

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
FRANKFORT DIVISION**

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**MARCUS CAREY,**

**Plaintiff,**

**v.**

**Civil Action No.**

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**STEPHEN D. WOLNITZEK, in his official capacity  
as Chairperson of the Kentucky Judicial Conduct  
Commission, R. D. DYCHE, III, in his official capacity  
as a member of the Kentucky Judicial Conduct  
Commission, JAMES L. BOWLING, JR., in his official  
capacity as a member of the Kentucky Judicial Conduct  
Commission, STEPHEN N. FRAZIER, in his official  
capacity as a member of the Kentucky Judicial Conduct  
Commission, WILLIAM P. RYAN, JR., in his official  
capacity as a member of the Kentucky Judicial Conduct  
Commission, DIANE E. LOGSDON, in her official  
capacity as a member of the Kentucky Judicial Conduct  
Commission, JOYCE KING JENNINGS, in her official  
capacity as a member of the Kentucky Judicial Conduct  
Commission, MARGARET E. KEANE, in her official  
capacity as chairperson of Panel A of the Kentucky  
Inquiry Commission, REED N. MOORE, JR., in his  
official capacity as chairperson of Panel B of the  
Kentucky Inquiry Commission, STEPHEN L. BARKER,  
in his official capacity as chairperson of Panel C of the  
Kentucky Inquiry Commission, and LINDA A.  
GOSNELL, in her official capacity as Bar Counsel in  
Kentucky,**

**Defendants.**

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**VERIFIED COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

**COMES NOW** Plaintiff Marcus Carey and, in support of his Complaint against the Defendants, states the following:

### **INTRODUCTION**

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of various provisions of the Kentucky Code of Judicial Conduct as set forth in Kentucky Supreme Court Rule 4.300, including, in particular,

- a) Canon 5B(1)(c), on its face and as applied to certain questions which the Plaintiff, Marcus Carey, wants to answer and wants to ask other judicial candidates [hereinafter “the Questions”];
- b) Canon 3E(1) and KRS § 26A.015(2)(e) as applied to the Questions; and
- c) Canons 5A(1)(b), 5A(2), and 5B(2), both facially and as applied to Mr. Carey,

all as interpreted by the Kentucky Judicial Ethics Committee (“JEC”), and all as incorporated by reference into the Kentucky Rules of Professional Conduct, SCR 3.130.

2. Canon 5B(1)(c) states, in relevant part: “A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court . . .” The quoted language is hereinafter identified as “the Commit Clause” of Canon 5B.

3. Plaintiff Carey complains that the aforesaid provision of Canon 5B(1)(c), on its face and as applied to the Questions, is unconstitutional because it infringes upon constitutionally protected free speech and association; because it chills judicial candidates' free speech by prohibiting them from expressing their views on legal and political issues; and because it does so through a vague and overly-broad prohibition.

4. Canon 3E(1) and KRS 26A.015(2)(e), collectively identified herein as “the Disqualification Requirement,” require that a judge disqualify himself in a proceeding where he has “expressed an opinion concerning the merits of the proceeding,” KRS 26A.015(2)(e), or where his “impartiality might reasonably be questioned,” Canon 3E(1).

5. Plaintiff Carey complains that the Disqualification Requirement, as applied to the Questions that Mr. Carey wants to answer and wants to ask other judicial candidates, unconstitutionally chills and penalizes judges who have announced their views on disputed legal and political issues, in violation of their First Amendment freedom of speech and association rights. Specifically, the Disqualification Requirement is not narrowly tailored to serve a compelling interest.

6. Canon 5A(1)(b) provides in part that: “(1) A judge or candidate for election to judicial office shall not: . . . (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office; . . .”

7. Plaintiff Carey complains that Canon 5A(1)(b), on its face and as applied to Mr. Carey, burdens his free speech rights under the First and Fourteenth Amendment

because it is overbroad and vague, and because it is not narrowly tailored to serve a compelling interest.

8. Canon 5B(2) states in part that “A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.”

9. Plaintiff Carey complains that Canon 5B(2), on its face and as applied to Mr. Carey, violates the First Amendment because it is not narrowly tailored, but is instead overbroad, unconstitutionally preventing judicial candidates from exercising their free speech rights.

10. Canon 5A(2) states in relevant part: “A judge or candidate shall not identify himself or herself as a member of a political party . . . [but] only in answer to a direct question, a judge or candidate may identify himself or herself as a member of a particular political party.”

11. Plaintiff Carey complains that Canon 5A(2) on its face and as applied to Mr. Carey is not narrowly tailored, but is vague, in violation of his First Amendment free speech and association rights.

### **Jurisdiction and Venue**

12. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

13. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

14. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b).

### **Parties**

15. Plaintiff Marcus Carey is a citizen of the United States, a resident of Owen County, Kentucky, a member of the Kentucky Bar and a candidate for election to the Supreme Court of Kentucky.

16. The Defendants Stephen D. Wolnitzek, R. D. Dyche, III, Stephen N. Frazier, William P. Ryan, Jr., Diane Logsdon, and Joyce King Jennings are members of the Kentucky Judicial Conduct Commission (“JCC”) and are named as Defendants in this action solely in those official capacities. Kentucky Supreme Court Rule [SCR] 4.020 authorizes the JCC to enforce the provisions of the Kentucky Code of Judicial Conduct, including the unconstitutional provisions mentioned in the preceding paragraphs, through the imposition of disciplinary sanctions against any person who is accused of violating those provisions as a judge of the Kentucky Court of Justice or as a lawyer who is a candidate for judicial office. The members of the JCC are named as Defendants because this action seeks declaratory and injunctive relief which will prohibit the JCC from exercising the aforesaid powers in any way that supports, ratifies, enforces or otherwise gives any effect whatsoever to the unconstitutional aspects of the Kentucky Code of Judicial Conduct.

17. The Defendants Margaret E. Keane, Reed N. Moore, Jr. and Stephen L. Barker are members of the Kentucky Inquiry Commission and are named as Defendants in this action solely in those official capacities. The Kentucky Rules of Professional Conduct provide in part that “a lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.” SCR 3.130(8.2)(b). The Rules of the Supreme Court of Kentucky authorize the Inquiry Commission to initiate an investigation of any conduct that might constitute a violation of the aforesaid provision, SCR 3.160(1). The Inquiry Commission also has the responsibility and authority to determine whether any member of the Kentucky Bar should be charged with professional misconduct based upon any alleged violation of the aforesaid provision. SCR 3.185. The Inquiry Commission is divided into three separate Panels for the purpose of performing the aforesaid responsibilities, SCR 3.140(2). The Defendants Keane, Moore and Barker are the chairpersons of the three Panels and, as such, possess the authority to direct and supervise the activities of their respective Panels in reviewing and acting upon allegations of professional misconduct. They are named as Defendants in this action because this action seeks declaratory and injunctive relief which will prohibit the Inquiry Commission from exercising the aforesaid powers in any way that supports, ratifies, enforces or otherwise gives any effect whatsoever to the unconstitutional aspects of the Kentucky Code of Judicial Conduct.

18. The Defendant Linda A. Gosnell is Bar Counsel in Kentucky and is named as a Defendant in this action solely in that official capacity. Under the Rules of the

Supreme Court of Kentucky, she is responsible for investigating and prosecuting all disciplinary cases against members of the Kentucky Bar. SCR 3.155(1). She discharges that responsibility with the assistance of other attorneys and staff in the KBA Office of Bar Counsel, which she directs and supervises. She is named as a Defendant in this action because this action seeks declaratory and injunctive relief which will prohibit her from performing her aforesaid responsibilities in any way that supports, ratifies, enforces or otherwise gives any effect whatsoever to the unconstitutional aspects of the Kentucky Code of Judicial Conduct.

### **Facts**

19. Plaintiff Marcus Carey is a candidate for election to the Supreme Court of Kentucky from the Sixth Appellate District of the Commonwealth of Kentucky. Mr. Carey wants to answer certain Questions announcing his views on disputed legal and political issues by posting his responses on his website. He also wants to pose those questions to other judicial candidates.

20. Mr. Carey also wants to state his political party affiliation, seek endorsements from other political officials, and solicit individuals for contributions during his campaign.

21. On May 4, 2006, Mr. Carey mailed a letter to the Kentucky Judicial Ethics Committee (“JEC”) requesting advice on whether he could answer certain questions, seek endorsements, and personally solicit individuals for contributions during his campaign. *See Letter to Judicial Ethics Committee* attached as Exhibit A. Mr. Carey attached a list

of questions (identified herein as the “Questions”) which he wants to answer and which he wants to ask of other judicial candidates during his campaign for judicial office. *See Questions* attached as Exhibit B. Mr. Carey submitted that inquiry to the JEC pursuant to Kentucky Supreme Court Rule 4.310, which states in part that “[o]pinions as to the propriety of any act or conduct and the construction or application of any canon shall be provided by the [JEC] upon request from any . . . judicial candidate.” SCR 4.310(2) The same Rule provides, further, that “the [Judicial Conduct Commission] and the Supreme Court shall consider reliance by . . . any judicial candidate upon the ethics committee opinion” in any subsequent disciplinary proceeding. SCR 4.310(3). Mr. Carey has not received any response from the JEC.

22. Mr. Carey has reluctantly concluded that he cannot answer the Questions during his campaign for judicial office, and that he cannot ask other judicial candidates to answer the same Questions, without risking an allegation that such conduct constitutes a violation of Kentucky Code of Judicial Conduct, due to the overly broad and unduly vague nature of the Commit Clause that appears in Canon 5B(1)(c). Thus, Mr. Carey’s exercise of his constitutionally-protected right of free speech has been chilled and thwarted by the unconstitutional nature of Canon 5B(1)(c).

23. The Commit Clause of Canon 5B(1)(c), on its face and as applied, chills all Kentucky judicial candidates' exercise of their free speech rights and free association. Judicial candidates are unable to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public

issues before choosing among them on election day. *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976). By prohibiting judicial candidates from exercising their freedom of speech on legal and political issues of concern to the voters, the Commit Clause of Canon 5B(1)(c) requires judicial candidates to withhold essential information from the voters as they seek to educate themselves and participate fully in democracy.

24. Canon 3E(1) and KRS 26A.015(2)(e), collectively identified herein as “the Disqualification Requirement,” require that a judge disqualify himself in a proceeding where he has “expressed an opinion concerning the merits of the proceeding,” KRS 26A.015(2)(e), or where his “impartiality might reasonably be questioned,” Canon 3E(1). Mr. Carey has reluctantly concluded that he cannot answer the Questions during his campaign for judicial office, and that he cannot ask other judicial candidates to answer the same Questions, without risking an allegation that such conduct constitutes a violation of Kentucky Code of Judicial Conduct, due to the overly broad and unduly vague nature of the Disqualification Requirement. Thus, Mr. Carey’s exercise of his constitutionally-protected right of free speech has been chilled and thwarted by the unconstitutional nature of the Disqualification Requirement.

25. The Disqualification Requirement, as applied to the Questions, violates the free speech and association rights of judges and judicial candidates. Judges are inappropriately presumed to be partial on an issue because of a previous commitment to a particular side of the issue, when they may, in fact, have reconsidered their position. *White*, 536 U.S. at 783. By requiring judges to disqualify themselves because of

statements made during the election process, KRS § 26A.015(2)(e) and Canon 3E(1) as applied to the Questions forces judicial candidates such as Mr. Carey to refrain from speaking on issues essential to voters' decision-making process during elections, thereby violating his free speech and free association rights.

26. Canon 5A provides in part that “(1) A judge or a candidate for election to judicial office shall not: . . . (b) . . . publicly endorse or oppose a candidate for public office; . . .” . The quoted language is hereinafter identified as “the Endorsement Clause” of Canon 5A.

27. Mr. Carey wishes to seek endorsements from other public officials. However, the Endorsement Clause of Canon 5A, on its face and as applied to Mr. Carey, unconstitutionally prohibits speech. Specifically, Canon 5A(1)(b) as interpreted in Judicial Ethics Opinions JE-66 and JE-93 prohibits Mr. Carey from allowing other political officials from endorsing him. *See* JE-66 attached as Exhibit C; and JE-93 attached as Exhibit D. Based on his review of JE-66 and an informal advisory opinion he received from the JEC, Mr. Carey concluded that it was necessary to withdraw the names of political officials who were listed as hosts for one of his fundraisers. *See Email from Jean Collier* attached as Exhibit E. Consequently, his rights of free speech and association rights have been violated by Canon 5A(1)(b).

28. Canon 5B(2) provides in part that “[a] judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditures of funds for the campaign and to obtain

public statements of support for the candidacy.” The quoted language is hereinafter identified as “the Solicitation Clause” of Canon 5B.

29. Mr. Carey wants to personally solicit funds from those who wish to support him by making personal phone calls and signing letters asking for financial support. However, the Solicitation Clause of Canon 5B, on its face and as applied to Mr. Carey, along with JEC’s interpretation as set forth in Judicial Ethics opinion JE-92, unconstitutionally prohibit him from doing so. *See* JE-92 attached as Exhibit F. As such, Mr. Carey’s freedom of speech and association rights have been violated.

30. Canon 5A(2) prohibits a judge or candidate from identifying “himself or herself as a member of a political party . . . [except that] only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a political party.” The quoted language is hereinafter identified as “the Partisan Activities Clause” of Canon 5A.

31. Mr. Carey has been consistently asked by voters about his party affiliation. He believes that the voters are interested and deserving of information in this regard and therefore wants to identify his party registration throughout his campaign. However, the Political Affiliation Clause of Canon 5A, on its face and as applied to Mr. Carey, and JEC’s interpretation of that Clause as set forth Judicial Ethics opinion JE-105, unconstitutionally prohibit him from doing so, in violation of his First Amendment rights of free speech and association. *See* JE-105 attached as Exhibit G.

32. Mr. Carey is suffering and will continue to suffer immediate and irreparable injury, loss, and damage because the unconstitutional character of the Commit Clause, the Disqualification Requirement, the Endorsement Clause, the Solicitation Clause, and the Political Affiliation clause are chilling and thwarting his exercise of constitutionally-protected rights of free speech and association. He wants to announce his views, seek endorsements, participate in the solicitation of campaign funds, and announce his party affiliation well before the November 7, 2006, election. Consequently, time is of the essence in this matter.

33. Plaintiff has no adequate remedy at law.

### COUNT I

**CANON 5B(1)(c)'S "COMMIT CLAUSE" IS ON ITS FACE UNCONSTITUTIONALLY VAGUE AND OVERBROAD, PROHIBITING AND CHILLING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

34. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count I.

35. Canon 5B(1) of the Kentucky Code of Judicial Conduct states: "A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the

court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.”

36. A law is vague if it is not “sufficiently defined so that ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited, without encouragement of arbitrary and discriminatory enforcement.” *United States v. Salisbury*, 983 F.2d 1369, 1377-78 (6th Cir. 1993).

37. Canon 5B(1)(c) does not adequately define its Commit Clause since judicial candidates such as Plaintiff Carey who wish to engage in constitutionally protected speech by announcing their views on disputed political and legal issues believe that these clauses prevent them from making such announcements. *Letter to Judicial Ethics Panel* attached at Exhibit A. As such, Canon 5B(1)(c) chills speech and is a vague, unconstitutional regulation of protected political speech and association under the First and Fourteenth Amendments.

38. A law is overbroad if it prohibits more speech that is necessary to achieve the drafter's purposes. *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004).

39. Canon 5B(1)(c) sweeps constitutionally protected announcements of personal views on disputed legal and political issues within the sphere of prohibited speech under the Canon and, thus, is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

## COUNT II

### **CANON 5B(1)(c)'S "COMMIT CLAUSE" AS APPLIED TO MR. CAREY'S QUESTIONS UNCONSTITUTIONALLY PROHIBIT AND CHILL JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

40. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count II.

41. Canon 5B(1) of the Kentucky Code of Judicial Conduct states: "A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts."

42. Plaintiff Carey wishes to announce his views on disputed political and legal issues. *Letter to Judicial Ethics Panel* attached at Exhibit A. Specifically, Mr. Carey would like to answer and ask of other judicial candidates questions ("Questions") about judicial philosophy and moral values. *See Questions* attached at Exhibit B. Such announcements are protected political speech under *White*, 536 U.S. at 788.

43. Canon 5B(1)(c)'s Commit Clause sweeps judicial candidates' announced personal views on disputed legal and political issues into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association,

*Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and are in direct violation of *White*, 536 U.S. at 788.

44. Further, Mr. Carey believes that Canon 5B(1)(c) prohibits him from responding to the Questions. *Letter to Judicial Ethics Panel* attached at Exhibit A. As consequence, the Commit Clause is vague in application, constituting an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

### **COUNT III**

#### **KRS 26A.015(2) AND CANON 3E(1) ARE UNCONSTITUTIONAL AS APPLIED TO MR. CAREY’S QUESTIONS.**

45. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count III.

46. KRS 26A.015(2) provides that “[a]ny justice or judge . . . shall disqualify himself in any proceeding: (e) [w]here he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.”

47. KRS 26A.015(2) is enforceable by the JCC pursuant to Canon 2A of the Kentucky Code of Judicial Conduct, which states: “[a] judge shall respect and comply with the law . . . .”

48. Further, Canon 3(E)(1) of the Kentucky Code of Judicial Conduct specifically requires judges to recuse themselves when a “judge's impartiality might reasonably be questioned . . . .”

49. The Disqualification Requirement contained in KRS § 26A.015(2)(e) and Canon 3(E)(1), as applied to the Questions which Mr. Carey wants to ask and answer in his judicial campaign, has the effect of prohibiting and chilling speech, because Mr. Carey is refraining from responding to the Questions and from announcing his views on disputed legal and political issues raised in a judicial campaign for fear he must later disqualify himself from proceedings relating to such issues. *See Letter to Judicial Ethics Panel* attached as Exh. A at A-1. Judicial candidates have the constitutional right to announce their views on legal and political issues. *White*, 536 U.S. at 788. Consequently, the Disqualification Requirement as applied to the Questions serves as an unconstitutional penalty for judicial candidates who exercise their constitutional right to announce their views on disputed political and legal issues.

50. Further, the Disqualification Requirement as applied to the Questions is not narrowly tailored but is overbroad in its scope, covering not only appropriate situations in which a judge must recuse him or herself, such as a bias concerning a party or a party's lawyer before him, but also applying to protected speech, in violation of the First and Fourteenth Amendment rights to free speech and association.

## COUNT IV

### **CANON 5A(1)(b)'S ENDORSEMENT CLAUSE IS ON ITS FACE UNCONSTITUTIONALLY VAGUE AND OVERBROAD, PROHIBITING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFF CAREY'S FREEDOM OF SPEECH AND ASSOCIATION.**

51. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count IV.

52. Canon 5A(1) of the Kentucky Code of Judicial Conduct states: “(1) A judge or candidate for election to judicial office shall not: . . . (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office; . . .” The quoted language is hereinafter identified as “the Endorsement Clause” of Canon 5A.

53. A law is vague if it is not “sufficiently defined so that ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited, without encouragement of arbitrary and discriminatory enforcement.” *United States v. Salisbury*, 983 F.2d 1369, 1377-78 (6th Cir. 1993).

54. Canon 5A’s Endorsement Clause does not adequately define what constitutes an endorsement since judicial candidates who wish to receive an endorsement from another political official believe that the endorsement clause prevent them from making such announcements. *See Letter to Judicial Ethics Panel* attached at Exh. A. As such, the Endorsement Clause chills speech and is a vague, unconstitutional regulation of protected political speech and association under the First and Fourteenth Amendments.

55. A law is overbroad if it prohibits more speech that is necessary to achieve the drafter's purposes. *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004).

56. The Endorsement Clause sweeps constitutionally protected political speech within the sphere of prohibited speech under the Canon without sufficient tailoring to serve a compelling interest and, thus, is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

## COUNT V

### **CANON 5A(1)(b)'S ENDORSEMENT CLAUSE AS APPLIED TO MR. CAREY UNCONSTITUTIONALLY PROHIBITS JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFFS' FREEDOM OF SPEECH AND ASSOCIATION.**

57. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count V.

58. Canon 5A(1) of the Kentucky Code of Judicial Conduct states: “(1) A judge or candidate for election to judicial office shall not: . . . (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office; . . .” The quoted language is hereinafter identified as “the Endorsement Clause” of Canon 5A.

59. Plaintiff Carey wants to seek the endorsement of various political officials throughout his campaign. A fundraiser he had in place that was hosted by several

political officials was amended to exclude those officials because of the endorsement clause. *See Letter to Judicial Ethics Panel* attached at Exhibit A.

60. The Endorsement Clause as applied to Mr. Carey sweeps non-judicial candidates' speech into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and is in direct violation of *White*, 536 U.S. at 788.

61. Further, Mr. Carey believes that the Endorsement Clause as applied to him prohibits him from seeking endorsements from political officials for his campaign. *See Letter to Judicial Ethics Panel* attached at Exhibit D. In this regard, Canon 5A(1)(b)'s endorsement clause is vague in application, constituting an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

## COUNT VI

### **THE JUDICIAL ETHICS COMMITTEE'S INTERPRETATION OF THE ENDORSEMENT CLAUSE AS EXPRESSED IN JE-93 AND JE-66 UNCONSTITUTIONALLY PROHIBITS JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

62. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count VI.

63. Canon 5A of the Kentucky Code of Judicial Conduct states: “(1) A judge or candidate for election to judicial office shall not: . . . (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office; . . .”

64. The Judicial Ethics Committee [JEC] issued advisory opinion JE-93 on April 1, 1998, stating that “A judicial candidate . . . may not advertise the endorsement” made by another political official. *See* JE-93 attached as Exhibit D. Likewise, JE-66 states that judicial candidates “cannot endorse candidates for public office” as “[e]ndorsements by current public officials who run for office on a partisan ticket would violate the policy of nonpartisan elections in judicial campaigns.” *See* JE-66 attached as Exhibit E. Further, an informal advisory opinion indicates that Canon 5A(1)(b) is interpreted to prevent other political officials from endorsing judicial candidates. *See Email from Jean Collier* attached as Exhibit E.

65. Plaintiff Carey wants to seek the endorsement of various political officials throughout his campaign. A fundraiser he had in place that was hosted by several political officials was amended by him to exclude those officials because of the JEP’s enforcement policy of the endorsement clause. *See Letter to Judicial Ethics Committee* attached as Exhibit A at A-1.

66. JEC’s interpretation of Canon 5A sweeps protected judicial candidates’ speech into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, constitutes an unconstitutionally overbroad application of the rules governing judicial

political campaign speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and are in direct violation of *White*, 536 U.S. at 788.

66. Further, Mr. Carey believes that JEC's interpretation prohibits him from seeking endorsements from other political officials. See *Letter to Judicial Ethics Panel* attached at Exhibit A at A-1. As consequence, JEC's interpretation is vague and overbroad in its application, imposing as an unconstitutional regulation of protected political speech and association in violation of the First and Fourteenth Amendments of the United States Constitution.

67. Because JCC has been empowered by the Kentucky Supreme Court to authoritatively interpret and enforce the Kentucky Code of Judicial Conduct, and places reliance upon JEC's advisory opinions when considering a complaint against a judge or judicial candidate, SCR 4.310(3), JEC's interpretation is state action, and must be enjoined on its face and as applied to Questions as in violation of the First and Fourteenth Amendments of the United States Constitution.

## COUNT VII

### **CANON 5B(2)'S SOLICITATION CLAUSE IS ON ITS FACE UNCONSTITUTIONALLY OVERBROAD, PROHIBITING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

68. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count VII.

69. Canon 5B(2) of the Kentucky Code of Judicial Conduct states: “A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.” The quoted language is hereinafter identified as “the Solicitation Clause” of Canon 5B.

70. A law is overbroad if it prohibits more speech that is necessary to achieve the drafter's purposes. *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004).

71. The Solicitation Clause of Canon 5B(2) sweeps constitutionally protected speech within its purview and is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

72. The Solicitation Clause of Canon 5B(2) also is not narrowly tailored to serve the state’s interests in impartiality and thus is an unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

### COUNT VIII

#### **CANON 5B(2)’S SOLICITATION CLAUSE AS APPLIED TO MR. CAREY UNCONSTITUTIONALLY PROHIBITS JUDICIAL CANDIDATES’ PROTECTED POLITICAL SPEECH AND PLAINTIFF’S FREEDOM OF SPEECH AND ASSOCIATION.**

73. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count VIII.

74. Canon 5B(2) of the Kentucky Code of Judicial Conduct states: “A judge or a candidate for judicial office shall not solicit campaign funds, but may establish

committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.” The quoted language is hereinafter identified as “the Solicitation Clause” of Canon 5B.

75. Mr. Carey wants to make personal phone calls and sign letters seeking contributions to his campaign throughout the election cycle.

76. The Solicitation Clause as applied to Mr. Carey sweeps judicial candidates' protected speech into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and are in direct violation of *White*, 536 U.S. at 788.

77. Further, Mr. Carey believes that the Solicitation Clause as applied to him prohibits him from making phone calls and signing letters to specific individuals and general populations requesting contributions. As consequence, the Solicitation Clause as applied to Mr. Carey constitutes an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

## COUNT IX

### **THE JUDICIAL ETHICS COMMITTEE'S INTERPRETATION OF THE SOLICITATION CLAUSE AS EXPRESSED IN JE-92 UNCONSTITUTIONALLY PROHIBITS JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

78. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count IX.

79. Canon 5B(2) of the Kentucky Code of Judicial Conduct states: “A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.” The quoted language is hereinafter identified as “the Solicitation Clause” of Canon 5B.

80. JEC issued advisory opinion JE-92 on April 1, 1998, stating that “[a] Committee is . . . required by the Code if judicial candidate intends to solicit money.” *See JE-92* attached as Exhibit F.

81. Mr. Carey wants to make personal phones and sign letters to specific individuals and general populations seeking contributions to his campaign throughout the election cycle.

82. JEC's interpretation of the Solicitation Clause sweeps judicial candidates' speech soliciting funds into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, is an unconstitutional policy governing judicial political campaign

speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and in direct violation of *White*, 536 U.S. at 788.

83. Because JCC has been empowered by the Kentucky Supreme Court to authoritatively interpret and enforce the Code of Judicial Conduct, and places reliance upon JEC's advisory opinions when considering a complaint against a judge or judicial candidate, SCR 4.310((3), JEC's interpretation is state action, and must be enjoined on its face and as applied to Questions as in violation of the First and Fourteenth Amendments of the United States Constitution.

## COUNT X

### **CANON 5A(2)'S PARTISAN ACTIVITIES CLAUSE IS ON ITS FACE UNCONSTITUTIONALLY OVERBROAD, PROHIBITING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

84. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count X.

85. Canon 5A(2) of the Kentucky Code of Judicial Conduct states: "A judge or candidate shall not identify himself or herself as a member of a political party . . . [but] only in answer to a direct question, a judge or candidate may identify himself or herself as a member of a particular political party." The quoted language is hereinafter identified as "the Partisan Activities Clause" of Canon 5A.

86. A law is overbroad if it prohibits more speech that is necessary to achieve the drafter's purposes. *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004).

87. The Partisan Activities Clause of Canon 5A(2) sweeps constitutionally protected speech within the sphere of prohibited speech under the Canon and, thus, does not satisfy strict scrutiny but is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

## COUNT XI

### **CANON 5A(2)'S PARTISAN ACTIVITIES CLAUSE AS APPLIED TO MR. CAREY UNCONSTITUTIONALLY PROHIBIT JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

88. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count XI.

89. Canon 5A(2) of the Kentucky Code of Judicial Conduct states: “A judge or candidate shall not identify himself or herself as a member of a political party . . . [but] only in answer to a direct question, a judge or candidate may identify himself or herself as a member of a particular political party.” The quoted language is hereinafter identified as “the Partisan Activities Clause” of Canon 5B.

90. Mr. Carey would like to announce his political affiliation throughout his 2006 campaign. Such announcements are protected political speech under *White*, 536 U.S. at 788.

91. The Partisan Activities Clause as applied to Mr. Carey sweeps judicial candidates' speech into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing

judicial political campaign speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and are in direct violation of *White*, 536 U.S. at 788.

92. As consequence, the Partisan Activities Clause constitutes an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

## COUNT XII

### **THE JUDICIAL ETHICS COMMITTEE'S INTERPRETATION OF THE PARTISAN ACTIVITIES CLAUSE AS EXPRESSED IN JE-105 UNCONSTITUTIONALLY PROHIBITS JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFF'S FREEDOM OF SPEECH AND ASSOCIATION.**

93. Plaintiff Carey hereby reiterates and incorporates all allegations contained in the preceding paragraphs of this Complaint as if set forth at length as part of this Count XII.

94. Canon 5A(2) states: "A judge or candidate shall not identify himself or herself as a member of a political party . . . [but] only in answer to a direct question, a judge or candidate may identify himself or herself as a member of a particular political party." The quoted language is hereinafter identified as "the Partisan Activities Clause" of Canon 5B.

95. The Judicial Ethics Committee [JEC] issued advisory opinion JE-105 on April 30, 2004, stating that judicial candidates cannot identify themselves as a member of

a specific political party because “judicial elections in Kentucky are nonpartisan.” *See* JE-105 attached as Exhibit G at G-1.

96. Mr. Carey wants to announce his political affiliation throughout his 2006 campaign. Such announcements are protected political speech under *White*, 536 U.S. at 788.

97. JEC’s interpretation of the Partisan Activities Clause of Canon 5B sweeps judicial candidates’ speech into the sphere of speech prohibited by the Kentucky Judicial Canons and, thus, is an unconstitutional policy governing judicial political campaign speech and association, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993), and in direct violation of *White*, 536 U.S. at 788.

98. Because JCC has been empowered by the Kentucky Supreme Court to authoritatively interpret and enforce the Code of Judicial Conduct, Ky. Const. § 121, and weighs reliance upon JEP’s advisory opinions when considering a complaint against a judge or judicial candidate, Ky. S. Ct. R. 4.310(3), JEP’s enforcement policy is state action, and must be enjoined on its face and as applied to Questions as in violation of the First and Fourteenth Amendments of the United States Constitution.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays that this Court:

- (1) Declare Canon 5B(1)(c) of the Kentucky Code of Judicial Conduct unconstitutional on its face and as applied to the Questions which the Plaintiff, Marcus Carey, wants to ask and answer during the course of his judicial campaign,

in violation of his rights of political speech and freedom of association under the First and Fourteenth Amendment to the United States Constitution;

- (2) Declare KRS 26A.015(2)(e) and Canon 3E(1) of the Kentucky Code of Judicial Conduct unconstitutional as applied to the Questions which the Plaintiff, Marcus Carey, wants to ask and answer during the course of his judicial campaign, because they chill and penalize him for responding to the Questions in violation of his free speech and freedom of association rights under the First and Fourteenth Amendments to the U.S. Constitution;
- (3) Declare Canon 5A(1)(b) of the Kentucky Code of Judicial Conduct, and the Judicial Ethics Committee's interpretation thereof, unconstitutional on its face and as applied to the Plaintiff, Marcus Carey, because it prohibits Mr. Carey from seeking endorsements in violation of his free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;
- (4) Declare Canon 5A(2) of the Kentucky Code of Judicial Conduct, and the Judicial Ethics Committee's interpretation thereof, unconstitutional on its face and as applied to the Plaintiff, Marcus Carey, because it prohibits Mr. Carey from soliciting contributions in violation of his free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;
- (6) Declare Canon 5B(2) of the Kentucky Code of Judicial Conduct, and the Judicial Ethics Committee's interpretation thereof, unconstitutional on its face and as applied to the Plaintiff, Marcus Carey, because it prohibits Mr. Carey from stating

his party affiliation in violation of his free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S Constitution;

- (7) Prohibit, by way of preliminary and permanent injunction, the Defendants, their agents, and successors, from
  - (a) enforcing the unconstitutional provisions of KRS 26A.015(2)(e) or Canon 5B(1)(c), Canon 3E(1), Canon 5A(1)(b), Canon 5A(2) or Canon 5B(2) of the Kentucky Code of Judicial Conduct, as identified in this Complaint, as against Mr. Carey or any other person similarly situated, or
  - (b) initiating any investigation or considering any complaint against Mr. Carey or any other person similarly situated, to the extent any such investigation or complaint is based on the unconstitutional provisions of KRS 26A.015(2)(e) or on the unconstitutional provisions of Canon 5B(1)(c), Canon 3E(1), Canon 5A(1)(b), Canon 5A(2) or Canon 5B(2) of the Kentucky Code of Judicial Conduct, as identified in this Complaint,;
- (8) Grant Plaintiff's costs and attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and
- (9) Grant Plaintiff such other relief as may be just and equitable.

Respectfully submitted,

James Bopp, Jr.\*  
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*\* Pro Hac Vice Motions filed June 9, 2006*

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*Local Counsel for Plaintiff*

**VERIFICATION**

**I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS MADE IN THE FOREGOING VERIFIED COMPLAINT CONCERNING ME ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.**

Dated: June \_\_\_\_\_, 2006

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