UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION

INDIANA RIGHT TO LIFE, INC. and ARLINE SPRAU,)
Plaintiffs,)
v.) CASE NO. 4:04-CV-00071-AS-APR
RANDALL T. SHEPARD, *et al.*,)
Defendants.)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Randall T. Shepard, *et al.*, in their official capacities as members of the Indiana Commission on Judicial Qualifications and Indiana Disciplinary Commission (collectively, "Commission"), by counsel and pursuant to Federal Rule of Civil Procedure 56 and N.D. Ind. L.R. 56.1, respectfully submits the following Memorandum in Support of their Motion for Summary Judgment against Plaintiffs, Indiana Right to Life, Inc. and Arline Sprau (collectively "Right to Life").

I. STATEMENT OF MATERIAL FACTS

In 1972, the American Bar Association ("ABA") adopted the Model of Judicial Conduct ("ABA Model"). The 1972 ABA Model included a clause that prohibited candidates for judicial elections from *announcing* their views on disputed legal and political issues (the "announce" clause). Subsequently, in 1973, the Indiana Supreme Court adopted the ABA Model. In 1990, the Commission issued an advisory opinion (Preliminary Advisory Opinion #2-90), which cited the "announce" clause and stated that judges and candidates may not express their personal views on abortion. Second Affidavit of Margaret W. Babcock, Exhibit B ("Babcock Aff., Ex. B"), ¶ 2. In 1990, the ABA amended the Model Code and took out the "announce" clause, and in March 1993,

the Indiana Supreme Court amended its Code and also took out the "announce" clause. Babcock Aff. (Ex. B), ¶¶ 3-4.

In February 2002, the Commission sent a memo to all the judicial candidates for that year's elections stating that they may not make statements which appear to commit them to the outcome of cases, such as "tough on crime" platforms. Babcock Aff. (Ex. B), ¶ 5. Shortly thereafter, in June 27, 2002, the United States Supreme Court issued its opinion in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), holding the "announce" clause in Minnesota's canons unconstitutional. Following the White decision, in October 2002, the Commission issued another preliminary advisory opinion #1-02 ("Advisory Opinion") to judicial candidates stating that candidates are constitutionally permitted to state their general views about disputed social and legal issues, but they have a duty to ensure that the statements they make do not call into question his or her impartiality. Preliminary Advisory Opinion #1-02 ("Advisory Op.") Preliminary Advisory Opinion #1-02 ("Advisory Op."), Exhibit C at 2; Affidavit of Margaret W. Babcock, Exhibit A ("Babcock Aff., Ex. A"), ¶ 5; Babcock Aff. (Ex. B), ¶ 6. The Advisory Opinion provided numerous examples of what type of statements would not violate the canons. For example, a candidate may criticize an opponent's qualifications, record or past decisions, so long as the criticism is based on objective facts. Advisory Op. (Ex. C) at 4. Candidates may also make truthful statements of fact about an opponent and may also make promises relating to court administration or the improvement of the judicial system. Id.

In 2002, sometime after the Advisory Opinion was issued, Right to Life began to send out questionnaires to judicial candidates up for election that year. In 2004, Right to Life again sent out a questionnaire ("Questionnaire") to the judicial candidates of that year's elections. Most judges or judicial candidates who received the Questionnaire declined to respond to it. Complaint, Exhibits

E-1 through E-23. A couple of other judges and judicial candidates provided substantive responses to the Questionnaire. Complaint, Exhibits E-24 through E-31.

On June 21, 2004, Right to Life contacted the Indiana Disciplinary Commission and the Indiana Commission on Judicial Qualifications regarding the fact that judicial candidates declined to answer Right to Life's questionnaires. See Letter from Right to Life to Indiana Disciplinary Commission, Exhibit F and Letter from Right to Life to Indiana Commission on Judicial Qualifications, Exhibit G. The Qualifications Commission responded to Right to Life's inquiries by sending it a letter on July 16, 2004, stating that the Commission's advice to candidates was to not respond to the Survey and further stating that the Commission has not threatened discipline for those who chose to respond. See Letter from Margaret Babcock to Right to Life, Exhibit H ("Commission Letter, Ex. H"); Babcock Aff. (Ex. A), ¶ 8. The letter went on to say: "Judges and candidates may not make statements which appear to commit them to the outcome of cases," because to do so "creates questions about his or her impartiality when those issues present themselves in court. Judges must follow the law, regardless of their personal view, and they have a duty to minimize disqualification motions." Commission Letter (Ex. H).

On September 29, 2004, Right to Life filed a Verified Complaint for Declaratory and Injunctive Relief against the Commission. On January 4, 2004, Right to Life filed an "Amended Verified Complaint for Relief" (the "Complaint"). Specifically, Right to Life challenges the "recusal clause" found in Canon 3E(1) and "the pledges and promises clause" and "commit clause" found in Canon 5A(3)(d)(i) and (ii). Complaint at 2, ¶ 3; 3, ¶ 5.

Canon 3E(1) requires a judge to "disqualify himself or herself any proceeding in which the judge's impartiality might reasonably be questioned… ." Complaint at 3, ¶ 6. Canon 5A(3) states: "a candidate for judicial office: …(d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements

that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court… ." Complaint at 2, ¶ 2.

Right to Life claims that Canon 3E(1) violates the First Amendment of the United States Constitution as applied to the 2004 candidate questionnaire, insofar as it "can be applied to prevent judges who have exercised their right to speak on disputed legal and political issues from hearing cases that address the issues on which they have spoken." Complaint at 3, ¶ 5. Right to Life further claims that the Commission's enforcement policy regarding Canon 3E(1) "is in violation of the First Amendment, both on its face and as applied to the 2004 candidate questionnaire." Complaint at 3, ¶ 5. Right to Life further alleges that Canons 5A(3)(d)(i) and (ii) of the Indiana Code of Judicial Conduct ("Code") violate the First and Fourteenth Amendments to the United States Constitution. Complaint at 9, ¶ 31. Specifically, Right to Life claims that Canon 5A(3)(d)(i) and (ii) "chills judicial candidate's free speech in the overbreath and vagueness of its language, in its application to the 2004 candidate questionnaire, and in the [Commission's] enforcement policy by prohibiting candidates from expressing their views on legal and political issues, and thus, from responding to the 2004 candidate questionnaire that seeks to ascertain the candidate's views on issues." Complaint at 2, ¶ 3.

In its Complaint, Right to Life attached exhibits consisting of the responses of judges and judicial candidates to the Questionnaire. Complaint, Exhibits E-1 through E-31. Most of those judges and judicial candidates "declined" to respond. Complaint, Exhibits E-1 through E-23. Right to Life uses those exhibits to argue that the judges and judicial candidates declined to respond because they understood the Canons at issue to subject them to discipline if they did answer and because they understood the Commission and its Advisory Opinion to prohibit them from answering as being improper. Complaint at 6, ¶ 19. With respect to the exhibits of those who provided substantive answers to the Questionnaire (Complaint, Exhibits E-24 through E-31), Right to Life uses

those to argue that even though it received two substantive responses to the Questionnaire, it has "refrained from publishing [the judicial candidates'] answers to prevent exposing the judicial candidates to disciplinary proceedings, which [Right to Life] believe was a strong possibility based on the other judicial candidate responses and the [Judicial Qualification Commission's] Memorandum." Complaint at 6, ¶ 19.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Hedberg v. Indiana Bell Tele. Co., Inc., 47 F.3d 928, 931 (7th Cir. 1995). The applicable burdens under Rule 56 are well settled. As succinctly explained by the Seventh Circuit:

> The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. However, in cases in which the nonmoving party bears the burden of proof on a dispositive issue, that party also bears the burden of affirmatively demonstrating a genuine issue for trial on that issue. In such a situation, the nonmoving party may not rest on the allegations in the pleadings but must offer specific evidence demonstrating a factual basis on which he is entitled to relief.

Roger v. Yellow Freight Sys. Inc., 21 F.3d 146, 148 (7th Cir. 1994) (citations omitted).

Moreover, the non-movant cannot avoid summary judgment by simply offering "self-serving assertions without factual support," Jones v. Merchants Nat. Bank & Trust Co., 42 F.3d 1054, 1058 (7th Cir. 1994); *see also* Hedberg, 47 F.3d at 931 ("Conclusory allegations by the party opposing the motion cannot defeat the motion."); by merely demonstrating some "metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), *cert denied*, 481 U.S. 1029 (1987); or by providing only a scintilla of evidence in support of her position, Young v. Lincoln Nat'l Corp., 937 F. Supp. 1326, 1333 (N.D. Ind. 1996). "No genuine issue for trial exists where the record as a whole could not lead a rational trier of fact to

find for the nonmoving party." Id. (quoting Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 322 (7th Cir. 1992)). While the court must draw all reasonable inferences from the undisputed evidence in favor of the non-moving party, "'[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained' and in such cases summary judgment is appropriate." Id. (quoting Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361, 367 (7th Cir. 1983)).

III. ARGUMENT

The Commission is entitled to summary judgment as a matter of law for two reasons. **First**, Canon 3E(1) is not unconstitutional as applied to the Questionnaire because it is narrowly tailored to serve the compelling state interest of preserving impartiality in the judiciary in that it guarantees that a judge will apply the law to all parties in an equal manner. **Second**, Canon 5A(3)(d)(i) and (ii) and the Commission's enforcement policy are not unconstitutional on their face or as applied to the Questionnaire. Canon 5A(3)(d)(i) and (ii) are narrowly tailored to serve the compelling state interest in protecting the due process rights of litigants by preserving the impartiality and appearance of impartiality of the judiciary and are not overbroad or vague. Therefore, summary judgment is warranted in the Commission's favor.

A. Canon 3E(1) is Constitutional as Applied to the Questionnaire

Right to Life challenges the constitutionality of Canon 3E(1), which relates to judges' obligation to recuse themselves. Canon 3E(1) requires a judge to "disqualify himself or herself any proceeding in which the judge's impartiality might reasonably be questioned… ." Specifically, Right to Life claims that Canon 3E(1) violates the First Amendment of the United States Constitution as applied to the 2004 candidate questionnaire, insofar as it "can be applied to prevent judges who have exercised their right to speak on disputed legal and political issues from hearing cases that address the issues on which they have spoken." Complaint, p. 3, ¶ 5. Right to Life further claims

that the Commission's enforcement policy regarding Canon 3E(1) "is in violation of the First Amendment, both on its face and as applied to the 2004 candidate questionnaire." Complaint, p. 3, ¶ 5. Right to Life's challenge fails.

First of all, the Commission is aware of no case from across the United States that has struck down anything like this judicial canon and Right to Life has cited no such case. In fact, in all the other district court decisions addressing this issue, the recusal clause was upheld as being narrowly tailored to serve the compelling state interest of preserving impartiality in the judiciary. See Pennsylvania Family Institute v. Black , 2005 WL 2931825 (M.D. Penn. Nov. 4, 2005) (dismissing similar case for lack of standing and ripeness); Alaska Right to Life Political Action Committee v. Feldman, 380 F.Supp.2d 1080, 1084 (D. Alaska 2005) (holding the recusal clause to be "narrowly tailored to serve a compelling State interest, i.e., it offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant"); North Dakota Family Alliance, Inc. v. Bader, 361 F.Supp.2d 1021, 1043-44 (D.N.D. 2005) (holding the recusal clause to be "narrowly tailored to serve the compelling State interest of offering a "guarantee to parties that the judge will apply the law in the same manner that would be applied to any other litigant"); Family Trust Foundation of Kentucky, Inc. v. Wolnitzek, 345 F.Supp.2d 672, 708 (E.D. Ky. 2004).

As stated in Wolnitzek, this Canon furthers the purpose of removing bias for or against a party to the proceeding, which according to White, assures equal protection of the law. Wolnitzek, 345 F.Supp.2d at 707; see also Babcock Aff. (Ex. B), ¶ 10. "Certainly, this is a compelling state interest inasmuch as the authority of the judiciary relies upon the public faith in the integrity of its judges." Id. The recusal clause also serves the state's interest in "open-mindedness" in that it seeks to guarantee each litigant "not an equal chance to win the case, but at least some chance of doing so." Id. (citing White, 536 U.S. at 778). Judges should "keep an open mind about the outcome of a case until all of the evidence and arguments have been presented." Id. at 708. Under the recusal

clause, judges must recuse or disqualify themselves from a case in which they feel that they cannot be open-minded. Therefore, the recusal clause guarantees that a judge will apply the law to all parties in an equal manner and is thus narrowly tailored to serve the compelling interest of impartiality in the judiciary. See Id.; Feldman, 380 F.Supp.2d at 1084; Bader, 361 F.Supp.2d at 1043-44.

Furthermore, the recusal clause is not unconstitutionally overbroad or vague. Canon 3E(1) does not chill speech. Significantly, recusal is not required in every instance in which a judge has expressed a view on a certain issue. See Wolnitzek, 345 F.Supp.2d at 709. While the recusal clause "may have the effect of chilling some speech," it cannot be said that "in light of the state's compelling interest in maintaining the impartiality and appearance of impartiality of the courts" that Canon 3E(1) prohibits "a 'substantial' amount of protected speech in relation to its many legitimate applications." Id. Consequently, the recusal clause is not overbroad. Moreover, the recusal clause is not unconstitutionally vague because "a judge, in most instances, can determine those circumstances in which a statement might appear to commit him to an issue and thus require recusal from a case involving that issue." Id. at 710.

In sum, there is no reason to declare the recusal clause unconstitutional. Therefore, Right to Life's challenge must fail and the Commission is thus entitled to summary judgment as a matter of law.

B. Canon 5A(3)(d)(i) and (ii) and the Commission's Enforcement Policy are Constitutional on their Face and as Applied to the Questionnaire

Canon 5A(3)(d)(i) and (ii) and the Commission's enforcement policy do not violate the First and Fourteenth Amendments of the United States Constitution.

1. Canon 5A(3)(d)(i) and (ii) is facially constitutional.

The Commission is entitled to summary judgment as a matter of law because Canon 5A(3)(d)(i) and (ii) are narrowly tailored to serve a compelling state interest and is thus, constitutional on its face and as applied. Right to Life has the burden of demonstrating that there is no cir-

cumstance in which the Canons at issue are constitutional. See United States v. Salerno, 481 U.S. 739, 745 (1987) (for a facial challenge to succeed, there must be no circumstance in which the law is constitutional). This Right to Life cannot do.

a) Canon 5A(3)(d)(i) and (ii) is narrowly tailored to serve a compelling state interest

As recognized by the United States Supreme Court and followed by other district courts, the Commission's interest in protecting the due process rights of litigants by preserving the impartiality and appearance of impartiality of the judiciary is a compelling one. See Republican Party of Minnesota v. White, 536 U.S. 765, 776-77 (2002) (recognizing that states have a compelling interest in protecting the due process rights of litigants by preserving an impartial judiciary) (citing Tumey v. Ohio, 273 U.S. 510, 523, 531-534 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); Wolnitzek, 345 F.Supp.2d at 708 (recognizing the state interest of preserving an impartial judiciary as a compelling one); Feldman, 380 F.Supp.2d at 1084 (same); Bader, 361 F.Supp.2d at 1043-44 (same); see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822-825 (1986) (same); Ward v. Monroeville, 409 U.S. 57, 58-62 (1972) (same); Johnson v. Mississippi, 403 U.S. 212, 215 -216 (1971) (*per curiam*) (judge violated due process by sitting in a case in which one of the parties was previously successful litigant against him); Bracy v. Gramley, 520 U.S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); In re Murchison, 349 U.S. 133, 137-139 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted)); see also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 617 (1993) (judicial bias, or even the appearance, violates the Due Process Clause); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to

find against him."); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); Bloom v. Illinois, 391 U.S. 194, 205 (1968) ("Trial before 'an unbiased judge' is essential to due process."); Offutt v. United States, 348 U.S. 11, 13 (1954 ("justice must satisfy the appearance of justice").

Right to Life's claim that the challenged Canons are facially unconstitutional is incorrect (Complaint at 2, ¶ 3) because there is a compelling state interest served by the Canons at issue. The state interest is in judges having an open mind: "This quality in a judge 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. This sort 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…. [I]mpartiality in this sense, and the appearance of it, are desirable in the judiciary …." White, 536 U.S. at 778 (emphasis in original).

Indeed, the challenged Canons are narrowly tailored to serve the state's interest in open-mindedness. Having 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 from an impartial arbiter. The United States Supreme Court in White noted, "A candidate who says, 'If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages' will positively be breaking his word if he does not do so (although one would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign 'pledges or promises,' which is not challenged here." 536 U.S. at 780. Therefore, the pledges or promises and commit clauses serves the state's interest in promoting open-mindedness and thus ensuring an impartial or the appearance of an impartial judiciary. See Babcock Aff. (Ex. B), ¶ 9.

b) Canon 5A(3)(d)(i) and (ii) is not overbroad or vague

Right to Life's claim that these clauses are unconstitutionally overbroad is wrong. Complaint at 2, ¶ 3. The Commission's Preliminary Advisory Opinion #1-02 issued in October 2002, in the wake of White states: "[C]andidates are permitted under the first amendment to state their general views about disputed social and legal issues. Candidates have a constitutional right to state their views on, for example, abortion or the death penalty, to characterize themselves as 'conservative' or 'tough on crime,' or to express themselves on any number of other philosophies or perspectives. These examples are not exclusive, but are those about which candidates in Indiana most often inquire." Advisory Op. (Ex. C) at 2. The preliminary advisory opinion continues: "Of course, candidates are not obligated to respond to inquiries about their views on social and legal issues, and may legitimately respond that their views are not relevant to their obligations as judges to follow the law and to rule on each case on its facts and merits. Conversely, opponents of candidates who do express their views are free to criticize their opponents for those expression for that same reason." Id. To suggest as Right to Life does that the challenged Canons as construed are overbroad is incorrect.

Right to Life's claim that the challenged Canons are unconstitutionally vague is also wrong. Complaint at 2, ¶ 3. The Advisory Opinion is evidence of the erroneous nature of this assertion. In the Advisory Opinion the Commission wrote: "Beyond simple expression of views on disputed issues, there are myriad other examples of campaign speech which were not clearly affected by White, but which often are expressed in judicial campaigns. While the Commission members recognize that judicial candidates would take comfort in a list of approved and disapproved statements, it has become clear that the propriety of more particularized statements is too dependent upon context and facts to allow the Commission's prejudgment in most instances. Instead, many issues about campaign speech will require ad hoc analysis. In that regard, judicial candidates are encour-

aged to contact the Commission directly and in advance to discuss the appropriateness of their campaign statements, or to discuss the appropriateness of their opponents' statements and the proper response to those statements. Nonetheless, the Commission will attempt to set out some parameters based on hypothetical examples of campaign speech." Advisory Op. (Ex. C) at 2-3. The Commission's hypothetical examples directly rebut Right to Life's claim that the challenged Canons are unconstitutionally vague. Id.

c) The decision in White has no bearing on the constitutionality of the "pledges or promises" or "commit" clauses.

In challenging Canon 5A(3)(d)(i) and (ii), Right to Life relies on Republican Party of Minnesota v. White, 536 U.S. 765 (2002). Complaint at 10, ¶¶ 33, 36, 37. This reliance is misplaced because the pledges or promises and commit clauses are not akin to the "announce" clause. In fact, White does not address the "pledges or promises" clause or "commit" clause. It only addresses the "announce" clause.

In White, the United States Supreme Court addressed the question of "whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues." 536 U.S. at 768. The Court expressed no view on Minnesota's "'pledges or promises' clause which *separately* prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office'…—a prohibition that is not challenged here and on which we express no opinion." 536 U.S. at 770 (emphasis in original, citation omitted). Later, the Court reiterated the point: "But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign 'pledges or promises,' which is not challenged here." Id. at 780. The 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 decisions.

Likewise, the White opinion did not address the "commit" clause other than in a passing footnote: "In 1990, in response to concerns that its 1972 Model Canon—which was the basis for Minnesota's announce clause—violated the First Amendment, … the ABA replaced the canon with a provision that prohibits a judicial candidate from making 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.'" 536 U.S. at 773 n.5 (citations omitted). "[B]ased on the same constitutional concerns that had motivated the ABA," the Court continued in the footnote, "the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions [like Indiana], declined." Id. The Court concluded the footnote: "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question." Id. The Court in White was not considering whether judicial candidates could be precluded from making commitments concerning cases, controversies or issues.

Commitments also more closely resemble pledges and promises as distinguished from the announcement of views. Babcock Aff. (Ex. B), ¶ 8. A commitment, like a pledge or promise, undermines the open-mindedness and impartiality of the judiciary as well as the appearance of such, both basic components of the public's confidence in the judicial system. Babcock Aff. (Ex. B), ¶ 9. In discussing open-mindedness, the Court wrote: "This quality in a judge 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. This sort 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. … [I]mpartiality in this sense, and the appearance of it, are desirable in the judiciary…." 536 U.S. at 778 (emphasis in original). Given the similarities be-

tween commitments and pledges/promises on the one hand, and announcement of views on the other hand, nothing in White can be construed as striking down the prohibition on commitments.

Indiana, like many states, does not have the "announce" clause at issue in White but instead the narrower "pledges and promises" and "commit" clauses, which have been upheld against constitutional attack. See In re Watson, 100 N.Y.2d 290, 299-303, 763 N.Y.S.2d 219, 224-26, 794 N.E.2d 1, 5-8 (2003) (*per curiam*) ("New York's Rules Governing Judicial Conduct do not include a provision analogous to Minnesota's 'announce clause'.... Thus, White does not compel a particular result here"; pledges and promises rule did not violate First Amendment); In re Kinsey, 842 So.2d 77, 85-87 (Fla. 2003) ("In contrast to White, Florida does not have an 'announce clause' but instead adopted a more narrow canon"; judicial canon prohibiting a judicial candidate from making statements that appear to commit the candidate with respect to cases or issues does not violate right to free speech); see also In re Raab, 100 N.Y.2d 305, 763 N.Y.S.2d 213, 793 N.E.2d 1287, 1290 (2003) (*per curiam*) ("White did not involve review of political activity restriction analogous to those at issue here"). These cases correctly read White as limited to the "announce" clause. This Court should do the same.

Also, the Advisory Opinion, issued in the wake of White, states that candidates are permitted to state their general views on disputed social and legal issues, such as for example, abortion or the death penalty, by characterizing themselves as "conservative," "tough on crime," "pro-life," or with any other general statement. Advisory Op. (Ex. C) at 2. If judges announced that they were "pro-life," that fact would not result in disciplinary action by the Commission further proving that the "pledges or promises" clause and the "commit" clause have not been used or enforced to prohibit candidates from *announcing* their views on disputed legal and political issues. Right to Life can point to no evidence that would prove the contrary.

2. The challenged Canons are not unconstitutional as applied to the Questionnaire or as enforced by the Commission.

Right to Life erroneously asserts that the pledges and promises and commit clauses are unconstitutional as applied to the Questionnaire and as enforced by the Commission. Complaint at 2, ¶ 3. Through the Questionnaire, Right to Life wants judicial candidates to announce their views on disputed legal and political issues. See 2004 Judicial Candidate Questionnaire, Exhibit E ("2004 Questionnaire, Ex. E). It cannot, however, force or compel judicial candidates to do so. The United States Supreme Court said: "Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issue" referring to "instances in which nominees to this Court declined to announce such views during Senate confirmation hearing" and distinguishing between "*terms of propriety, rather than disqualification*, … [and] distinguishing quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench." White, 536 U.S. at 783 n.11 (quoting Laird v. Tatum, 409 U.S. 824, 836 n. 5 (1972)) (emphasis in original).

The Commission wrote to Right to Life to explain: "My advice to judicial candidates has been to not answer your survey questions. I have not threatened discipline, of course, but have expressed to those who have inquired that I believe they should decline. Judges and candidates may not make statements which appear to commit them to the outcome of cases. A judge who has expressed a view on particular issues creates questions about his or her impartiality when those issues present themselves in court. Judges must follow the law, regardless of their personal view, and they have a duty to minimize disqualification motions." Commission Letter (Ex. H). The advisory nature without threat of disciplinary action is consistent with the United States Supreme Court's distinction in White.

Contrary to Right to Life's assertions, 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. "An-

nouncements" sufficiently inform voters of a judge's or judicial candidate's general views on legal or political issues. Pledging, promising or committing does not encompass the general nature of "announcements". Instead, pledging, promising or committing refers to specific statements that would cast doubt on a judge's or judicial candidate's impartiality or appearance of impartiality. The 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.

a) Judges and judicial candidates are not prohibited from announcing their views or answering questionnaires like the one at issue.

Nothing prohibits judges or judicial candidates from "announcing" their views. It is one thing to say for example, "I will put every sex offender behind bars," and another to say "I will be tough on crime." The difference between the two statements is that the former is promising or committing to do something with respect to a particular issue. The latter, is announcing a general view about a social and legal issue. There is nothing that impedes or prohibits judges or judicial candidates from making such announcements.

Moreover, judges and judicial candidates are not prohibited from answering questionnaires like the one at issue. The Commission has simply advised judges and judicial candidates not to answer. Thus, to say that the Commission has *prohibited* judges or judicial candidates from speaking is simply false. The Commission has only exercised its advisory obligation by informing judges and judicial candidates that answering the questionnaire may give the appearance of bias, if not actual bias, which may cause concerns should this issue come before them. Judges and judicial candidates are fully aware of and recognize their right to announce their views. See Exhibits to Motion to Dismiss Amended Complaint ("Motion Ex."), Ex. 1, ¶ 11; Ex. 2, ¶ 11; Ex. 4, ¶ 9; Ex. 5, ¶ 12; Ex. 6, ¶ 13; Ex. 7, ¶ 6; Ex. 8, ¶ 6, 10; Ex. 9, ¶ 6. That the judges and judicial candidates "declined" to respond to the Questionnaire, does not automatically mean that they declined to respond because they were prohibited from doing so or because they were "chilled" from doing so.

Significantly, no judges or judicial candidates have stepped forward to challenge the Canons or to assert their rights under the First Amendment. Instead, judges and judicial candidates have testified that, as a matter of propriety, they do not want to announce their views and they did not want to answer the Questionnaire. Motion Ex., Ex. 1, ¶ 9; Ex. 2, ¶ 9; Ex. 3, ¶ 6; Ex. 4, ¶¶ 5, 8-11; Ex. 5, ¶¶ 9-17; Ex. 6, ¶¶ 6, 8-14; Ex. 7, ¶¶ 6, 7, 10-13; Ex. 8, ¶¶ 6, 7, 10-13. See also Appendix to Reply in support of Motion to Dismiss ("Reply App."), Heimann Dep. (Reply App. Tab 1) 15:14-15; Humphrey Dep. (Reply App. Tab 2) 6:4-7; Vorhees Dep. (Reply App. Tab 3) 10:6-14; Nowak Dep. (Reply App. Tab 4) 12:3-6; 13:12-14; Pylitt Dep. (Reply App. Tab 5) 5:5-10; Newkirk Dep. (Reply App. Tab 7) 7:10-20; 8:3-8. They were exercising their right not to announce their views based on their personal beliefs that doing so is inappropriate. Motion Ex., Ex. 1, ¶ 9; Ex. 2, ¶ 14; Ex. 4, ¶ 8; Ex. 5, ¶ 12; Ex. 6, ¶ 8; Ex. 7, ¶ 7. In fact, they would not have done so regardless of the existence of the Canons. Motion Ex., Ex. 1, ¶ 14; Ex. 2, ¶ 9; Ex. 5, ¶ 17; Ex. 6, ¶ 14; Ex. 7, ¶ 13.

Specifically, Judge Heimann testified: "[B]ecause of my professional position, I don't believe it is appropriate to go around announcing what my position is because that limits me in what I can do." Heimann Dep. (Reply App. Tab 1) 6:3-7; see also Motion Ex., Ex.1, ¶¶ 9-10. He continued: "I recognize that I'm allowed to tell people what my personal opinion is. But I wanted some advice from [Meg Babcock] that would help me so *I wouldn't have to answer this*." Heimann Dep. (Reply App. Tab 1) 6:17-20 (emphasis added); see also Motion Ex., Ex.1, ¶¶ 6,7. Judge Heimann "did not want to answer the questionnaire." Heimann Dep. (Reply App. Tab 1) 15:14-15; see also Motion Ex., Ex.1, ¶ 6. Judge Heimann's primary reason for not wanting to announce his views is "because there would be an appearance of impropriety." Heimann Dep. (Reply App. Tab 1) 7:10-15; 12:19-20; see also Motion Ex., Ex.1, ¶¶ 8-9.

Judge Humphrey also testified that he didn't want to answer the Questionnaire because he doesn't "think it's appropriate for a judge to respond." Humphrey Dep. (Reply App. Tab 2) 6:4-7.

He contacted Meg Babcock only "to clarify judicial canons" (Humphrey Dep. (Reply App. Tab 2) 6:8-10) and to "get her advice regarding my sending [a] courtesy letter" to Indiana Right to Life. Humphrey Dep. (Reply App. Tab 2) 10:5-8; Ex. 4, ¶¶ 8, 11. Judge Humphrey further testified that regardless of the existence of the Canon, "[M]y personal feeling regarding my role as a judge, I don't think it would be appropriate for me to answer those questions." Humphrey Dep. (Reply App. Tab 2) 17:8-16. Similarly, Judge Vorhees felt that it was "not appropriate for [her] as a candidate for judge to express [her] personal opinions … [b]ecause as a judge [her] duty is … to hear evidence, facts, research the law, and apply the law to the facts before [her]." Vorhees Dep. (Reply App. Tab 3) 10:6-14, 15-20. She also believes that even if there were no Canons of Judicial Conduct or anything in the canons prohibiting her from answering the Questionnaire, as judge it would be wrong for her to announce her views and she would not have answered the Questionnaire. Vorhees Dep. (Reply App. Tab 3) 11:24-25 – 12:1-10; 20:3-11.

Judge Nowak did not want to answer the Questionnaire either. In fact, the first time he saw it he "threw it in the trash." Nowak Dep. (Reply App. Tab 4) 6:12-13; see also Motion Ex., Ex. 6, ¶ 10. He later retrieved it from the trash and then decided to answer it by "declining." Nowak Dep. (Reply App. Tab 4) 6:14-21; 7:10-12; see also Motion Ex., Ex. 6, ¶ 10. The primary reason for Judge Nowak declining to answer the Questionnaire was due to the "perception of potential litigants in front of [him] and their interpretation of what might have been the meaning behind this." Nowak Dep. (Reply App. Tab 4) 12:3-6. His decision as to how he "responded to [the Questionnaire] would have been the same irrespective of what the canons or, for that matter, what is said in the Minnesota case, had to say." Nowak Dep. (Reply App. Tab 4) 13:7-12; see also Motion Ex., Ex. 6, ¶ 14. "The canons, in my view, do nothing more than reinforce what my position is." Nowak Dep. (Reply App. Tab 4) 13:12-14. "To the extent that [the White case] gives me a right to speak on an issue, I do not agree that I should exercise that right." Nowak Dep. (Reply App. Tab 4) 20:4-17.

Judge Pylitt also declined to answer the Questionnaire because he felt that "it would be inappropriate for a judicial candidate to give public opinions about issues." Pylitt Dep. (Reply App. Tab 5) 5:5-10; see also Motion Ex., Ex. 2, ¶ 9. It was entirely Judge Pylitt's decision not to answer the Questionnaire. Pylitt Dep. (Reply App. Tab 5) 20:5-7; see also Motion Ex., Ex. 2, ¶ 7. He believes that "[r]egardless of the canons, … it's inappropriate for judges to express their personal opinions for a lot of reasons." Pylitt Dep. (Reply App. Tab 5) 13:17-19; 14:4-6; 17:23-24; see also Motion Ex., Ex. 2, ¶ 14. One of the reasons, according to Judge Pylitt, is that it "would lead in[to] forum shopping." Pylitt Dep. (Reply App. Tab 5) 13:22-23; see also Motion Ex., Ex. 2, ¶ 13. Also, Judge Newkirk testified that he wanted to answer with "decline." Newkirk Dep. (Reply App. Tab 7) 10:14-17; Ex. 3, ¶ 6. He felt that some of the questions elicited answers that may constitute commitments as well as announcements. Newkirk Dep. (Reply App. Tab 7) 8:12-16; 14:11-13, 18-22.

Furthermore, there have been judges and judicial candidates who have provided substantive responses to the Questionnaire. See Complaint Exhibits E-24 through E-31. But even those judges and judicial candidates who answered the Questionnaire testified that they would not have done so if they had known that their answers would be published because they feel that it is inappropriate for them as judges to state their views as it casts doubt on their impartiality and because their views have no bearing on their duties as a judge. Motion Ex., Ex. 8, ¶¶ 7, 11; Ex. 9, ¶ 6, 9, 10, 12. They chose to answer the Questionnaire with the intent that their answers would not be disseminated to the public. Motion Ex., Ex. 8, ¶¶ 6, 7. While they understand that they have the right to announce their views, they nonetheless believe that they should not do so in order to maintain the appearance of impartiality. Motion Ex., Ex. 8, ¶ 10; Ex. 9, ¶ 9.

Judge Laur testified as follows: "When I talk about announcing views I'm not saying you can't do that. I wouldn't do it." Laur Dep. (Reply App. Tab 8) 15:23-25; see also Laur Dep. (Reply

App. Tab 8) 19:21-22; 24:3-8, 22-25; 25:1-12; Motion Ex., Ex. 8, ¶ 7, 10. "I would never have wanted my personal views public because I think in my position, and even if I weren't a judge, I guess, I wouldn't have wanted them public." Laur Dep. (Reply App. Tab 8) 9:12-15; see also 8:20-25 through 9:1-15; 12:1-9; Motion Ex., Ex. 8, ¶ 7. "But as a judge, I think it's important that I listen to people and I apply whatever issues come up to whatever the law tells me I have to do whether I like it or whether I don't." Laur Dep. (Reply App. Tab 8) 9:18-22; Motion Ex., Ex. 8, ¶ 11. "I don't think judges ought to commit to positions." Laur Dep. (Reply App. Tab 8) 8:12-13. Judge Laur answered the Questionnaire only because he "thought that it was important for [Indiana Right to Life] to know how judges *as a collective group* may have felt" on the issues. Laur Dep. (Reply App. Tab 8) 10:21-23 (emphasis added). He never knew his answers were going to be made public. Laur Dep. (Reply App. Tab 8) 23:23-25 through 24:1-9; Motion Ex., Ex. 8, ¶ 7.

Judge Brown also personally believes that it is improper to make pledges, promises, and commitments, regardless of the existence of the Canons at issue. Brown Dep. (Reply App. Tab 9) 19:4-6; 20:5-12; Ex. 9, ¶ 10. Furthermore, as previously stated, Judge Laur and Judge Brown have not been threatened with discipline. Brown Dep. (Reply App. Tab 9) 21:5-11, 16-18; 22:18-22; Motion Ex., Ex. 9, ¶ 8; Ex. 8, ¶ 9.

Simply put, none of the judges or judicial candidates views the Canons as prohibiting them from answering the Questionnaire. In fact, the decision of those who provided substantive answers is evidence in and of itself that judges and judicial candidates understand that they have a right to announce their views. Consequently, Right to Life can point to no judge or judicial candidate who wants to answer the Questionnaire but refuses to do so because of the Canons. Therefore, the Canons do not chill the judges' or judicial candidates' exercise of their free speech rights.

b) The Commission's Advisory Opinion or enforcement policy does not chill judges' or judicial candidates' exercise of their free speech rights.

The evidence demonstrates that there is no chilling effect on judicial candidates based on the Commission's interpretation of the Canons or its advice to judicial candidates and that the judges and judicial candidates are not chilled by the Canons due to any perceived threat or fear of prosecution. The Commission has not given the judges or judicial candidates any reason to fear prosecution. Initially, Right to Life itself is not subject to the jurisdiction of the Commission. Thus, Right to Life's contention that its constitutional rights have been violated is unfounded. Further, there has been no threat of prosecution to judges or judicial candidates who chose to respond to the Questionnaire. None 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. See Motion Ex., Ex. 1, ¶ 8; Ex. 2, ¶ 8; Ex. 3, ¶ 7; Ex. 4, ¶ 6; Ex. 6, ¶ 7; Ex. 7, ¶ 8; Ex. 8, ¶ 9; Ex. 9, ¶ 8; Pylitt Dep. (Reply App. Tab 5) 13:2-5; 19:16-20. "At no time have I been threatened with a disciplinary action by Ms. Babcock or Judicial Qualifications Commission regarding a response to the questionnaire." Motion Ex., Ex. 4, ¶ 6; see also Motion Ex., Ex. 3, ¶ 7; Ex. 1, ¶ 8; Ex. 2, ¶ 8; Ex. 6, ¶ 7. In fact, Meg Babcock told Judge Heimann that he could answer the Questionnaire if he wanted to. Heimann Dep. (Reply App. Tab 1) 6:21-25; 16:13-25. Meg Babcock also told Judge Pylitt that it was his decision to make: "You are the judge. You need to make those decisions. And I'm not going to tell you what to do." Pylitt Dep. (Reply App. Tab 5) 8:10-12; 20:1-2.

There is also no indication that the judges or judicial candidates who responded to the Questionnaire have been subjected to discipline. The two judges who provided substantive responses, namely Judge Laur and Judge Brown, both testified that they were not and did not feel in any way threatened with discipline for having chosen to respond and indeed, they have not been disciplined. Brown Dep. (Reply App. Tab 9) 21:5-11; 22:18-22; Motion Ex., Ex. 9, ¶ 8; Laur Dep. (Reply App. Tab 8) 8:3-23; Motion Ex., Ex. 8, ¶ 9. Consequently, Right to Life's claim that it cannot publish the

views of those judges who answered the Questionnaire because of fear that those judges might be disciplined, is untenable. Complaint, p. 6, ¶ 19. The only thing that may lead to Right to Life's inability to publish those judges' views is the lack of consent from those judges to have their views disseminated. This, however, has nothing to do with the Canons at issue.

Likewise, the fact that the Commission may speak out against those judges and judicial candidates who choose to state their views is not a tenable basis to support Right to Life's claim that the judges and judicial candidates are "chilled" from exercising their rights to free speech. The Commission is entitled to use its First Amendments rights to speak out against candidates who choose to express their views. "The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so." White, 536 U.S. at 795 (Kennedy, J. concurring). "The limits of the Court's holding are evident: Even if the Minnesota Lawyers Professional Responsibility Board (Board) may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker's unfitness for judicial office. *If the solution to harmful speech must be more speech, so be it*." Id. at 797 (Stevens, J., dissenting) (emphasis added).

Moreover, the Advisory Opinion does not chill judges' or judicial candidates' exercise of their free speech rights and free association. The Advisory Opinion clarifies that judges and judicial candidates *may* in fact announce their views and outlines specific examples of this. Advisory Op. (Ex. C) at 2-5. The judges and judicial candidates understand that they may announce their views, as evidenced in their affidavits and deposition testimony. In fact, there have been two judges or judicial candidates that have answered the Questionnaire and have not been or felt threatened with discipline for having chosen to answer the Questionnaire. As for those who declined to respond,

they specifically state that they chose not to answer the Questionnaire as a matter of propriety, not because of the Canons. They also felt that, by answering the Questionnaire, they would compromise their ability to maintain the appearance of impartiality. Motion Ex., Ex. 1, ¶ 9; Ex. 2, ¶ 9; Ex. 4, ¶ 8; Ex. 5, ¶ 13, Ex. 6, ¶ 13; Ex. 7, ¶ 9.

Furthermore, the fact that none of the judges or judicial candidates have been or have ever felt threatened in any manner whatsoever with discipline if they had chosen to answer the Questionnaire or for in fact having answered the Questionnaire, demonstrates that they have not been "chilled" from speaking due to the Canons, the Advisory Opinion, or the Commission's enforcement policy overall. The Advisory Opinion, which was issued in response to White, acknowledges judicial candidates' right to announce their views. Advisory Op. (Ex. C) at 2. It also notes, however, that White did not invalidate the "pledges or promises clause" or the "commit clause" of the Code, namely Canons 5A(3)(d)(i) and (ii). Advisory Op. (Ex. C) at 1-2. Moreover, to address Right to Life's inquiries regarding the Questionnaire and the judges' and judicial candidates' refusal to respond, the Commission wrote a letter to Right to Life clarifying its position concerning White and stating that the Commission has not threatened discipline against those who chose to state their views. Commission Letter (Ex. H). Significantly, the Commission has not received any complaint concerning these Canons or taken any action to enforce them with respect to the Questionnaire.

It is also noteworthy that the Questionnaire recognizes that judicial candidates should not pledge or promise certain results in cases that may come before them. 2004 Questionnaire (Ex. E) at 2. Right to Life acknowledges that White strongly suggests that judicial candidates can be prohibited from pledging or promising certain results in particular cases. Excerpt of Transcript of Preliminary Injunction Hearing ("Hearing Transcript) (Reply App., Tab 12), p. 15, ¶¶ 2-5. In fact, Right to Life argued that it is entitled to "know the judge's general views on legal and political issues. Not pledges and promises of certain results in particular cases." Hearing Transcript (Reply

App., Tab 12), p. 15, ¶¶ 18-24. While, on the one hand, Right to Life seems to suggest that the prohibition on pledges, promises, and commitments is appropriate, on the other hand, it challenges that very same prohibition. In that respect, Right to Life's position is contradictory.

c) Right to Life is not prohibited from using the substantive responses it has received.

The fact remains that Right to Life is free to publish the substantive answers it has received. There is no impediment or prohibition on Right to Life from doing so, especially considering that the Commission has no jurisdiction over Right to Life. See Right to Life's Response to First Set of Request for Admissions Nos. 3, 4 (Reply App. Tab 10). There is no indication that the judges or judicial candidates who responded to the Questionnaire have been subjected to discipline so as to substantiate any claim that publishing any answers may subject the judges or judicial candidates to discipline. The two judges who provided substantive responses, namely Judge Laur and Judge Brown, both testified that they were not and did not feel in any way threatened with discipline for having chosen to respond and indeed, they have not been disciplined. Brown Dep. (Reply App. Tab 9) 21:5-11; 22:18-22; Motion Ex., Ex. 9, ¶ 8; Laur Dep. (Reply App. Tab 8) 8:3-23; Motion Ex., Ex. 8, ¶ 9.

Moreover, in addition to the substantive responses it received to its 2004 Questionnaire, Right to Life had also received substantive responses to its 2002 Questionnaire. Significantly, however, Right to Life cannot point to any disciplinary action that has taken place as a result of those 2002 responses. Therefore, Right to Life cannot possibly have a legitimate "fear" of exposing judicial candidates to discipline considering that it has had substantive responses since 2002 and no disciplinary action has resulted. Consequently, the Commission's enforcement policy and the Advisory Opinion does not have a chilling effect on judges' and judicial candidates' or Right to Life's free speech rights.

IV. CONCLUSION

The Commission is entitled to summary judgment as a matter of law because there is no genuine issue of material fact that **(i)** Canon 3E(1) is constitutional as applied to the Questionnaire because it is narrowly tailored to serve the compelling state interest of preserving impartiality in the judiciary, and **(ii)** Canon 5A(3)(d)(i) and (ii) and the Commission's enforcement policy are constitutional on their face and as applied to the Questionnaire.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2005, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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