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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

TORREY BAUER, et al.

Plaintiffs,

v.

RANDALL T. SHEPARD, et al.

Defendants.

3:08CV 196RM

Civil Action No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER

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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 Canon 5A(3)(d)(i) and (ii) of Indiana’s Code of Judicial Conduct, which embodies its “pledges and promises” clause and its “commits” clause, does not survive a facial or as-applied challenge under *White*.

Facts

The facts of this case are set out in the *Verified Complaint for Declaratory and Injunctive Relief* and verified there by Torrey Bauer, Judge David Certo, and Mike Fichter, the Executive Director of Indiana Right to Life, Inc. They are briefly restated here for the Court’s convenience.

At issue in this case is the constitutionality of Canons 5A(3)(d)(i) and (ii) of the Indiana Code of Judicial Conduct. Canon 5A(3)(d)(i) (the “pledges and promises clause”) provides that a candidate for judicial office shall not “make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office.” (emphasis added) Canon

5A(3)(d)(ii) (the “commits clause”) provides that a candidate for judicial office shall not “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).

In 2002, the CJQ issued Preliminary Advisory Opinion #1-02 regarding the effect *White* had on Indiana's judicial canons. See *Preliminary Advisory Opinion #1-02* attached as Exhibit C. The Memorandum stated that while the United States Supreme Court had found “announce clauses” unconstitutional, Indiana had eliminated that provision. *Id.* at 2.

Plaintiff IRL is a non-profit corporation incorporated in the State of Indiana. IRL gathers information and publishes questionnaires to educate its members and other citizens about candidates for public office. *Complaint* ¶ 17. In 2004, IRL brought suit against the CJQ and Disciplinary Commission, challenging the constitutionality of Canons 3E(1), 5A(3)(d)(i) and (ii). On November 14, 2006, the pledges and promises clause and commits clause were declared unconstitutional by the federal district court, and an injunction was issued preventing enforcement of those provisions by the CJQ or Disciplinary Commission. See *Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006). The CJQ and Disciplinary Commission appealed, and on October 26, 2007, the Seventh Circuit reversed on standing grounds. See *Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007). *Complaint* ¶ 18.

On March 22, 2008, IRL mailed an explanatory cover letter and a 2008 “Indiana Right to Life Judicial Candidate Questionnaire” (“IRL Questionnaire”) to all judicial candidates nominated by their party. *Complaint* ¶ 19. However, many judicial candidates have refused to answer the questions on the IRL Questionnaire, citing Canon 5A(3)(d)(i) and (ii) as grounds for their refusal. *Complaint* ¶ 21.

Additionally, several judicial candidates did answer all of the questions on the IRL Questionnaire. One of these candidates is Torrey Bauer, a candidate for Superior Court Judge in Kosciusko County, Indiana, in the 2008 elections. *Complaint* ¶ 24. Because Bauer has answered the questions on the IRL Questionnaire, he believes that he has violated the pledges and promises clause and commits clause of Canon 5A(3)(d), and is potentially subject to discipline by the CJQ or Disciplinary Commission. *Complaint* ¶ 26.

David Certo is currently a Superior Court Judge in Marion County, Indiana, and is a candidate for re-election to this office in the 2008 elections. Judge Certo received a copy of the IRL Questionnaire in March of 2008. Judge Certo would have answered all of the questions on the IRL Questionnaire, but did not answer any of the questions because he believed he was prohibited from doing so by Canon 5A(3)(d)(i) and (ii). *Complaint* ¶ 28.

If Plaintiffs do not obtain the requested injunctive relief, Plaintiff Certo will not be able to announce his views on disputed legal and political issues, Plaintiff Bauer will risk discipline under the Canons for his prior statements, and Plaintiff IRL will not be able to receive and publish information regarding judicial candidates' views on disputed political and legal issues. Plaintiffs have no adequate remedy at law. *Complaint* ¶ 35.

Argument

I. Plaintiffs Raise Valid Article III Claims That Are Fully Justiciable By This Court.

This Court has jurisdiction over Plaintiffs' claims: They have standing; and the case is ripe.

A. Plaintiffs Have Standing to Bring Their Claims.

The Supreme Court succinctly summarized the now familiar elements a plaintiff must

demonstrate to establish Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555

(1992):

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of– the injury has to be “fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be ‘redressed by a favorable decision.’”

Id. at 560-61. Plaintiffs meet all three of these requirements.

First, each of the Plaintiffs has already suffered a concrete and particularized injury in fact. Judge Certo will not announce his views on disputed legal and political issues. *Complaint* ¶ 28. He will continue to suffer these injuries until the offending Canon is enjoined. Similarly, Torrey Bauer has answered the questions on the IRL Questionnaire, and as such faces the threat of discipline under the Canons. Plaintiffs Certo and Bauers’ injuries are thus clearly and sufficiently concrete for standing purposes. *See Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1221 (D. Kan. 2006); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1032 (D. N.D. 2005); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672, 685 (E.D. Ky. 2004).

Likewise, Plaintiff IRL has suffered an injury in fact. Judge Certo has indicated that he would have answered the questions on the IRL Questionnaire but for the existence of the challenged Canons, and the candidates who responded to the IRL Questionnaire by marking “Decline” for some or all of the questions have indicated the same. *Complaint* ¶ 21. IRL will suffer further injury if Canons 5A(3)(d)(i) and (ii) are not enjoined, because they will not be able

to publish the views of judicial candidates prior to the May 6, 2008 primary election and the November 4, 2008 general election. Plaintiffs' injuries are thus clearly sufficiently concrete for standing purposes. *See Stout*, 440 F. Supp. 2d at 1221; *Bader*, 361 F. Supp.2d at 1032; *Family Trust*, 345 F. Supp. 2d at 685.

Likewise, Plaintiffs have satisfied the second prong of the test, which requires a causal connection to exist between claimed injury and the Defendants' conduct. Plaintiffs have a right to receive speech from anyone who wishes to speak. Ten judicial candidates specifically declined to respond to some of the questions on the IRL Questionnaire precisely because they feared disciplinary action under Canon 5A(3)(d). *Complaint* ¶ 21. Further, Judge Certo declined to answer the questions on the IRL Questionnaire because he feared disciplinary action under Canon 5A(3)(d). *Complaint* ¶ 28. Additionally, IRL's own speech has been chilled by Canon 5A(3)(d) because IRL does not want to expose judicial candidates who have responded to the IRL Questionnaire, including Plaintiff Torrey Bauer, to the possibility of discipline under Canons 5A(3)(d)(i) and (ii). There is an obvious causal connection between the injuries that the Plaintiffs have suffered and will suffer and the offending Canons and Rules that the Defendants will enforce. *See Stout*, 440 F. Supp. 2d at 1221; *Bader*, 361 F. Supp.2d at 1032; *Family Trust*, 345 F. Supp. 2d at 687.

Finally, Plaintiffs' claimed injuries can be redressed by a favorable decision from this Court. By finding Canons 5A(3)(d)(i) and (ii) unconstitutional and enjoining the Defendants from enforcing them, the pledges and promises clause and commits clause will no longer have their chilling effect on judicial candidates, such as Judge Certo and Bauer. Nor will they chill the speech of IRL. Judicial candidates such as Judge Certo and Bauer will be able to freely announce

their views if they so chose, and IRL can receive and disseminate that information so that the electorate may make informed decisions when casting their votes on election day. Plaintiffs' injuries can clearly be redressed by this Court. *See Stout*, 440 F. Supp. 2d at 1221; *Bader*, 361 F. Supp.2d at 1032; *Family Trust*, 345 F. Supp. 2d at 687.

Prior to the initiation of this action, Plaintiff IRL had brought suit challenging the constitutionality of the pledges and promises clause and commits clause on First Amendment grounds. That case initially resulted in Canons 5A(3)(d)(i) and (ii) being declared unconstitutional and enjoined by the federal district court. *See Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006). On appeal, however, the Seventh Circuit reversed, finding that IRL lacked standing to bring its claims. *See Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007).

Although the legal claims brought by Plaintiffs in this case are similar to those involved in *Shepard*, in terms of standing the two cases are distinguishable. In the prior case, IRL had brought suit on its own, and there were no judicial candidates serving as plaintiffs. For the Seventh Circuit, this served to distinguish the case from prior cases such as *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993) and *White*, where pre-enforcement challenges of state judicial canons had been allowed to proceed. *Shepard*, 507 F.3d at 549 (“in both [*Buckley* and *White*], the plaintiffs were themselves judicial candidates whose right to speak was constrained.”) According to the court, “what [*Buckley* and *White*] had and the present case lacks are plaintiffs who wanted to speak but felt constrained not to because of the Judicial Code or who were being disciplined for speaking out in violation of the Code.”) The court went on to hold that IRL “would have standing if there are otherwise willing speakers who are constrained by the Judicial Code.” *Id.*

Here, two of the plaintiffs, Torrey Bauer and Judge Certo, are judicial candidates bound by the Canons. Judge Certo wishes to answer the questions on the IRL Questionnaire, but feels constrained not to do so because of the Judicial Code, while Torrey Bauer has answered the questions on the IRL Questionnaire, and faces the possibility of discipline under the Canons. Thus, under the standard set forth in the Seventh Circuit's *Shepard* decision, Plaintiffs have standing.

The situation in this case is in some ways parallel to the situation in *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007). As here, the Pennsylvania Family Institute ("PFI") brought two cases challenging the constitutionality of Pennsylvania's pledges and promises clause and commits clause as applied to a judicial questionnaire. In the first case, none of the plaintiffs were judicial candidates. On appeal, the Third Circuit held that PFI lacked standing, because it had not established the presence of a willing speaker who wanted to answer its questionnaire but was prohibited from doing so by the Canons. *Pennsylvania Family Institute v. Black*, 489 F.3d 156, 169 (3rd Cir. 2007) Subsequently, PFI again brought suit, along with six judicial candidates, challenging the constitutionality of the same provisions. This time, plaintiffs were found to have standing. *See Celluci*, 521 F. Supp. 2d at 366-370. With regard to standing, Plaintiffs in this case are exactly parallel to the plaintiffs in *Celluci*, and, as such, Plaintiffs have standing.

Plaintiffs meet all three prongs of the *Lujan* standing test. For this reason, this Court should hear the merits of Plaintiffs' claims.

B. Plaintiffs' Claims Are Ripe.

For a case to be ripe, a plaintiff must allege "an intention to engage in a course of conduct

arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.” *Commodity Trend Serv. Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679, 687 (7th Cir. 1998) (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 n.3 (1979)). However, “[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute.” *Wisconsin Right to Life v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004).

While it is true that the pledges and promises clause and commits clause have not yet been enforced against judicial candidates, they need not be as they are *already* chilling speech by virtue of their very existence. Judicial candidates, including Judge Certo and Bauer, believe that the pledges and promises clause and the commits clause will be enforced against them if they announce their views by answering the IRL Questionnaire. In addition, IRL has already been harmed as it cannot publish or receive information about judicial candidates' views that they have a right to receive. Such injury is not anchored in a future hypothetical event, but is actual, concrete, present harm that this Court should review expeditiously. Plaintiffs claim is ripe for this Court’s review. *See Pennsylvania Family Institute v. Celluci*, 489 F. Supp. 2d 460, 480 (E.D. Pa. 2007); *Stout*, 440 F. Supp. 2d at 1222; *Bader*, 361 F. Supp.2d at 1033-34; *Family Trust*, 345 F. Supp.2d at 687-88.

II. Plaintiffs Satisfy the Preliminary Injunction and Temporary Restraining Order Requirements.

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.

Abott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). Plaintiffs meet these requirements. Additionally, a temporary restraining order is only granted when “(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.” F. R. C. P. 65(b). Plaintiffs meet these requirements. Thus, a temporary restraining order and preliminary injunctive relief should be granted.

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

1. The Pledges and Promises Clause and Commits Clause Are Unconstitutional Both On Their Face and As Applied to the IRL Questionnaire.

Canon 5A(3)(d)(i) (the “pledges and promises clause”) provides that a candidate for judicial office shall not “make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office.” (emphasis added) Canon 5A(3)(d)(ii) (the “commits clause”) provides that a candidate for judicial office shall not “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).

Federal courts have repeatedly held unconstitutional various state judicial canons employing the language of the pledges and promises clause and commits clause. In *Buckley v. Illinois*, the Seventh Circuit struck down on First Amendment grounds Illinois’ pledges and promises clause,

which provided that “a candidate, including incumbent judge, for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues” *Buckley*, 997 F.2d at 225. Writing for the Seventh Circuit, Judge Posner acknowledged that the State had a legitimate interest in preventing judicial candidates and judges from “mak[ing] commitments to decide particular cases or types of case in a particular way.” *Id.* at 228. The pledges and promises clause in that case, however, achieved this objective by banning all pledges and promises, including those that did not amount to a pledge or promise of certain results in a particular case or class of cases. Under the clause, a judge or judicial candidate cannot

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

Id. Because of this overbreadth, the Seventh Circuit concluded that the pledges and promises clause was unconstitutional. *Id.* at 230.

Nine years later, the Supreme Court concurred with these conclusions in *Republican Party of Minnesota v. White*. The *White* case involved a Minnesota judicial canon forbidding judicial candidates from “announc[ing] their views on disputed legal and political issues.” *White*, 536 U.S. at 788. Because political speech concerning the qualifications of candidates for public office is “at the core of our first amendment freedoms,” the Court in *White* held that the announce clause was subject to strict scrutiny, and would only be upheld if it was narrowly tailored to further a compelling government interest. *Id.* at 774 (internal citations omitted).

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. *Id.* at 775-80. None of these were deemed to justify the announce clause.

Preserving impartiality towards parties, while a compelling interest, was only “barely tailored” to the announce clause, as that clause dealt with issues and not parties. *Id.* at 776. Impartiality as to issues was deemed not compelling, as having a judge with no preconceptions on any legal issue is neither possible nor desirable. *Id.* at 777. Finally, with regard to judicial open-mindedness,¹ the Court conceded neither that the interest was compelling nor that it was advanced by prohibitions on judicial speech. Instead, the Court simply noted that the announce clause could not be narrowly tailored to this interest because it applied only to statements made after a person had declared their candidacy, and not to statements made before this date. *Id.* at 778. Since the announce clause was not narrowly tailored to further any compelling government interest, the Supreme Court concluded that it was unconstitutional in violation of the First and Fourteenth Amendments. *Id.* at 788.

In *Indiana Right to Life v. Shepard*, the Supreme Court’s reasoning in *White* was used to

¹ As defined by *White*, judicial open-mindedness is the quality in a judge that “demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case,” and “seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.” *White*, 536 U.S. at 778.

strike down Indiana's pledges and promises clause and commits clause.² In *Shepard*, the district court held that "the pledges and promises clause and commits clause 'are essentially de facto 'announce clauses' which were found unconstitutional' in *White*." *Shepard*, 463 F. Supp. 2d at 889 (quoting *Bader*, 361 F. Supp. 2d at 1042). According to the court, "there is no principled distinction between the 'announce clause' struck down in *White* and the 'pledges and promises' and the 'commitment clause.'" *Shepard*, 463 F. Supp. at 890. The court also found the provisions unconstitutionally overbroad, and unconstitutionally vague. *Id.* at 889-90.

In addition to *Shepard*, since *White* five other 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 *Duwe v. Alexander*, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007); *Stout*, 440 F. Supp. 2d at 1241; *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005), *reversed on other grounds*, 504 F.3d 840 (9th Cir. 2007); *Bader*, 361 F. Supp. 2d at 1042; *Wolnitzek*, 345 F. Supp. 2d at 711. The Sixth Circuit has also declined to stay an injunction against Kentucky's "commits" clause, finding that 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).

Post *White*, only one federal court has upheld a commits clause against a constitutional challenge on the merits. See *Celluci*, 521 F. Supp. 2d at 351. *Celluci* involved a challenge to Pennsylvania's pledges and promises clause and commits clause. The court in *Celluci* found that the

² *Shepard* was ultimately reversed on appeal on standing grounds. See *Shepard*, 504 F.3d at 550. Nevertheless, the decisions reasoning on the merits of plaintiffs' constitutional challenge to the pledges and promises clause and commits clause remain persuasive authority for this Court.

commits clause as written was unconstitutional, because it prohibited not only commitments but also statements that “appear to commit” a candidate with regard to an issue. *Id.* at 380 (“It is also clear that the phrase “or appear to commit” makes the commits clause unconstitutionally vague.”) Likewise, the court held that Pennsylvania’s pledges and promises clause as written was unconstitutionally overbroad, as it prohibited protected political speech. *Id.* at 377. However, the court was bound by Third Circuit jurisprudence to accept Pennsylvania’s interpretation of the commits clause as applied only to pledges and promises of certain results in particular cases.³ The court therefore “delet[ed]” the appear to commit language from the commits clause and upheld the rewritten clause as constitutional. *Id.* at 380.

Celluci is distinguishable, however. In *Celluci*, the court was required by unique Third Circuit precedent to rewrite the challenged commits clause in order to make it comply with the constitution. *Id.* at 377. This court, by contrast, has neither the obligation nor the power to rewrite state laws. *See Buckley*, 997 F.2d at 229-30 (finding both the district court and defendants’ attempts to narrow the canon inadequate and refusing to “patch up” the canon to be in accord with the constitution).

For the reasons given in the above cited cases, and further elaborated below, Plaintiffs’ have a substantial likelihood of prevailing on the merits.

³ The Third Circuit case in question, *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991), held that Pennsylvania’s announce clause was constitutional. While the specific conclusion in *Stretton* was voided by *White*, the court in *Celluci* held that it was still bound by *Stretton*’s methodology, and thus had to accept the defendants’ interpretation of the commits clause even if it meant disregarding the clause’s plain language. *Celluci*, 521 F. Supp. 2d at 380.

a. **The Pledges and Promises Clause and Commits Clause Fail Strict Scrutiny.**

Political speech concerning the qualifications of candidates for public office is “at the core of our first amendment freedoms.” *White*, 536 U.S. at 774 (quoting *Republican Party of Minnesota v. Kelly*, 247 F. 3d 854 (8th Cir. 2001)). Because the pledges and promises clause and commits clause impinge on core political speech, they are subject to strict scrutiny. *White*, 536 U.S. at 774. 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).

The pledges and promises clause and commits clause, both facially and as applied to the IRL Questionnaire, are not narrowly tailored to the State’s interest in preserving judicial impartiality under any of the three definitions of impartiality considered in *White*. The provisions do not restrict speech for or against particular parties, but rather deal with statements made by judges and judicial candidates regarding issues. The pledges and promises clause and commits clause are therefore only “barely tailored” to Indiana’s interest in preserving judicial impartiality towards parties. *White*, 536 U.S. at 776. Nor do the provisions advance the goal of preserving judicial impartiality towards

issues, as prohibiting a candidate from stating his view on an issue does not prevent him from having a view on that issue in the first place.

Finally, the pledges and promises clause and commits clause are not narrowly tailored to the State's interest in preserving judicial open-mindedness. Like the announce clause in *White*, the pledges and promises clause and commits clause only encompass statements made by judges and judicial candidates, and they do not address statements made before a lawyer announces his or her candidacy. *See id.* at 779-80. Candidates often have already taken a position on legal issues well before they become candidates, either in the form of lectures, books, or law review articles. *Id.* at 779. In essence, the pledges and promises clause and commits clause permit lawyers to take positions on legal issues until the day they declare their candidacy, after which such statements are prohibited. The provisions are thus grossly underinclusive.

In addition, the pledges and promises clause and commits clause are overinclusive in that they prevent judges and judicial candidates from announcing their views on disputed legal and political issues. Indiana has a legitimate interest in prohibiting judges or judicial candidates from pledging or promising certain results in particular cases or classes of cases, but the pledges and promises clause and commits clause seek to further this interest in the "most comprehensive fashion imaginable." *Buckley*, 997 F.2d at 228. Under these provisions, a judge or judicial candidate

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

Id.; *see also, Stout*, 440 F. Supp. 2d at 1232 (pledges and promises clause would prohibit a candidate

from saying that he “promises to be tough on crime” or “is committed to upholding the First Amendment”); *Family Trust*, 345 F. Supp. 2d at 697 (same).

None of this is justified by the State’s interest in preserving judicial openmindedness. Judges and judicial candidates may take a position on a legal or political issue without compromising their open-mindedness. Yet the pledges and promises clause and commits clause prohibit candidates from announcing their views on these issues, even where doing so does not amount to a pledge or promise of certain results in a particular case or class of cases. Judges and judicial candidates such as Judge Certo and Candidate Bauer cannot answer the questions on the IRL Questionnaire by giving their opinion on *Roe v. Wade* and other such cases without risking being disciplined should the Commission decide such statements commit or appear to commit them on the issue. The pledges and promises clause and commits clause are, therefore, wildly overinclusive. *Buckley*, 997 F.2d at 230.

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).⁴

⁴ 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).

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).

In addition, 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.

Because they are underinclusive, overinclusive, and because there are less restrictive means of achieving the state’s interest in judicial open-mindedness, the pledges and promises clause and commits clause are not narrowly tailored to the State’s interest in preserving judicial impartiality. They therefore cannot pass strict scrutiny. *See Buckley*, 997 F.2d at 230; *Shepard*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

b. The Pledges and Promises Clause And Commits Clause Are Unconstitutionally Overbroad.

An overbroad law is to be facially invalidated if the impermissible applications of the law are substantial when compared to the law's legitimate application. *Commodity Trends Serv. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 688 n. 4 (7th Cir. 1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). As such, the overbreadth doctrine prevents a law from having a deterrent effect on protected speech. *Id.*

Canon 5A(3)(d)(i)'s pledges and promises clause provides that judicial candidates "should not make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office." (emphasis added). Canon 5A(3)(d)(ii)'s commits clause prohibits judicial candidates from "mak[ing] 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). Read literally, the provisions could be taken to ban even such innocuous statements as that the candidate "pledges to give a better shake to indigent litigants or harried employers," "promises to be tough on crime," or "is committed to upholding the First Amendment." See *Buckley*, 977 F.2d at 228; *Stout*, 440 F. Supp. 2d 1232; *Family Trust*, 345 F. Supp. 2d at 697.

Further, the commits clause bans not only commitments, but also statements which merely "appear to commit" a candidate with regard to a given issue. This is impermissible. 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., *Saxe v. State College Area School District*, 240 F.3d 200, 209 (3rd Cir. 2001) ("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 speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.” *Buckley*, 424 U.S. at 43. 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, the commits clause would seem to prohibit judicial candidates from announcing their views on issues in written opinions or law review articles on the grounds that in so doing they “appear to commit” 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 provision might have. *See Buckley*, 997 F.2d at 230; *Shepard*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1044; *Stout*, 440 F. Supp. 2d at 1232; *Family Trust*, 345 F. Supp. 2d at 697.

c. The Pledges and Promises Clause And Commits Clause Are Unconstitutionally Vague.

The pledges and promises clause and commits clause provide 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” (emphasis added). These provisions 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 Canon 5A(3)(d). 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?

The phrase “appear to commit” is also inherently vague. Judicial candidates interpret the phrase to include simply stating views on disputed political or legal issues. If this is what the provision means, then it is unconstitutionally overbroad, as 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 generally 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 relatively 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 if, 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 noted in *Shepard*, “in all but a few narrow situations, application of the Canon will require ad hoc analysis and advice from the Commission each time there is a question about the permissibility of a candidate’s statement.” *Shepard*, 463 F. Supp. 2d at 890. As such, the pledges and promises clause and commits clause are unconstitutionally vague. *Id.*

B. Plaintiffs Will Suffer Irreparable Injury Without the Injunction.

Without immediate injunctive and declaratory relief, Judge Certo and Candidate Bauer will continue to be irreparably harmed. Judge Certo is currently unable to exercise his right to announce his views on disputed legal and political issues, and thus cannot answer the questions on the IRL Questionnaire. And while Bauer has answered the questions on the IRL Questionnaire, in doing so he has opened himself to the possibility of discipline under the Canons. “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).

Likewise, without immediate injunctive and declaratory relief, IRL will continue to be irreparably harmed. IRL has the constitutional right to receive speech under *Stanley v. Georgia*, 394 U.S. 557 (1969), which states: “the Constitution protects the right to receive information and ideas.” *Id.* at 564. IRL is currently unable to exercise its right to receive and publish speech because judicial candidates have declined to answer the IRL Questionnaire. They are also unable to exercise their right to free expressive association. *Eu*, 489 U.S. at 216. IRL intends to solicit judicial candidates again for their views on disputed legal and political issues and publish those responses on its website, but cannot do so without immediate injunctive relief. Loss of First Amendment rights is automatically irreparable harm. *Elrod*, 427 U.S. at 373. Therefore, this required element for

immediate temporary and preliminary injunctive relief is met.

C. 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). Plaintiffs will be irreparably harmed if judicial candidates, including Judge Certo and Candidate Bauer, cannot announce their views on disputed legal and political issues, including answering the questions on the IRL Questionnaire. Similarly, IRL will be irreparably harmed if it cannot receive and publish answers to its survey from judicial candidates. By contrast, no harm will result if judicial candidates are allowed to announce their views or if IRL resubmits its survey to judicial candidates and publishes the judicial candidates' answers. Instead, voters will be able to make informed decisions regarding for whom they should vote.

D. 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 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 on May 6, 2008, and November 4, 2008. Therefore, the requested injunctive relief serves the public interest.

E. A Temporary Restraining Order is Appropriate.

As demonstrated above, Plaintiffs will suffer immediate, irreparable injury if Canons 5A(3)(d)(i) and (ii) are not enjoined. *See supra* Part II. Plaintiffs intend to make every effort to get a copy of the Complaint and all documents and briefing pertaining to Plaintiffs' TRO and

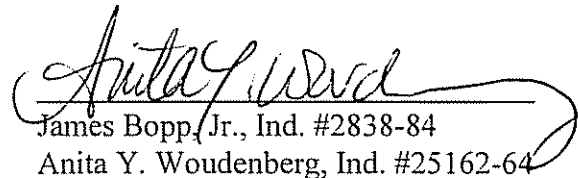
preliminary injunction request to Defendants' counsel as soon as possible so as to provide them with notice of this action. However, in light of the imminent election day – May 6, 2008– Plaintiffs request this Court to expeditiously consider its request regardless of the presence of Defendants and their counsel at the Court's hearing to ensure that Plaintiffs will have an opportunity to resubmit their questionnaires and distribute the responses of judicial candidates in a timely and meaningful fashion.

Conclusion

Canons 5A(3)(d)(i) and (ii) are unconstitutional facially and as-applied to the IRL Questionnaire. All the required elements for a temporary restraining order are met. This Court should expeditiously grant the requested injunctive relief.

Dated: April 18, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Memorandum Supporting Plaintiffs' Motion for Temporary Restraining Order* served via First Class U.S. Mail on the 18th day of April, 2008, upon:

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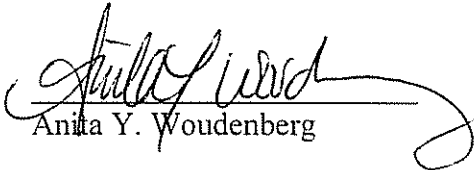
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