IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

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

2008AP002458-J

Wisconsin Judicial Commission,
Complainant,

v.

The Honorable Michael J. Gableman,
Respondent.

ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATION OF DISCIPLINE
OF THE JUDICIAL CONDUCT PANEL,
HARRY G. SNYDER, PRESIDING JUDGE

BRIEF AND APPENDIX OF THE WISCONSIN JUDICIAL COMMISSION

James C. Alexander
Attorney at Law
State Bar No.: 01013971
110 East Main Street
Suite 700
Madison, WI 53703-3328
Telephone: (608) 266-7637

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the Honorable Michael J. Gableman willfully violate SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct during his 2008 campaign for election to the Wisconsin Supreme Court and thereby engage in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a)?

Answered by the Judicial Conduct Panel: No.

II. Is SCR 60.06(3)(c) constitutional?

Not answered by the Majority. Answered No by Judge Fine's concurrence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Charges of judicial misconduct invariably generate substantial interest on the part of the public, the judiciary, and the Bar. The Judicial Commission believes that oral argument is important in deciding the issues presented in this case and will assist the Court in understanding the positions of the parties and in reaching a fair decision.

The Judicial Commission believes that the decision should be published because of its statewide importance.

STATEMENT OF THE CASE

I. Nature and Procedural Status of the Case.

This case is an original action in the Supreme Court pursuant to Wis. Stat. § 757.85(5). The Judicial Commission ("Commission") initiated the action by filing a formal complaint on October 7, 2008, alleging that the Honorable Michael J. Gableman ("Judge Gableman")when he was a circuit court judge for Burnett County Circuit Court willfully violated SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct and thus engaged in misconduct pursuant to Wis. Stat. § 757.81(4)(a).

Judge Gableman filed an answer to the complaint. A Judicial Conduct Panel ("Panel") was constituted to hear the matter and report its Findings of Fact, Conclusions of Law and Recommendation as to appropriate discipline to the Court. After each party filed a statement of facts, Judge Gableman filed a motion for summary judgment. A hearing on Judge Gableman's motion for summary judgment was held on September 16, 2009 and on November 12, 2009 the Panel filed with the Court its Findings of Fact, Conclusions of Law, and Recommendation.

The matter is now before the Court under Wis. Stat. § 757.91 for review of the Panel's report and final disposition.

II. Panel's Findings, Conclusions and Recommendation.

The Panel's Findings of Fact are stated in paragraphs numbered 1 through 21 of its report (Ap. A-6-10). The Findings of Fact are based upon the pleadings and the statements of facts submitted by the parties.

The Panel concluded that the facts alleged by the Commission do not constitute a violation of SCR 60.06(3)(c) and, accordingly, recommends that Judge Gableman's motion for summary judgment be granted and the Commission's complaint be dismissed. Judge Deininger filed a separate concurring opinion emphasizing that he found fault with the Advertisement in question because it falsely implies that Louis Butler's representation of Reuben Mitchell caused or resulted in Mitchell's release from prison and thus controverts the aspirational second sentence of SCR 60.06(3)(c). Also, in his concurrence Judge Deininger condemned the Advertisement's disdain for the role of defense counsel in the adversary system (Ap. A-17). Judge Fine wrote a separate concurring opinion respectfully disagreeing with the Majority that the Advertisement did not violate the first sentence of SCR 60.06(3)(c) but concurring in the bottom line recommendation for dismissal because of his conclusion that SCR 60.06(3)(c) does not pass constitutional muster (Ap. A-28).

The parties have agreed that the factual record established before the Panel is complete and can form the basis for review by the Court (Ap. B-1).

III. Statement of Facts.

The following Statement of Facts is from pages 6 through 10 of the Judicial Conduct Panel's Findings of Fact, Conclusions of Law and Recommendation and should be accepted (Ap. A-6-10).

1. At all times material to the Commission's complaint, the Honorable Michael J. Gableman was a circuit court judge for Burnett County, Wisconsin (Ap. A-6).

2. At all times material to the Commission's complaint, Justice Gableman was a candidate for the office of Wisconsin Supreme Court justice and thus a "candidate" for judicial office pursuant to SCR 60.01(2), Wisconsin Code of Judicial Conduct (footnote 8 omitted, Ap. A-6-7).

3. During the campaign, advisors to Justice Gableman told him that a third-party political group had released an advertisement in support of Justice Butler that suggested that Justice Gableman had "purchased his job," was a "substandard judge," and had "coddled child molesters." The advisors believed that the advertisement was very damaging to Justice Gableman's campaign and that Justice Gableman needed to respond with an advertisement that

focused on the comparative backgrounds of the two candidates, emphasizing Justice Gableman's judicial philosophy and his experience as a prosecutor compared to Justice Butler's experience as a criminal defense attorney and his willingness to represent and find legal loopholes for criminal defendants (Ap. A-7).

4. Justice Gableman's advisors wanted to air a responsive advertisement as soon as possible, and the advertisement that underlies this complaint was presented to Justice Gableman for his review (Ap. A-7).

5. Justice Gableman personally reviewed both the audio and video of the advertisement before its release. Justice Gableman was not pleased with the tone of the advertisement and he delayed the release of the advertisement while he sought to verify the accuracy of its contents (Ap. A-7).

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

Mitchell's subsequent criminal conduct and conviction (Ap. A-7-8).

7. Justice Gableman ultimately approved the advertisement as it had been originally presented to him (Ap. A-8).

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

> Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true!
>
> Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe-putting child molesters behind bars for over 100 years.
>
> Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.
>
> Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

An electronic copy of the advertisement is Exhibit A to the Commission's complaint (Ap. A-8).

9. The purpose of the advertisement was to compare and contrast the background, qualifications, and experience

of Justice Gableman with the background, qualifications, and experience of Justice Butler (Ap. A-8).

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

11. One of the issues raised by Justice Butler in Mitchell's appeal concerned the circuit court's admission of evidence that the victim had been a virgin, evidence that Butler argued should have been excluded under the rape-shield law, Wis. Stat. § 972.11(2)(b) (1985-86). The court of appeals agreed with Butler and reversed Mitchell's conviction (Ap. A-9).

12. The State sought and the supreme court accepted review of the court of appeals' decision. The supreme court agreed with the court of appeals that evidence of the victim's virginity should have been excluded pursuant to the rape-shield law. The supreme court, however, held that the error was harmless and, therefore, reversed the court of appeals decision. Mitchell's judgment of conviction and sentence were reinstated (Ap. A-9).

13. Mitchell was not released from prison during the pendency of his appeal. Because the judgment of conviction was ultimately upheld by the supreme court, Mitchell remained in prison as sentenced by the circuit court (Ap. A-9).

14. Mitchell was released from prison on parole in 1992 (Ap. A-9).

15. In 1995, Mitchell was convicted of second-degree sexual assault of a child (Ap. A-9).

16. Nothing that Justice Butler did in the course of his representation of Mitchell caused, facilitated, or enabled Mitchell's release from prison in 1992 (Ap. A-10).

17. Nothing that Justice Butler did in the course of his representation of Mitchell had any connection to Mitchell's commission of a second sexual assault of a child (Ap. A-10).

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

19. The statement in the advertisement describing Mitchell's 1985 crime, "Reuben Lee Mitchell … raped an 11-

year-old girl with learning disabilities" is true (Ap. A-10).

20. The statement in the advertisement, Butler found a loophole," is true. In Mitchell's appeal, Justice Butler successfully argued that he rape-shield law, a law designed to protect sexual assault victims, had been violated, an argument that inured to Mitchell's benefit (Ap. A-10).

21. The statement in the advertisement, "Mitchell went on to molest another child," is true (Ap. A-10).

ARGUMENT

I. The Panel's Conclusion of Law that the Advertisement Does Not Violate SCR 60.06(3)(c) is Erroneous.

A. The Advertisement Contains a False Statement of Fact Intentionally Made.

The false statement conveyed in the Advertisement is that the work of Louis Butler ("Butler") enabled or resulted in the release from prison of Reuben Mitchell ("Mitchell") and Mitchell's subsequent commission of a heinous crime. The Advertisement is carefully crafted to conflate four statements that are arguably, literally true into one lie.

Butler represented Mitchell in Butler's role as an attorney with the Office of the Public Defender. Butler represented Mitchell in his appeal and persuaded both the Court of Appeals and the Wisconsin Supreme Court that evidence in Mitchell's trial had been wrongly admitted. The supreme court, however, determined that the mistake was not sufficiently prejudicial to require a new trial and Mitchell's conviction was upheld and enforced. Mitchell, therefore, remained in prison under the original sentence. Mitchell once again raped a child years after being released on parole. Butler did nothing in the course of his representation of Mitchell that caused, facilitated, or enabled Mitchell's release from prison in 1992 or had any connection with Mitchell's commission of a second crime (Ap. A-9, Findings 10-15). This is the truth.

Before publication of the Advertisement, Judge Gableman personally reviewed both the audio and video of the Advertisement and familiarized himself with the decisions of the court of appeals and the supreme court in Mitchell's case. Judge Gableman also made himself aware of the arguments made by Butler during his representation of Mitchell and of Mitchell's subsequent criminal conduct and conviction. Judge Gableman ultimately approved the Advertisement as had been originally presented to him (Ap.

7-8, Findings 4-7). Judge Gableman knew the truth about the Mitchell case and Butler's involvement.

The first sentence of SCR 60.06(3)(c) in material part reads:

> A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent [a]. . . fact concerning . . . an opponent.

The end of the Advertisement contains the following message:

> Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.
>
> Can Wisconsin families feel safe with Louis Butler on the Supreme Court?
> (Ap. A-8, Finding 8)

The fact asserted in the Advertisement is that Butler found a loophole that put Mitchell back on the street enabling Mitchell to commit another heinous crime. It is this false fact, intentionally and purposely made, that violates SCR 60.06(3)(c).

That the purpose of the Advertisement was to misrepresent to the public that Butler's work, as a lawyer, caused Mitchell's release and subsequent crime is clear from the way the message is crafted and presented. The position of the words and sentences clearly states to the

viewer or listener that Butler did something during the course of his representation of Mitchell that permitted Mitchell to commit another crime. "Butler found a loophole. Mitchell went on to molest another child." This follows language in the first sentence of the paragraph that Butler worked to put criminals on the street. The false message in the Advertisement that the conduct of Butler, in finding a loophole, (Event A) resulted in Mitchell's commission of another crime (Event B), begs the question about Wisconsin families feeling safe with Butler on the Wisconsin Supreme Court. Only a false statement about Butler doing something that caused Mitchell's release from prison enabling him to commit another heinous crime could alarm the viewer into believing that they could not be safe with Butler on the bench.

B. The Court Must Look at the Words in the Advertisement in the Context They Were Made to Determine Whether They Misrepresent.

> Words are understood, not in isolation, but in interrelationship with other words. We understand systems of symbols, rather than single words; a word is no more to be understood without understanding its linguistic associates than a hand can be shaken without touching a body.

Black, Max. The Labyrinth of Language. New York: Prager, 1968. pp 52-53.

Words are to be understood in the context in which they are used and the meaning they are intended to express. Judge Gableman has argued that the court can only look at each sentence in the Advertisement to determine its objective, literal truth. Judge Gableman's argument has no legal support and defies common sense and human experience. In effect, Judge Gableman asks the court to put on blinders and analyze each sentence, standing alone, denuded of any context or meaning. Judge Fine is correct in his concurrence when he says that Judge Gableman's argument leads to ". . . a crabbed reading, lashed to the mast of a sentence-by-sentence literalism, and ignores the way we use language, often deriving significant meaning by implication" (Judge Fine concurrence, Ap. A-24).

Judge Fine correctly points out in his concurrence that "neither common sense nor the law permits the sculpting of literally true 'facts' into a lie," (Ap. A-24) citing a line of cases and legal treatises in support (Ap. A-24-25).

In addition to the legal support cited by Judge Fine, the court should also look to long-settled law established in defamation cases in Wisconsin for guidance in determining that the Advertisement contains a false statement of fact.

The Wisconsin Supreme Court in *Meier v. Meurer*, 8 Wis. 2d 24, 98 N.W.2d 411 (1959), says as follows: "The duty of the court at this stage is to determine whether the language used is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by plaintiffs is a natural and proper one. Woods v. Sentinel-News Co., 1935, 215 Wis. 2d 627, 629, 258 N.W.2d 166; Judevine v. Benzies-Montanye Fuel & Whse. Co., 1936, 222 Wis. 2d 512, 517, 269 N.W.2d 295, 106 A.L.R. 1443. 'The words used must be construed in the plain and popular sense in which they would naturally be understood.' Leuch v. Berger, 1915, 161 Wis. 2d 564, 570, 155 N.W.2d N.W. 148, 151. The words used must be 'reasonably interpreted.' Dabold v. Chronicle Publishing Co., 1900, 107 Wis. 2d 357, 362, 83 N.W.2d 639.

Following *Meier*, the Court again in *Frinzi v. Hanson*, 30 Wis. 2d 271, 140 N.W.2d 259 (1966), says that whether language is defamatory depends upon words being reasonably interpreted and construed in the plain and popular sense and how they would naturally be understood in the context in which they were used and under the circumstances they are uttered. *See also*, Restatement Second of Torts § 563 (1977).

Applying Wisconsin law, the Seventh Circuit Court of Appeals in *Milsap v. Journal/Sentinel*, 100 F.3d 1265 (7th

Cir. 1996), allowed the case to proceed because it implied an undisclosed defamatory fact. The statements were made in an editorial column in a newspaper to the effect that if the columnist's case was typical, the defendant "simply reneged on paying people." The Court said that the statement was actionable as being defamatory under Wisconsin law, even though the statement was arguably an expressed opinion because it implied undisclosed defamatory fact, namely, that the plaintiff had failed to pay the columnist.

The Majority's conclusion and Judge Gableman's argument that the court can only look at each sentence in the Advertisement to determine its objective, literal truth, has troubling consequences for a judicial system that relies on its integrity for the faith and confidence of the people. What the Majority and Judge Gableman are saying is that Judge Gableman should be protected from any responsibility for speech made in the course of a judicial election campaign that knowingly conveys a false fact about an opponent because he studiously and cunningly avoids saying it directly. That, in effect, constitutes lying in a judicial campaign. The court should soundly reject Judge Gableman's argument.

C. The Majority Opinion of the Judicial Conduct Panel misinterprets SCR 60.06(3)(c).

The Majority opinion of the Panel erroneously concludes that the first sentence of SCR 60.06(3)(c) only applies to statements that, standing alone, are false. To reach this conclusion the Majority states that the first sentence of the Rule speaks to the "truth or falsity" of any statement that misrepresents the identity, qualifications, present position, or other fact concerning the candidate or an opponent. From this misreading of the first sentence, the Majority says that the first section cannot be construed to apply to true statements that may mislead without making the second sentence of the Rule superfluous.

The lynchpin of the Majority's conclusion is the phrase "truth or falsity" and its use in the first sentence. But, the phrase "truth or falsity" in the first sentence is used **only** to modify the word "disregard" in the scienter part of the sentence, which says . . . "knowingly or with reckless disregard for the statement's truth or falsity." The phrase relied upon by the majority to reach its erroneous conclusion does not modify the core prohibition in the first sentence of the Rule, which is "shall not . . . misrepresent a fact." Thus, there is

nothing in the first sentence of the Rule that makes the second sentence superfluous.

In context the two sentences in SCR 60.06(3)(c) address different types of statements. The first sentence prohibits the knowing lie. The second sentence addresses statements that are true but misleading. Nothing in the first sentence requires parsing of each word or sentence of a statement in order to find a misrepresentation.

II. SCR 60.06(3)(c) is Constitutional.

A. Political Speech that is Knowingly False or Made with Reckless Disregard is Not Protected Speech.

Political speech that is false and made knowingly or with reckless disregard as to its truth or falsity is not constitutionally protected speech. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. State of Louisiana*, 379 U.S. 64 (1964). Both cases involve political speech. As stated in *Garrison* at page 75:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Reisman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at

> once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. ***' Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

The first sentence in SCR 60.06(3)(c) is unambiguous and only restricts judicial campaign speech that is knowingly false or made with reckless disregard as to the statement's truth or falsity.

Courts considering campaign rules in Michigan, Alabama, and the Federal Court of Appeals for the Eleventh Circuit have essentially determined that Code provisions similar to SCR 60.06(3)(e) are constitutional as long as they are confined to false speech made with actual malice. In *In re Chmura* 461 MICH 517, 608 N.W.2d 31 (2002), the Michigan Supreme Court struck down a much broader Code provision then SCR 60.06(3)(c) and, in its opinion, amended the Michigan provision to provide that a candidate for judicial office: "should not knowingly, or with reckless disregard, use or participate in the use of

any form of public communication that is false." 608 N.W.2d at 43.

The United States Court of Appeals for the Eleventh Circuit struck down a broadly worded Georgia rule in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). The Eleventh Circuit ruled that the Georgia rule could not withstand a First Amendment challenge because it was not narrowly tailored to serve the State's compelling interest of reserving the integrity, impartiality, and independence of the judiciary. The court said that the restrictions "must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false-i.e., an actual malice standard." 309 F.3 at 1319. A similar result was reached by the Alabama Supreme Court in *Butler v. Alabama Judicial Inquiry Commission*, 802 So. 2d 207 (Ala. 2001).

The Majority expresses its unease with the constitutional application of SCR 60.06(3)(c) to the facts of this case (Ap. A-15-16, footnote 10). The Majority cites *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 469 (2007), *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Thomas v. Collins*, 323 U.S. 516 (1945) as the source of its discomfort. Those cases, which caution against regulation of speech based upon what someone may take it to mean are not on point here.

Resolution of this case does not rely upon unexpected, or even reasonable, but unintended understanding ascribed to the speech to the listener.

Here the viewer is at the mercy of the speaker. This case is about the intentional use of selective facts, expertly positioned and communicated by video in such a way as to convey the false statement of fact that conduct of Butler was in some way responsible for Mitchell's release from prison and subsequent commission of a crime, the natural and intended meaning of the words so used. The purpose of the Advertisement is not to set forth the true facts and allow viewers to come to their own conclusion as to whether Wisconsin families could feel safe with Butler on the supreme court. Rather, Judge Gableman controlled the facts, the false message, and the method of communication so that the viewer must reach the natural, and intended, conclusion Wisconsin families can not feel safe with Butler on the supreme court because his conduct allowed Mitchell to offend again.

Judge Fine, in his concurrence, relies heavily upon *Rickert v. State of Washington,* 161 Wash. 2d 843, 168 P.3d 826 (2007). The *Rickert* majority in large part sets forth a mistaken interpretation of a long line of United States Supreme Court cases and is of dubious value. On the other hand, the dissenting opinion of four justices

correctly points out that any speech, defamatory or not, including political speech, which is knowingly false or uttered with reckless disregard for its falsity, is unprotected by the First Amendment. The dissenting opinion in *Rickert* states the unfortunate consequences of the majority opinion as follows:

> Unfortunately, the majority's decision is an invitation to lie with impunity. The majority opinion advances the efforts of those who would turn political campaigns into contests of the best stratagems of lies and deceit, to the end that honest discourse and honest candidates are lost in the maelstrom. The majority does no service to the people of Washington when it turns the First Amendment into a shield for the "unscrupulous…and skillful" liar to use knowingly false statements as an "effective political tool" in election campaigns. *See Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). It is little wonder that so many view political campaigns with distrust and cynicism.
>
> *Rickert* page 857, ¶30.

The Panel's discomfort with the constitutionality of SCR 60.06(3)(c) is unfounded. The Code provision easily passes constitutional muster as does its application to the facts of this case.

B. SCR 60.06(3)(c) Serves a Compelling State Interest of the Highest Order.

In the *In re Chmura,* 608 N.W.2d 31 (2002) and *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002) cases, the courts

recognized a compelling state interest in the protection of the integrity of the judicial system. Indeed, protecting judicial integrity is a state interest of the highest order. As recently stated by the United States Supreme Court in *Caperton et al. v. A.T. Massey Coal* Co., Inc., et al., 556 U.S. ___, 129 S.Ct. 2252, 2266-2267 (2009)

> These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:
>
> > "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (KENNEDY, J., concurring).

Preventing lying in judicial election campaigns protects not only the integrity of judicial elections, but most importantly, the integrity of the judicial system in the State of Wisconsin. Misrepresentation of fact made knowingly or with reckless disregard for the statement's truth or falsity is not protected by law because of the

extreme violence such statements inflict upon the integrity of the judicial system. This court should not allow unfettered, anything goes judicial campaign speech in Wisconsin.

CONCLUSION

The Panel's Findings of Fact should be accepted. For the foregoing reasons, the Court should reverse the Panel's Conclusion of Law, find that Judge Gableman engaged in judicial misconduct and determine the appropriate discipline consistent with the protection of the judicial system and the public.

Respectfully submitted,

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James C. Alexander
Attorney at Law
State Bar No.: 01013971
110 East Main Street, Suite 700
Madison, WI 53703-3328
(608) 266-7637

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) for a brief produced using Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 22 pages.

Dated this 8th day of January 2010.

State of Wisconsin
Judicial Commission

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James C. Alexander

CERTIFICATE OF COMPLIANCE WITH WIS. STAT.§ (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, 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 date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of January 2010.

State of Wisconsin
Judicial Commission

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James C. Alexander

APPENDIX