clause was constitutional by applying the Pickering v. Board of Education6 balancing test for the first time to judicial elections and judges' First Amendment rights.7

This Note will first review the facts and holding of Siefert.8 This Note will then discuss decisions involving the constitutionality of Endorsement Clauses or other similar clauses under strict scrutiny analysis.9 This Note will argue the Seventh Circuit in Siefert erred by failing to follow the Supreme Court's decision in White I, which required the application of strict scrutiny as opposed to the Pickering

---

1. 608 F.3d 974 (7th Cir. 2010).
2. Siefert v. Alexander, 608 F.3d 974, 977 (7th Cir. 2010), cert. denied 131 S. Ct. 2872 (2011) (mem.).
4. See Wis. Sup. Ct. R. 60.06(2)(b)(4) (prohibiting judges and judicial candidates from “[p]ublicly endors[ing] or speak[ing] on behalf of its candidates or platforms”); see also Siefert, 608 F.3d at 977 (reversing the district court's holding that prohibitions on endorsing partisan candidates are unconstitutional).
7. See Siefert, 608 F.3d at 991 (Rovner, J., dissenting) (referring to the majority opinion and stating that the majority concedes it is not using strict scrutiny, but rather a new manufactured balancing test).
8. See infra notes 15-53 and accompanying text.
9. See infra notes 54-210 and accompanying text.
balancing test to content-based restrictions such as the Endorsement Clause. Further, this Note will illustrate that Wisconsin's Endorsement Clause is like Minnesota's Announce Clause and Party-Affiliation Clause, both of which the Supreme Court found unconstitutional, and as such, the Seventh Circuit should have found the Endorsement Clause unconstitutional. Finally, this Note will show that the Seventh Circuit erroneously found the Endorsement Clause constitutional by failing to consider the modern legal trend of treating judicial elections like legislative and executive elections.

II. FACTS AND HOLDING

In 1999, John Siefert was elected as a County Circuit Court Judge in Milwaukee, Wisconsin. Before his election, Siefert was a member of the Democratic Party and highly involved in partisan activities such as running twice as a Democrat for the state legislature, running twice for the county's treasurer, and serving as an alternate elector for President Bill Clinton in 1992. After being elected judge, Siefert desired to declare his party affiliation with the Democratic Party because he believed that his membership would vocalize his desire for peace and justice. Siefert additionally wanted to endorse partisan candidates for public office such as President Barack Obama and then-governor of Wisconsin, Jim Doyle. Finally, Siefert wished to solicit contributions for his upcoming judicial election in 2011 by making phone calls, signing fundraising letters, and inviting potential donors to events.

Since 1913, affiliating with a political party was absent from Wisconsin judicial elections, but in 1968 Wisconsin expressly prohibited judges from affiliating with a political party. In 2004, the Wisconsin Supreme Court amended the Code of Judicial Conduct and banned judges from declaring party membership, personally soliciting campaign contributions, and making partisan endorsements—the precise privileges Siefert believed he was granted under the rights of freedom.

10. See infra notes 221-60 and accompanying text.
12. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1), (B)(1) (West 2004) (invalidated by Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005)).
13. See infra notes 261-302 and accompanying text.
14. See infra notes 303-28 and accompanying text.
15. Siefert v. Alexander, 608 F.3d 974, 977 (7th Cir. 2010), cert. denied 131 S. Ct. 2872 (2011) (mem.).
16. Siefert, 608 F.3d at 977.
17. Id.
18. Id.
19. Id.
20. Id. at 978.
of speech and association guaranteed by the First Amendment.\textsuperscript{21} To avoid running the risk of violating Wisconsin’s Code of Judicial Conduct, Siefert filed suit under 42 U.S.C. § 1983 requesting declaratory and injunctive relief against, inter alia, James C. Alexander.\textsuperscript{22} Alexander was the executive director of the Wisconsin Judicial Commission, the body that enforces Wisconsin’s Code of Judicial Conduct.\textsuperscript{23}

The United States District Court for the Western District of Wisconsin found in favor of Siefert, holding that it was unconstitutional to ban judges from affiliating with a party, endorsing partisan candidates, and personally soliciting campaign funds.\textsuperscript{24} The court used a strict scrutiny analysis to strike all three provisions of the Wisconsin Code of Judicial Conduct because they were content-based regulations of speech.\textsuperscript{25} The court noted the general rule that every content-based regulation of speech is subject to strict scrutiny.\textsuperscript{26} Under strict scrutiny, the regulation has to be narrowly tailored to serve a compelling governmental interest by the least restrictive means.\textsuperscript{27} The court followed the United States Supreme Court in Republican Party of Minnesota v. White\textsuperscript{28} (White I) and the United States Court of Appeals for the Eighth Circuit in Republican Party of Minnesota v. White\textsuperscript{29} (White II), which both applied strict scrutiny to strike down similar judicial codes of conduct.\textsuperscript{30}

Moreover, the district court refused to apply the balancing test the Supreme Court established in Pickering v. Board of Education,\textsuperscript{31} which weighs the government’s interests of functionality and efficiency against a public employee’s right to speak on public matters.\textsuperscript{32} The court opined that the Pickering balancing test was inappropriate because it is arduous to characterize an elected judge as an employee of the government since he is accountable to the electorate and not to

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 977.
\textsuperscript{23} Id.
\textsuperscript{24} See Siefert v. Alexander, 597 F. Supp. 2d 860, 889-90 (W.D. Wis. 2009) aff’d in part, rev’d in part, 608 F.3d 974 (7th Cir. 2010) (holding Wisconsin Supreme Court Rules 60.06(2)(b)(1), 60.06(2)(b)(4), and 60.06(4) are unconstitutional).
\textsuperscript{25} Alexander, 597 F. Supp. 2d at 884-85, 887 (noting Wis. Sup. Ct. R. 60.06(2)(b)(1) and 60.06(2)(b)(4) are content-based restrictions and that Wis. Sup. Ct. R. 60.06(4) required strict scrutiny inferring it was a content-based restriction).
\textsuperscript{26} Id. at 868 (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 574 (2001)).
\textsuperscript{27} Id. at 867 (citing Johnson v. California, 543 U.S. 499, 505 (2005); United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000)).
\textsuperscript{28} 536 U.S. 765 (2002).
\textsuperscript{29} 416 F.3d 738 (8th Cir. 2005).
\textsuperscript{30} Alexander, 597 F. Supp. 2d at 867-68. The court cited to White I and White II, which invalidated judges from participating in campaign solicitations and partisan activities. Id.
\textsuperscript{31} 391 U.S. 563 (1968).
\textsuperscript{32} Alexander, 597 F. Supp. 2d at 869-70.
the government. The court opted not to apply the Pickering balancing test because courts have never allowed the government to ban candidates from communicating pertinent information to voters during an election. The court additionally stated that Wisconsin's rule of banning judicial candidates from affiliating with a political party seemed parallel to Minnesota's rule in White I banning judicial candidates from announcing their views on legal or political issues, and thus strict scrutiny should apply.

The court determined that the three provisions of the Wisconsin Supreme Court Rules regarding party affiliation, endorsement of partisan candidates, and personal solicitation for campaign funds lacked narrow tailoring. The court reasoned that the provisions were underinclusive and did not use the least restrictive means to achieve the compelling state interest of preventing bias and the appearance of bias within the judiciary. The court stated that the provision prohibiting party affiliation was underinclusive because it only banned political party affiliation but allowed affiliation with religious, fraternal, sororal, educational, civic and other interest groups. The court determined that recusal was the least restrictive and effective measure to promote Wisconsin's state interests.

Alexander appealed to the United States Court of Appeals for the Seventh Circuit, and the court affirmed the judgment of the district court in part and reversed in part. The Seventh Circuit applied strict scrutiny to affirm the district court's judgment, which determined that judicial candidates' rights to affiliate with a political party were protected. Nevertheless, the Seventh Circuit reversed the district court's judgment that determined it unconstitutional for judges to publicly endorse political candidates and personally solicit campaign contributions.

First, the Seventh Circuit applied strict scrutiny to the Party Affiliation Clause, which prohibited judicial candidates from affiliating with a political party, and affirmed the district court's reasoning

33. Id. at 870.
34. Id. at 868.
35. See id. at 869 (noting Wisconsin's rule prohibiting party affiliation was no different than Minnesota's rule in White I that prohibited judges from announcing their legal or political views).
36. Id. at 883, 886, 888.
37. Id.
38. Id. at 879.
39. Id. at 882-83.
40. Siefert, 608 F.3d at 977.
41. Id. at 981.
42. Id. at 977.
43. Wis. Sup. Ct. R. 60.06(2)(b)(1) (invalidated by Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010)).
that it was unconstitutional. However, in examining the Endorsement Clause, which banned judicial candidates from endorsing or speaking on behalf of its candidates or platforms during elections, the Seventh Circuit did not apply strict scrutiny, but rather applied the Pickering balancing test. In refusing to apply strict scrutiny to the Endorsement Clause, the Seventh Circuit distinguished the type of speech the Endorsement Clause prohibited from the speech the Supreme Court protected in White I—a judge endorsing a candidate is different from a judge announcing his or her views on legal or political issues.

The Pickering balancing test differs from strict scrutiny because it does not require narrow tailoring. The Seventh Circuit applied the Pickering balancing test by balancing the state's interests against Siefert's interests. The Seventh Circuit noted that the Endorsement Clause potentially put judicial candidates at the fulcrum of party politics, which could destabilize Wisconsin's interest in maintaining the judiciary's impartiality. Further, the Seventh Circuit articulated that Wisconsin also has a due process obligation to prevent the appearance of partisan bias in the judiciary. The Seventh Circuit weighed Wisconsin's interests against Siefert's interest to inform the electorate of his beliefs and qualifications. In the end, the Seventh Circuit gave more weight to Wisconsin's interests than to Siefert's interests and accordingly determined that the Endorsement Clause was constitutional under the Pickering balancing test.

III. BACKGROUND

A. REPUBLICAN PARTY OF MINNESOTA v. WHITE: THE UNITED STATES SUPREME COURT APPLIED STRICT SCRUTINY TO FIND MINNESOTA'S ANNOUNCE CLAUSE UNCONSTITUTIONAL

In Republican Party of Minnesota v. White, the United States Supreme Court applied strict scrutiny to the Announce

---

44. Siefert, 608 F.3d at 981, 990.
45. Wis. Sup. Ct. R. 60.06(2)(b)(4).
46. Siefert, 608 F.3d at 983, 985 (referencing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).
47. Id. at 983-84.
48. Id. at 985.
49. Id.
50. Id. at 986-87.
51. Id.
52. Id.
53. See id. (explaining that the regulation is permissible when Wisconsin’s interests to an impartial judiciary and due process outweighs the judge’s interest of self-expression).
Clause,\textsuperscript{55} a clause in Minnesota's Code of Judicial Conduct that prohibited judicial candidates from announcing their views on legal or political issues, because the clause was a content-based restriction on speech.\textsuperscript{56} The Supreme Court determined that Minnesota failed to narrowly tailor the Announce Clause to achieve the state's interest of impartiality.\textsuperscript{57} In doing so, the Supreme Court determined that the Announce Clause was underinclusive by prohibiting relevant information that voters are entitled to receive from the judicial candidates during elections.\textsuperscript{58}

In 1996 and 1998, Gregory Wersal ran for a position on the Minnesota Supreme Court.\textsuperscript{59} During the 1996 campaign, Wersal distributed literature expressing his views, which criticized certain Minnesota Supreme Court decisions regarding the issues of welfare, crime, and abortion.\textsuperscript{60} In response to Wersal's activities, a complaint was filed with the Office of Lawyers Professional Responsibility, the agency that investigates ethical violations of attorney candidates for judicial office.\textsuperscript{61} Minnesota's Lawyers Professional Responsibility Board ("Board") dismissed the complaint because it was unsure whether the Announce Clause was constitutional.\textsuperscript{62} Fearful of further ethical complaints, Wersal withdrew from the election.\textsuperscript{63}

Wersal then filed a lawsuit in the United States District Court for the District of Minnesota requesting the court to declare that the Announce Clause violated the First Amendment.\textsuperscript{54} The district court, however, ruled against Wersal and concluded that the Announce Clause did not violate the First Amendment because Minnesota had a compelling state interest in ensuring actual and apparent impartiality within the judiciary.\textsuperscript{65} The district court construed the Announce Clause narrowly, reasoning that the Minnesota Supreme Court would do the same.\textsuperscript{66}


\textsuperscript{56} See Republican Party of Minn. v. White (\textit{White I}), 536 U.S. 765, 774 (2002) (noting the United States Court of Appeals for the Eighth Circuit recognized that the Announce Clause bans speech on the basis of its content).

\textsuperscript{57} \textit{White I}, 536 U.S. at 776.

\textsuperscript{58} Id. at 781, 783.

\textsuperscript{59} Id. at 768-69.

\textsuperscript{60} Id. at 769.

\textsuperscript{61} Id. at 768-69.

\textsuperscript{62} Id. at 769.

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 769-70.


\textsuperscript{66} Kelly, 63 F. Supp. 2d at 986.
Wersal appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court’s decision by applying strict scrutiny to the Announce Clause. The Eighth Circuit likewise found the Announce Clause narrowly tailored to achieve a compelling state interest. The Eighth Circuit reasoned that announcing a particular viewpoint or opinion during a campaign makes it more difficult for the judge to be impartial to future litigants. The Eighth Circuit held that the Board met its evidentiary burden concerning the necessity of restrictions on speech that demonstrated a judge’s propensity to decide a case in a certain way. The Eighth Circuit concluded that the Announce Clause did not ban general discussions of the law, philosophical viewpoints, or appellate decisions. The Eighth Circuit decided that the Announce Clause was narrowly tailored to serve a compelling government interest.

The United States Supreme Court granted certiorari and reversed the Eighth Circuit’s ruling, remanding in part. The Supreme Court first clarified that the Announce Clause was not a pledge or promise clause. The Supreme Court noted that an announcement on a political or legal view (e.g., the Federal Government should end the embargo of Cuba) is not likely to be problematic because it is so remote from the day-to-day action in the judge’s chambers. The Supreme Court further opined that banning judicial candidates from announcing their political or legal views limits their communication to general discussions of case law and judicial philosophy, which turns out to be of little significance or assistance to the electorate during an election campaign.

Further, the Supreme Court established that Minnesota had two compelling state interests: preserving the impartiality of the judiciary and preserving the appearance of impartiality. In an effort to define impartiality, the Supreme Court crafted three possible meanings: the

68. Republican Party of Minn., 247 F.3d at 885.
69. Id. at 878.
70. Id. at 879.
71. Id. at 882.
72. Id.
73. White I, 536 U.S. at 770, 788.
74. Id. at 770. A pledge or promise clause bars judicial candidates from pledging or promising certain conduct in office other than impartial and faithful performance of his or her duties. Id.
75. See id. at 772 (noting a judge’s statements relating to matters outside the scope of state routine business of state courts).
76. Id. at 773.
77. See id. at 775 (recognizing the Eighth Circuit established two proffered interests).
lack of bias for or against the parties to a proceeding; the lack of pre-
conception for or against a particular legal view; and the willingness
to consider opposing views, remaining open to persuasion in a pending
proceeding.\footnote{78. Id. at 775, 777-78.}

The Supreme Court stated that the first definition did not serve
the state’s interest because the Announce Clause did not limit speech
for or against \textit{parties} but limited speech for or against specific \textit{is-
sues}.\footnote{79. Id. at 776.} The Supreme Court declined to adopt the second definition of
impartiality as a compelling state interest because, if a judge’s mind
was \textit{tabula rasa} in constitutional adjudication, that would evidence
the absence of qualification, not the absence of bias.\footnote{80. Id. at 777-78.} Finally, the
third definition also fell short of a compelling state interest because
judges have often made up their minds on legal issues before they
even get to the bench.\footnote{81. Id. at 778-79.} Ultimately, the Supreme Court decided that
the three definitions hardly preserved the appearance of impartial-
ity.\footnote{82. See supra notes 79-81 and accompanying text.} Therefore the Announce Clause was not narrowly tailored to the
state’s interests.\footnote{83. See \textit{White I}, 536 U.S. at 776 (stating the first definition of impartiality failed
strict scrutiny because it was not narrowly tailored); \textit{id.} at 777-78 (stating neither impartiality or the appearance of impartiality were compelling state interests); \textit{id.} at 778 (dismissing the third definition of impartiality).}

In regard to strict scrutiny, the Supreme Court ruled that the An-
nounce Clause was underinclusive, or lacked narrow tailoring, be-
cause the clause prohibited announcements only in certain forms and
at certain times.\footnote{84. Id. at 783.} The Court also acknowledged that strict scrutiny
applied because the Announce Clause constituted a content-based reg-
ulation.\footnote{85. See \textit{id.} at 774 (recognizing the Announce Clause is a content-based regulation).} In the concurrence, Justice Kennedy noted that direct con-
tent-based restrictions on candidate speech were beyond the
government’s authority to impose.\footnote{86. Id. at 793 (Kennedy, J., concurring).} The Supreme Court determined
that a lively and robust debate on candidates’ qualifications should
not be limited since such debate is precisely what is crucial to the elec-
toral process and First Amendment freedoms.\footnote{87. See \textit{id.} at 782-83 & n.9 (majority opinion) (referring to Justice Ginsburg’s
dissent).} Moreover, the Su-
preme Court opined that judicial elections are just as political as
legislative elections; therefore, limiting judges’ ability to express their

---

\footnotesize{78. Id. at 775, 777-78.}
\footnotesize{79. Id. at 776.}
\footnotesize{80. Id. at 777-78.}
\footnotesize{81. Id. at 778-79.}
\footnotesize{82. See supra notes 79-81 and accompanying text.}
\footnotesize{83. See \textit{White I}, 536 U.S. at 776 (stating the first definition of impartiality failed
strict scrutiny because it was not narrowly tailored); \textit{id.} at 777-78 (stating neither impartiality or the appearance of impartiality were compelling state interests); \textit{id.} at 778 (dismissing the third definition of impartiality).}
\footnotesize{84. Id. at 783.}
\footnotesize{85. See \textit{id.} at 774 (recognizing the Announce Clause is a content-based regulation).}
\footnotesize{86. Id. at 793 (Kennedy, J., concurring).}
\footnotesize{87. See \textit{id.} at 782-83 & n.9 (majority opinion) (referring to Justice Ginsburg’s
dissent).}
views to the public stifles political speech.\textsuperscript{88} In conclusion, the Supreme Court held that the Announce Clause was unconstitutional because it failed to overcome strict scrutiny.\textsuperscript{89}

B. \textit{REPUBLICAN PARTY OF MINNESOTA v. WHITE: ON REMAND, THE EIGHTH CIRCUIT APPLIED STRICT SCRUTINY TO FIND MINNESOTA'S PARTISAN-ACTIVITIES CLAUSE AND SOLICITATION CLAUSE UNCONSTITUTIONAL}

In \textit{Republican Party of Minnesota v. White}\textsuperscript{90} (\textit{White I}), the United States Supreme Court remanded a portion of the case to the United States Court of Appeals for the Eighth Circuit.\textsuperscript{91} On remand, the Eighth Circuit in \textit{Republican Party of Minnesota v. White}\textsuperscript{92} (\textit{White II}), adjudicated the constitutionality of two rules of court conduct that banned judicial candidates' partisan-activities and solicitation for campaign funds.\textsuperscript{93} The Eighth Circuit found that both regulations violated the First Amendment.\textsuperscript{94}

First, the Partisan-Activities Clause\textsuperscript{95} forbade judges from identifying themselves as a member of a political organization unless identification was necessary to vote.\textsuperscript{96} The Partisan-Activities Clause also prohibited judges from attending political gatherings and from accepting, seeking, or using endorsements by a political party or organization.\textsuperscript{97} The Partisan-Activities Clause also prohibited a judge or judicial candidate from speaking at political organization gatherings.\textsuperscript{98}

The Eighth Circuit determined that because the Partisan-Activities Clause was a content-based restriction, strict scrutiny applied, which required narrow tailoring to advance the state's interest.\textsuperscript{99} In the analysis, narrow tailoring should not sweep too broadly (overinclusive) or too narrowly (underinclusive), and the clause must be the

\begin{itemize}
\item \textsuperscript{88} See id. at 784-85 (noting state court judges make common law and have immense power to mold state constitutions).
\item \textsuperscript{89} See id. at 781 (applying strict scrutiny to the Announce Clause); id. at 788 (reversing the Eighth Circuit's decision that the Announce Clause was constitutional).
\item \textsuperscript{90} 536 U.S. 765 (2002).
\item \textsuperscript{91} Republican Party of Minn. v. White (\textit{White II}), 416 F.3d 738, 744 (8th Cir. 2005).
\item \textsuperscript{92} 416 F.3d 738 (8th Cir. 2005).
\item \textsuperscript{93} \textit{White II}, 416 F.3d at 744.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1), (B)(1) (West 2004) (invalidated by Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005)).
\item \textsuperscript{96} \textit{White II}, 416 F.3d at 745.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} See id. at 762 (noting the Partisan-Activities Clause affects political parties and interests groups; the analysis turns on restricting the content of the speech, which creates a suspect classification).
\end{itemize}
least restrictive alternative to advance the state's interests.\textsuperscript{100} The Eighth Circuit emphasized that the First Amendment prohibits the government from restricting speech based on its message, idea, subject matter, or content.\textsuperscript{101} In addition, the Eighth Circuit cited that a law regulating speech based on its content, such as the Partisan-Activities Clause, is presumptively invalid.\textsuperscript{102} The Eighth Circuit determined that the Partisan-Activities Clause was underinclusive because it banned judges from affiliating with political parties but did not ban them from affiliating with other organizations such as special interest groups, which pose a threat at least as immense as any threat posed by political parties.\textsuperscript{103} The Eighth Circuit reasoned that associating with a political group does not destroy judicial impartiality.\textsuperscript{104} Furthermore, the Eighth Circuit indicated the First Amendment affords freedom of association and speech, especially in the political arena.\textsuperscript{105} The Eighth Circuit concluded that recusal, rather than banning judges from political activities, is the least restrictive means to ensure impartiality and determined that the Partisan-Activities Clause failed strict scrutiny.\textsuperscript{106}

Second, the Solicitation Clause\textsuperscript{107} banned judges from personally soliciting or accepting campaign contributions or from soliciting public support.\textsuperscript{108} The Solicitation Clause allowed candidates, however, to establish a committee to conduct campaign media advertisements, mailings, and solicitation and acceptance of campaign contributions on behalf of the candidate.\textsuperscript{109} The Solicitation Clause restricted the committee from disclosing campaign contributions to the judicial candidate in any way.\textsuperscript{110}

\textsuperscript{100} Id. at 751.
\textsuperscript{101} Id. at 762.
\textsuperscript{102} See id. (determining the Partisan-Activities Clause was a content-based restriction); id. at 763 n.14 (noting content-based restrictions are presumptively invalid).
\textsuperscript{103} See id. at 759 (establishing the underinclusiveness of the Partisan-Activities Clause); id. at 761 (suggesting influence of special interest groups is as great as political parties).
\textsuperscript{104} Id. at 754. In coming to this conclusion, the Eighth Circuit compared the Announce Clause, which was held unconstitutional in \textit{White I}, to the Partisan-Activities Clause in \textit{White II}, and found the Partisan-Activities Clause unconstitutional for similar reasons. \textsuperscript{Id.} The Eighth Circuit reasoned that expressing one's views (a constitutionally protected right violated by the Announce Clause in \textit{White I}) is substantially similar to associating with a particular group (a right the court found the Partisan-Activities Clause violated in \textit{White II}). \textsuperscript{Id.}
\textsuperscript{105} Id.
\textsuperscript{106} See id. at 755-56 (discussing the least restrictive means for ensuring impartiality).
\textsuperscript{107} MINN. CODE OF JUDICIAL CONDUCT Canon 5(B)(2).
\textsuperscript{108} \textit{White II}, 416 F.3d at 745.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
Acknowledging that political campaigns require financial expenditures, the Eighth Circuit suggested that insofar as the Solicitation Clause regulates the amount of fundraising a judicial candidate could spend on his campaign, it was unconstitutional.\textsuperscript{111} The Eighth Circuit, however, established that the Solicitation Clause was ineffective in maintaining the confidentiality of the sources of the campaign contributions because all contributions were available to the public on the Internet, allowing the judge to see the people who were contributors.\textsuperscript{112} Therefore, the Eighth Circuit ruled that both the Partisan-Activities Clause and the Solicitation Clause did not pass strict scrutiny, and thus violated the First Amendment.\textsuperscript{113}

\textbf{C. CAREY v. WOLNITZEK: THE SIXTH CIRCUIT APPLIED STRICT SCRUTINY TO FIND THE PARTY-AFFILIATION CLAUSE AND THE SOLICITATION CLAUSE UNCONSTITUTIONAL DUE TO LACK OF NARROW TAILORING}

In \textit{Carey v. Wolnitzek},\textsuperscript{114} the United States Court of Appeals for the Sixth Circuit considered the constitutionality of three clauses of the Kentucky Code of Judicial Conduct: the Party-Affiliation Clause,\textsuperscript{115} the Solicitation Clause,\textsuperscript{116} and the Commits Clause,\textsuperscript{117} and determined that the Party-Affiliation and Solicitation Clauses violated the First Amendment but remanded the Commits Clause for further consideration of its meaning and validity.\textsuperscript{118} The Sixth Circuit applied a strict scrutiny analysis to the Party-Affiliation Clause and the Solicitation Clause.\textsuperscript{119} The Sixth Circuit determined that the Party-Affiliation Clause, which prohibited judicial candidates from affiliating with a political party, violated the First Amendment.\textsuperscript{120} In addition, the Sixth Circuit determined that the Solicitation Clause, which banned judicial candidates from personally soliciting campaign contributions, was overbroad and facially invalid.\textsuperscript{121}

In 2006, Marcus Carey ran for a seat on the Kentucky Supreme Court.\textsuperscript{122} Believing that his First Amendment rights were being infringed, Carey brought a suit against the Kentucky Judicial Conduct

\begin{itemize}
\item \textsuperscript{111} \textit{Id.} at 764 (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)).
\item \textsuperscript{112} \textit{Id.} at 766 & n.16.
\item \textsuperscript{113} \textit{Id.} at 766.
\item \textsuperscript{114} 614 F.3d 189 (6th Cir. 2010).
\item \textsuperscript{115} Ky. SuP. Ct. R. 4.300(5)(A)(2).
\item \textsuperscript{116} Ky. SuP. Ct. R. 4.300(5)(B)(2).
\item \textsuperscript{117} Ky. SuP. Ct. R. 4.300(5)(B)(1)(c).
\item \textsuperscript{118} Carey v. Wolnitzek, 614 F.3d 189, 209 (6th Cir. 2010).
\item \textsuperscript{119} Carey, 614 F.3d at 198.
\item \textsuperscript{120} \textit{Id.} at 201-04.
\item \textsuperscript{121} \textit{Id.} at 204-07.
\item \textsuperscript{122} \textit{Id.} at 195.
\end{itemize}
Commission, the Kentucky Bar Association, and the Kentucky Inquiry Commission (together, the "KBA") in the United States District Court for the Eastern District of Kentucky, Central Division. In his complaint, Carey challenged the constitutionality of the Commits Clause, the Party-Affiliation Clause, and the Solicitation Clause. Following in the United States Supreme Court's analysis in Republican Party of Minnesota v. White, the district court distinguished the difference between a judicial candidate announcing his political or legal views from a judicial candidate committing or promising oneself to rule a certain way if elected. The district court then applied strict scrutiny to the Commits Clause, which banned candidates or judges from recklessly or intentionally making a statement that a reasonable person could perceive as committing the candidate or judge to rule a specific way on a case, because the clause restricted core political speech. Under strict scrutiny, the government had the burden of proving that the Commits Clause was narrowly tailored to serve a compelling governmental interest. Despite the KBA's arguments, the court refused to apply a lower standard of scrutiny because the KBA cited no cases using a test other than strict scrutiny. The court reasoned that promises by judicial candidates to commit to rule a certain way on cases harms the compelling governmental interest of impartiality because the judge becomes close-minded and biased. The court ultimately found that the Commits Clause was narrowly tailored to accomplish the state's goal of impartiality.

As for the Solicitation Clause, the court found that it was not narrowly tailored, and thus failed strict scrutiny. The court reasoned that the Solicitation Clause does nothing to diminish the influence interest groups have in judicial decisions. In finding the Solicitation Clause unconstitutional, the district court noted that judicial candidates soliciting campaign contributions, and subsequently having the donors appear in court, should not be permissible.

127. Id. at *8, *17.
128. Id. at *18 (quoting White I, 536 U.S. at 774-75).
129. Id. at *24.
130. Id. at *28.
131. Id. at *44.
132. Id. at *54.
133. Id. at *52.
134. Id. at *54.
The court then discussed the Party-Affiliation Clause and found that the clause was not narrowly tailored to achieve the state’s interests in preserving impartiality and the appearance of impartiality.\(^\text{135}\) The district court opined the simple fact that a presiding judge or a judicial candidate affiliating with a political party does not reasonably create a perception of judicial bias.\(^\text{136}\) Citing the United States Court of Appeals for the Fifth Circuit’s decision in *Jenevein v. Willing*,\(^\text{137}\) the district court noted that judicial candidates are no different from legislative or executive candidates in that they too are elected and have the right to inform voters about themselves.\(^\text{138}\) In conclusion, the court determined that there are less restrictive means of achieving the state’s interests than preventing the electorate from knowing with what party a judicial candidate affiliates.\(^\text{139}\) Understanding the judge’s political affiliation informs voters, allowing them to make better decisions when they vote; thus, the court found the Party-Affiliation clause unconstitutional.\(^\text{140}\)

On appeal, the Sixth Circuit affirmed the district court’s ruling on the Party-Affiliation Clause and the Solicitation Clause.\(^\text{141}\) The Sixth Circuit vacated and remanded the issue of the Commits Clause to the district court.\(^\text{142}\) The Sixth Circuit followed the United States Supreme Court’s standard in *White I* and applied strict scrutiny to the Party-Affiliation and Solicitation Clauses because they both were content-based restrictions on speech.\(^\text{143}\) The Sixth Circuit stated that the Party-Affiliation and Solicitation Clauses were content-based because they prevented judicial candidates from discussing certain subject matters (e.g., legal issues, party affiliation, and judicial philosophy), but not others (e.g., experience).\(^\text{144}\) In addition, the Sixth Circuit cited the United States Court of Appeals for the Third Circuit in *Stretton v. Disciplinary Board of Supreme Court of Pennsylvania*,\(^\text{145}\) the United States Court of Appeals for the Seventh Circuit in *Siefert v. Alexander*,\(^\text{146}\) the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. White*\(^\text{147}\) (*White II*), and the United

---

135. *Id.* at *64.
136. *Id.* at *63.
137. 439 F.3d 551 (5th Cir. 2007).
139. *Id.* at *63.
140. *Id.* at *64.
141. *Carey*, 614 F.3d at 209.
142. *Id.*
143. *Id.* at 198-99 (citing *White I*, 536 U.S. at 774).
144. *Id.* at 199.
145. 944 F.2d 137 (3d Cir. 1991).
146. 608 F.3d 974 (7th Cir. 2010).
147. 416 F.3d 738 (8th Cir. 2005).
States Court of Appeals for the Eleventh Circuit in Weaver v. Bonner,\textsuperscript{148} in which each appellate court also applied strict scrutiny to comparable free-speech challenges.\textsuperscript{149}

The Sixth Circuit determined the Party-Affiliation Clause excessively suppressed speech because it prohibited judicial candidates from announcing their views on issues deemed important to voters such as the party they support and the party's platform of ideas.\textsuperscript{150} The Sixth Circuit noted the Supreme Court had never permitted the government to prohibit candidates from communicating pertinent information to the electorate during an election.\textsuperscript{151} The Sixth Circuit also determined that the Party-Affiliation Clause was underinclusive because the Clause banned judicial candidates from being members of a political party but allowed them to affiliate with special interest groups, which can communicate more about the judge's political and philosophical convictions than political party membership often does.\textsuperscript{152}

Regarding Kentucky's Solicitation Clause, the Sixth Circuit opined that while states have a right to allow judicial elections, they cannot eliminate the means judges use to pay for their campaigns.\textsuperscript{153} The Sixth Circuit explained that the 2006 Kentucky Supreme Court election featured several races, including ten candidates that raised a total of $2,119,871 and spent $772,563 on 2,357 television advertisements.\textsuperscript{154} In addition, the Sixth Circuit commented that judicial elections receive less attention than legislative or executive elections.\textsuperscript{155} The Sixth Circuit stated that banning judicial candidates from asking for money suppresses speech in a way that favors incumbent judges (who benefit due to their current status), the well-to-do (who already have the money to spend), and the well-connected (who have a docket of donors) over outsiders and the less wealthy.\textsuperscript{156} The Sixth Circuit further noted that the Solicitation Clause was underinclusive because it banned judicial candidates from personally soliciting but not saying thank you upon receiving a donation, making it obvious to the judge who were his supporters.\textsuperscript{157} The Sixth Circuit concluded that the

\begin{footnotesize}
\begin{enumerate}
\item[148.] 309 F.3d 1312 (11th Cir. 2002).
\item[149.] Carey, 614 F.3d at 199-200.
\item[150.] Id. at 201-02.
\item[151.] Id. at 202 (citing White 1, 536 U.S. at 782).
\item[152.] Id.
\item[153.] Id. at 204-05.
\item[154.] Id. at 204.
\item[155.] Id.
\item[156.] Id.
\item[157.] See id. at 204-05 (establishing the Solicitation Clause was not narrowly tailored).
\end{enumerate}
\end{footnotesize}
Party-Affiliation Clause and the Solicitation Clause violated the First Amendment.\textsuperscript{158}

D. \textbf{WERSAL V. SEXTON: THE EIGHTH CIRCUIT APPLIED STRICT SCRUTINY TO FIND THE ENDORESEMENT CLAUSE AND THE SOLICITATION CLAUSE CONSTITUTIONAL}

In 2007, Gregory Wersal, a judicial candidate for Associate Justice of the Minnesota Supreme Court, wanted to endorse candidates for the following positions: Minnesota district court judge, Minnesota Supreme Court Justice, and United States congressional representative.\textsuperscript{159} Wersal, however, faced a legal dilemma because Minnesota's Supreme Court amended its Codes of Judicial Conduct to prohibit judicial candidates from endorsing public officials or other candidates, personally soliciting for campaign funds, and soliciting for a political organization or other candidate.\textsuperscript{160} In response to these restrictions, Wersal believed he could not run an effective campaign as long as the provisions remained in force because those provisions invaded his First Amendment rights, and thus he sought injunctive and declaratory relief in the United States District Court for the District of Minnesota.\textsuperscript{161}

The district court denied Wersal's First Amendment challenges to the Endorsement Clause\textsuperscript{162} and the Solicitation Clause,\textsuperscript{163} ruling in favor of the Minnesota Board of Judicial Standards and the Minnesota Lawyers Professional Responsibility Board.\textsuperscript{164} The court then revisited \textit{Republican Party of Minnesota v. White}\textsuperscript{165} (\textit{White I}) and \textit{Republican Party of Minnesota v. White}\textsuperscript{166} (\textit{White II}) to reiterate that: (1) the First Amendment protects judicial candidates' speech about their qualifications before being elected to office, (2) any regulation banning speech must be narrowly tailored, (3) bias must relate to parties to a proceeding and not issues, and (4) recusal is the best measure to address bias.\textsuperscript{167}

The district court determined that both the Endorsement and the Solicitation Clause were constitutional because they passed strict scrutiny being narrowly tailored to the state's interests of impartial-

\textsuperscript{158} \textit{Id.} at 299.
\textsuperscript{159} \textit{Wersal v. Sexton}, 613 F.3d 821, 827 (8th Cir. 2010).
\textsuperscript{160} \textit{Wersal}, 613 F.3d at 826.
\textsuperscript{161} \textit{Id.} at 826-27.
\textsuperscript{162} \texttt{MINN. CODE OF JUDICIAL CONDUCT Canon 4.1(A)(3) (2010).}
\textsuperscript{163} \texttt{MINN. CODE OF JUDICIAL CONDUCT Canon 4.2(B).}
\textsuperscript{164} \textit{Wersal}, 613 F.3d at 826.
\textsuperscript{165} 536 U.S. 765 (2002).
\textsuperscript{166} 416 F.3d 738 (8th Cir. 2005).
\textsuperscript{167} \textit{Wersal v. Sexton}, 607 F. Supp. 2d 1012, 1021 (D. Minn. 2009), rev'd 613 F.3d 821 (8th Cir. 2010).
Wersal appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the district court’s findings and determined that the Solicitation and Endorsement Clauses failed strict scrutiny and were unconstitutional. The Eighth Circuit revisited longstanding precedent established by the United States Supreme Court, noting that the democratic system relies on the protection of freedom of speech to ensure government officials are accountable to their electorate. The Eighth Circuit applied strict scrutiny requiring a compelling government interest and narrow tailoring to survive constitutional muster.

The Eighth Circuit opined that the Endorsement Clause was a content-based regulation because it restricted core political speech, thereby triggering strict scrutiny. The Eighth Circuit reasoned that the Endorsement Clause was overinclusive, or not narrowly tailored, because it restricted more speech than was necessary. The Eighth Circuit noted that the Endorsement Clause excessively burdened political speech because it prevented judicial candidates from advocating on behalf of another candidate and from associating with like-minded candidates. As an example, the Eighth Circuit noted that if a judicial candidate agreed with President Reagan or Clinton and subsequently endorsed either one of them, it was highly unlikely that either President would show up in the judge’s chambers. Furthermore, the Eighth Circuit established that, instead of completely banning public endorsements, which is a form of political speech, the least restrictive means to maintaining judicial impartiality and due process is recusal. The Eighth Circuit decided that the Endorsement Clause was woefully underinclusive and reasoned that announcing views on political issues was substantially similar to endorsing

169. Wersal, 613 F.3d at 826.
170. Id. at 842.
171. Id. at 828 (quoting Citizens United v. FEC, 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010)); see also Buckley v. Valeo, 424 U.S. 1, 15 (1976) (stating “the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office”).
172. Wersal, 613 F.3d at 828-29 (quoting Republican Party of Minn. v. White (White II), 416 F.3d 738, 749 (8th Cir. 2005)).
173. See id. at 833-35 (noting the Endorsement Clause infringes upon core political speech).
174. Id. at 835. The Endorsement Clause, in addition to being overinclusive, was found to be underinclusive because judicial candidates can endorse other candidates so long as they have not filed for office. Id. at 836.
175. Id. at 834.
176. Id. at 835.
177. Id. at 836-37 (citing White II, 416 F.3d at 755); see Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009) (noting states can enforce more stringent standards for judicial recusal than due process requires).
another candidate for public office.\textsuperscript{178} The Eighth Circuit added that the judicial election system instigated a political motivated judiciary, bedeviling any idea that Minnesota can remove politics and power from the process.\textsuperscript{179}

The Eighth Circuit determined that the Solicitation Clause was not narrowly tailored to serve Minnesota's interest of impartiality and thus failed strict scrutiny.\textsuperscript{180} The Eighth Circuit opined that it was highly unlikely that a litigant who had previously been solicited by a judge would show up in court in front of that same judge.\textsuperscript{181} The Eighth Circuit reasoned that the Solicitation Clause was underinclusive because it allowed the judge's committee to solicit funds but prohibited the judges from soliciting the exact same funds.\textsuperscript{182} The Eighth Circuit again established that recusal was the least restrictive means to promote judicial impartiality.\textsuperscript{183} The Eighth Circuit determined that the Solicitation Clause was not narrowly tailored to address the interest of judicial impartiality, and therefore failed strict scrutiny.\textsuperscript{184}

The Eighth Circuit granted the petition for an en banc review, which affirmed the district court's decision to uphold the constitutionality of the Endorsement and Solicitation Clauses, thereby vacating the Eighth Circuit's original decision regarding these clauses.\textsuperscript{185} The Eighth Circuit concluded that the Endorsement Clause was narrowly tailored to meet Minnesota's compelling state interests of preserving impartiality and the appearance of impartiality.\textsuperscript{186} The Eighth Circuit held the Solicitation Clause constitutional because it was narrowly tailored to achieve the government interests.\textsuperscript{187}

The Eighth Circuit applied strict scrutiny to the Endorsement Clause because it was a content-based restriction on political speech.\textsuperscript{188} The Eighth Circuit determined the Endorsement Clause was not overinclusive, or swept too broadly, because the Clause only prohibits the act of endorsement itself; it does not prevent candidates from conveying other pertinent information concerning their qualifica-

\begin{itemize}
\item \textsuperscript{178} Wersal, 613 F.3d at 837-38.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. at 841.
\item \textsuperscript{181} Id. at 840 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. at 841.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} See Wersal v. Sexton, 674 F.3d 1010, 1013 (8th Cir. 2012) (affirming the district court's decision to uphold the constitutionality of the challenged clauses).
\item \textsuperscript{186} Wersal, 674 F.3d at 1028.
\item \textsuperscript{187} Id. at 1031.
\item \textsuperscript{188} Id. at 1019; see also Carey v. Wolnitzek, 614 F.3d 189, 198, 200 (6th Cir. 2010) (applying strict scrutiny to a solicitation clause). But cf. Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) (applying a balancing test instead of strict scrutiny to an endorsement clause).
\end{itemize}
tions to the electorate. Endorsements, the Eighth Circuit determined, were direct expressions of bias for or against potential parties, which damaged the appearance of judicial impartiality. Next, the Eighth Circuit clarified that the Endorsement Clause was not underinclusive because the prohibition applied to endorsements of any candidate running for public office regardless of whether the elections were nonpartisan or partisan. The Eighth Circuit distinguished the Endorsement Clause in *Siefert v. Alexander*, which the court determined to be underinclusive because that Endorsement Clause only applied to endorsements in partisan elections. With regard to endorsements, the Eighth Circuit suggested that recusal was not the least restrictive means because judicial candidates would be allowed to endorse individuals who would be frequent litigants in the judge’s chambers. The Eighth Circuit did not determine that recusal was the least restrictive means available.

The Eighth Circuit noted that in *White I*, the Supreme Court concluded that the Announce Clause was unconstitutional because it did not restrict speech for or against parties, but rather speech for or against issues. The Eighth Circuit refused to analogize the Endorsement Clause to the Announce Clause in *White I* and to Partisan-Activities Clause in *White II* because the Endorsement Clause restricted speech for or against particular parties rather than particular issues. The Eighth Circuit stated that when a judicial candidate endorses another candidate for public office, a risk of partiality toward the endorsed party is created. In the end, the Eighth Circuit concluded that Minnesota’s Endorsement Clause was narrowly tailored to achieve the state’s compelling interests of impartiality and preserving the appearance of impartiality.

As for the Solicitation Clause, the Eighth Circuit determined that keeping judicial candidates from personally soliciting campaign con-

---

189. *Wersal*, 674 F.3d at 1026.
190. *Id.*
191. *Id.*
192. 608 F.3d 974 (7th Cir. 2010).
193. *See Wersal*, 674 F.3d at 1027 (stating “nor is this situation like the Seventh Circuit confronted in *Siefert*, where an endorsement clause only applied to endorsements in partisan elections . . . *Siefert* recognized ‘this underinclusiveness could be fatal to the rule’s constitutionality’ under strict scrutiny”).
194. *Id.*
195. *Id.* at 1028 (citing Mistrella v. United States, 488 U.S. 361, 407 (1989)). “While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy.” *Mistrella*, 488 U.S. at 407.
196. *Wersal*, 674 F.3d at 1025.
197. *Id.*
198. *Id.*
199. *Id.* at 1028.
tributions from individuals who might come before the judge addressed the state’s compelling interest of impartiality.\textsuperscript{200} The Eighth Circuit added that direct personal solicitation created a scenario where potential contributors must choose either to contribute or decline to do so, with a resulting ramification of possible retribution.\textsuperscript{201} The Eighth Circuit decided that recusal was not the least restrictive means because it only served as an after-the-fact remedy that insufficiently amended the damage to the appearance of impartiality of personal solicitations.\textsuperscript{202} The Eighth Circuit held that the Solicitation Clause was therefore narrowly tailored to achieve the state’s interests.\textsuperscript{203}

Judge Beam, joined by Chief Judge Riley, dissented, noting that endorsements of a public candidate are often an extremely efficient and effective means of expressing a judicial candidate’s views on issues.\textsuperscript{204} Judge Beam added that political speech has its most urgent and fullest protection during campaigns for public office, including campaigns for judicial office.\textsuperscript{205} Judge Beam noted that strict scrutiny was the appropriate test to apply to the Endorsement Clause because such Clause restricted speech entirely because of the speech’s content.\textsuperscript{206}

Also dissenting, Judge Colloton, joined by Chief Judge Riley and Judges Beam, Gruender, and Benton, stated that the Endorsement Clause was not narrowly tailored to meet the state’s interests.\textsuperscript{207} For example, Judge Colloton asserted, the Endorsement Clause was underinclusive because it prohibited a candidate from saying, “I endorse Michelle Bachman for the U.S. Congress,” yet allowed a candidate to announce, “I agree with Senator Y on all of the issues of the day.”\textsuperscript{208} Justice Colloton also noted that the Endorsement Clause was overinclusive because it banned all endorsements regardless of the likelihood that an endorsee would ever appear before the judge in a legal proceeding.\textsuperscript{209} In the end, Justice Colloton determined that the Endorsement Clause was not the least restrictive means to achieve the state’s interests, and thus failed strict scrutiny.\textsuperscript{210}
IV. ANALYSIS

In Siefert v. Alexander, the United States Court of Appeals for the Seventh Circuit held that John Siefert, a Wisconsin County Circuit Court judge, was prohibited from publicly endorsing other political candidates during his judicial campaign. The Seventh Circuit prohibited Siefert from endorsing political candidates by determining that Wisconsin's Endorsement Clause, a code of judicial ethics that banned judicial candidates from endorsing other candidates during elections, was constitutional. Instead of applying strict scrutiny, the level of review established in Republican Party of Minnesota v. White, the Seventh Circuit determined the Endorsement Clause was constitutional by applying the Pickering v. Board of Education balancing test for the first time to judicial elections and judges' First Amendment rights.

This Note will first show that the Seventh Circuit in Siefert erred by applying the Pickering balancing test to the Endorsement Clause because the Supreme Court in White, followed by the Third, Sixth, Eighth, and Eleventh Circuits, established that content-based restrictions on speech, like the Endorsement Clause, require strict scrutiny review. Next, this Note will illustrate how the Announce Clause in White and the Party-Affiliation Clause in White were substantially similar to the Endorsement Clause, and therefore the Seventh Circuit in Siefert should have applied strict scrutiny to the Endorsement Clause. Finally, this Note will show that the Seventh Circuit ignored the modern legal trend of treating judicial elections essentially equal to legislative or executive elections, and thus proving that the Endorsement Clause unfairly discriminates against judges by prohib-

211. 608 F.3d 974 (7th Cir. 2010).
212. Siefert v. Alexander, 608 F.3d 974, 977 (7th Cir. 2010), cert. denied 131 S. Ct. 2872 (2011) (mem.).
214. See Wis. Sup. Ct. R. 60.06(2)(b)(4) (prohibiting judges and judicial candidates from "[publicly endors[ing] or speak[ing] on behalf of its candidates or platforms"); see also Siefert, 608 F.3d at 977 (reversing the district court's holding that prohibitions on endorsing partisan candidates are unconstitutional).
217. See Siefert, 608 F.3d at 991 (Rovner, J., dissenting) (referring to the majority opinion and stating that the majority concedes it is not using strict scrutiny, but rather a new manufactured balancing test).
218. See infra notes 221-60 and accompanying text.
219. See infra notes 261-302 and accompanying text.
iting endorsements only in judicial elections but allowing endorse-
ments during other types of elections. 220

A. THE SEVENTH CIRCUIT ERRONEOUSLY APPLIED THE PICKERING BALANCING TEST TO WISCONSIN'S ENDORSEMENT CLAUSE

In Siefert v. Alexander, 221 the United States Court of Appeals for the Seventh Circuit erroneously applied the Pickering v. Board of Education 222 balancing test to determine that Wisconsin's Endorsement Clause 223 was constitutional. 224 The Seventh Circuit failed to con-
sider the United States Supreme Court's precedent in Republican Party of Minnesota v. White 225 (White I), which established that content-based restrictions on speech require strict scrutiny. 226 The Sev-
enth Circuit in Siefert erred in upholding the constitutionality of the Endorsement Clause and should have ruled more analogously to the United States Court of Appeals for the Sixth Circuit decision in Carey v. Wolnitzek, 227 and the dissenting opinion's rationale in Wersal v. Sexton, 228 which both applied the strict scrutiny. 229

The Seventh Circuit in Siefert erred by failing to consider whether the Endorsement Clause was a content-based restriction. 230 The Supreme Court in White I recognized that Minnesota's Announce Clause, 231 which prohibited judicial candidates from announcing their views on legal or political issues, was a content-based restriction. 232 The Announce Clause was a content-based restriction because it pro-
hibited speech entirely based on its content—it burdened a category of speech at the core of First Amendment freedoms, particularly speech regarding the qualifications of judicial candidates for public office. 233 Therefore, the Supreme Court determined that the proper test was strict scrutiny. 234 The Supreme Court ruled that the Announce Clause was woefully underinclusive and lacked narrow tailoring be-
cause it prohibited announcements only at certain forms and in cer-

220. See infra notes 303-28 and accompanying text.
221. 608 F.3d 974 (7th Cir. 2010).
223. WIS. SUP. CT. R. 60.06(2)(b)(4).
224. See infra notes 230-56 and accompanying text.
226. See infra notes 230-41 and accompanying text.
227. 614 F.3d 189 (6th Cir. 2010).
228. 674 F.3d 1010 (8th Cir. 2012).
229. See infra notes 242-56 and accompanying text.
230. See infra notes 231-60 and accompanying text.
232. White I, 536 U.S. at 774.
233. Id.
234. Id.
In his concurrence, Justice Kennedy considered direct content-based restrictions on a candidate’s political speech to be beyond the government’s authority to impose. The Supreme Court reasoned that a lively and robust debate on the qualifications of candidates should not be limited since such debate is precisely what is crucial to the electoral process and First Amendment freedoms.

The Seventh Circuit in Siefert incorrectly applied the Pickering balancing test to adjudicate the Endorsement Clause despite the Supreme Court’s precedent in White I that required strict scrutiny application to content-based restrictions of speech. The dissent in Siefert prudently pointed out that, in addition to the Supreme Court’s precedent to apply strict scrutiny to content-based restrictions, the Supreme Court and the Eighth Circuit had never before implemented the Pickering balancing test to elected officials’ speech. Moreover, the two dissenting opinions in White I defending the speech restriction did so by applying strict scrutiny rather than the manufactured Pickering balancing test. Nevertheless, the Seventh Circuit admitted that, had it applied strict scrutiny to the Endorsement Clause, it would have determined the Endorsement Clause was underinclusive, and thus unconstitutional.

Unlike the Seventh Circuit in Siefert, the Sixth Circuit in Carey followed the Supreme Court’s decision in White I by applying strict scrutiny to a similar content-based restriction. The Sixth Circuit in Carey emphasized that content-based restrictions on speech, which are subject to strict scrutiny, are presumptively invalid.

235. See id. at 783 (stating the Announce Clause failed strict scrutiny).
236. Id. at 793 (Kennedy, J., concurring).
237. See id. at 782-83 & n.9 (majority opinion) (referring to Justice Ginsburg’s dissent).
238. Compare White I, 536 U.S. at 774-75 (stating the proper test for content-based restrictions of speech is strict scrutiny), with Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) (stating the Pickering balancing test is appropriate instead of strict scrutiny), cert. denied 131 S. Ct. 2872 (2011) (mem.).
239. See Siefert, 608 F.3d at 991-92 (Rovner, J., dissenting) (stating the Supreme Court and the Eighth Circuit have never “held that these decisions limiting the speech of public employees can be applied to elected officials’ speech, including the speech of elected judges”).
240. Siefert, 608 F.3d at 992.
241. See id. at 987 (majority opinion) (stating that if the Eighth Circuit applied strict scrutiny to the Endorsement Clause, the Clause being underinclusive could be fatal to the Clause’s constitutionality).
242. Compare Carey v. Wolnitzek, 614 F.3d 189, 198 (6th Cir. 2010) (citing United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000)) (stating the test for content-based restrictions on speech is strict scrutiny), with Siefert, 608 F.3d at 983 (citing Ex parte Curtis, 106 U.S. 371 (1882)) (stating a balancing test is the appropriate test to evaluate the Endorsement Clause).
Circuit emphatically reiterated that it is rare that a content-based restriction on speech survives strict scrutiny.244 Moreover, the Sixth Circuit highlighted that the United States Court of Appeals for the Third, Sixth, Seventh, Eighth, and Eleventh Circuits have all applied strict scrutiny to substantially similar content-based restrictions as to the Endorsement Clause.245 The Sixth Circuit further stated it never found a single case that had ever applied anything less than strict scrutiny to similar speech restrictions on judicial election clauses.246

In his dissenting opinion in Wersal, Judge Beam highlighted the reasons why the Endorsement Clause warrants strict scrutiny.247 Noting that restricting speech based on its subject or content triggers strict scrutiny, Judge Beam emphasized that the Endorsement Clause was content-based because it restricted core political speech.248 Judge Beam stated that citizens are entitled to as much information about the contesting judicial candidates as possible and that the voters, not the government, decide the relevance of candidates’ political speech.249 Judge Beam reiterated the importance of the right of elected officials to endorse like-minded persons as an extremely efficient and effective means of expressing his or her views on political or legal issues.250

Moreover, Judge Beam noted that the Endorsement Clause was a content-based restriction because it does not bar candidates from speaking about other judicial candidates for any other purpose than endorsing them.251 The Endorsement Clause excessively burdened political speech because it impaired judicial candidates from vigorously advocating on behalf of other candidates, associating with like-minded candidates, and robustly promoting his or her own cam-

244. Id. at 200 (citing Barson v. Freeman, 504 U.S. 191, 211 (1991)).
246. Carey, 614 F.3d at 199.
247. See infra notes 248-56 and accompanying text.
249. Wersal, 674 F.3d at 1039 n.23.
250. Id. at 1051.
251. Id. at 1050.
Continuing, Judge Beam determined the Endorsement Clause was not narrowly tailored because, in addition to being underinclusive as admitted in Siefert, it was overinclusive by restricting more speech than was necessary, and thus failed strict scrutiny. For illustration, the Endorsement Clause prohibited judicial candidates from endorsing candidates clearly unlikely to appear as parties before the judge in litigation (e.g., Supreme Court Justices or Congressmen). Judge Beam noted that judicial recusal was the least restrictive means to limit actual or apparent impartiality. In keeping with the foundational framework of the Supreme Court, Judge Beam agreed that the Endorsement Clause, like the Announce Clause in White I, placed most subjects of interest to the voters off limits by restricting more speech than necessary.

In Siefert, the Seventh Circuit failed to consider whether the Endorsement Clause was a content-based regulation, which the Supreme Court in White I established as the first step of the analysis regarding strict scrutiny. The Seventh Circuit should have ruled more analogously to the Sixth Circuit’s decision in Carey because, as Judge Beam’s dissent illustrated, the Endorsement Clause was a content-based restriction on political speech and, as such, warranted strict scrutiny. As a result, the Seventh Circuit erroneously applied the manufactured Pickering balancing test to the Endorsement Clause instead of the required strict scrutiny review. In fact, the Seventh Circuit admitted that if it had applied strict scrutiny to the Endorsement Clause, it would be underinclusive and fatal to constitutionality.

252. See id. (referencing White II where the Eighth Circuit stated, “A candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates . . . the unfettered opportunity to make their views known [and associate with like-minded persons] so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day”).

253. Compare Wersal, 674 F.3d at 1051-52 (stating the Endorsement Clause restricts more speech than is necessary and is also underinclusive), with Siefert, 608 F.3d at 987 (stating if the Endorsement Clause was analyzed according to strict scrutiny it would be underinclusive and fatal to constitutionality).

254. Wersal, 674 F.3d at 1051.

255. Id. at 1051-53.

256. Compare White I, 536 U.S. at 787 (stating the Announce Clause placed most subjects that voters are interested in off limits), with Wersal, 674 F.3d at 1051-53 (stating the Endorsement Clause was underinclusive and not the least restrictive means to achieve the state’s interest of impartiality).

257. See supra notes 230-41 and accompanying text.

258. Compare Siefert, 608 F.3d at 983 (citing Ex parte Curtis, 106 U.S. 371 (1882)) (stating a balancing test is the appropriate test to evaluate the Endorsement Clause), with Carey, 614 F.3d at 198 (citing Playboy Entm’t Grp., 529 U.S. at 813) (stating the test for content-based restrictions on speech is strict scrutiny), and Wersal, 674 F.3d at 1050 (stating the Endorsement Clause restricts speech entirely based upon the subject matter of the speech, and thus requires a strict scrutiny review).

259. See supra notes 230-56 and accompanying text.
In Siefert v. Alexander, the United States Court of Appeals for the Seventh Circuit should have applied strict scrutiny to the Endorsement Clause because the Endorsement Clause was substantially similar to the Announce Clause in Republican Party of Minnesota v. White (White I) and Party-Affiliation Clause in Republican Party of Minnesota v. White (White II), both of which received strict scrutiny. The Endorsement Clause in Siefert prohibited judicial candidates from publicly endorsing or speaking on behalf of any partisan candidate or platform. The Announce Clause in White I prohibited judicial candidates from announcing their views on legal or political issues. The Party-Affiliation Clause in White II prohibited judicial candidates from identifying themselves as a member of a political party, except as necessary to vote.

First, Wisconsin’s Endorsement Clause is substantially similar to the Minnesota Announce Clause, which was reviewed by the Supreme Court in White I. The Supreme Court in White I opined that an enunciated statement of position during a judicial election would not bind a judge to a certain decision or restrain him from being impartial. The Supreme Court further believed that prohibiting a judicial candidate from announcing his views was not narrowly tailored under a strict scrutiny analysis because it was underinclusive. For example, during elections a judicial candidate could not say, “I think it is constitutional for the legislature to prohibit same-sex marriages,” yet the candidate could say the exact same phrase until declaring himself.

260. See Siefert, 608 F.3d at 987 (stating that if the Eighth Circuit applied strict scrutiny to the Endorsement Clause, the Clause being underinclusive could be fatal to the Clause’s constitutionality). See also supra note 241 and accompanying text.
261. 608 F.3d 974 (7th Cir. 2010).
265. Minn. Code of Judicial Conduct Canon 5(A)(1), (B)(1) (West 2004) (invalidated by Republican Party of Minn. v. White (White II), 416 F.3d 738 (8th Cir. 2005)).
266. 416 F.3d 738 (8th Cir. 2005).
267. See infra notes 268-99 and accompanying text.
268. Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010).
269. White I, 536 U.S. at 770.
270. White II, 416 F.3d at 745.
271. See infra notes 272-91 and accompanying text.
272. White I, 536 U.S. at 780.
273. Id. at 779-80.
self a candidate.\textsuperscript{274} The Supreme Court underscored that abridging political speech on disputed topics in the context of electioneering places First Amendment freedom of speech jurisprudence on its head.\textsuperscript{275} The Supreme Court was clear that because of the role elected judges have in our society it is imperative that they freely express themselves on matters of public importance.\textsuperscript{276}

The Seventh Circuit in \textit{Siefert} should have found that the Endorsement Clause is substantially similar to the Announce Clause.\textsuperscript{277} The Seventh Circuit stated that the Endorsement Clause is not merely a form of announcing a judge’s views on an issue, but rather puts judges in a role as a political powerbroker in another candidate’s campaign.\textsuperscript{278} The Seventh Circuit justified the restriction on endorsements because endorsements pose a danger of misusing the prestige of judicial office in effort to advance other’s interests.\textsuperscript{279} This argument is unpersuasive because judicial endorsements are substantially similar to announcing one’s views, as was highlighted by the Supreme Court in \textit{White I}.\textsuperscript{280} The Seventh Circuit avoided the Supreme Court’s explicit basis in \textit{White I} that an enunciated statement of position during a judicial election would not bind a judge to a certain decision or restrain him from being impartial.\textsuperscript{281} However, the dissent in \textit{Siefert} stated that judicial endorsements are as much a part of the political discussion as judge’s announcing their views on the current legal issues.\textsuperscript{282} Thus, an endorsement, which is equally a part of the political discussion as announcing one’s views, would similarly not bind a judge to rule a specific way or restrain him from being impartial.\textsuperscript{283} Had the Seventh Circuit followed the precedent established by the Su-
The Supreme Court in *White I*, the Seventh Circuit would have found the Endorsement Clause substantially similar to the Announce Clause.\(^2^{84}\) The Seventh Circuit erred by not considering another substantial similarity between the Endorsement Clause and the Announce Clause: the lack of narrow tailoring.\(^2^{85}\) The Supreme Court in *White I* determined that the Announce Clause was woefully underinclusive because a judicial candidate could endorse a public official the day before he enters a political race and he would not be penalized despite the public knowledge of the judge's views in regard to that specific endorsee, but once he entered the race he will be penalized for such an endorsement.\(^2^{86}\) The Supreme Court emphasized that being underinclusive decreases the credibility of the state's rationale for restricting certain political speech.\(^2^{87}\) The Seventh Circuit recognized that the Endorsement Clause was underinclusive because it restricted judicial endorsements during partisan elections but not in non-partisan elections.\(^2^{88}\) The Seventh Circuit in *Siefert* recognized that if the Endorsement Clause was analyzed according to strict scrutiny it would fail the test due to being underinclusive.\(^2^{89}\) Had the Seventh Circuit followed the precedent in *White I*, the state's argument in *Siefert* for banning judicial endorsements would have been diminished as in *White I*.\(^2^{90}\) The Seventh Circuit missed the striking similarities between the Endorsement Clause and the Announce Clause.\(^2^{91}\)

Second, the Seventh Circuit in *Siefert* erred by failing to see the sufficient similarities between the Endorsement Clause and the Party-Affiliation Clause, which was highlighted by the Eighth Circuit in *White II*, the dissent in *Sexton v. Wersal*,\(^2^{92}\) and the Seventh Circuit's dissent in *Siefert*.\(^2^{93}\) As the dissent in *Siefert* deciphers, announcing one's political views is significantly similar to judicial endorsements, which are equally part of the important discussion dur-

---

\(^2^{84}\) See supra notes 271-83 and accompanying text.

\(^2^{85}\) See infra notes 286-91 and accompanying text.

\(^2^{86}\) *White I*, 536 U.S. at 768, 779-80.

\(^2^{87}\) Id. at 780.

\(^2^{88}\) *Siefert*, 608 F.3d at 987 (majority opinion).

\(^2^{89}\) See id. (reasoning the Endorsement Clause only bans judicial endorsements during partisan elections and not in other types of elections, which makes the rule fatally underinclusive according to strict scrutiny).

\(^2^{90}\) Compare *White I*, 536 U.S. at 780 (stating being underinclusive damages the credibility of the state's rationale for restricting certain political speech), with *Siefert*, 608 F.3d at 987 (recognizing the Endorsement Clause was underinclusive because it restricted judicial endorsements during partisan elections but not in non-partisan elections, but did not apply strict scrutiny).

\(^2^{91}\) See supra notes 271-90 and accompanying text.

\(^2^{92}\) 674 F.3d 1010 (8th Cir. 2012).

\(^2^{93}\) See infra notes 294-99 and accompanying text.
ing campaigns and elections. The Endorsement Clause is substantially similar to the Announce Clause. The Eighth Circuit in White II noted that expressing one's views on legal issues is substantially similar to associating with a political party or organization. In other words, the Announce Clause is substantially similar to the Party-Affiliation Clause. Finally, the Eighth Circuit's dissent in Wersal noted that the endorsement of another candidate is often stronger indicia of the judge's beliefs of the candidates than is his or her affiliation with a political party. In other words, the Endorsement Clause is substantially similar to the Party-Affiliation Clause.

Therefore, the Seventh Circuit should have applied strict scrutiny to the Endorsement Clause based on the substantial similarities between the Announce and Party-Affiliation Clauses, but failed to do so. The Seventh Circuit in Siefert should have applied strict scrutiny to determine that the Endorsement Clause is as equally unconstitutional as the Announce Clause. In the end, the Seventh Circuit erred by failing to apply strict scrutiny to the Endorsement Clause despite its striking similarities to the Announce and Party-Affiliation Clauses, both of which received strict scrutiny and were found unconstitutional.

294. Siefert, 608 F.3d at 994-95 (Rovner, J., dissenting).
295. Id.
296. White II, 416 F.3d at 754.
297. Id.
298. See Wersal v. Sexton, 674 F.3d 1010, 1051 (8th Cir. 2012) (Beam, J., dissenting) (noting endorsements are often an extremely efficient and effective means of expressing one's views about issues and that association with like-minded parties may draw money, votes, and volunteers).
299. See supra notes 294-98 and accompanying text.
300. Compare Wersal, 674 F.3d at 1051 (stating endorsements are often an extremely efficient and effective means of expressing one's views about issues and that association with like-minded parties may draw money, votes, and volunteers), Siefert, 608 F.3d at 994-94 (stating endorsements are equally a part of campaign and elections as is announcing one's views on political or legal issues), and White II, 416 F.3d at 754 (stating that expressing one's particular views is substantially similar to associating with a political group), with Siefert, 608 F.3d at 983 (majority opinion) (dividing the line between the Endorsement Clause and the Party-Affiliation Clause because judicial endorsements serve a different purpose from the speech addressed in White I).
301. Compare White I, 536 U.S. at 774 (stating content-based restrictions on the freedoms of the First Amendment require strict scrutiny review), and Siefert, 608 F.3d at 991 (Rovner, J., dissenting) (citing White I, 536 U.S. at 774) (stating speech pertaining to the qualifications of judicial candidates for public office is strictly scrutinized because it is at the core of First Amendment rights), with Siefert, 608 F.3d at 983-85 (majority opinion) (applying the Pickering balancing test instead of strict scrutiny because "an endorsement 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 political powerbroker").
302. See supra notes 268-99 and accompanying text.
C. THE SEVENTH CIRCUIT INCORRECTLY FOUND THE ENDORSEMENT CLAUSE CONSTITUTIONAL BY FAILING TO APPLY THE MODERN LEGAL TREND TREATING JUDICIAL ELECTIONS LIKE LEGISLATIVE AND EXECUTIVE ELECTIONS

In Siefert v. Alexander, the United States Court of Appeals for the Seventh Circuit incorrectly determined that the Endorsement Clause was constitutional because it failed to follow the United States Supreme Court's decision in Republican Party of Minnesota v. White (White I), which diminished the differences between judicial elections from legislative and executive elections. In following White I, the United States Court of Appeals for the Sixth Circuit in Carey v. Wolnitzek, the United States Court of Appeals for the Eighth Circuit in Republican Party of Minnesota v. White (White II), and the United States Court of Appeals for the Eleventh Circuit in Weaver v. Bonner, created the modern legal trend of treating judicial elections like legislative and executive elections. The Seventh Circuit, however, incorrectly dismissed the modern legal trend, finding the Endorsement Clause constitutional.

In White I, the Supreme Court declared that the differences between legislative and judicial elections have been immensely exaggerated. It acknowledged that judges, like legislators, have the power to shape states' constitutions, which is precisely why electing judges became so popular. Judges, especially those who sit on the state's highest court, like legislators and executives, create law.

In Siefert, however, the Seventh Circuit asserted that judges are different than legislative and executive political actors. The court stated that judicial elections should be treated differently than legisla-

303. 608 F.3d 974 (7th Cir. 2010).
305. 536 U.S. 765 (2002).
306. See infra notes 312-16 and accompanying text.
307. 614 F.3d 189 (6th Cir. 2010).
308. 416 F.3d 738 (8th Cir. 2005).
309. 309 F.3d 1312 (11th Cir. 2002).
310. See infra notes 317-25 and accompanying text.
311. See infra notes 326-28 and accompanying text.
312. See Republican Party of Minn. v. White (White I), 536 U.S. 765, 784 (2002) (stating Justice Ginsburg's dissent greatly exaggerates the difference between legislative and judicial elections).
313. White I, 536 U.S. at 784.
314. Id. at 784 n.12.
315. See Siefert v. Alexander, 608 F.3d 974, 984 (7th Cir. 2010) (noting courts warrant more deference for prohibitions on judicial endorsements).
tive or executive elections because judges must appear to the public to be fair and impartial, unlike legislators and executives.\textsuperscript{316}

In \textit{White II}, the Eighth Circuit declared that it is a myth that judges are apolitical and do not make law.\textsuperscript{317} The Eighth Circuit emphasized that judges routinely fill gaps created by legislators.\textsuperscript{318} Additionally, the court noted that judicial campaigns are extremely expensive and involve speeches, rallies, mass media, radio, television, and leaflets, like legislative and executive campaigns.\textsuperscript{319}

Similarly, in \textit{Carey}, the Sixth Circuit highlighted that the 2006 Kentucky Supreme Court elections, including 10 candidates, raised a grand total of $2,119,871, which part of this money was spent on 2,357 television advertisements.\textsuperscript{320} The Sixth Circuit added that information bans (e.g., Announce, Party-Affiliation, Endorsement or Solicitation Clauses) have a history of being judicially struck and legislatively tried because voters can handle the information disclosed during elections.\textsuperscript{321}

In \textit{Weaver}, the Eleventh Circuit echoed the Supreme Court’s decision in \textit{White I} proposing judicial elections should be adjudicated by the exact same standards as those for legislative and executive elections.\textsuperscript{322} The Eleventh Circuit opined that separating the judiciary from the enterprise of representative government does not capture the American system because state court judges create laws and shape constitutions.\textsuperscript{323} Ultimately, the Eleventh Circuit agreed with the Supreme Court in \textit{White I} that the differences between judicial, legislative, and executive elections have been immensely exaggerated.\textsuperscript{324} The Eleventh Circuit could not justify tougher restrictions on speech during judicial elections than during other types of elections.\textsuperscript{325}

In \textit{Siefert}, the Seventh Circuit should have followed the Supreme Court’s decision in \textit{White I}.\textsuperscript{326} The Supreme Court highlighted that

\textsuperscript{316} See \textit{Siefert}, 608 F.3d at 984-85 (failing to consider the analysis of \textit{White II} and stating that judges are not akin to other political actors because judges “must not only be fair and impartial, but must also appear to the public to be fair and impartial”)

\textsuperscript{317} Republican Party of Minn. v. White (\textit{White II}), 416 F.3d 738, 747 (8th Cir. 2005).

\textsuperscript{318} \textit{White II}, 416 F.3d at 747.

\textsuperscript{319} \textit{Id.} at 764 (citing Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

\textsuperscript{320} \textit{Carey} v. Wolnitzek, 614 F.3d 189, 204 (6th Cir. 2010).

\textsuperscript{321} \textit{Carey}, 614 F.3d at 203.

\textsuperscript{322} \textit{Weaver} v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002).

\textsuperscript{323} \textit{Weaver}, 309 F.3d at 1321 (citing \textit{White I}, 536 U.S. at 784).

\textsuperscript{324} \textit{Id.} (citing \textit{White I}, 536 U.S. at 784).

\textsuperscript{325} \textit{Id.}

\textsuperscript{326} Compare \textit{White I}, 536 U.S. at 784 (stating the difference between legislative and judicial elections has been extremely exaggerated), \textit{Carey}, 614 F.3d at 203-04 (noting judicial elections are immensely expensive like other types of elections), \textit{White II}, 416 F.3d at 747 (stating it is a myth that judges are apolitical and also emphasizing that judges create law like legislators), and \textit{Weaver}, 309 F.3d at 1321 (stating judicial elec-
judicial elections are just as political as legislative elections; therefore, limiting judges' ability to express their views to the public stifles core political speech.\textsuperscript{327} Had the Seventh Circuit followed \textit{White I}, it would have deemed the Endorsement Clause unconstitutional because the Endorsement Clause prohibits endorsements only in judicial elections and not in legislative or executive elections.\textsuperscript{328}

V. CONCLUSION

In \textit{Siefert v. Alexander},\textsuperscript{329} the United States Court of Appeals for the Seventh Circuit determined that the Endorsement Clause\textsuperscript{330} was constitutional by applying the \textit{Pickering v. Board of Education} balancing test\textsuperscript{331} for the very first time in regards to judicial elections and judges' First Amendment rights.\textsuperscript{332} The Seventh Circuit did so despite the countervailing precedent established by the United States Supreme Court in \textit{Republican Party of Minnesota v. White}\textsuperscript{333} (\textit{White I}), which required that content-based restrictions of speech like the Endorsement Clause must be analyzed according to a strict scrutiny standard.\textsuperscript{334} In applying the manufactured \textit{Pickering} balancing test, which has never been applied in regards to judicial rights and elections, the Seventh Circuit ultimately gave more weight to Wisconsin's interests than to judges' freedom of expression to endorse partisan candidates for public office; thus determining the Endorsement Clause was constitutional.\textsuperscript{335}

This Note first showed that the Seventh Circuit in \textit{Siefert} erred by applying the \textit{Pickering} balancing test to the Endorsement Clause because the Supreme Court in \textit{White I}, followed by the Third, Sixth,
Eighth, and Eleventh Circuit Courts, established that content-based restrictions on speech, like the Endorsement Clause, require strict scrutiny review. Next, this Note illustrated how the Announce Clause in White I and the Party-Affiliation Clause in White II were substantially similar to the Endorsement Clause, and therefore the Seventh Circuit in Siefert should have applied strict scrutiny to the Endorsement Clause. Finally, this Note showed that the Seventh Circuit ignored the modern legal trend of treating judicial elections essentially equal to legislative or executive elections, thus, proving that the Endorsement Clause unfairly discriminates against judges by prohibiting endorsements only in judicial elections but allowing endorsements during other types of elections.

By applying the Pickering balancing test, the Seventh Circuit in Siefert destroyed the stare decisis of the Supreme Court. As a result, the Seventh Circuit encouraged an unmanageable approach to adjudicate the delicate issue of First Amendment rights of judicial candidates and the ethical dilemmas facing state judiciaries. Under the Seventh Circuit's analysis, courts will have to engage in an impracticable balancing test, requiring analysis of each party's interests. This creates a problem because one party's interests might be more dominant in one jurisdiction than in another jurisdiction, essentially leaving judicial candidates' rights entirely at the discretion of the court. Strict scrutiny prevents this dilemma by offering courts a straightforward approach—the restriction on speech must be narrowly tailored to promote a compelling governmental interest.

In addition, the Seventh Circuit's ruling misses the striking similarities between announcing one's views on a legal issue, affiliating with a political party, and endorsing a like-minded individual. These three political activities elicit essentially the same kind of speech and are all at the core of elections and campaigning regardless of whether it is a legislative, executive, or judicial election. The Seventh Circuit's approach of banning political endorsements in judicial elections is entirely adverse to the Supreme Court's long-lasting jurisprudence of allowing more speech rather than less speech, especially

---

336. See supra notes 221-60 and accompanying text.
337. See supra notes 261-302 and accompanying text.
338. See supra notes 303-28 and accompanying text.
339. See supra notes 221-41 and accompanying text.
340. See supra notes 261-302 and accompanying text.
when it comes to pertinent information that the electorate has the right to know before voting a judge into office.\textsuperscript{341}

\textit{Tyler J. Moss – ’13}

\textsuperscript{341} Thank you to my dear wife, Kathryn Marie Moss, the love and joy of my life; my son, Zachary Gordon Moss, who gives me endless energy like the sun; my parents Duane W. Moss and Kristine Wood Moss, for an upright bringing, continual motivation, and spiritual guidance; my student article editor, Ben Williams, for being a great editor and friend; my student article co-editor, Tony Fornasier, for patiently enduring the Blue Booking and editing sessions; my two Editors-in-Chief, Katie A. Kotlik and Y. Kamaal Patterson, for helping me improve my writing; and to the several other members of the Creighton Law Review who helped publish this student article.