

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
MADISON DIVISION**

MARK DUWE, et al.,)	
)	
Plaintiffs,)	
)	
)	
v.)	
)	Civil Action No. _____
)	
JAMES C. ALEXANDER, et al.,)	
)	
)	
Defendants.)	
)	

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

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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 Wisconsin Supreme Court Rule 60.06(3)(b), which consists of a “pledges and promises” clause and a “commits” clause, does not survive a facial or as-applied challenge under *White*. Plaintiffs will also show that SCR 60.04(4)(f) (the “issues-recusal requirement”), cannot withstand a facial or as-applied challenge under *White*, and that SCR 60.04(4), (the “general-recusal requirement”), cannot constitutionally be applied to the Plaintiffs in this case.

Facts

The facts of this case are set out in Plaintiffs’ Verified Complaint for Declaratory and Injunctive Relief and are verified there by Plaintiffs Mark Duwe, Andrew Bourdo, Mary Strosin, James Dragani, Rita Dragani, Amy Gehrke, Mary Baxa, Michael Baxa, and Wisconsin Right to Life, Inc. They are briefly restated here.

SCR 60.06(3)(b), which contains a “pledges and promises” clause and a “commits” clause,

forbids judges, judicial candidates, and judges-elect from making, with respect to “cases, controversies, or issues likely to come before the court, *pledges, promises, or commitments* that are inconsistent with the impartial performance of the adjudicative duties of office” (emphases added). The Comment following SCR 60.06(3)(b) interprets this provision to mean that “a judge or judicial candidate may not, while a proceeding is pending or impending in the court to which selection is sought, make any public comment that may *reasonably be viewed as committing* the judge, judge-elect, or candidate to a particular case outcome” (emphases added).

Wisconsin’s issues-recusal requirement, embodied in SCR 60.04(4)(f), requires that a judge disqualify himself or herself from a proceeding when, as either a judge or a judicial candidate, he or she “has 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” (emphases added). Wisconsin also has a general-recusal requirement, embodied in SCR 60.04(4), which mandates a judge’s disqualification in any case where “reasonable, well informed persons knowledgeable about judicial ethics standards . . . and aware of the facts and circumstances . . . would *reasonably question the judge’s ability to be impartial*” (emphases added). Judges who do not recuse in such cases risk being disciplined.

The Wisconsin Judicial Commission (“the Commission”) is charged with enforcing SCR 60.06(3)(b), 60.04(4), and 60.04(4)(f) against judges. The executive director of the Commission investigates any allegation of misconduct by a judicial official and makes an initial determination of whether it warrants review by the Commission. The Commission may then authorize the executive director to conduct a full, fair, and prompt investigation of any violation of the Code of Judicial Conduct and presents the findings to the Commission. The Commission is then empowered

to determine whether to file formal charges against a judicial officer in the Wisconsin Supreme Court. If formal charges are filed, the Commission may authorize the executive director or other counsel to prosecute the case on behalf of the Commission. *Complaint* ¶ 12.

Wisconsin's Office of Lawyer Regulation ("OLR") enforces the Wisconsin Code of Judicial Conduct against lawyers who are judicial candidates. Specifically, the Wisconsin Rules of Professional Conduct for Attorneys provide that a "lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct." SCR 20:8.2(b). By this rule, the Wisconsin Office of Disciplinary Administrator ("ODA") incorporates the language of SCR 60.06(3)(b) and 60.04(4)(f), and is thus charged with enforcing those provisions against attorneys. *Complaint* ¶ 13.

Plaintiff Wisconsin Right to Life, Inc. ("WRL") is a non-profit organization registered in the State of Wisconsin. WRL seeks to collect and publish data regarding judicial candidates' views on disputed legal and political issues. *Complaint* ¶ 6, 16. It endeavored to accomplish this by sending out the "Candidate for Judicial Office (2006)" questionnaire in January 2006 ("2006 Questionnaire") to all judicial candidates running for election in the State of Wisconsin. *Complaint* ¶ 18. WRL received seven completed questionnaires from judicial candidates. Of these, six declined to respond to all of the questions in the 2006 Questionnaire. *Complaint* ¶ 18. Five of these six adopted the following statement provided on the 2006 Questionnaire as their reason for doing so:

This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Wisconsin Supreme Court Rule 60.06(3)(b), which forbids judges, judicial candidates, and judges-elect from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office" and which is interpreted to mean by the Comment to this Rule that a "judge or judicial candidate may not, while a proceeding is pending or impending in the court to which selection is sought, make any public

comment that may reasonably be viewed as committing the judge, judge-elect or candidate to a particular case outcome.” This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as judge in any proceeding concerning this answer on account of Wisconsin Supreme Court Rule 60.04(4)(f), which requires a judge or judge-candidate to recuse himself or herself when he or she “has 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.”

Complaint ¶ 18. The sixth did not adopt this statement, but noted his refusal to respond and wrote after each question “pursuant to SCR 60.06(3)(b).” *Complaint* ¶ 19. One candidate provided a substantive answer to one of the questions on the 2006 Questionnaire, but WRL did not publish that answer to prevent the possibility of subjecting that candidate to discipline - a serious prospect in light of the other candidates’ responses. *Complaint* ¶ 20. For the remainder of the questions, the candidate declined to answer, adopting as his reason for not doing so above statement. *Complaint* ¶ 20.

Because of one judicial candidate’s desire to respond substantively to the questions on the 2006 Questionnaire, he asked the Wisconsin Judicial Conduct Advisory Committee (“Advisory Committee”) whether judicial candidates could respond to the 2006 Questionnaire without fear of discipline in light of the Supreme Court’s decision in *White*. In correspondence dated March 24, 2006, the Advisory Committee responded that they were “not authorized to determine the constitutional validity of the Code of Judicial Conduct in SCR Chapter 60” and therefore refused to answer his question. *Complaint* ¶ 21.

The deadline for candidates to enter the 2007 judicial election is January 1, 2007. WRL intends to send out a 2007 Questionnaire to all Wisconsin judicial candidates before the primary election on February 20, 2007, and the general judicial election on April 3, 2007, with questions identical to the questions in its 2006 Questionnaire. WRL then intends to publish judicial candidates’

replies to its 2007 Questionnaire along with statements indicating whether these replies agree or disagree with WRL's positions. *Complaint* ¶ 23.

Mark Duwe, Andrew Bourdo, Mary Strosin, James Dragani, Rita Dragani, Amy Gehrke, Mary Baxa, and Michael Baxa (collectively "Listener Plaintiffs") are residents and registered voters in Wisconsin, and are eligible to vote in the 2007 Wisconsin judicial election. The Listener Plaintiffs wish to receive the information contained in the 2007 Questionnaire, so as to educate themselves and meaningfully participate in the election process. They are unable to do so, however, because judicial candidates must refuse to answer any questions on disputed legal or political issues because of SCR 60.06(3)(b)'s "pledges and promises" clause and "commits" clause, and the recusal requirements of SCR 60.04(4) and (4)(f), and WRL does not wish to subject those candidates who do answer to discipline under those provisions. *Complaint* ¶ 25.

Judicial candidates have a constitutional right to answer the questions in the 2006 Questionnaire and 2007 Questionnaire (collectively "WRL's Questionnaires") if they so choose. If WRL 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 2007 election. Similarly, the Listener Plaintiffs will not be able to receive information on judicial candidates' views on disputed legal and political issues so as to allow themselves to make an informed voting decision. As a result, WRL and the Listener Plaintiffs 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 the commitments clause and the recusal clause. They have no adequate remedy at law.

Argument

Four factors govern preliminary injunctions:

a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has “no adequate remedy at law” and will suffer “irreparable harm” if preliminary relief is denied . . . the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest.

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). Plaintiffs meet these requirements and thus, preliminary injunctive relief should be granted.

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

A. SCR 60.06(3)(b): The “Pledges and Promises” and “Commits” Clauses

SCR 60.06(3)(b), which contains a “pledges and promises” clause and a “commits” clause, forbids judges, judicial candidates, and judges-elect from making, with respect to “cases, controversies, or issues likely to come before the court, *pledges, promises, or commitments* that are inconsistent with the impartial performance of the adjudicative duties of office” (emphases added). The Comment following SCR 60.06(3)(b) interprets this provision to mean that “a judge or judicial candidate may not, while a proceeding is pending or impending in the court to which selection is sought, make any public comment that may *reasonably be viewed as committing* the judge, judge-elect, or candidate to a particular case outcome” (emphases added).

Five federal district courts have held that “pledges and promises” and “commits” clauses almost identical to the “pledges and promises” and “commits” clauses challenged here are unconstitutional under *White*. See *Indiana Right to Life v. Shepard*, 2006 WL 3314565 (N.D. Ind. Nov. 14, 2006) (striking down Indiana’s “pledges and promises” and “commits” clauses); *Kansas*

Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1241 (D. Kan. 2006) (granting a preliminary injunction against Kansas’ “pledges and promises” and “commit” clauses); *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) (granting a preliminary injunction against Alaska’s “pledges and promises” and “commits” clauses); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1042 (D. N.D. 2005) (striking down North Dakota’s “pledges and promises” and “commitments” clauses); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672, 711 (D. Ky. 2004) (granting a preliminary injunction against Kentucky’s “promises” and “commit” clauses). The Sixth Circuit has also declined to stay an injunction against Kentucky’s “commits” clause, finding that the Kentucky was not likely to succeed on the merits of the claim. *Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm’n*, 388 F. 3d 224, 227 (6th Cir. 2004).

1. SCR 60.06(3)(b)’s “Pledges and Promises” and “Commits” Clauses Are Unconstitutional As Applied to WRL’s Questionnaires.

Judicial candidates who responded to the 2006 Questionnaire indicated they believe SCR 60.06(3)(b) prohibits them from answering the questions in the 2006 Questionnaire, and thus forbids them from stating their views on disputed legal and political issues. *See Complaint* ¶¶19-21. As a result, they refused to answer questions which they had a constitutional right to answer and their speech was effectively chilled. *See White*, 536 U.S. at 778. WRL and the Listener Plaintiffs were likewise denied the right to receive constitutionally protected information from the judicial candidates. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (stating that the Constitution protects the right to receive information and ideas). 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 commits clause impinges on core political speech, the canon must survive strict scrutiny in order to pass constitutional muster. *White*, 536 U.S. at 774. For the reasons indicated below, SCR 60.06(3)(b) cannot do so.

a. SCR 60.06(3)(b)'s Pledges and Promises and Commits Clauses Are Not Narrowly Tailored to Further a Compelling State Interest.

To survive strict scrutiny, the law or regulation in question 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).

Restrictions on judicial campaign speech and conduct are often rationalized on the grounds that such restrictions are necessary to preserve judicial impartiality. In *White*, the Supreme Court considered three possible definitions of this impartiality interest: impartiality as lack of bias towards the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as open-mindedness. *White* 536 U.S. at 775-80. For the reasons discussed below, SCR 60.06(3)(b) cannot survive strict scrutiny under any of these definitions of impartiality.

The State does have a compelling interest in preserving judicial impartiality towards parties.

Id. at 776. This interest arises because of due process, which requires trial before an unbiased judge. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). By its plain terms, however, SCR 60.06(3)(b) does not restrict speech for or against particular parties, but rather prohibits “pledges, promises, or commitments” with respect to “cases, controversies, or *issues* that are likely to come before the court.” (emphasis added). Since the pledges and promises clause and the commits clause restrict speech about issues rather than parties, they are only “barely tailored” to Wisconsin’s interest in preserving judicial impartiality towards parties. *White*, 536 U.S. at 776.

The second definition of impartiality considered by *White* was impartiality defined as a lack of preconceptions on legal issues. This interest is not compelling, as 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.”) Thus, the pledges and promises clause and commits clause do not satisfy the compelling interest requirement of strict scrutiny.

The final definition of impartiality considered by *White* is impartiality as judicial open-mindedness. This definition of impartiality “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 Supreme Court did not hold that judicial open-mindedness was a compelling state interest.¹ Nonetheless, the Court held that even if the interest was compelling, the

¹ Indeed, there would seem to be some issues, such as whether conviction of a crime requires proof beyond a reasonable doubt, where judicial open-mindedness on the issue is undesirable.

announce clause did not pass strict scrutiny because it was not narrowly tailored to that interest. *Id.*, at 780. A similar analysis applies here. Like the announce clause in *White*, SCR 60.06(3)(b) only encompasses pledges, promises, and commitments made by judicial candidates, and does not address pledges, promises, 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 become 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 pledges and promises clause and commits clause permit lawyers and judges alike to pledge, promise, commit, or appear to commit themselves on legal issues until the day they declare their candidacy, after which such pledges, promises, commitments, and appearances of commitments are prohibited.

Further, 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 in 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).²

Since it is apparent that judges and judicial candidates have views on disputed legal or political

² Ironically, speech restrictions undercut the important role voters play in preserving judicial open-mindedness. 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).

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).

Because it is underinclusive and because the election process itself provides a less restrictive means of achieving the state’s interest in judicial open-mindedness, SCR 60.06(3)(b) is not narrowly tailored to that interest. It therefore cannot pass strict scrutiny. *See Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

2. SCR 60.06(3)(b)’s Pledges and Promises and Commits Clauses Are Facially Unconstitutional

In order for a law to be facially invalidated, it must ordinarily be shown that it is unconstitutional in all of its applications. *United States v. Salerno*, 481 U.S. 739 (1987). However, in the First Amendment context, a law will be invalidated on its face if it can be shown that it is either unconstitutionally overbroad or unconstitutionally vague. *See Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 n. 11 (7th Cir. 2003) (citing *Horton v. City of St. Augustine*, 272 F.3d 1318, 1331 (11th Cir. 2001)). For the reasons indicated below, SCR 60.06(3)(b) is subject to invalidation on both of these grounds.

a. SCR 60.06(3)(b)’s Pledges and Promises and Commits Clauses Are Unconstitutionally Overbroad.

The overbreadth doctrine “permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’” *City of Chicago v. Morales*, 527 U.S. 41, 52

(1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). As such, the overbreadth doctrine prevents a law from having a chilling effect on protected speech. *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F. 3d 1048, 1056 (7th Cir. 2004).

SCR 60.06(3)(b) bans all pledges, promises and commitments made by judicial candidates that are “inconsistent with the impartial performance of the adjudicative duties of the office” with respect to “cases, controversies, or issues that are likely to come before the court.” Read literally, the provision could be taken to ban even such innocuous statements as that the candidate “promises to be tough on crime” or “is committed to upholding the First Amendment.” *See Family Trust*, 345 F. Supp. 2d at 697; *Kansas Judicial Watch*, 440 F. Supp. 2d 1232.

Further, the Official Commentary following SCR 60.06(3)(b) interprets the provision to prohibit any statement which might “reasonably be viewed as committing” a candidate to a particular case outcome. This interpretation renders the commits clause substantially overbroad. A person’s right to freedom of speech cannot be contingent on the reaction to or interpretation of that speech by third parties. *See, e.g., Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (“Listeners’ reaction to speech is not a content neutral basis for regulation”). As the Supreme Court noted in *Buckley*, making the legitimacy of speech turn on the interpretation of third parties is problematic, as it “puts the speaking . . . 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 its blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.” *Buckley*, 424 U.S. at 43. Moreover, as the Eleventh Circuit held in a related context, judicial candidates’ statements cannot be held to a “reasonableness” standard, because this does not allow the necessary “breathing space” for robust campaigning. *See*

Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002) (“restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false - i.e. an actual malice standard”).

As written, SCR 60.06(3)(b) could be held to prohibit judicial candidates from announcing their views on issues in written opinions or law review articles on the grounds that they may be “reasonably viewed as committing” themselves to a particular result in a particular case. *See White*, 536 U.S. at 780-81 (noting that judges are more likely to feel constrained to vindicate positions expressed in prior judicial opinions that they are statements made in the course of a campaign). Such a restriction cannot be constitutionally upheld. Neither can the State prohibit a candidate from stating the same views in response to a questionnaire without rendering *White* meaningless. Such gross overbreadth cannot be justified by whatever very limited legitimate applications the Rule might have. *See Kansas Judicial Watch*, 440 F. Supp. 2d at 1232.

b. SCR 60.06(3)(b)’s Pledges and Promises and 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 are closely examined to ensure they are precisely drafted. *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976).

SCR 60.06(3)(b) does not ban all pledges, promises, and commitments made by judicial candidates, but only those that are “inconsistent with the impartial performance of the adjudicative duties of the office” with respect to “cases, controversies, or issues that are likely to come before the

court.” The provision gives no guidance, however, as to which pledges, promises, and commitments are to be considered consistent with the impartial performance of the judge’s office and which are not. SCR 60.06(3)(b) cannot be read to prohibit any pledge, promise, or commitment relating to an issue without being unconstitutionally overbroad. But if the provision does not prohibit all pledges, promises, and commitments, then what does it prohibit? The provision does not say.

The meanings of “pledge,” “promise,” and “commitment” are also vague as used in SCR 60.06(3)(b). 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.” *Webster’s II New Riverside University Dictionary* (1984). Taken in their ordinary senses, the three terms would appear to have the same meaning, and therefore the use of all three would be redundant, suggesting that they may be intended in a broader sense. But if the terms are not meant in their ordinary sense, what do they mean? This confusion is confirmed by the Official Commentary to SCR 60.06(3)(b), which interprets those terms to include statements which might “reasonably be viewed as committing” a candidate to a particular case outcome. The phrase “reasonably be viewed as committing” is inherently vague. Thus, SCR 60.06(3)(b) does not provide any guidance either to judicial candidates or to the Defendants as to what types of statements may reasonably be viewed as committing a candidate to a particular case outcome. Without such guidance, there is a danger that the Defendants will enforce the commits clause against candidates who have simply announced their views on disputed legal or political issues, or that candidates will refrain from announcing their views on such issues because they fear discipline under the Rule. Because of this, SCR 60.06(3)(b) is unconstitutionally vague.

B. SCR 60.04(4) and (4)(f): Recusal

SCR 60.04(4)(f) requires that a judge recuse himself or herself from a proceeding when, as either a judge or a judicial candidate, he or she “has 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” (emphases added). In addition, SCR 60.04(4) requires that a judge recuse himself or herself when “reasonable, well informed persons knowledgeable about judicial ethics standards . . . and aware of the facts and circumstances . . . would *reasonably question the judge’s ability to be impartial*” (emphases added). Judges who do not recuse in such cases risk being disciplined.

A number of district courts have dealt with the recusal issue in the wake of *White*. See *Shepard*, 2006 WL 3314565 at *7-8; *Carey v. Wolnitzek*, 2006 WL 2916814 at *15-16 (E.D. Ky. Oct. 10, 2006); *Stout*, 440 F. Supp. 2d at 1234-35; *Feldman*, 380 F. Supp. 2d at 1083-4; *Family Trust Foundation of Kentucky*, 345 F. Supp. 2d at 711; *Bader*, 361 F. Supp. 2d at 1043-44. The courts in these cases have generally held that strict scrutiny applies to a state recusal provision. However, these courts have held, at least as a preliminary matter, that the clauses in question are narrowly tailored, despite the fact that both the scope of the statute and the state interest involved are the same as with the pledges and promises and commits clauses. In any event, it should be stressed that Plaintiffs are not challenging Wisconsin’s recusal requirement as such, *but only as it applies to issues rather than to parties*.³ So understood, Plaintiffs have a substantial likelihood of success on

³ Plaintiffs do challenge SCR 60.04(4)(f), the issues-recusal requirement, on its face as that provision deals only with issues. But Plaintiffs challenge the general-recusal requirement of SCR 60.04(4) only insofar as it may be applied to issues rather than to parties.

the merits of its challenge.

1. SCR 60.04(4)(f)'s Issues-recusal Requirement Is Unconstitutional As Applied to the WRL Questionnaires.

Judicial candidates who responded to the 2006 Questionnaire indicated that they believed SCR 60.04(4)(f) applied to the WRL Questionnaires, and therefore refused to answer questions because of fear that they might later be disciplined if they did not recuse themselves from proceedings concerning the issues they responded to. *Complaint* ¶ 15. Since they had a constitutional right to respond to questions concerning disputed legal and political issues, their speech was effectively chilled. *See White*, 536 U.S. at 778. WRL and the Listener Plaintiffs are likewise denied the right to receive constitutionally protected speech from the judicial candidates, resulting in their speech being chilled as well. Like the pledges and promises and commits clauses, Wisconsin's issues-recusal requirement thus restricts a core First Amendment freedom and are subject to strict scrutiny. *See White*, 536 U.S. at 775 (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). For the reasons indicated below, SCR 60.04(4)(f) does not meet this standard.

a. SCR 60.04(4)(f)'s Issues-recusal Requirement Is Not Narrowly Tailored to Further a Compelling State Interest.

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 “adopt recusal standards more rigorous than due process requires.” *White* 536 U.S. at 794 (Kennedy, J., concurring).⁴ It may

⁴ 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

even adopt a reasonableness standard when dealing with conflicts of 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*, 424 U.S. at 43; *Ovadal*, 416 F.3d at 537; *Weaver*, 309 F.3d at 1319. Wisconsin's interest in preserving judicial impartiality towards parties is adequately served by the portions of its recusal statute other than SCR 60.04(4)(f). It is not served by SCR 60.04(4)(f), which deals with issues rather than parties, and is "barely tailored" to this interest. *See White*, 536 U.S. at 776.

Wisconsin's issues-recusal requirement 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 issues-recusal requirement be justified in terms of the State's interest in preserving open-mindedness. Even assuming this interest is compelling, SCR 60.04(4)(f) is not narrowly tailored to that interest because it only encompasses commitments or appearance of commitments

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 (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.

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. 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, SCR 60.04(4)(f) 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 because of the requirement of recusal. This renders SCR 60.04(4)(f) underinclusive. *See Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

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.

2. SCR 60.04(4)(f)’s Issues-recusal Requirement is Facially Unconstitutional.

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. *See Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982).⁵ 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 subjects⁶ – 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.⁷

⁵ 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 judge’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.

⁶ Nor could judges have web logs like Judge Posner does at <http://www.becker-posner-blog.com>.

⁷ 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.*

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original).⁸ 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). Nevertheless, Wisconsin's judges face discipline under the issues-recusal requirement if they fail to recuse themselves in cases involving issues that have previously commented upon, even where those statements merely appear to commit the judge regarding the issue. For the reasons indicated below, SCR 60.04(4)(f) is unconstitutional and must be invalidated.

⁸ 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, 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 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); *Rosquist*, 692 F.2d at 1107 (stating that the judge was not required to recuse himself because he holds and expresses certain views on a general subject); *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.").

a. SCR 60.04(4)(f)'s Issues-recusal Requirement is Unconstitutionally Overbroad.

SCR 60.04(4)(f)'s issues-recusal requirement is also overbroad for reasons similar to the commits clause. Like the commits clause, whether a statement is restricted under the recusal clause turns partly on how that clause is interpreted by third parties, rather than on how it is intended. This is impermissible. *See Buckley*, 424 U.S. at 43; *Ovadal*, 416 F.3d at 537; *Weaver*, 309 F.3d at 1319. SCR 60.04(4)(f) could potentially 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. SCR 60.04(4)(f) is therefore substantially overbroad and unconstitutional.

b. SCR 60.04(4)(f)'s Issues-recusal Requirement is Unconstitutionally Vague.

As with the commits clause, Wisconsin'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” (emphases 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 Rule by the Defendants and chilled from announcing their views on disputed legal and political issues. SCR 60.04(4)(f) is therefore unconstitutionally vague.

3. SCR 60.04(4)'s General-recusal Requirement is Unconstitutional As Applied to WRL's Questionnaires.

SCR 60.04(4) requires that a judge recuse himself or herself when “reasonable, well informed

persons knowledgeable about judicial ethics standards . . . and aware of the facts and circumstances . . . would *reasonably question the judge's ability to be impartial*" (emphases added). Judges who do not recuse in such cases risk being disciplined.

Plaintiffs do not challenge SCR 60.04(4) on its face. Wisconsin has a compelling interest in ensuring that parties receive due process, which in this context means a judge who is not biased for or against one of the parties in the case. And where no First Amendment rights are implicated, Wisconsin is free to extend the scope of its recusal statute beyond what is required by due process. So, for example, Plaintiffs do not object to the specific recusal requirements embodied in SCR 60.04(4)(a)-(e). Even so, Wisconsin's general-recusal requirement cannot be applied to prohibit constitutionally protected speech, absent a compelling government interest.

Applying SCR 60.04(4) to WRL's Questionnaires is not justified by the State's interest in preserving judicial impartiality towards parties, as the fact that a judge has commented on a specific issue does not bias him for or against any particular party. *See White*, 536 U.S. at 776-77 ("To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose.") (emphasis in original). Nor is it justified by the State's interest in preserving impartiality as to issues, because such an interest is not compelling. *Id.* at 777-78.

Finally, applying SCR 60.04(4) to the WRL's Questionnaires is not justified by the State's interest in preserving judicial open-mindedness. The mere fact that a judge expresses an opinion on an issue does not prevent him from being open-minded about that issue. *Id.* at 778 (open-mindedness requires only that a judge be willing "to consider views that oppose his preconceptions, and remain

open to persuasion, when the issues arise in a pending case”). If a judge lacks open-mindedness simply because he has announced his views on a particular legal issue, then a judge would have to recuse himself in any case involving an issue on which he had expressed a position in a law review article or even in a prior judicial opinion. *Id.* at 780-81 (“We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding . . . than a carefully considered holding that the judge set forth in an earlier opinion denying some individual’s claim to justice.”) But that would be absurd. In fact, preventing judges from giving their opinions on legal issues impedes the State’s interest in judicial open-mindedness, as it makes it more difficult for voters to distinguish those judicial candidates who are truly open-minded from those who are not. *See Morrison, supra*, 36 Ind. L. Rev. at 734.

Since no such compelling interest justifies threatening judges with discipline if they do not recuse themselves in cases involving issues they have previously commented upon, SCR 60.04(4) is unconstitutional as applied to WRL’s Questionnaires.

II. Plaintiffs Will Suffer Irreparable Injury Without the Injunction.

Plaintiffs have the constitutional right to receive speech under *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), which states: “the Constitution protects the right to receive information and ideas.” WRL is currently unable to exercise its right to receive and publish speech because judicial candidates have declined to answer its 2006 Questionnaire. Likewise, the Listening Plaintiffs are unable to exercise their right to receive information. They are also unable to exercise their right to free expressive association. *Krislov v. Rednour*, 226 F.3d 851, 857-58 (7th Cir. 2000). Without injunctive and declaratory relief, WRL will continue to be irreparably harmed. WRL intends to solicit judicial candidates again for their views on disputed legal and political issues and publish those

responses to the 2007 Questionnaire before the 2007 election, but cannot do so without injunctive relief. Similarly, the Listening Plaintiffs ability to make a meaningful decision regarding judicial elections and cast an educated vote in the upcoming election, is impeded without injunctive relief, and their rights to receive speech and freely associate will be irreparably lost without injunctive and declaratory relief. Loss of First Amendment rights is automatically irreparable harm: “The 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 temporary and preliminary injunctive relief is met.

III. The Injunction Will Not Substantially Injure Others.

For a preliminary injunction to be denied, the balance of the harms must weigh against it. *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 813 (7th Cir. 2002). While the Listening Plaintiffs and other citizens of Wisconsin will be irreparably harmed if WRL cannot provide its survey, the converse is not true. If WRL resubmits its survey to judicial candidates and publishes the judicial candidates' answers, no actual harm will befall anyone. Instead, voters, including the Listening Plaintiffs, will be able to make informed decisions regarding whom they should vote.

IV. The Injunction Furthers 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 vote in the upcoming elections. Therefore, the requested injunctive relief serves the public interest.

Conclusion

SCR 60.06(3)(b) is unconstitutional facially and as applied to WRL's Questionnaires; SCR 60.06(4)(f) is unconstitutional facially and as applied to WRL's Questionnaires; and SCR 60.04(4) is unconstitutional as applied to WRL's Questionnaires. 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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