No. 09-2963

In the
United States Court of Appeals
for the Seventh Circuit

TORREY BAUER, THE HONORABLE DAVID CERTO,
and INDIANA RIGHT TO LIFE, INC.,

Plaintiffs-Appellants,

v.

RANDALL T. SHEPARD, STEPHEN L. WILLIAMS, CHRISTINE KECK,
JOHN C. TRIMBLE, MARK LUBBERS, MICHAEL GAVIN, JOHN FEIGHNER,
in their official capacity as members of the Indiana Commission on Judicial Qualifications;
ANTHONY M. ZAPPIA, SALLY FRANKLIN ZWEIG, CATHERINE A. NESTRICK,
CORINNE R. FINNERTY, FRED AUSTERMAN, R. ANTHONY PRATHER,
J. MARK ROBINSON, TONY WALKER, MAUREEN GRINSFELDER,
in their official capacity as members of the Indiana Disciplinary Commission;

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, No. 3:08-cv-196.
The Honorable **Theresa Springmann**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS

JAMES BOPP, JR.
ANITA Y. WOUDENBERG
JOSIAH NEELEY
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434

Counsel for Plaintiffs-Appellants,
Torrey Bauer, David Certo, and
Indiana Right to Life, Inc.

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-2963

Short Caption: Bauer et al. v. Shepard et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Torrey Bauer, The Honorable David Certo, Indiana Right to Life, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bopp, Coleson & Bostrom

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: _____ Date: 9/11/2009

Attorney's Printed Name: Anita Y. Woudenberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

Address: 1 South 6th Street
Terre Haute, IN 47807

Phone Number: 812/232-2434 Fax Number: 812/235-3685

E-Mail Address: awoudenberg@bopplaw.com

Table of Contents

Table of Authorities

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

Jurisdictional Statement

The district court's subject matter jurisdiction in this case rests on 28 U.S.C. § 1331, because this is a civil action alleging that the challenged Indiana Canons violate the First Amendment of the U.S. Constitution. This Court has jurisdiction over this federal question under 28 U.S.C. § 1291 to review the district court's final order dismissing Count I and II of Plaintiffs' claims and granting Defendants' motion for summary judgment with regard to the remaining claims on July 7, 2009, and disposing of all claims in this case. R. 83, 84. Plaintiffs appealed as of right of that judgment, Fed. R. App. P. 4, filing their Notice of Appeal on August 6, 2009. R. 90.

Introduction

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). In *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the United States Supreme Court reaffirmed the protected nature of political and campaign speech in the judicial context, invalidating a Minnesota judicial canon that prohibited judicial candidates from announcing their views on disputed political and legal issues. In like manner, Mr. Bauer, Judge Certo, and Indiana Right to Life, Inc. will demonstrate that former Canon 5A(3)(d)(i) and (ii) and current Canons 2.10(B), 2.11(A)(5), and 4.1(A)(1), (2), (4),(8) and (13), of Indiana's Code of Judicial Conduct are unconstitutional both facially and as applied, and that Canon 2.11(A) is unconstitutional as applied to the Question-naire.

Statement of the Issues

I. Whether The District Court Erred In Dismissing Plaintiffs' Claims Against Former Commits Clause 5A(3)(d)(i) and (ii).

II. Whether The District Court Erred In Holding the Commits Clauses Constitutional On Its Face And As Applied To The Questionnaire.

III. Whether the District Court Erred In Holding The Recusal Clause Constitutional On Its Face And As Applied To The Questionnaire.

IV. Whether the District Court Erred In Upholding The Solicitation Clause As Constitutional.

V. Whether The District Court Erred In Finding The Partisan Activities Clause As Constitutional.

Statement of the Case

On April 18, 2008, Mr. Bauer, Judge Certo, and Indiana Right to Life filed their Complaint against Canons 5A(3)(d)(i) and (ii) (the former commits clause) and 3E(1) (the general recusal clause). (R. 1.) Concurrently, they sought a preliminary injunction of the former commits clause, which was granted on May 6, 2008. (R. 3, 23.) An Amended Complaint was filed on June 5, 2008, adding additional challenges to Canons 5A(1)(e) and 5C(2) (the solicitations clauses) and 5A(1)(a) and (c) (the partisan activities clause) on behalf of Judge Certo. (R. 25.)

Mr. Bauer, Judge Certo, and Indiana Right to Life sought summary judgment against all of the challenged canons on July 28, 2008. (R. 31.) The Court

continued briefing for the motion on September 25, 2008, to allow for sixty days of discovery. (R. 37.) Due to speech Judge Certo wanted to engage in, a preliminary injunction against the solicitations clauses and the partisan activities clauses was filed on October 1, 2008. (R. 39.) Both the summary judgment and preliminary injunction requests were denied as moot on March 23, 2009, in light of revisions to Indiana's Code of Judicial Conduct. (R. 64.) At the District Court's direction, Mr. Bauer, Judge Certo, and Indiana Right to Life filed a Second Amended Complaint to account for any changes to the Code, (R. 67), and refiled their Motion for Summary Judgment to reflect those changes to the Code on May 1, 2009. (R. 70.) They retained their challenge against the former commits clause to ensure permanent protection for those who acted under the preliminary injunction order granted by the District Court. The Commission also filed a Motion for Summary Judgment on May 1, 2009. (R. 72.) The District Court ruled on the briefs, dismissing the former commits clause claim as moot and uphold all provisions as constitutional under the First Amendment. (R. 83.)

Statement of Facts

Indiana Right to Life ("IRL") is a non-profit educational organization that collects and publishes data regarding judicial candidates' political philosophy and stance on disputed legal and political issues. (R. 67, 2d Am. Compl. at ¶ 15.) It has

done this by sending out judicial candidate questionnaires. (*Id.* at ¶ 21.)

In 2004, IRL brought a legal challenge to Canon 5A(3)(d)(i) and (ii) and Canon 3E(1) because they were causing judicial candidates to decline to answer IRL's Questionnaire. *See Indiana Right to Life v. Shepard,* 463 F. Supp. 2d 879 (N.D. Ind. 2006) ("*Shepard I*"). Indiana Canon 5A(3) stated, in relevant part, that "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 . . . ." This former commits clause has been interpreted in Preliminary Advisory Opinion #1-02 ("Advisory Opinion") to reach "broad statements relating to the candidate's position on disputed social and legal issues" because they "incur[] the risk of violating the 'commitment' clause and/or the 'promises' clause." (R. 19, Advisory Opinion, Ex. 1, at 4.) Ms. Babcock, as counsel to the Commission on Judicial Qualifications ("CJQ"), also advised judicial candidates not to answer the 2004 Questionnaire. (R. 19, Babcock Dep., Ex. 16, at 41:21-23.)

Additionally, Indiana had a canon addressing recusal obligations of judges. Canon 3E(1) mandated that a judge recuse himself when a "judge's impartiality might reasonably be questioned . . . ." This recusal requirement has been under-

stood by judicial candidates to require judges who have engaged in constitutionally protected political speech to recuse themselves from proceedings involving issues about which they have spoken. (R. 19, Heimann Dep., Ex. 10, at 7:8-9; Humphrey Dep., Ex. 13, at 13:20-14:4; Newkirk Dep., Ex. 12, at 18:6-19:6.)

The district court granted summary judgment against the Commission as to the former commits clause. (R. 19, Judgment, Ex. 15.) However, on appeal, the Seventh Circuit determined that IRL lacked standing to bring its suit because no clear evidence existed that a judicial candidate wanted to answer the Questionnaire. *Indiana Right to Life v. Shepard,* 507 F.3d 545, 549-550 (7th Cir. 2007).

In 2008, IRL again solicited judicial candidates for responses to an identical 2008 Questionnaire. (R. 67, 2nd Am. Compl., Ex. 5.) Because so many candidates declined to answer, IRL did not publish the substantive responses it received, fearing that doing so would expose judicial candidates to discipline, (R. 67, 2nd Am. Compl. at ¶ 29), and renewed litigation against Defendants in this cause of action.

This second cause of action also included a challenge to Canon 5's solicitation clauses and partisan activities clause on behalf of Judge Certo. (R. 25.) Canon 5A(1) prohibited 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 Canon 5C(2) prohibited judicial candidates in public election from "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support," allowing them to instead form a committee for that purpose. Judge Certo wanted to but did not personally solicit funds for his campaign from family members, former roommates and classmates—none of whom would affect his ability to be impartial any more than he is already affected. (R. 67, 2nd Am. Compl. at ¶¶ 40, 41.) Likewise, he wanted to but did not encourage participation in the political process among people by encouraging them to make contributions to the Republican Party. (*Id.*)

Judge Certo also wanted to but did not engage in partisan activities by continuing to serve as a delegate to the Indiana State Republican Convention, 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 high-school students about Indiana's legislature, with which he has participated in the past. (R. 67, 2nd Am. Compl. at ¶¶ 42, 43.) This was because of Canon 5A(1), which prohibits judicial candidates from "(a) act[ing] as a leader . . . in a political organization" and from "(c) mak[ing] speeches on behalf of a political organiza-

tion."

Effective January 1, 2009, the Indiana Supreme Court has amended the Indiana Code of Judicial Code. In light of this, the District Court directed Plaintiffs-Appellants to amend their Complaint in relation to those new canons. (R. 64.) Plaintiffs-Appellants continue to desire to engage in the political speech described above, but will not do so because the new canons reach the same speech.

Canons 2.10(B) and 4.1(A)(13) (the "current 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." The Commentary to this provision 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." Because of these canons, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires and IRL will not publish responses. (R. 67, 2nd Am. Compl. at ¶¶ 30, 32, 39.)

Canon 2.11 (the recusal clause) retains the requirement that judge disqualify himself if his impartiality is reasonably questioned, but adds that recusal is specifically required when "(5) [t]he 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." Because of these clauses, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires. (R. 67, 2nd Am. Compl. at ¶¶ 31, 34.) Moreover, IRL would not publish such responses because it fears it would continue to cause judges who answered the Questionnaire to recuse or be disciplined for failing to do so. Because of these canons, Judge Certo and Torrey Bauer will not answer subsequent Questionnaires. (R. 67, 2nd Am. Compl. at ¶ 39.)

Canon 4.1(A) retains substantively identical language in banning judicial candidates from "(4) 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 "(8) personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee" (collectively the "solicitation clauses"); and "(1) act[ing] as a leader in or hold an office in a political organization" and "(2) mak[ing] speeches on behalf of a political organization" (collectively the "partisan activities clauses").

Judge Certo continues to be banned from the personal solicitation and partisan activities he desired to engage in under the old Code. (R. 67, 2nd Am. Compl. at ¶¶ 41, 43.)

Plaintiffs-Appellants have been deprived of their constitutional rights under the First and Fourteenth Amendments to the United State Constitution by the above Canons and have suffered and will continue to suffer irreparable harm with no adequate remedy at law. (R. 67, 2nd Am. Compl. at ¶ 45.)

Summary of the Argument

The Canons here challenged all chill or prohibit core political speech. In analyzing their constitutionality, this Court's decision in *Buckley v. Illinois Judicial Inquiry Board* and the United States Supreme Court's decision of *Republican Party of Minnesota v. White* provide the framework. Applying strict scrutiny to these content-based restrictions, these decisions recognized impartiality as a possible compelling interest for judicial canons and assessed whether the canons were narrowly tailored to serve such an impartiality interest. This analysis is not undermined by the recent Supreme Court decision of *Caperton v. Massey*, which held that, given the extreme circumstances and facts of that case, a judge should recuse himself for impartiality concerns. The same concerns are not present in this case such that First Amendment political speech is justifiably banned.

In reviewing this case, the District Court erred on five grounds. First, it held that the challenge to the former commits clause was mooted out by the 2009 amendments to the Code. However, this does not take into consideration collateral consequences. While a preliminary injunction was secured, there is no assurance that the Commission will not enforce the old provision against those who spoke out under that preliminary injunction without a final judgment on the merits ensuring complete protection. The Commission has been active in instructing judicial candidates not to answer the questionnaire—or at least giving the distinct impression that candidates should not—and as an enforcement body, merely litigation positions not to enforce are of little comfort to those who engaged in political speech following the 2008 preliminary injunction order.

Second, the District Court erred in finding the commits clause, both former and current, constitutional. That both clauses contain, whether in its text or in its commentary, "appears to commit" type language that can reach the Questionnaire—which solicits announced views protected under *Buckley* and *White*—makes them unconstitutional. The clauses fail strict scrutiny because they do not serve any impartiality interest and are not drafted to serve such an interest. They are overbroad because they chill announced speech, not just pledges or promises of certain results in a particular case. And they are vague because, as the

Commission concedes in Advisory Opinion 1-02, they require ad hoc analysis to determine whether they are violated and are dependent on the listener for their application. For these reasons, they are unconstitutional both on their face and as applied to the Questionnaire.

Third, the District Court erred in upholding as constitutional the recusal clause. The recusal clause has two components: a general recusal requirement and a specific issues-based recusal requirement. The first is unconstitutional as applied to the Questionnaire; the second is unconstitutional both on its face and as applied to the Questionnaire. Both fail strict scrutiny because they are relevant only to bias as to issues rather than parties—an illegitimate due process concern under *White* and this Circuit's precedent. Moreover, the issues recusal requirement is vague and overbroad for the same reasons as the commits clauses: it chills protected announced views and uses ad hoc "appear to commit" analysis. The recusal clause is likewise unconstitutional.

Fourth, the District Court erred in finding the solicitation clauses constitutional. The clauses fail strict scrutiny because they do not preserve impartiality or prevent judicial corruption—Judge Certo can know the outcome of his solicitations, whether for his own campaign or to political parties because of reporting requirements. Indeed, he can know who contributed at all, regardless of

whether he solicited funds, rendering the clauses irrelevant to impartiality concerns. The clauses are also overbroad because they ban all solicitations—even of family members or friends that would have no impact on a candidates' ability or inability to be impartial. The solicitations clauses are unconstitutional.

Finally, the District Court erred in upholding the partisan activities clause. The clause, which prohibits speeches on behalf of and acting as a leader in a political party fail strict scrutiny because this associational right does not account for prior roles a candidate might have had in a political party that would account for possible partiality concerns. Indeed, judicial candidates are allowed significant party participation under the canons. That these specific speech and associational contexts implicate impartiality more such that they should be banned indiscriminately is illogical and facially overbroad. And candidates are not prohibited from similar speech or leadership roles in other organizations, merely political ones. Thus the partisan activities clause is likewise unconstitutional.

Because the District Court erred in finding these Canons constitutional, Plaintiffs-Appellants respectfully this Court reverse that decision and find in their favor.

Argument

I. Standard of Review

In evaluating the district court's order granting the Commission's summary judgment motion, this Court employs *de novo* review. *Skinner v. Astrue,* 478 F.3d 836, 841 (7th Cir. 2007). In doing so, this Court "draw[s] all reasonable inferences in the light most favorable to the non-moving party." *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 631 (7th Cir. 2004).

A. *Buckley* and *White* Establish The Proper Analysis For Judicial Canon Challenges.

In this Court's 1993 decision of *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224 (7th Cir. 1993), this Court struck down on First Amendment grounds Illinois' pledges and promises clause, which provided that "a candidate, including incumbent judge, for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his views on disputed legal or political issues . . . ." *Id.* at 225. The Seventh Circuit found the provision inadequately tailored and overbroad and concluded that it was unconstitutional. *Id.* at 230. Nine years later, the U.S. Supreme Court concurred with the *Buckley* decision when it held that Minnesota's announce clause failed strict scrutiny. *Republican Party of Minnesota v. White*,

536 U.S. 765, 773 (2002). The Court recognized that restrictions on judicial campaign speech and conduct are often rationalized on the grounds that they are necessary to preserve judicial impartiality and considered three possible definitions of this interest: impartiality as lack of bias towards the parties, impartiality as a lack of preconceptions about legal issues, and impartiality as openmindedness. *White,* 536 U.S. at 775-80.

The *White* court first considered impartiality as to parties. *Id.* at 776. It found this interest compelling because it stems from due process, which requires trial before an unbiased judge. *See Johnson v. Mississippi*, 403 U.S. 212, 216 (1971).

The court determined that the second definition, "a lack of preconceptions on legal issues," was not a legitimate interest because having a judge with no preconceptions on any legal issue is neither possible nor desirable. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualifications, not lack of bias.")

Last, the *White* court considered impartiality as judicial openmindedness. The court defined judicial openmindedness as a judicial quality that "demands, not that he have no preconceptions on legal issues, but that he be willing to consider

views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case," and "seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so." *White,* 536 U.S. at 778 (emphasis in original). The Court did not state that this interest was compelling. Instead, it simply noted that the announce clause could not be narrowly tailored to this interest because it applied only to statements made after a person had declared their candidacy, and not to statements made before this date. *Id.* at 778.

B. Impartiality As Openmindedness Is Not A Compelling Interest.

The *White* court did not recognize judicial openmindedness as a compelling state interest because, regardless of the merit of such an interest, the announce clause did not serve it. *Id.* ("It may well be that [openmindedness], and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.") This Court should also decline to recognize openmindedness as a compelling state interest. While openmindedness is no doubt valuable as an aspirational goal for judges, as a basis for prohibiting speech it is problematic.

Evaluating openmindedness is inherently subjective. Openmindedness is a state of mind, and as such it is extremely difficult to prove its presence or absence at any given moment. Openmindedness does not preclude judges from having opinions on legal issues, even firmly held and strongly stated ones. *See id.* (openmindedness requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.") Judges often have strong legal opinions which can be forcefully stated. *See, e.g.*, *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) ("Justice O'Connor's assertion, that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously."); *Bush v. Gore*, 531 U.S. 98, 128-129 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.") Such statements do not, however, preclude a open mind on the part of a judge. No objective way to evaluate such a state of mind exists.

Because openmindedness is a matter not of what a judge says but rather of a mental state, it cannot be objectively determined from a particular statement. The same statement, made by two different judges, may in one case reflect a judge that is closeminded, while in the other it may not. Any attempt to restrict speech based on concerns about openmindedness would thus necessarily involve hypothesizing about the inner workings of a judge's psyche, and would, ironically enough, subject judges to the biases and preconceptions of enforcement agencies. But premising the legitimacy of speech on the interpretation of third parties is problematic, as it "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976). Indiana's interest in preserving judicial impartiality cannot include such suppression of speech.

C. *Caperton* Does Not Provide The Proper Framework for Review.

Contrary to the district court's analysis, the recent Supreme Court decision of *Caperton Coal Co. v. Massey,* 129 S.Ct. 2252 (2009) should have no impact on this case. In *Caperton*, the Supreme Court held that due process required the

recusal of West Virginia Supreme Court of Appeals Justice Brent Benjamin in a case involving the Massey Coal Company on account of the fact that Massey CEO and President Don Blankenship had spent in excess of three million dollars to defeat Justice Benjamin's opponent in the previous election. *Caperton*, 129 S.Ct. at 2257.

As the context of the case should make clear, the *Caperton* decision has little bearing on the constitutionality of the canons at issue in this case. The Supreme Court went out of its way to stress that the *Caperton* decision was a narrow and limited one, and was not widely applicable to other circumstances. *See*, *e.g.*, *id.* at 2263 ("this is an exceptional case"); *id.* at 2265 ("On these extreme facts"); *id.* ("Our decision today addresses an extraordinary situation"); *id.* ("The facts now before us are extreme by any measure"); *id.* ("The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case"); *id.* at 2267 ("Application of the constitutional standard implicated in this case will thus be confined to rare instances"). Indeed, as the Court noted, "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias." *Id.* at 2263. Instead, the Court held that improper bias was created by a contribution where "when a person with a personal stake in a particular case had a significant and disproportionate influence

in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64. If due process does not even require recusal based on campaign contributions except in the most extraordinary of circumstances, then it is unlikely that due process supports the direct prohibition of and recusal for "appearing to commit," or direct prohibitions for making personal solicitations or of partisan activities on judicial candidates, all of which are at issue in this case.

II. The District Court Erred In Dismissing Plaintiffs-Appellants' Claims Against Former Commits Clause Canon 5A(3)(d)(i) and (ii).

The district court held that the claims against the former commits clause were moot because of the 2009 amendments to the Code of Judicial Conduct. Although Plaintiffs-Appellants have received the remedy they sought against the former commits clause in the form of a preliminary injunction, they still seek a permanent injunction of the provision to prevent the collateral consequence of judicial discipline for the speech engaged in under the protection of that injunction. (R. 67, 2nd Am. Compl. at ¶ 38.) *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"); *In re Hancock*, 192 F.3d 1083, 1084 (7th Cir. 1999) (*citing Dailey,* 141 F.3d at 227-29);

Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367, 1370 (11th Cir. 1989) (holding that attorney's appeal of the revocation of his pro hac vice status was not moot following dismissal of the underlying case because "the 'brand of disqualification' on grounds of dishonesty and bad faith could well hang over his name and career for years to come").

In a recent Tenth Circuit decision involving a similar amendment to Kansas' judicial code, the Court determined that the collateral consequences at issue there were too speculative and remote. *Kansas Judicial Review v. Stout,* 562 F.3d 1240 (10th Cir. 2009). Here, the facts indicate an active participation of the Commission in advising candidates prior to the injunction. (R. 19, Babcock Responses, Ex. 3.) Unless the Commission is willing to agree that it will not enforce the former commits clause against Plaintiffs Certo and Bauer or against others who similarly responded under protection of the preliminary injunction, the possibility of enforcement is a reasonable and real concern to Plaintiffs with a real threat of injury to their political careers. This matter is not moot as to that conduct.

III. The District Court Erred In Holding the Commits Clauses Constitutional On Their Face And As Applied To The Questionnaire.

Canon 5A(3)(d)(i) (the "former commits clause") provides that a candidate for judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "make statements that commit or *appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." (emphases added). It has been amended to 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." Canon 2.10, 4.1(A)(13) (the "current commits clauses"). What constitutes a pledge, promise or commitment is

> 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. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited.

Canon 4.1(A)(13), Comment 15.

In 2002, the Commission issued Preliminary Advisory Opinion 1-02, dealing with the effect of *White* on Indiana's judicial canons. (R. 19, Opinion 1-02, Ex. 1.) There, the Commission notes that "in light of the *White* opinion, the

Commission is compelled to acknowledge that candidates are permitted under the first amendment to state their *general* views about disputed social and legal issues." (*Id.* at 2) (emphasis added). The Commission goes on to state, however, that "[when] a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous 'tough on crime' statement, or broad statements relating to the candidate's position on disputed social and legal issues, the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause." (*Id.* at 3.) Further, a "statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct." (*Id.* at 3.) In light of this, the Commission acknowledged that "many issues about campaign speech will require ad hoc analysis," and that "judicial candidates are encouraged to contact the Commission directly and in advance to discuss the propriety of their campaign statements." (*Id.* at 3.) This Opinion was not disavowed with the adoption of the new canons.

During the 2008 election campaign, the Commission's counsel Margaret Babcock responded to inquiries from judicial candidates regarding Indiana Right to Life's Questionnaire ("Questionnaire") by sending the candidates copies of

Opinion 1-02, as well as excerpts from the 2007 ABA Model Code of Judicial Conduct, which are now part of the current code provisions. (R. 19, Babcock Responses, Ex. 3.)

The Questionnaire asks judicial candidates to announce their views on disputed legal and political issues. For example, Question 4 of the Questionnaire asks judicial candidates whether they agree or disagree with the statement "I believe that there is no provision in our current Indiana Constitution which is intended to protect a right to abortion." (R. 67, Questionnaire, attached to 2nd Am. Compl. as Ex. 5, at 4.) Agreeing with this statement and the other similar statements contained in the Questionnaire does not constitute a pledge or promise of certain results in a particular case or class of cases. However, these statements do "commit or appear to commit" a candidate with respect to a legal issue and could also appear to constitute a pledge, promise, or commitment other than the faithful and impartial performance of the duties of a judge's office. A judge or judicial candidate who answers the Questionnaire violates the commits clauses.

A. The Commits Clauses Fail Strict Scrutiny.

Political speech concerning the qualifications of candidates for public office is "at the core of our first amendment freedoms." *White*, 536 U.S. at 774 (*quoting Republican Party of Minnesota v. Kelly*, 247 F. 3d 854 (8th Cir. 2001)). Because

the former commits clause and the current commits clause are content-based regulations of core political speech, they are subject to strict scrutiny. *White*, 536 U.S. at 774. To survive strict scrutiny, a challenged law or regulation must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Board*, 502 U.S. 105, 121 (1991). The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *See*, *e.g.*, *Carey v. Brown*, 447 U.S. 455, 465 (1980). Finally, a regulation can fail to be narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990).

By their plain terms, the commits clauses do not restrict speech for or against particular parties, but rather prohibit any pledge or promise other than the impartial performance of judicial duties. And the former commits clause prohibits any statements that commit or appear to commit a candidate. Since the commits clauses restrict speech about issues rather than parties, they are only "barely tailored" to Indiana's interest in preserving judicial impartiality towards parties.

White, 536 U.S. at 776; *see also Duwe v. Alexander,* 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007); *Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005); *North Dakota Family Alliance v. Bader,* 361 F. Supp. 2d 1021, 1042 (D.N.D. 2005); *Family Trust Foundation of Kentucky v. Wolnitzek,* 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004).

Likewise, the commits clauses do not serve any purportedly valid interest in preserving judicial openmindedness. Like the announce clause in *White*, these clauses only encompass statements made by judges and judicial candidates, and they do not address statements made before a lawyer announces his candidacy. *See id.* at 779-80. Candidates often have already taken a position on legal issues well before they become candidates, either in the form of lectures, books, or law review articles. *Id.* at 779. In essence, the commits clauses permit lawyers to take positions on legal issues until the day they declare their candidacy, after which such statements are prohibited. They are thus grossly underinclusive. *Shepard I*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.

The commits clauses are also overinclusive. In *Buckley*, this Court acknowledged that the State had a legitimate interest in preventing judicial candidates and judges from "mak[ing] commitments to decide particular cases or

types of case in a particular way." *Buckley*, 997 F.2d at 228. The pledges and promises clause at issue there, however, sought to further this interest in the "most comprehensive fashion imaginable." *Id*. Under the clause, a judge or judicial candidate cannot

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

Id.; see also, *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1232 (D. Kansas 2006) (pledges and promises clause would prohibit a candidate from saying that he "promises to be tough on crime" or "is committed to upholding the First Amendment"); *Family Trust*, 345 F. Supp. 2d at 697 (same). Because the provision banned speech far beyond what could be legitimately restricted, this Court concluded that the pledges and promises clause was unconstitutional, and a similar result should follow here. *Buckley,* 997 F.2d at 230. As Advisory Opinion 1-02 notes, even statements of fact may be taken to violate these provisions if, in the Commission's view, they "may be deemed an implied promise of future

conduct." (R. 19, Opinion 1-02, Ex. 3, at 3.) The commits clauses fail strict scrutiny facially and as applied to the Questionnaire.

To the extent that the State does have a legitimate interest in preserving judicial open-mindedness, this interest is better served through the election process itself. Voters expect a certain level of decorum from their judicial candidates, and do not want judges who do not have an open mind. Because of this, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 248 (1987).[1]

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is also a danger that silence inspires the

---

[1] *See also* James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism,* 6 First Amend. L. Rev. 180, 190-91 (2007) (describing instances where judges have been defeated in elections for making improper statements). Ironically, speech restrictions undercut the important role voters play in preserving judicial openmindedness. Preventing a judicial candidate from speaking on an issue will not keep a candidate from lacking an open mind on that issue, but it will keep voters from knowing that he is not open-minded. *See* Alan B. Morrison, *The Judge Has Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 Ind. L. Rev. 719, 734 (2003).

suspicion that they are hiding their views to mask their partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. *See Bridges v. California*, 314 U.S. 252, 270-71 (1941) ("an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

While the court below asserts that the commits clauses do not reach announced views of the Questionnaire, the district court in *Shepard I,* presented with an identical factual context, recognized that "the commits clause[s] 'are essentially de facto 'announce clauses' which were found unconstitutional' in *White*," and, "there is no principled distinction between the 'announce clause' struck down in *White* and [this clause].'" *Shepard I*, 463 F. Supp. at 889-90 (internal citations omitted). Despite the current commits clauses' disclaimer of reaching announced speech in Commentary 15, that announced views such as those on the Questionnaire can be reasonably construed as apparent commitments continue this trend.

Because they are underinclusive, overinclusive, and because there are less restrictive means of achieving the state's interest in openmindedness, the commits clauses are not facially nor as applied to the Questionnaire narrowly tailored to the

Indiana's interest in preserving judicial impartiality. They do not pass strict scrutiny. *See Buckley*, 997 F.2d at 230; *Shepard I*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1039-40; *Family Trust*, 345 F. Supp. 2d at 699-700.[2]

B. The Commits Clauses Are Unconstitutionally Overbroad.

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

Read literally, the commits clauses could be taken to ban even such innocuous statements of a candidate that she "pledges to give a better shake to indigent litigants or harried employers," "promises to be tough on crime," or "is committed to upholding the First Amendment." *See Buckley*, 977 F.2d at 228; *Stout*, 440 F. Supp. 2d 1232; *Family Trust*, 345 F. Supp. 2d at 697. Such overbreadth is substantial.

---

[2] *See also* James Bopp, Jr. & Anita Y. Woudenberg, *To Speak or Not to Speak: Unconstitutional Regulation in the Wake of* White, 28 Just. Sys. J. 326 (2007) (noting constitutional difficulties with the pledges and promises clause and commits clause).

Because the clauses reach issues, its scope is more than a pledge or promise of certain results in a particular case as permitted by the U.S. Supreme Court in *White* and this Court in *Buckley*. In doing so, the provision unconstitutionally broadens its reach to statements that, as assessed by a third party, might appear to commit a candidate. *See Duwe,* 490 F. Supp. 2d at 976.

C. The Commits Clauses Are Unconstitutionally Vague.

A law is void for vagueness "if it fails to give fair warning of what is prohibited, if it fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement, and if its lack of clarity chills lawful behavior." *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006). Laws regulating First Amendment freedoms must be precisely drafted. *Buckley v. Valeo*, 424 U.S. at 40-41.

The former commits clause's phrase "appear to commit" is inherently vague. As noted in *Shepard I*, "in all but a few narrow situations, application of the Canon will require ad hoc analysis and advice from the Commission each time there is a question about the permissibility of a candidate's statement." *Shepard I*, 463 F. Supp. 2d at 890. (R. 19, Opinion 1-02, Ex. 1, at 3) ("many issues about campaign speech will require ad hoc analysis."). As such, the former commits clause is unconstitutionally vague. *Shepard I,* 463 F. Supp. 2d at 890.

Likewise, the current commits clauses are vague. It, too, has the modifier "likely to come before the court," which is contrary to the *White* decision.[3] As viewed by the *White* Court, this modifier functions as no modifier at all.

But if this modifier is given effect to limit the commits clauses, it is then vague. How is a judicial candidate to know what is likely to come before him or her or what is not? This construction creates vagueness and may result in chilling judicial candidates' speech.

It is unclear how a pledge or promise is different from a commitment. Webster's defines "pledge" as "a formal promise to do or not to do something," "promise" as "an assurance that one will or will not do something," and "commitment" as "a pledge to do something."[4] If "commitment" has the same meaning as "promise," then "pledge or promise" would suffice and "commit" is redundant.

But the use of the word "commit," in addition to "pledge or promise," suggests that more than pledges or promises are included within its scope and, in order to give effect to each word in the current commits clauses, "commit" must

---

[3] *See also Buckley,* 997 F.2d at 229; *Shepard I,* 463 F. Supp. 2d at 890.

[4] *Webster's II New Riverside University Dictionary* (1984).

mean more than a "pledge or promise."[5] But what is it that is encompassed by the word "commit" that is not encompassed by a "pledge or promise"?

The new canon's commentary provides a partial answer, though an unconstitutionally vague one. The commentary says that "[t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases," but that "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." Canon 4.1(A), Commentary 15. Thus, application of the current commits clauses is dependent on the perceptions of the listener – the "reasonable person's belief – not the objective meaning of what the judicial candidate says.

But a speaker cannot be left to the perceptions of a listener: "it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Buckley v. Valeo,* 424 U.S. at 43 (*quoting Thomas v. Collins,* 323 U.S. 516, 535 (1945)). And as the United States Supreme Court stated in *FEC v. Wisconsin Right to Life*, 127 U.S. 2652 (2007), such a standard would "typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on

---

[5]*See* James Bopp, Jr. & Anita Y. Woudenberg, *supra* note 2, at 326 (discussing the meaning and scope of the word "commit" in relation to the pledges and promises clause).

such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech." *Id.* at 2666. As a result, content-based restrictions on speech that are dependent on the subjective perceptions of the hearer are unconstitutional. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Furthermore, the use of this vague standard to determine the scope of judicial speech in effect puts in place a form of prior restraint—candidates must first check to ensure their speech is proper before exercising their right—a particularly egregious form of speech regulation. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66-67, 70 (1963) (finding that a Commission's advice to booksellers of their rights rose to the level of informal censorship warranting injunction). *See also Shepard I*, 463 F. Supp. 2d at 890 ("in all but a few narrow situations, application of the Canon will require ad hoc analysis and advice from the Commission each time there is a question about the permissibility of a candidate's statement.").

Moreover, this subjectivity can reach announced views though it may be unintended. Statements that announce views by criticizing *Roe v. Wade*, or expressing "views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of

the prisons, or products liability" could be believed to commit a candidate on an issue. *See Buckley*, 997 F.2d at 228.

The only truly objective way to evaluate a judicial candidate's speech is to look at the words spoken and what such words, on their face, mean. *See Buckley v. Valeo,* 424 U.S. at 43-44 (stating that the only way to avoid vagueness of an expenditure provision was to require the expressed speech to advocate a candidate). Because the commits clauses go beyond the words spoken, they are unconstitutionally vague. The District Court erred in finding the commits clause constitutional.

IV. The District Court Erred In Holding The Recusal Clause Constitutional On Its Face And As Applied To The Questionnaire.

Canon 2.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," (the "recusal requirement") including when "(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" (the "issues recusal requirement"). Judges who do not recuse in such cases risk being disciplined. According to Opinion 1-02, a "candidate's statements

[regarding issues] may invite future recusal requests, or even mandate recusal." (R. 19, Opinion 1-02, Ex. 1, at 3.)

Recusal requirements in cases where a judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case" have a long history in our jurisprudence, though even in such cases recusal is required "only in the most extreme cases." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 825-26 (1986). Recusal for announcing one's views on issues, by contrast, is simply unprecedented.[6] This Circuit, in particular, has repeatedly denied motions to recuse based on the fact that a judge had previously announced his views on legal positions related to an individual case. *See Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1112 (7th Cir. 1982) ("Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to

---

[6] Plaintiffs are aware of only one decision where a judge was required to recuse himself for prior announcement of views. *See Republic of Panama v. American Tobacco Co.*, 265 F.3d 299 (5th Cir. 2001), *rev'd on other grounds sub nom. Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229 (2002) (holding that a judge who had previously been associated with a view of a legal issue must recuse himself from a case involving that legal issue). In his dissent, Judge Wiener states: "The panel opinion for this case marks the first time in the history of American jurisprudence that an appellate court has reversed a trial judges's discretionary refusal to recuse himself – and has ordered the judge recused – based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and . . . [that view] is now being espoused by one of the parties in a case pending before him." *Id.* at 300.

recuse himself merely because he holds and had expressed certain views on that general subject."); *Schurz Communications v. F.C.C.*, 982 F.2d 1057, 1062 (7th Cir. 1992) ("movants do not and could not argue that a judge should disqualify himself because he has views on a case"). Indeed, historically, under both federal law, 28 U.S.C. § 455(b)(1), and the ABA Canons, disqualification was

> only required if there is bias concerning a *party*, as distinguished from bias concerning an *issue* in the case. . . . [Thus] a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects – all activities expressly permitted under [1990 ABA] Canon 4B. Indeed, after deciding cases and creating precedent for years, it would be incredible if the judge did not form some fixed ideas about the law.

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original).[7] The Supreme

[7] *See, e.g.,*regarding the federal disqualification statute, *Schurz*, 982 F.2d at 1062 (stating that the judge was not required to recuse himself because he has views on a case); *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (Rehnquist, J., on motion to recuse) (holding that Justice Rehnquist did not need to recuse himself from a Department of Justice lawsuit, an entity for whom he previously worked); *Buell v. Mitchell*, 274 F.3d 337, 347 (6th Cir. 2001) (holding that a judge who previously as a legislator supported a bill restoring the death penalty was not required to recuse himself from a death penalty case); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996) (holding that a judge's views on legal issues may not serve as a basis for a motion to disqualify that judge); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992) (holding that a judge's bias can only be disqualifying if it stems from an extrajudicial source and makes the judge's impartiality reasonably questionable); *United States v. Glick*, 946 F.2d 335, 336-37 (4th Cir. 1991) (holding that judge who was the Chairman of the United States Sentencing

Court held that prior announced views that then came before administrative adjudicators did not require disqualification in *FTC v. Cement Institute*, 333 U.S. 683 (1948), and *United States v. Morgan*, 313 U.S. 409 (1941).

Despite this long history, on January 1, 2009, the Indiana's Canons of Judicial Conduct were amended to include an issues specific recusal requirement. Given that there is no evidence prior to 2009 that judges and judicial candidates were making inappropriate commitments and subsequently failing or refusing to recuse themselves, Indiana's rationale for adopting this provision is unclear. Nevertheless, because the recusal clause impinges on core political speech, it must survive strict scrutiny in order to pass constitutional muster, and the issues recusal requirement is subject to vagueness and overbreadth analysis. *White*, 536 U.S. at 774.

A. The Issues Recusal Requirement Is Unconstitutionally Vague.

Commission was not precluded from hearing cases challenging the United States Sentencing Guidelines); *Phillip v. ANR Freight Systems*, 945 F.2d 1054, 1056 (8th Cir. 1991) (holding that a judge's negative comments about Title VII were not a basis for recusal in Title VII case); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 491 (1st Cir. 1989) (holding that the fact a judge had made several "pro-statehood" speeches was not a proper basis for recusal); *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) ("The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice").

Indiana's issues recusal requirement is vague, because it defines the scope of prohibited conduct in terms of how the statement "appears" to third parties, rather than how the statement was intended. *Anderson*, 433 F.3d at 978. The requirement that judges must recuse themselves if, while a judge or judicial candidate, they "made a public statement that commits, or *appears to commit*, the judge with respect to . . . [a]n issue in the proceeding . . . [or] [t]he controversy in the proceeding" (emphasis added) is inherently vague. There is no indication as to what type of statements "appear" to commit a candidate, leaving judicial candidates vulnerable to improper enforcement of the canon by the Defendants and chilled from announcing their views on disputed legal and political issues. The issues recusal requirement is therefore unconstitutionally vague. *See Duwe,* 490 F. Supp. 2d at 977.

B. The Issues Recusal Requirement Is Unconstitutionally Overbroad.

Indiana's issues-recusal requirement is also overbroad for reasons similar to the commits clauses. As with those provisions, whether a statement is restricted under the issues recusal requirement turns partly on how that clause is interpreted by third parties, rather than on how it is intended. This is impermissible. *See Buckley v. Valeo*, 424 U.S. at 43; *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). The

issues recusal requirement could subject judicial candidates to discipline for announcing their views on issues in written opinions or law review articles on the grounds that the announcement "appears to commit" the candidate to a particular result in a particular case. The issues recusal requirement is therefore substantially overbroad and unconstitutional. *See Buckley*, 997 F.2d at 230; *Duwe,* 490 F. Supp. 2d at 977.

C. The Recusal Clause Does Not Pass Strict Scrutiny.

Due process requires judges not to hear cases if they cannot maintain impartiality towards the parties in the case. In fashioning a recusal statute, the state is allowed to "may adopt recusal standards more rigorous than due process requires." *White* 536 U.S. at 794 (Kennedy, J., concurring).[8] It may even adopt a

---

[8]Some commentators have concluded based on this statement by Justice Kennedy that the *White* decision does not apply in the recusal context. *See* Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Judicial Respectability in the Post-White Era*, 94 Ky. L.J. 1, 14 (2005). This is mistaken. Traditional recusal standards that deal with impartiality to parties are not limited to what is required by due process, because such requirements do not pose any threat to free speech. Recusal restrictions based on judicial candidates' statements about legal issues, however, do implicate the First Amendment, and must therefore be limited only to cases involving a compelling government interest, such as due process. *See, e.g.*, *White*, at 782-83 (rejecting argument that announce clause was justified by requirements of due process). To say that a state could restrict First Amendment rights absent a compelling government interest would turn decades of jurisprudence on its head, and it is a particularly strange view to attribute to

reasonableness standard when dealing with conflicts of interest, or other cases where impartiality to parties is involved. What it may not do, however, is enact a recusal statute that infringes on an individual's freedom of speech or association, nor may it make those rights contingent on the reactions and interpretations of third parties. *See Buckley v. Valeo*, 424 U.S. at 43; *Ovadal*, 416 F.3d at 537; *Weaver*, 309 F.3d at 1319. Indiana's interest in preserving judicial impartiality towards parties is adequately served by the portions of its recusal statute other than the issues recusal requirement. It is not served by the issues recusal requirement, which deals with issues rather than parties, nor is it served by the recusal requirement when that is applied to the Questionnaire. *See White*, 536 U.S. at 776.

Indiana's recusal clause cannot be justified in terms of the State's interest in preventing legal preconceptions, as this interest is not compelling. *See White*, 536 U.S. at 777-78 (stating that a judge without legal preconceptions is neither possible nor desirable).

Justice Kennedy, who has repeatedly suggested that restrictions on core political speech should be held unconstitutional even where they do meet strict scrutiny. *See*, *e.g.*, *White*, 536 U.S. at 793 (Kennedy, J., concurring) ("I adhere to my view . . . that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.") Justice Kennedy's comments are clearly directed to traditional recusal standards based on conflicts of interest or bias as to parties – which do not implicate First Amendment rights – not to restrictions on judicial speech.

Nor can the recusal clause be justified in terms of the State's interest in preserving open-mindedness. Even assuming this interest is compelling, Indiana's issues recusal requirement is not narrowly tailored to that interest because it only encompasses commitments or appearance of commitments made by judges or judicial candidates, and it does not address commitments on issues made before the lawyer or judge announced his or her candidacy. *See id.* at 779-80. Judges often have already committed themselves on legal issues well before they became candidates for any particular judicial office, either in the form of lectures, books, law review articles, or previous rulings. *Id.* at 779. In essence, the issues recusal requirement would permit lawyers and judges alike to pledge or commit themselves on legal issues until the day they declare their candidacy, after which such pledges and commitments are prohibited because of the requirement of recusal. This renders the issues recusal requirement underinclusive. *Id.*

The issues recusal requirement on its face and the recusal requirement as applied to the Questionnaire is also overinclusive, in that they prevent judges and judicial candidates not only from pledging or promising certain results in particular cases or classes of cases, but even from announcing their views on disputed legal and political issues. By requiring recusal whenever a judge has previously has made a public statement that commits, or appears to commit the

judge with regard to an issue in a proceeding before him, or more generically when a judge's impartiality can be reasonably questioned, both recusal requirements would ban even such innocuous statements by a candidate as that he was committed to giving a better shake to indigent litigants or harried employers, or that he was committed to upholding the First Amendment. *See Buckley*, 997 F.2d at 228. Nor could a judge and judicial candidate answer the questions on the Questionnaires by giving his opinion on *Roe v. Wade* and other such cases without risking being disciplined should the Commission decide that such statements may reasonable be viewed as committing the judge or candidate on the issue. *Id*.

Further, whatever interest the State has in preserving judicial impartiality can be achieved through less restrictive means. In addition to the restraints placed on judges by the electorate noted above, judges themselves also serve as a natural restraint to preserve judicial impartiality. *See Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("Some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time, for instance, upon trial after a remand. Still, we accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous matters is one of the

requisites of judicial office.") (internal citations and quotations omitted). Thus, in the current context, judges cannot be disciplined for failing to recuse themselves after announcing their views on disputed legal and political issues; the awareness of bias is enough to limit its impact on their decisions.

The District Court erred is upholding the constitutionality of the recusal clause.

V. The District Court Erred In Upholding The Solicitation Clause As Constitutional.

Canon 4.1(A)(4) prohibits judicial candidates from "solicit[ing] funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or candidate for public office." Canon 4.11(A)(8) prohibits judicial candidates in public elections from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee" and provided that such solicitations do not occur "more than one (1) year before the applicable primary 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).

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 for re-election. He is prohibited from doing so, however, by these two solicitation clauses. This prohibition is unconstitutional.

A. The Solicitation Clauses Fail Strict Scrutiny.

Soliciting contributions is an essential part of any election campaign. *See Weaver*, 309 F.3d at 1322 ("Campaigning for elected office necessarily entails raising campaign funds,"); *see also White*, 536 U.S. at 789 ("Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.") A solicitation clause "depends wholly upon the subject matter of the speech for its invocation." *Republican Party of Minnesota v. White*, 416 F.3d 738, 763 (8th Cir. 2005) ("*White II*"). The solicitation clauses are content-based regulations of core political speech and subject to strict scrutiny. *Id.* at 763-64; *Weaver*, 309 F.3d at 1322; *Carey v. Wolnitizek*, No. 3:06-cv-36, 2008 WL 4602786 at *6 (E.D. Ky. October 15, 2008); *Stout*, 440 F. Supp. 2d at 1237.

The solicitation clauses do not further judicial impartiality by preventing bias towards parties. Judicial candidates, such as Judge Certo, know who has donated to their campaign. The allowance of judicial candidates to create "a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code," Canon 4.4(B)(2), does not affect this. As a result, "[s]uccessful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting." *Weaver*, 309 F.3d at 1323. The solicitation clauses, both on their face and as applied to Judge Certo, do not significantly reduce the risk of judicial partiality by only allowing the candidate's committee, rather than the candidate, to seek funds. *Weaver,* 309 F.3d at 1322-23. The solicitation clauses on their face and as applied to Judge Certo do not serve an interest in preserving impartiality as to parties.

Even if judicial openmindedness were a compelling state interest (which it is not), the solicitation clauses would not serve it. This is because the solicitation clauses, both on their face and as applied to Judge Certo, are underinclusive. By only prohibiting judicial candidates such as Judge Certo from personally soliciting while allowing them to know who has donated to their campaign, the solicitation clauses do not ensure that a judge will be openminded and unaffected by the source of contributions made during his campaign. *Weaver,* 309 F.3d at 1322-23.

Additionally, the provisions only consider funds solicited by candidates such as Judge Certo and their committees, disregarding funds voluntarily offered without solicitation. A judge's openmindedness can also be affected by funds secured from those who approach the candidate of their own volition and offer financial support. Because they only restrict a judicial candidate from soliciting funds rather than prohibiting a judicial candidate from accepting funds, the solicitation clauses on their face and as applied to Judge Certo are underinclusive and fail strict scrutiny. *See White,* 536 U.S. at 779-80; *White II,* 416 F.3d at 757.

Arguably, the solicitation clauses are designed to preserve impartiality by preventing judicial corruption because of financial support given to judges during their campaigns. *White II,* 416 F.3d at 764. They are not drafted to reflect such an interest, however, because they do not prohibit judicial candidates from knowing from whom their financial support comes, but instead merely require judicial candidates' committees, rather than the candidates themselves, to solicit the funds. The solicitation clauses do not serve such an interest, both on their face and as applied to Judge Certo. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2008 WL 4602786 at *15; *Stout*, 440 F. Supp. 2d at 1237. Nor is it clear how a committee is less coercive than the candidate herself. *Siefert v. Alexander,* 597 F. Supp. 2d 860, 888 (W.D. Wis. 2009).

To the extent that judicial candidates soliciting campaign contributions raises impartiality concerns, they "are created by the State's decision to elect judges publicly." *Id.* As noted by Justice O'Connor:

> Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

White, 536 U.S. at 792 (O'Connor, J., concurring); *see also White*, 536 U.S. at 788 (*quoting Renne v. Geary,* 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) ("If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.") Because the impartiality concerns, if any, are of Indiana's own making, the state cannot use these concerns as grounds for restricting core political speech. *White II*, 416 F.3d at 764; *Weaver*, 309 F.3d at 1322; *Carey*, 2008 WL 4602786 at *17; *Stout*, 440 F. Supp. 2d at 1237; *Siefert,* 597 F. Supp. 2d at 888.

B. The Solicitation Clauses Are Unconstitutionally Overbroad.

In addition to failing strict scrutiny, the solicitation clauses are invalid on overbreadth grounds. While the State may be concerned about quid pro quo

solicitations, the solicitation clauses reach far more than just such solicitations: they ban any and all personal solicitations, indiscriminately and without justification. The solicitation clauses create an unnecessary and substantial prohibition upon judicial candidates' protected speech. For this reason, the solicitation clauses are unconstitutionally overbroad.

The District Court erred in holding the solicitations clauses constitutional.

VI. The District Court Erred In Finding The Partisan Activities Clause Constitutional On Its Face And As Applied to Judge Certo.

Indiana's partisan activities clause prohibits judicial candidates from "(1) act[ing] as a leader . . . in a political organization" and from "(2) mak[ing] speeches on behalf of a political organization." Canon 4.1(A). "Political organization" is defined by the Canons as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office." *See* Indiana Code of Judicial Conduct, *Terminology*. 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. The partisan activities clause prohibits this.

A. The Partisan Activities Clause Fails Strict Scrutiny.

The right to associate with a political party is "a particularly important political right" under the Constitution. *See Randall v. Sorrell*, 548 U.S. 230, 256 (2006); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.") In *White II*, the Eighth Circuit held that a political activities clause that barred judicial candidates from declaring a political affiliation or accepting endorsements was not justified by any of the three impartiality interests discussed in *White*. According to the Eighth Circuit, "the underlying rationale for the partisan-activities clause – that *associating with a particular group* will destroy a judge's impartiality – differs only in form from that which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality." *White II*, 416 F.3d at 754 (emphasis in original).

As with the partisan activities clause in *White II*, Indiana's partisan activities clause is premised on the idea that judicial candidates cannot associate with political parties—either by holding positions of leadership within the party or by making speeches on its behalf—without destroying their impartiality.

Consequently, the partisan activities clause is a content-based regulation of core political speech that is subject to strict scrutiny. *Id*.

The partisan activities clause is not narrowly tailored to Indiana's interest in maintaining judicial impartiality towards parties. Associating with a political party is different than simply announcing one's views on an issue, insofar as political parties are potential litigants. *Id.* ("in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in favor of that litigant.") However, as the Eighth Circuit has noted, even where a political party is a litigant in a case, "any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party." *Id.* Here, Judge Certo wishes to serve as a delegate to the Indiana State Republican Convention, 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. Engaging in these activities would not prevent him from being impartial should a case involving the Republican Party come before him as judge.

Further, in the rare circumstance where a political party is a litigant before a judge who has associated with that party to the extent that his impartiality in the

case might be questioned, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." *Id.; Siefert,* 597 F. Supp. 2d at 882. The partisan activities clause is not the least restrictive means of safeguarding judicial impartiality towards parties and thus is not narrowly tailored. *Rutan*, 497 U.S. at 75.

The partisan activities clause is also underinclusive with respect to a purportedly valid interest in preserving judicial openmindedness, for three reasons. First, since the political activities clause applies only to judicial candidates, it does nothing to safeguard against the dangers to impartiality from a judge who has been "a life-long, active member of a political party" at whatever level. *White II*, 416 F.3d at 757. Indeed, prior to becoming candidates, many judges have been legislators, political officeholders, or political party officers, actively promoting the party's agenda and candidates. *Id.* at 758 ("history indicates it will be rare that a judicial candidate . . . will not have had some prior, substantive, political association.")

Second, while the Canons prohibit judges and judicial candidates from "(1) act[ing] as a leader . . . in a political organization" and from "(2) mak[ing] speeches on behalf of a political organization," the Canons also provide that a judge or a candidate subject to partian election may at any time "(1) identify

himself or herself as a member of a political party; (2) voluntarily contribute to and attend meetings of political organizations; and (3) attend dinners and other events sponsored by political organizations." Canon 4.1(C). In fact, many Indiana state law judges, including Judge Certo, are elected on a partisan basis. The fact that Indiana allows such close association between candidates and political parties arbitrarily and wrongly assumes that a judicial candidate cannot be openminded as a leader in a political party or as a speaker on its behalf but can be openminded in other, equally political contexts.

Finally, while the partisan activities clause prohibits judges and judicial candidates from being party leaders and from making speeches on behalf of political parties, it does not prohibit candidates and judges from serving as leaders of, or making speeches for, other types of political associations. "Political organization" is defined by the Canons as "a political party or organization, the principal purpose of which is to further the election or appointment of candidates to political office." *See* Indiana Code of Judicial Conduct, *Terminology*. There are, however, many political groups, ranging from the Sierra Club to the NRA, whose principal purpose is not to help elect candidates for political office, but to advocate on behalf of certain political issues. Participation in these groups could just as readily affect a judge's openmindedness as participation in a political party.

Since "the partisan-activities clause unavoidably leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited," it cannot be justified as a means of furthering Indiana's interest in preserving judicial openmindedness, regardless of whether that interest is judged compelling. *White II*, 416 F.3d at 760; *Siefert,* 597 F. Supp. 2d at 880-81; *Carey,* 2008 WL 4602786 at *19.

B. The Partisan Activities Clause is Unconstitutionally Overbroad.

The partisan activities clause is also invalid on overbreadth grounds. Even assuming that the state may legitimately prohibit judges from holding certain leadership roles within a political party, there is no justification for the partisan activities clause's ban on all activity that could be viewed as acting as a leader in a political organization. And while Indiana may legitimately prohibit candidates from pledging or promising certain results in particular cases, there is no justification for the provision's ban on all speech made in favor of a political party, which effectively prohibits candidates from announcing their views. Because of this overbreadth, judicial candidates such as Judge Certo are chilled from engaging in political activities such as 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 on behalf of

the Republican Party, including the Eastern Indiana Model Legislature. Because the provision's impermissible applications "are substantial when compared to the law's legitimate application," the partisan activities clause is unconstitutionally overbroad. *Commodity Trends,* 149 F.3d at 688 n. 4.

C. The Partisan Activities Clause is Unconstitutionally Vague.

Finally, the partisan activities clause is unconstitutionally vague. While the provision prohibits judges and judicial candidates from "act[ing] as a leader . . . in a political organization," the partisan activities clause is unclear as to what actions would constitute "act[ing] as a leader" in such an organization. As a Republican elected official, Judge Certo is of necessity a leader in the state Republican Party. Presumably this alone is not sufficient to violate the Canon, as partisan judicial elections are mandated by Indiana law. But if holding public office as a Republican does not constitute acting as a leader in the Republican Party, what does? The provision provides no guidance.

Likewise, the partisan activities clause prohibits judges and judicial candidates from "mak[ing] speeches on behalf of a political organization." Yet the canons also allow judges and judicial candidates to engage in other partisan activities, such as endorsing other candidates running for office in the same election cycle. *See* Canon 4.2(B). The difference, however, between endorsing

Republican candidates for public office and making speeches on behalf of the Republican Party, however, is far from clear. Because the partisan activities clause "fails to give fair warning of what is prohibited [and] fails to provide explicit standards for the persons responsible for enforcement and thus creates a risk of discriminatory enforcement," the provision is unconstitutionally vague. *Anderson*, 433 F.3d at 978.

The District Court erred in upholding the partisan activities clause.

Conclusion

This Court should reverse the district court's decision to dismiss the former commits clause and holding the commits clause, the recusal clause, the solicitations clauses, and the partisan activities clause constitutional. The clauses unconstitutionally chill and prohibit judicial candidates from exercising their First Amendment free speech rights.

Dated: September 11, 2009

Respectfully Submitted,

James Bopp, Jr.
Anita Y. Woudenberg
Josiah Neeley
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434
Counsel for Plaintiffs-Appellants, Torrey Bauer, The Honorable Judge Certo, and Indiana Right to Life

Certificate of Compliance With Fed. R. App. P. 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned certifies that this *Brief of Plaintiffs-Appellants* complies with the type-volume limitations of this Court.

1. In accordance with Federal Rules of Appellate Procedure 32(a)(7)(B), this brief contains 12,749 words.

2. The Brief has been prepared in proportionately spaced typeface using Word Perfect 9.0 in Times New Roman, 14 point font.

_____

Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434

Circuit Rule 31(e)(1) Certification

Pursuant to Cir. R. 31(e)(1), undersigned counsel for Torrey Bauer, the Honorable Judge Certo, and Indiana Right to Life, Inc. hereby certifies that I have filed electronically, versions of the brief and all of the appendix items that are available in non-scanned PDF format. The undersigned also certifies the disk/CD is virus free.

_____
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434

Circuit Rule 30(d) Statement

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

_____
Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434

Certificate of Service

Undersigned counsel for Torrey Bauer, the Honorable Judge Certo, and Indiana Right to Life, Inc. hereby certifies that on September 11, 2009, two copies of their brief and appendix, as well as a digital version containing the brief, were served upon the below-listed counsel of record by first-class mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 11th day of September, 2009:

Thomas M. Fisher
Heather Hagan
OFFICE OF THE ATTORNEY GENERAL
302 West Washington Street
Indianapolis, IN 46204
Ph.: 317-232-6315
tom.fisher@atg.in.gov
heather.hagan@atg.in.gov

George T. Patton, Jr.
Marisol Sanchez
Suzanna Hartzell-Baird
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
Ph.: 317-684-5421
gpatton@boselaw.com
msanchez@boselaw.com

_____

Anita Y. Woudenberg
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812-232-2434