No. 09-2963

In the
United States Court of Appeals
for the Seventh Circuit

TORREY BAUER, THE HONORABLE DAVID CERTO,
and INDIANA RIGHT TO LIFE, INC.,

Plaintiffs-Appellants,

v.

RANDALL T. SHEPARD, STEPHEN L. WILLIAMS, CHRISTINE KECK,
JOHN C. TRIMBLE, MARK LUBBERS, MICHAEL GAVIN, JOHN FEIGHNER,
in their official capacity as members of the Indiana Commission on Judicial Qualifications;
ANTHONY M. ZAPPIA, SALLY FRANKLIN ZWEIG, CATHERINE A. NESTRICK,
CORINNE R. FINNERTY, FRED AUSTERMAN, R. ANTHONY PRATHER,
J. MARK ROBINSON, TONY WALKER, MAUREEN GRINSFELDER,
in their official capacity as members of the Indiana Disciplinary Commission;

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, No. 3:08-cv-196.
The Honorable **Theresa Springmann**, Judge Presiding.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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A. The Commits Clauses and As-Applied Recusal Requirement Challenge Are Ripe.

The Commission contends that the challenges against the commits clauses are unripe, focusing on the lack of threat of enforcement. Comm. Br. at 15. They rely on this Court's prior holding in *Indiana Right to Life v. Shepard,* 507 F.3d 545 (7th Cir. 2007) ("*Shepard I*"), and *Lawson v. Hill*, 368 F.3d 955 (7th Cir. 2004). In *Shepard I,* this Court held that Indiana Right to Life did not have standing because no evidence of a willing speaker existed to justify their suit. This problem has been rectified in this case, with Judge Certo and Mr. Bauer joining as judicial candidates and willing speakers, wanting to answer the questionnaire. Judge Certo refrained from answering prior to securing a preliminary injunction for fear he would be disciplined for doing so. Mr. Bauer answered the questionnaire, knowing he could very well be disciplined.

In *Lawson,* this Court found that the risk of prosecution was too remote to confer standing on Plaintiff Lawson because the county prosecutor had expressly directed the police not to investigate whether the flag desecration at issue violated state statutes because of Supreme Court precedent that protected such speech. 368

F.3d at 957. It found that the mere existence of the flag-desecration statute was not enough to confer a threat of prosecution because it clearly failed to cover Ms. Lawson's conduct. *Id.* at 958. And it stated that clear disavowals of prosecution are not important except in those cases where "the plaintiff seeking to enjoin enforcement would have a reasonable basis for concern that he might be prosecuted . . . . The disavowal might alleviate his concern, while refusal to disavow would be a signal that his concern was well founded." *Id.* at 959 (citations omitted).

In this pre-enforcement challenge, Plaintiffs-Appellants' concern of being prosecuted is reasonably based. In 2008, Ms. Babcock received numerous inquiries about the appropriateness of answering the questionnaire under the canons. Rather than disavow prosecution, Ms. Babcock merely quoted the provision back to the candidates, citing Advisory Opinion #1-02 as support and referencing the proposed revisions to the canons. *See, e.g., Response to Judge Daniel Banina*, Comm. App. at 93-96. This failure, along with the Commission's continued refusal to state that the questionnaire merely seeks announced views of candidates and does not violate the commits clause or potentially trigger the recusal clause, suggests that plaintiffs' concerns are well-founded. These inquiries were made prior to this lawsuit with specific facts made available to the Commission for consideration. Unlike in *Lawson*, this lawsuit is not being brought to "put an official on the spot," as the

Commission argues. Comm. Br. at 18. That no investigations or proceedings are being pursued against candidates for answering the questionnaire is not surprising, since candidates are chilled and those that have answered are protected–or at least, were protected–by a preliminary injunction issued May 2008. Because of the existence of the commits clauses and the reasonable expectation that violations of them will be investigated, *see Babcock Affidavit,* Comm. App.. at 46, ¶ 4, the commits clauses challenges are ripe.

The Commission states that an as-applied general recusal clause challenge is likewise unripe because the clause has not yet been enforced against a candidate. Comm. Br. at 37. However, judicial candidates were given copies of Advisory Opinion #1-02 in response to their inquiry about responding to the questionnaire, *see Babcock Responses,* Comm. App. at 49-101, which discusses mandatory recusal as the result of announcing one's views. Comm. App. at 176-77. Judge Certo, a sitting judge, was chilled from answering the questionnaire in part because of the general recusal clause and has most certainly opened himself up to discipline should he fail to recuse on an issue he responded to on the questionnaire under the preliminary injunction.[1]

[1] Moreover, to render unripe a pre-enforcement challenge premised upon the chill of a speaker suggests that *any* chill from a statute of constitutionally-protected speech can never be rectified. It is precisely because of the chill that no enforcement has taken or ever will take place.

B. The Former Commits Clause Challenge Is Not Moot.

The Commission asks this Court to affirm the district court's finding that the challenge to the former commits clause under which a preliminary injunction was secured is moot. Comm. Br. at 19. The district court in doing so does not properly address this Court's decision in *Zessar v. Kieth,* 536 F.3d 788 (7th Cir. 2008). In *Zessar*, this Court held significant to its mootness inquiry the fact that the post-amended provisions no longer contained the constitutional deficiency and were thus no longer substantially similar to the pre-amended provisions. *Id.* at 795. Such is not the case here. The new commits clause has merely moved the offending "appears to commit" language to Commentary 15, reflected in its "reasonable person" analysis. *See Comparative Chart,* Comm. App. at 105-06. Moreover, in responding to judicial candidates' inquiry about responding to the questionnaire under the old code of judicial conduct, Ms. Babcock often cited what has now become the new commits clause in her response. *See Babcock Responses*, 49-101. No reason exists to believe that the Commission will behave any differently in regard to enforcement challenges, and candidates like Judge Certo are legitimately concerned about discipline under commits clauses—whether old or new—against their speech under the preliminary injunction previously secured. The challenge to the former commits clause is not moot.

II. The District Court Erred In Upholding The Commits Clauses.

Throughout its discussion of the commits clauses, the Commission gives the impression that the commits clauses only apply to pledges or promises of certain results—the only constitutional judicial speech regulation the Supreme Court has recognized. *See* Comm. Br. at 20. It contends that the "appears to commit" language has been removed and so renders cases that hold canons including such language unconstitutional inapposite. Comm. Br. at 24. Yet the problematic language, held unconstitutional in other decisions, is very much still present. Canons 2.10 and 4.1(A)(13) prohibit judges and judicial candidates from "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Whether something is a pledge, promise, or commitment "is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." Canon 4.1(A)(13), Comment 15. In other words, whether a candidate's speech *appears* to be a pledge, promise, or commitment is instrumental in assessing a violation of the commits clauses.

This reliance on the listener is, according the Commission, completely legitimate and makes the rule constitutional because it is "objective." Comm. Br. at 27. Under United States Supreme Court precedent, it is neither constitutional nor objective. Relying on third party interpretation of speech unconstitutionally "compels the speaker to hedge and trim." *Buckley v. Valeo,* 424 U.S. 1, 43 (1976). It is a subjective standard that is indeterminate and "unquestionably chill[s] a substantial amount of political speech." *FEC v. Wisconsin Right to Life*, 127 U.S. 2652, 2666 (2007). Such chill is evident in this case: Judge Certo, among others, was chilled from answering the questionnaire, and numerous candidates contacted the Commission because whether the questionnaire would cause a violation of the commits clauses was indeterminate. *See Babcock Responses,* Comm. App. at 49-101.

In advocating that the commits clauses survive strict scrutiny, the Commission argues that openmindedness is a legitimate compelling interest because masking constitutionally protected opinions on legal issues discourages closedmindness. Comm. Br. at 21. This position merely demonstrates the problem in enforcing openmindedness. The only objective way to regulate circumstances where a judge is closed-minded is to prohibit pledges or promises of certain results in a particular case. Going beyond such pledges and promises can reach

announcements or commitments on issues that in fact do not reflect whether a judge is actual openmindedness and is ineffectual in preventing closedmindedness because evidence of such is masked from the public view. The analysis by necessity then shifts to whether a judge *should be* closed or openminded in the context of announcement or commitment on an issue. This ad hoc analysis is made by the listener—namely, the Commission—and is, at best, a guess as to whether the judge is actually open- or closedminded and at worst, a prior restraint on political speech based upon what the Commission believes a judge ought to do, regardless of any actual openmindedness concern. Openmindedness is not a compelling interest. And because the commits clauses go beyond pledging or promising certain results in a particular case, the clauses do not serve an interest in openmindedness.

The prior restraint problem of the commits clauses is reinforced by their vagueness. The Commission appears to believe that because other canons are broadly worded, such broad, indefinite wording in the commits clauses is permissible. Comm. Br. at 25. The canons the Commission cites, however, are not directed towards restricting political speech, but are broad, overarching principles. *See, e.g.,* Canon 2.1 ("The duties of judicial offices, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities"); Canon 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the

independence, integrity, and impartiality of the judiciary"). None of these canons are directed at restrictions on political speech nor perceived by judicial candidates to have that effect. The commits clauses, in contrast, fall under a Canon that is specifically crafted to regulate political or campaign activity, *see* Canon 4 ("A Judge or Candidate for Judicial Office Shall Not Engage in Political Activity That is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary"), with Canon 2.10's identical language having the same effect. Facial vagueness in provisions designed to regulate political speech is not permissible. *See Anderson v. Milwaukee County,* 433 F.3d 975, 978 (7th Cir. 2006).

What the Commission perceives as "hypertextual parsing," Comm. Br. at 27, is merely what is ultimately an ineffectual effort to understand the meaning and scope of the commits clauses. The imprecision of the clauses is underscored in Advisory Opinion #1-02, which advocates ad hoc analysis in advance of speaking to ensure the appropriateness of such speech under the clauses. Comm. App.. at 176. Indeed, that Ms. Babcock does not tell candidates whether or not they can or cannot answer the questionnaire when asked but instead merely relays the language of clauses along with the relevant advisory opinion suggests an underlying inability for *any* reasonable person to ascertain the reasonable scope of the provision. *See Babcock Responses,* Comm. App. at 49-101. The commits clause is vague.

Even if the facial challenge to the commits clauses fail, the Commission fails

to address the as-applied challenge to the commits clauses. Perhaps this is because it still does not yet know if the clauses apply to the questionnaire. Or it awaits this Court to inform it of their applicability.

In an effort to avoid falling under this Court's *Buckley* decision, the Commission argues that the commits clauses are much more permissive than the language considered in *Buckley*, allowing any speech "consistent with the impartial administration of justice." Comm. Br. at 23. However, Comment 17 specifically notes that questionnaires that seek to learn judicial candidates views on disputed or controversial legal or political issues might be views as a pledge, promise, or commitment to perform adjudicative duties of office other than in an impartial way. Comm. App.. at 106. Thus, announced views fall within the purview of the commits clauses and are no more permissive than the pledges clause addressed in *Buckley*.

Because the commits clauses are vague, overbroad, and fail strict scrutiny on their face and as applied to the questionnaire, this Court should find them unconstitutional.

III. The District Court Erred In Upholding The Recusal Clause.

In offering its analysis of the recusal clause, the Commission distorts the case law on recusal clause challenges. Comm. Br. at 29. The general recusal requirement, which requires recusal when a judge's impartiality can be reasonably

questioned—has never been held facially unconstitutional, but Plaintiffs-Appellants do not seek facial invalidation of that provision. Instead, they only bring an as-applied claim as against the questionnaire, a reasonable application in light of the Commission's discussion of such in Advisory Opinion #1-02 and the commentary of the commits clauses. *See* Canon 4.1(A)(13), Comment 17, Comm. App.. at 106 (Candidates "may state their reasons for not responding, such as . . . that it might lead to frequent disqualification.") The issue recusal requirement—a specific provision under the general recusal clause requiring disqualification when a candidate commits or appears to commit herself— is being challenged facially and has been successfully done in the past in *Duwe v. Alexander,* 490 F. Supp. 2d 968 (W.D. Wis. 2007).

In offering its analysis of the recusal clause, the Commission yet again acts as though the bulk of offending language of the canon is not in the canon, stating that "judges are free to announce their views . . . so long as they do not commit to a particular outcome." Comm. Br. at 31. Even assuming that what constitutes a commitment rather than a pledge or a promise is known and understood by judicial candidates, the issue recusal clause goes beyond that, restricting statements that "appear to commit." It is this language that makes the clause unconstitutionally vague and overbroad.

The Commission argues that the general recusal requirement is not vague, noting how the comparable federal statute likewise requires recusal where a judge's "impartiality might be reasonably questioned." Comm. Br. at 37. This is not at issue. Plaintiffs-Appellants assert the issues recusal requirement is vague. This vagueness stems from the language itself, which leaves wide open the possible regulation of announced views and consequently chills such lawfully protected speech. Because it "fails to give fair warning of what is prohibited" and "its lack of clarity chills lawful behavior," *Anderson*, 433 F.3d at 975, the issue recusal requirement is vague.

In analyzing the potential overbreadth of the issues recusal requirement, the Commission misapplies the overbreadth standard by arguing that, to be overbroad, the canon must apply to every instance where a candidate has expressed his views. Comm. Br. at 34. Overbreadth occurs when the impermissible applications of the law are substantial when compared to the law's legitimate application. *Commodity Trends Serv. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 688 n. 4 (7th Cir. 1998) (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Here, the state has a compelling due process interest in preventing judges who have made pledges or promises of certain results in a particular case from sitting on such case. The scope of the issues recusal requirement goes well beyond this, however, requiring recusal for appearing to commit to reach a particular result. Mere

announcements like those in the questionnaire, such as "I believe that there is no provision under our current Indiana Constitution which is intended to protect abortion," can easily appear to commit a judge to reach a particular result in a case involving abortion. The commentary to the commits clauses, Comment 17, reinforces this broad scope in its discussion of announcing views through questionnaires and the need to disqualify for such announcements. Comm. App. at 106. Such statements are protected speech under *White*. That the issues recusal requirement has such a substantial reach beyond its legitimate scope makes it overbroad.

The recusal clause also fails strict scrutiny. The Commission argues that the issues recusal requirement is not underinclusive in protecting openmindedness because the recusal list offered in Canon 2.11 is not exhaustive and could include other statements made prior to candidacy. Comm. Br. at 35. Yet they also argue that covering promises and commitments before an election is not necessary to preserve the state's interest in openmindedness. Comm. Br. at 36.

That judges *might* be subject to recusal for committing or appearing to commit prior to her candidacy does not remedy the fact that the issues recusal requirement quite noticeably omits such statements from its scope. As Justice Scalia points out in the *White* decision, "statements in election campaigns are such an infinitesimal portion of public commitments" undertaken by judicial candidates.

536 U.S. at 779. If openmindedness were legitimately the concern, its scope would most certainly include *all* statements that commit or appear to commit a judge, including those from books, articles and speech—statements given at a time where no pressure was on the candidate and, consequently, statements that are more likely to be honored.

The Commission tries to lend significance to the purported differing consequences of the recusal canon as compared to the announce clause in *White*. Comm. Br. at 31. That the consequences are different is false: in both circumstances, discipline results. Yet even if the consequence is different in the sense that a judicial candidate is prohibited from speaking as compared with being required to subsequently recuse, the effect of both canons is the same: it chills judicial candidates from announcing their views for fear that it will violate the canons. In the case of the issues recusal clause, such announcements would commit or appear to commit them.

The Commission fails to appreciate the intersection of political speech with due process concerns by focusing on other circumstances that warrant recusal. Comm. Br. at 31. That judges are required to recuse for past law practice and financial investments does nothing to shore up an argument justifying recusal for political speech, particularly where, unlike here, the interest underlying such recusal is impartiality as to parties.

The Commission believes that invalidating the issues recusal clause would run counter to the sentiments of the *Caperton* court because the Court recognized an objective test under the facts of that case and the importance of judicial canons in general. Comm. Br. at 33. That *Caperton* notes the importance of judicial canons and judicial conduct regulation does not somehow render the entire code challenge-proof. Nor does it render the "appears to commit" language of the issue recusal clause objective. Even if an objective test protects against a judge that "simply misreads or misapprehends the real motives at work in deciding [a] case," *Caperton v. A.T. Massey Coal Co.,* 129 S. Ct. 2252, 2263 (2008), the Commission offers no legitimate reason to suppose that it—or some other, third party listener—is able to properly read or apprehend those motives any more than the judge who is involved. The Commission assumes its test to be objective while offering nothing to demonstrate how it actually protects litigants in a way that a judge and the appellate process do not. And that candidates contact the Commission to determine whether the questionnaire falls within the purview of the canons shows such objectivity claims are false: candidates, and indeed, even the Commission, do not know what a reasonable person would think under these rules.

This Court should find the recusal clause unconstitutional.

IV. The District Court Erred In Upholding The Solicitation Clauses.

The Commission expressly denies bias as the interest served by the

solicitations clauses, Comm. Br. at 41, and instead contends that the state has an interest in preventing judicial candidates from using their position to coerce potential donors. Comm. Br. at 39, 43 ("The interest here is coercion and misuse of power, not bias."). Preventing potential contributors from feeling pressure, however, is not a sufficiently compelling interest to justify restricting First Amendment rights. The state does have an interest in preventing corruption, and therefore could justifiably prohibit contributions that were solicited as part of a *quid pro quo*, but it cannot ban solicitations simply to safeguard the subjective feelings of a potential contributor. *See Carey v. Wolnitzek*, No. 3:06-cv-36, 2008 WL 4602786 at *16 (E.D. Ky. October 15, 2008) ("It may also be more difficult for a solicitee to decline to contribute where the judge makes the solicitation himself rather than through an agent. However, the state does not have a compelling interest in simply making it more comfortable for solicitees to decline to contribute to judicial campaigns.")

That personal solicitations may be more effective does not inherently making preventing coercion compelling, as the Commission seems to suppose. Comm. Br. at 40. Nevertheless, even assuming that the state does have a compelling interest in preventing coerced feelings, the solicitation clause still fails strict scrutiny, as it is not narrowly tailored to that interest. Indiana's solicitation clauses are not limited to cases where potential contributors feel or are likely to

feel coerced by a solicitation. It applies broadly to all solicitations, regardless of context. The solicitation clauses prohibit a candidate from personally accepting a check from the candidate's own spouse or from personally accepting a contribution from a best friend or co-worker whose contribution was spontaneous and completely altruistic. The Commission believes that no exceptions—not even those Judge Certo seeks—are necessary or appropriate. Comm. Br. at 45-46. That it has none and that the Commission will allow for none makes the clauses overinclusive and overbroad. *See Republican Party of Minnesota v. White*, 416 F.3d 738, 766 (8th Cir. 2005) (*White II*); *Weaver v. Bonner,* 309 F.3d 1312, 1322 (11th Cir. 2002); *Carey*, 2008 WL 4602786 at *17.

The Commission states "the power of their office (or the office they seek) infuses their solicitations with a kind of social leverage not found in other contexts." Comm. Br. at 43. However, this interest is in no way confined to contributions solicited by candidates for judicial election. A person may feel directly or indirectly coerced when solicited by a legislative candidate just as much as when solicited by a judicial candidate. In fact, the felt coercion could be greater in the case of legislative candidates, since it is generally unknown prior to an election whether a judge will ever sit on a case involving a potential contributor, whereas legislators have the authority to influence the law on whatever matters they so choose. So, if Indiana's purported interest in avoiding feelings of coercion

does justify a ban on personal solicitation by judicial candidates, then it would equally justify a ban on personal solicitation by legislative candidates. But Indiana does not prohibit legislative candidates from personally soliciting campaign contributions. As such, the solicitation clause on its face and as applied to Judge Certo is underinclusive and fails strict scrutiny. *See White,* 536 U.S. at 779-80; *White II,* 416 F.3d at 757; *Carey*, 2008 WL 4602786 at *17.[1]

To the extent that personal solicitation by candidates raises impartiality concerns, these concerns are inherent in the state's decision to elect judges in the first place. As the Eleventh Circuit observed in *Weaver*:

> It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of be elected.

Weaver 309 F.3d at 1320.

Likewise, "[c]ampaigning for elected office necessarily entails raising campaign funds." *Id.* at 1322; *see also White*, 536 U.S. at 789-90 (O'Connor, J., concurring) ("Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial

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[1] *See also* James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections:* Davis, White, *and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 175, 201-206 (2008) (discussing constitutional difficulties involved in banning personal solicitation of campaign contributions by judicial candidates).

skill, the cost of campaigning requires judicial candidates to engage in fundraising.") The "fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected." *Weaver*, 309 F.3d at 1322. But even if some members of the public assume this is the case, this is ultimately a consequence inherent in the state's decision to elect its judges. *See White*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges").

While the solicitation clause does not further Indiana's interest in preserving judicial impartiality, it does serve the interests of incumbents. *See* C. Scott Peters, *Canons, Cost and Competition in State Supreme Court Elections,* 91 Judicature 27 (Jul.-Aug. 2007) (noting that "incumbents would likely benefit from less competitive elections if ethical restrictions make it more difficult for campaigns to communicate their views to voters.") Because incumbents tend to have higher name recognition than challengers, and are more likely to have developed donor lists and contacts, it is easier for an incumbent to raise money through an intermediary than for a challenger to do so. As Justice Scalia noted in *McConnell*, an election "is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage.

Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored." *McConnell v. FEC*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part). If the only way for a challenger to defeat an incumbent is, as is often the case, to outraise and outspend him, restrictions on personal solicitation will serve to eliminate the one advantage a potential challenger may have over an incumbent opponent.

V. The District Court Erred In Upholding The Partisan Activities Clause.

While the Commission does not argue that the political affiliation clause is necessary to prevent actual bias on the part of judges, it contends that the provision is designed to promote citizen confidence in the integrity and independence of the judiciary. Comm. Br. at 46. This argument is problematic, for several reasons. First, it is not at all clear that acting as a party leader by serving as a state party delegate and speaking on behalf of the Republican Party to students not just as a judge but as a Republican judge, for example, would undermine the public's perception of judicial independence and integrity as the Commission thinks it does.[2] Comm. Br. at 54. The evidence tends to suggest that, generally "the strictness of a state's code of judicial conduct does not significantly affect how

[2] *See* Erwin Chemerinsky, *Restrictions On The Speech Of Judicial Candidates Are Unconstitutional*, 35 Ind. L. Rev. 735, 742-43 (2002) (arguing that "public confidence in the courts is [not] fragile; quite the contrary, it seems resilient and a product of over 200 years of American history.").

impartially that state's judges are perceived." Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U.L. Rev. 781, 785 (2008). The Commission offers nothing that contravenes this.

Far from undermining confidence in the judiciary, judicial elections can actually increase the perceived legitimacy of the judiciary, by giving the public a stake in the selection of judges, rather than having them selected through a sometimes secretive and political appointment process. In order to "tap the energy and the legitimizing power of the democratic process," however, states "must accord the participants in that process . . . the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788 (*quoting Renne v. Greary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

In addition, while maintaining public confidence in the judiciary is no doubt important, no court has ever suggested that the state is justified in suppressing core political speech and associational rights in order to maintain a positive public perception of the judiciary. No doubt public confidence in the judiciary could be damaged by private criticism of judges, their decisions, or the court system as a whole by individual citizens. Yet it would be absurd to suggest that this fact would make it permissible to ban any speech that might cause criticism of the courts. Rather, the underlying assumption of the First Amendment is that public confidence in our institutions is strengthened when free and open debate is the

norm. As such, Indiana's interest is preserving public confidence in the judiciary is not sufficient to justify the partisan activities clause.

The Commission seeks to rely on *Caperton v. A.T. Massey Coal Co.,* 129 S.Ct. 2252 (2009), for support for the partisan activities clause, Comm. Br. at 55, yet that case addresses, as they acknowledge, bias and neutrality, not confidence in and the independence of the judiciary. Additionally, the case applies very narrowly to recusal in extreme campaign financing situations—a situation much different from this. It has little bearing on this Court's analysis of this matter.

The Commission addresses the vagueness charge by arguing that "act as a leader" has a self-evident scope, prohibiting "dual official roles." Comm. Br. at 48, 50. If that were the language of the provision, it would at least be clear. But it is not. The clause prohibits acting as a leader in a political organization. Judge Certo understands himself to be a party leader by virtue of his Republican judgeship. Yet the clause most certainly is not intended to prohibit him from being a judge. By prohibiting "acting as a leader," the clause is vague in its directives to judicial candidates.

Likewise, the Commission contends that the difference between endorsing a Republican candidate and the Republican Party and speaking on behalf of the Republican Party is obvious. Comm. Br. at 48-49. Yet if Judge Certo advocates support for the Republican Party at a political club meeting, or even endorses the

Party publically, how is it clear that he is not speaking on behalf of the Party as one of the Party's leaders, having run for and won an office on a partisan ticket? Judge Certo is allowed to support the Party and even endorse the Party, according to the Commission, Comm. Br. at 53-54, but when he crosses the line into "speaking on behalf of the party" is not evident. The partisan activities clause is vague.

As the Commission notes, the canon goes too far in some aspects and not far enough in others for the state's interest to be credibly served. Comm. Br. at 58-59. The Commission states that the partisan activities clause is not underinclusive in restricting political leadership even though the clause allows leadership in other organizations, arguing that other organizations are issue-oriented. Comm. Br. at 60. However, political organizations are just as issues-based as the NRA or the Sierra Club, *see White II*, 416 F.3d at 759-60, and consequently should be just as relevant to the state's analysis in its efforts—whether legitimate or not—to ensure public confidence in the judiciary. In this regard, it is underinclusive and therefore does not serve the State's interest.

Conversely, it is overinclusive. The partisan activities clause reaches not just those positions where legitimate concerns of impartiality might lie, such as serving as the Chairman of the Party or on the State Committee, but *any* leadership position, including serving as one of hundreds of delegates at a State Convention, where participation does not trigger any greater impartiality concerns than would

attending a State Party dinner, which is permitted under the Canons.

Much of the impartiality concerns raised by partisan involvement are more narrowly and appropriately addressed through recusal. Yet the Commission contends that recusal is an insufficient alternative for preventing the judiciary from falling into disrepute. Comm. Br. at 56-57. However, as demonstrated above, public confidence in and of itself is not a compelling interest for the state to protect. *See supra* page 20. Recusal provides an adequate remedy for those few circumstances where a judge's impartiality is suspect due to party bias created as a result of his political participation.

Conclusion

For the foregoing reasons, this Court should reverse the District Court and hold that the commits clauses, the recusal clause, the solicitation clauses, and the partisan activities clause are unconstitutional.

Dated: October 26, 2009

Respectfully Submitted,

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Certificate of Compliance With Fed. R. App. P. 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned certifies that this *Reply Brief of Plaintiffs-Appellants* complies with the type-volume limitations of this Court.

In accordance with Federal Rules of Appellate Procedure 32(a)(7)(B), this brief contains 5,349 words.

The Brief has been prepared in proportionately spaced typeface using Word Perfect 9.0 in Times New Roman, 14 point font.

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Circuit Rule 31(e)(1) Certification

Pursuant to Cir. R. 31(e)(1), undersigned counsel for Torrey Bauer, the Honorable Judge Certo, and Indiana Right to Life, Inc. hereby certifies that a digital version of the foregoing brief has been furnished to the court.

_____

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Undersigned counsel for Torry Bauer, the Honorable Judge Certo, and Indiana Right to Life, Inc. hereby certifies that on October 26, 2009, two copies of their brief, as well as a digital version containing the brief, were served on the below-listed counsel of record by first-class mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 26th day of October, 2009:

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