UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

TORREY BAUER, DAVID CERTO, and INDIANA RIGHT TO LIFE, INC.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 3:08-cv-196**
RANDALL T. SHEPARD, in his official capacity as a member of the Indiana Commission on Judicial Qualifications, STEPHEN L. WILLIAMS, in his official capacity as a member of the Indiana Commission on Judicial Qualifications, JOAN M. HURLEY, in her official capacity as member of the Indiana Commission on Judicial Qualifications, JOHN C. TRIMBLE, in his official capacity as member of the Indiana Commission on Judicial Qualifications, MARK LUBBERS, in his official capacity as member of the Indiana Commission on Judicial Qualifications, DARYL R. YOST, in his official capacity as member of the Indiana Commission on Judicial Qualifications, SHERRILL WM. COLVIN, in her official capacity as member of the Indiana Commission on Judicial Qualifications, ANTHONY M. ZAPPIA, in his official capacity as member of the Indiana Disciplinary Commission, SALLY FRANKLIN ZWEIG, in her official capacity as member of the Indiana Disciplinary Commission, DIANNE L. BINDER, in her official capacity as member of the Indiana Disciplinary Commission, CORINNE R. FINNERTY, in her official capacity as member of the Indiana Disciplinary Commission, FRED AUSTERMAN, in his official capacity as	)	**(VERIFIED SECOND AMENDED COMPLAINT FOR RELIEF)**

member of the Indiana Disciplinary Commission, R. ANTHONY PRATHER, in his official capacity as member of the Indiana Disciplinary Commission, J. MARK ROBINSON, in his official capacity as member of the Indiana Disciplinary Commission, ROBERT L. LEWIS, in his official capacity as member of the Indiana Disciplinary Commission, MAUREEN GRINSFELDER, in her official capacity as member of the Indiana Disciplinary Commission,

Defendants.

COMES NOW Plaintiffs Torrey Bauer, David Certo, and Indiana Right to Life, Inc. ("IRL"), and, for their complaint against the Defendants, state 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 portions of Canons 2, 3 and 4 of the Indiana Code of Judicial Conduct. This Code was amended with changes to take effect in January 2009. Plaintiffs' initial challenge was to former provisions of the Code, which has been revised and renumbered. Plaintiffs furnish this Amended Complaint with this Court's permission to reflect those changes.

2. Canons 2.10(B) and 4.1(A)(13) (collectively the "commits clauses") prohibit judges and judicial candidates from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." These canons replace Canon 5A(3)(d) (the "former commits clause"), which provided that a candidate for judicial office shall not

"make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office" nor "make statements that *commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." (emphases added). The Commentary to Canon 4.1(A) indicates that "[15] [t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result."

3. Plaintiffs complain that the former commits clause and the current commits clauses, both on their face and as applied to the Indiana Right to Life Judicial Candidate Questionnaire ("IRL Questionnaire") and to Plaintiffs Torrey Bauer and David Certo, are unconstitutional in that they infringe upon constitutionally protected free speech and association. Specifically, the clauses chill judicial candidates' free speech, are unconstitutionally overbroad and vague, and cannot be constitutionally applied to the IRL Questionnaire or to Plaintiffs Bauer or Certo. The provisions also inhibit IRL from receiving judicial candidates' responses to the IRL Questionnaire and from publishing any substantive responses for fear of exposing responsive candidates to discipline, to this degree prohibiting IRL, its members, and other interested citizens from receiving and publishing candidates' political speech and prohibiting IRL from exercising its freedom of speech.

4. Canon 2.11 (the "recusal clause") states that "(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . . (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision,

or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." This provision expands upon former Canon 3E(1), which required judges to recuse themselves when a "judge's impartiality might reasonably be questioned . . . ."

5. Plaintiffs complain that the recusal clause on its face and as applied to the IRL Questionnaire and to Plaintiffs Bauer and Certo is unconstitutional in that it infringes upon constitutionally protected free speech and association. Specifically, the recusal clause chills judicial candidates' free speech, is overbroad and vague, and cannot be constitutionally applied to the IRL Questionnaire or to Plaintiffs Bauer or Certo. The provision also inhibits IRL from receiving judicial candidates' responses to the IRL Questionnaire and from publishing any substantive responses for fear of exposing responsive candidates to discipline, thereby prohibiting IRL, its members, and other interested citizens from receiving and publishing candidates' political speech and prohibiting IRL from exercising its freedom of speech.

6. Canons 4.1(A)(1) and (2) (the "partisan activities clauses") state that "a judicial candidate shall not: . . . act as a leader in or hold an office in a political organization" nor "make speeches on behalf of a political organization." These provisions are identical to former Canon 5A(1), which prohibited judicial candidates from "(a) act[ing] as a leader . . . in a political organization" and from "(c) mak[ing] speeches on behalf of a political organization."

7. Plaintiff Judge Certo complains that the partisan activities clauses are unconstitutional because they infringe upon constitutionally protected free speech and association. Specifically, the

partisan activities clauses are overbroad, vague, and fail strict scrutiny, unconstitutionally prohibiting judicial candidates from exercising their freedom of speech and associational rights.

8. Canons 4.11(A)(4) and (8) (the "solicitation clauses") state that a judicial candidate shall not "solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office" nor "personally solicit or accept campaign contributions other than through a campaign committee." These provisions were found in former Canons 5A(1)(e) and 5C(2), which prohibited judges and judicial candidates from "solicit[ing] funds for, pay[ing] an assessment, slating fee or other mandatory political payment to, or mak[ing] a contribution to, a political organization or candidate" and from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit publicly stated support," respectively, allowing them to instead form a committee for that purpose.

9. Judge Certo complains that the solicitation clauses are unconstitutional in that they infringes upon constitutionally protected free speech and association. Specifically, the solicitation clauses prohibit judges and judicial candidates from personally soliciting funds for their own campaigns or for the Republican Party, and thereby undermine free speech and associational rights.

Jurisdiction and Venue

10. 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.

11. 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).

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

Parties

13. Plaintiff Torrey Bauer is an individual and resident of the State of Indiana. Torrey Bauer lives in the City of Warsaw, Indiana, in the County of Kosciusko, and was a candidate for Superior Court Judge in Kosciusko County in the 2008 elections.

14. Plaintiff David Certo is an individual and resident of the State of Indiana. David Certo lives in the City of Indianapolis, Indiana, in the County of Marion, and was a candidate for re-election as Superior Court Judge in Marion County in the 2008 elections.

15. Plaintiff IRL is a non-profit corporation incorporated in the State of Indiana. IRL is not associated with any political candidate, political party, or campaign committee. IRL's headquarters are located in the City of Indianapolis in the County of Marion. The Articles of Incorporation and By-Laws of IRL are attached as Exhibits 1 and 2. IRL uses judicial questionnaires to gather and publish candidates' views on legal and political issues.

16. The Defendants are the members of the Indiana Commission on Judicial Qualifications ("CJQ"), sued in their official capacity: Randall T. Shepard, Stephen L. Williams, Joan M. Hurley, John C. Trimble, Mark Lubbers, Daryl R. Yost, and Sherrill Wm. Colvin. The Indiana Code § 33-38-13-14(a) provides that the commission may "institute formal proceedings against a justice or judge."

17. Also as Defendants are the members of the Indiana Disciplinary Commission, sued in their official capacity: Anthony M. Zappia, Franklin Zweig, Dianne L. Binder, Corinne R. Finnerty, Fred Austerman, R. Anthony Prather, J. Mark Robinson, Robert L. Lewis, and Maureen

Grinsfelder. The Indiana Rules of Professional Conduct provide disciplinary procedures for attorneys who are candidates for judicial office who fail to "comply with the applicable provisions of the Code of Judicial Conduct." Ind. R. of Prof'l Conduct 8.2(b)(1999). Disciplinary procedures are administered by the Disciplinary Commission, Ind. S. Ct. R. 23, § 2, and the Disciplinary Commission "supervise[s] the investigation of claims of misconduct." *Id.* at § 8(c).

Facts

18. Indiana state court judges are selected through a process of partisan, non-partisan, and retention judicial elections. Regulation of judicial conduct, as well as of the conduct of candidates for judicial office, is governed by the Indiana Code of Judicial Conduct.

19. Canon 5A(3)(d) (the "former commits clause") provided that a candidate for judicial office shall not "(i) make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office." nor "(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 . . . ." (emphases added). It was replaced in January 2009 by Canons 2.10(B) and 4.1(A)(13)'s commits clauses, which prohibit a judge or judicial candidate from, "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

20. In 2002, the CJQ issued Preliminary Advisory Opinion #1-02 regarding the effect *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), had on Indiana's judicial canons. *See*

Preliminary Advisory Opinion #1-02 attached as Exhibit 3. The Memorandum stated that while the United States Supreme Court had found "announce clauses" unconstitutional, Indiana had eliminated that provision. *Id.* at 2. The CJQ further stated that it would still enforce "the rules in Canon 5 requiring candidates . . . to not make pledges and promises of conduct in office . . . and to not make statements which commit or appear to commit the candidate with respect to cases likely to come before the court." *Id.* (citations omitted). Specifically, the CJQ asserted that "broad statements relating to the candidate's position on disputed social and legal issues . . . incurs the risk of violating the 'commitment' clause and/or the 'promises' clause." *Id.* at 4. This approach is reinforced in the commentary to Canon 4.1, which states that "[15] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result."

21. Plaintiff IRL is a non-profit corporation incorporated in the State of Indiana. IRL gathers information and publishes questionnaires to educate its members and other citizens about candidates for public office.

22. In 2004, IRL brought suit against the CJQ and Disciplinary Commission, challenging the constitutionality of Canons 3E(1), 5A(3)(d)(i) and (ii). On November 14, 2006, the former commits clause were declared unconstitutional by the federal district court, and an injunction was issued preventing enforcement of those provisions by the CJQ or Disciplinary Commission. *See Indiana Right to Life v. Shepard*, 463 F. Supp. 879 (N.D. Ind. 2006). The CJQ and Disciplinary

Commission appealed, and on October 26, 2007, the Seventh Circuit reversed on standing grounds. *See Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007).

23. On March 22, 2008, IRL mailed an explanatory cover letter and a 2008 "Indiana Right to Life Judicial Candidate Questionnaire" ("IRL Questionnaire") to all judicial candidates nominated by the various parties. The letter explained that the questionnaire's deadline was April 15, 2008. *See Letter and IRL Questionnaire* attached as Exhibits 4 & 5.

24. IRL received thirty-five responses from judicial candidates. *See IRL Questionnaire Responses* attached as Exhibit 6 and 7. Five candidates responded by letter. One of these candidates indicated in his letter that "I believe that responding to the survey would violate the judicial canons that are currently in place," and that "[a]s such, I respectfully decline to respond to your survey." *Id.* at 2. Another candidate stated that "I must decline to answer because of Judicial Commission." *Id.* at 3. A third candidate wrote that

> I have reviewed the Questionnaire and I believe that due to the limitations of the Indiana Code of Judicial Conduct, I am not able to respond to any of the questions posed. As you know, a candidate for Judicial office is prohibited from making any statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the Court. Notwithstanding the citation to Republican Party of *Minnesota v. White*, 122 S. Ct. 2528 (2002), I believe that taking a position on these highly sensitive and volatile issues while running for Judicial office would be, in my opinion, a violation of the Indiana Code of Judicial conduct.

Id. at 4.

25. Of the thirty-one candidates who filled out the questionnaire forms, twenty-one declined to answer some or all of the questions. Exhibit 6, at 6-57; Exhibit 7, at 2-59. For the

questions these candidates declined to answer, each candidate checked a box marked "Decline" which included the following explanatory note:

> By declining to answer, I assert that I would have replied to this question but for the prospect that I may be disciplined for doing so under Indiana Judicial Canon 5A(3)(d)(i) and (ii)—which provides that a judicial candidate "shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (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." I also will not answer because doing so could subject me to mandatory recusal as a judge under Canon 3E(1), which requires "A judge [to] disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." My response would neither cause me to be biased for or against parties nor affect my ability to be open-minded with regard to any issue.

Id. at 4-28.

26. One candidate who marked "Decline" underlined the portion of the explanation that read "(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." Exhibit 6, at 6-10. Another struck out the sentence in the explanatory note reading "My response would neither cause me to be biased for or against parties nor affect my ability to be open-minded with regard to any issue." *Id.* at 11-15.

27. Ten candidates did answer each of the questions on the IRL Questionnaire. Exhibit 7, at 60-83. However, IRL did not publish these responses, for fear that doing so would subject the responding candidates to discipline under Canons 5A(3)(d)(i) and (ii), and will require these candidates to recuse themselves on cases involving issues discussed in the IRL Questionnaire.

28. Torrey Bauer was a candidate for Superior Court Judge in Kosciusko County, Indiana, in the 2008 elections, and intends to run for judicial office in future elections. Elections for Superior Court Judge in Kosciusko County are partisan. As a candidate for judicial office he is bound by the Canons. Bauer received a copy of the IRL Questionnaire in March of 2008. At the time Bauer

received the Questionnaire, he was unaware that the district court's decision in *Indiana Right to Life v. Shepard* had been reversed on appeal. In April of 2008, Bauer returned his copy of the IRL Questionnaire to IRL, having answered all of the questions on the questionnaire. Exhibit 7, at 60-64.

29. In answering the questions on the IRL Questionnaire, Bauer did not pledge or promise certain results in particular cases or classes or types of cases, but rather merely announced his views on disputed legal and political issues. Answering the questions on the IRL Questionnaire and announcing his views on disputed legal and political issues has not caused Bauer to be biased for or against any party and would not prevent him from remaining open-minded on any issue raised in the IRL Questionnaire.

30. However, because he had answered the questions on the IRL Questionnaire, Bauer believed that he may have violated Canon 5A(3)(d), and was and remains potentially subject to discipline by the CJQ or Disciplinary Commission. Because he believes the current commits clauses have the same scope as the former commits clause, he would decline to answer the IRL Questionnaire if asked in subsequent elections.

31. Further, because he has answered the questions on the IRL Questionnaire, Bauer may be required to recuse himself should he successfully win a bid for judge in cases involving the issues raised in the questionnaire because of Canon 2.11(A), formerly Canon 3E(1), and may be subject to discipline if he does not recuse in such a case.

32. David Certo is currently a Superior Court Judge in Marion County, Indiana. He was a candidate for re-election to this office in the 2008 elections, and intends to run for judicial office in future elections. Elections for Superior Court Judge in Marion County are partisan. As a candidate for judicial office he is bound by the Canons. Judge Certo received a copy of the IRL Questionnaire

in March of 2008. Judge Certo would have answered all of the questions on the IRL Questionnaire, but did not answer any of the questions because he believed he was prohibited from doing so by Canon 5A(3(d)(i) and (ii). Judge Certo further believes that because the current commits clauses have the same scope as the former commits clause, he would be equally chilled under the new canon as under the old canon from answering the IRL Questionnaire.

33. Judge Certo does not wish to pledge or promise certain results in particular cases or classes or types of cases, but merely wishes to announce his views on disputed legal and political issues. Answering the questions on the IRL Questionnaire and announcing his views on disputed legal and political issues would not cause Judge Certo to be biased for or against any party and would not prevent him from remaining open-minded on any issue raised in the IRL Questionnaire.

34. Further, Judge Certo did not answer the questions on the IRL Questionnaire because, if he did so, he could be required to recuse himself in cases involving those issues by Canon 2.11(A), formerly Canon 3E(1), and may be subject to discipline if he does not recuse in such a case.

35. IRL wished to publish responses to the IRL Questionnaire of judicial candidates, including Judge Certo, before the May 6, 2008, primary election and November 4, 2008, general election. In addition, IRL wishes to publish the responses of judicial candidates to identical questionnaires to be sent to judicial candidates in future elections.

36. However, the former commits clause, both on its face and as applied to the IRL Questionnaire chilled judicial candidates' exercise of their free speech rights and free association. Judicial candidates, such as Judge Certo and Candidate Bauer, were unable to make their views known so that the electorate could 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). Judicial candidates cannot tell the public their views on disputed political and legal issues. *White*, 536 U.S. at 788. By prohibiting judicial candidates from exercising their freedom of speech on legal and political issues of concern to the voters, the CJQ and the Disciplinary Commission prevent judicial candidates from conveying to voters essential information as they seek to win election and to educate the voters.

37. In light of this, Plaintiffs successfully sought a preliminary injunction of the former commits clause in this action and on May 5, 2008, this Court enjoined Defendants from enforcing the clause against those who answered the IRL Questionnaire.

38. Because of that injunction, IRL redistributed the IRL Questionnaire and secured answers from judicial candidates, including Judge Certo. To ensure permanent protection of those respondents' speech against enforcement under the prior canon, Plaintiffs seek a permanent injunction of the former commits clause.

39. Moreover, although IRL would like to publish and distribute the answers to subsequent distributions of the IRL Questionnaire, IRL no longer is able to secure answers from judicial candidates because of the commits clauses, which are fully enforceable against judicial candidates in upcoming elections, as well as the continued applicability of the recusal clause. IRL and its members are unable to fully exercise their free speech and association rights to receive and publish political information, because judicial candidates like Judge Certo and candidate Bauer will refuse to answer the questions in the IRL Questionnaire. Further, if IRL publishes any substantive responses it received, it believes it will subject those judicial candidates to discipline.

40. Judge Certo also wants to personally solicit funds for his own campaign from non-attorneys and out-of-state attorneys, and personally solicit first time donations from groups of

young people and donors to the Republican Party to encourage financial participation in the state and local Republican Parties.

41. However, Canons 4.1(A)(4) and (A)(8), formerly Canons 5A(1) and 5C(2), prohibit judicial candidates from "solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or a candidate for public office" and from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee." Consequently, Judge Certo will not personally solicit funds on behalf of himself or the Republican Party.

42. Judge Certo also wants to continue to serve as a delegate to the Indiana State Republican Convention as he has in the past, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature, a program designed to teach students about Indiana's legislature, with which he has participated in the past.

43. However, Canon 4.1(A)(1) and (A)(2), formerly Canon 5A(1), prohibit judicial candidates from "act[ing] as a leader . . . in a political organization" and from "mak[ing] speeches on behalf of a political organization." Thus, he will not serve as a delegate or speak on behalf of Republican judges or the Republican Party.

44. Immediate and irreparable injury, loss, and damage has occurred and will continue to occur as a result of the pledges and promises clause and commits clause, chilling Plaintiffs' free speech and free association rights.

45. Plaintiffs have no adequate remedy at law.

COUNT I

FORMER CANON 5A(3)(d)'S COMMITS CLAUSE IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, PROHIBITING AND CHILLING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFFS' FREEDOM OF SPEECH AND ASSOCIATION.

46. Plaintiffs reallege the preceding paragraphs.

47. Canon 5A(3)(d) provides that a candidate for judicial office "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 . . . ." (emphases added).

48. The former commits clause is content-based restrictions on political speech, and, as such, is subject to strict scrutiny. *Entertainment Software Association v. Blagojevich,* 469 F.3d 641, 646 (7th Cir. 2006). Because they are not narrowly tailored to further any compelling government interests, the pledges and promises clause and commits clause are unconstitutional.

49. A law is vague if it does not have "a 'reasonable degree of clarity' such that anyone of ordinary intelligence can grasp its import." *Weinberg v. City of Chicago,* 310 F.3d 1029, 1042 (7th Cir. 2002) (*citing Roberts v. United States Jaycees,* 468 U.S. 609, 629 (1984)).

50. The former commits clause is not adequately defined because judicial candidates who wished to engage in constitutionally protected speech by announcing their views on disputed political and legal issues believed that the clause prevent them from making such announcements. *See IRL Questionnaire Responses* attached at Exhibit 6 and 7. Likewise, IRL believed that judicial candidates who have answered the questionnaire will be subject to discipline for announcing their views and has refrained from publishing their responses as a

consequence. As such, Canon 5A(3)(d)(i) and (ii) chilled speech and is a vague, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments.

51. A law is overbroad "where 'it prohibits a substantial amount of protected expression.'" *United States v. Johnson,* 376 F.3d 689, 694 (7th Cir. 2004) (*quoting Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244 (2002)).

52. The former commits clause sweeps constitutionally protected announcements of personal views on disputed legal and political issues within the sphere of prohibited speech under the Canon, deterring judicial candidates from announcing their views and deterring IRL from publishing any answers judicial candidates have given announcing their views. Thus, Canon 5A(3)(d)(i) and (ii) is overbroad, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *See White,* 536 U.S. at 788.

53. Although Plaintiffs have successfully preliminarily enjoined Canon 5A(3)(d) on its face, because judicial candidates responded to the IRL Questionnaire under the protection of that injunction, Plaintiffs seek to permanently enjoin Defendants from enforcing the clause against those candidates who responded. *See Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 228 (5th Cir. 1998) (finding that "the mere possibility of adverse collateral consequences is sufficient to preclude a finding of mootness") (*cited by In re Hancock,* 192 F.3d 1083, 1084 (7th Cir. 1999)).

COUNT II

FORMER CANON 5A(3)(d)'S COMMITS CLAUSE AS APPLIED TO THE IRL QUESTIONNAIRE UNCONSTITUTIONALLY PROHIBITS AND CHILL JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFFS' FREEDOM OF SPEECH AND ASSOCIATION.

54. Plaintiffs reallege the preceding paragraphs.

55. 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 . . . ." (emphases added).

56. The IRL Questionnaire asked judicial candidates to announce their views on disputed political and legal issues. *See IRL Questionnaire* attached at Exhibit 5. Specifically, the IRL Questionnaire asked judicial candidates to announce their views on nine disputed legal and political issues. *See id.* attached at Exhibit 5. Such announcements are protected political speech under *White*, 536 U.S. at 788.

57. The former commits clause as applied to the IRL Questionnaire sweeps judicial candidates' announced personal views on disputed legal and political issues into the sphere of speech prohibited by the Indiana Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *see 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.

58. Further, judicial candidates, including Judge Certo, believe that Canon 5A(3)(d)(i) and (ii) as applied to the IRL Questionnaire prohibited them from responding to the IRL Questionnaire. *See IRL Questionnaire Responses* attached at Exhibits 6 and 7. Likewise, IRL believes that judicial candidates like Torrey Bauer, who answered the IRL Questionnaire, may be exposed to disciplinary proceedings for violation of Canon 5A(3)(d)(i) and (ii), even though the IRL Questionnaire only asks judicial candidates to announce their views on disputed

legal and political issues. As consequence, Canon 5A(3)(d) constitutes an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

59. Although Plaintiffs have successfully preliminarily enjoined Canon 5A(3)(d), because judicial candidates responded to the IRL Questionnaire under the protection of that injunction, Plaintiffs seek to permanently enjoin Defendants from enforcing the clause against those candidates who responded. *See Dailey*, 141 F.3d at 228 (*cited by In re Hancock*, 192 F.3d at 1084).

COUNT III

CANONS 2.10(A)(5) AND 4.1(A)(13)'S COMMITS CLAUSE ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD, PROHIBITING AND CHILLING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON PLAINTIFFS' FREEDOM OF SPEECH AND ASSOCIATION.

60. Plaintiffs reallege the preceding paragraphs.

61. Canons 2.10(A)(5) and 4.1(A)(13) (the "commits clauses") prohibit judges and judicial candidates from "in connection with cases, controversies, or issues that are likely to come before the court, mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

62. The commits clauses are content-based restrictions on political speech, and, as such, are subject to strict scrutiny. *Blagojevich,* 469 F.3d at 646 (7th Cir. 2006). Because they are not narrowly tailored to further any compelling government interests, the commits clauses are unconstitutional.

63. A law is vague if it does not have "a 'reasonable degree of clarity' such that anyone of ordinary intelligence can grasp its import." *Weinberg,* 310 F.3d at 1042 (7th Cir. 2002).

64. The commits clauses are not adequately defined because judges such as Judge Certo and judicial candidates such as Torrey Bauer who wished to engage in constitutionally protected speech by announcing their views on disputed political and legal issues believe that the clauses prevent them from making such announcements. Likewise, IRL believes that judicial candidates who have answer the IRL Questionnaire will be subject to discipline for announcing their views and will continue to refrain from publishing their responses as a consequence. As such, the commits clauses chilled speech and are a vague, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments.

65. A law is overbroad "where 'it prohibits a substantial amount of protected expression.'" *Johnson,* 376 F.3d at 694 (7th Cir. 2004) (*quoting Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244 (2002)).

66. The commits clauses sweep constitutionally protected announcements of personal views on disputed legal and political issues within the sphere of prohibited speech under the Canon, deterring judicial candidates from announcing their views and deterring IRL from publishing any answers judicial candidates have given announcing their views. Thus, Canon 5A(3)(d)(i) and (ii) is overbroad, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *See White,* 536 U.S. at 788.

COUNT IV

CANONS 2.10(A)(5) AND 4.1(A)(13)'S COMMITS CLAUSES AS APPLIED TO THE IRL QUESTIONNAIRE UNCONSTITUTIONALLY PROHIBIT AND CHILL JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND PLAINTIFFS' FREEDOM OF SPEECH AND ASSOCIATION.

67. Plaintiffs reallege the preceding paragraphs.

68. Canons 2.10(A)(5) and 4.1(A)(13) (the "commits clauses") prohibit judges and judicial candidates from "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

69. The IRL Questionnaire asks judicial candidates to announce their views on disputed political and legal issues. *See IRL Questionnaire* attached at Exhibit 5. Specifically, the IRL Questionnaire asks judicial candidates to announce their views on nine disputed legal and political issues. *See id.* attached at Exhibit 5. Such announcements are protected political speech under *White*, 536 U.S. at 788.

70. The commits clauses as applied to the IRL Questionnaire sweep judicial candidates' announced personal views on disputed legal and political issues into the sphere of speech prohibited by the Indiana Judicial Canons and, thus, constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *see Buckle*, 997 F.2d at 231 (7th Cir. 1993), and is in direct violation of *White*, 536 U.S. at 788.

71. Further, judicial candidates, including Judge Certo, believe that the commits clauses and (ii) as applied to the IRL Questionnaire prohibited them from responding to the IRL Questionnaire. Likewise, IRL believes that judicial candidates who answered subsequent IRL Questionnaire, may be exposed to disciplinary proceedings for violation of the commits clauses, even though subsequent questionnaires will be identical to the IRL Questionnaire and only ask judicial candidates to announce their views on disputed legal and political issues. As consequence, the commits clauses constitute an unconstitutional regulation of protected political

speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT V

CANON 2.11(A)'S RECUSAL CLAUSE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE IRL CANDIDATE QUESTIONNAIRE.

72. Plaintiffs reallege the preceding paragraphs.

73. Canon 2.11(A) (the "recusal clause") states that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to . . . (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." This specifies the scope of former Canon 3E(1), which required judges to recuse themselves when a "judge's impartiality might reasonably be questioned . . . ."

74. The recusal clause is a content-based restriction on political speech, and, as such, is subject to strict scrutiny. *Blagojevich*, 469 F.3d at 646 (7th Cir. 2006). Because it is not narrowly tailored to further any compelling government interests, the recusal clause is unconstitutional.

75. A law is vague if it does not have "a 'reasonable degree of clarity' such that anyone of ordinary intelligence can grasp its import." *Weinberg*, 310 F.3d at 1042 (7th Cir. 2002).

76. Part (5) of the recusal clause is not adequately defined because judges such as Judge Certo and judicial candidates such as Torrey Bauer who wished to engage in

constitutionally protected speech by announcing their views on disputed political and legal issues believe that the clauses require them to recuse themselves if they make such statements as candidates or judge. Likewise, IRL believes that judicial candidates who have answered the questionnaire will be subject to discipline for announcing their views and then failing to recuse. As such, IRL will continue to refrain from publishing their responses as a consequence. Part (5) of the recusal clause chills speech and is a vague, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments.

77. A law is overbroad "where 'it prohibits a substantial amount of protected expression.'" *Johnson,* 376 F.3d at 694 (7th Cir. 2004) (*quoting Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244 (2002)).

78. Part (5) of the recusal clause sweeps constitutionally protected announcements of personal views on disputed legal and political issues within the sphere of prohibited speech under the Canon, penalizing judicial candidates for announcing their views and deterring IRL from publishing any answers judicial candidates have given announcing their views. Thus, part (5) of the recusal clause is overbroad, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *See White,* 536 U.S. at 788.

79. The recusal clause as applied to the IRL Questionnaire has the effect of chilling speech, as judicial candidates, including Judge Certo, have refrained from responding to the IRL Questionnaire and from announcing their views on disputed legal and political issues raised in a judicial campaign because they believe they must later recuse themselves from proceedings relating to such issues or expose themselves to discipline for failing to recuse. For candidates like Torrey Bauer who answered the questionnaire, IRL has not published and will continue to refrain

from publishing those responses because it believes that doing so will force those judicial candidates to recuse themselves or be subject to discipline for announcing their views on disputed legal and political issues. Such an effect is in violation of the First and Fourteenth Amendment rights of freedom of speech.

80. Judicial candidates have the constitutional right to announce their views on legal and political issues. *White,* 536 U.S. at 788. Consequently, the recusal clause as applied to the IRL Questionnaire imposes an unconstitutional penalty on judicial candidates who exercise their constitutional right to announce their views on disputed political and legal issues and chills IRL's and judicial candidates' speech.

81. The recusal clause as applied to the IRL Questionnaire is a content-based restriction on political speech, and, as such, is subject to strict scrutiny. *Blagojevich,* 469 F.3d at 641. Because it are not narrowly tailored to further any compelling government interests when applied to the IRL Questionnaire, the recusal clause is unconstitutional.

COUNT VI

CANON 4.1(A)'S SOLICITATION CLAUSES ARE FACIALLY OVERBROAD, PROHIBITING JUDGES' AND JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON JUDGE CERTO'S FREEDOM OF SPEECH AND ASSOCIATION.

82. Plaintiffs reallege the previous paragraphs.

83. Canons 4.1(A)(4) and (A)(8) (the "solicitation clauses"), replacing Canons 5A(1)(e) and 5C(2), prohibit judicial candidates from "solicit[ing] funds for, pay[ing] an assessment, or mak[ing] a contribution to, a political organization or candidate" and from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign

committee." A candidate's committee may solicit funds, provided that such solicitations not occur "more than one (1) year before an election, caucus, or general or retention election, nor more than ninety (90) days after the last election in which the candidate participated." Canon 4.4(B)(2).

84. Judge Certo wants to personally solicit funds for his own campaign from non-attorneys and out-of-state attorneys, and personally solicit first time donations from groups of young people and donors to the Republican Party to encourage financial participation in the state and local Republican Parties. He wishes to make such solicitations regardless of whether he is up re-election. However, he will not because of the solicitation clauses.

85. A law is overbroad "where 'it prohibits a substantial amount of protected expression.'" *Johnson,* 376 F.3d at 694 (*quoting Ashcroft,* 535 U.S. at 244).

86. The solicitation clauses of Canon 4.1(A) sweep constitutionally protected speech within their purview and are an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White,* 536 U.S. at 788.

87. The solicitation clauses are content-based restrictions on political speech, and, as such, are subject to strict scrutiny. *Blagojevich,* 469 F.3d 641. Because solicitation clauses are not narrowly tailored to serve the state's interests in impartiality, they are unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

COUNT VII

CANON 4.1(A)'S SOLICITATION CLAUSES ARE UNCONSTITUTIONAL AS APPLIED TO JUDGE CERTO.

88. Plaintiffs reallege the previous paragraphs.

89. Canons 4.1(A)(4) and (A)(8) (the "solicitation clauses"), replacing Canons 5A(1)(e) and 5C(2), prohibit judicial candidates from "solicit[ing] funds for, pay[ing] an assessment, or mak[ing] a contribution to, a political organization or candidate" and from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee." A candidate's committee may solicit funds, provided that such solicitations not occur "more than one (1) year before an election, caucus, or general or retention election, nor more than ninety (90) days after the last election in which the candidate participated." Canon 4.4(B)(2).

90. Judge Certo wants to personally solicit funds for his own campaign from non-attorneys and out-of-state attorneys, and personally solicit first time donations from groups of young people and donors to the Republican Party to encourage financial participation in the state and local Republican Parties. He wishes to make such solicitations regardless of whether he is up re-election. However, he will not because of the solicitation clauses.

91. The solicitation clauses prohibit Judge Certo's protected speech, are not narrowly tailored to serve a compelling interest, and are in direct violation of *White*, 536 U.S. at 788.

92. Further, Plaintiff Certo believes that the solicitation clauses prohibit him from making personal solicitations on behalf of the Republican Party and his own campaign. As consequence, the solicitation clause as applied to Judge Certo constitute unconstitutional

regulations of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT VIII

CANON 4.1(A)'S PARTISAN ACTIVITIES CLAUSES ARE VAGUE AND OVERBROAD ON THEIR FACE, PROHIBITING JUDICIAL CANDIDATES' PROTECTED POLITICAL SPEECH AND IMPINGING ON JUDGE CERTO'S FREEDOM OF SPEECH AND ASSOCIATION.

93. Plaintiffs reallege the previous paragraphs.

94. Canons 4.1(A)(1) and (A)(2) (the "partisan activities clauses"), formerly Canon 5A(1)(a) and (c), prohibit judicial candidates from "act[ing] as a leader . . . in a political organization" and from "mak[ing] speeches on behalf of a political organization."

95. Judge Certo wants to continue to serve as a delegate to the Indiana State Republican Convention as he has in the past, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature, with which he has participated in the past. However, he will not because of the partisan activities clauses.

96. A law is vague if it does not have "a 'reasonable degree of clarity' such that anyone of ordinary intelligence can grasp its import." *Weinberg*, 310 F.3d at 1042.

97. The partisan activities clauses of Canon 4.1(A) do not adequately define what constitutes a "leader" nor what amounts to a speech "on behalf of a political organization." As such, the partisan activities clauses chill association and speech and are vague, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments.

98. A law is overbroad "where 'it prohibits a substantial amount of protected expression.'" *Johnson*, 376 F.3d at 694 (*quoting Ashcroft*, 535 U.S. at 244).

99. Canon 4.1(A)'s partisan activities clauses sweep constitutionally protected speech within their purview and are overbroad, unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

100. The partisan activities clauses are content-based restrictions on political speech, and, as such, are subject to strict scrutiny. *Blagojevich*, 469 F.3d 641. Because partisan activities clauses are not narrowly tailored to serve the state's interests in impartiality, they are unconstitutional regulations of protected political speech under the First and Fourteenth Amendments. *White*, 536 U.S. at 788.

COUNT IX

CANON 4.1(A)'S PARTISAN ACTIVITIES CLAUSES ARE UNCONSTITUTIONAL AS APPLIED TO JUDGE CERTO.

101. Plaintiffs reallege the previous paragraphs.

102. Canons 4.1(A)(1) and (A)(2) (the "partisan activities clauses"), formerly Canon 5A(1)(a) and (c), prohibit judicial candidates from "act[ing] as a leader . . . in a political organization" and from "mak[ing] speeches on behalf of a political organization."

103. Judge Certo wants to continue to serve as a delegate to the Indiana State Republican Convention as he has in the past, speak at political club meetings on behalf of Republican judges and the Republican Party, and speak to students on behalf of the Republican Party, including at such events as the Eastern Indiana Model Legislature, with which he has participated in the past. However, he will not because of the partisan activities clauses.

104. The partisan activities clauses appear to prohibit Judge Certo's protected association and speech interests and are not narrowly tailored to serve a compelling interest and are in direct violation of *White*, 536 U.S. at 788.

105. Further, Judge Certo believes that the partisan activities clauses prohibit him from serving as a delegate to the Indiana State Republican Convention, speaking at political club meetings on behalf of Republican judges and the Republican Party, and speaking to students at events such as the Eastern Indiana Model Legislature on behalf of the Republican Party. As consequence, the partisan activities clauses as applied to Judge Certo constitute unconstitutional regulations of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

PRAYER FOR RELIEF

106. Plaintiffs reallege the previous paragraphs.

WHEREFORE, Plaintiffs request this Court to:

(1) Declare former Canon 5A(3)(d)(i) and (ii) unconstitutionally vague and overbroad, and in violation of Plaintiffs' right of free speech and association under the First and Fourteenth Amendments to the United States Constitution;

(2) Declare that former Canon 5A(3)(d)(i) and (ii) unconstitutionally chill and prohibit Plaintiffs' rights to receive and publish speech under the First and Fourteenth Amendments to the United States Constitution;

(3) Declare former Canon 5A(3)(d)(i) and (ii) unconstitutional as applied to the IRL Questionnaire on the grounds that it chills and prohibits Plaintiffs' free speech rights under the First and Fourteenth Amendments to the United States Constitution;

(4) Declare Canons 2.10(A)(5) and 4.1(A)(13) unconstitutionally vague and overbroad, and in violation of Plaintiffs' right of free speech and association under the First and Fourteenth Amendments to the United States Constitution;

(5) Declare Canons 2.10(A)(5) and 4.1(A)(13) unconstitutionally chill and prohibit Plaintiffs' rights to receive and publish speech under the First and Fourteenth Amendments to the United States Constitution;

(6) Declare Canons 2.10(A)(5) and 4.1(A)(13) unconstitutional as applied to the IRL Questionnaire on the grounds that they chill and prohibit Plaintiffs' free speech rights under the First and Fourteenth Amendments to the United States Constitution;

(7) Declare Canon 2.11(A)(5) unconstitutionally vague and overbroad, and in violation of Plaintiffs' right of free speech and association under the First and Fourteenth Amendments to the United States Constitution;

(8) Declare Canons 2.11(A) and 2.11(A)(5) unconstitutionally chills and prohibits Plaintiffs' rights to receive and publish speech under the First and Fourteenth Amendments to the United States Constitution;

(9) Declare Canons 2.11(A) and 2.11(A)(5) unconstitutional as applied to the IRL Questionnaire on the grounds that it chills and prohibits Plaintiffs' free speech rights under the First and Fourteenth Amendments to the United States Constitution;

(10) Declare Canons 4.1(A)(4) and (8) unconstitutionally overbroad, and in violation of Plaintiff Certo's right of free speech and association under the First and Fourteenth Amendments to the United States Constitution;

(11) Declare Canons 4.1(A)(4) and (8) unconstitutionally chill and prohibit Judge Certo's right to speak under the First and Fourteenth Amendments to the United States Constitution;

(12) Declare Canons 4.1(A)(4) and (8) unconstitutional as applied to Judge Certo on the grounds that they chill and prohibit Plaintiff Certo's free speech rights under the First and Fourteenth Amendments to the United States Constitution;

(13) Declare Canons 4.1(A)(1) and (2) unconstitutionally overbroad, and in violation of Judge Certo's right of free speech and association under the First and Fourteenth Amendments to the United States Constitution;

(14) Declare Canons 4.1(A)(1) and (2) unconstitutionally chills and prohibits Judge Certo's right to speak under the First and Fourteenth Amendments to the United States Constitution;

(15) Declare Canons 4.1(A)(1) and (2) unconstitutional as applied to Judge Certo on the grounds that it chills and prohibits Judge Certo's free speech and association rights under the First and Fourteenth Amendments to the United States Constitution;

(16) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors, from enforcing former Canon 5A(3)(d)(i) and (ii), and current Canons 2.10(A)(5) and 4.1(A)(13), and from filing or considering complaints based on former Canons 5A(3)(d)(i) and (ii) and current Canons 2.10(A)(5), or 4.1(A)(13) against judicial candidates who responded or will respond to the IRL Questionnaire and all others similarly situated;

(17) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors, from enforcing Canons 2.11(A) and 2.11(A)(5) against judicial candidates who respond to the IRL Questionnaire and all others similarly situated;

(18) Prohibit, by way of permanent injunction, Defendants, their agents, and successors, from enforcing Canons 4.1(A)(4) and (8) against judges and judicial candidates;

(19) Prohibit, by way of permanent injunction, Defendants, their agents, and successors, from enforcing Canon 4.1(A)(1) and (2) against judicial candidates;

(20) Grant Plaintiffs' costs and attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(21) Grant Plaintiffs such other relief as may be just and equitable.

Dated: April 3, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which sent notification of such filing to the following:

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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 AMENDED COMPLAINT CONCERNING ME ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: 4-1-2009

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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: 3/31/09

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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 AND MY ORGANIZATION ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: 4-3-09

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