

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION**

**INDIANA RIGHT TO LIFE, INC., and
ARLINE SPRAU,**

Plaintiffs,

v.

RANDALL T. SHEPARD, et al.,

Defendants.

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Civil Action No. 4:04CV0071AS

**RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

On December 31, 2005, Defendants filed their second *Motion for Summary Judgment*. Pursuant to this Court's September 16, 2005, order requiring all responses to dispositive motions be filed on or before April 3, 2006, Plaintiffs now timely file their response. (Docket 84.)

FACTS

Plaintiffs reassert the facts of this case as articulated in their *Response Brief in Opposition to Defendants' Motion to Dismiss*.

ARGUMENT

Defendants state that “the challenged Canons are of no consequence to the public’s right to hear a judge’s legal or political views in order to become an informed voter.” (Defs.’ Mem. Supp. Mot. Summ. J. at 15.) When judicial candidates are chilled from announcing their views during their campaign because of these Canons, however, voters' rights are fundamentally undermined.

Judges in Indiana create law. Judges make common law doctrine, for example, with regard to choice of law issues, *Simon v. United States*, 805 N.E.2d 798, 804 (Ind. 2004), contract law, *Straub v. B.M.T. by Todd*, 645 N.E.2d 597, 600 (Ind. 1994), trespassing standards, *Galbreath v. Engineering Constr. Corp.*, 149 Ind. App. 347, 349 (1971), and legal malpractice claims, *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 341 (Ind. 1991). The common law is ever-evolving, *In re Lawrance*, 579 N.E.2d 32, 39 (Ind. 1991), as

[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as a means adapted to an end. If they do not function, they are diseased. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with

the shadow of continued life, but sterilized, truncated, impotent for harm.

Burrell v. Meads, 569 N.E.2d 637, 642 (Ind. 1991). *See White*, 536 U.S. at 784 (“state-court judges possess the power to ‘make’ common law”); *id.* at 799 (Stevens, J., dissenting) (stating that a judge “may make common law”); *id.* at 804 (Ginsburg, J., dissenting) (stating that judges “develop common law”).

Because judges can and do make law, voters are entitled to hear judicial candidates’ views on disputed legal and political issues should a judicial candidate wish to so announce them. By depriving a voter of information that a judicial candidate has a constitutional right to provide, as Canons 5A(3)(d)(i) and (ii), the CJQ’s enforcement policy, and Canon 3E(1) as applied do, voters’ right to vote is subverted. Canons 5A(3)(d)(i) and (ii) and 3E(1), along with the CJQ’s enforcement policy, undercut both voters’ entitlement to hear and make an informed decision on election day and judicial candidates’ right to announce their views. As such, they are unconstitutional.

Standard of Review

To request a summary judgment from this Court, as Defendants have done, Defendants must “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). As is evidenced by both parties filing motions for summary judgment, no material facts are in dispute in this case. However, Defendants have not successfully demonstrated that, as a matter of law, they are entitled to summary judgment in their favor.

I. Canon 5A(3)(d)(i) and (ii) And the CJQ’s Enforcement Policy Is Unconstitutional.

As Defendants state, “[t]he United States Supreme Court in *White* specifically distinguished the ‘announce clause’ from the provision of the judicial campaign canons that bar candidates from making ‘pledges or promises’ concerning judicial decision.” (Defs.’ Mem. Supp. Mot. Summ. J. at 12.) Unfortunately, Defendants have not made the same distinction. Defendants have interpreted their commits clause and pledges and promises clause, found in Canon 5A(3)(d), to include within their scope announced views, including those views solicited by questionnaires such as IRL’s 2004 Candidate Questionnaire. (Pls.’ Mem. Supp. Mot. Summ. J. at 7-8.) Canon 5A(3)(d)(i) and (ii) and the CJQ’s enforcement policy make no constitutional distinction between Canon 5A(3)(d)(i) and (ii) and the announce clause challenged in *White*, and Canon 5A(3)(d)(i) and (ii) has been interpreted to have the same effect. Consequently, *White* is directly on point in analyzing this issue and leads to the inevitable conclusion that Canon 5A(3)(d)(i) and (ii) is unconstitutional both facially and as applied to the 2004 Candidate Questionnaire.¹

Defendants have raised a variety of arguments to assert the constitutionality of Canon 5A(3)(d)(i) and (ii). Plaintiffs will address each in turn.

¹Defendants allege that *White* is inapplicable after relying on it to demonstrate the constitutionality of Canon 5A(3)(d)(i) and (ii). (Defs.’ Mem. Supp. Mot. Summ. J. at 12.) However, courts have been applying the analysis in *White* to not just the pledges and promises clause and the commits clause, see *Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission*, 388 F.3d 224, 227-28 (6th Cir. 2004), but to other canon provisions as well. See *Republican Party v. White*, 416 F.3d 738, 746 (8th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312, 1320, 1322 (11th Cir. 2002); *Spargo v. State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 88-89 (N.D. N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003); *Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 at *3 (W.D. Tex. 2002).

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

In the First Amendment context,² this Court must find Canon 5A(3)(d)(i) and (ii) facially unconstitutional if it is overbroad, vague, or fails strict scrutiny. *See Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission*, 388 F.3d 224 (6th Cir. 2004); *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). Plaintiffs will now weigh each of these considerations.

1. Overbreadth

Defendants claim that “[t]o suggest as Right to Life does that the challenged Canons as construed are overbroad is incorrect.” (Defs.’ Mem. Supp. Mot. Summ. J. at 11.) Yet, Defendants offer little to support their assertion, merely contending that Advisory Opinion #1-02 permits judicial candidates to state their views. (Defs.’ Mem. Supp. Mot. Summ. J. at 11.) Defendants appear to ignore the letter sent to IRL indicating that judicial candidates were advised to decline to respond to IRL’s questionnaire. (*See* Babcock Dep. 41:21-24, attached to Pls.’ Mem. Supp. Mot. Summ. J. as Ex. 11.) Such advice belies the assertion by Defendants that judicial candidates can announce their views.

²Defendants suggest that Plaintiffs must show that there is no circumstance where the challenged provision is constitutional in order to successfully make their facial attack to Canon 5A(3)(d)(i) and (ii), citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, the *Salerno* Court used the above standard to analyze a Fifth Amendment claim because the court has “not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *Id.* This standard has no relevance in the present matter, which makes a First Amendment challenge.

As this Court is well aware, a law is overbroad if it has substantial unconstitutional applications and, consequently, has a deterrent effect on protected speech. *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)). In this instance, the CJQ has established an ad hoc approach to interpreting Canon 5A(3)(d)(i) and (ii), one which reaches judicial speech that announces views on disputed legal issues. (Defs.' Mem. Supp. Mot. Summ. J. at 11 (citing Advisory Opinion #1-02); *id.* at 15 (citing The Commission's Letter).) It cannot do this and comport with *White*. Because it reaches a substantial amount of protected speech, Canon 5A(3)(d)(i) and (ii) is unconstitutionally overbroad.

Defendants contend that Plaintiffs' position is contradictory because "Right to Life seems to suggest that the prohibitions on pledges, promises, and commitments is appropriate [yet] challenges that same prohibition." (Defs.' Mem. Supp. Mot. Summ. J. at 24.) Defendants misunderstand Plaintiffs' position. Plaintiffs recognize that judicial candidates can be constitutionally prohibited from making a pledge or promise of certain results in a particular case. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993). Canon 5A(3)(d)(i) and (ii) does not limit its scope in the same manner as does the above prohibition, however. It reaches speech that "appears to commit," a regulation that is overbroad and encompasses speech that announces views on disputed legal and political issues. (Pls.' Mem. Supp. Mot. Summ. J. at 8-9, 10-11.) It is not a carefully crafted regulation of speech but reaches speech expressly protected in *White*. Consequently, this Court should find Canon 5A(3)(d)(i) and (ii) unconstitutional because of its overbreadth. (*See* Pls.' Mem. Supp. Mot. Summ. J. at 6-10.) *See also*

Bader, 361 F. Supp. 2d at 1039; *Family Trust*, 345 F. Supp. 2d at 697.

2. Vagueness

Quoting the CJQ's Advisory Opinion #1-02, Defendants state that “many issues about campaign speech will require ad hoc analysis. Judicial candidates are encouraged to contact the Commission directly and in advance to discuss the appropriateness of their campaign statements.” (Defs.’ Mem. Supp. Mot. Summ. J. at 11.) As is evident from this statement, the CJQ is aware that Canon 5A(3)(d)(i) and (ii) is unclear in its breadth and expects that candidates will need to contact the CJQ to have the canon interpreted and applied for them in their context. Such expectations connote vagueness because Canon 5A(3)(d)(i) and (ii) does not “have a ‘reasonable degree of clarity’ such that anyone of ordinary intelligence can grasp its import.” *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)). The need for the CJQ's interpretation demonstrates that Canon 5A(3)(d)(i) and (ii) is not precisely drafted. *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976). Because judicial candidates are not expected to be able to ascertain the meaning of Canon 5, but are, instead, encouraged to contact the CJQ for its interpretation, this Court should find that Canon 5A(3)(d)(i) and (ii) is vague. (See Pls.’ Mem. Supp. Mot. Summ. J. at 10-12.)

3. Strict Scrutiny

Defendants state that due process is served “by preserving the impartiality and appearance of impartiality of the judiciary.” (Defs.’ Mem. Supp. Mot. Summ. J. at 9.) To that end, Defendants contend that Canon 5A(3)(d)(i) and (ii) serves the impartiality interest of openmindedness. (Defs.’ Mem. Supp. Mot. Summ. J. at 10.) Such an interest is a laudable goal,

as the *White* court recognized: “It may well be that impartiality [that ‘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.’], and the appearance of it, are desirable in the judiciary.” *White*, 536 U.S. at 778. However, Canon 5A(3)(d)(i) and (ii) is not narrowly tailored to serve that interest because it is underinclusive.³ Canon 5A(3)(d)(i) and (ii) only includes within its scope those pledges and commitments made by judicial candidates without addressing pledges or commitments made by non-candidate judges or attorneys. (Pls.’ Mem. Supp. Mot. Summ. J. at 5-6.) *See White*, 536 U.S. at 779-80. Additionally, the state’s interest can be adequately served with a prohibition on judicial candidates from “pledging or promising certain results in a particular case.” *Buckley*, 997 F. 2d at 230; *see Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972).

Defendants recognize the validity of such a standard, stating that “[h]aving a judicial candidate pledge, promise or commit to rule on a specific case in a particular way removes any chance that some litigants will receive due process of law.” (Defs.’ Mem. Supp. Mot. Summ. J. at 10.) However, this is not the nature of the canon here challenged.⁴ In this case, judicial candidates are asked to announce their views and are being told they should decline to do so because doing so may commit or appear to commit the judicial candidates in violation of Canon

³*See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (*cited in White*, 536 U.S. at 780) (stating that underinclusiveness “diminishes the credibility of the government’s rationale for restricting speech”).

⁴Defendants assert that “[t]he Canons at issue simply require judges or judicial candidates to avoid making pledges or promises or commitments to issues that may later appear before them.” (Defs.’ Mem. Supp. Mot. Summ. J. at 16.) However, the CJQ’s response to IRL’s 2004 Candidate Questionnaire, stating that judicial candidates should decline to answer the questionnaire, discredits that assertion.

5A(3)(d)(i) and (ii). (*See Answers to Plaintiffs' Requests for Admission* at 2, attached to Pls.' Mem. Supp. Mot. Summ. J. as Ex. 12; Babcock Dep. 44:8-10, attached to Pls.' Mem. Supp. Mot. Summ. J. as Ex. 11.) Such a position reaches well beyond that of pledging or promising certain results in a particular case, and, in fact, encompasses constitutionally protected speech. *See White*, 536 U.S. at 774-75. It is not, as Defendants claim, narrowly tailored to serve the state's interest, but is, rather, unconstitutionally broad in its scope. Because Canon 5A(3)(d)(i) and (ii) does not satisfy strict scrutiny review, this Court should find it unconstitutional. (*See Pls.' Mem. Supp. Mot. Summ. J. at 3-6.*) *See also Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp.2d at 699-700.

B. Canon 5A(3)(d)(i) and (ii) Is Unconstitutional As Applied to The 2004 Candidate Questionnaire.

Defendants contend that “[j]udges and judicial candidates are not prohibited from announcing their views or answering questionnaires like the one at issue.” (Defs.’ Mem. Supp. Mot. Summ. J. at 16.) Yet Defendants reassert that “[t]he Commission has simply advised judges and judicial candidates not to answer.” (Defs.’ Mem. Supp. Mot. Summ. J. at 16; *see also* Babcock Dep. 57:2-64:19, 41:11-43:24, attached to Pls.’ Mem. Supp. Mot. Summ. J. as Ex. 11; Newkirk Dep. 5:9-12, attached to Pls.’ Mem. Supp. Mot. Summ. J. as Ex. 5; Vorhees Dep. 8:16-17, attached to Pls.’ Mem. Supp. Mot. Summ. J. as Ex. 9.) It is clear that, at minimum, the CJQ interprets Canon 5A(3)(d)(i) and (ii) to prohibit judicial candidates from announcing their views by answering the questions on the 2004 Candidate Questionnaire. Canon 5A(3)(d)(i) and (ii), when applied to the 2004 Candidate Questionnaire in this manner, is clearly unconstitutional in light of the holding in *White*. (*See Pls.’ Mem. Supp. Mot. Summ. J. at 12-13.*)

C. The CJQ’s Enforcement Policy Is Unconstitutional.

Defendants assert that the CJQ’s Advisory Opinion “states that candidates are permitted to state their views on disputed social and legal issues, such as . . . abortion or the death penalty.” (Defs.’ Mem. Supp. Mot. Summ. J. at 14.) However, Defendants do not expressly state that judicial candidates can answer the 2004 Candidate Questionnaire, a questionnaire that asks judicial candidates to announce their views on disputed legal and political issues. ARL’s questions asked no more than that the candidates announce their views of certain disputed legal and political issues, which the Supreme Court in *White* specifically held they may do. None of the questions posed to the candidates ask them to pledge, promise, or commit themselves to certain results in a particular case. Defendants do not contest this, stating that “[t]hrough the Questionnaire, Right to Life wants judicial candidates to announce their views on disputed legal and political issues.” (Defs.’ Mem. Supp. Mot. Summ. J. at 15.) The disparity between the CJQ’s Advisory Opinion on the one hand and its policy of advising against answering the 2004 Candidate Questionnaire on the other renders the CJQ’s policy vague. It also demonstrates that the CJQ’s enforcement policy is not narrowly tailored because it restricts speech expressly protected in *White*.

Defendants allege that “[n]one of the judges or judicial candidates who declined to answer the Questionnaire were or felt threatened in any way with discipline if they had chosen to answer” and that “[t]he two judges who provided substantive responses . . . both testified that they were not and did not feel in any way threatened with discipline for having chosen to respond.” (Defs.’ Mem. Supp. Mot. Summ. J. at 21.) Defendants underestimate the authority of

the CJQ's position. The CJQ does not need to actually threaten discipline to chill speech. In addition to the threat inherent in the Canon itself (Pls.' Resp. Mem. Opp. Mot. Dismiss at 15-16), the CJQ merely needs to provide advice, implicit within which is a threat of discipline. For example, Judge Newkirk called the CJQ to determine what options he had regarding the 2004 Candidate Questionnaire. (Newkirk Dep. 10:7-8, attached to Pls.' Mem. Supp. Mot. Summ. J. as Ex. 5.) And "as a result of the telephone conversation [with Ms. Babcock], that was [his] response, that is, to decline." (Newkirk Dep. 13:3-5, attached to Pls.' Mem. Supp. Mot. Summ. J. as Ex. 5.)

Likewise, Judge Brown, although she responded, indicated that if she had known Ms. Babcock was recommending that judicial candidates not answer the questionnaire, she would not have answered and that she "would have called Meg and said, 'Hey, is this okay' before [she] answered it." (Brown Dep. 10:5-9, attached to Pls.' Mem. Supp. Mot. Summ J. as Ex. 1.) In particular, she states that she would not "want to do anything to run afoul of the canons *or the Commission's view* on the canons." (Brown Dep. 10:8-9, attached to Pls.' Mem. Supp. Mot. Summ J. as Ex. 1 (emphasis added)). Clearly, the CJQ's enforcement policy has an effect on judicial candidates' decision to speak, and in the context of Judge Newkirk, chills constitutionally protected speech. For these reasons, the CJQ's enforcement policy of Canon 5A(3)(d)(i) and (ii) is unconstitutional. (*See* Pls.' Mem. Supp. Mot. Summ. J. at 13-16.)

II. Canon 3E(1) Is Unconstitutional As Applied to the 2004 Candidate Questionnaire.

Defendants state that the CJQ "is aware of no case from across the United States that has struck down anything like this judicial canon." (Defs.' Mem. Supp. Mot. Summ. J. at 7.) The

three cases⁵ Defendants cite to support the validity of Canon 3E(1) all found that Canon 3E(1) is facially constitutional. Plaintiffs here challenge Canon 3E(1) only as applied to questionnaires such as IRL's.

In this context and contrary to Defendants' assertions, Canon 3E(1) is not narrowly tailored to serve an interest in impartiality by preserving the openmindedness of a judge. (Defs.' Mem. Supp. Mot. Summ. J. at 7-8.) As the *White* Court noted, while openmindedness is a compelling interest, including announced views to fall under such a provision is not a narrow tailoring to protect that interest. *White*, 536 U.S. at 779. Plaintiffs know of no instance where a judge has been required to disqualify from a case because he or she announced his or her views during their campaign. (Pls.' Mem. Supp. Mot. Summ. J. at 19-21.) In fact, requiring that judges so disqualify themselves is unnecessary, as both the election process and the judge himself or herself will exert restraint on the judicial candidate's comments during an election. (Pls.' Mem. Supp. Mot. Summ. J. at 17-18.) For these reasons, Canon 3E(1) as applied to the 2004 Candidate Questionnaire is not narrowly tailored, but is an unconstitutional infringement upon Plaintiffs' free speech rights. (*See* Pls.' Mem. Supp. Mot. Summ. J. at 16-21.)

CONCLUSION

Canon 5A(3)(d)(i) and (ii), the CJQ's enforcement policy of Canon 5A(3)(d)(i) and (ii), and Canon 3E(1) all affect speech that is constitutionally protected: judicial candidates are chilled from announcing their views on disputed political and legal issues. Because Canon

⁵In the fourth case Defendants cite, *Pennsylvania Family Institute v. Black*, 2005 WL 2931825 (M.D. Penn. Nov. 4, 2005), the court did not reach the issue of the constitutionality of Canon 3E(1).

5A(3)(i) and (ii) and the CJQ's enforcement policy are facially overbroad and vague and do not survive strict scrutiny, this Court should find them to be unconstitutional. In like manner, this Court should hold that Canon 3E(1) as applied to the 2004 Candidate Questionnaire is unconstitutional because it is not narrowly tailored to serve a compelling interest. Because Defendants are not entitled to judgment as a matter of law for the above reasons, this Court should deny *Defendants' Motion for Summary Judgment* and grant *Plaintiffs' Motion for Summary Judgment*.

Dated: April 3, 2006

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I hereby certify that on April 3, 2006, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which sent notification of such filing to the following:

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