

IN THE SUPREME COURT  
OF THE STATE OF WISCONSIN

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

Wisconsin Judicial Commission,

Case No. 2008AP2458-J

Complainant,

v.

The Honorable Michael J. Gableman,

Respondent.

**FILED**

NOV 19 2008

CLERK OF SUPREME COURT  
OF WISCONSIN

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**ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

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Justice Michael J. Gableman ("Justice Gableman"), by and through his attorneys, Eric M. McLeod, Michael Best & Friedrich LLP, and James Bopp, Jr. and Anita Y. Woudenberg, Bopp, Coleson & Bostrom, and for his Answer, Affirmative Defenses and Counterclaims to the Complaint of the Wisconsin Judicial Commission ("Commission"), states and alleges as follows:

**ANSWER**

1. The Wisconsin Judicial Commission ("Commission") is organized under Wis. Stat. §§ 757.81 to 757.99 (2005-06) and is charged with the responsibility of investigating allegations of misconduct by members of the Wisconsin judiciary. Upon a finding of probable cause that a judge has engaged in misconduct, the Commission is required to file a complaint with the Supreme Court.

**Answer:** In response to ¶ 1, Justice Gableman admits that the Commission is organized under the referenced statutes and has those duties provided for by statute; denies that those duties have been properly exercised in this case.

2. At all times material to this complaint, the Honorable Michael J. Gableman ("Judge Gableman") was a judge of the Burnett County Circuit Court and thus a judge within the meaning of Wis. Stat. § 747.81(3).

**Answer:** In response to ¶ 2, Justice Gableman admits that at all times material to the matters set forth in the Allegations he was circuit court judge for Burnett County and thus a judge within the meaning of Wis. Stat. § 757.81(3).

3. At all times material, Judge 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.

**Answer:** In response to ¶ 3, Justice Gableman admits that at all times material to the matters set forth in the Allegations he was a candidate for the office of Wisconsin Supreme Court Justice and thus a "candidate" pursuant to SCR 60.01(2).

4. On April 30, 2008 the Commission notified Judge Gableman that it was investigating allegations of his possible misconduct, and on July 15, 2008 the Commission notified Judge Gableman of the substance of the allegations contained in this Complaint.

**Answer:** In response to ¶ 4, Justice Gableman admits that he received certain notice of the Commission's investigation and that he subsequently received a Notice of Formal Proceeding and Request to Respond. To the extent any further answer is required, Justice Gableman denies.

5. Judge Gableman responded to the allegations with a written submission on August 14, 2008 and by appearing in person, with counsel, before the Commission on August 21, 2008. These responses were considered by the Commission.

**Answer:** In response to ¶ 5, Justice Gableman admits that he has responded to the allegations with a written submission on August 14, 2008 and by appearing in person, with counsel, before the Commission on August 21, 2008; lacks knowledge or information sufficient to form a belief as to the truth of the allegation that these responses were considered by the Commission and accordingly denies same.

6. The Commission has found probable cause to believe that Judge Gableman willfully violated SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct, which, in relevant part, states that a candidate for 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.

**Answer:** In response to ¶ 6, Justice Gableman denies that the Commission had any basis to find probable cause to believe that he willfully violated SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct; affirmatively alleges the language of SCR 60.06(3)(c) and denies any characterization of the rule that is misleading, incomplete or otherwise erroneous. To the extent any further answer is required, Justice Gableman denies.

7. On or about March 14, 2008 Judge Gableman published and released a television advertisement ("Advertisement") supporting his candidacy for Justice of the Wisconsin Supreme Court against then incumbent Justice Louis Butler. The audio text of the Advertisement was 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 learn 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 compact disc of the Advertisement is attached as Exhibit A.

**Answer:** In response to ¶ 7, Justice Gableman admits that the Gableman for Supreme Court campaign committee published and released a television advertisement which appears to be depicted on the compact disc attached to the Complaint as Exhibit A; affirmatively alleges that the content of the Advertisement speaks for itself and denies any characterization of

the Advertising which is misleading, incomplete or otherwise erroneous. To the extent any further answer is required, Justice Gableman denies.

8. The purpose of the Advertisement was to compare and contrast the background, qualifications, and experience of Judge Gableman with the background, qualifications, and experience of Justice Butler.

**Answer:** In response to ¶ 8, Justice Gableman affirmatively alleges that the content of the Advertisement speaks for itself and denies any characterization of the Advertising which is misleading, incomplete or otherwise erroneous. To the extent any further answer is required, Justice Gableman denies.

9. Prior to its publication, Judge Gableman personally reviewed and approved the Advertisement.

**Answer:** In response to ¶ 9, Justice Gableman admits.

10. Louis Butler was an Assistant Public Defender for the State of Wisconsin from 1979 until 1992. In that capacity, Louis Butler represented Reuben Lee Mitchell ("Mitchell") from 1985 to 1988 in Mitchell's appeal of his conviction in circuit court. This is the matter handled by Louis Butler to which the Advertisement referred. In reviewing Mitchell's appeal of his conviction in that case, both the Court of Appeals and the Supreme Court of Wisconsin agreed with Louis Butler's argument that the circuit court had committed error in admitting certain evidence (the "loophole" to which the Advertisement referred). The Supreme Court concluded, however, that the error was not sufficiently prejudicial to have denied Mitchell's right to a fair trial and affirmed his conviction. *State v. Reuben Lee Mitchell*, 139 Wis. 2d 856, 407 N.W.2d 566 (Ct. App. 1987), *reversed*, 144 Wis. 2d 596, 424 N.W.2d 698 (1988). Accordingly, Mitchell remained in prison as sentenced by the circuit court. Mitchell was released on parole in 1991. In 1995 Mitchell was convicted of second-degree sexual assault of a child (the "other child" to which the Advertisement referred).

**Answer:** In response to ¶ 10, Justice Gableman admits that Louis Butler was an Assistant Public Defender for the State of Wisconsin from 1979 until 1992; admits that in his capacity as an Assistant Public Defender Louis Butler represented Reuben Lee Mitchell; affirmatively alleges that the decisions of the Court of the Appeals and the Supreme Court of Wisconsin speak for themselves and denies any characterization of those decisions which is

misleading, incomplete or otherwise erroneous; lacks knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning how or under what circumstances Mr. Butler was assigned to the Mitchell case or otherwise came to represent Rueben Lee Mitchell on appeal; admits that the Supreme Court of Wisconsin agreed with Mr. Butler's argument that an error on the admission of certain evidence occurred in the circuit court but found that it was not harmful error requiring a new trial; on the basis of the Supreme Court's decision in the Mitchell case, admits that Mitchell remained in prison until he was released on parole and that while on parole Mitchell committed a new offense. To the extent any further answer is required, Justice Gableman denies.

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. Each of these statements of fact constituting the message is false.

**Answer:** In response to ¶ 11, Justice Gableman denies each and every allegation contained therein.

12. Louis Butler did not cause, facilitate, or enable Mitchell's release from prison and had no responsibility for or connection with Mitchell's subsequent commission of a crime.

**Answer:** In response to ¶ 12, Justice Gableman acknowledges that although the Wisconsin Supreme Court decision in the Mitchell case did not result in Mitchell's release from prison, he lacks knowledge or information sufficient to form a belief as to the truthfulness of the allegation that no other action or conduct by Louis Butler resulted in the release from prison of Reuben Lee Mitchell or allowed Mitchell to commit a new criminal offense. To the extent any further answer is required, Justice Gableman denies.

13. Prior to publication of the Advertisement, Judge Gableman was familiar with the facts and holdings of both the Supreme Court and the Court of Appeals decisions cited in paragraph 10 above.

**Answer:** In response to ¶ 13, Justice Gableman affirmatively alleges that he had a general understanding of the decisions referenced in ¶ 10, above. To the extent any further answer is required, Justice Gableman denies.

14. At the time Judge Gableman approved and published the Advertisement, he had no reason to believe that Louis Butler had any responsibility for or involvement in Mitchell's release from prison in 1992 or that any action by or work of Louis Butler had anything to do with Mitchell's commission of the subsequent criminal molestation referred to in the Advertisement.

**Answer:** In response to ¶ 14, Justice Gableman denies the Advertisement states "that Louis Butler had any responsibility for or involvement in Mitchell's release from prison in 1992 or that any action by or work of Louis Butler had anything to do with Mitchell's commission of the subsequent criminal molestation referred to in the Advertisement." To the extent any further answer is required, Justice Gableman denies.

15. The false statements expressed in the Advertisement identified in paragraph 11 related to Louis Butler's background, qualifications, and experience and constitute a misrepresentation of facts. The misrepresentation was made knowingly or with reckless disregard for the truth by Judge Gableman. The publication of the Advertisement therefore constituted a willful violation by Judge Gableman of SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct.

**Answer:** In response to ¶ 15, Justice Gableman denies each and every allegations contained therein.

16. By publishing the Advertisement in willful violation of SCR 60.06(3)(c), Judge Gableman engaged in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a).

**Answer:** In response to ¶ 16, Justice Gableman denies each and every allegation contained therein.

#### **AFFIRMATIVE DEFENSES**

1. The Complaint fails to state a claim upon which relief may be granted as a matter of law.

2. The Advertisement is true and does not contain any statements that are objectively false.

3. No statement in the Advertisement constitutes any misrepresentation made knowingly, or with reckless disregard for the statement's truth or falsity.

4. SCR 60.06(3)(c) is unconstitutional on its face and as applied to the Advertisement.

### **COUNTERCLAIMS**

The Honorable Michael J. Gableman, by his attorneys, Eric McLeod, Michael Best & Friedrich, LLP, and James Bopp, Jr. and Anita Y. Woudenberg, Bopp, Coleson & Bostrom, and for his counterclaim against the Wisconsin Judicial Commission, states as follows:

### **INTRODUCTION**

1. This is a counterclaim seeking injunctive relief under the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of SCR 60.06(3)(c) of Wisconsin's Code of Judicial Conduct, both facially and as applied to the Advertisement.

2. Specifically, SCR 60.06(3)(c) states that

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.

3. Justice Gableman complains that SCR 60.06(3)(c)'s misrepresentation clause, both on its face and as applied to Justice Gableman, is unconstitutional in that it infringes upon constitutionally protected free speech. Specifically, the misrepresentation clause fails strict

scrutiny, is unconstitutionally overbroad and vague, and cannot be constitutionally applied to the Advertisement.

### **JURISDICTION AND VENUE**

4. Justice Gableman's counterclaim arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

5. The Wisconsin Supreme Court has jurisdiction to adjudicate Justice Gableman's claims under the United States Constitution, Article VI, and the Constitution of Wisconsin, Article VII, Section 3(2) and 11.

### **FACTS**

6. Justice Gableman is a member of the Wisconsin Supreme Court. He successfully ran for office in 2008.

7. The Wisconsin Judicial Commission is charged with enforcing Wisconsin's Code of Judicial conduct, found in SCR 60.

8. On March 14, 2008, Justice Gableman ran an ad ("the Advertisement") against his opponent Justice Louis Butler. The relevant audio track text of the Advertisement included the following:

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?

9. The Commission initiated an investigation of Justice Gableman and the Advertisement and, on October 7, 2008, the Wisconsin Judicial Commission (“the Commission”) filed a complaint in this cause of action against Justice Gableman, claiming the Advertisement violated SCR 60.06(3)(2)’s misrepresentations clause, which prohibits judicial candidates from

knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

10. However, the misrepresentations clause violates judicial candidates’ rights of free speech. The veracity of speech cannot be regulated by the government. *See Rickert v. State*, 168 P.3d 826, 829 (Wash. 2007). Nor can the speech be constitutionally regulated under a standard that does not include all components of a defamation claim. *Id.*

11. Because of the unconstitutional enforcement of SCR 60.06(3)(2), Justice Gableman has suffered and will continue to suffer irreparable injury, loss, and damage.

12. Justice Gableman has no adequate remedy at law.

## COUNT I

### THE MISREPRESENTATIONS CLAUSE IS UNCONSTITUTIONALLY OVERBROAD.

13. Justice Gableman realleges the preceding paragraphs.

14. SCR 60.06(3)(2) (“the misrepresentations clause”), prohibits judicial candidates  
from

knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

15. A law is overbroad “where ‘it prohibits a substantial amount of protected expression.’” *United States v. Johnson*, 376 F.3d 689, 694 (7th Cir. 2004) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)).

16. The misrepresentations clause reaches protected speech, including not only false statements but true statements that misrepresent another candidate. While defamatory speech is not constitutionally protected, *see Sullivan*, 376 U.S. 254, the misrepresentations clause is not limited to such speech. The misrepresentations clause substantially prohibits protected speech and is unconstitutional under the First and Fourteenth Amendment to the United States Constitution.

## COUNT II

### THE MISREPRESENTATIONS CLAUSE IS UNCONSTITUTIONALLY VAGUE.

17. Justice Gableman realleges the preceding paragraphs.

18. The misrepresentations clause prohibits judicial candidates from knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

19. A law is vague if it does not have “a ‘reasonable degree of clarity’ such that anyone of ordinary intelligence can grasp its import.” *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)).

20. The misrepresentations clause prohibits both true and false speech that misrepresents a candidate. While false speech is easily identifiable as misleading, which true speech misrepresents and which does not is far from clear. The misrepresentations clause does

not provide a clear rule and allows the government, through the Commission, to unilaterally determine whether speech constitutes a misrepresentation in an ad hoc fashion. Because it is vague, the misrepresentations clause is unconstitutional.

### **COUNT III**

#### **THE MISREPRESENTATIONS CLAUSE DOES NOT SATISFY STRICT SCRUTINY.**

21. Justice Gableman realleges the preceding paragraphs.

22. The misrepresentations clause prohibits judicial candidates from

knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

23. The misrepresentations clause restricts core political speech. It is a content-based restriction and subject to strict scrutiny. Because the misrepresentations clause is not narrowly tailored to serve a compelling interest, it is unconstitutional.

### **COUNT IV**

#### **THE MISREPRESENTATIONS CLAUSE IS UNCONSTITUTIONAL AS APPLIED TO THE ADVERTISEMENT.**

24. Justice Gableman realleges the preceding paragraphs.

25. The misrepresentations clause prohibits judicial candidates from

knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

26. The Advertisement amounts to core political speech. Because the misrepresentations clause does not narrowly serve a compelling interest as applied to the Advertisement, it is unconstitutional.

## COUNT V

### THE MISREPRESENTATIONS CLAUSE IS UNCONSTITUTIONAL UNDER THE WISCONSIN CONSTITUTION

27. Justice Gableman realleges the preceding paragraphs.

28. The misrepresentations clause prohibits judicial candidates from knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] 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.

29. Article 1, Section 3 of the Wisconsin Constitution states that “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.”

30. The Advertisement is political speech. That the misrepresentations clause reaches the Advertisement demonstrates that the clause is overbroad, vague, and fails strict scrutiny, in violation of the free speech clause of the Wisconsin Constitution.

### PRAYER FOR RELIEF


WHEREFORE, Justice Michael J. Gableman demands the following relief:

- A. That the Commission’s action be dismissed with prejudice;
- B. That the Court declare SCR 60.06(3)(c) unconstitutional on its face and as applied to Justice Gableman as in violation of judicial candidates’ right to free speech under the First and Fourteenth Amendment;

- C. That the Court prohibit, by way of permanent injunction, the Commission, their agents, and successors, from enforcing SCR 60.06(3)(c), and from filing, investigating or considering complaints based on SCR 60.06(3)(c) against judicial candidates;
- D. That the Court grant Justice Gableman his costs and attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and
- E. That the Court grant Justice Gableman such other relief as may be just and equitable.

Dated this 19<sup>th</sup> day of November, 2008.

MICHAEL BEST & FRIEDRICH LLP  
*Attorneys for Respondent*

By:   
Eric M. McLeod  
State Bar No. 1021730

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. 2328-84\*  
Anita Y. Woudenberg, Ind. 25162-64\*  
Bopp, Coleson & Bostrom  
1 South 6th Street  
Terre Haute, IN 47807  
Ph: (812) 232-2434  
Fax: (812) 235-3685  
*Attorneys for Respondent*  
*\*Pro Hac Vice Motion Pending*