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Intrastate Judicial Endorsement Clauses: How States Can Protect Impartiality without Violating the First Amendment

Marci Haarburger†

INTRODUCTION

Currently, thirty-nine states select members of their judiciary through elections.¹ Judicial campaigns present a unique set of challenges to state legislatures tasked with enacting canons of judicial conduct. While states have a clear interest in preserving the impartiality of the judiciary, particularly where the candidate for judicial office is a sitting judge, they also must not violate the constitutional protections traditionally afforded to judicial speech. This task has become even more difficult in the wake of the Supreme Court’s 2002 decision in Republican Party of Minnesota v White (“White I”),² which struck down a law barring judicial candidates from announcing their views on controversial issues.³

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³ Id at 788.
Since White I, courts have rendered mixed opinions concerning the constitutionality of other limits on conduct in judicial campaigns. This Comment will examine the controversy regarding one type of restriction on judicial campaigns: endorsement clauses. These clauses prohibit candidates for judicial office from endorsing other political candidates. Two circuits are currently split over whether it is constitutional for states to enact endorsement clauses. In Wersal v Sexton, the Eighth Circuit held that such laws are unconstitutional restrictions of political speech, while the Seventh Circuit held that the endorsement clause in question was constitutional under a "balancing of interests" test in Siefert v Alexander. Part I provides a background of two different lines of jurisprudence that serve as the bases for these courts' decisions. Part II describes the two decisions constituting the circuit split, focusing on how the courts' reliance on different lines of precedents led to contrasting conclusions. Part III assesses the strengths and weaknesses of each decision. It defends the Eighth Circuit's determination that strict scrutiny is the applicable standard of review for endorsement clauses, but disagrees with that court's conclusion that recusal is the least restrictive means of accomplishing the state's interest in judicial impartiality. Part IV proposes that the optimal way for the state to achieve its interest in impartiality while satisfying strict scrutiny review is to enact an "intrastate endorsement clause": a law that prohibits judicial candidates from endorsing other candidates in elections within the same state.

I. BACKGROUND

Underlying the Seventh and Eighth Circuit's decisions are two very different lines of jurisprudence. Part I.A summarizes the precedents relied on by the Eighth Circuit in its opinion in Wersal. These cases illustrate the manner in which courts grant heightened protection to campaign speech by applying strict scrutiny to laws burdening such speech. Part I.B describes the precedents that the Seventh Circuit relied on in Siefert, which afford lesser protections to speech uttered by government em-

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4 See, for example, Pennsylvania Family Institute, Inc v Celluci, 521 F Supp 2d 351, 381 (ED Pa 2007) (upholding a law barring candidates from making "pledges or promises of conduct in office"); Weaver v Bonner, 309 F3d 1312, 1322–23 (11th Cir 2002) (invalidating a law banning judicial candidates from personally soliciting campaign contributions).

5 613 F3d 821 (8th Cir 2010), rehearing en banc granted (Oct 15 2010).

6 Id at 842.

7 608 F3d 974, 977 (7th Cir 2010).
ployees. Courts review restrictions on this kind of speech by applying a “balancing test” that takes into account the interests of both the speaker and the government employer.

A. Campaign Speech and Strict Scrutiny

The Eighth Circuit's decision in *Wersal* stems from the Supreme Court’s long history of recognizing that “[t]he First Amendment protects political association as well as political expression.”8 Although most forms of speech enjoy full First Amendment protection, the Court has particularly emphasized the protected status of political campaign speech, including endorsements,9 because of its central role in our democratic system.10 If this sort of speech is unduly curtailed, it not only “hammers the ability of a party to spread its message,”11 but also infringes upon candidates’ freedom of association by preventing them from identifying others with whom they share common ideas and values.12 For this reason, “the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.”13

To protect these critically important rights, courts apply the most stringent standard of review possible, known as strict scrutiny, to laws that burden campaign speech.14 Under strict scrutiny, the government must prove that the law “furthers a compelling interest and is narrowly tailored to achieve that interest.”15 The law must also represent the least restrictive option for achieving the state's compelling interest.16

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9 See *Eu v San Francisco County Democratic Central Committee*, 489 US 214, 224 (1989) (“Depriving a political party of the power to endorse suffocates [free speech and freedom of association] right[s].”).
10 See id at 222–23, quoting *Williams v Rhodes*, 393 US 23, 32 (1968) (“[Campaign] speech [ ] is at the core of our electoral process.”).
11 *Eu* 489 US at 223.
12 See id at 224 (describing how prohibiting political parties from endorsing candidates in a primary election burdens the party's and candidates' freedom of association).
14 See *Federal Election Commission v Wisconsin Right To Life, Inc*, 551 US 449, 464 (2007). Both federal and state laws burdening political speech are subject to strict scrutiny, as the First Amendment applies to the states via the Fourteenth Amendment. See *Bigelow v Virginia*, 421 US 809, 811 (1975).
15 *Wisconsin Right To Life*, 551 US at 464.
16 See *United States v Playboy Entertainment Group, Inc*, 529 US 803, 813 (2000) (“If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.”).
Laws that impede political speech uttered in the course of campaigns for elected judicial office are subject to the same strict scrutiny review that governs analogous laws for legislative or executive campaigns.\textsuperscript{17} However, the outcomes resulting from this review appear to be different in these two contexts. The Court has consistently overturned restrictions that burden speech related to legislative and executive campaigns, including prohibitions on endorsements in primary elections and laws barring candidates from making promises of conduct in office, on the grounds that they do not advance a compelling state interest.\textsuperscript{18} The Court solidified this approach in its recent decision in \textit{Citizens United v Federal Election Commission},\textsuperscript{19} in which it held that the government did not have a compelling interest in prohibiting independent corporate expenditures (considered to be a form of speech subject to First Amendment protection) for electioneering communications.\textsuperscript{20}

However, the Court has recognized that judicial campaigns differ from those for other offices "in ways that bear on the strength of the state's interest in restricting their freedom of speech."\textsuperscript{21} While the Court did invalidate a law barring judicial candidates from announcing their views on controversial issues in \textit{White I}, it did so on the grounds that the law was not narrowly tailored to achieve the state's interest in impartiality.\textsuperscript{22} The Court recognized that this interest, at least in the sense of a "lack of bias for or against either party to [a] proceeding," was a compelling one.\textsuperscript{23} Therefore, unlike laws burdening the speech of candidates for positions in other branches of government, restrictions on the speech of judicial candidates must only overcome the narrow tailoring prong of the strict scrutiny test, so long as they advance the state's interest in impartiality.

\begin{itemize}
\item[\textsuperscript{17}] See \textit{White I}, 536 US at 774 (applying strict scrutiny to a restriction applicable only to candidates for elected judicial office on the grounds that it burdened speech concerning the qualifications of candidates for office).
\item[\textsuperscript{18}] See, for example, \textit{Eu}, 489 US at 228 (rejecting the state's proffered interests in banning endorsements in primary elections as not sufficiently compelling); \textit{Brown v Hartlage}, 456 US 45, 58 (1982) (holding that the state had no compelling interest in preventing a candidate for county commissioner from promising to reduce his salary).
\item[\textsuperscript{19}] 130 S Ct 876 (2010).
\item[\textsuperscript{20}] Id at 913.
\item[\textsuperscript{21}] \textit{Buckley v Illinois Judicial Inquiry Board}, 997 F2d 224, 228 (7th Cir 1993).
\item[\textsuperscript{22}] 536 US at 783.
\item[\textsuperscript{23}] Id at 775 (emphasis omitted).
\end{itemize}
B. Restrictions on the Speech of Government Employees

Despite the strong protections generally afforded to political speech detailed above, the Supreme Court has consistently held that restrictions on government employee speech are subject to less stringent review. In *Pickering v Board of Education*, the Court recognized that a public employee's First Amendment rights are not absolute; rather, a court must "arrive at a balance between the interests of the [government employee], 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." Accordingly, in *US Civil Service Commission v National Association of Letter Carriers, AFL-CIO*, the Court upheld the constitutionality of Section 9(a) of the Hatch Act, which prohibited federal employees from "take[ing] an active part in political management or in political campaigns." Of particular significance to the present circuit split, the *Letter Carriers* court stated that the federal government's interest in regulating its employees' partisan activities was not only to ensure the actual "impartial execution of the laws," but also to maintain the appearance of impartiality, so as not to erode public "confidence in the system of representative Government."

The Supreme Court has not determined, however, whether states may constitutionally impose restrictions on the speech of sitting judges on the basis of *Pickering*. Although several district courts have ruled that they may, the only circuit court to consider the issue concluded otherwise. That court, the Fifth Circuit, based its analysis on the premise that an elected official's "'employer' is the public itself," which holds "the power to hire and fire." Entrusted with such a powerful role, the public "is

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25 Id at 568.
27 Id at 550.
28 Id at 565.
29 See *White I*, 536 US at 796 (Kennedy concurring) ("Whether the rationale of *Pickering* ... 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.") (internal citations omitted).
30 See Devon Helfmeyer, *Do Public Officials Leave Their Constitutional lights at the Ballot Box? A Commentary on the Texas Open Meetings Act*, 15 Tex J CL-CR 205, 233 & n 76 (citing several district court decisions holding that restrictions on the speech of government employees were valid as applied to elected officials).
31 See *Jenevein v Willing*, 493 F3d 551, 558 (5th Cir 2007).
obliged to inform itself” about elected officials. Therefore, the court concluded, full First Amendment protection must be afforded to these officials so that they can convey any information that would inform the democratic process. This position is also consistent with principles set out by the Supreme Court in Wood v Georgia, a pre-Pickering case in which the Court rejected the contention that the state could restrict a sheriff’s freedom of expression solely on the basis of his employment, as “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.”

II. CIRCUIT SPLIT

Part I summarized the precedents that dictate different standards of review for campaign speech and speech uttered by government employees. This Section describes how the Seventh and Eighth Circuits utilized those cases to arrive at contrasting conclusions regarding the constitutionality of endorsement clauses. Part II.A details the Eighth Circuit’s position that endorsement clauses are subject to strict scrutiny and its invalidation of a Minnesota clause under this standard of review. Part II.B examines the Seventh Circuit’s opposing position that the clauses are subject to a balancing of interests test and its finding that a Wisconsin clause satisfied this test.

A. The Eighth Circuit’s Position

In 2010, the Eighth Circuit held in Wersal v Sexton that a state endorsement clause violated the First Amendment. At issue in Wersal was a provision of the Minnesota Code of Judicial Conduct that prevented “a judicial candidate from ‘publicly endors[ing] or, except for the judge or candidate’s opponent, publicly oppos[ing] another candidate for public office.’”

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32 Id at 557-58.
33 Id.
34 370 US 375 (1962).
35 Id at 395.
36 613 F3d 821 (8th Cir 2010), rehearing en banc granted (Oct 15, 2010).
37 Id at 842.
38 Id at 827, quoting 52 Minn Stat Ann, Code of Judicial Conduct, Canon 4.1(A)(3) (alteration in original).
As an initial matter, the court noted the broad protections typically afforded to political speech.\(^{39}\) It framed the issue presented as one of the constitutionality of a restriction on political speech; it did not discuss any cases related to limitations of the speech of public employees.\(^{40}\) Against this backdrop, the court found that the endorsement clause was both a content-based restriction, as the state prohibited only one category of speech based on its subject matter (endorsements), and a “burden[] [on] core political speech.”\(^{41}\) Consequently, the clause was subject to strict scrutiny; that is, to survive review, it must “advance[] a compelling state interest and [be] narrowly tailored to serve that interest.”\(^{42}\)

The court first evaluated whether Minnesota’s purported interest “in maintaining judicial impartiality and the appearance thereof” satisfied the first prong of the strict scrutiny test.\(^{43}\) Relying on its previous interpretation of the possible meanings of “impartiality” articulated in \textit{White I}, the court concluded that the concept of impartiality as a “lack of bias for or against either party to [a] proceeding” was a compelling interest, and thus satisfied this part of the test.\(^{44}\)

Nevertheless, the court found that the clause was not narrowly tailored to serve this interest.\(^{45}\) It posited that a judicial candidate might use an endorsement of a presidential candidate who advocated judicial restraint as a proxy for the judicial candidate’s own philosophy.\(^{46}\) Since it is unlikely that a candidate for President, or another “similar endorsee,” would appear as a litigant in the endorsing judge’s court, the law was overinclusive in that it “prohibit[ed] endorsements regardless of the likelihood that the endorsee will ever appear as a party in the state's courts,” and “restrict[es] more speech than is necessary to prevent a public display of favoritism.”\(^{47}\) The court found the law to be underinclusive as well, as it “would permit a candidate to en-

\(^{39}\) See \textit{Wersal}, 613 F3d at 828–29 (quoting several cases that describe the strength of First Amendment protection for political speech).

\(^{40}\) See id.

\(^{41}\) Id at 834.

\(^{42}\) Id at 832, quoting \textit{Republican Party of Minnesota v White}, 416 F3d 738, 749 (2005) (\textit{“White I”}).

\(^{43}\) \textit{Wersal}, 613 F3d at 832.

\(^{44}\) Id at 832 (alteration in original) (emphasis omitted), quoting \textit{White I}, 536 US at 775.

\(^{45}\) Id at 835.

\(^{46}\) Id.

\(^{47}\) \textit{Wersal}, 613 F3d at 835–36.
dorse the acts and policies of non-candidates,” even if those non-
candidates had a high chance of appearing before the court.\textsuperscript{48}
Thus, the court concluded that the endorsement clause failed the
second prong of the strict scrutiny test with respect to this inter-
est.\textsuperscript{49}

The court next evaluated whether the law withstood strict
scrutiny if the state’s interest was in preserving “openminded-
ness,” a goal that “seeks to guarantee each litigant, not an \textit{equal}
chance to win the legal points in the case, but at least \textit{some}
chance of doing so.”\textsuperscript{50} Like the \textit{White I} court, the Eighth Circuit
decided to rule on whether this meaning constituted a compelling
interest.\textsuperscript{51} Rather, it rejected this interest on narrow tailor-
ing grounds.\textsuperscript{52} It reasoned that associating with individual politi-
cal candidates was no more of a threat to impartiality than associ-
ating with political parties, a practice which was upheld in \textit{White II}.
\textsuperscript{53} The court also stated that it did not “believe that a
judicial candidate's endorsement of another candidate indicates
that as a judge he or she will be any less open to alternate legal
conceptions of a case.”\textsuperscript{54} Having demonstrated that the clause
was “woefully underinclusive” to serve an interest in preserving
the openmindedness of judges, the court concluded that this
could not possibly be the underlying purpose of the state’s regu-
lation.\textsuperscript{55}

The court also did not address whether the \textit{appearance} of
impartiality was a compelling state interest.\textsuperscript{56} Nor did it consider
whether the clause was narrowly tailored to meet that interest.\textsuperscript{57}
Instead, the court found that the endorsement clause was not the
least restrictive means of accomplishing the appearance of im-
partiality, as the possibility of recusal always exists in cases
where there appears to be bias.\textsuperscript{58} It dismissed the possibility that
a judicial candidate would endorse a political figure that was

\textsuperscript{48} Id at 836.
\textsuperscript{49} Id at 837.
\textsuperscript{50} Id, quoting \textit{White I}, 536 US at 778 (emphasis in original).
\textsuperscript{51} See \textit{Wersal}, 613 F3d at 833.
\textsuperscript{52} Id at 838.
\textsuperscript{53} Id.
\textsuperscript{54} Id at 837.
\textsuperscript{55} See \textit{Wersal}, 613 F3d at 837–38.
\textsuperscript{56} See id at 832–33.
\textsuperscript{57} See id at 834–36 (discussing the overinclusiveness and underinclusiveness of the
regulation as it relates to serving \textit{actual} judicial impartiality, but not the appearance of
impartiality).
\textsuperscript{58} Id at 836.
likely to frequently appear before the judge, such as a local sheriff. It would be “foolish” of a candidate to do so, the court reasoned, and in any event the “electoral marketplace” would prevent such a situation. Moreover, the court reasoned, if a judge is so biased in favor of one party such that the other party’s due process rights are threatened, a court can order the judge to recuse himself, as the Supreme Court did in Caperton v A.T. Massey Coal Co (discussed in more detail in Part III.B.2).

Finding no state interest that could pass muster under strict scrutiny, the court struck down Minnesota’s endorsement clause for violating the First Amendment.

B. The Seventh Circuit’s Position

Just one month after the Eighth Circuit’s decision in Wersal, the Seventh Circuit upheld an endorsement clause in Siefert v Alexander. The clause in question, a section of the Wisconsin Supreme Court Rules, provided in relevant part:

(a) . . . Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of a political party.

. . .

4. Publicly endorse or speak on behalf of its candidates or platforms.

Unlike the court in Wersal, which characterized the Minnesota endorsement clause as a classic burden on political speech, the Siefert court began its analysis by distinguishing the clause at issue from the campaign speech jurisprudence discussed in

59 Id.
60 129 S Ct 2252, 2257 (2009).
61 See Wersal, 613 F3d at 837.
62 Id at 842.
63 608 F3d 974, 977 (7th Cir 2010).
64 Id at 978, quoting Wis S Ct Rule 60.06.
Part I.A. It reasoned that an endorsement is different from other types of campaign speech because it is "less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign." Since this falls outside of the category of free speech jurisprudence concerning "a judge's own campaign," the court concluded that a "more deferential approach to government prohibition of these endorsements" was warranted.

The "deferential approach" taken by the court consisted of analyzing the clause under the "balancing test" articulated in Pickering v Board of Education, which requires a "balance between the interests of the [employee], 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." The court validated this approach by citing the fact that neither White II nor Citizens United explicitly foreclosed the application of the Pickering test to speech regulations for government employees, elected or otherwise. Thus the appellee, a government employee by virtue of his judgeship, could be subject to regulations that meet this balancing test.

Evaluating the state's side of the balancing equation, the court deemed the state's interest in maintaining the appearance of impartiality in the judiciary to be a "weighty one," as "justice must satisfy the appearance of justice" in order for the judiciary "[t]o perform its high function in the best way." The state also expressed concern for actual bias that may result if an endorsee appears before the endorsing judge's court. Neither of these concerns could be remedied by recusal, the state argued, "due to both the volume of litigation involving the government in Wis-

65 Compare Wersal, 613 F3d at 829 ("[The clause]'s restriction on endorsements ... directly limit[s] judicial candidates' political speech"), with Siebert, 608 F3d at 983 (stating that "a public endorsement does not fit neatly" into the category of protected campaign speech).
66 Siebert, 608 F3d at 984.
67 Id.
69 Siebert, 608 F3d at 985, quoting Pickering, 391 US at 568 (alteration in original).
70 See Siebert, 608 F3d at 984, quoting Citizens United, 130 S Ct at 899 ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons ... based on an interest in allowing governmental entities to perform their functions.") White I, 536 US at 796 (Kennedy concurring) (see quotation in note 29).
71 See Siebert, 608 F3d at 987-88.
73 Siebert, 608 F3d at 986.
consin and the number of small circuit courts." The court agreed, adding that simply prohibiting judges from using their title when making endorsements would be ineffective in concealing their true identities.

By contrast, the court characterized the judge's interest in endorsing other politicians as more limited, since such speech is primarily aimed at "bolstering another politician's chances for office" rather than expressing the judge's credentials. One interest that a judicial candidate might have in endorsing another candidate, that of being able to give and receive endorsements on a quid pro quo basis, was problematic for the court in that it could encourage such candidates to elicit promises from elected officials. The court also took issue with endorsements of national figures, such as the president, as an influential judge might have the power to "tip[ ] the outcome of a close election in the politician's favor" by endorsing a particular candidate. This could in turn make the judge appear to be "a powerful political actor, and thus call into question the impartiality of the court." Given, then, that a judge's interest in endorsing candidates was far outweighed by the state's interest in maintaining an impartial (and thus optimally functioning) judiciary, the court concluded that the clause was constitutionally permissible.

The court also considered two other potentially problematic elements of the prohibition unrelated to the balancing test. First, it recognized that the clause only prohibits endorsements of partisan candidates; endorsements in nonpartisan elections, including those for judicial positions, "may be freely given." While the court admitted that "this underinclusiveness could be fatal to the rule's constitutionality" under a strict scrutiny test, it found that because partisan officials were the most frequent litigants in state court and partisan endorsements pose a greater threat to the political impartiality of the judiciary, the state's interest in banning only partisan endorsements was sufficient for
the regulation to pass the balancing test. Finally, the court noted that its analysis was limited to the validity of the clause as it pertained to the appellee, a sitting judge, because the case was not "appropriate . . . to address the issue of regulations for judicial candidates who are not judges."84

III. STRICT SCRUTINY AND ACHIEVING THE STATE'S INTEREST IN JUDICIAL IMPARTIALITY

As illustrated in the previous Section, the disparate outcomes in these cases result from the difference between framing endorsement clauses as either general restrictions on campaign speech, or as regulations of the speech of government employees. While the Seventh and Eighth Circuits' opinions indicate that there are distinct reasons for choosing either framework, this Comment contends that it is more appropriate to treat the clauses as general campaign speech restrictions that the court must review under a strict scrutiny standard. Part III.A outlines how precedent supports this approach, and highlights the problematic consequences of following the Seventh's Circuit's framework. Part III.B examines the Eighth Circuit's claim that recusal is a less restrictive and more effective means of achieving the state's interest in actual or apparent judicial impartiality. Drawing on the dissent in Wersal and the majority opinion in Siefert, it concludes that recusal, the electoral marketplace, and due process protections are all insufficient mechanisms for ensuring this goal.

A. Strict Scrutiny as the Appropriate Standard of Review

1. Endorsements may benefit the endorsing candidate and are thus a form of campaign speech.

Contrary to the Seventh Circuit's opinion, endorsements are valuable not just for the endorsee, but also for the endorsing judge. As the Eighth Circuit noted, a candidate for judicial office may "use an endorsement as a proxy for expressing his or her views."85 One might criticize allowing endorsements for this purpose on the grounds that it is unnecessary for a judge to use a proxy to express her own views, since White I held that a judge

83 See id.
84 Id.
85 Wersal, 613 F3d at 835.
may simply express those views herself. However, endorsements of other political candidates can be more effective at conveying a judicial candidate's views for several reasons.

First, political candidates typically express opinions on a wide variety of issues that judicial candidates may not have the opportunity to address. Furthermore, a judicial candidate may want to use an endorsement as a proxy when expressing a view would put the judge at risk of having to recuse himself if that issue were to come before the court. For instance, a candidate for judge may not want to express support for legalizing gay marriage to avoid the risk of appearing to have "promised" to vote this way before potential parties have argued their individual cases. However, endorsing a candidate for the United States Senate who has expressed support for gay marriage would signal the judicial candidate's opinion to voters who care about the issue without binding her to it. Finally, a judicial candidate may fear that voters will not read a long publication detailing views on a large number of issues. Endorsing national figures whose views on legal issues are well-publicized allows a judicial candidate to signal his views on a wide variety of issues in a single statement that voters may be more likely to take notice of.

The Seventh Circuit also underestimated the value of offering endorsements on a quid pro quo basis. As one scholar noted, "for judicial candidates running statewide or in diverse, metropolitan districts, endorsements are a necessary, if not essential, component of a successful campaign." As a result, judicial candidates already go to great lengths to garner endorsements from people and organizations. "Trading" endorsements, then, is yet another way that judicial candidates could secure this valuable form of electoral capital. Although it may be true that "judicial candidates . . . could elicit promises from elected officials . . . in exchange for their endorsement," a separate law could be enacted that bans such promises, while still allowing for quid pro quo endorsements traded for their inherent value.

Since there is value in endorsements beyond the benefit conferred to the endorsee, endorsements must be classified as a form

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86 See White I, 536 US at 788 (holding that judges may freely announce their views on disputed issues).
88 See id at 348–49 (discussing various endorsement processes, including questionnaires, forums, and networking).
89 Siebert, 608 F3d at 986, quoting Amicus Brief of Conference of Chief Justices, Siebert v Alexander, Civil Action No 09-1713, 23.
of campaign speech entitled to First Amendment protection. Hence, they must be reviewed under a strict scrutiny standard.

2. Applying *Pickering* would impermissibly prohibit speech on the basis of the identity of the speaker.

As the holding of *Pickering* lessens free speech protection only for government employees, endorsement clauses would only be effective in regulating the speech of incumbent judges.90 Other candidates who are not current government employees would remain free to endorse whomever they wished. Applying the *Pickering* balancing test in favor of regulating incumbent judges would therefore mean that the legality of speech would turn on the identity of the party uttering it.

The Supreme Court’s recent holding in *Citizens United* struck down a restriction on political speech where the regulation turned on the speaker’s corporate identity.91 Although the holding itself proscribed a restriction that targeted a corporation, the opinion condemns identity-based restrictions generally:

[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.92

A system in which only non-incumbent challengers have the right to endorse, and the public only has an opportunity to hear endorsements from the challenging side, is thus at odds with the Supreme Court’s logic. For these reasons, strict scrutiny, rather

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90 See *Pickering*, 391 US at 568 ("[T]he 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.") (emphasis added). Of course, this assumes that elected judges are subject to the *Pickering* test in the first place. As discussed in Part I.B, one circuit has found that this is not the case. See *Jenevein v Willing*, 493 F3d 551, 558 (5th Cir 2007).

91 See 130 S Ct at 913.

92 Id at 899.
than the Pickering test, is the appropriate standard for analyzing endorsement clauses.

B. Other Mechanisms Like Recusal or the “Electoral Marketplace” Do Not Adequately Ensure Actual or Apparent Impartiality

1. Recusal.

While the Eighth Circuit rightfully determined that ensuring judges' lack of bias for either party to a case was a compelling state interest, it did not address whether the state's interest in maintaining the appearance of impartiality was sufficiently compelling.93 Instead, it concluded that because recusal was always available to remedy the appearance of bias, the endorsement clause was not the least restrictive means for the state to accomplish any degree of actual or apparent impartiality.94

The court cast doubt on the possibility that a judicial candidate would endorse candidates who would frequently appear before the court, since the judicial candidate, if elected, would end up having to recuse himself from a large number of cases.95 This reasoning assumes that a judge will actually recuse himself, per the Code of Judicial Conduct, “in any proceeding in which the judge's impartiality might reasonably be questioned.”96 However, the significant procedural hurdles to obtaining a recusal order make it unlikely that this provision will be enforced in practice. In Minnesota and most other states, a trial judge whom a party is seeking to remove first decides on the motion to recuse.97 If the judge denies the motion, the challenging party may seek reconsideration of the motion by the chief judge of the district, but the law does not mandate such reconsideration.98 Even if the law were remedied to mandate reconsideration, the costs and potential for the delay of trial associated with these motions might still make it nearly impossible for many litigants to effectively challenge their judge's impartiality.

93 See Wersal, 613 F3d at 832–33.
94 See id at 836–37.
95 See id.
96 Id at 836, quoting 52 Minn Stat Ann, Code of Judicial Conduct, Canon 2.11(A).
98 See 3A Minn Prac, Gen Rules Of Prac Ann R 106.2 (“In many instances, the chief judge will not be able effectively to review the trial judge's denial of the motion.”).
Both the Siefert court and Wersal dissent note another practical obstacle to mandating recusal: there simply are not enough judges, particularly in rural areas, to frequently step in for the recusing judge.\(^9\) Thus, there is little incentive for a judge who knows that recusal provisions cannot be enforced against him to refrain from endorsing whatever party he wishes while campaigning. Finally, even if a state were to implement a completely effective enforcement mechanism for recusals, the appearance of judicial impartiality might still be compromised. "Perceptions of bias would be justified in cases involving not just endorsees, but also their friends, family, associates . . . and their supporters," causing the erosion of public confidence in the impartiality of the judiciary as a whole.\(^10\)

2. Court-ordered recusal on due process grounds.

Traditionally, courts held that the Due Process clause required a judge's recusal only when the judge had a financial interest in the outcome of a case,\(^1\) or the judge is ruling on a criminal contempt charge resulting from a defendant's hostility towards that judge.\(^2\) However, in its recent decision in Caperton v A.T. Massey Coal Co,\(^3\) the Supreme Court seemed to expand the set of circumstances that would mandate recusal. At issue in Caperton was whether a justice on the West Virginia Supreme Court who had received $3 million in various forms of campaign contributions from the CEO of Massey Coal Co—$1 million more than all other contributors combined—violated a plaintiff's due process rights by denying a motion for recusal in a case involving a high-stakes suit against Massey.\(^4\) Rather than undertake an inquiry into whether the state justice was actually biased, the Court employed the objective standard of whether "the probability of actual bias rises to an unconstitutional level."\(^5\) Highlighting the large amount of money donated and the timing of the

\(^9\) See Siefert, 608 F3d at 986; Wersal, 613 F3d at 851 (Bye dissenting).
\(^10\) Wersal, 613 F3d at 851 (Bye dissenting).
\(^1\) See Tumey v State of Ohio, 273 US 510, 520 (1927) (holding that a defendant's due process rights were violated where a mayor presided over cases of unlawful alcohol possession and received a portion of the fines assessed upon conviction); see also Ward v Monroeville, 409 US 57, 60 (1972) (overturning a mayor's assessment of fines where the fines would be deposited into the city's treasury, which the mayor was responsible for managing).
\(^3\) 129 S Ct 2252 (2009).
\(^4\) See id at 2256–57.
\(^5\) Id at 2265 (emphasis added).
contribution, the Court concluded that "there was [ ] a serious, objective risk of actual bias that required [the judge's] recusal."106

Although the Caperton majority stated that it was doing "nothing more than what the Court has done before"107 in ordering the recusal, the dissent countered that the Court was actually extending the reach of the Due Process Clause far beyond what it had required of judges before.108 The Eighth Circuit endorsed this more expansive reading of the Due Process Clause in Wersal, describing Caperton as holding that "due process demands that certain actions which occur during a judicial campaign may later require recusal."109 Read in conjunction with Caperton's "objective probability" test,110 this statement could be interpreted as affirming that the Constitution requires recusal in any case in which a judge's conduct during a campaign gives rise to a high probability of bias. If federal courts were indeed required to order recusal in such circumstances, blanket endorsement clauses would be overly restrictive and unnecessary, as courts would instead consider the potential for bias on a case-by-case basis.

Although some scholars have argued that the rule described above would be ideal,111 the Caperton court repeatedly emphasized that its holding did not apply broadly. Addressing the respondent's criticism that the decision would result in a "flood of recusal motions," the Court noted that the facts of the case represented an "extraordinary situation" that was not analogous to any other pending case.112 Moreover, "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."113 Although contributors to judicial campaigns typically outnumber candidates who have been endorsed by judges, the latter is not such an infrequent occurrence (absent an endorsement clause) that it could be considered

106 Id.
107 Caperton, 129 S Ct at 2266.
108 Id at 2267 (Roberts dissenting) ("Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents.").
109 Wersal, 613 F3d at 837.
110 See text accompanying note 105.
111 See, for example, Jeffrey W. Stempel, Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal, 29 Rev Litig 249, 299 (2010) (arguing that a due process violation occurs whenever a judge could objectively be considered to be non-neutral).
112 Caperton, 129 S Ct at 2265.
113 Id at 2263.
an “extraordinary” situation that would trigger due process concerns. *Caperton’s* focus on the unique aspects of the West Virginia case underscores federal courts’ reluctance to intervene in all but the most extreme cases of bias; otherwise, recusals are purely a matter of state law.\textsuperscript{114} Due process protections are thus not strong enough to compensate for the inadequacies of state recusal procedures.

3. The “electoral marketplace.”

Even those who concede that endorsements could be problematic in theory might question the need for endorsement clauses in light of the consequences (or lack thereof) of *White I*. They may argue that endorsements pose no more of a threat to impartiality than a rule allowing judges to announce their views on controversial issues. Since the latter has been legal since *White I*, and there does not appear to currently be a widespread problem of biased judges hearing cases or eroded public confidence in the judiciary, the *Wersal* court could be right that the “electoral marketplace” is a sufficient check on judges’ behavior.\textsuperscript{115}

Endorsements and announcements differ, however, in significant ways that give rise to a much greater need to regulate the former. As *White I* explained, litigants cannot expect their judge to be completely free of any preconception for a particular legal view.\textsuperscript{116} When a judge announces her views, she is simply bringing to light some of the principles that motivate her decision-making.\textsuperscript{117} Thus, a litigant would not face a *unique* bias when appearing before a judge who has previously expressed views in conflict with the litigant’s position.\textsuperscript{118} Allowing judges to announce their views therefore does not threaten the appearance of impartiality. By contrast, not all judges strongly support, nor have expressed such support for, one party to a proceeding. Endorsements are thus more likely to convey a unique kind of bias.

\textsuperscript{114} See id at 2267, quoting *White I*, 536 US at 794 (“States may choose to ‘adopt recusal standards more rigorous than due process requires.’”).

\textsuperscript{115} *Wersal*, 613 at 837.

\textsuperscript{116} 536 US at 777-78.

\textsuperscript{117} Id.

\textsuperscript{118} This is not to say that there would not be situations in which a judge’s announcement of a view would give rise to a unique bias towards a litigant; for instance, if a judge had disparaged a group to which a particular party belonged, or had promised to uphold or oppose a particular issue in all cases. These situations are rare enough that the recusal option would be an effective remedy.
towards or against one litigant, and in turn pose a greater threat to the impartiality of the judiciary as a whole.

IV. THE INTRASTATE SOLUTION

As the previous Section illustrated, endorsements can be a valuable aid to a campaign in some situations, but pose grave risks to actual and apparent judicial impartiality in others. While alternative mechanisms preserve judges’ right to endorse when it will not result in a high probability of bias, they also do not adequately safeguard litigants when endorsements are the most likely to create bias. The challenge thus remains for state legislatures to craft a law that withstands strict scrutiny while effectively serving the interests both of judges who wish to endorse other candidates and litigants that could potentially appear before judges who have endorsed another party to the case.

This Section proposes that the optimal rule for states to adopt is one that bars a judicial candidate from endorsing other candidates for state offices within his own state. Under such “intrastate clauses,” a candidate for the Wisconsin Supreme Court could not endorse candidates for Wisconsin Attorney General or Governor, for example, but could endorse a candidate for the Wisconsin seat in the United States Senate or House of Representatives. For the reasons described below, the intrastate clause would both survive strict scrutiny and provide the best possible balance between the interests of citizens and judicial candidates.

An intrastate clause satisfies the first prong of the strict scrutiny test—that the law must advance a compelling state interest—because it furthers an interest already deemed to be compelling by the Supreme Court: preventing bias against parties to a judicial proceeding. Although both the Wersal and Siefert courts found that the challenged endorsement clauses fulfilled this interest, it is not necessarily the case that all endorsement clauses would fulfill this part of the test per se. Indeed, one aspect of the Wisconsin clause at issue in Siefert suggests that it might not have withstood the compelling interest test had it been reviewed under a strict scrutiny standard. The clause was part of a judicial canon containing several other prohibitions on judge’s political activity that opened with a statement of the state’s interest: “Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not

119 See text accompanying note 44.
120 See id and text accompanying notes 72–73.
appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary."\textsuperscript{121}

The Siefert court found that a provision of the canon that prevented judges from affiliating with political parties violated \textit{White I}, as it amounted to prohibiting them from indicating their views "by proxy."\textsuperscript{122} However, the court did not explore the possibility that the endorsement clause was aimed at achieving this very same goal.\textsuperscript{123} This possibility seems all the more likely considering the clause's placement as a subsection under the statement of purpose banning partisan activity, and the fact that the clause bans only the endorsement of partisan candidates.\textsuperscript{124} As the Supreme Court has not recognized that avoiding the appearance of partisanship is a compelling state interest—and probably would not, as the Siefert court itself admitted\textsuperscript{125}—Wisconsin's clause would likely not withstand the compelling interest test under strict scrutiny review. By contrast, an intrastate clause bans the endorsement of \textit{all} intrastate candidates for office, whether partisan or not. Accordingly, it unambiguously promotes the interest in impartiality deemed to be compelling by the Court.

Unlike the endorsement clauses in \textit{Wersal} and Siefert, an intrastate clause also passes the narrow tailoring portion of the strict scrutiny test. By prohibiting the endorsements of intrastate officials, who are likely to be frequent parties to cases (whether as litigants, witnesses, or prosecutors), the rule targets only those endorsements that cannot be adequately remedied by recusal.\textsuperscript{126} At the same time, it permits judges to endorse federal and out-of-state candidates who might be effective proxies for their views. Since these candidates are no more likely than any other citizen to appear before an endorsing judge, the incidents in which there would be a conflict of interest would be rare enough that recusal would be a feasible option.\textsuperscript{127} The intrastate

\textsuperscript{121} Siefert, 608 F3d at 978, quoting Wis S Ct Rule 60.06. See also text accompanying note 64 (quoting the relevant portions of the canon).

\textsuperscript{122} See Siefert, 608 F3d at 982.

\textsuperscript{123} See id at 983–88 (discussing the purpose of the endorsement clause with reference only to the state's proffered interest in "impartiality," rather than the interest suggested by the text of the statute).

\textsuperscript{124} See id at 978, quoting Wis S Ct Rule 60.06.

\textsuperscript{125} See Siefert, 608 F3d at 982.

\textsuperscript{126} See Part III.B.1 for a complete discussion of the inadequacy of the recusal option for parties who frequently appear in court.

\textsuperscript{127} This situation recently occurred in Alaska, where a state judge recused himself from presiding over senatorial candidate Joe Miller's request for an injunction to stop the recount of write-in ballots, citing his "unfavorable opinion" of Miller and campaign contri-
clause therefore overcomes the *Wersal* court's concern that a ban on endorsements in all elections would be overinclusive.\footnote{128}{See text accompanying note 47.}

An intrastate clause would not resolve the Eighth Circuit's concern that endorsement clauses are underinclusive because they still permit judicial candidates to "endorse the acts and policies of non-candidates no matter the likelihood of their becoming litigants before the court."\footnote{129}{Wersal, 613 F3d at 836.} While accurate, this fact alone does not render a law unconstitutional. As the court's language implies, it would be nonsensical for a judicial candidate to state that he "endorses" a state official who is not currently campaigning or a nonpartisan organization; rather, the judicial candidate would be expressing support for the *views* of those actors. Expressing support for any sort of view falls squarely within the realm of legal conduct permitted by *White I*, and thus could not be proscribed by an endorsement clause.

Moreover, if a judicial candidate endorsed a specific act by an individual or organization that could not be classified as supporting a more general view—perhaps, for instance, supporting a corporation's decision to suppress employee unionization—such an act would almost certainly be isolated enough in nature that recusal would be feasible were that candidate elected and presented with that matter in court. Finally, even if the clause in this form leaves some remote problematic element of endorsements intact, such minimal underinclusiveness is not enough to be "fatal" to the law. By being neither overinclusive nor fatally underinclusive, an intrastate clause is narrowly tailored to achieve the state's compelling interest in preserving judicial impartiality, thus passing strict scrutiny.

\section{V. Conclusion}

The Eighth Circuit and the Seventh Circuit have developed two very different frameworks for analyzing endorsement clauses, but neither gives full recognition to both the importance of endorsements as campaign speech *and* the state's interest in preserving the impartiality of its judiciary. Although reviewing endorsement clauses under strict scrutiny best protects the former

\footnotesize{

\begin{itemize}
  \item \footnote{128}{See text accompanying note 47.}
  \item Wersal, 613 F3d at 836.
\end{itemize}
}
interest, it does not mean that the state cannot serve the latter interest as well. An intrastate endorsement clause, which bans endorsements of only intrastate candidates, prevents judges from endorsing candidates who may appear before their court so frequently that recusal would be impossible or impracticable to enforce, but also preserves a valuable form of campaign speech by allowing out-of-state and federal endorsements. Accordingly, it advances the state's compelling interest in judicial impartiality and is narrowly tailored to achieve that interest, and is thus constitutional under strict scrutiny review.