

2010 WI 62

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No. 2008AP2458-J

STATE OF WISCONSIN

:

IN SUPREME COURT

In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable Michael J. Gableman

Wisconsin Judicial Commission,

Complainant,

v.

The Honorable Michael J. Gableman,

Respondent.

FILED

JUN 30, 2010

David R. Schanker
Clerk of Supreme Court

MEMORANDUM DECISION OF
JUSTICE DAVID T. PROSSER,
JUSTICE PATIENCE DRAKE ROGGENSACK
AND JUSTICE ANNETTE KINGSLAND ZIEGLER

1 ¶1 Justice David T. Prosser, Patience Drake Roggensack
2 and Justice Annette Kingsland Ziegler: The court is at an
3 impasse. Three members of the court, Justice Prosser, Justice
4 Roggensack and Justice Ziegler, agree with the recommendation of
5 the three-judge Judicial Conduct Panel (Panel) that the
6 Wisconsin Judicial Commission's (Commission) complaint against
7 Justice Michael J. Gableman must be dismissed. We agree with
8 the Panel's recommendation because after conducting an

1 independent review of the record and considering the arguments
2 of counsel, we have concluded that the Commission failed to
3 establish, by evidence that is clear, satisfactory and
4 convincing, that Justice Gableman violated Supreme Court Rule
5 60.06(3)(c).

6 ¶2 The campaign advertisement that gave rise to the
7 Commission's complaint against Justice Gableman and the
8 governmental rule, SCR 60.06(3)(c), by which the Commission
9 seeks to punish Justice Gableman for that advertisement must be
10 examined according to the commands of the First Amendment. As
11 the United States Supreme Court has explained, the First
12 Amendment applies to judicial elections and to canons of
13 judicial conduct that states seek to apply to candidates in
14 judicial elections. Republican Party of Minnesota v. White, 536
15 U.S. 765, 788 (2002). We acknowledge that the advertisement run
16 by Justice Gableman's campaign committee was distasteful;
17 however, the First Amendment prevents the government from
18 stifling speech, even when that speech is distasteful. R.A.V.
19 v. City of St. Paul, Minnesota, 505 U.S. 377, 380, 391 (1992).
20 The United States Supreme Court has established the parameters
21 of the First Amendment's protections of campaign speech that we
22 follow in our decision below.

23 ¶3 In order to meet its burden of proof under Wis. Stat.
24 § 757.89, the Commission must persuade at least four justices,
25 by clear, satisfactory and convincing evidence, that the
26 advertisement by Justice Gableman's campaign committee violated
27 SCR 60.06(3)(c). The Commission has failed to do so.

1 Accordingly, we anticipate that the Commission, or the
2 Commission and Justice Gableman together, promptly will file a
3 motion to dismiss the complaint against Justice Gableman.¹

¹ Chief Justice Abrahamson, Justice Bradley and Justice Crooks would like to remand the complaint for a hearing before a jury panel that the Commission never requested. (One could interpret their writings as actually remanding the matter for a jury trial. See writings of Chief Justice Abrahamson, Justice Bradley and Justice Crooks, 2010 WI 61, ¶105 [hereinafter the Abrahamson writings]. However, when the court is sitting six, it takes the affirmative vote of four justices to make any type of court order, including a remand. There are not four votes to remand.)

They assert their suggestion of a jury panel is necessary to resolve the court's impasse. Abrahamson writings, ¶16. Generally, when the court reaches an impasse, the decision immediately preceding our review is affirmed. See, e.g., Hornback v. Archdiocese of Milwaukee, 2008 WI 98, ¶5, 313 Wis. 2d 294, 752 N.W.2d 862. Our impasse here could be resolved by adopting the recommendation of the three-judge panel and dismissing the complaint.

The Abrahamson writings do not choose this usual mode of resolving an impasse because they do not like the result. However, their attempt at a second trial is wholly without merit. Any request for a jury panel must have been made before the complaint was filed. Wis. Stat. § 757.87(1). However, pursuant to § 757.87(1), the Commission chose to have the Wis. Stat. § 757.89 hearing before a panel of three court of appeals judges. The Panel conducted the § 757.89 hearing the Commission requested. The Panel that conducted the hearing made findings of fact, conclusions of law and the recommendation to dismiss the complaint against Justice Gableman. There is no availability of a second hearing on this complaint. The Abrahamson writings omit words from § 757.87(1) in an attempt to support the writings' position. For further discussion of these omissions, see infra note 24.

1 I. BACKGROUND

2 ¶4 This action began on October 7, 2008, when the
3 Commission filed a complaint alleging that it had found probable
4 cause to believe that then-Judge Gableman willfully violated SCR
5 60.06(3)(c) of the Wisconsin Code of Judicial Conduct and
6 thereby engaged in judicial misconduct as defined by Wis. Stat.
7 § 757.81(4)(a) (2007-08).² The Commission alleged that the
8 violation of SCR 60.06(3)(c) occurred in a television
9 advertisement that then-Judge Gableman's campaign committee ran
10 during the course of his campaign for election to the Wisconsin
11 Supreme Court.³ The Commission alleged that the television
12 advertisement "directly implied and was intended to convey the
13 message that action or conduct of Louis Butler enabled or
14 resulted in [Reuben] Mitchell's release and Mitchell's
15 subsequent commission of a criminal molestation."⁴

16 ¶5 Justice Gableman timely answered the complaint and
17 raised affirmative defenses. Thereafter, Justice Gableman moved
18 the three-judge panel for summary judgment dismissing the
19 complaint. The Commission agreed that summary judgment was an

² Commission complaint, ¶16.

Wisconsin Stat. § 757.81(4)(a) (2007-08) provides that it is judicial misconduct to commit a "willful violation of a rule of the code of judicial ethics." All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ Commission complaint, ¶¶6-15.

⁴ Id., ¶11.

1 appropriate procedure to use in the Panel's recommendation to
2 the Supreme Court because the material facts were not disputed.⁵
3 The Panel accepted submissions of fact from the parties,
4 accepted briefs from the parties and held a hearing prior to
5 making its own findings of fact upon which its recommendation
6 relied. The Panel found:

7 1. At all times material to the Commission's
8 complaint, the Honorable Michael J. Gableman was a
9 circuit court judge for Burnett County, Wisconsin.

10 2. At all times material to the Commission's
11 complaint, Justice Gableman was a candidate for the
12 office of Wisconsin Supreme Court justice and thus was
13 a "candidate" for judicial office pursuant to SCR
14 60.01(2), Wisconsin Code of Judicial Conduct.
15 (Footnote omitted.)

16 3. During the campaign, advisors to Justice
17 Gableman told him that a third-party political group
18 had released an advertisement in support of Justice
19 Butler that suggested that Justice Gableman had
20 "purchased his job," was a "substandard judge," and
21 had "coddled child molesters." The advisors believed
22 that the advertisement was very damaging to Justice
23 Gableman's campaign and that Justice Gableman needed
24 to respond with an advertisement that focused on the
25 comparative backgrounds of the two candidates,
26 emphasizing Justice Gableman's judicial philosophy and
27 his experience as a prosecutor compared to Justice
28 Butler's experience as a criminal defense attorney and
29 his willingness to represent and find legal loopholes
30 for criminal defendants.

31 4. Justice Gableman's advisors wanted to air a
32 responsive advertisement as soon as possible, and the
33 advertisement that underlies this complaint was
34 presented to Justice Gableman for his review.

⁵ Judicial Conduct Panel Decision, 4 n.4 [hereinafter Panel Decision].

1 5. Justice Gableman personally reviewed both
2 the audio and video of the advertisement before its
3 release. Justice Gableman was not pleased with the
4 tone of the advertisement and he delayed the release
5 of the advertisement while he sought to verify the
6 accuracy of its contents.

7 6. As part of that effort, Justice Gableman
8 became familiar with the decisions of the court of
9 appeals and supreme court in Reuben Lee Mitchell's
10 appeal, State v. Mitchell, 139 Wis. 2d 856, 407 N.W.2d
11 566 (Ct. App. 1987) (unpublished slip op.), reversed,
12 State v. Mitchell, 144 Wis. 2d 596, 424 N.W.2d 698
13 (1988), Justice Butler's arguments made during his
14 representation of Mitchell, and Mitchell's subsequent
15 criminal conduct and conviction.

16 7. Justice Gableman ultimately approved the
17 advertisement as it had been originally presented to
18 him.

19 8. On or about March 14, 2008, Justice Gableman
20 published and released a television advertisement
21 supporting his candidacy for the supreme court against
22 then-incumbent Justice Butler. The audio text of the
23 advertisement is as follows:

24 Unbelievable. Shadowy special interests
25 supporting Louis Butler are attacking Judge
26 Michael Gableman. It's not true!

27 Judge, District Attorney, Michael Gableman
28 has committed his life to locking up
29 criminals to keep families safe—putting
30 child molesters behind bars for over 100
31 years.

32 Louis Butler worked to put criminals on the
33 street. Like Reuben Lee Mitchell, who raped
34 an 11-year-old girl with learning
35 disabilities. Butler found a loophole.
36 Mitchell went on to molest another child.

37 Can Wisconsin families feel safe with Louis
38 Butler on the Supreme Court?

39 An electronic copy of the advertisement is Exhibit A
40 to the Commission's complaint.

1 9. The purpose of the advertisement was to
2 compare and contrast the background, qualifications,
3 and experience of Justice Gableman with the
4 background, qualifications, and experience of Justice
5 Butler.

6 10. Justice Butler had been an appellate state
7 public defender from 1979 to 1992. As part of that
8 employment, he represented Reuben Lee Mitchell, from
9 1985 to 1988, in Mitchell's appeal from a conviction
10 of first-degree sexual assault of a child. The
11 advertisement refers to Butler's representation of
12 Mitchell.

13 11. One of the issues raised by Justice Butler
14 in Mitchell's appeal concerned the circuit court's
15 admission of evidence that the victim had been a
16 virgin, evidence that Butler argued should have been
17 excluded under the rape-shield law, Wis. Stat.
18 § 972.11(2)(b) (1985-86). The court of appeals agreed
19 with Butler and reversed Mitchell's conviction.

20 12. The State sought and the supreme court
21 accepted review of the court of appeals' decision.
22 The supreme court agreed with the court of appeals
23 that evidence of the victim's virginity should have
24 been excluded pursuant to the rape-shield law. The
25 supreme court, however, held that the error was
26 harmless and, therefore, reversed the court of appeals
27 decision. Mitchell's judgment of conviction and
28 sentence were reinstated.

29 13. Mitchell was not released from prison during
30 the pendency of his appeal. Because the judgment of
31 conviction was ultimately upheld by the supreme court,
32 Mitchell remained in prison as sentenced by the
33 circuit court.

34 14. Mitchell was released from prison on parole
35 in 1992.

36 15. In 1995, Mitchell was convicted of second-
37 degree sexual assault of a child.

38 16. Nothing that Justice Butler did in the
39 course of his representation of Mitchell caused,
40 facilitated, or enabled Mitchell's release from prison
41 in 1992.

1 17. Nothing that Justice Butler did in the
2 course of his representation of Mitchell had any
3 connection to Mitchell's commission of a second sexual
4 assault of a child.

5 18. The statement in the advertisement, "Louis
6 Butler worked to put criminals on the street" is true.
7 As a criminal defense attorney, Justice Butler
8 appropriately assisted accused persons, whether they
9 were innocent or guilty, in lessening or defeating the
10 criminal charges lodged against them.

11 19. The statement in the advertisement
12 describing Mitchell's 1985 crime, "Reuben Lee Mitchell
13 . . . raped an 11-year-old girl with learning
14 disabilities" is true.

15 20. The statement in the advertisement, "Butler
16 found a loophole," is true. In Mitchell's appeal,
17 Justice Butler successfully argued that the rape-
18 shield law, a law designed to protect sexual assault
19 victims, had been violated, an argument that inured to
20 Mitchell's benefit.

21 21. The statement in the advertisement, "Mitchell
22 went on to molest another child," is true.

23 II. DISCUSSION

24 A. Standard of Review

25 ¶6 We review the findings of fact, conclusions of law and
26 recommendation of the Panel pursuant to Wis. Stat. § 757.91.⁶ In
27 re Disciplinary Proceedings Against Laatsch, 2007 WI 20, ¶1, 299

⁶ Wisconsin Stat. § 757.91 provides in relevant part:

Supreme court, disposition. The supreme court shall review the findings of fact, conclusions of law and recommendations under s. 757.89 and determine appropriate discipline in cases of misconduct The rules of the supreme court applicable to civil cases in the supreme court govern the review proceedings under this section.

1 Wis. 2d 144, 727 N.W.2d 488. We interpret and apply SCR
2 60.06(3)(c) independently of the Panel, as questions of law, but
3 benefitting from the Panel's discussion. Filppula-McArthur v.
4 Halloin, 2001 WI 8, ¶32, 241 Wis. 2d 110, 622 N.W.2d 436.
5 Whether the Commission has met its burden under Wis. Stat.
6 § 757.89, to prove the allegations in its complaint "to a
7 reasonable certainty by evidence that is clear, satisfactory and
8 convincing," is a question of law for our independent review.
9 See Seraphine v. Hardiman, 44 Wis. 2d 60, 64-65, 170 N.W. 739
10 (1969).

11 ¶7 Neither party contends that the Panel's findings of
12 fact should be overturned or supplemented. Rather, the
13 Commission contends that the application of SCR 60.06(3)(c) to
14 the facts found by the Panel prove that Justice Gableman
15 violated SCR 60.06(3)(c). Justice Gableman contends that when
16 SCR 60.06(3)(c) is interpreted and applied to the campaign
17 speech at issue here in a manner that does not contravene the
18 First Amendment of the United States Constitution, no violation
19 of SCR 60.06(3)(c) occurred. The interpretation and application
20 of SCR 60.06(3)(c) under constitutional standards present
21 questions of law that we review independently of the Panel's
22 determination. State v. Brienzo, 2003 WI App 203, ¶9, 267
23 Wis. 2d 349, 671 N.W.2d 700. While the Panel's recommendations
24 are not binding on this court, they "are entitled to some
25 deference." In re Complaint Against Seraphim, 97 Wis. 2d 485,
26 513, 294 N.W.2d 485 (1980).

1 B. The First Amendment

2 ¶8 The advertisement that forms the basis for the
3 Commission's complaint was run during the course of a campaign
4 for political office. To consider the advertisement in the
5 context in which it was distributed, we first interpret SCR
6 60.06(3)(c) consistent with the commands of the First Amendment,
7 and then we apply that interpretation to the advertisement
8 itself. We begin with foundational First Amendment principles.

9 1. General principles

10 ¶9 The First Amendment to the United States Constitution
11 provides that "Congress shall make no law . . . abridging the
12 freedom of speech."⁷ As a general matter, this means that the
13 First Amendment prohibits government restrictions on speech
14 "because of its message, its ideas, its subject matter, or its
15 content." Ashcroft v. American Civil Liberties Union, 535 U.S.
16 564, 573 (2002) (internal quotes and citation omitted). Time
17 and again the United States Supreme Court has held that
18 regulations authorizing the government to restrain or suppress
19 speech and to prosecute violations of government-imposed
20 regulations restraining speech are disfavored due to the
21 protections accorded by the First Amendment. Thomas v. Collins,
22 323 U.S. 516, 530 (1945); Buckley v. Valeo, 424 U.S. 1, 17

⁷ The First Amendment is applied to the states by the Fourteenth Amendment. State v. Douglas D., 2001 WI 47, ¶2 n.2, 243 Wis. 2d 204, 626 N.W.2d 725 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996)).

1 (1976); Federal Election Comm'n v. Wisconsin Right to Life,
2 Inc., 551 U.S. 449, 469 (2007).

3 ¶10 There are limited, permitted exceptions to the general
4 prohibition on governmental regulations of speech. See, e.g.,
5 United States v. Williams, 553 U.S. 285, 288-89 (2008)
6 (permitting governmental restrictions on child pornography);
7 Brown v. Glines, 444 U.S. 348, 353 (1980) (upholding an Air
8 Force regulation that prohibited the solicitation of petitions
9 on military bases without prior approval by base commanders);
10 Roth v. United States, 354 U.S. 476, 483 (1957) (explaining that
11 suits based on the restraint of obscenity may proceed).

12 ¶11 The constitutional protection of the First Amendment
13 has its fullest and most robust application to speech during a
14 campaign for political office. Buckley, 424 U.S. at 14. It
15 cannot be disputed that campaign advertisements are political
16 speech that come within the scope of the First Amendment. See
17 Wisconsin Right to Life, 551 U.S. at 469.

18 ¶12 When a challenge is made to the regulation of campaign
19 speech, the challenger is not required to prove that the
20 regulation was unconstitutionally applied. See id. at 464.
21 Because core First Amendment speech is being regulated by the
22 government, the government's application of the regulation is
23 subject to strict scrutiny. See id. Accordingly, the
24 government bears the burden of proving that the application of
25 its regulation does not contravene the First Amendment. Id.
26 (explaining that with "strict scrutiny, the Government must
27 prove that applying [the regulation] . . . furthers a compelling

1 interest and [that the regulation] is narrowly tailored to
2 achieve that interest").

3 ¶13 Recent United States Supreme Court decisions that
4 address governmental restrictions on speech demonstrate the
5 application of strict scrutiny. In R.A.V., the Supreme Court
6 examined the St. Paul Bias-Motivated Crime Ordinance that
7 provided:

8 Whoever places on public or private property a
9 symbol, object, appellation, characterization or
10 graffiti, including, but not limited to, a burning
11 cross or Nazi swastika, which one knows or has
12 reasonable grounds to know arouses anger, alarm or
13 resentment in others on the basis of race, color,
14 creed, religion or gender commits disorderly conduct
15 and shall be guilty of a misdemeanor.

16 R.A.V., 505 U.S. at 380. The Minnesota Supreme Court upheld the
17 ordinance, concluding that it was a constitutionally permissible
18 regulation of "fighting words" that the First Amendment did not
19 protect. Id. at 380-81.

20 ¶14 The United States Supreme Court accepted the Minnesota
21 Supreme Court's interpretation of the ordinance as affecting
22 only "fighting words," but it nevertheless struck down the
23 ordinance because it restricted speech "solely on the basis of
24 the subjects the speech addresses." Id. at 381. "The First
25 Amendment does not permit St. Paul to impose special
26 prohibitions on those speakers who express views on disfavored
27 subjects." Id. at 391. In so concluding, the Supreme Court
28 demonstrated that the First Amendment prevents governments from
29 stifling speech.

1 ¶15 More recently, in Republican Party, the United States
2 Supreme Court examined a canon of the Minnesota Code of Judicial
3 Conduct that provided, a "candidate for a judicial office,
4 including an incumbent judge," may not "announce his or her
5 views on disputed legal or political issues." Republican Party,
6 536 U.S. at 768 (internal quotes and quotation omitted). The
7 candidate whose claim was before the Court alleged that the
8 canon operated as a prior restraint of his speech because it
9 "forced [him] to refrain from announcing his views on disputed
10 issues during the 1998 campaign, to the point where he declined
11 response to questions put to him by the press and public, out of
12 concern that he might run afoul of the announce clause." Id. at
13 770.

14 ¶16 The United States Supreme Court recognized that
15 campaign speech is "at the core of our First Amendment
16 freedoms." Id. at 774 (quotation omitted). The Court then
17 subjected the Minnesota canon of judicial ethics to strict
18 scrutiny, requiring the state to prove that the canon was
19 "narrowly tailored[] to serve [] a compelling state interest."
20 Id. at 774-75.

21 ¶17 Minnesota had claimed that the "special context" of
22 judicial elections permitted its "abridgement" of speech during
23 the campaign. Id. at 781. The United States Supreme Court
24 strongly disagreed with the State of Minnesota, by pronouncing
25 that such an argument "sets our First Amendment jurisprudence on
26 its head." Id. After a lengthy discussion, the Supreme Court

1 concluded that the canon of judicial ethics violated the First
2 Amendment. Id. at 788.

3 ¶18 In 2010, the United States Supreme Court once again
4 examined restrictions of speech relating to elections. Citizens
5 United v. Federal Elections Comm'n, 130 S. Ct. 876 (2010). In
6 Citizens United, the Court explained that a First Amendment
7 challenge to government regulation begins with interpreting the
8 governmental regulation at issue. Id. at 889. The Court said
9 that when interpreting a government regulation, courts must
10 avoid drawing fine lines and making intricate case-by-case
11 determinations to verify whether political speech is banned
12 because to do so will chill the exercise of political speech
13 contrary to the mandate of the First Amendment. Id. at 891-92
14 (explaining that "[t]he interpretative process itself would
15 create inevitable, pervasive, and serious risk of chilling
16 protected speech pending the drawing of fine distinctions that,
17 in the end, would themselves be questionable"). Moreover,
18 reviewing courts "must give the benefit of any doubt to
19 protecting rather than stifling speech." Id. at 891 (further
20 citations omitted).

21 ¶19 In interpreting a governmental regulation of campaign
22 speech, courts must recognize that, "[t]he decision to speak is
23 made in the heat of political campaigns, when speakers react to
24 messages conveyed by others." Id. at 895. Accordingly, for
25 those involved in political campaigns, governmental regulations
26 of uncertain meaning effectively act as prior restraints on
27 speech, in contravention of the First Amendment. Id. at 895-96.

1 A constitutional interpretation of government-imposed regulation
2 of campaign speech cannot include an interpretation that permits
3 government officials to "pore over each word of a text to see
4 if, in their judgment, it accords with the [regulation]." Id.
5 at 896. Care must be taken in any interpretation that the
6 government is not placed in the position of deciding "what
7 political speech is safe for public consumption by applying
8 ambiguous tests." Id. Furthermore, governmental regulations
9 that cause the censorship of campaign speech are contrary to the
10 principles upon which the First Amendment is predicated. Id.

11 ¶20 Even though defamation cases such as New York Times
12 Co. v. Sullivan, 376 U.S. 254 (1964) and Milkovich v. Lorain
13 Journal Co., 497 U.S. 1 (1990), are sometimes discussed in
14 opinions where a governmental regulation of speech is at issue,
15 principles from civil defamation cases should not be transferred
16 into the analysis of governmental regulations that operate on
17 protected speech. This is so because: (1) civil defamation
18 claims do not involve enforcement of governmental regulations
19 that are subject to strict scrutiny under the First Amendment;
20 and (2) the law of defamation permits prosecution of false
21 statements by private persons only when those statements also
22 harm another's reputation, see New York Times, 376 U.S. at 267,
23 thereby permitting evidence of the effect of the statement on
24 others.

25 ¶21 To explain further, judicial consideration of an
26 alleged violation of a governmental regulation of speech employs
27 strict scrutiny to assure that the regulation serves a

1 compelling governmental interest and also to assure that
2 application of the regulation is narrowly tailored to achieve
3 that compelling interest. Wisconsin Right to Life, 551 U.S. at
4 464. Construction and application of governmental regulations
5 of speech require the use of an objective test of the truth of
6 the statement, which test does not permit consideration of the
7 effect of the statement on the person hearing it. Id. at 469
8 (citing Buckley, 424 U.S. at 43-44) (explaining that "the proper
9 standard for an as-applied challenge . . . must be objective,
10 focusing on the substance of the communication rather than
11 amorphous considerations of intent and effect").

12 ¶22 By sharp contrast in a civil defamation suit, no
13 governmental regulation is construed, and in order to prevail,
14 the plaintiff must prove he has sustained an injury to his
15 reputation. Rechsteiner v. Hazelden, 2008 WI 97, ¶72 n.11, 313
16 Wis. 2d 542, 753 N.W.2d 496 (explaining that to prevail on a
17 claim for defamation the plaintiff must prove a false statement
18 that is unprivileged and "tends to harm one's reputation so as
19 to lower him or her in the estimation of the community or to
20 deter third persons from associating or dealing with him or
21 her"). Accordingly, proof that the statement's effect was to
22 injure the plaintiff's reputation requires courts to consider
23 the understanding of the hearer. See New York Times, 376 U.S.
24 at 267; Rechsteiner, 313 Wis. 2d 542, ¶72 n.11.

25 ¶23 For example, New York Times was based on a private
26 right of action, New York Times, 376 U.S. at 265 (noting "this
27 is a civil lawsuit between private parties"); its holding

1 balanced Sullivan's right to recover for damage to his
2 reputation with the speaker's defense under the First Amendment,
3 id. at 279-80. However, when the government seeks to enforce a
4 restraint it has placed on speech by punishment for what the
5 government has concluded is a violation of its regulation, there
6 is no private injury warranting compensation that is balanced
7 with rights arising under the First Amendment, as was present in
8 New York Times. See Charles Fried, The New First Amendment
9 Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 238
10 (1992).⁸ As explained above, the government must prove that the
11 regulation it seeks to enforce survives strict scrutiny such
12 that the application of the regulation is narrowly tailored to
13 achieve a compelling state interest. A strict scrutiny analysis
14 is completely absent from civil defamation cases.⁹

15 2. Interpretation and Application of SCR 60.06(3)(c)

16 ¶24 It is within the above described framework of core
17 constitutional principles established to ensure that campaign
18 speech is not diminished, that we must interpret and apply SCR
19 60.06(3)(c) because the television advertisement occurred during

⁸ "The First Amendment protects a liberty—liberty of expression—and it is an effect of this liberty that there is wide and uninhibited discussion of political matters. . . . The First Amendment does not protect a person from lies or imposition by private individuals. Rather the First Amendment protects against impositions by government." Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 226-27, 234 (1992).

⁹ See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

1 the course of a campaign for political office.¹⁰ It was run "to
2 compare and contrast the background, qualifications, and
3 experience of Justice Gableman with the background,
4 qualifications, and experience of Justice Butler."¹¹ More
5 importantly, each statement in the advertisement is true.¹²

6 ¶25 While reluctant to identify any impact of the First
7 Amendment on SCR 60.06(3)(c), the Commission did opine that the
8 compelling interest furthered by SCR 60.06(3)(c) is "the
9 protection of the integrity of the judicial system," and that
10 the rule could not be tailored more narrowly.¹³ Justice Gableman
11 does not contend that the protection of the integrity of the
12 judicial system is not a compelling interest. However, he
13 maintains that the Commission's interpretation and application
14 of SCR 60.06(3)(c) is contrary to the First Amendment's
15 protection of campaign speech. Stated otherwise, Justice
16 Gableman maintains that when SCR 60.06(3)(c) is interpreted and
17 applied using strict scrutiny, which the constitution requires,
18 his campaign speech does not violate the Supreme Court Rule.

¹⁰ Panel Decision (Finding of Fact No. 2).

¹¹ Id. (Finding of Fact No. 9).

¹² Id. (Findings of Fact Nos. 18-21). The Commission does not contest these, or any, findings of the Panel.

¹³ April 16, 2010 statement of James Alexander at oral argument before this court.

1 ¶26 Our interpretation of SCR 60.06(3)(c) presents as a
2 question of first impression and begins with the language of SCR
3 60.06(3)(c), which provides:

4 Misrepresentations. A candidate for a judicial
5 office shall not knowingly or with reckless disregard
6 for the statement's truth or falsity misrepresent the
7 identity, qualifications, present position, or other
8 fact concerning the candidate or an opponent. A
9 candidate for judicial office should not knowingly
10 make representations that, although true, are
11 misleading, or knowingly make statements that are
12 likely to confuse the public with respect to the
13 proper role of judges and lawyers in the American
14 adversary system.

15 ¶27 SCR 60.06(3)(c) has the potential to operate as a
16 prior restraint of speech during judicial campaigns. This is so
17 because, without defining "truth or falsity," SCR 60.06(3)(c)
18 both prohibits judicial candidates from making certain
19 statements during the course of campaigns and permits the
20 government to prosecute and punish willful violations. See Wis.
21 Stat. §§ 757.81(4)(a), 757.85(5) and 757.91.

22 ¶28 When a governmental regulation is not clear and is
23 interpreted using "ambiguous tests," it forces a speaker who
24 wants to avoid the threat of punishment to obtain prior
25 permission to speak. See Citizens United, 130 S. Ct. at 896.
26 Rather than undertake the burden of obtaining prior approval, a
27 speaker may choose simply to abstain from protected speech. The
28 result is self-censorship. See id.; William T. Mayton, Toward a
29 Theory of First Amendment Process: Injunctions of Speech,
30 Subsequent Punishment, and the Costs of the Prior Restraint
31 Doctrine, 67 Cornell L. Rev. 245 (1982).

1 ¶29 Without a doubt, the First Amendment applies to SCR
2 60.06(3)(c)'s interpretation and application, see Wisconsin
3 Right to Life, 551 U.S. at 476, and, therefore, SCR 60.06(3)(c)
4 is subject to strict scrutiny by this court, see id. at 464
5 (explaining that "the Government must prove that applying [the
6 regulation] . . . furthers a compelling interest and [that the
7 regulation] is narrowly tailored to achieve that interest"); see
8 also Republican Party, 536 U.S. at 774-75. Under strict
9 scrutiny, SCR 60.06(3)(c) can be constitutionally applied "only
10 if it is narrowly tailored to further a compelling interest."
11 Wisconsin Right to Life, 551 U.S. at 476.

12 ¶30 Supreme Court Rules are subject to the rules of
13 statutory construction. Filppula-McArthur, 241 Wis. 2d 110,

14 ¶32. Accordingly, we begin with the language of the rule.
15 State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58,
16 ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Context is also an
17 important consideration in rule interpretation. See Burbank
18 Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶26, 294 Wis. 2d
19 274, 717 N.W.2d 781. That this rule operates in the context of
20 judicial elections is important because it affects core
21 political speech, which enjoys the "fullest and most urgent"
22 protection under the First Amendment. Wisconsin Right to Life,
23 551 U.S. at 469; Buckley, 424 U.S. at 15.

24 ¶31 The Commission alleges no violation of the second
25 sentence of SCR 60.06(3)(c); rather, the Commission claims
26 Justice Gableman violated the first sentence of SCR 60.06(3)(c),
27 which provides:

1 A candidate for judicial office shall not knowingly or
2 with reckless disregard for the statement's truth or
3 falsity misrepresent the identity, qualifications,
4 present position, or other fact concerning the
5 candidate or an opponent.

6 The Panel interpreted SCR 60.06(3)(c), and in so doing, it
7 compared the first sentence of SCR 60.06(3)(c), which is phrased
8 in mandatory terms, and the second sentence of SCR 60.06(3)(c),
9 which is phrased in aspirational terms.¹⁴

10 ¶32 The second sentence of SCR 60.06(3)(c) addresses
11 statements that although true, are misleading or likely to
12 confuse. It must regulate conduct that does not fall within the
13 parameters of the first sentence, to avoid rendering the second
14 sentence mere surplusage.¹⁵ Therefore, to violate the first
15 sentence, the statement must be false because a true statement
16 that misleads falls within the second sentence of SCR
17 60.06(3)(c).

18 ¶33 Two members of the Panel concluded that because each
19 of the statements in the advertisement was true, no violation
20 occurred.¹⁶ Stated otherwise, those Panel members determined
21 that SCR 60.06(3)(c) does not regulate objectively true
22 statements. We agree with that interpretation of the rule.

¹⁴ SCR 60.06(3)(c) cmt. (explaining that "[t]he second sentence is aspirational" and "[t]he remaining standards are mandatory").

¹⁵ We interpret rules to avoid surplusage. See Hutson v. Wisconsin Pers. Comm'n, 2003 WI 97, ¶49, 263 Wis. 2d 612, 655 N.W.2d 212.

¹⁶ Panel Decision, 14.

1 ¶34 To explain further, the Panel's interpretation
2 comports with the requirements of the First Amendment as well as
3 generally accepted principles of statutory interpretation. This
4 is so because defining "truth" as a statement that is
5 objectively true, without regard to any effect the statement may
6 or may not have on the hearer, narrowly tailors the rule as
7 strict scrutiny requires.¹⁷

8 ¶35 Defining "truth" as a statement that is objectively
9 true also accomplishes at least three other important First
10 Amendment goals: (1) it limits the rule's potential to be
11 enforced as an effective prior restraint of speech, see Citizens
12 United, 130 S. Ct. at 892; (2) it removes uncertainty from the
13 rule, thereby reducing the propensity for self-censorship, i.e.,
14 the chilling of political speech, see id. at 895-96; and (3) it
15 promotes uniform application of the rule because the speaker is
16 not at the mercy of the hearer's understanding, see Wisconsin
17 Right to Life, 551 U.S. at 469.

18 ¶36 The Commission asserts a television advertisement run
19 by Justice Gableman's campaign committee "directly implied and
20 was intended to convey the message that action or conduct of

¹⁷ The Abrahamson writings repeatedly rely on defamation cases. In so doing, the writings fail to recognize that civil defamation cases do not employ strict scrutiny as part of the analysis. However, subjecting the governmental regulation of speech to strict scrutiny is a foundational principle that a proper First Amendment analysis requires when the government is seeking punishment for an alleged violation of its regulation. Federal Elections Comm'n v. Wisconsin Right to Life, 551 U.S. 449, 464 (2007).

1 Louis Butler enabled or resulted in [Reuben] Mitchell's release
2 and Mitchell's subsequent commission of a criminal
3 molestation."¹⁸ The Commission fundamentally misunderstands the
4 test required by the United States Supreme Court for
5 governmental regulations of campaign speech. Its
6 misunderstanding of the appropriate test leads the Commission to
7 attempt to punish speech not because the statements were untrue
8 but because they "implied" or "intended to convey" a particular
9 message. To do what the Commission attempts is constitutionally
10 impermissible; it is prohibited by the First Amendment. Let us
11 explain more fully.

12 ¶37 In Wisconsin Right to Life, the United States Supreme
13 Court mandated the use of an objective standard when evaluating
14 speech to which a governmental regulation was being applied.
15 Id., 551 U.S. at 469. The required objective standard does not
16 consider the intent of the speaker or the effect of the speech
17 on the hearer. Id. (explaining that "the proper standard for an
18 as-applied challenge . . . must be objective, focusing on the
19 substance of the communication rather than amorphous
20 considerations of intent and effect").

21 ¶38 Furthermore, United States Supreme Court precedent
22 prohibits applying SCR 60.06(3)(c) in a way that considers what
23 a hearer thinks the campaign speech means. See Citizens United,
24 130 S. Ct. at 896 (explaining that the First Amendment protects

¹⁸ Commission complaint, ¶11 (emphasis added).

1 against government officials "por[ing] over each word of a text
2 to see if, in their judgment, it accords with the
3 [regulation]"). However, that is exactly what the Commission
4 has done.

5 ¶39 The Commission admits that each statement made in the
6 advertisement is true. All parties agree that the First
7 Amendment prohibits punishing truthful speech. See Wisconsin
8 Right to Life, 551 U.S. at 467-68. That should be the end of
9 the discussion. However, rather than acceding to this
10 foundational First Amendment principle, the Commission attempts
11 to redefine what "true" means. The Commission does so through
12 its interpretation of the advertisement as statements that
13 "implied and w[ere] [] intended to convey" an untrue message
14 about Louis Butler.¹⁹

15 ¶40 Wisconsin Right to Life repeatedly explains that the
16 court has rejected a First Amendment test of campaign speech
17 that considers the intent of the speaker. Id.

18 For the reasons regarded as sufficient in
19 Buckley, we decline to adopt a test for as-applied
20 challenges turning on the speaker's intent to affect
21 an election. . . . The test should also "reflect our
22 profound national commitment to the principle that
23 debate on public issues should be uninhibited, robust,
24 and wide-open." A test turning on the intent of the
25 speaker does not remotely fit the bill.

26 Id. (emphasis added) (quoting Buckley, 424 U.S. at 14 (further
27 internal quotes and citation omitted)). The Supreme Court

¹⁹ Id.

1 explained that considering the speaker's intent could lead to
2 "the bizarre result that identical ads aired at the same time
3 could be protected speech for one speaker, while leading to
4 criminal penalties for another." Id. at 468.

5 ¶41 Wisconsin Right to Life also reaffirmed Buckley's
6 holding that First Amendment campaign speech cannot be limited
7 by the hearers' understanding of what was said, rather than
8 evaluating the words actually spoken. As the Supreme Court
9 related:

10 Buckley also explains the flaws of a test based
11 on the actual effect speech will have on an election
12 or on a particular segment of the target audience.
13 Such a test "puts the speaker . . . wholly at the
14 mercy of the varied understanding of his hearers."
15 . . . Litigation on such a standard may or may not
16 accurately predict electoral effects, but it will
17 unquestionably chill a substantial amount of political
18 speech.

19 Id. at 469 (emphasis added) (quoting Buckley, 424 U.S. at 43).
20 Accordingly, because the proper test for an as-applied challenge
21 to governmental regulation of political campaign speech "must
22 give the benefit of any doubt to protecting rather than stifling
23 speech," it cannot be limited by a hearer's interpretation. Id.
24 To apply the governmental regulation broadly so as to encompass
25 what a hearer may infer from the statement, as the Commission
26 has done, contravenes the mandate of strict scrutiny that
27 regulations of speech must be narrowly tailored as they are
28 applied. Id.

1 ¶42 The Commission asserts we must "interpret" the
2 statements based on the "context in which [they were] made."²⁰
3 The Commission relies on various defamation cases "for guidance
4 in determining that the Advertisement contains a false statement
5 of fact."²¹ The Commission's reliance on defamation cases for
6 support in defining that the statements in the advertisement are
7 false is misplaced. This is so because the Commission employs a
8 broad interpretation and application of SCR 60.06(3)(c),
9 contrary to strict scrutiny, and also because the test for
10 determining whether a statement is false is different in
11 defamation cases than it is in governmental restraint cases.
12 Compare New York Times, 376 U.S. at 267, with Wisconsin Right to
13 Life, 551 U.S. at 469.

14 ¶43 Our position that defamation principles should not be
15 applied to SCR 60.06(3) also is supported by the plain meaning
16 of SCR 60.06(3)(c). To explain, while SCR 60.06(3)(c) applies
17 to statements that one candidate makes about another candidate,
18 it also applies to statements that a candidate makes about
19 himself or herself. Defamation cases can have no relevance to

²⁰ April 16, 2010 statement of James Alexander at oral argument before this court.

²¹ Commission brief in chief, 12. The Abrahamson writings fall into the same quagmire because of their reliance on civil defamation cases where the effect of the statement on the hearer is not only a permissible part of the analysis of the claim, it is a required part. See, e.g., Milkovich, 497 U.S. at 20 n.7.

1 an alleged SCR 60.06(3)(c) violation based on an untruthful
2 statement a candidate makes about himself or herself.

3 ¶44 The Supreme Court's discussion of false statements in
4 civil defamation cases is not appropriate to engraft onto cases
5 addressing governmental regulations of political speech. This
6 is so for at least three reasons: (1) in defamation cases, the
7 falsity of the statement is interwoven with the effect of the
8 statement on the hearer, Milkovich, 497 U.S. at 20 n.7; (2) in
9 governmental regulation of political speech cases, we are
10 prohibited from considering the effect of the speech on the
11 hearer, Wisconsin Right to Life, 551 U.S. at 469; and (3) civil
12 defamation cases arise from a private right of action where the
13 plaintiff's right to recover for damages to his good name is
14 balanced with the speaker's defense under the First Amendment,
15 without concerns that a governmental regulation will chill
16 constitutional speech.²²

17 ¶45 A United States Supreme Court defamation decision
18 provides a helpful example, demonstrating how the analysis of
19 whether a statement is false in a defamation case differs from
20 the analysis of whether a statement is false in a governmental
21 regulation of political speech case. In Milkovich, the Supreme
22 Court was asked to decide whether a statement expressed as an
23 opinion was protected from prosecution as defamation.
24 Milkovich, 497 U.S. at 3. There, the Lorain Journal published

²² See supra ¶¶20-23 (discussing defamation cases).

1 an article "implying that petitioner Michael Milkovich, a local
2 high school wrestling coach, lied under oath in a judicial
3 proceeding." Id.

4 ¶46 The defamation claim in Milkovich required proof that
5 the published statement was false and also that it lowered
6 Milkovich in the esteem of others. Id. at 11. The Supreme
7 Court noted that because Milkovich's claim was based on
8 defamation, the issue of falsity was interwoven with the
9 defamatory nature of the statement. Id. at 20. As the Supreme
10 Court has explained for defamation claims, "the issue of falsity
11 relates to the defamatory facts implied by a statement." Id. at
12 20 n.7. Therefore, in order to prove that a statement is
13 defamatory, the defamatory effect on a reasonable hearer must be
14 shown. Id. at 20. Accordingly, in defamation suits,
15 implications from the statements actually made are discussed
16 because of the requirement to prove that the statements had a
17 defamatory effect on the hearer.

18 ¶47 The evaluation of whether a statement is false when
19 the potential for restraint of political speech is at issue is
20 much different. When a governmental regulation of speech
21 results in the government's seeking to punish the speech that it
22 sought to regulate, the United States Supreme Court has
23 precluded consideration of the effect of the speech on the
24 hearer. Wisconsin Right to Life, 551 U.S. at 469 (explaining
25 that "a test based on the actual effect speech will have . . .
26 puts the speaker . . . wholly at the mercy of the varied
27 understanding of his hearers"). Rather than considering the

1 effect of the speech on others, an objective test for the
2 truthfulness of the statement is applied. Id. Stated
3 otherwise, the alleged falsity when governmental regulation of
4 speech is at issue is not related to facts that may be implied
5 by the statement. See id. Furthermore, when a civil defamation
6 claim is under review, strict scrutiny is not part of the
7 analysis, yet when the government regulates campaign speech,
8 strict scrutiny forms the foundation for the constitutional
9 analysis. Buckley, 424 U.S. at 75.

10 ¶48 We are bound to follow the directives of the United
11 States Supreme Court's First Amendment jurisprudence as we apply
12 SCR 60.06(3)(c). Republican Party clearly establishes that
13 candidates for judicial office have First Amendment rights that
14 codes of judicial conduct may not transgress. Republican Party,
15 536 U.S. at 788. Accordingly, we apply an objective test in our
16 review of whether the statements made are false statements of
17 fact. We review the words actually used in the advertisements.
18 We do not apply "amorphous considerations of intent and effect."
19 Id. Furthermore, the United States Supreme Court has instructed
20 that courts are to apply governmental regulations in a way that
21 will preserve their constitutionality. Citizens United, 130
22 S. Ct. at 892.

23 ¶49 We conclude that the statements in the campaign
24 advertisement were objectively true and therefore, they did not
25 violate SCR 60.06(3)(c). Were we to conclude that objectively
26 true statements can be punished for what the government asserts
27 they imply or for the alleged effect they may have on some

1 hearer, we would violate the command of strict scrutiny that the
2 regulation be narrowly construed and applied. We follow the
3 directives of the United States Supreme Court in our decision,
4 as we must.

5 C. Burden of Proof

6 ¶50 The Commission commenced this original action²³ by
7 filing a complaint against then-Judge Gableman with the clerk of
8 the supreme court, pursuant to Wis. Stat. § 757.85(5). In so
9 doing, the Commission assumed the obligation to prosecute the
10 complaint, § 757.85(6), and was given the burden to prove the
11 complaint as set out in Wis. Stat. § 757.89. Section 757.89
12 requires that a complaint alleging judicial misconduct "be
13 prove[d] to a reasonable certainty by evidence that is clear,
14 satisfactory and convincing."

15 ¶51 Wisconsin Stat. § 757.91, entitled "Supreme court;
16 disposition," assists us in determining how the facts are
17 established. Section 757.91 provides as follows:

18 The supreme court shall review the findings of fact,
19 conclusions of law and recommendations under s. 757.89
20 and determine appropriate discipline in cases of
21 misconduct. . . . The rules of the supreme court
22 applicable to civil cases in the supreme court govern
23 the review proceedings under this section.

24 ¶52 In this case, there is no dispute by either party
25 about the Panel's findings of fact. On review, we employ the
26 rules applicable to civil proceedings and we accept the Panel's

²³ The Wisconsin Supreme Court has appellate and original jurisdiction. Wis. Const. art. VII, § 3(2).

1 findings of fact unless they are clearly erroneous. No party
2 contends the Panel's fact findings are clearly erroneous or that
3 there is any need for further fact-finding. Rather, both
4 parties accept the Panel's findings of fact as the facts upon
5 which our ultimate decision is to be made.

6 ¶53 We three justices have concluded that based on the
7 undisputed facts before us, the Commission has failed to prove
8 the allegations in its complaint by evidence that is clear,
9 satisfactory and convincing as Wis. Stat. § 757.89 obligates the
10 Commission to do. When a party has not met its required burden
11 of proof, dismissal of the complaint is required by law. Wis.
12 Stat. § 757.89; see Seraphine, 44 Wis. 2d at 65.

13 ¶54 This case has not been dismissed because Chief Justice
14 Abrahamson, Justice Bradley and Justice Crooks refuse to apply
15 the burden of proof to the Commission that the legislature
16 specifically requires in § 757.89. They refuse to follow the
17 law, even though it is apparent that the Commission has not met
18 its burden of convincing four members of this court that Justice
19 Gableman violated SCR 60.06(3)(c), and even though the

1 Commission agrees that the facts found by the Panel are all
2 true.²⁴

²⁴ Instead of applying the burden of proof required by Wis. Stat. § 757.89, Chief Justice Abrahamson, Justice Bradley and Justice Crooks suggest that the complaint should be returned to the Commission so that the Commission can now request a jury trial. Abrahamson writings at ¶¶15-17. This suggestion passes belief. Juries determine facts and the facts of this matter are not in dispute, by either the Commission or Justice Gableman. Furthermore, no party has asserted that the facts as found by the Panel should be supplemented.

A hearing before a jury panel is not a legal option. This is so because Wis. Stat. § 757.87(1) requires that any request for a hearing before a jury panel must have been made by the vote of a majority of the members of the Commission "before the commission files a formal complaint." § 757.87(1) (emphasis added). Such votes "shall be recorded and shall be available for public inspection under [Wis. Stat.] s. 19.35." Id. The Commission did not request a hearing before a jury panel; the Commission chose a hearing before a three-judge panel, as it had the right to do. § 757.87(1).

In addition, the Abrahamson writings are not forthright in their representations to the public about the availability of a hearing before a jury panel. Their writings Gerry-rig Wis. Stat. § 757.87(1) by eliminating words from the statute to make it appear that their suggestion of a jury panel is reasonable. In that regard, it is worth reading the actual statute, so that a comparison can be made with the Abrahamson writings' representation, see ¶15 n.9, and what actually is written in the statute. Section 757.87(1) provides:

After the commission has found probable cause that a judge or circuit or supplemental court commissioner has engaged in misconduct or has a permanent disability, and before the commission files a formal complaint or a petition under s. 757.85(5), the commission may, by a majority of its total membership not disqualified from voting, request a jury hearing. If a jury is not requested, the matter shall be heard by a panel constituted under sub. (3). The vote of each member on the question of a jury request shall be recorded and shall be available for

(continued)

1 ¶55 The Abrahamson writings also repeatedly try to shift
2 the focus of the reader to a discussion of summary judgment,
3 when no party has moved this court for summary judgment.²⁵ This
4 is not an appellate review process in which we are engaged,
5 where we review motions made and decided by a previous court.
6 This complaint was filed with the Wisconsin Supreme Court; it is
7 a case of original jurisdiction. No one has moved this court
8 for summary judgment. The Abrahamson writings' attempt to fog
9 the issues actually presented with their summary judgment ploy
10 is unworthy of the difficult process in which we are engaged.

11 ¶56 Applying the burden of proof set out by the
12 legislature in Wis. Stat. § 757.89, requires dismissal of the
13 complaint. Other courts have dismissed actions when the party
14 who had the burden of proof garnered only an evenly divided
15 court. For example, in In re Isserman (Isserman I), 345 U.S.
16 286 (1953) the United States Supreme Court was equally divided
17 when the Court was confronted with whether Isserman, an attorney
18 convicted of misconduct and disbarred by a state supreme court,
19 should be disbarred by the United States Supreme Court as well.

public inspection under s. 19.35 after the formal
complaint or the petition is filed.

²⁵ The Abrahamson writings also mischaracterizes our opinion
as "granting summary judgment." Abrahamson writings, ¶9. No
party moved this court for summary judgment and we three
justices are not ruling on a motion for summary judgment.
Because this is a case of original jurisdiction, we are not
reviewing a summary judgment motion made to the Panel. We have
independently reviewed the record, including the basis for the
findings of fact made by the Panel, and the applicable law.

1 When the Isserman matter was first presented to the Supreme
2 Court, the rule provided that Isserman be disbarred unless "he
3 shows good cause to the contrary within forty days." Id. at
4 287. The Supreme Court was equally divided on the issue and
5 resolved the division based on Isserman's failure to meet his
6 burden to prove good cause:

7 The order of the Court placed the burden upon
8 respondent to show good cause why he should not be
9 disbarred. In our judgment, he has failed to meet
10 this test. An order disbaring him from practice in
11 this Court should issue.

12 Id. at 290.

13 ¶57 Less than one year later, on rehearing, the Supreme
14 Court vacated the order entered in Isserman I. In re Isserman
15 (Isserman II), 348 U.S. 1 (1954). The Court noted that on
16 April 6, 1953, "an order was entered disbaring Isserman from
17 the practice of law in this Court pursuant to . . . this Court's
18 Rules then in effect." Id. at 1. However, at the time of
19 Isserman II, the governing rule had been amended such that "'no
20 order of disbarment will be entered except with the concurrence
21 of a majority of the justices participating.'" Id. (quoting
22 Supreme Court Rule 2). Because it was no longer Isserman's
23 burden to prove why he should not be disbarred, the previous
24 order of disbarment was set aside. Id. At the United States
25 Supreme Court level, the party who had the burden of proof lost
26 whenever that burden was not met.

27 ¶58 In In re Apportionment of Michigan Legislature, 140
28 N.W.2d 436 (Mich. 1966), in an original action, an equally

1 divided Michigan Supreme Court dismissed a petition alleging
2 defects in a plan of legislative apportionment. While each of
3 the justices filed a separate writing, dismissal occurred
4 because a majority of the court could not agree that the
5 alternate apportionment plan was constitutionally deficient,
6 i.e., the allegations in the petition had not been proved. Id.
7 at 468.

8 ¶59 In Lohrmann v. Arundel Corp., 500 A.2d 344 (Md. Ct.
9 Spec. App. 1985), the Maryland Court of Special Appeals was
10 confronted with "whether an evenly-divided vote by the Ann
11 Arundel County Board of Appeals operates as a denial of a
12 special exception previously granted by a zoning hearing officer
13 or as an affirmance of the hearing officer's decision." Id. at
14 345. The court concluded that Arundel Corporation had the
15 burden of proof before the Board. Because the Board was evenly
16 divided, Arundel Corporation had not met its requisite burden of
17 proof. Id. Accordingly, Arundel Corporation's request for a
18 special exception was denied. Id.

19 ¶60 The burden of proof is a foundational premise of law.
20 The person to whom that burden is assigned must meet it or
21 dismissal of the complaint is required. This is so because when
22 the burden of proof has not been met, the evidence presented is
23 held insufficient to satisfy the charge made in the complaint as
24 a matter of law. See Bubb v. Bruskey, 2009 WI 91, ¶30, 321
25 Wis. 2d 1, 768 N.W.2d 903; State v. Bonds, 2006 WI 83, ¶53, 292
26 Wis. 2d 344, 717 N.W.2d 133.

1 ¶61 The equal division of the justices in the complaint
2 pending against Justice Gableman shows that the Commission has
3 failed to carry its burden to prove to a majority of the court
4 that Justice Gableman violated SCR 60.06(3)(c) by evidence that
5 is clear, satisfactory and convincing, as Wis. Stat. § 757.89
6 requires. Accordingly, we anticipate that the Commission, or
7 the Commission and Justice Gableman together, promptly will move
8 this court to dismiss the Commission's complaint, as it is
9 apparent that it cannot be proved.

10 III. CONCLUSION

11 ¶62 Three members of the court, Justice Prosser, Justice
12 Roggensack and Justice Ziegler, agree with the recommendation of
13 the three-judge Panel that the Commission's complaint against
14 Justice Gableman must be dismissed. We agree with the Panel's
15 recommendation because after conducting an independent review of
16 the record and considering the arguments of counsel, we have
17 concluded that the Commission failed to establish, by evidence
18 that is clear, satisfactory and convincing, that Justice Michael
19 J. Gableman violated SCR 60.06(3)(c).

20 ¶63 The campaign advertisement that gave rise to the
21 Commission's complaint against Justice Gableman and the
22 governmental rule, SCR 60.06(3)(c), by which the Commission
23 seeks to punish Justice Gableman for that advertisement must be
24 examined according to the commands of the First Amendment. As
25 the United States Supreme Court has explained, the First
26 Amendment applies to judicial elections and those canons of
27 judicial ethics that states seek to apply to judicial elections.

1 Republican Party, 536 U.S. at 788. We acknowledge that the
2 advertisement run by Justice Gableman's campaign committee was
3 distasteful; however, the First Amendment prevents the
4 government from stifling speech, even when that speech is
5 distasteful. R.A.V., 505 U.S. at 380, 391. The United States
6 Supreme Court has established the parameters of the First
7 Amendment's protections of campaign speech that we have followed
8 in our decision.

9 ¶64 In order to meet the burden of proof assigned to the
10 Commission by Wis. Stat. § 757.89, at least four justices must
11 conclude that the advertisement by Justice Gableman's campaign
12 committee violated SCR 60.06(3)(c), when SCR 60.06(3)(c) is
13 interpreted and applied consistent with the commands of the
14 First Amendment. The Commission has not met that burden of
15 proof. Accordingly, we anticipate that the Commission, or the
16 Commission and Justice Gableman together, promptly will file a
17 motion to dismiss the complaint against Justice Gableman.

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