UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

TORREY BAUER, *et al.* ***Plaintiffs,*** ***v.*** **RANDALL T. SHEPARD, *et al.*** ***Defendants.***	**Civil Action No. 3:08-CV-196-TLS-CAN**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

Introduction

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." 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 *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the United States Supreme Court reaffirmed the protected nature of political and campaign speech in the judicial context, invalidating a Minnesota judicial canon that prohibited judicial candidates from announcing their views on disputed political and legal issues. In like manner, Plaintiffs will demonstrate that former Canon 5A(3)(d)(i) and (ii) and current Canons 2.10(B), 2.11(A)(5), and 4.1(A)(1), (2), (4),(8) and (13), of Indiana's Code of Judicial Conduct are unconstitutional both facially and as applied, and that Canon 2.11(A) is unconstitutional as applied to the Questionnaire.

Statement of Material Facts

Indiana Right to Life ("IRL") is a non-profit educational organization that collects and publishes data regarding judicial candidates' political philosophy and stance on disputed legal and political issues. (2nd Am. Compl. ¶ 15.) It has done this by sending out judicial candidate questionnaires. (2nd Am. Compl. ¶ 21.)

In 2004, IRL brought a legal challenge to Canon 5A(3)(d)(i) and (ii) and Canon 3E(1) because they were causing judicial candidates to decline to answer IRL's Questionnaire. *See Indiana Right to Life v. Shepard,* 463 F. Supp. 2d 879 (N.D. Ind. 2006) ("*IRTL*"). Indiana Canon 5A(3) stated, in relevant part, that "A candidate for judicial office: . . . (d) shall not: (i) make

pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .” This former commits clause has been interpreted in Preliminary Advisory Opinion #1-02 (“Advisory Opinion”) to reach “broad statements relating to the candidate’s position on disputed social and legal issues” because they “incur[] the risk of violating the ‘commitment’ clause and/or the ‘promises’ clause.” (*Advisory Opinion*, Ex. 1 at 4; *see also Answers to Plaintiffs’ Interrogatories*, Ex. 17, at 15, ¶ 17.) [1] Ms. Babcock, as counsel to the Commission on Judicial Qualifications (“CJQ”), also advised judicial candidates not to answer the 2004 Questionnaire. (*See* Babcock Dep. 41:21-23, Ex. 16.)

Additionally, Indiana had a canon addressing recusal obligations of judges. Canon 3E(1) mandated that a judge recuse himself when a “judge’s impartiality might reasonably be questioned . . . .” This recusal requirement has been understood by judicial candidates to require judges who have engaged in constitutionally protected political speech to recuse themselves from proceedings involving issues about which they have spoken. (*See, e.g.*, Heimann Dep. 7:8-9, Ex. 10; Humphrey Dep. 13:20-14:4, Ex. 13; Newkirk Dep. 18:6-19:6, Ex. 12.)

The district court granted summary judgment against the CJQ and the Disciplinary Commission as to the former commits clause. (*Judgment*, Ex. 15.) However, on appeal, the Seventh Circuit determined that IRL lacked standing to bring its suit because no clear evidence

[1] All exhibit references refer to the *Parties’ Agreed Preliminary Injunction Exhibits* furnished to this Court at the preliminary injunction hearing in this matter unless otherwise noted.

existed that a judicial candidate wanted to answer the Questionnaire. *Indiana Right to Life v. Shepard,* 507 F.3d 545, 549-550 (7th Cir. 2007).

In 2008, IRL again solicited judicial candidates for responses to an identical 2008 Questionnaire. (*2008 Questionnaire,* attached to 2nd Am. Compl. as Ex. 5.) Because so many candidates declined to answer, IRL did not publish the substantive responses it received, fearing that doing so would expose judicial candidates to discipline (2nd Am. Compl. ¶ 29), and renewed litigation against Defendants in this cause of action.

This second cause of action also included a challenge to Canon 5's solicitation clauses and partisan activities clause on behalf of Judge Certo. (Doc. 25.) Canon 5A(1) prohibited judicial candidates from "solicit[ing] funds for, pay[ing] an assessment, slating fee or other mandatory political payment to, or mak[ing] a contribution to, a political organization or candidate" and Canon 5C(2) prohibited judicial candidates in public election from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support," allowing them to instead form a committee for that purpose. Judge Certo wanted to but did not personally solicit funds for his campaign from family members, former roommates and classmates—none of whom would affect his ability to be impartial any more than he is already affected. (2nd Am. Compl. ¶¶ 40, 41.) Likewise, he wanted to but did not encourage participation in the political process among people by encouraging them to make contributions to the Republican Party. (*Id.*)

Judge Certo also wanted to but did not engage in partisan activities by continuing to serve as a delegate to the Indiana State Republican Convention, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the

Republican Party, including at such events as the Eastern Indiana Model Legislature, a program designed to teach high-school students about Indiana's legislature, with which he has participated in the past. (2nd Am. Compl. ¶¶ 42, 43.) This was because of Canon 5A(1), which prohibits judicial candidates from "(a) act[ing] as a leader . . . in a political organization" and from "(c) mak[ing] speeches on behalf of a political organization."

Since bringing this challenge, the Indiana Supreme Court has amended the Indiana Code of Judicial Code. In light of this, this Court directed Plaintiffs to amend their Complaint in relation to those new canons. (Doc. 64.) Plaintiffs continue to desire to engage in the political speech described above, but will not do so because the new canons reach the same speech.

Canons 2.10(B) and 4.1(A)(13) (the "current commits clauses") 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." The Commentary to this provision states that "[15] The making of 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." Because of these canons, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires and IRL will not publish responses. (2nd Am. Compl. ¶¶ 30, 32, 39).

Canon 2.11 (the recusal clause) retains the requirement that judge disqualify himself if his impartiality is reasonably questioned, but adds that recusal is specifically required when "(5) [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a

court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Because of these clauses, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires. (2nd Am. Compl. ¶¶ 31, 34). Moreover, IRL would not publish such responses because it fears it would continue to cause judges who answered the Questionnaire to recuse or be disciplined for failing to do so. (Because of these canons, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires. (2nd Am. Compl. ¶ 39).

Canon 4.1(A) retains substantively identical language in banning judicial candidates from "(4) solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office" and "(8) personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee" (collectively the "solicitation clauses"); and "(1) act[ing] as a leader in or hold an office in a political organization" and "(2) mak[ing] speeches on behalf of a political organization" (collectively the "partisan activities clauses"). Judge Certo continues to be banned from the personal solicitation and partisan activities he desired to engage in under the old Code. (2nd Am. Compl. ¶¶ 41, 43.)

Plaintiffs have been deprived of their constitutional rights under the First and Fourteenth Amendments to the United State Constitution by the above Canons and have suffered and will continue to suffer irreparable harm with no adequate remedy at law. (2nd Am. Compl. ¶ 45.)

Argument

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. R. Civ. P. 56(c). Based on the undisputed facts in this case, the former commits clause and the current commits clauses, the solicitation clauses, the partisan activities clause, and the recusal requirement as applied to the Questionnaire violate the First Amendment. Plaintiffs seek summary judgment enjoining Defendants from enforcing these canons against judges and judicial candidates who wish to announce their views on legal and political issues or engage in other, protected political activities. Plaintiffs are entitled to judgment in their favor as a matter of law.

I. *Buckley* and *White* Establish The Proper Analysis For Judicial Canon Challenges.

In its 1993 decision of *Buckley v. Illinois*, the Seventh Circuit struck down on First Amendment grounds Illinois' pledges and promises clause, which provided that "a candidate, including incumbent judge, for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues . . . ." *Buckley*, 997 F.2d 224, 225. The Seventh Circuit found the provision inadequately tailored and overbroad and concluded that it was unconstitutional. *Id.* at 230. Nine years later, the U.S. Supreme Court concurred with the *Buckley* decision when it held that Minnesota's announce clause failed strict scrutiny. *Republican Party of Minnesota v. White*, 536 U.S. 765, 773 (2002). The Court recognized that restrictions on judicial campaign speech and conduct are often rationalized on the grounds that they are necessary to preserve judicial impartiality and considered three possible definitions of this interest: impartiality as lack of bias towards the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as openmindedness. *White*, 536 U.S. at 775-80.

The *White* court first considered impartiality as to parties. *Id.* at 776. It found this interest compelling because it stems from due process, which requires trial before an unbiased judge. *See Johnson v. Mississippi*, 403 U.S. 212, 216 (1971).

The court determined that the second definition, "a lack of preconceptions on legal issues," was not a legitimate interest because having a judge with no preconceptions on any legal issue is neither possible nor desirable. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias.")

Last, the *White* court considered impartiality as judicial openmindedness. The court defined judicial openmindedness as a judicial quality that "demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case," and "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *White*, 536 U.S. at 778 (emphasis in original). The Court did not state that this interest was compelling. Instead, it simply noted that the announce clause could not be narrowly tailored to this interest because it applied only to statements made after a person had declared their candidacy, and not to statements made before this date. *Id.* at 778.

II. Impartiality As Openmindedness Is Not A Compelling Interest.

The *White* court did not recognize judicial openmindedness as a compelling state interest because, regardless of the merit of such an interest, the announce clause did not serve it. *Id.* ("It may well be that [openmindedness], and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted

the announce clause for that purpose.") This Court should also decline to recognize openmindedness as a compelling state interest. While openmindedness is no doubt valuable as an aspirational goal for judges, as a basis for prohibiting speech it is problematic.

Evaluating openmindedness is inherently subjective. Openmindedness is a state of mind, and as such it is extremely difficult to prove its presence or absence at any given moment. Openmindedness does not preclude judges from having opinions on legal issues, even firmly held and strongly stated ones. *See id.* (openmindedness requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.") Judges often have strong legal opinions which can be forcefully stated. *See, e.g., Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) ("Justice O'Connor's assertion, that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); *Bush v. Gore*, 531 U.S. 98, 128-129 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.") Such statements do not, however, preclude a open mind on the part of a judge. No objective way to evaluate such a state of mind exists.

Because openmindedness is a matter not of what a judge says but rather of a mental state, it cannot be objectively determined from a particular statement. The same statement, made by two different judges, may in one case reflect a judge that is closeminded, while in the other it

may not. Any attempt to restrict speech based on concerns about openmindedness would thus necessarily involve hypothesizing about the inner workings of a judge's psyche, and would, ironically enough, subject judges to the biases and preconceptions of enforcement agencies. But premising the legitimacy of speech on the interpretation of third parties is problematic, as it "puts the speaker . . . 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. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43. Indiana's interest in preserving judicial impartiality cannot include such suppression of speech.[2]

III. The Commits Clauses Are Unconstitutional Both Facially and As Applied to the Questionnaire.

Canon 5A(3)(d)(i) (the "former commits clause") provides that a candidate for judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "make statements that commit or *appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." (emphases added). It has been amended to 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." Canon 2.10, 4.1(A)(13) (the "current commits clauses"). What constitutes a pledge, promise or commitment is

[2]*See* James Bopp, Jr. and Anita Y. Woudenberg, *An Announce Clause By Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak,* 55 Drake L. Rev. 723, 745-750 (2007) (discussing the problems attendant to openmindedness as an compelling interest).

> 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. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited.

Canon 4.1(A)(13), Comment 15.

In 2002, CJQ issued Preliminary Advisory Opinion 1-02, dealing with the effect of *White* on Indiana's judicial canons. (*See Opinion 1-02*, Ex. 1.) There, CJQ notes that "in light of the *White* opinion, the Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their *general* views about disputed social and legal issues." (*Id.* at 2 (emphasis added).) CJQ goes on to state, however, that "[when] a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous 'tough on crime' statement, or broad statements relating to the candidate's position on disputed social and legal issues, the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause." (*Id.* at 3.) Further, a "statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct." (*Id.* at 3.) In light of this, CJQ acknowledged that "many issues about campaign speech will require ad hoc analysis," and that "judicial candidates are encouraged to contact the Commission directly and in advance to discuss the propriety of their campaign statements." (*Id.* at 3.) This Opinion was not disavowed with the adoption of the new canons.

During the 2008 election campaign, CJQ's counsel Margaret Babcock responded to inquiries from judicial candidates regarding Indiana Right to Life's Questionnaire ("Questionnaire") by sending the candidates copies of Opinion 1-02, as well as excerpts from the

2007 ABA Model Code of Judicial Conduct, which are now part of the current code provisions. (*See Babcock Responses*, Ex. 3.)

The Questionnaire asks judicial candidates to announce their views on disputed legal and political issues. For example, Question 4 of the Questionnaire asks judicial candidates whether they agree or disagree with the statement "I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion." (*See Questionnaire*, attached to 2nd Am. Compl. as Ex. 5, at 4.) Agreeing with this statement and the other similar statements contained in the Questionnaire does not constitute a pledge or promise of certain results in a particular case or class of cases. However, these statements do "commit or appear to commit" a candidate with respect to a legal issue and could also constitute a pledge, promise, or commitment other than the faithful and impartial performance of the duties of a judge's office. A judge or judicial candidate who answers the Questionnaire violates the commits clauses.

A. Plaintiffs' Challenge to the Former Commits Clause Is Not Moot.

Although Plaintiffs have received the remedy they sought against the former commits clause in the form of a preliminary injunction, they still seek a permanent injunction of the provision to prevent the collateral consequence of judicial discipline for the speech engaged in under the protection of that injunction. (2nd Am. Compl. ¶ 38.) *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir. 1998) (finding that "the mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness"); *In re Hancock*, 192 F.3d 1083, 1084 (7th Cir. 1999) (*citing Dailey*, 141 F.3d at 227-29); *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367, 1370 (11th Cir. 1989) (holding that attorney's appeal of the revocation of his pro hac vice status was not moot following dismissal of the underlying case

because "the 'brand of disqualification' on grounds of dishonesty and bad faith could well hang over his name and career for years to come").

In a recent Tenth Circuit decision involving a similar amendment to Kansas' judicial code, the Court determined that the collateral consequences at issue there were too speculative and remote. *Kansas Judicial Review v. Stout*, No. 06-3290, 2009 WL 1026486 (10th Cir. 2009). Here, the facts indicate an active participation of the Commission in advising candidates prior to the injunction. (*Babcock Responses*, at Ex. 3.) Unless the Commission is willing to agree that it will not enforce the former commits clause against Plaintiffs Certo and Bauer or against others who similarly responded under protection of the preliminary injunction, the possibility of enforcement is a reasonable and real concern to Plaintiffs with a real threat of injury to their political careers. This matter is not moot as to that conduct.

B. The Commits Clauses Fail Strict Scrutiny.

Political speech concerning the qualifications of candidates for public office is "at the core of our first amendment freedoms." *White*, 536 U.S. at 774 (*quoting Republican Party of Minnesota v. Kelly*, 247 F. 3d 854 (8th Cir. 2001)). Because the former commits clause and the current commits clause are content-based regulations of core political speech, they are subject to strict scrutiny. *White*, 536 U.S. at 774. To survive strict scrutiny, a challenged law or regulation must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive

if it fails to restrict speech that does implicate the government's interest. *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980). Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

By their plain terms, the commits clauses do not restrict speech for or against particular parties, but rather prohibit any pledge or promise other than the impartial performance of judicial duties. And the former commits clause prohibits any statements that commit or appear to commit a candidate. Since the commits clauses restrict speech about issues rather than parties, they are only "barely tailored" to Indiana's interest in preserving judicial impartiality towards parties. *White*, 536 U.S. at 776; *see also Duwe v. Alexander*, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007); *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1042 (D.N.D. 2005); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004).

Likewise, the commits clauses do not serve any purportedly valid interest in preserving judicial openmindedness. Like the announce clause in *White*, these clauses only encompass statements made by judges and judicial candidates, and they do not address statements made before a lawyer announces his candidacy. *See id.* at 779-80. Candidates often have already taken a position on legal issues well before they become candidates, either in the form of lectures, books, or law review articles. *Id.* at 779. In essence, the commits clauses permit lawyers to take positions on legal issues until the day they declare their candidacy, after which such statements are prohibited. They are thus grossly underinclusive. *IRTL v. Shepard*, 463 F. Supp. 2d 879, 889 (N.D. Ind. 2006); *Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

The commits clauses are also overinclusive. In *Buckley*, the Seventh Circuit acknowledged that the State had a legitimate interest in preventing judicial candidates and judges from "mak[ing] commitments to decide particular cases or types of case in a particular way." *Buckley*, 997 F.2d at 228. The pledges and promises clause at issue there, however, sought to further this interest in the "most comprehensive fashion imaginable." *Id*. Under the clause, a judge or judicial candidate cannot

> pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*, 410 U.S. 113, 35 L. E. 2d 147, 93 S. Ct. 705. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability – or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform.

Id.; see also, *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1232 (D. Kansas 2006) (pledges and promises clause would prohibit a candidate from saying that he "promises to be tough on crime" or "is committed to upholding the First Amendment"); *Family Trust*, 345 F. Supp. 2d at 697 (same). Because the provision banned speech far beyond what could be legitimately restricted, the Seventh Circuit concluded that the pledges and promises clause was unconstitutional, and a similar result should follow here. *Buckley*, 997 F.2d at 230. As Advisory Opinion 1-02 notes, even statements of fact may be taken to violate these provisions if, in the Defendants view, they "may be deemed an implied promise of future conduct." (*Opinion 1-02*, Ex. 3, at 3.) The commits clauses fail strict scrutiny facially and as applied to the Questionnaire.

To the extent that the State does have a legitimate interest in preserving judicial open-mindedness, this interest is better served through the election process itself. Voters expect a certain level of decorum from their judicial candidates, and do not want judges who do not have

an open mind. Because of this, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 248 (1987).[3]

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is also a danger that silence inspires the suspicion that they are hiding their views to mask their partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. *See Bridges v. California*, 314 U.S. 252, 270-71 (1941) ("an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

As the district court noted in *IRTL*, "the commits clause[s] 'are essentially de facto 'announce clauses' which were found unconstitutional' in *White*," and, "there is no principled distinction between the 'announce clause' struck down in *White* and [this clause].'" *IRTL*, 463 F. Supp. at 889-90 (internal citations omitted). Despite the current commits clauses' disclaimer of reaching announced speech in Commentary 15, that announced views such as those on the Questionnaire can be reasonably construed as apparent commitments continue this trend.

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3 *See also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 First Amend. L. Rev. 180, 190-91 (2007) (describing instances where judges have been defeated in elections for making improper statements). Ironically, speech restrictions undercut the important role voters play in preserving judicial openmindedness. Preventing a judicial candidate from speaking on an issue will not keep a candidate from lacking an open mind on that issue, but it will keep voters from knowing that he is not open-minded. *See* Alan B. Morrison, *The Judge Has Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 Ind. L. Rev. 719, 734 (2003).

Because they are underinclusive, overinclusive, and because there are less restrictive means of achieving the state's interest in openmindedness, the commits clauses are not facially nor as applied to the Questionnaire narrowly tailored to the Indiana's interest in preserving judicial impartiality. They do not pass strict scrutiny. *See Buckley*, 997 F.2d at 230; *IRTL*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.[4]

C. The Commits Clauses Are Unconstitutionally Overbroad.

An overbroad law is to be facially invalidated if 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)). As such, the overbreadth doctrine prevents a law from having a deterrent effect on protected speech. *Id*.

Read literally, the commits clauses could be taken to ban even such innocuous statements of a candidate as that she "pledges to give a better shake to indigent litigants or harried employers," "promises to be tough on crime," or "is committed to upholding the First Amendment." *See Buckley*, 977 F.2d at 228; *Stout*, 440 F. Supp. 2d 1232; *Family Trust*, 345 F. Supp. 2d at 697. Such overbreadth is substantial.

Because the clauses reach issues, its scope is more than a pledge or promise of certain results in a particular case as permitted by the U.S. Supreme Court in *White* and the Seventh Circuit in *Buckley*. In doing so, the provision unconstitutionally broadens its reach to statements

[4] *See also* James Bopp, Jr. & Anita Y. Woudenberg, *To Speak or Not to Speak: Unconstitutional Regulation in the Wake of* White, 28 Just. Sys. J. 326 (2007) (noting constitutional difficulties with the pledges and promises clause and commits clause).

that, as assessed by a third party, might appear to commit a candidate. *See Duwe,* 490 F. Supp. 2d at 976.

D. The Commits Clauses Are Unconstitutionally Vague.

A law is void for vagueness "if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior." *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006). Laws regulating First Amendment freedoms must be precisely drafted. *Buckley v. Valeo*, 424 U.S. at 40-41.

The former commits clause's phrase "appear to commit" is inherently vague. As noted in *IRTL*, "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." *IRTL*, 463 F. Supp. 2d at 890; *see also, Opinion 1-02*, at 3 ("many issues about campaign speech will require ad hoc analysis."). As such, the former commits clause is unconstitutionally vague. *Id*.

Likewise, the current commits clauses are vague. It, too, has the modifier "likely to come before the court," which is contrary to the *White* decision.[5] As viewed by the *White* Court, this modifier functions as no modifier at all.

But if this modifier is given effect to limit the commits clauses, it is then vague. How is a judicial candidate to know what is likely to come before him or her or what is not? This construction creates vagueness and may result in chilling judicial candidates' speech.

[5]*See also Buckley*, 997 F.2d at 229; *Shepard,* 463 F. Supp.2d at 890.

It is unclear how a pledge or promise is different from a commitment. Webster's defines "pledge" as "a formal promise to do or not to do something," "promise" as "an assurance that one will or will not do something," and "commitment" as "a pledge to do something."[6] If "commitment" has the same meaning as "promise," then "pledge or promise" would suffice and "commit" is redundant.

But the use of the word "commit," in addition to "pledge or promise," suggests that more than pledges or promises are included within its scope and, in order to give effect to each word in the current commits clauses, "commit" must mean more than a "pledge or promise."[7] But what is it that is encompassed by the word "commit" that is not encompassed by a "pledge or promise"?

The new canon's commentary provides a partial answer, though an unconstitutionally vague one. The commentary says that "[t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases," but that "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), Commentary 15. Thus, application of the current commits clauses is dependent on the perceptions of the listener – the "reasonable person's belief – not the objective meaning of what the judicial candidate says. But a speaker cannot be left to 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. 1, 43 (1976) (*quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

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[6] *Webster's II New Riverside University Dictionary* (1984).

[7] *See* James Bopp, Jr. & Anita Y. Woudenberg, *supra* note 4, at 326 (discussing the meaning and scope of the word "commit" in relation to the pledges and promises clause).

And as the United States Supreme Court stated in *FEC v. Wisconsin Right to Life*, 127 U.S. 2652 (2007), such a standard would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech." *Id.* at 2666. As a result, content-based restrictions on speech that are dependent on the subjective perceptions of the hearer are unconstitutional. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Furthermore, the use of this vague standard to determine the scope of judicial speech in effect puts in place a form of prior restraint—candidates must first check to ensure their speech is proper before exercising their right—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 Shepard*, 463 F. Supp. 2d at 890 ("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.").

Moreover, this subjectivity can reach announced views though it may be unintended. Statements that announce views by criticizing *Roe v. Wade*, or expressing "views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability" could be believed to commit a candidate on an issue. *See Buckley*, 997 F.2d at 228.

The only truly objective way to evaluate a judicial candidate's speech is to look at the words spoken and what such words, on their face, mean. *See Buckley*, 424 U.S. at 43-44 (stating that the only way to avoid vagueness of an expenditure provision was to require the expressed

speech to advocate a candidate). Because the commits clauses go beyond the words spoken, they are unconstitutionally vague.

IV. The Recusal Clause Is Unconstitutional.

Canon 2.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," (the "recusal requirement") including when "(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy" (the "issues recusal requirement"). Judges who do not recuse in such cases risk being disciplined. According to Opinion 1-02, a "candidate's statements [regarding issues] may invite future recusal requests, or even mandate recusal." (*Opinion 1-02*, Ex. 1, at 3.)

Recusal requirements in cases where a judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case" have a long history in our jurisprudence, though even in such cases recusal is required "only in the most extreme cases." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 825-26 (1986). Recusal for announcing one's views on issues, by contrast, is simply unprecedented.[8] The Seventh Circuit, in particular, has

[8] Plaintiffs are aware of only one decision where a judge was required to recuse himself for prior announcement of views. *See Republic of Panama v. American Tobacco Co.*, 265 F.3d 299 (5th Cir. 2001), *rev'd on other grounds sub nom. Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229 (2002) (holding that a judge who had previously been associated with a view of a legal issue must recuse himself from a case involving that legal issue). In his dissent, Judge Wiener states: "The panel opinion for this case marks the first time in the history of American jurisprudence that an appellate court has reversed a trial judges's discretionary refusal to recuse himself – and has ordered the judge recused – based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and . . . [that view] is now being espoused by one of the parties in a case pending before him." *Id.* at 300.

repeatedly denied motions to recuse based on the fact that a judge had previously announced his views on legal positions related to an individual case. *See Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) ("Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to recuse himself merely because he holds and had expressed certain views on that general subject."); *Schurz Communications v. F.C.C.*, 982 F.2d 1057, 1062 (7th Cir. 1992) ("movants do not and could not argue that a judge should disqualify himself because he has views on a case"). Indeed, historically, under both federal law, 28 U.S.C. § 455(b)(1), and the ABA Canons, disqualification was

> only required if there is bias concerning a *party*, as distinguished from bias concerning an *issue* in the case. . . . [Thus] a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects – all activities expressly permitted under [1990 ABA] Canon 4B. Indeed, after deciding cases and creating precedent for years, it would be incredible if the judge did not form some fixed ideas about the law.

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original).[9] The Supreme Court held that prior announced

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[9] *See, e.g.*,regarding the federal disqualification statute, *Schurz*, 982 F.2d at 1062 (stating that the judge was not required to recuse himself because he has views on a case); *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (Rehnquist, J., on motion to recuse) (holding that Justice Rehnquist did not need to recuse himself from a Department of Justice lawsuit, an entity for whom he previously worked); *Buell v. Mitchell*, 274 F.3d 337, 347 (6th Cir. 2001) (holding that a judge who previously as a legislator supported a bill restoring the death penalty was not required to recuse himself from a death penalty case); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996) (holding that a judge's views on legal issues may not serve as a basis for a motion to disqualify that judge); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992) (holding that a judge's bias can only be disqualifying if it stems from an extrajudicial source and makes the judge's impartiality reasonably questionable); *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991) (holding that judge who was the Chairman of the United States Sentencing Commission was not precluded from hearing cases challenging the United States Sentencing

views that then came before administrative adjudicators did not require disqualification in *FTC v. Cement Institute*, 333 U.S. 683 (1948), and *United States v. Morgan*, 313 U.S. 409 (1941).

Despite this long history, on January 1, 2009, the Indiana's Canons of Judicial Conduct were amended to include an issues specific recusal requirement. Given that there is no evidence prior to 2009 that judges and judicial candidates were making inappropriate commitments and subsequently failing or refusing to recuse themselves, Indiana's rationale for adopting this provision is unclear. Nevertheless, because the recusal clause impinges on core political speech, it must survive strict scrutiny in order to pass constitutional muster, and the issues recusal requirement is subject to vagueness and overbreadth analysis. *White*, 536 U.S. at 774.

A. The Issues Recusal Requirement Is Unconstitutionally Vague.

Indiana's issues recusal requirement is vague, because it defines the scope of prohibited conduct in terms of how the statement "appears" to third parties, rather than how the statement was intended. *Anderson*, 433 F.3d at 978. The requirement that judges must recuse themselves if, while a judge or judicial candidate, they "made a public statement that commits, or *appears to commit*, the judge with respect to . . . [a]n issue in the proceeding . . . [or] [t]he controversy in the proceeding" (emphasis added) is inherently vague. There is no indication as to what type of statements "appear" to commit a candidate, leaving judicial candidates vulnerable to improper enforcement of the canon by the Defendants and chilled from announcing their views on

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Guidelines); *Phillip v. ANR Freight Systems*, 945 F.2d 1054, 1056 (8th Cir. 1991) (holding that a judge's negative comments about Title VII were not a basis for recusal in Title VII case); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 491 (1st Cir. 1989) (holding that the fact a judge had made several "pro-statehood" speeches was not a proper basis for recusal); *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) ("The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice").

disputed legal and political issues. The issues recusal requirement is therefore unconstitutionally vague. *See Duwe*, 490 F. Supp. 2d at 977.

B. The Issues Recusal Requirement Is Unconstitutionally Overbroad.

Indiana's issues-recusal requirement is also overbroad for reasons similar to the commits clauses. As with those provisions, whether a statement is restricted under the issues recusal requirement turns partly on how that clause is interpreted by third parties, rather than on how it is intended. This is impermissible. *See Buckley v. Valeo*, 424 U.S. at 43; *Ovadal*, 416 F.3d at 537; *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). The issues recusal requirement could subject judicial candidates to discipline for announcing their views on issues in written opinions or law review articles on the grounds that the announcement "appears to commit" the candidate to a particular result in a particular case. The issues recusal requirement is therefore substantially overbroad and unconstitutional. *See Buckley*, 997 F.2d at 230; *Duwe*, 490 F. Supp. 2d at 977.

C. The Recusal Clause Does Not Pass Strict Scrutiny.

Due process requires judges not to hear cases if they cannot maintain impartiality towards the parties in the case. In fashioning a recusal statute, the state is allowed to "may adopt recusal standards more rigorous than due process requires." *White* 536 U.S. at 794 (Kennedy, J., concurring).[10] It may even adopt a reasonableness standard when dealing with conflicts of

[10] Some commentators have concluded based on this statement by Justice Kennedy that the *White* decision does not apply in the recusal context. *See* Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Judicial Respectability in the Post-White Era*, 94 Ky. L.J. 1, 14 (2005). This is mistaken. Traditional recusal standards that deal with impartiality to parties are not limited to what is required by due process, because such requirements do not pose any threat to free speech. Recusal restrictions based on judicial candidates' statements about legal issues, however, do implicate the First Amendment, and must therefore be limited only to cases involving a compelling government interest, such as due process. *See, e.g.*, *White*, at 782-83

interest, or other cases where impartiality to parties is involved. What it may not do, however, is enact a recusal statute that infringes on an individual's freedom of speech or association, nor may it make those rights contingent on the reactions and interpretations of third parties. *See Buckley v. Valeo*, 424 U.S. at 43; *Ovadal*, 416 F.3d at 537; *Weaver*, 309 F.3d at 1319. Indiana's interest in preserving judicial impartiality towards parties is adequately served by the portions of its recusal statute other than the issues recusal requirement. It is not served by the issues recusal requirement, which deals with issues rather than parties, nor is it served by the recusal requirement when that is applied to the Questionnaire. *See White*, 536 U.S. at 776.

Indiana's recusal clause cannot be justified in terms of the State's interest in preventing legal preconceptions, as this interest is not compelling. *See White*, 536 U.S. at 777-78 (stating that a judge without legal preconceptions is neither possible nor desirable).

Nor can the recusal clause be justified in terms of the State's interest in preserving open-mindedness. Even assuming this interest is compelling, Indiana's issues recusal requirement is not narrowly tailored to that interest because it only encompasses commitments or appearance of commitments made by judges or judicial candidates, and it does not address commitments on issues made before the lawyer or judge announced his or her candidacy. *See id.* at 779-80.

(rejecting argument that announce clause was justified by requirements of due process). To say that a state could restrict First Amendment rights absent a compelling government interest would turn decades of jurisprudence on its head, and it is a particularly strange view to attribute to Justice Kennedy, who has repeatedly suggested that restrictions on core political speech should be held unconstitutional even where they do meet strict scrutiny. *See, e.g.*, *White*, 536 U.S. at 793 (Kennedy, J., concurring) ("I adhere to my view . . . that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.") Justice Kennedy's comments are clearly directed to traditional recusal standards based on conflicts of interest or bias as to parties – which do not implicate First Amendment rights – not to restrictions on judicial speech.

Judges often have already committed themselves on legal issues well before they became candidates for any particular judicial office, either in the form of lectures, books, law review articles, or previous rulings. *Id.* at 779. In essence, the issues recusal requirement would permit lawyers and judges alike to pledge or commit themselves on legal issues until the day they declare their candidacy, after which such pledges and commitments are prohibited because of the requirement of recusal. This renders the issues recusal requirement underinclusive. *Id.*

The issues recusal requirement on its face and the recusal requirement as applied to the Questionnaire is also overinclusive, in that they prevent judges and judicial candidates not only from pledging or promising certain results in particular cases or classes of cases, but even from announcing their views on disputed legal and political issues. By requiring recusal whenever a judge has previously has made a public statement that commits, or appears to commit the judge with regard to an issue in a proceeding before him, or more generically when a judge's impartiality can be reasonably questioned, both recusal requirements would ban even such innocuous statements by a candidate as that he was committed to giving a better shake to indigent litigants or harried employers, or that he was committed to upholding the First Amendment. *See Buckley*, 997 F.2d at 228. Nor could a judge and judicial candidate answer the questions on IRL's Questionnaires by giving his opinion on *Roe v. Wade* and other such cases without risking being disciplined should the Commission decide that such statements may reasonable be viewed as committing the judge or candidate on the issue. *Id*.

Further, whatever interest the State has in preserving judicial impartiality can be achieved through less restrictive means. In addition to the restraints placed on judges by the electorate noted above, judges themselves also serve as a natural restraint to preserve judicial impartiality.

See Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("Some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time, for instance, upon trial after a remand. Still, we accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.") (internal citations and quotations omitted). Thus, in the current context, judges cannot be disciplined for failing to recuse themselves after announcing their views on disputed legal and political issues; the awareness of bias is enough to limit its impact on their decisions.

V. The Solicitation Clauses Are Unconstitutional Both On Their Face And As Applied To Judge Certo.

Canon 4.1(A)(4) prohibits judicial candidates from "solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or candidate for public office." Canon 4.11(A)(8) prohibits judicial candidates in public elections from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee" and provided that such solicitations do not occur "more than one (1) year before the applicable primary election, caucus, or general or retention election, nor more than ninety (90) days after the last election in which the candidate participated." Canon 4.4(B)(2).

Judge Certo wants to personally solicit funds for his own campaign from non-attorneys and out-of-state attorneys, and personally solicit first time donations from groups of young people and donors to the Republican Party to encourage financial participation in the state and local Republican Parties. He wishes to make such solicitations regardless of whether he is up for

re-election. He is prohibited from doing so, however, by these two solicitation clauses. This prohibition is unconstitutional.

A. The Solicitation Clauses Fail Strict Scrutiny.

Soliciting contributions is an essential part of any election campaign. *See Weaver*, 309 F.3d at 1322 ("Campaigning for elected office necessarily entails raising campaign funds,"); *see also White*, 536 U.S. at 789 ("Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.") A solicitation clause "depends wholly upon the subject matter of the speech for its invocation." *Republican Party of Minnesota v. White*, 416 F.3d 738, 763 (8th Cir. 2005) ("*White II*"). The solicitation clauses are content-based regulations of core political speech and subject to strict scrutiny. *Id.* at 763-64; *Weaver*, 309 F.3d at 1322; *Carey v. Wolnitizek*, No. 3:06-36, 2006 WL 2916814 at *29 (E.D. Ky. Oct. 10, 2006); *Stout*, 440 F. Supp. 2d at 1237.

The solicitation clauses do not further judicial impartiality by preventing bias towards parties. Judicial candidates, such as Judge Certo, know who has donated to their campaign. The allowance of judicial candidates to create "a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code," Canon 4.4(B)(2), does not affect this. As a result, "[s]uccessful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting." *Weaver*, 309 F.3d at 1323. The solicitation clauses, both on their face and as applied to Judge Certo, do not significantly reduce the risk of judicial partiality by only allowing the candidate's committee, rather than the candidate, to seek

funds. *Weaver,* 309 F.3d at 1322-23. The solicitation clauses on their face and as applied to Judge Certo do not serve an interest in preserving impartiality as to parties.

Even if judicial openmindedness were a compelling state interest (which it is not), the solicitation clauses would not serve it. This is because the solicitation clauses, both on their face and as applied to Judge Certo, are underinclusive. By only prohibiting judicial candidates such as Judge Certo from personally soliciting while allowing them to know who has donated to their campaign, the solicitation clauses do not ensure that a judge will be openminded and unaffected by the source of contributions made during his campaign. *Weaver,* 309 F.3d at 1322-23.

Additionally, the provisions only consider funds solicited by candidates such as Judge Certo and their committees, disregarding funds voluntarily offered without solicitation. A judge's openmindedness can also be affected by funds secured from those who approach the candidate of their own volition and offer financial support. Because they only restrict a judicial candidate from soliciting funds rather than prohibiting a judicial candidate from accepting funds, the solicitation clauses on their face and as applied to Judge Certo are underinclusive and fail strict scrutiny. *See White,* 536 U.S. at 779-80; *White II,* 416 F.3d at 757.

Arguably, the solicitation clauses are designed to preserve impartiality by preventing judicial corruption because of financial support given to judges during their campaigns. *White II,* 416 F.3d at 764. They are not drafted to reflect such an interest, however, because they do not prohibit judicial candidates from knowing from whom their financial support comes, but instead merely require judicial candidates' committees, rather than the candidates themselves, to solicit the funds. The solicitation clauses do not serve such an interest, both on their face and as applied to Judge Certo. *White II,* 416 F.3d at 764; *Weaver,* 309 F.3d at 1322; *Carey,* 2006 WL 2916814

at *29; *Stout*, 440 F. Supp. 2d at 1237. Nor is it clear how a committee is less coercive than the candidate herself. *Siefert v. Alexander*, 597 F. Supp. 2d 860, 888 (W.D. Wis. 2009).

"Campaigning for elected office necessarily entails raising campaign funds," and "the fact that judicial candidates require financial support . . . to run successful campaigns does not suggest that they will be partial if they are elected." *Weaver*, 309 F.3d at 1322. Rather, to the extent that judicial candidates soliciting campaign contributions raises impartiality concerns, they "are created by the State's decision to elect judges publicly." *Id.* As noted by Justice O'Connor:

> Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. 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.

White, 536 U.S. at 792 (O'Connor, J., concurring); *see also White*, 536 U.S. at 788 (*quoting Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) ("If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.") Because the impartiality concerns, if any, are of Indiana's own making, the state cannot use these concerns as grounds for restricting core political speech. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2006 WL 2916814 at *29; *Stout*, 440 F. Supp. 2d at 1237; *Siefert*, 597 F. Supp. 2d at 888.

B. The Solicitation Clauses Are Unconstitutionally Overbroad.

In addition to failing strict scrutiny, the solicitation clauses are invalid on overbreadth grounds. While the State may be concerned about quid pro quo solicitations, the solicitation

clauses reach far more than just such solicitations: they ban any and all personal solicitations without justification. Campaigning for elective office "necessarily entails raising campaign funds," and by unnecessarily reaching all solicitations, the solicitation clauses undermine the state's decision to elect judges in the first place. *Weaver*, 309 F.3d at 1322-23; *see also White*, 536 U.S. at 789 (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 skill, the cost of campaigning requires judicial candidates to engage in fundraising."). The solicitation clauses create an unnecessary and substantial prohibition upon judicial candidates' protected speech. For this reason, the solicitation clauses are unconstitutionally overbroad.

VI. The Partisan Activities Clause is Unconstitutional Both On Its Face And As Applied to Judge Certo.

Indiana's partisan activities clause prohibits judicial candidates from "(1) act[ing] as a leader . . . in a political organization" and from "(2) mak[ing] speeches on behalf of a political organization." Canon 4.1(A). "Political organization" is defined by the Canons as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office." *See* Indiana Code of Judicial Conduct, *Terminology*. Judge Certo wants to continue to serve as a delegate to the Indiana State Republican Convention as he has in the past, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature. The partisan activities clause prohibits this.

A. The Partisan Activities Clause Fails Strict Scrutiny.

The right to associate with a political party is "a particularly important political right" under the Constitution. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.") In *White II*, the Eighth Circuit held that a political activities clause that barred judicial candidates from declaring a political affiliation or accepting endorsements was not justified by any of the three impartiality interests discussed in *White*. According to the Eighth Circuit, "the underlying rationale for the partisan-activities clause – that *associating with a particular group* will destroy a judge's impartiality – differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality." *White II*, 416 F.3d at 754 (emphasis in original).

As with the partisan activities clause in *White II*, Indiana's partisan activities clause is premised on the idea that judicial candidates cannot associate with political parties—either by holding positions of leadership within the party or by making speeches on its behalf—without destroying their impartiality. Consequently, the partisan activities clause is a content-based regulation of core political speech that is subject to strict scrutiny. *Id*.

The partisan activities clause is not narrowly tailored to Indiana's interest in maintaining judicial impartiality towards parties. Associating with a political party is different than simply announcing one's views on an issue, insofar as political parties are potential litigants. *Id.* ("in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in

favor of that litigant.") However, as the Eighth Circuit has noted, even where a political party is a litigant in a case, "any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party." *Id.* Here, Judge Certo wishes to serve as a delegate to the Indiana State Republican Convention, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature. Engaging in these activities would not prevent him from being impartial should a case involving the Republican Party come before him as judge.

Further, in the rare circumstance where a political party is a litigant before a judge who has associated with that party to the extent that his impartiality in the case might be questioned, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *Id.; Siefert*, 597 F. Supp. 2d at 882. The partisan activities clause is not the least restrictive means of safeguarding judicial impartiality towards parties and thus is not narrowly tailored. *Rutan*, 497 U.S. at 75.

The partisan activities clause is also underinclusive with respect to a purportedly valid interest in preserving judicial openmindedness, for three reasons. First, since the political activities clause applies only to judicial candidates, it does nothing to safeguard against the dangers to impartiality from a judge who has been "a life-long, active member of a political party" at whatever level. *White II*, 416 F.3d at 757. Indeed, prior to becoming candidates, many judges have been legislators, political officeholders, or political party officers, actively promoting the party's agenda and candidates. *Id.* at 758 ("history indicates it will be rare that a judicial candidate . . . will not have had some prior, substantive, political association.")

Second, while the Canons prohibit judges and judicial candidates from "(1) act[ing] as a leader . . . in a political organization" and from "(2) mak[ing] speeches on behalf of a political organization," the Canons also provide that a judge or a candidate subject to partian election may at any time "(1) identify himself or herself as a member of a political party; (2) voluntarily contribute to and attend meetings of political organizations; and (3) attend dinners and other events sponsored by political organizations." Canon 4.1(C). In fact, many Indiana state law judges, including Judge Certo, are elected on a partisan basis. The fact that Indiana allows such close association between candidates and political parties arbitrarily and wrongly assumes that a judicial candidate cannot be openminded as a leader in a political party or as a speaker on its behalf but can be openminded in other, equally political contexts.

Finally, while the partisan activities clause prohibits judges and judicial candidates from being party leaders and from making speeches on behalf of political parties, it does not prohibit candidates and judges from serving as leaders of, or making speeches for, other types of political associations. "Political organization" is defined by the Canons as "a political party or organization, the principal purpose of which is to further the election or appointment of candidates to political office." *See* Indiana Code of Judicial Conduct, *Terminology*. There are, however, many political groups, ranging from the Sierra Club to the NRA, whose principal purpose is not to help elect candidates for political office, but to advocate on behalf of certain political issues. Participation in these groups could just as readily affect a judge's openmindedness as participation in a political party. Since "the partisan-activities clause unavoidably leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited," it cannot be justified as a means of furthering Indiana's interest

in preserving judicial openmindedness, regardless of whether that interest is judged compelling. *White II*, 416 F.3d at 760.

B. The Partisan Activities Clause is Unconstitutionally Overbroad.

The partisan activities clause is also invalid on overbreadth grounds. Even assuming that the state may legitimately prohibit judges from holding certain leadership roles within a political party, there is no justification for the partisan activities clause's ban on all activity that could be viewed as acting as a leader in a political organization. And while Indiana may legitimately prohibit candidates from pledging or promising certain results in particular cases, there is no justification for the provision's ban on all speech made in favor of a political party, which effectively prohibits candidates from announcing their views. Because of this overbreadth, judicial candidates such as Judge Certo are chilled from engaging in political activities such as serving as a delegate to the Indiana State Republican Convention, speaking at political club meetings on behalf of Republican judges and the Republican Party, and speaking to students on behalf of the Republican Party, including the Eastern Indiana Model Legislature. Because the provision's impermissible applications "are substantial when compared to the law's legitimate application," the partisan activities clause is unconstitutionally overbroad. *Commodity Trends*, 149 F.3d at 688 n. 4.

C. The Partisan Activities Clause is Unconstitutionally Vague.

Finally, the partisan activities clause is unconstitutionally vague. While the provision prohibits judges and judicial candidates from "act[ing] as a leader . . . in a political organization," the partisan activities clause is unclear as to what actions would constitute "act[ing] as a leader" in such an organization. As a Republican elected official, Judge Certo is of

necessity a leader in the state Republican Party. Presumably this alone is not sufficient to violate the Canon, as partisan judicial elections are mandated by Indiana law. But if holding public office as a Republican does not constitute acting as a leader in the Republican Party, what does? The provision provides no guidance.

Likewise, the partisan activities clause prohibits judges and judicial candidates from "mak[ing] speeches on behalf of a political organization." Yet the canons also allow judges and judicial candidates to engage in other partisan activities, such as endorsing other candidates running for office in the same election cycle. *See* Canon 4.2(B). The difference, however, between endorsing Republican candidates for public office and making speeches on behalf of the Republican Party, however, is far from clear. Because the partisan activities clause "fails to give fair warning of what is prohibited [and] fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement," the provision is unconstitutionally vague. *Anderson*, 433 F.3d at 978.

Conclusion

For the reasons stated above, Plaintiffs respectfully request this Court grant Plaintiffs' Motion for Summary Judgment.

Dated: May 1, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2009, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which sent notification of such filing to the following:

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