IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

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

Wisconsin Judicial Commission,

Complainant, 2008AP002458-J

v.

The Honorable Michael J. Gableman,

Respondent.

AMICUS CURIAE BRIEF OF THE CENTER FOR COMPETITIVE POLITICS

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I. Supreme Court Rule (3)(c)'s Attempt To Determine And, If Determined, To Punish "False" Speech Between Competing Candidates In An Election Campaign Under The Province of Judicial Ethics Usurps The Role Of Voters And Is Beyond The Power Of Government.

This Court must sense that there are profound problems with this case; for the Commission goes out on a limb to argue that placing four true statements side-by-side can transform truth into a "lie." *See* Reply Brief of Wisc. Judicial Comm'n. at 1. What this Court may not sense as quickly is that the new rule at issue here, Supreme Court Rule 60.06(3)(c) ("Rule (3)(c)"), is fundamentally flawed, not just when tenuously extended, but flawed at both the root and the branch.

Rule (3)(c) erects an "actual malice" standard, borrowed from *New York Times v. Sullivan,* 376 U.S. 254 (1964), through which the government will decide which of competing electoral candidates speaks "truth" and which speaks "falsity." The Rule then purports to allow the government to punish the "false" political speaker. But the actual malice standard that Rule (3)(c) adopts is for defamation actions, not political speech. And the First

Amendment denies to government the power to punish political speech between political competitors, or to say which speech is truthful upon pain of penalty. *Riley v. Nat'l Federation of the Blind,* 487 U.S. 781, 791 (1988) (it is well established that the "government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government").

"The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Welch,* 418 U.S. 323, 341 (1974). Yet, the Commission does not assert in its brief that Rule (3)(c) exists to compensate candidate Butler.

The "actual malice" standard (used in Rule (3)(c)) belongs to defamation law and serves two purposes, neither of which is to allow government to referee "truth" and punish "falsity" in election campaigns. The actual malice standard both recognizes "the legitimate state interest in compensating" public figures "for wrongful injury to reputation," and at the same time "shields the press ... from the rigors of strict liability for defamation," which was the standard for liability at common law. *Gertz*, 418 U.S. at 348

(1974). In libel, "the existence of injury is presumed from the fact of publication." *Id.* at 349. The harm inflicted by defamation includes "impairment of reputation, personal humiliation, and mental anguish and suffering." *Id.* at 350. Yet Rule (3)(c) does not exist to compensate candidate Butler for any of these injuries.

What then is the asserted interest?

If the interest is to determine "truth" in judicial campaigns, that is a role the First Amendment denies to government. If the interest is to ameliorate electoral speech for those who might prefer that judges be appointed rather than elected, to the point of "election-nullifying effect," *see Republican Party of Minn. v. White,* 536 U.S. 765, 782 (2002), the interest is unconstitutional. *Id.*[1]

If the interest is, as Rule (3)(a) would have it, to "maintain, in campaign conduct, the dignity appropriate to judicial office," it is an interest that cannot be purchased at

[1] It is worth mentioning that the new Rule at (3)(c) is based upon the "August 2003 amendments to the ABA model code of conduct." *See* Judicial Conduct Panel's Findings of Fact, Conclusions of Law, and Recommendation at 11. And this is not surprising, as the U.S. Supreme Court noted at length in its *White* opinion that the ABA "has long been an opponent of judicial elections." *White,* 536 U.S. at 787 (2002). As the Court noted, "[t]hat opposition may be well taken..., but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what elections are about." *Id.* at 787-88.

the price of the First Amendment, or by using an ethics process of penalties and punishment—administered by officials and applicable to judges—to supplant an electoral process of vigorous debate between competing judicial *candidates*, whose validity is to be determined by voters. So long as Wisconsin chooses its judges by popular election, those elections must include the unfettered speech of speakers. *White,* 536 U.S. 792 (2002). Judge Gableman's role in his election was that of candidate and campaign speaker (not judge), and the parameters for that speech are better set by political-speech jurisprudence than by ethics rules, or the jurisprudence for defamation. While the State of Wisconsin certainly possesses the "'power to dispense with [judicial] elections altogether [that power] does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *White*, 536 U.S. at 788 (quoting *Renne v. Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted). According judicial candidates the speech rights that attach to

their roles, which must include rights to unfettered speech and partisan debate, is not a violation of any judicial canon for "[j]udicial elections were generally partisan during" the "19th and [early] 20th centur[ies]," with "the movement toward nonpartisan judicial elections not even beginning until the 1870's." *White*, 536 U.S. at 785.

The First Amendment requires that we presume that "speakers, not the government, know best both what they want to say and how to say it." *Riley,* 487 U.S. at 791, *quoting Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 224 (1987); *cf. First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations). Indeed, the "very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating… speech." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring).[2]

[2] Even courts that would permit the government to opine on truth and falsity in campaign speech—courts, it should be noted, that considered the question without benefit of the U.S. Supreme Court's opinion in *White*—still would not permit the government to punish campaign speech. *See e.g. Pestrak v. Ohio Elections Commission,* 926 F.2d 573 (6th Cir. 1991).

Furthermore, candidate Butler could hardly have been surprised to see campaign advertisements coming from an opponent that cast his past professional actions in a negative light. "An individual who decides to seek government office must accept certain necessary consequences[, and] runs the risk of close public scrutiny [because] the public's interest extends to 'anything which might touch on an official's fitness for office.'" *Gertz,* 418 U.S. at 344-45 (internal citations omitted).

Speech "about the qualifications of candidates for public office" is at the core of the First Amendment. *White,* 536 U.S. at 792 (2002). And "[d]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). Indeed, the United States Supreme Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *White,* 536 U.S. at 782 (2002).[3] Overruling the recommendation of the Judicial Conduct Panel

[3] It is worth noting that federal campaign law lacks a prohibition on false statements in election campaigns, *see* 2 U.S.C. 431 *et seq*, and prohibits broadcast stations to refuse to run candidate advertising on the basis of its truth or falsity. *See* 47 U.S.C. § 315(a).

in order to adopt the Commission's argument, that four truths can make a "lie," is hardly the place for this Court to start.

II. The Regulation, Let Alone Punishment, Of Political Speech Cannot Turn On Subjective Impressions of Intent, Implication, or Effect.

To makes its case, the Commission must have this Court find that words are contained in the ad that were not placed there by the speaker. This is the only way this Court may find that the true statements in this ad constitute a "lie." Specifically, to complete the Commission's case this Court must insert into the ad, before the last sentence of the third paragraph, the following words, or their equivalent: "that caused Mitchell to be released from prison, and because he was released from prison." But the ad does *not* contain these words. The ad does *not* say: "Butler found a loophole [that caused Mitchell to be released from prison, and because he was released from prison] Mitchell went on to molest another child."

Indeed, the Commission knows these words do not appear in the ad. Therefore, the Commission leans on implications, alleging in its complaint that the advertisement "directly *implied* and was *intended* to convey a message" that

Butler's actions "enabled or resulted in" Mitchell's release from prison and the committing of a second crime. *See* Judicial Conduct Panel's Findings of Fact, Conclusions of Law and Recommendation at 13 (emphasis added). But this Court knows that constitutional protection for political speech cannot turn on questions of mere implication, or on a speaker's underlying intent, or the speech's overall effect in the minds of some listeners. *See FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449 (2007).

The Commission's case unravels when it is discovered that there is an equally plausible meaning that is conveyed by Judge Gableman's advertisement. The ad, it must be acknowledged, can as easily be read to convey this message to voters: *"Voters, understand: During his legal career, Butler may have been willing to provide aid to defendants he might reasonably have suspected were incorrigible—because time has shown that at least one defendant that Butler provided aid was later* proved *to be incorrigible. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"*

Some may not like electoral messages of this kind; appearing in judicial campaigns, and spoken of lawyers who

have defended clients in courts. And some may wish these messages were not part of our politics. But it does not follow that such messages are "false," or that they are the province of judicial ethics, or that it is the place of government to keep them, through the threat of punishment, from Wisconsin's voters while Wisconsin's judges are elected by the People.

CONCLUSION

There are constitutional problems in enforcing Rule (3)(c) in any event. But to enforce it here, where doing so would require this Court to infer a "lie" merely from the speaker's intent, or from an ad's implications or effect in the minds of some listeners, is particularly problematic. As the Judicial Conduct Panel found, Justice Gableman has not violated Rule (3)(c) as a matter of law. This Court should adopt the Panel's recommendations and dismiss the Commission's complaint with prejudice.

Dated this 16th day of April, 2010

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §§ 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,820 words.

Dated this 16th day of April, 2010

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I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §§ 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this dated. A copy of this certificate has been served with the paper copies of this brief with the Court and served on all parties of record.

Dated this 16th day of April, 2010

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