

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA DIVISION**

KANSAS JUDICIAL WATCH, <i>et al.</i>,)	
)	
Plaintiffs,)	
)	
)	
v.)	
)	Civil Action No. 06-4056-SAC
)	
MIKEL L. STOUT, <i>et al.</i>)	
)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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Introduction

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court held that judicial candidates have the right to announce their views on disputed political and legal issues. Subsequently, three district courts used the *White* analysis to determine that the “pledges” and “commits” clauses, identical to the ones challenged here, are unconstitutional. *Alaska Right to Life v. Feldman*, 380 F. Supp.2d 1080 (D. Alaska 2005); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp.2d 672 (D. Ky. 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005). The Sixth Circuit agreed, finding that the state could not demonstrate a likelihood of success on the merits to justify staying a district court’s preliminary injunction against Kentucky’s pledges and commits clauses. *Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm’n*, 388 F.3d 224, 227 (6th Cir. 2004).

In like manner, Plaintiffs will demonstrate that Canon 5A(3)(d)(i) and (ii) of the Kansas Code of Judicial Conduct, which embodies the “pledges and promises” clause and the “commits” clause, does not survive a facial or as-applied challenge under *White*. Plaintiffs will also show that Canon 3E(1), addressing judicial disqualification, cannot withstand an as-applied challenge under *White*.

Plaintiff Robb Rumsey, a judicial candidate, wishes to give information about his views on legal and political issues so that he might inform voters about the upcoming 2006 election and Plaintiff Kansas Judicial Watch (“KJW”) wishes to publish these views. When judicial candidates exercise their constitutional right to announce their views on disputed legal and political issues, the listeners have a right to hear it, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), and to associate with whomever they so choose. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 216

(1989). Depriving judicial candidates and listeners of these rights, as Canons 5A(3)(d)(i) and (ii) and 3E(1) do, is to deprive them of their First and Fourteenth Amendment rights of speech and association. Such a deprivation causes irreparable harm, and it must be preliminarily enjoined.

In addition, the “solicitation” clause, found in Canon 5C(2) of the Kansas Code of Judicial Conduct, cannot survive a facial or as-applied challenge. Campaigning for an elected public office “necessarily entails . . . seeking endorsements” from citizens in the community. *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (citation omitted). The solicitation clause “depends wholly upon the subject matter of the speech for its invocation” and, moreover, the clause prohibits speech that is of the highest order – political speech. *Republican Party v. White*, 416 F.3d 738, 763-64 (8th Cir. 2005). “It can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Id.* at 764 (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)) (other quotation omitted) (alteration in original).

Judge Hart wishes to go door-to-door to seek nomination petition signatures in order to qualify as a candidate in the 2008 election. However, he will not do so because he fears discipline under Canon 5C(2); thus, he is prohibited from exercising his First and Fourteenth Amendment rights of speech and association. This deprivation of rights causes irreparable harm and must be enjoined.

Facts

The facts of this case are set out in the Verified Complaint for Declaratory and Injunctive Relief and verified there by Richard Peckham, Executive Director of Kansas Judicial Watch, Honorable Charles M. Hart, and Robb Rumsey. They are briefly restated here.

Kansas Judicial Canon 5A(3)(d)(i) and (ii) states: “A candidate for a judicial office: . . . (d) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; 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;” Canon 3E(1) mandates that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned” The Canon can be applied to require judges who have engaged in constitutionally protected political speech to disqualify themselves from proceedings involving issues about which they have spoken. Canon 5C(2) provides that “a candidate shall not personally . . . solicit publicly stated support”

Kansas’ disqualification, pledges and commits, and solicitation clauses have caused judicial candidates who might otherwise announce their views on political and legal issues to refrain for fear of discipline and mandatory disqualification if they win the election. *Complaint* ¶¶ 18,21.

The Office of Disciplinary Administrator enforces the Code of Judicial Conduct against lawyers who are judicial candidates pursuant to Rule 8.2(b) of the Code of Professional Conduct, which states: “A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.” By this rule, the Office of Disciplinary Administrator incorporates the language of Canons 5A(3)(d)(i) and (ii), 5C(2), and 3E(1). *Complaint* ¶ 16.

KJW, a political action committee, seeks to collect and publish data regarding judicial candidates’ political philosophy on disputed legal and political issues. *Complaint* ¶ 17. It endeavored to accomplish this by sending out the 2006 Judicial Candidate Questionnaire (“2006 Candidate Questionnaire”) in February 2006 to judicial candidates in Sedgwick county and to all nine judges on the Kansas Court of Appeals. *Complaint* ¶ 20. Of the seven judicial candidates who responded

to the questionnaire, all but one of them refused to answer all of the questions, citing Canons 5A(3)(d)(i) and (ii) and 3E(1) as grounds for their refusal. *Complaint* ¶ 21. One candidate answered seven of the eight questions asked in the questionnaire. KJW will not publish that response, however, because it does not want to expose that candidate to discipline or place him in a position where he must disqualify himself as judge. *Complaint* ¶ 22.

Rumsey would like to inform voters of his views before the primary and general elections in August and November 2006, but will refrain because of Canons 5A(3)(d)(i) and (ii), 3E(1), and 5C(2). He also would like to share such information in subsequent judicial elections. *Complaint* ¶ 18.

If KJW does not obtain the requested injunctive relief expeditiously, it will not be able to receive and publish information regarding judicial candidates' views on disputed political and legal issues in time for the 2006 election. Similarly, Rumsey will not be able to inform voters of his views on disputed legal and political issues so as to allow voters to make an informed voting decision. As a result, KJW and Rumsey will be deprived of their constitutional rights under the First and Fourteenth Amendments to the United State Constitution and will continue to suffer immediate and irreparable harm if Defendants are not preliminarily enjoined from enforcing Canon 5A(3)(d)(i) and (ii), Canon 3E(1), and Canon 5C(2). They have no adequate remedy at law.

Canon 5C(2)'s solicitation provision will also cause judicial candidates to refrain from going door-to-door to ask for nomination petition signatures out of fear of discipline under the canon. Judge Hart would like to go door-to-door to ask for nomination petition signatures so that he might qualify as a candidate in the 2008 election. If Judge Hart does not obtain the requested injunctive relief, he will be unable to talk with citizens to seek their support. Consequently, Judge Hart will be deprived of his constitutional rights of speech and association under the First and Fourteenth

Amendments and will continue to suffer irreparable harm if Defendants are not enjoined from enforcing Canon 5C(2). He has no adequate remedy at law.

Statement of the Issues

1. Whether Plaintiffs should be granted a preliminary injunction enjoining Defendants from enforcing Canon 5A(3)(d)(i) and (ii) against judicial candidates because the provisions prohibit constitutionally protected speech in violation of the First and Fourteenth Amendments.
2. Whether Plaintiffs should be granted a preliminary injunction enjoining Defendants from enforcing Canon 3E(1) against judicial candidates because the provisions are unconstitutional as applied to KJW's 2006 Candidate Questionnaire.
3. Whether Plaintiffs should be granted a preliminary injunction enjoining Defendants from enforcing Canon 5C(2) against judicial candidates because the provisions prohibit constitutionally protected speech and association in violation of the First and Fourteenth Amendments.

I. Plaintiffs Satisfy the Preliminary Injunction Requirements.

A movant may obtain a preliminary injunction if:

- (1) the movant will be irreparably injured by denial of the relief;
- (2) the movant's injury outweighs any damage the injunction may cause the opposing party;
- (3) granting the preliminary relief would not be adverse to the public interest; and
- (4) there is a substantial likelihood of success on the merits.

Keirnan v. Utah Transit Auth., 339 F.3d 1217, 1220 (10th Cir. 2003) (citation omitted).

“When a party seeking a preliminary injunction satisfies the first three requirements, the standard for meeting the fourth ‘probability of success’ prerequisite becomes more lenient. The movant need only show ‘questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation.’” *Id.* at 1221 (citations omitted).

Plaintiffs meet these requirements. Thus, preliminary injunctive relief should be granted.

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

1. Canon 5A(3)(d)(i) and (ii) Is Unconstitutional Both On Its Face and As Applied to the 2006 Candidate Questionnaire.

Canon 5A(3)(d)(i) and (ii) states that judicial candidates 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” This provision, comprised of a *pledges and promises* clause and a *commits* clause, has the same essential meaning and effect as the announce clause in *White* as it is interpreted by the Commission on Judicial Qualifications (“The Commission”) and judicial candidates who have responded to KJW’s survey: It prohibits judicial candidates from expressing their views on disputed legal and political issues.

a. Canon 5A(3)(d)(i) and (ii) Is Facially Unconstitutional.

Like the announce clause at issue in *White*,¹ the pledges and promises clause and the commits clause must survive overbreadth and vagueness analysis. And, like the announce clause, they must satisfy strict scrutiny to pass constitutional muster because they encompass speech protected under the First Amendment. *White*, 536 U.S. at 774. However, they survive none of these requirements.²

¹ Minnesota’s announce clause stated that a “‘candidate for a judicial office, including an incumbent judge,’ shall not ‘announce his or her views on disputed legal or political issues.’” *White*, 536 U.S. at 768 (citing Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000)).

² The federal courts have vigorously enforced the First Amendment protections found in *White* and have struck down numerous judicial canons since 2002. The U.S. Court of Appeals for the Eleventh Circuit found that a Georgia canon prohibiting judicial candidates for making negligent false statements and misleading or deceptive true statements, and from personally soliciting contributions and support was unconstitutional under *White*. *Weaver*, 309 F.3d at 1320, 1322. The Eighth Circuit in an *en banc* decision applied the *White* Court’s analysis to Minnesota’s partisan-activities and solicitation clauses, finding them unconstitutional. *White*, 416 F.3d 738. (continued)

i. Canon 5A(3)(d)(i) and (ii) Is Unconstitutionally Overbroad.

An overbroad law is to be facially invalidated if the burden it places on protected speech is “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *Bader*, 361 F. Supp. 2d at 1038. Overbreadth doctrine prevents a law from having a deterrent effect on protected speech. *Faustin v. City and County of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005); *Bader*, 361 F. Supp. 2d at 1038.

Canon 5A(3)(d)(i) and (ii) sweeps constitutionally protected speech within its scope. Specifically, both the pledges and promises clause and the commits clause, as the Commission and Kansas judicial candidates interpret them, embrace the same speech as an announce clause. Of course, judicial candidates cannot pledge, promise, or commit to a particular outcome in a particular case without denying due process to litigants. *White*, 536 U.S. at 776. But simply announcing views on issues, as KJW’s survey solicits, does not constitute a commitment, pledge, or promise to

District courts have likewise decided. In the Second Circuit, the court for the Northern District of New York found Code provisions that required judges to preserve the independence and integrity of the judiciary by avoiding the appearance of impropriety were unconstitutional as they could not withstand strict scrutiny under *White*. *Spargo v. State Comm’n on Judicial Conduct*, 244 F. Supp.2d 72, 88-89 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003). In the Fifth Circuit, a Texas district court enjoined a judicial canon that prohibited a judicial candidate from “mak[ing] statements that indicate an opinion on any issue” that may come before him or her. *Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 (W.D. Tex. 2002). Most recently, a Sixth Circuit District Court issued a preliminary injunction against the Ohio Supreme Court Disciplinary Counsel, staying disciplinary proceedings against the plaintiff-judge for identifying himself as a member of a political party and stating his views of the Ohio Supreme Court. *O’Neill v. Coughlan*, No. 04 Civ. 1612 (N.D. Ohio Sept. 14, 2004) (order granting preliminary injunction) (attached as Exhibit 1). Citing *White*, the court found that plaintiff was likely to succeed on the merits of his claim as the canons at issue were not sufficiently narrowly tailored. *Id.* at 9, 12, 14.

reaching a particular outcome in a particular case.³

For example, the 2006 Candidate Questionnaire asks candidates to respond to the following question: “Under the Kansas Constitution, a statute defining marriage as between one man and one woman is the prerogative of the Kansas State Legislature, not the Kansas Supreme Court.” *See* Complaint, Exhibit D. By responding “Agree” or “Disagree,” candidates in no way commit, pledge, or promise that they will rule in any particular way in a particular case that same-sex marriage is legal or illegal.

Nor can the Canon’s prohibition on making statements that “*appear* to commit the candidate with respect to cases, controversies, or *issues* that are likely to come before the court” (emphases added) be justified. Used to prohibit candidates from stating their views on legal or political matters, the “appear to commit” prohibition renders it indistinguishable from the announce clause struck down in *White*. Judicial candidates are clearly not and cannot be prohibited from announcing their views on issues in written opinions or law review articles on the grounds that this constitutes an “appearance of commitment” to a particular result in a particular case. Neither can they be forbidden from stating the same views in response to a survey without rendering *White* meaningless.

Further, the overbreadth of “appears to commit” is not cured by the fact that it applies only to issues “likely to come before the court.” As the Supreme Court noted in *White*, “limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all [T]here

³ To “announce” is “to make known publicly, to indicate beforehand.” *Merriam-Webster’s Collegiate Dictionary* 47 (10th ed. 2001). To “commit,” in contrast, requires more – “to obligate or pledge oneself.” *Id.* at 231. Likewise, a pledge is “a binding promise or agreement to do or forbear,” *id.* at 891, and a “promise” is “a declaration that one will do or refrain from doing something specified.” *Id.* at 931.

is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.” *White*, 536 U.S. at 772 (citing *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 229 (7th Cir. 1993)).

Canon 5A(3)(d)(i) and (ii) impermissibly prohibits judicial candidates from announcing their views on disputed political and legal issues. Since such gross overbreadth cannot be justified by the very limited legitimate purpose of preventing judicial candidates from stating what result they will reach in a particular case, Plaintiffs are likely to succeed on the merits of their overbreadth claim. *See Bader*, 361 F. Supp. 2d at 1039; *Family Trust*, 345 F. Supp. 2d at 697.

ii. Canon 5A(3)(d)(i) and (ii) Is Unconstitutionally Vague.

A statute is impermissibly vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Jordan*, 425 F.3d at 824-25 (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56-57 (1999))). And a law is vague if it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Laws regulating First Amendment freedoms are closely examined to ensure they are precisely drafted. *Buckley*, 424 U.S. at 40-41.

On its face, Canon 5A(3)(d)(i) and (ii) provides that judicial candidates 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). The meanings of “pledge,” “promise,” and “commit” seem clear enough in themselves. *See* this Memorandum at n.3. Nevertheless, the Commission’s authoritative interpretation of these terms

applies them, or applies the phrase “appear to commit” together with them or in itself, to forbid judicial candidates from announcing their views.

But the phrase “appear to commit” is inherently vague. The Commission and judicial candidates interpret the phrase to include simply stating views on disputed political or legal issues – though this interpretation makes no sense because it would forbid incumbent judicial candidates from even stating their views in judicial opinions, scholarly articles, or speeches to the bar. Yet if it does not forbid candidates from announcing their views on legal or political issues, then what does it forbid? There is no guidance from the Canon itself, other than the meaningless requirement that the issue must be “likely” to come before the candidate as judge for the Canon to apply – a requirement that increases uncertainty because, as the Supreme Court observed, ““there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”” *White*, 536 U.S. at 772 (citing *Buckley*, 997 F.2d at 229). As such, Canon 5A(3)(d)(i) and (ii) is unconstitutionally vague.

iii. Canon 5A(3)(d)(i) and (ii) Is Not Narrowly Drawn to Satisfy a Compelling State Interest.

In *White*, the U.S. Supreme Court recognized that judicial candidates have the constitutional right to announce their views on disputed political and legal issues under the First and Fourteenth Amendments. 536 U.S. at 788. Restrictions on fundamental First Amendment freedoms, such as the announce clause, are subject to strict scrutiny, requiring a law to be narrowly tailored to serve a compelling government interest. *Id.* at 774-75. Defenders of a restriction on judicial candidate speech must show that it does not ““unnecessarily circumscribe protected speech.”” *Id.* at 775 (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). Subjecting Minnesota’s announce clause to strict

scrutiny, the Supreme Court found that it was not narrowly tailored to reflect the state's interest in impartiality. *Id.* at 775-80. The same result should follow here.

Defenders of the announce clause claimed that it served a compelling state interest in assuring “judicial impartiality,” and the *White* Court considered three understandings of this interest: lack of bias towards the parties, lack of preconception towards a particular legal viewpoint, and openmindedness. *Id.* at 775-80. The Court found that the first and last of these possible definitions of the state interest in “judicial impartiality” were inadequately served by the announce clause, while the second definition was insufficiently compelling to support the clause. *Id.* at 775-80.

Like the announce clause, Canon 5A(3)(d)(i) and (ii) restricts freedom of speech; consequently, it is subject to strict scrutiny analysis. Subject to this standard, the Canon fails. Like the announce clause, the Canon's pledges and promises clause and commits clause do serve the compelling interest of preserving the real and apparent impartiality of the courts. However, this interest is not narrowly tailored in Canon 5A(3)(d)(i) and (ii), regardless of how “impartiality” is defined. *See id.* at 775-80.

If Kansas' interest concerns a judge's impartiality toward parties, the language of the Canon does not reflect that interest. Like the announce clause, the Canon does not restrict speech for or against particular parties, but rather prohibits “statements that commit or appear to commit the candidate with respect to cases, controversies or *issues* that are likely to come before the court.” (emphasis added). Just as the announce clause, Canon 5A(3)(d)(i) and (ii) is barely tailored to serve this interest. *See White*, 536 U.S. at 776.

If the interest is to preserve impartiality by preventing preconceptions, such an interest is not compelling. As the *White* Court noted, this interest is naive as no judge is without preconceptions. *See id.* at 777-78. Just as this interest was not compelling for the announce clause, it is not

compelling for Canon 5A(3)(d)(i) and (ii). *Id.* at 777. Thus, even if the Canon could be construed to reflect this interest, it does not satisfy the compelling interest requirement of strict scrutiny.

Finally, if Kansas' interest in impartiality is preserving openmindedness, such an interest is underinclusive. Like the announce clause in *White*, Canon 5A(3)(d)(i) and (ii) only encompasses pledges and commitments made by judicial candidates, and does not address pledges or commitments made before the lawyer or judge announced his or her candidacy. *See id.* at 779-80. Judges often have already committed themselves on legal issues well before they became candidates for judicial office, either in the form of lectures, books, law review articles, or previous rulings. *Id.* at 779. In essence, the Canon permits 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. This effectively joins Canon 5A(3)(d)(i) and (ii) with the announce clause in its underinclusiveness, and like the announce clause, renders the Canon insufficiently tailored to satisfy strict scrutiny. *See Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

b. Canon 5A(3)(d)(i) and (ii) Is Unconstitutional as Applied to the 2006 Candidate Questionnaire.

In addition to not withstanding a facial challenge, Canon 5A(3)(d)(i) and (ii) as applied to the 2006 Candidate Questionnaire is unconstitutional because it is not narrowly tailored to serve the state's compelling interest, but rather is overbroad and vague.

The Canon as applied to the 2006 Candidate Questionnaire restricts the First Amendment freedom of speech and, thus, must survive strict scrutiny. Under this standard, Canon 5A(3)(d)(i) and (ii) fails. While the Canon as applied to the questionnaire serves a compelling interest in preserving the impartiality and appearance of impartiality of the courts, this interest is not narrowly tailored,

regardless of how “impartiality” is defined. *See White*, 536 U.S. at 775-80. If impartiality concerns a judge’s impartiality towards parties, the language of Canon 5A(3)(d)(i) and (ii) does not reflect that interest as it addresses issues, not parties. *See id.* at 776. If impartiality means no preconceptions, such an interest is not evidenced in the Canon and is, in fact, a naive interest as no judge is completely without preconceptions. *See id.* at 777-78. If impartiality is desired to preserve openmindedness, Canon 5A(3)(d)(i) and (ii) as applied to the questionnaire is underinclusive because it only encompasses pledges and commitments made by judicial candidates and does not address those made before the lawyer or judge announced his or her candidacy. *See id.* at 779-80.

While Canon 5A(3)(d)(i) and (ii)’s commits clause is limited to issues that will come before the court, such a limitation is hardly a limitation at all when it is applied to the 2006 Candidate Questionnaire, as almost any issue can come before a judge in any American court of general jurisdiction. *Id.* at 772. Such a “limitation” reaches beyond the scope of the state’s interest in impartiality, sweeping broadly into protected free speech.

Likewise, the pledges and promises clause only permits speech relating to the impartiality of the court. When applied to the 2006 Candidate Questionnaire, such a broad construction is barely tailored to serve the state’s interest in impartiality as less restrictive means exist to satisfy that interest. Because it is not narrowly drawn to serve a compelling government interest, Canon 5A(3)(d)(i) and (ii) as applied to the 2006 Candidate Questionnaire should be found unconstitutional.

2. The Commission’s Enforcement Policy of Canon 5A(3)(d)(i) and (ii) Is Unconstitutional.

Not only does Canon 5A(3)(d)(i) and (ii) fail overbreadth and vagueness challenges and the requirements laid out in *White*, the enforcement policy espoused by the Commission regarding

Canon 5A(3)(d)(i) and (ii) does not survive those challenges either.

The Commission's enforcement policy is vague. First articulated in Advisory Opinion JE 100, the Ethics Advisory Panel majority opined that responding to the questionnaire would be a request for endorsement and would violate Canon 5C(2)'s mandate that candidates "shall not personally . . . solicit . . . publicly stated support . . ." See Exhibit H attached to Plaintiffs' Verified Complaint at H-2. The minority stated that the candidate could respond to the questionnaire but must be "ever mindful of the Canons of Judicial Conduct, and particularly Canon 5," although the minority did not specify which provision of Canon 5 to which it referred. *Id.* The Commission added the following postscript to the opinion: "The Commission on Judicial Qualifications respectfully rejects the majority view and adopts the minority view as expressed in JE 100. The Commission is not bound by advisory opinions." *Id.* In Opinion JE 139, issued in April 2006, the panel affirmed its opinion that judicial candidates could not answer questionnaires, citing Canon 5A(3)(d)(i) and (ii).

Such an enforcement policy, however, cannot constitutionally prohibit judicial candidates from announcing their views on political and legal issues because it prohibits constitutionally protected speech in a manner that is not narrowly tailored to serve a compelling interest. Because judicial candidates believe that the enforcement policy prohibits announcing their views on disputed political and legal issues, the policy is unconstitutionally vague both on its face and in its application.

The Commission's enforcement policy is also overbroad. The policy, by adopting wholesale the language of Canon 5A(3)(d)(i) and (ii) and offering only ambiguous guidelines for interpreting the Canon, also adopts the Canon's sweeping proscription of all speech, protected or otherwise. Such an overreaching policy is an overbroad regulation of protected speech, and must be enjoined.

Finally, the enforcement policy both on its face and as applied to the 2006 Candidate

Questionnaire restricts the fundamental freedom of speech and, thus, must survive strict scrutiny. Under this analysis, the enforcement policy falters. While the policy serves a compelling interest in preserving the impartiality and appearance of impartiality of the courts, this interest is not narrowly tailored under any definition of “impartiality.” *See White*, 536 U.S. at 775-80. If the state’s interest concerns a judge’s impartiality towards parties, the language of the policy does not reflect that interest as it requires impartiality as to issues, not parties. *See id.* at 776. If the state’s interest is in preserving impartiality by preventing preconceptions, such an interest is not addressed in the policy and is a naive interest as no judge is without preconceptions. *See id.* at 777-78. If the interest in impartiality is to preserve openmindedness, it is underinclusive as reflected in the policy because it only encompasses pledges and commitments made by judicial candidates, not addressing pledges or commitments made before the lawyer or judge announced their candidacy. *See id.* at 779-80.

The Commission’s enforcement policy regarding the pledges and promises clause is so broad, it only permits speech relating to the impartiality of the court. Such a construction is barely tailored to serve the state’s interest in impartiality as less restrictive means exist to satisfy that interest. Thus, the enforcement policy both on its face and as applied to the 2006 Candidate Questionnaire is not narrowly tailored and is an unconstitutional prohibition and burden on protected speech.

3. Canon 3E(1) as Applied to the 2006 Candidate Questionnaire Violates Plaintiffs’ Rights.

Much like Canon 5A(3)(d)(i) and (ii), Canon 3E(1) fails an as-applied challenge. Mandating that a judge recuse himself when his “impartiality might reasonably be questioned . . . ,” Canon 3E(1) as applied to the 2006 Candidate Questionnaire chills and penalizes speech. Rather than subjecting judges to discipline for announcing their views, as Canon 5A(3)(d)(i) and (ii) does, Canon

3E(1) penalizes judges by denying them employment, resulting in a chilling effect on judicial candidates who seek to avoid such an unconstitutional condition⁴.

Like Canon 5A(3)(d)(i) and (ii), the application of Canon 3E(1) to the 2006 Candidate Questionnaire restricts a core First Amendment freedom and is subject to strict scrutiny. *See White*, 536 U.S. at 775 (*quoting Brown*, 456 U.S. at 54). The application of Canon 3E(1) to the 2006 Candidate Questionnaire fails under this analysis.

Canon 3E(1) appears to serve the compelling interest of preserving the impartiality and appearance of impartiality of the courts.⁵ The state validly has concern about the impartiality of the judiciary, as do voters. The voter does not prefer the corrupt, but values impartiality in judges. Because the public values impartiality, 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). This serves as a natural restraint on judicial candidate speech, which has served us throughout our Nation’s history.⁶

⁴ *See Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (stating that the government cannot require a person to give up a constitutional right to receive a discretionary benefit); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (stating that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech,” even though he is not entitled to that benefit); *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (finding an unconstitutional condition where a taxpayer had to execute an oath to receive a tax exemption).

⁵ Of course, if the state’s interest is in preserving impartiality by preventing preconceptions, such an interest is not compelling, as no judge is completely without preconceptions. *See White*, 536 U.S. at 777-78.

⁶ For example, when it was suggested that Salmon P. Chase – President Abraham Lincoln’s nominee to this Court to replace Chief Justice Roger B. Taney – should be questioned on how he would vote on slavery and legal tender laws, President Lincoln responded: “We cannot ask a man

Judges themselves also serve as a natural restraint to preserve impartiality:

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. Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228, 229-230 (1957). 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.” *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.

Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring). Thus, in the current context, judges need not recuse themselves for announcing their views in answering the 2006 Candidate Questionnaire; the awareness of bias is enough to limit its impact on their decisions.

The state’s interest in impartiality arises because of due process, which requires trial before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). However, disqualification is required “only in the most extreme of cases.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 825-26 (1986). It must be shown that the judge has a “direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” *Id.* at 821-22 (citation and quotation marks omitted). Thus, while the presumption of impartiality may be overcome in particular cases through judicial disqualification, wholesale and categorical rejection of the presumption for all judges who state their views carries “a much more difficult burden of persuasion.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The court must be convinced that “under a realistic appraisal of psychological tendencies and human weakness,” public expression of a judge’s general views on the law during a campaign “poses such a risk of actual bias or prejudgment that the practice must be forbidden.” *Id.* See also *Del*

what he will do [on the Court], and if we should, and he should answer us, we should despise him for it.” Nat Hentoff, *To Get A Supreme Court Seat*, Washington Post, August 14, 1999, at A17.

Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1361, 1375-77 (7th Cir. 1994) (en banc).

Expression of a view on an issue simply does not overcome the presumption of impartiality of all judges and cannot be a basis for wholesale disqualification.

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. Thus, “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.” *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Additionally, recusal for announcing one’s views is unprecedented⁷. It is uniformly accepted in both federal law, 28 U.S.C. § 455(b)(1), and under the ABA Canons that disqualification is

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 subjects⁸ – all activities expressly permitted

⁷ 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’ 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.

⁸ Nor could judges have web logs like Judge Posner does at <http://www.becker-posner-blog.com>.

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.⁹

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original).¹⁰ In fact, the Supreme Court has found that prior expressions of views on issues 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), which should end the inquiry.

As a consequence, Canon 3E(1) as applied to the 2006 Candidate Questionnaire serves as an unconstitutional penalty on judges who decided to exercise their right to announce their views by

⁹ The original draft of the 1972 ABA Canon 3E(1)(a), which required disqualification if a judge “had a fixed belief concerning the merits,” was changed to the “personal bias or prejudice” standard for fear the original draft would require a judge “to disqualify himself if he had a fixed belief about the law applicable to a given case.” Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 61 (1973). “[T]he [ABA drafting] committee recognized the necessity and the value of judges having fixed beliefs about constitutional principles and many other facets of the law.” *Id.*

¹⁰ *See, e.g.*, regarding the federal disqualification statute, *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 (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 (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 (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. Payne*, 944 F.2d 1458 (9th Cir. 1991) (holding that expertise or exposure to a subject does not require a judge to recuse himself); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987) (personal bias based upon a judge's background and associations alone does not require recusal); *Southern Pac. Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984) (stating that the mere fact that judge has views on the law or policies at issue in a case before him does not require his recusal); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982) (stating that the judge was not required to recuse himself because he holds and expresses certain views on a general subject); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980) (stating that the views of a judge on legal issues are not an adequate basis for motions to disqualify).

answering the 2006 Candidate Questionnaire. Because it has never been applied to judges for statements made during their campaign, the Commission is not justified in applying Canon 3E(1) to judges who answered the 2006 Candidate Questionnaire. Such an interpretation and enforcement of Canon 3E(1) is not narrowly tailored to serve the state’s compelling interest in impartiality. Additionally, Canon 3E(1) as applied to the 2006 Candidate Questionnaire does not serve the state’s interest in a judge’s impartiality towards parties, but rather focuses upon issues.

For these reasons, the application of Canon 3E(1) to the 2006 Candidate Questionnaire chills and penalizes constitutionally protected speech. *See McDaniel v. Paty*, 435 U.S. 618, 633 (1977). As such, Canon 3E(1) cannot be constitutionally applied to the 2006 Candidate Questionnaire.

4. Canon 5C(2) Is Unconstitutional Both on its Face and as Applied to the 2006 Candidate Questionnaire and to Nomination Petitions.

a. Canon 5C(2) Is Facially Unconstitutional.

Canon 5C(2) provides that “a candidate shall not personally . . . solicit publicly stated support” The solicitation clause must survive overbreadth and vagueness analysis. In addition, the clause must satisfy strict scrutiny because it “both prohibits speech on the basis of its content and burdens a category of speech that is at the core of our First Amendment freedoms – speech about the qualifications of candidates for public office.” *White*, 536 U.S. at 774 (citation omitted).

i. Canon 5C(2) Is Unconstitutionally Overbroad.

An overbroad law is to be facially invalidated if its burden on protected speech is “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Jordan*, 425 F.3d at 828 (citing *Broadrick*, 413 U.S. 615); *Bader*, 361 F. Supp.2d 1038.

Canon 5C(2) sweeps constitutionally protected speech within its scope because it encompasses

the same speech as an announce clause. A candidate cannot pledge, promise, or commit to a particular outcome in a particular case without denying due process to litigants, *White*, 536 U.S. at 776, but simply announcing views on issues, as the 2006 Candidate Questionnaire solicits, does not constitute a commitment, pledge, or promise to reaching a particular outcome in any particular case.

Canon 5C(2) unconstitutionally prohibits judicial candidates from announcing their views on disputed political and legal issues. Such gross overbreadth cannot be justified by the very limited legitimate purpose of preventing judicial candidates from stating what result they will reach in a particular case; thus, Plaintiffs are likely to succeed on the merits of their overbreadth claim. *See Bader*, 361 F. Supp.2d at 1039; *Family Trust*, 345 F. Supp. 2d at 697.

In addition, Canon 5C(2) sweeps the protected speech of judicial candidates seeking nomination petition signatures into its ambit. While it could arguably be permissible to restrict incumbent judicial candidates from seeking nomination petition signatures from parties engaged in litigation before the judge, it is impermissible to restrict candidates from engaging in constitutionally protected speech and association by going door-to-door to speak with voters to seek their support. Canon 5C(2) provides that candidates may establish committees to solicit public support for the candidate. However, this overbreadth is not remedied by allowing a candidate's representative to solicit signatures. As the Eighth Circuit has held, any possible risk "is not significantly reduced by allowing the candidate's agent to seek these endorsements . . . on the candidate's behalf rather than the candidate seeking them himself." *Weaver*, 309 F.3d at 1322-23.

Canon 5C(2) impermissibly prohibits judicial candidates from engaging in protected political speech and, as a result, must be enjoined.

ii. Canon 5C(2) Is Unconstitutionally Vague.

A statute is impermissibly vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *Jordan*, 425 F.3d at 824-25 (citing *Hill*, 530 U.S. at 732) (citing *Morales*, 527 U.S. at 56-57)). And a law is vague if it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis” *Grayned*, 408 U.S. 108-09. Laws regulating First Amendment freedoms are closely examined to ensure they are precisely drafted. *Buckley*, 424 U.S. at 40-41.

Canon 5C(2) provides that “a candidate shall not personally . . . solicit publicly stated support.” Although the meaning of the phrase seems clear, the Ethics Advisory Panel has interpreted it to include simply stating views on political or legal issues by answering questionnaires. There is no guidance from the Panel or the Canon itself as to which questionnaires are permissible to answer and which ones are not, or even which questions within the questionnaire are deemed objectionable and why. Canon 5C(2) fails to adequately define the solicitation clause since judicial candidates who wish to engage in constitutionally protected speech by announcing their views on disputed political and legal issues have reason to believe that this clause prevents them from making such announcements. Consequently, Canon 5C(2) is unconstitutionally vague.

iii. Canon 5C(2) Is Not Narrowly Drawn to Satisfy a Compelling Interest.

Candidate speech is entitled to the highest protection under the First Amendment. *See White*, 536 U.S. at 774-75 (applying strict scrutiny to legislation limiting judicial candidate speech). The public must be able to hear from the candidates regarding their qualifications and positions on issues:

[D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society

makes it all the more imperative that *they* be allowed freely to express *themselves* on matters of current public importance. [As a result,] [w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

White, 536 U.S. at 781-82 (citations and internal quotation marks omitted) (emphasis added); *see also id.* at 805-06 (Ginsburg, J., dissenting). Thus, “the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy.” *Buckley*, 424 U.S. at 54.

“Restricting speech based on its subject matter triggers the same strict scrutiny as does restricting core political speech.” *White*, 416 F.3d at 763-64. Canon 5C(2)’s solicitation clause does both so the clause must be narrowly tailored to serve a compelling state interest. *Id.* at 764. To show that the clause is narrowly tailored, Defendants “must demonstrate that it does not unnecessarily circumscribe protected expression.” *Id.* at 775 (citation omitted).

If the state’s interest is in promoting a judge’s impartiality toward parties, the clause is “barely tailored” to serve this interest. *Id.* at 765 (holding that a solicitation clause unconstitutionally prohibited candidates from personally soliciting campaign contributions because it was “barely tailored” to serve the state’s interest in unbiased judges); *see also Weaver*, 309 F.3d at 1322 (holding that Georgia’s solicitation clause prohibiting candidates from personally soliciting publicly stated support as well as campaign contributions failed strict scrutiny because it chilled candidates’ speech “while hardly advancing the state’s interest in judicial impartiality at all”). “The fact that judicial candidates require . . . public endorsements to run successful campaigns does not suggest that they will be partial if they are elected.” *Weaver*, 309 F.3d at 1322. Canon 5C(2) allows candidates to establish committees to solicit public support on their behalf. However, even if there were such a partiality risk, it is not “significantly reduced by allowing the candidate’s agent to seek

these . . . endorsements on the candidate’s behalf rather than the candidate seeking them himself.” *Id.* at 1322-23. Canon 5C(2) “fails strict scrutiny because it completely chills a candidate’s speech on these topics while hardly advancing the state’s interest in judicial impartiality at all.” *Id.* at 1323.

b. Canon 5C(2) is Unconstitutional as Applied to the 2006 Candidate Questionnaire.

Canon 5C(2) as applied to the 2006 Candidate Questionnaire restricts the First Amendment freedom of speech and, thus, must survive strict scrutiny. The Canon as applied to the questionnaire may serve a compelling interest in preserving the impartiality and appearance of impartiality of the courts, but the interest is not narrowly tailored. *See White*, 536 U.S. at 775-80. If impartiality concerns a judge’s impartiality towards parties or openmindedness, the Canon utterly fails to address these issues. *See id.* at 776. If impartiality means no preconceptions, such an interest is not present in the language of the Canon and is not achievable as no judge is without preconceptions. *See id.* at 777-78. Because it is not narrowly drawn to serve a compelling government interest, Canon 5C(2) as applied to the 2006 Candidate Questionnaire should be found unconstitutional.

c. Canon 5C(2) Is Unconstitutional as Applied to Nomination Petitions.

In addition to failing a facial challenge, Canon 5C(2) as applied to nomination petitions is unconstitutional. Canon 5C(2) is not narrowly tailored to serve the state’s interest. Canon 5C(2) restricts Judge Hart’s freedom of speech. As a result, it must survive strict scrutiny by being narrowly tailored to serve a compelling state interest. *Id.* at 764. If the state’s interest is in promoting a judge’s impartiality toward parties, the only interest that is conceivably compelling, the clause is “barely tailored” to serve this interest. *White*, 416 F.3d at 765; *see also Weaver*, 309 F.3d at 1322. “The fact that judicial candidates require . . . public endorsements to run successful campaigns does not

suggest that they will be partial if they are elected.” *Weaver*, 309 F.3d at 1322. Canon 5C(2) allows candidates to establish committees to solicit public support on their behalf. However, even if there were such a risk of partiality toward parties, it is not “significantly reduced by allowing the candidate’s agent to seek these . . . endorsements on the candidate’s behalf rather than the candidate seeking them himself.” *Id.* at 1322-23. Further, Judge Hart desires to go door-to-door *in person* to speak with voters and does not wish to send a representative on his behalf. The “First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy,” *Buckley*, 424 U.S. at 54, and the Supreme Court has “never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” *White*, 536 U.S. at 782.

Canon 5C(2) as applied to nomination petitions “fails strict scrutiny because it completely chills a candidate’s speech on these topics while hardly advancing the state’s interest in judicial impartiality at all.” *Weaver*, 309 F.3d at 1323. Accordingly, it should be found unconstitutional.

5. The Commission’s Enforcement Policy of Canon 5(C)(2) Is Unconstitutional.

The enforcement policy of the Canon espoused by Advisory Opinions JE 100 and 117 does not survive overbreadth and vagueness objections. First, the policy is vague. In Advisory Opinion JE 100, the Ethics Advisory Panel majority opined that responding to the questionnaire would be a request for endorsement and would violate Canon 5C(2)’s mandate that candidates “shall not personally . . . solicit . . . publicly stated support . . .” *See* Exhibit H attached to Plaintiffs’ Verified Complaint at H-2. Such an enforcement policy, however, cannot constitutionally prohibit judicial candidates from announcing their views on political and legal issues nor be constitutionally applied to the 2006 Candidate Questionnaire. Because judicial candidates believe that the policy prohibits

announcing their views on disputed political and legal issues, the policy is unconstitutionally vague both on its face and in its application.

The policy is also overbroad. The policy, by adopting wholesale the language of Canon 5C(2) and offering only ambiguous guidelines for interpreting the Canon, also adopts the Canon's sweeping proscription of all speech, protected or otherwise. Such a reaching policy is an overbroad regulation of protected speech, and must be enjoined from enforcement.

Finally, the Commission's enforcement policy both on its face and as applied to the 2006 Candidate Questionnaire cannot survive *White*'s strict scrutiny analysis. While the policy serves a compelling interest in preserving impartiality and its appearance, this interest is not narrowly tailored under any definition of "impartiality." *See White*, 536 U.S. at 775-80. If the state's interest ultimately concerns a judge's impartiality towards parties, the language of the enforcement policy does not reflect that interest in any manner. *See id.* at 776. If the state's interest is in preserving impartiality by preventing preconceptions, such an interest is not addressed in the policy and be achieved because no judge is completely without preconceptions. *See id.* at 777-78. If the state's interest in impartiality is to preserve openmindedness, such an interest is underinclusive as reflected in the policy because it only encompasses expression of views made by judicial candidates, not addressing such expression made before the lawyer or judge qualified as candidate. *See id.* at 779-80. The Commission's enforcement policy both on its face and as applied to the 2006 Candidate Questionnaire is not narrowly tailored, and as a result is an unconstitutional burden on protected speech.

In addition, the Commission's enforcement policy both on its face and as applied to nomination petitions is unconstitutional. The policy is overbroad, sweeping the protected speech of judicial

candidates seeking nominating petition signatures into its ambit. While it could arguably be permissible to restrict incumbent candidates from seeking signatures from parties engaged in litigation before the judge, the policy sweeps in the constitutionally protected speech and association rights of judicial candidates to go door-to-door to speak with voters to seek their support. Although Canon 5C(2) allows candidates to establish committees to solicit public support for the candidate, this overbreadth is not alleviated by allowing a candidate's representative to solicit signatures. *Weaver*, 309 F.3d at 1322-23.

The policy restricts the fundamental First Amendment freedom of speech and, as a result, must be narrowly tailored to serve a compelling state interest. *White*, 536 U.S. at 774-75. If the state's interest is in promoting a judge's impartiality toward parties, which is the only conceivably compelling interest the state could raise, the clause is "barely tailored" to serve this interest. *White*, 416 F.3d at 765; *see also Weaver*, 309 F.3d at 1322. Moreover, independent candidates may *only* qualify for candidacy by nomination petition, Kan. Stat. Ann. § 25-202, 25-313, thereby forcing them to solicit signatures while depriving them of the right to seek those signatures themselves. Such a policy makes no sense and is further proof of lack of narrow tailoring.

The Commission's enforcement policy of Canon 5C(2) on its face and as applied to nomination petitions "fails strict scrutiny because it completely chills a candidate's speech on these topics while hardly advancing the state's interest in judicial impartiality at all." *Weaver*, 309 F.3d at 1323. Thus, it should be found unconstitutional, as in violation of the First and Fourteenth Amendments.

B. Plaintiffs Will Suffer Irreparable Injury Without the Injunction.

Judicial candidates are unable to make their views known so that the electorate may intelligently evaluate the candidates' positions on vital public issues before choosing among them

on election day. *Buckley*, 424 U.S. at 52-53. Judicial candidates cannot tell the public their views on disputed political and legal issues. *White*, 536 U.S. at 788. By prohibiting judicial candidates from exercising their freedom of speech on legal and political issues of concern to the voters, Canons 5A(3)(d)(i) and (ii), 3E(1), and 5C(2) require judicial candidates to withhold essential or important information from the voters as they seek to educate themselves and participate fully in democracy.

Plaintiff KJW has the constitutional right to receive speech under *Stanley*, 394 U.S. at 564, which states: “the Constitution protects the right to receive information and ideas.” KJW is currently unable to exercise its right to receive and publish speech because judicial candidates have declined to answer its 2006 Candidate Questionnaire. *Eu*, 489 U.S. at 216.

Without immediate injunctive and declaratory relief, Plaintiffs Robb Rumsey and KJW will continue to be irreparably harmed. KJW intends to solicit judicial candidates again for their views on disputed legal and political issues and publish those responses, but cannot do so without immediate injunctive relief, and even if it did so, Rumsey would not answer because of Canons 5A(3)(d)(i) and (2), 3E(1), and 5C(2).

In addition, judicial candidates have the speech and association rights to go door-to-door to solicit nomination petition signatures. Campaigning for an elected public office “necessarily entails . . . seeking endorsements” from citizens in the community. *Weaver*, 309 F.3d at 1322 (citation omitted). “It can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Id.* at 764 (*quoting Buckley*, 424 U.S. at 15) (other quotation omitted) (alteration in original). Plaintiff Judge Hart would like to go door-to-door to seek nomination petition signatures in his next election, but will refrain from doing so because of Canon 5C(2). Without injunctive and

declaratory relief, Judge Hart will be irreparably harmed.

Loss of First Amendment rights is automatically irreparable harm: “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for immediate temporary and preliminary injunctive relief is met.

C. Plaintiffs’ Injuries Outweigh Any Damage the Injunction May Cause Defendants.

For a preliminary injunction to be denied, the balance of the harms must weigh against it. *Keirnan*, 339 F.3d at 1220. While citizens of Kansas will be irreparably harmed if KJW cannot provide its survey, the converse is not true. If KJW resubmits its survey to judicial candidates and publishes the judicial candidates’ answers, no actual harm will befall anyone. Instead, citizens will be able to make informed decisions in voting. The only injury that will occur is in the abstract, against impartiality that has been struck down as unconstitutional by the U.S. Supreme Court in *White*. As such, the only injury relating to KJW’s survey is in its prohibition. Additionally, Judge Hart will be irreparably harmed if he is denied his First Amendment rights to seek nomination petition signatures, while no injury will be suffered by Defendants if he is allowed to do so.

D. The Injunction Is Not Adverse to the Public Interest.

It is clearly in the public interest for Americans to be able to make informed voting decisions, but it is in the highest public interest to preserve Americans’ First Amendment rights of free speech and association. No greater free speech interest exists than that of political speech. It is in the public interest for citizens to know about the views on disputed political and legal issues espoused by judicial candidates, that they might make an educated decision in casting their votes in August and November 2006. Also, it is not adverse to the public interest for citizens to meet judicial candidates

and have the opportunity to associate with them by signing a nomination petition. Therefore, the requested injunctive relief serves the public interest.

Conclusion

Canon 5A(3)(d)(i) and (ii) is unconstitutional facially and as applied to the 2006 Candidate Questionnaire, Canon 3E(1) is unconstitutional as applied to KJW's survey, and Canon 5C(2) is unconstitutional facially and as applied to the 2006 Candidate Questionnaire and nomination petitions. All the required elements for preliminary injunctive relief are met. Plaintiffs respectfully ask this Court to expeditiously grant the requested injunctive relief.

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Respectfully submitted,

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