1. **Case Backgrounds:**

   a. **Wersal v. Sexton**¹

   Gregory Wersal (“Wersal”), a candidate for Justice of the Minnesota Supreme Court, filed suit against the Minnesota Board of Judicial Standards challenging the “endorsement,” “personal solicitation,” and “solicitation for personal organization or candidate” clauses of Canon 4 of the Minnesota Code of Judicial Conduct (“Code”). At issue was whether the three clauses impermissibly restricted his First Amendment right to free speech and association during the course of his judicial election. The District Court found that the clauses were narrowly tailored to meet the state’s compelling interest to promote judicial impartiality, and thus, constitutional. Wersal appealed.

   The “endorsement” clause prevents a judicial candidate from “publicly endorsing or, except for the judge or candidate’s opponent, publicly opposing another candidate for public office.”² The “personal solicitation” clause prohibits a judicial candidate from “personally

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¹ Wersal v. Sexton, No. 08-6468, 2010 WL 2945171 (8th Cir. July 29, 2010)
soliciting or accepting campaign contributions.”³ Lastly, the “solicitation for personal organization or candidate” clause provides that a judicial candidate shall not “solicit funds for a political organization or a candidate for public office.”⁴

On appeal the Eighth Circuit reversed the District Court, holding that the three clauses do not survive strict judicial scrutiny because the clauses are either over- or under- inclusive, respectively, and therefore violate the First Amendment to free speech.

b. Carey v. Wolnitzek⁵

In June 2006, Marcus Carey (“Carey”), a candidate for a seat on the Kentucky Supreme Court, filed suit against the Kentucky Judicial Conduct Commission, challenging the “party affiliation,” “solicitation,” and “commits” clauses of Canon 5 of the Rules of Supreme Court of Kentucky. Similar to Wersal v. Sexton, at issue was whether or not the three clauses unconstitutionally violated Carey’s First Amendment rights to free speech and association during the course of the judicial election. The District Court determined that the “party affiliation” and “solicitation” clauses were unconstitutional on their face, but that the “commits” clause was not. Both parties appealed.

The “party affiliation” clause prohibits judges and candidates from disclosing their party affiliation except in a few circumstances.⁶ The “solicitation” clause prohibits judicial candidates from soliciting campaign funds.⁷ The “commits” clause prohibits judicial candidates from “intentionally or recklessly making a statement that a reasonable person would perceive as

⁷ Id. at *12.
committing a judge or candidate to rule in a certain way in a case controversy or issue that is likely to come before the court.”

On appeal the Sixth Circuit reversed the District Court’s decision as it pertained to the party affiliation and solicitation clauses for similar “means-ends” reasons as the “Wersal” court. However, the Court also vacated the District Court’s judgment as to the “commits” clause, stating that the clause was “constitutional in the main, but contains a material ambiguity,” remanding the issue to flush out the ambiguity.

2. Thesis

Based on the foregoing, this case comment will focus on the Sixth Circuit’s analysis of Kentucky’s “commits” clause and Eighth Circuit’s analysis of Minnesota’s “endorsement” clause and will argue that the Courts’ respective analyses are inconsistent with one another in light of the Supreme Court’s controlling decision in Republican Party of Minnesota v. White. Although both courts apply a strict level of judicial scrutiny (i.e. analyzing whether the states’ judicial campaign rules are narrowly tailored to achieve their “compelling” state interests of judicial impartiality), the courts come to drastically different conclusions regarding constitutional viability of the two clauses with respect to the First Amendment. This is striking because, although the clauses take different names, the apparent policy behind each is remarkably similar – namely, preventing judicial candidates from ruling in a certain way based on either political endorsements or preexisting commitments to rule in specific manner once they are on the bench.

Specifically, the Sixth’s Circuit’s analysis of the “commits” clause holds that the clause is “constitutional in the main” if the rule is narrowly interpreted to mean limiting judicial campaign commitments to rule a certain way with respect to future “cases” or “controversies.” However,

8 Id. at *15 (quoting Rules of Supreme Court Kentucky 4.300, Canon 5B(1)(C)).
9 Id. at *2.
the Sixth Circuit held that the clause’s application to “issues” was too general (e.g. what qualifies as an “issue”?), explaining why the court remanded this aspect of the matter back to the district court.

By way of comparison, the Eighth Circuit’s analysis of the Minnesota “endorsement clause” holds that the clause is unconstitutional because “it impairs a candidate’s ability to vigorously advocate the election of other candidates, associate with like-minded candidates, and, thus, vigorously advocate his or her own campaign.”

This case comment would argue that Sixth and Eighth Circuits’ interpretations of the respective Canons are contradictory insofar as restricting campaign commitments to “rule a certain way” with respect to “cases” or “controversies” is at odds with allowing judicial candidates to associate with given political entities (and thereby defining, at least provisionally, how a candidate might adjudge future case and controversies).

3. Preemption Check:

In order to determine whether this comment is preempted, the author took the following steps:

a. KeyCited both cases, looking for secondary sources discussing them. There were no secondary periodical sources discussing either case.

b. Ran a Terms and Connectors Test: "JUDICIAL ELECTIONS" /P "FIRST AMENDMENT" "FREEDOM OF SPEECH." This search turned up a significant number of law review pieces; however, this shouldn’t preempt this topic because, as noted directly above, neither of these cases have been written on before.

c. Ran a Terms and Connectors Test: “"JUDICIAL ELECTIONS" /P "FIRST AMENDMENT" "FREEDOM OF SPEECH" /10 "WHITE".” Again, this search

turned up a number law review articles (62) of varying relevance but none of them
discuss the two cases at issue here.

Accordingly, although the topic of judicial campaign restrictions has been discussed
at length, this topic is not preempted because it has not been applied to these most
recent decisions. Moreover, the narrow comparison of the Minnesota and Kentucky
rules at play here is sufficiently unique to avoid preemption.

4. Sources: