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.

REVIEW OF JUDICIAL CONDUCT PANEL'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION PURSUANT TO WIS. STAT. § 757.91

BRIEF OF RESPONDENT

Eric M. McLeod, SBN 1021730
MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Post Office Box 1806
Madison, WI 53701-1806
Telephone: 608.257.3501

James Bopp, Jr., Ind. # 2838-84
Anita Y. Woudenberg, Ind. #25162-64
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47803
Telephone: 812.232.2434

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

STATUTES

STATEMENT OF THE ISSUES PRESENTED

1. Does Supreme Court Rule 60.06(3)(c), Wisconsin Code of Judicial Conduct, allow the government to punish a judicial candidate for his or her speech on the grounds that factual statements, which are true, contain allegedly false implications?

Answer of the Judicial Conduct Panel: No.

2. Did the Honorable Michael J. Gableman violate Supreme Court Rule 60.06(3)(c), Wisconsin Code of Judicial Conduct, during his 2008 campaign for election to the Wisconsin Supreme Court?

Answer of the Judicial Conduct Panel: No.

STATEMENT ON ORAL ARGUMENT

Further oral argument in this matter is unnecessary. The issues presented have been fully briefed and oral argument has been conducted before the Judicial Conduct Panel ("Panel"). In the interest of judicial economy, the Court should review the Panel's recommendation without further proceedings.

STATEMENT OF THE CASE[1]

In reaching its recommendation that the Wisconsin Judicial Commission's ("Commission") Complaint should be dismissed, the Judicial Conduct Panel found that the Advertisement at issue did not contain any false statements of fact as required by SCR 60.06(3)(c). The Advertisement reads 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?

(A-8, *Panel Recommendation* at 8.)[2]

The Panel found that the statements contained in the Advertisement are true. Specifically, the Panel found as follows:

> 18. The statement in the advertisement, "Louis Butler worked to put criminals on the street" is true. As a criminal defense attorney, Justice Butler

[1] In its brief to this Court, (herafter "Comm'n Br."), the Commission has accurately described the nature and procedural status of the case. (Comm'n Br. at 1)

[2] References to "A-___" are to the Appendix attached to the Commission's Brief.

> appropriately assisted accused persons, whether they were innocent or guilty, in lessening or defeating the criminal charges lodged against them.
>
> 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.
>
> 20. The statement in the advertisement, "Butler found a loophole," is true. In Mitchell's appeal, Justice Butler successfully argued that the rape-shield law, a law designed to protect sexual assault victims, had been violated, an argument that inured to Mitchell's benefit.
>
> 21. The statement in the advertisement, "Mitchell went on to molest another child," is true.

(A-10, *Id*. at 10.)

The Commission has affirmatively stated in its brief to this Court that it does not dispute the Panel's Statement of Facts and that such factual findings "should be accepted." (Comm'n Br. at 3.) Justice Gableman also does not dispute the Panel's Statement of Facts. Accordingly, the parties are in agreement that there is no false statement of fact contained in the actual language of the Advertisement.

Despite the fact that the Commission does not dispute the Panel's clear findings, it contends that Justice Gableman violated SCR 60.06(3)(c) on the basis of alleged false *implications*. In particular, the Commission's Complaint alleges that,

> The Advertisement *directly implied and was intended to convey* the message that action or conduct of Louis Butler enabled or resulted in Mitchell's release and Mitchell's subsequent commission of a criminal molestation.

(Complaint, ¶ 11, emphasis added.)

The Panel rejected the Commission's contention that Justice Gableman violated the first, mandatory sentence of SCR 60.06(3)(c), which provides as follows:

> A candidate for a judicial office *shall not* knowingly or with reckless disregard for *the statement's truth or falsity* misrepresent the identity, qualifications, present position, or other *fact* concerning the candidate or an opponent.

(SCR 60.06(3)(c), first sentence, emphasis added.) The Panel noted that that SCR 60.06(3)(c) consists of two sentences. The second, non-mandatory sentence provides as follows:

> A candidate for judicial office *should not* knowingly make representations that, *although true, are misleading*, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.

(SCR 60.06(3)(c), second sentence, emphasis added.) The Panel correctly determined that "the allegations of the complaint fall within the scope of the second, non-mandatory, sentence of the Rule." (A-14) The Panel concluded that "because the individual statements in the advertisement were true, any false or misleading implied message of the advertisement necessarily falls within the reach of the second sentence of SCR 60.06(3)(c), for which discipline may not be imposed." (A-15)

The Panel's recommendation properly concluded that Justice Gableman did not violate the first, mandatory sentence of SCR 60.06(3)(c) and, accordingly, that the Commission's Complaint should be dismissed. This Court should adopt the Panel's recommendation.

ARGUMENT

I. THE PANEL PROPERLY DECLINED TO GO BEYOND THE ACTUAL WORDS OF THE ADVERTISEMENT.

A. By Its Own Terms, The Mandatory Provision of SCR 60.06(3)(c) Does Not Reach Inferences Or Implications Of Speech.

Supreme Court Rule 60.06(3)(c) states:

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

The plain language of SCR 60.06(3)(c) makes clear that the speech of a candidate for judicial office may only be subject to penalty if it contains a statement of fact that is false. SCR 60.06(3)(c) contains two separate provisions. The first states that a "candidate for a judicial office *shall not* knowingly or with reckless disregard for the statement's *truth or falsity* misrepresent … [a] *fact* concerning the candidate or an opponent." (SCR 60.06(3)(c), emphasis added.) This is the provision of the Rule that the Commission claims has been violated. (Complaint, ¶ 6.)

The second provision states that a "candidate for judicial office *should not* knowingly make representations that, *although true*, are *misleading* …" (SCR 60.06(3)(c), emphasis added.) The language of the second provision makes clear that the first provision applies only to *statements*

of fact that are *false*. Statements, "that, *although true*, are *misleading*" are specifically addressed in the second provision of the Rule. Thus, under well-settled rules of statutory construction, the first provision must be limited to statements that are objectively false. *Hutson v. State of Wisconsin Personnel Comm'n*, 2003 WI 97, ¶ 49, 263 Wis. 2d 612, 665 N.W.2d 212 ("When construing statutes, meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible."); *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981).

Importantly, the second provision of SCR 60.06(3)(c) is advisory ("should not"), as opposed to mandatory ("shall not"), and therefore may not be used to impose any sanction or penalty on a candidate for judicial office. Indeed, the comments to the Rule make this abundantly clear:

> *The second paragraph is aspirational. Thus, "should" is used rather than "shall."* The remaining standards are mandatory and prohibit candidates from knowingly or with reckless disregard for the truth making various specific types of misrepresentations.

(SCR 60.06(3)(c), comment.) Thus, as the Panel held, the first provision of the Rule cannot be construed to apply to allegedly false implications – or put another way, statements that although true are misleading – because to do so would render the second provision superfluous. (A-14)

In reviewing the Advertisement, the Panel focused on the truth or falsity of the actual text of the Advertisement as required by the first sentence of SCR 60.06(3)(c). The Panel concluded that the actual statements contained in the

Advertisement were true and therefore the first sentence of the Rule had not been violated. (A-15) This Court should accept the recommendation of the Panel, confirm its holding and dismiss the Commission's Complaint.

B. The Mandatory Provision of SCR 60.06(3)(c) Cannot Constitutionally Reach Inferences And Implications.

As noted above, the Panel focused on the truth or falsity of the actual text of the Advertisement. The Commission continues to advocate, as it has all along, that this Court should go beyond the actual words used in an effort to find false implications and impressions allegedly contained in the Advertisement. (Comm'n Br. at 8; *see also* Complaint ¶ 11 ("The Advertisement directly implied and was intended to convey the message that action or conduct of Louis Butler enabled or resulted in Mitchell's release and Mitchell's subsequent commission of a criminal molestation"); Comm'n Prop. Statement of Facts ¶ 10.A ("The Advertisement falsely implied and was crafted so as to falsely convey the fact that the work of Louis Butler enabled or resulted in Mitchell's release from prison and Mitchell's subsequent commission of a criminal molestation"); Comm'n Resp. to Mot. Sum. Judg. at 6 ("The Commission contends that the Advertisement falsely implied and was intentionally crafted so as to convey the fact that the work of Louis Butler enabled or resulted in Mitchell's release from prison and Mitchell's subsequent commission of a criminal molestation"); Comm'n Resp. to Mot. Sum. Judg. at 6 ("The Advertisement is carefully crafted to consolidate four statements that are arguably, literally true

into one lie"); Comm'n Resp. to Mot. Sum. Judg. at 12 ("Respondent had to know from his understanding of the Mitchell case that key facts were omitted in the Advertisement, which enabled the communication of false information")). Such reliance on alleged implications, as a basis to punish core political speech, violates the First Amendment.

1. Defamation Law Does Not Apply To Government Regulation of Core Political Speech.

The Commission, in support of its argument that the implications of Justice Gableman's political speech warrant discipline under SCR 60.06(3)(c), continues to press the point by asserting that defamation law provides guidance about what constitutes a "false fact." (Comm'n Br. at 12-14.) However, defamation law is inapplicable in the context of constitutionally protected political speech and the Commission offers no authority for the proposition that legal standards governing civil defamation claims should apply to a claim in which the government seeks to penalize core political speech. The Commission simply disregards any distinction between the two. Moreover, it ignores the controlling precedent applicable to government regulation of political speech under the First Amendment:

> "The very purpose of the First Amendment is to *foreclose public authority* from assuming a guardianship of the public mind … In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us."

Meyer v. Grant, 486 U.S. 414, 419-20 (1988) (emphasis added) (quoting *Thomas*, 323 U.S. at 545).

The Commission relies principally on *Milsap v. Journal/Sentinel*, 100 F.3d 1265 (7th Cir. 1996) for the proposition that a claim for defamation can be based on an "implied … defamatory fact." (Comm'n Br. at 13-14.) Assuming, for the sake of discussion, that a defamation claim can be based on implication, as opposed to an objective statement of fact, the Commission offers no legal basis to apply such a rule here. Instead, the Commission criticizes Justice Gableman for daring to insist that his political speech should be entitled to the protections afforded under the First Amendment:

> 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.

(Comm'n Br. at 14.) What is far more troubling is the Commission's complete and utter disregard for bedrock principles of Constitutional law articulated in United States Supreme Court decisions, which the Commission simply ignores. It is far more troubling that the state should seek to punish a political ad containing "statements that are arguably, literally true" on the grounds that those "literally true" statements "falsely implied and [were] intentionally crafted so as to falsely convey" a message not explicitly stated by the actual words. (Comm'n Br. at 8, Comm'n Resp. to Mot. Summ. Judg. at 6.) In seeking to punish that speech in this case, the Commission has assumed the authority to "substitute

its judgment as to how best to speak for that of speakers and listeners" – something the government cannot do under the First Amendment. *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 791 (1988) ("free and robust debate cannot thrive if directed by the government.")

Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). In protecting such speech, the United States Supreme Court has clearly stated that a regulation of speech "must be objective, focusing on the substance of the communication rather than amorphous considerations of *intent and effect*." *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2666 (2007) ("*WRTL*") (emphasis added) (*citing Buckley*, 424 U.S. 43-44). In the context of this case, such protections are of no lesser importance as the United States Supreme Court has clearly held that First Amendment rights are enjoyed by candidates for judicial office just as they are by others. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788, 122 S.Ct. 2528, 2538 (2002).

Statutes that seek to limit, or have the effect of limiting political speech are to be strictly and narrowly construed. See *Republican Party of Minnesota*, 536 U.S. at 781 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222-223, 109 S.Ct. 1013 (1989), "'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges.") While a statute, properly construed, may

legitimately proscribe speech that is not constitutionally protected under the First Amendment, the United States Supreme Court has cautioned that such statutes must be narrowly construed in order to avoid a chilling effect on protected speech resulting from doubt as to the statute's scope or the limits on what it proscribes. See *Watts v. United States*, 394 U.S. 705, 707, 89, S.Ct. 1399, 1401 (1969) ("… a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind."); *Virginia v. Black*, 538 U.S. 343, 365, 123 S.Ct. 1536, 1551 (2003) (in the absence of a narrow construction of statutory provision prohibiting certain expression, "the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.")

Watts involved a federal statute that prohibited the making of threats against the President or other federal officers. The petitioner Robert Watts was accused of having violated this statute in the context of protesting his possible induction into the armed forces by stating, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 1401. In construing the statute as it related to "threats" against the President, the United States Supreme Court stated:

> We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues

> should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964)). While the Supreme Court held that the statute itself was not facially unconstitutional, it found that a proper construction of the statute must be narrowly limited to clear and direct threats of actual harm. To apply the statute to speech that merely allowed for an inference or implication of a threat, without more, would run afoul of the First Amendment.

The United States Supreme Court also addressed the importance of strictly construing a statute which impacts or limits political speech in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976). *Buckley* involved a challenge to the constitutionality of the Federal Election Campaign Act, which, in part, imposed certain campaign expenditure limits. One of the provisions of the Act, Section 608(e)(1), stated that "[n]o person may make any expenditure … *relative to a clearly identified candidate* during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." *Id.*, 424 U.S. at 39 (emphasis added). The Court held that the phrase "expenditure … relative to a clearly identified candidate" was "so indefinite" that, by itself, "fail[ed] to clearly mark the boundary between permissible and impermissible speech …" *Id.*, 424 U.S. at 41. Accordingly, the Court held that this phrase must be

limited to mean "advocating the election or defeat of a candidate." *Id*., 424 U.S. at 42.

Importantly, however, the Court noted that such a construction alone was still insufficient to pass constitutional muster. The Court held that a bright-line test was required which limited application of the provision to "communications that include *explicit words* of advocacy of election or defeat of a candidate …." *Id*., 424 U.S. at 43 (emphasis added). In holding that such a strict, bright-line test was required, the Court clearly established that, under the First Amendment, the meaning of political speech must be understood objectively according to the actual language used. In the context of regulating or restricting political speech, such speech cannot be construed according to what a particular hearer believes is implied by it. A contrary rule would put "the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

2. The Government Cannot Regulate Political Campaign Speech On the Basis of Listener Perceptions.

The foregoing Supreme Court authority makes clear that SCR 60.06(3)(c) cannot be construed so as to apply to an allegedly false implication that a listener claims is contained in, or intended by the actual language at issue. The rule must be strictly limited to objectively false statements contained in the language itself. In the absence of such a bright-line

standard, the effect of SCR 60.06(3)(c) would be to chill constitutionally protected speech – something that the First Amendment does not permit. In the absence of such a bright-line standard, candidates for judicial office would be forced to refrain from freely exercising their First Amendment rights in the context of a campaign for fear of crossing some ill-defined, ambiguous line as to what is prohibited.

If SCR 60.06(3)(c) were construed so as to punish a judicial candidate's speech because of its alleged implications, as the Commission seeks to advocate in this case, enforcement of the Rule would be dependent on the perceptions of a listener: "it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley v. Valeo,* 424 U.S. at 43 (*quoting Thomas v. Collins,* 323 U.S. 516, 535 (1945)). Such a standard would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result" that would "unquestionably chill a substantial amount of political speech." *WRTL*, 127 S.Ct. at 2666. In short, if SCR 60.06(3)(c) were applied to not only the actual words spoken but also to the alleged implications of such speech, the Rule would be unconstitutional. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). This Court must avoid construing SCR 60.06(3)(c) in a manner that renders it unconstitutional. *Betthauser v. Medical Protective Co.*, 172 Wis. 2d 141, 150, 493 N.W.2d

40 (1992) (citing *Lewis Realty v. Wisconsin R.E. Brokers' Board*, 6 Wis. 2d 99, 108, 94 N.W.2d 238 (1959))[3]

The Commission's argument that the Court should "look at the words … in the context they were made" (Comm'n Br. at 11) is nothing more than an invitation to judge speech according to what a particular hearer believes is implied by it. While the Commission relies on defamation cases in an attempt to advance the argument that the "duty of the court … is to determine whether the language used is *capable of conveying* a defamatory meaning …" (*Id*. at 13), the standards applicable to government regulation of core political speech are much stricter.[4] Rather than examining the

[3] Expanding the scope of SCR 60.06(3)(c) to include allegedly false implications would result in a form of prior restraint – a particularly egregious form of speech regulation. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67, 70 (1963) (finding that a Commission's advice to booksellers of their rights rose to the level of informal censorship warranting injunction). *See also INTL v. Shepard*, 463 F. Supp. 2d 879, 890 (N.D. Ind. 2006), overruled on other grounds 507 F.3d 545 (7th Cir. 2007) ("in all but a few narrow situations, application of the Canon will require ad hoc analysis and advice from the Commission each time there is a question about the permissibility of a candidate's statement."). Because implications are subjective, a candidate would need to first check with the Commission to ensure his or her speech is proper – that is, not susceptible to an allegedly false inference – before exercising the right to speak.

[4] It should be noted that, in his concurrence, Judge Fine relies solely on defamation cases to support his conclusion that construing the Advertisement objectively, on the basis of the actual words used, "ignores the way we use language, often deriving significant meaning by implication." (A-23 to A-24) Respectfully, Judge Fine's conclusion is in error as it relates to construing language in the context of government regulation of political speech. Ultimately, however, Judge Fine reaches the same result advocated by Respondent when he concludes that the government should have no authority in the first instance to determine whether campaign speech is true or false. (A-29)

explicit words used in the Advertisement, the Commission argues that "the *purpose* of the Advertisement" was to convey a message that is not actually stated, namely "that Butler's work, as a lawyer, caused Mitchell's release" from prison. (*Id*. at 10.)

The central problem with engaging in this type of analysis – or rather speculation – is that it allows the recipient of a message to determine what the speaker must have meant. To penalize the speaker on the basis of such a standard is to put "the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43 (citation omitted). It is thus a constitutionally impermissible exertion of government control over political speech. *Id*.

Furthermore, if SCR 60.06(3)(c) were construed so as to apply to inferences drawn by a particular listener or viewer, it would require the speaker to predict all allegedly false inferences that could be drawn in order for the speaker to ensure that he or she was not inadvertently running afoul of the Rule. This would be an impossible standard to satisfy and, in the context of political speech, would impose limitations on protected activity in contravention of the First Amendment.

Courts in other states have squarely rejected the position advocated by the Commission in this case. *See Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (stating that only false statements can be constitutionally prohibited); *Butler v. Alabama Judicial Inquiry Comm'n*, 802

So.2d 207, 218 (Ala. 2001) (*Butler II*) (requiring demonstrably false information for a violation of Alabama Canon 7B.(2)); *In Re Chmura,* 608 N.W.2d 31, 43 (Mich. 2000) (*Chmura I*) (construing Michigan Canon 7B(1)(d) to only apply to false statements rather than misleading or deceptive statements to save it from a finding of unconstitutionality). It is important to note that unlike SCR 60.06(3)(c), the language of the judicial code provisions at issue in these cases from Michigan, Georgia and Alabama explicitly applied to speech that, although true, was alleged to be deceptive or misleading. Here, as discussed above, the two provisions of SCR 60.06(3)(c) recognize the distinction between objectively false statements of fact and statements that, although true, are misleading. Ironically, the Commission in this case advocates an application of the first provision of SCR 60.06(3)(c) that is contrary to its plain language, let alone contrary to the First Amendment.

In *Chmura I*, the Supreme Court of Michigan considered Michigan Code of Judicial Conduct Canon 7(B)(1)(d) which provided that a candidate for judicial office,

> should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.

Chmura I, 608 N.W.2d at 36. The Michigan Supreme Court held that "Canon 7(B)(1)(d) greatly chills debate regarding the qualifications of candidates for judicial office" because

"[a] candidate for judicial office faces adverse consequences for statements that are not false, but, rather, are found misleading or deceptive." *Id.* at 42. Accordingly, the Court held that the provision was unconstitutional under the First Amendment. *Id*. at 43. The Court further exercised its authority to "narrow Canon 7(B)(1)(d) to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is *false*." *Id*. (emphasis added) The Court concluded:

> We conclude that limiting the reach of Canon 7(B)(1)(d) to *known false public communications* made with reckless disregard for their truth or falsity renders the canon narrowly tailored to serve the state's interest in preserving the integrity of elections and the judiciary. False statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* [*v. Hartlage*, 456 U.S. 45,] 60, 102 S.Ct. 1523. By limiting the scope of the canon to known and reckless false public statements, the canon provides the necessary "breathing space" for freedom of expression. *Id*. at 61, 102 S.Ct 1523.

Id. at 541-542, 608 N.W.2d at 43.

The *Weaver* and *Butler II* cases dealt with judicial code provisions nearly identical to the one in *Chmura I.* The courts in those cases reached the same result in holding that the provisions at issue were unconstitutional under the First Amendment. The Eleventh Circuit Court of Appeals, specifically relying on the Alabama Supreme Court's decision in *Butler II*, noted that,

> [T]he Alabama Supreme Court held that the canon [at issue in *Butler II*] violated the First Amendment because, like the statute in *Brown* [*v. Hartlage*, 456 U.S. 45, 102 S.Ct. 1523], it prohibited false statements negligently made and true statements that a reasonable person would find misleading or deceptive. *Butler II*, 802 So.2d at 218. The court eliminated the language in

> the canon prohibiting negligent misstatements and misleading true statements so that the canon only applied to knowing or reckless false statements.

Weaver, 309 F.3d at 1322.

The first provision of SCR 60.06(3)(c), by its own terms, applies only to statements of fact that are objectively false. Yet, even if there were any doubt about the proper construction of that rule, there can be no doubt that the First Amendment would not allow for a different construction. Because the Advertisement at issue does not contain any objectively false statements of fact, (A-15, *Panel Recommendation* at 15), the Advertisement does not violate the mandatory provision in SCR 60.06(3)(c).

C. SCR 60.06(3)(c) Would Be Unconstitutional If Applied To The Advertisement.

If this Court were to disregard the Panel's recommendation, finding that SCR 60.06(3)(c) applies to the Advertisement and that Justice Gableman violated the Rule based upon allegedly false implications, SCR 60.06(3)(c) would be unconstitutional because of this Court's role in determining whether his speech is true or false. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." *Meyer v. Grant,* 486 U.S. 414, 419-20 (1988). As such, the state cannot "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." *Riley v. Nat'l Fed'n of Blind, Inc.,* 487 U.S. 781, 791 (1988).

In the similarly postured case of *Rickert v. State*, 168 P.3d 826 (Wash. 2007), the Washington Supreme Court stated that "[t]he notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment." *Rickert v. State*, 168 P.3d 826, 827 (Wash. 2007). In *Rickert,* the Washington Supreme Court reviewed a cause of action filed by the Public Disclosure Commission against a candidate who, allegedly, with actual malice sponsored "Political advertising or an electioneering communication that contain[ed] a false statement of material fact about a candidate for public office." RCW 42.17.530(1)(a). The court found that provision failed strict scrutiny and as such, was unconstitutional under the First Amendment. *Rickert,* 168 P.3d at 856. A similar result would be warranted here.

Content-based regulation of protected political speech is subject to strict scrutiny. *Burson v. Freeman,* 504 U.S. 191, 198 (1992). The state must demonstrate that the provision at issue "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Under such scrutiny, it fails.

First, SCR 60.06(3)(c) does not serve a compelling interest. It does not serve an interest in compensating candidates for reputation injury because it does not include a provision for damages nor require proof of harm to that candidate's reputation. *Rickert,* 168 P.3d at 851.

Perhaps, like the provision at issue in *Rickert*, the interest SCR 60.06(3)(c) is designed to preserve the integrity of the election process. However, that interest is not reflected in the Rule. While the state has an interest in preventing direct harm to elections by, for example, protection the election poll area, *Burson*, 504 U.S. at 199, or by avoiding voter confusion through avoiding ballot overcrowding, *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), SCR 60.06(3)(c) does not prevent such direct harms. Instead it is in direct conflict with First Amendment principles fostering robust political debate and condemning government censorship.

Second, in the event that either of these interests were compelling, SCR 60.06(3)(c) is not narrowly tailored to serve them. SCR 60.06(3)(c) does not require proof of harm to a candidate's reputation, a necessary component if the interest is indeed to compensate that candidate for such harm. *Rickert*, 168 P.3d at 851. And SCR 60.06(3)(c) includes true speech a candidate states about himself or her opponent within its reach, the negative effect of which on the integrity of the judicial process is highly dubious. As to these interests, SCR 60.06(3)(c) is overinclusive and therefore inadequately tailored to serve a compelling interest.

The state of Wisconsin has chosen to conduct judicial elections. The solution to any speech concerns that arise in that context are already contained in that system: more speech. *See Brown v. Hartlage*, 456 U.S. 45, 61 (1982). To interject a government censor like the Commission and this

Court into the political fray as the arbiter of truth is contrary to this fundamental principle.

CONCLUSION

Regardless of any reasonable disagreement concerning its tone, the Advertisement was a constitutionally-protected means by which to inform the electorate about the contrast between the backgrounds of the two candidates. Justice Gableman had for the majority of his career prior to serving on the bench worked as a prosecutor. Justice Butler had devoted a significant portion of his legal career as a criminal defense attorney developing the kind of creative arguments he advanced in the Mitchell case – that a law enacted for the purpose of protecting victims of sexual abuse (the Rape Shield Law) should be used to protect his child-rapist client, Mitchell, to the disadvantage his client's victim, an eleven year-old mentally handicapped girl who had been raped by Mitchell, and who contracted gonorrhea during the commission of the rape. Yet, disagreement about the tone of political speech does not allow the government to penalize that speech on grounds that it falsely implies something which is not objectively stated.

For the foregoing reasons, Justice Gableman has not violated SCR 60.06(3)(c) as a matter of law. Accordingly, this Court should adopt the recommendations of the Judicial Conduct Panel and dismiss the Commission's Complaint with prejudice.

Dated this _____ day of January, 2010.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Respondent

By:_____
Eric M. McLeod
State Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Post Office Box 1806
Madison, WI 53701-1806
Telephone: 608.257.3501
Facsimile: 608.283.2275

James Bopp, Jr., Ind. # 2838-84
Anita Y. Woudenberg, Ind. #25162-64
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47803
Telephone: 812.232.2434
Facsimile: 812.235.3685

Q:\CLIENT\025487\0001\B2178126.0

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,533 words.

Dated this _____ day of January, 2010.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Respondent

By:_____
Eric M. McLeod
State Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Post Office Box 1806
Madison, WI 53701-1806
Telephone: 608.257.3501
Facsimile: 608.283.2275

James Bopp, Jr., Ind. # 2838-84
Anita Y. Woudenberg, Ind. #25162-64
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47803
Telephone: 812.232.2434
Facsimile: 812.235.3685

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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 _____ day of January, 2010.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Respondent

By:_____
Eric M. McLeod
State Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Post Office Box 1806
Madison, WI 53701-1806
Telephone: 608.257.3501
Facsimile: 608.283.2275

James Bopp, Jr., Ind. # 2838-84
Anita Y. Woudenberg, Ind. #25162-64
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47803
Telephone: 812.232.2434
Facsimile: 812.235.3685