No. 09-2963

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TORREY BAUER, *et al.*,

Plaintiffs/Appellants,

v.

RANDALL T. SHEPARD, *et al.*,

Defendants/Appellees.

Appeal from the Judgment of the
United States District Court, Northern District of Indiana
The Honorable Theresa Springmann, Judge
Civil Action No. 3:08-CV-196

BRIEF OF DEFENDANTS/APPELLEES, RANDALL T. SHEPARD, *et al.*

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DISCLOSURE STATEMENT AND PARTIES

Pursuant to Circuit Rule 26.1, Defendants/Appellees were represented in the district court and are represented in this appeal by the law firm of Bose McKinney & Evans LLP and by the Indiana Attorney General's Office.

A complete list of Defendant/Appellees not contained in the caption is:

Randall T. Sheppard
Stephen Williams
Christine Keck (replacing Joan Hurley)
James Young
Mark Lubbers
John Feighner (replacing Sherrill Colvin)
Michael Gavin (replacing Daryl Yost)
All in their official capacities as Members of the Indiana Commission on Judicial Qualifications

Fred Austerman
Catherine A. Nestrick (replacing Diane L. Bender)
Maureen Grinsfelder
Corinne R. Finnerty
Tony Walker (replacing Robert L. Lewis)
R. Anthony Prather
J. Mark Robinson
Anthony M. Zappia
Sally Franklin Zweig
All in their official capacities as Members of the Indiana Disciplinary Commission

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Rules

Defendants-Appellees, Randall T. Shepard, *et al*. (collectively, "Commission"), pursuant to Fed. R. App. P. 28(a) and Seventh Circuit Rule 28, respectfully submit this Brief of Appellees and Supplemental Appendix ("Supp. App.") in response to the appeal filed by Plaintiffs/Appellants, Torrey Bauer, *et. al.* (collectively "IRL") of the district court's Opinion and Order published at 2009 U.S. Dist. LEXIS 57724 (Appellants' App. 01-72).

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of Appellants is complete and correct.

STATEMENT OF ISSUES

I. Whether this Court's decision in *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 546 (7th Cir. 2007), renders unripe under Article III IRL's challenge to Judicial Canons prohibiting judges and judicial candidates from making pledges, promises and commitments with respect to cases and issues likely to come before them as judges.

II. Whether IRL's challenges to the pre-2009 version of Canons 5A(3)(d)(i) and (ii) is moot in light of the new 2009 Code of Judicial Conduct where there is no evidence the Commission will enforce the superseded Canons against IRL?

III. Whether Indiana may, consistent with the First Amendment, prohibit judges and judicial candidates from making pledges, promises and commitments with respect to cases and issues likely to come before them as judges.

IV. Whether Indiana may, consistent with the First Amendment, require judges to recuse themselves from deciding cases where their impartiality might reasonably be questioned, including where a judge's campaign statement has committed, or appears to have committed, the judge to reach a particular result in a proceeding?

V. Whether Indiana may, consistent with the First Amendment, prohibit judges and judicial candidates from personally soliciting or accepting campaign contributions?

VI. Whether Indiana may, consistent with the First Amendment, prohibit judges and judicial candidates from assuming leadership roles in political parties or speaking on behalf of political parties?

STATEMENT OF FACTS

I. Background Concerning the Code of Judicial Conduct

The Indiana Code of Judicial Conduct consists of a preamble and four Canons that require judges to "uphold and promote the independence, integrity, and impartiality of the judiciary, and . . . avoid impropriety and the appearance of impropriety." Ind. Code of Judicial Conduct Canon 1. The Code also requires judges to perform their judicial duties, impartially, meaning without bias or prejudice. Ind. Code of Judicial Conduct Canon 2.

The Indiana Commission on Judicial Qualifications advises judges concerning the Canons. Supp. App. 45, ¶ 2. The Commission's counsel, formerly Margaret Babcock, represents the Commission in enforcing the Code and is available to advise judicial candidates as to whether a proposed course of conduct would violate the Canons. Supp. App. 45, ¶ 2, 4. Following the Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Commission issued Preliminary Advisory Opinion #1-02, stating that "candidates are permitted under the first amendment to state their general views about disputed social and legal issues" and to "express themselves on any number of other philosophies or perspectives." Supp. App. 175.

When the Commission receives a complaint, it reviews the case and prosecutes the offending judge if appropriate. *See* Ind. R. Discipline 25(VIII). In a

prosecution, the Commission issues a disciplinary recommendation that is appealable to the Indiana Supreme Court. *See id* To Babcock's knowledge, the Commission has never investigated or prosecuted a judicial candidate or judge for answering an interest group questionnaire. Supp. App. 45.

II. The Challenged Canons

IRL challenges canons pertaining to pledges of conduct in office, recusal, solicitation of contributions, and partisan activities. In September 2008, the Indiana Supreme Court issued an Order Amending the Code of Judicial Conduct, including the challenged canons, which became effective on January 1, 2009. App. 4, 23. The new 2009 Code is patterned after the 2007 ABA Model Code of Judicial Conduct. *Id.*

Appellees include in their Supplemental Appendix a chart they created and submitted to the district court comparing the pre-2009 Canons with the 2009 Canons. Supp. App. 102. A narrative summary of the most important differences follows:

A. Pledges, Promises, and Commitments

Prior to the revisions to the Code, the Pledges and Promises Canon was Canon 5A(3)(d)(i) and the Commitments Canon was Canon 5A(3)(d)(ii). These Canons are now combined in Canon 4.1(A)(13) (hereinafter referred to as "Pledges Canons"), which states that a judge or candidate shall not "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."

Two substantive differences exist between the old and new Pledges Canons. First is the substitution of the phrase "that are inconsistent with the impartial performance of the adjudicative duties of judicial office" for the phrase "other than the faithful and impartial performance of the duties of the office." (The term "impartial" is defined to "mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Code of Judicial Conduct, "Terminology). Second is the elimination of the rule prohibiting statements that "appear to commit" candidates with respect to issues likely to come before them.

B. Recusal

The previous Recusal Canon, 3E(1), has been replaced and is now found under Canon 2. Specifically, Canon 2.11 states, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," and provides a non-exhaustive list of circumstances under which disqualification is necessary.

C. Solicitation

The restrictions on solicitation of contributions were previously found in Canons 5A(1) and 5C(2), but are now found under Canon 4. Canon 4.1(A) states: "Except as permitted by law, or by Rules 4.1(B), 4.1(C), 4.2, 4.3, and 4.4, a judge or judicial candidate shall not: . . . (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office; . . . (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4." These Canons are materially unchanged.

D. Partisan Activities

The Partisan Activities Canon was previously found in Canon 5A(1), and is now at Canon 4.1(A). Canon 4.1(A)(1) provides that a judge or candidate shall not "act as a leader in or hold an office in a political organization." Canon 4.1(A)(2) states that a judge or candidate shall not "make speeches on behalf of a political organization." These Canons also remain materially unchanged.

III. The Plaintiffs

A. Indiana Right to Life

Indiana Right to Life ("Right to Life") is a non-profit corporation whose purpose is "to promote legislative and constitutional changes that promote the right to life." (Doc. 67, Am. Compl. Ex. 1 at 2 (Articles of Incorporation)). Right to

Life sent questionnaires to Indiana judicial candidates in 2002, 2004, and 2008. Supp. App. 108, p. 3; 113, p. 4; 119, p. 4. Right to Life's questionnaire was substantially the same in each of these years, covering topics related to legal rights to abortion, physician-assisted suicide, and other similar matters. *Id.*

Right to Life executive director Mike Fichter concedes that the state should prohibit judges and judicial candidates from making some pledges. Supp. App. 126 Tr. at 102-105, 118, 121. According to Fichter, judges should be permitted to make promises only along the lines of, "my court will operate with integrity." Supp. App. 126 Tr. at 121, 123. He believes, for example, that it should prohibit candidates from pledging to send all drunk drivers to jail. Supp. App. 126 Tr. at 159. Fichter also agrees that a judicial candidate might make an improper (even in his view) pledge, promise, or commitment without using particular magic words (Supp. App. 126 Tr. at 80, 85). Notably, he does not believe the questionnaire asks candidates to make any pledges, promises or commitments inconsistent with the Indiana judicial canons. Supp. App. 126 Tr. at 75, 77.

Fichter asserts, as do all plaintiffs, that it would be appropriate for the State to prohibit pledges with respect to any "particular cases or classes of cases" or where the judge's bias "is clear." Supp. App. 126 Tr. at 15, 87, 88. Yet, Fichter concedes that the terms "classes of cases" and "clear bias" are broad concepts, the scope of which is open to reasonable disagreement. Supp. App. 126 Tr. at 87-88,

94. Still, he adheres to the notion that those concepts are suitable terms for judicial canons relating to pledges of conduct in office and recusal. Supp. App. 126 Tr. at 86, 90-91.

Fichter believes that recusal for bias in relation to "classes of cases" that also implicate "issues," such as medical malpractice, is justified only when "a judge's position on an issue would lead that judge to be biased against a party." Supp. App. 126 Tr. at 98. Yet he is "unclear" as to how the two notions—issue bias and party bias—can be separated. *Id.*

Fichter believes candidates should answer the questionnaire to provide voters with an idea about the candidate's morals and judicial philosophy. Supp. App. 126 Tr. at 125, 126; 160 Tr. at 130, 131, 158. But he acknowledges that revealing details about judicial philosophy can go too far, as when a judge promises to jail all drunk drivers. Supp. App. 126 Tr. at 159.

B. Judge David Certo

David Certo has spent many years actively involved with the Indiana Republican Party. Supp. App. 208 Tr. at 97, 121-123; 246 Tr. at 19. He ran for the Republican nomination for Treasurer of State in 2005. Supp. App. 208 Tr. at 98-106. He has volunteered, donated money, raised money, made speeches, founded an entirely new Republican Party club, and led the party as precinct chair, ward chair, and area chair in Marion County. Supp. App. 208 Tr. at 102-104. In 2007 he

was named "Young Republican of the Year". Supp. App. 208 Tr. at 105. In 2007, Governor Daniels appointed Certo to the Marion Superior Court bench. Supp. App. 208 Tr. at 101-102, 104.

Certo believes in the concept of judicial independence because "people want to feel that their cases are adjudicated on the basis of merits rather than exterior forces acting on the judge and as a consequence have confidence in the outcomes that no one walking into court will feel that his or her case will already have been decided or, in the alternative, not be given a fair full hearing." Supp. App. 208 Tr. at 7. Certo also agrees that judges should maintain the appearance of independence. Supp. App. 208 Tr. at 9, 74.

Certo wants to solicit funds for his own campaign, but "would rather not solicit lawyers if I could avoid it." Supp. App. 208 Tr. at 25. While he would prefer not to accept any donations from lawyers, Certo has not returned any donations from lawyers who appear in his court because "[w]e still have a significant debt." Supp. App. 208 Tr. at 28. He also says he "hopes" he would never, even if allowed, solicit lawyers who appear in his court. Supp. App. 208 Tr. at 26, 27. Yet, even this "hope" is dependent in part on need. Supp. App. 208 Tr. at 30.

Certo recognizes the potential for an appearance of favoritism of a judge toward a lawyer who has donated to his campaign. Supp. App. 208 Tr. at 26.

"[T]he better practice," Certo states, "would be simply to raise money without anyone asking questions about where the money came from or whether any party might be wrongfully influenced by contributions." Supp. App. 208 Tr. at 26.

Certo agrees with the general proposition that judges and judicial candidates can constitutionally be precluded from saying things that convey lack of impartiality. Supp. App. 208 Tr. at 37, 38. He also agrees that it would be impossible to write a canon that enumerates with specificity all possible scenarios where a judge's impartiality might reasonably be questioned, though he believes that a rule against commenting on specific cases pending before a judge would "cover most everything that a judge ought to be prohibited from talking about." Supp. App. 208 Tr. at 39. Still, Certo joins Right to Life and Bauer in proposing to prohibit judges or judicial candidates from "pledging or promising certain results in a particular case or class of cases." Supp. App. 186 at p. 15. That said, he agrees that reasonable people may differ as to the meaning of "class of cases." Supp. App. 208 Tr. at 57.

Certo also agrees with a rule requiring recusal in cases of "clear bias" or "actual bias", and feels "it matters little whether it's an issue or a party that brings you to that situation." Supp. App. 208 Tr. at 65. Certo concedes that the advisory comments to new Canon 2.11, which say that recusal is compelled when "a reasonable person would believe from the judge's public statement that the judge

has undertaken to reach a particular result" is "certainly a more narrow wording" than the previous canon. Supp. App. 208 Tr. at 71.

C. Torrey Bauer

In the 2008 Republican primary race, Torrey Bauer was a candidate for Superior Court judge in Kosciusko County, but was not nominated. Doc. 67 Am. Compl. ¶¶ 28; Supp. App. 304 Tr. at 4. During the primary race, Bauer provided substantive answers to Right to Life's 2008 questionnaire ("Questionnaire") under the mistaken belief that the Commission was enjoined from enforcing the Canons against those who responded to the Questionnaire. Doc. 67 Compl. ¶ 28-29; Supp. App. 304 Tr. at 33. After learning that no such injunction exists, Bauer claimed he was worried that he faced prosecution by the Commission for having answered the Questionnaire. Doc. 67 Am. Compl. ¶ 30. Bauer never contacted Babcock regarding the Questionnaire. (Supp. App. 45 ¶ 11).

Bauer also subscribes to the notion that the state may prohibit judges from making pledges, promises and commitments with respect to any "class of cases." Supp. App. 304 Tr. at 40-41. Like Fichter and Certo, he believes there may be differing reasonable interpretations of what a "class of case" is. Supp. App. 304 Tr. at 41-42. Regardless, he agrees that "you need to have a canon in regard to pledges and promises," but argues that such a canon should not preclude answering the Questionnaire. Supp. App. 304 Tr. at 52. Bauer conceded it would not be

possible to have a canon conclusively answering whether responding to the Questionnaire is permissible, that "there is no canon that can answer that question unless they specifically provide an exception." Supp. App. 304 Tr. at 63.

SUMMARY OF ARGUMENT

Like the challenge to Wisconsin's judicial canons pending before this Court in *Siefert v. Alexander*, 597 F. Supp. 2d 860 (W.D. Wis. 2009) (appeal pending), this lawsuit is a full-frontal assault on attempts by states to square judicial elections with judicial independence. It is one case among many across the country attempting to erase all distinctions between judicial elections and legislative or executive elections. This case not only attacks the ability of states to prohibit judicial candidates from pledging to rule in particular ways once elected to office, but also attacks rules prohibiting judges and judicial candidates from directly soliciting or accepting campaign contributions and from speaking on behalf of a political party—canons unquestionably central to limiting the politicization of state judiciaries.

The touchstone for this and similar cases is *Republican Party of Minnesota v. White*, 536 U.S. 465, 773-74 (2002), which invalidated rules precluding judges and judicial candidates from announcing their positions on controversial issues. Invalidation of other, more crucial, boundaries against crassly partisan judiciaries, however, is not the inevitable outcome of *White*. The Supreme Court itself

cautioned in *White* that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783; *see also id.* at 805-806 (Ginsburg, J., dissenting) ("I would differentiate elections for political offices. . . . Legislative and executive officials serve in representative capacities. . . . Judges, however, are not political actors."). So, while States may not preclude all political speech by judicial candidates, they may prevent judicial campaigns from spiraling into unrestrained partisan slugfests that "sound the same as those for legislative office." *White*, 536 U.S. at 783.

The larger issue is whether judges ought to be independent of popular will or directly influenced by it. Whether judges sit by dint of Senate confirmation and presidential appointment or popular election, their role is the same: to decide individual cases according to what the law is, not what it should be. *See* The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution."). Fundamentally, that is what it means to have due process, and judicial independence is critical to it.

Deregulated judicial campaigns, by contrast, will inexorably lead to politically dependent judicial decisions. For that reason, states *must* regulate judicial politicking so as to guaranty a judiciary free of gross political influence.

See Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009). A corollary is that States *may* impose broader regulations designed to provide the cushion that the Constitution requires and to prevent elected judges from systematically becoming functionaries of political machines. *See id.* at 2269.

The Judicial Canons challenged in this case further these interests. By promoting judicial openmindedness, the Pledges, Promises and Commitments Canons ("Pledges Canons") help ensure impartiality and the appearance of impartiality in the Indiana judiciary. The Pledges Canons balance the rights of candidates and litigants alike and are narrowly tailored to further the State's compelling interest in protecting the due process right of litigants. Thus, they withstand strict scrutiny and should be upheld.

The Recusal Canon also protects open-mindedness, judicial impartiality, and due process by requiring recusal when a judge has publicly committed to rule in a particular way. The Recusal Canon is not akin to an announce clause. It has never been applied to IRL or to anyone answering the Questionnaire and there has been no threat of such enforcement. Therefore, it also survives strict scrutiny.

Similarly, the Solicitations and Partisan Activities Canons are narrowly tailored to advance the state's interests in promoting public confidence and upholding the integrity and independence of the judiciary by safeguarding against political influence and possible coercion. Thus, they must also be upheld.

ARGUMENT

I. The Pledges Canons Are Not Properly Before This Court

No challenge to either the current or former Pledges Canon is ripe under Article III because this Court has already decided that the Commission's enforcement record does not justify a pre-enforcement challenge. *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007) ("*Shepard I*"). The district court erroneously ignored this holding from *Shepard I*, though it properly dismissed as moot Counts I and II of the complaint, which attack superseded Canons 5A(3)(d)(i) and (ii)). App. 34.

A. As in *Shepard I*, the challenge to the Pledges Canon is Unripe

The Commission has declared that it will enforce the Pledges Canons only in light of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and has never enforced them against anyone who has answered the Questionnaire, despite multiple opportunities to do so. Supp. App 45 ¶¶ 12-13; 173 p. 2. Accordingly, in dismissing *Shepard I*, this Court held that the Indiana Canons and the circumstances surrounding Right to Life's prior questionnaire provided "no evidence of a real threat of enforcement," which meant that "the case was not ripe." *Shepard I*, 507 F.3d at 550.

Following the decision in *Shepard I*, several recipients of the 2008 Questionnaire contacted Commission Counsel Babcock for advice (though neither

Plaintiffs Bauer or Certo did). Supp. App. 45, ¶ 9. Babcock did not advise any judicial candidates that the canons prohibited them from answering the Questionnaire or threaten any candidates with discipline if they did. Supp. App. 45, ¶ 9. Babcock gave each substantially the same advice, that "a candidate may not make Pledges, promises, or commitments with respect to cases, controversies, or issues likely to come before the court on which the candidate will serve if elected or appointed. Otherwise, a candidate is free to express his or her views on social and legal issues." Supp. App. 45, Attach. 1, p. 4, 8, 11, 14, 17, 20, 23, 26, 31, 35, 38, 44, 49, 53. Babcock also referenced and attached a 2006 Advisory Memorandum distributed by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight and the Commission's Preliminary Advisory Opinion #1-02, neither of which instructs candidates not to answer questionnaires. Supp. App. 45; 169; 173.

The district court, which principally addressed the ripeness issue when ruling on the plaintiffs' first motion for preliminary injunction, ruled that there is a latent threat of enforcement due to the mere existence of a Pledges Canon. *See* Supp. App. 360, May 6, 2008 Order at 23-26; *see also* App. 40. While that rule may hold generally, however, it does not apply where (1) there is Supreme Court precedent on point that precludes unconstitutional enforcement; and (2) the enforcement body has already acknowledged the existence of the precedent and

asserted that it will make enforcement decisions in line with it. *See Lawson v. Hill*, 368 F.3d 955, 958 (7th Cir. 2004). In such cases, both Article III ripeness and comity interests preclude a pre-enforcement challenge. *Id.*

That was the conclusion this Court reached with respect to the Indiana Pledges Canon in *Shepard I*, 507 F.3d at 550**,** and there is no reason to assume that the Commission will now suddenly begin enforcing the Pledges Canon against judges and judicial candidates who answer Right to Life's questionnaires. Indeed, because its 2008 Questionnaire is the same as the questionnaire that provided no justiciable controversy in the last lawsuit, Right to Life is collaterally estopped from relitigating this issue. *See Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000).

IRL's appellate brief claims that answering the Questionnaire violates the Pledges Canons (old and new), Appellants' Brief ("Br.") at 10-11, but two of the plaintiffs previously had said that answering the Questionnaire does not, in fact, transgress these Canons, while the third, Certo, claimed that he brought this lawsuit to seek "clarification of the matter." Supp. App. 126 Tr. at 75; 304 Tr. at 75; 208 Tr. at 50. As this Court ruled in *Shepard I*, federal courts are not forums for litigants to seek clarification of the Indiana judicial canons, particularly where state officials exist to fulfill that function in the first instance. *Shepard I*, 507 F.3d at

548; *see also Lawson v. Hill*, 368 F.3d 955, 959 (7th Cir. 2004) ("You can't bring a federal suit just to put an official on the spot.").

2. The lack of enforcement threat is significant in another way: There is no factual basis for adjudicating IRL's purported "as-applied" challenge to the Pledges Canon. With no enforcement record and no demonstrated intent of the Commission to enforce the canon against those who answer the Questionnaire, there is no enforcement rationale to weigh against IRL's asserted rights. *See, e.g.*, *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 147 (2003). Consequently, at the very least the Court should rule that Plaintiffs have no standing to bring an as-applied challenge.

B. The challenge to the former Pledges Canon is moot

IRL continues to challenge the former Pledges Canon even though it is no longer in effect. *See* Opinion and Order, *Bauer v. Shepard*, No. 3:08-cv-196, 2009 WL 791548 at *1 (N.D. Ind. Mar. 23, 2009) ("the pre-2009 version of the Code [of Judicial Conduct] no longer has legal effect, so the Amended Complaint . . . and any motions or pleadings based on the pre-2009 version of the Code have been rendered moot."). IRL claims that it seeks to avoid "the collateral consequence of judicial discipline for the speech engaged in under the protection of th[e] [preliminary] injunction." Br. at 19.

The district court, finding *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009), persuasive, held that IRL had failed to establish a likelihood that the previous Pledges Canons would be enforced, and vacated the preliminary injunction. App. 33-34. In *Stout*, the Tenth Circuit held that a challenge to Kansas' superseded pledges and promises canon was moot where there had never been an official adjudication against the plaintiffs concerning the old canon or any threats to enforce the canon against the plaintiffs at any stage of the litigation. *Id.* Here, similarly, it is "inherently unlikely and thus not foreseeable" that the Commission will enforce the canons against IRL. *Id.* Accordingly, the claims challenging the validity of former Canons 5A(3)(d)(i) and (ii) should be dismissed as moot *Id*.

IRL relies on *Dailey v. Vought Aircraft Co.*, 141 F.3d 224 (5th Cir. 1998), *In re Hancock*, 192 F.3d 1083 (7th Cir. 1999), and *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989), but in each the plaintiff had already been sanctioned, disbarred or disqualified. *See Hancock*, 192 F.3d at 1084; *Dailey*, 141 F.3d at 226, 228; *Kirkland*, 884 F.2d at 1370. The punishment would, if left intact, have adversely affect an attorney's reputation. Here, no such prior existing sanction affects IRL, so no further inquiry into the validity of the superseded Pledges Canon is warranted.

II. The Pledges Canons Are Narrowly Tailored To Protect Litigants' Due Process Rights Through Impartial, Openminded Judges

Indiana's Pledges Canons strike a constitutionally permissible balance because they permit candidates to announce their views on disputed issues likely to come before them as judges, as long as they do not also pledge close-mindedness. The Pledges Canons are narrowly tailored to serve the State's compelling interest in achieving an impartial judiciary and therefore must be upheld.

A. Preserving judicial openmindedness is a compelling interest

IRL argues that "[b]ecause 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." Br. 17. It says that preserving judicial openmindedness "cannot possibly be a compelling State interest warranting the restriction of judicial candidate speech." Br. 15-17.

As IRL acknowledges, however, judicial openmindedness requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider view that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." Br. 16 (quoting *White*, 536 U.S. at 778). States can strive to preserve judicial openmindedness without "hypothesizing about the inner workings of a judge's psyche." Br. 17. A necessary step toward openmindedness, even if not a sufficient one, is that judicial candidates not make

statements inconsistent with impartially deciding cases likely to come before them as judges.

Undoubtedly, such a restriction "does not preclude judges from having opinions on legal issues . . . ." Br. 16. Nonetheless, there is substantial value in masking such opinions for the purposes of both discouraging closed-mindedness and maintaining the appearance of an impartial judiciary. When it comes to ensuring public confidence in the judiciary, appearances do matter. *See White*, 536 U.S. at 778. It is not the goal of the Pledges Canons to eliminate a judicial candidate's opinions and preconceptions. Rather, the goal is to ensure that *despite* those opinions, the candidate as judge will keep an open mind and be open to persuasion, and that the public reasonably believe that to be the case.

Preserving openmindedness in this way furthers the compelling State interest in judicial impartiality and the appearance of it. This, in turn, helps to ensure the protection of litigants' due process rights. *See White*, 536 U.S. at 776-77 (recognizing that states have a compelling interest in protecting the due process rights of litigants by preserving an impartial judiciary); *Watson*, 794 N.E.2d at 5-8 (upholding New York Canons because the State has an "overriding" interest in "maintain[ing] a system that ensures equal justice and due process") (internal quotations omitted).

This interest justifies limiting judicial and judicial-candidate speech. Presaging *White*, this Court in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), recognized that "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech ." 997 F.2d at 228. "[T]he principle of impartial justice under law," the Court continued, "is strong enough to entitle government to restrict freedom of speech of participants in the judicial process, including candidates for judicial office." *Id.* at 231.

B. The Pledges Canons are narrowly tailored

IRL maintains the Pledges Canons are unconstitutionally overbroad. Br. 29-30. In a facial First Amendment challenge, the plaintiffs must prove a law is "substantially" overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This is particularly difficult where constitutionally protected interests lie on both sides of the legal equation: When the State is forced to choose between the constitutional rights of competing groups, courts calibrate the scales to give the State more leeway than if the State's interest were unrelated to protecting constitutional rights. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) ("A strict standard [is] especially inappropriate" when constitutional rights are "on both sides of the ledger.").

On that score, this Court in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), observed that canons affecting judicial candidate speech implicate two conflicting principles that must be reconciled: (1) "Candidates for public office should be free to express their views on all matters of interest to the electorate;" and (2) "Judges should decide cases in accordance with the law rather than with any express or implied commitments that they may have made to their campaign supporters or to others." 997 F.2d at 227. Both of these principles, "lie deep in our constitutional heritage" such that "only a fanatic would suppose that one of the principles should give way completely to the other." *Id.*

With this tension in mind, *Buckley* focused on the Illinois Announce Canon and observed that a candidate "may not 'announce his views on disputed legal or political issues,' period." *Id.* at 228. That sort of broad limitation "reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election." *Id.*

The Illinois canon also prohibited candidates from making "[p]ledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id.* at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). Indiana's Pledges Canons, in contrast, are far more narrowly targeted, permitting *any* speech "consistent with the impartial administration of justice." Canon 4.1(A)(13); Code

of Judicial Conduct, "Terminology." The new 2009 Pledges Canons have even eliminated the prior restriction against making statements that only "appear to commit" a judge or judicial candidate. *Compare* Canon 5A(3)(d)(ii) *with* Canon 4.1(A)(13). As agreed by the district court, the 2009 Pledges Canons "does not restrict the pledges or promises that judges and judicial candidates may make to the faithful and impartial performance of the duties of the office, and it does not include the 'appear to commit' language that was problematic in the 'commit clause,'" thus making the new 2009 Pledges Canons different from the canon at issue in *Buckley*. App. 52.

Accordingly, the *Buckley* decision permits the Indiana Pledges Canons, and the other cases IRL cites (Br. 25, 29) are not instructive because they relate to canons that more broadly preclude statements that "appear to commit" judges and judicial candidates as to issues likely to come before them as judges. *See North Dakota Family Alliance v. Bader*, 361 F.Supp.2d 1021, 1039-40 (D.N.D. 2005) (prohibiting judicial candidates from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F.Supp.2d 672, 699-700 (E.D. Ky. 2004) (prohibiting judicial candidates from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court); *see also*

Duwe v. Alexander, 490 F.Supp.2d 968, 975-76 (W.D. Wis. 2007) (upholding pledges canon facially, but striking down as potentially applied to a survey due to phrase "may reasonably be viewed as committing" included in the commentary).

C. The Pledges Canons are not unconstitutionally vague.

There is no legitimate concern that the Pledges Canons are unconstitutionally vague. Br. 30-34. As the district court concluded, it is reasonable to expect judges and judicial candidates to understand and to comply with broadly worded canons. App. 54. Even the judicial candidates in this case agree that lawyers are better able than average citizens to understand the meaning of broadly worded directives. Supp. App. 208 Tr. at 60; Supp. App. 304 Tr. at 45-47.

Many judicial canons are, of necessity, broadly phrased. *See, e.g.*, Ind. Code of Judicial Conduct, Canon 2.1 ("The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities."); Ind. Code of Judicial Conduct, Canon 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary"). Federal judicial canons are phrased in substantially the same terms. *See, e.g.*, Code of Conduct for U.S. Judges, Canon 2A (comparable to Indiana's Canon 1.2). All Appellants acknowledge it is not realistic to think of all the things that judges and judicial candidate might do to

undermine the system, and then prohibit those actions precisely. Supp. App. 149 Tr. at 85; 219 Tr. at 38; 318 Tr. at 52.

Nevertheless, IRL contends that the phrase "likely to come before the court" renders the Pledges Canons unconstitutionally vague. Br. 31. At least two of the Plaintiffs, however, have demonstrated that they, in fact, *do* have a reasonable idea of what this means. *See* Supp. App. 153 Tr. at 102-03 ("Q. So are you saying, then, that the case has to be pending before that judge in order for a judge to make a pledge about a specific outcome in a particular case? . . . A. I don't believe it has to be a pending case but a case that could come before the judicial candidate or the judge."); Supp. App. 315 Tr. at 37 ("I think [the amended Pledges Canon] gives more wiggle room because it has an additional clause regarding issues that are likely to come before the court where the prior provision did not have that language.").

IRL also argues that the Pledges Canons are impermissibly vague because "[i]t is unclear how a pledge or promise is different from a commitment." Br. 31. IRL hypothesizes that "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 [] clauses, 'commit' must mean more than a 'pledge or promise.'" Br. 31-32.

The entire reason the canons use three words ("pledges," "promises," and "commitments") to describe the same general notion of "expression of prejudgment" is to avoid the sort of hypertextual parsing that IRL now undertakes. The canons are drafted to avoid a situation where a candidate in some way expresses prejudgment of an issue, then later pleads innocence because that expression was not technically, under some definition, a "pledge."

Further resolving IRL's professed vagueness concerns, the Comment specifies that "[p]ledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited." Yet IRL still complains that the Comments are unhelpful because they indicate that application of the Pledges Canon "is dependent on the perceptions of the listener—the 'reasonable[']person's belief—not the objective meaning of what the judicial candidate says." Br. 32. But given that the Canons are intended to preserve the *appearance* of impartiality (in addition to actual impartiality), it is entirely appropriate for the Canons to define the scope of permissible speech in terms of how a reasonable person would perceive it.

The Canons encourage judges to think carefully before speaking or acting, lest their recklessness dissolve public trust in the backbone of republican government. Similar values are not at take with respect to ordinary criminal or civil statutes applicable to the public, which may be more vulnerable to facial

vagueness challenges. The text of the Pledges Canons is sufficiently specific to guide those who are regulated by them.

III. The Recusal Requirement Is Constitutional On Its Face, And There Is No Basis For An As-Applied Challenge

The Recusal Canon, Canon 2.11(A), protects open-mindedness by requiring judges who have already publicly committed to rule in a particular way from presiding over proceedings involving that issue, because such commitments would likely be an indication that the judge does not have an open mind about that issue. It provides 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) where "[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."

IRL contends the canon requires "[r]ecusal for announcing one's views on issues" and is therefore unconstitutionally vague, overbroad, and underinclusive. Br. at 35. Their argument, however, ignores not only the plain text of the canon but also cases upholding similar canons elsewhere.

A. Every District Court to consider the matter, with one exception, Has Upheld a Similar Recusal Canon

Every district court, with one exception, that has addressed the constitutionality of a recusal canon similar to Canon 2.11 has upheld it under the First Amendment. *See* App. 60-61; *Indiana Right to Life v. Shepard*, 463 F. Supp. 2d 879, 887 (N.D. Ind. 2006) (finding that Indiana's Recusal Canon is "narrowly tailored to serve a compelling State interest"), *reversed on other grounds* 507 F.3d 545 (7th Cir. 2007); *Alaska Right to Life v. Feldman*, 380 F.Supp.2d 1080, 1084 (D. Alaska 2005), *vacated on other grounds*, 504 F.3d 840 (9th Cir. 2007) (holding that Alaska's recusal canon serves a compelling state interest, "i.e., it offers assurance to parties that the judge will apply the law in the same manner that would be applied to any other litigant"); *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021, 1043-44 (D.N.D.2005) (holding that North Dakota's recusal canon serves the State interest of offering "a guarantee to parties that the judge will apply the law in the same manner that would be applied to any other litigant"); *Family Trust Found. of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 708 (E.D. Ky. 2004) (holding that Kentucky's recusal canon is narrowly tailored to "serve th[e] state's interest in impartiality"); *but see Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007) (holding facially invalid a broadly worded Wisconsin recusal clause requiring recusal when a judge, while a judge or a

judicial candidate, has made a public statement that commits, or appears to commit the judge with respect to an issue or controversy in the proceeding; the inclusion of the phrase "appears to commit" rendered the canon unconstitutionally overbroad and vague).

As these courts have recognized, recusal canons are a narrowly tailored way to serve the compelling State interests of assuring equal protection and due process by removing bias for or against a party to the proceeding and seeking to guarantee that the judge will apply the law in the same manner that would be applied to any other litigant. *See Feldman*, 380 F.Supp.2d at 1084; *Bader*, 361 F.Supp.2d at 1043-44; *Wolnitzek*, 345 F.Supp.2d at 708.

B. The Recusal Canon is Not a Trojan Horse Announce Canon

IRL labors to equate Indiana's Recusal Canon with old, repudiated Announce Canons like the one invalidated in *White* despite clear textual differences. The Announce Canon that the Supreme Court struck down in *White* stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). In contrast, the Recusal Canon merely provides relief where a judge has, as a judge or judicial candidate, made extrajudicial statements that commit or appear to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Under the Recusal Canon, judges are free to announce their views on disputed legal and political issues without either incurring discipline for doing so or running the risk of later recusal, so long as they do not commit to a particular outcome in a proceeding or controversy. Likewise, the Recusal Canon does not prohibit judges from writing books and articles about legal subjects because legal analysis is not a commitment.

Additionally, the Recusal Canon is distinguishable from Announce Canons because the two types of canons have different consequences. Announce Canons subjected judges to discipline based on their statements, whereas the Recusal Canon merely requires disqualification where, based on the totality of circumstances, the judge's impartiality might reasonably be questioned. Recusal is not a sanction for engaging in speech—it is a safeguard for litigants where, for any number of reasons, the impartiality of a judge might reasonably be called into question. *See Carey v. Wolnitzek*, 2006 WL 2916814, *16 (E.D.Ky. 2006) ("the Court does not believe that the mandated recusal is a punishment for the speech").

Judges are often required to recuse from cases for such benign reasons as a past law practice, financial investments, or relationships with parties. Surely no one would suggest that requiring recusal based on such circumstances violates the rights of judges, even though the state could not on the front end prevent judicial candidates from having law practices, financial investments, or relationships. The

lesson: There is a profound distinction between forbidding conduct and requiring recusal where permitted conduct interferes with judicial independence.

C. The Recusal Canon Protects Litigants' Due Process Rights

Despite their acknowledgment that States can adopt more rigorous recusal standards than due process requires, IRL nonetheless apparently contends that recusal can never be required based on a public statement by a judge or judicial candidate. *See* Br. at 40. In their view, public statements by judges evidence only bias toward issues, not toward parties, which IRL contends should never require recusal. Br. at 36.

The Plaintiffs themselves, however, have proven unable to distinguish between "issue bias" and "party bias." *See* Supp. App. 126 Tr. at 92 ("Q. How are [party bias and issue bias] separated? . . . A. I am unclear on that."); Supp. App. 208 Tr. at 65 ("I think actual bias is what we really ought to be concerned about. If you are unable to be a fair finder-of-fact, I think it matters little whether it's an issue or a party that brings you to that situation."). Even Right to Life Director Fichter acknowledged that a judge who makes a public statement to the effect that all drunk drivers should go to jail has ultimately made a statement that appears to manifest bias against a *party* in a later drunk driving case. Supp. App. 126 Tr. at 159.

IRL further argues that "judges themselves serve as a natural restraint to preserve judicial impartiality" and that judges' awareness of their own biases is sufficient protection to limit the impact on judicial decisions. (Br. at 42-43.) Although judges can help preserve impartiality by policing their own biases, objective rules are still necessary. As the Supreme Court recognized in *Caperton*, "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton*, 129 S. Ct. at 2263. "There are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 2257 (quotations omitted). The Court recognized that the "objective standards may . . . require recusal whether or not actual bias exists or can be proved" and that "[d]ue process may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties." *Id.* at 2265 (quotations omitted).

The *Caperton* decision also noted approvingly "the judicial reforms the States have implemented to eliminate even the appearance of partiality." *Caperton*, 129 S. Ct. at 2266. The Court explained that "[a]lmost every State . . . has adopted the American Bar Association's objective standard: 'A judge shall

avoid impropriety and the appearance of impropriety,'" observing (with apparent approval) that "[t]hese codes of conduct serve to maintain the integrity of the judiciary and the rule of law." *Id.* Indeed, the Court also observed the similarity with 28 U.S.C. § 455(a), which requires that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.*

Plainly, invalidating the Indiana Recusal Canon would not only run counter to the Court's sentiments on *Caperton*, but would also cast doubt on the validity of acts of Congress governing the federal judiciary.

D. The Recusal Canon is Not Overbroad, Underinclusive, or Vague

The Recusal Canon is not overbroad because, as explained above, the restriction does not apply in every instance in which a judge has expressed views on a certain issue, or even if every case where a litigant questions the judge's impartiality. *See Wolnitzek*, 345 F.Supp.2d at 709. Rather, it applies when the judge's impartiality is *reasonably* at issue. With these limits, the Recusal Canon plainly does not prohibit "a 'substantial' amount of protected speech in relation to its many legitimate applications." *Id.* As the district court recognized, the Recusal Canon "is narrowly tailored to serve judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law." App. 60.

IRL argues that the Recusal Canon cannot be justified by reference to preserving open-mindedness 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." Br. at 41.

First, while the canon specifically requires recusal for commitments a judge has made while a judge or judicial candidate, it also makes clear that these and other listed circumstances are not necessarily exhaustive. As comment 1 to the Recusal Canon explains, "[u]nder this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply." In other words, there may be circumstances where a judge would have to recuse based on statements made prior to candidacy.

Second, even if the Recusal Canon were limited to commitments a judge has made while a judge or judicial candidate, that would be an entirely defensible limitation under the First Amendment. As a threshold matter, "[t]he concept of underinclusiveness needs to be approached with some caution . . . . Holding an underinclusive classification to violate the First Amendment can chase government into overbroad restraints of speech." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005). As *White I* itself confirms, a law regulating speech is

fatally underinclusive only where its coverage is so minimal that it cannot hope to achieve its objectives and its purported justification is undermined. *See White I*, 536 U.S. at 781.

In this context, there is a vivid difference between promises and commitments made outside a campaign and those made during a campaign. In short, "'the only time a promise to rule a certain way has any meaning is in the context of a judicial campaign.'" *Kansas Judicial Watch v. Stout*, 440 F.Supp.2d 1209, 1230 (D. Kan. 2006) (quoting Wolnitzek, 345 F.Supp.2d at 695). A non-candidate, non-judge lawyer who promises to decide a case a certain way is promising nothing because that lawyer is not in a position to effectuate the promise. But a *candidate* who makes that promise does so manifestly to attain the judgeship, which makes the promise far more significant for due process purposes.

It is exactly because voters may react to that promise by voting the candidate into office that the problem arises. If that were to happen, as the Court recognized in *White*, the elected judge would be highly unlikely to be open to reconsidering the position, and due process would suffer. That is the circumstance that the State is entitled to prevent, and extending the Recusal Canon to commitments made outside a campaign by a non-judge lawyer would not necessarily address it (though again it may, depending on the circumstances).

Finally, the Recusal Canon is not unconstitutionally vague because, as the Eastern District of Kentucky recognized, "a judge, in most instances, can determine those circumstances in which a statement might appear to commit him to an issue and thus require recusal from a case involving that issue." *Id.* at 710. Indeed, the federal judiciary's own recusal statute states that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." 28 U.S.C. § 455(a). If the federal judiciary has no trouble interpreting and complying with this standard, neither does the Indiana judiciary.

E. An As-Applied Challenge to the Recusal Canon Is Unripe

Like IRL's as-applied challenge to the Pledges Canon, its as-applied challenge to the Recusal Canon should be denied because the Canon has never been applied to the plaintiffs or to anyone answering the Questionnaire, and the Commission has never threatened any such enforcement. For the Recusal Canon to apply, a judge who answered the Questionnaire would then need to be confronted with a case touching on issues raised in the Questionnaire. Because this situation has not occurred, the Court can do nothing more than speculate as to how the Recusal Canon *might* be applied to a hypothetical judge who has given hypothetical answers to the Questionnaire and is then confronted with a hypothetical case having some unspecified relationship to the Questionnaire.

IV. The Solicitation Canons Permissibly Advance the State's Interests in Protecting the Integrity of the Judicial Power

The solicitation canons, Rules 4.11(A)(4) and (8), prohibit judges and judicial candidates from accepting or soliciting campaign contributions, except through a campaign committee. The Comments also warn judges and judicial candidates to be wary of accepting contributions from lawyers who might appear before them in order to avoid grounds for disqualification. Comment 3 to Rule 4.4. The solicitation canons are necessary to uphold the integrity of the judiciary. As the Oregon Supreme Court observed, "if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary." *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

Certo argues that the canons (1) do not preserve impartiality or prevent judicial corruption (Br. at 11), and (2) exceed any permissible scope because they ban all personal solicitations, including of his friends and family members. Br. at 12. The district court observed that Certo "has come forward with little evidence to show that his circumstances or desires are unique or that he is somehow specially affected by [the] application of the [solicitation canons]." App. 70.

A. The Solicitation Canons advance compelling State interests

The district court found that the Solicitation Canons serve numerous interests, "including judicial fairness, impartiality, independence, and integrity, as

well as the principles of justice and the rule of law." App. 69. In addition to preventing possible coercion by judges, the canons are "designed to safeguard the judiciary and judges from political influence and partisan interests and to promote public confidence in the independence and impartiality of the judiciary." App. 69-70. Judicial independence is served because "solicitations, payments, and contributions . . . have the potential to compromise a judge's freedom from influence or control." App. 70. In addition, solicitations "have the potential to compromise a judge's probity, fairness, honesty, uprightness, and soundness of character," in the eyes of the public. App. 70.

The state has a compelling interest in ensuring that its judges and judicial candidates do not misuse the influence of the position to coerce, intentionally or not, any donors into giving money to a campaign. The specter of undue judicial influence on donors is not a new concern. In *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 146 (3d Cir. 1991), *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003), and *In re Fadeley*, 802 P.2d 31, 42-43 (Or. 1990), the courts upheld prohibitions on personal solicitations under provisions similar to Canon 4.1(A) as reasonable means of protecting the judiciary and constituents from the coercive and corrupting effects of personal solicitations by judicial candidates.

Certo himself has acknowledged that judges are community leaders held in high regard by lawyers and non-lawyers, litigants and non-litigants, alike. He has recalled that, when he was growing up, judges were "people who enjoyed respect, who had influence over civic affairs, people who were never addressed by first name." Supp. App. 208 Tr. at 80. In light of that prestige, he recognizes that judges should be careful about throwing their weight around. Supp. App. 208 Tr. at 80-81.

He also testified that he understands the difference made by a direct personal solicitation, having recently been persuaded by direct invitation to volunteer for a cause even though he had ignored letters requesting the same thing:

> **Certo**: It's still not as compelling as when he called me and said, hey, we're short people to attend and you'd be great at it, so –
>
> **Q.** Yeah. Twisting your arm a little bit?
>
> **Certo**: Well, I responded to him, so yes. It's a lot harder to say no to my friend than it is to throw out a letter from the executive director of the organization.
>
> **Q**. Same principle carries over to your campaign?
>
> **Certo:** I presume so, sure

Supp. App. 208 Tr. at 79-80.

It is one thing to have your arm twisted by a friend asking you to volunteer. It is another thing entirely to have your arm twisted by a judge asking for a

campaign contribution. The State has a compelling interest in preventing judges from using their influence—intentionally or not—to shake down donors.

Certo argues that bans on direct solicitation do not serve the State's interests in impartiality and judicial openmindedness because judges and judicial candidates may still seek campaign contributions through a committee or accept unsolicited donations. Br. at 45-46. If the judge still knows the identity of the donors, he asserts, then the result is that the judge may still be biased when dealing with such donors in court. Br. at 11-12. This argument misses the point. The concern is not so much bias as it is coercion and misuse of power. As Certo concedes, most citizens, perhaps especially non-lawyers, are aware of the potency of judicial power and reflexively respect judges for it. When that respect is combined with a direct, personal appeal for campaign dollars, the situation is inherently inequitable.

For this reason, other courts have upheld no-solicitation rules despite the lack of donor anonymity. *See Stretton*, 944 F.2d at 145 (upholding a no-solicitation canon as narrowly tailored even though the candidate "may review lists of those who have contributed and the amounts"); *Simes v. Arkansas Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876, 884 (Ark. 2007) (holding that Arkansas's no- solicitation canon was narrowly tailored despite the judge's ability to know who had donated to his campaign committee). In *Stretton*, the court stressed that collecting and spending money for campaigns "invites abuses that are

inconsistent with the ideals of an impartial and incorruptible judiciary," such that "the state may [] draw a line at the point where the coercive effect, or its appearance is at its most intense—personal solicitation by the candidate." *Id*. at 144-46. Further, viewing personal solicitation as the most effective means for raising money "only underscores the effect of solicitation in person—one that lends itself to the appearance of coercion or expectation of impermissible favoritism." *Id*.

Indiana's no-solicitation rule likewise satisfies strict scrutiny analysis.

B. The Solicitation Canon is not overbroad

Indiana's Solicitation Canon is narrowly tailored because it allows candidates to solicit funds through committees. *See Stretton*, 944 F.2d at 145; *Fadely*, 802 P.2d at 44. A valid request for campaign funds from a committee member will not carry the same potentially coercive effect as an in-person request by the judge or candidate. The district court found the committee necessary to "promote[] the principles of justice and the rule of law by building barriers between judges and partisan politics." App. 70. With the committee as an intermediary, judges can decide "cases based upon the law applied to the facts, rather than solicitations accepted or turned away, money paid or not, and contributions made or not." App. 70.

Certo cites *Siefert v. Alexander*, 597 F. Supp. 2d 860, 888 (W.D. Wis. 2009) (appeal pending before this Court), for the proposition that committees are as coercive as candidates. It is reasonable, however, for the Indiana Supreme Court to find greater risk of tacit coercion (not to mention misuse of power) when the judges or judicial candidates themselves do the soliciting. Judge Crabb held that there is no basis for concluding "that judicial candidates are uniquely predatory compared to others soliciting campaign contributions." *Id*. at 887. While judicial candidates may be no more *personally* intimidating than others, however, the power of their office (or the office they seek) infuses their solicitations with a kind of social leverage not found in other contexts. When a judge solicits money, there is always the potential that the aura of power, not the worthiness of the cause or the means available, will lead the targeted donor to comply.

Certo also claims that the solicitation canons go too far in banning all personal solicitation, even of family members and non-lawyer friends who live in other states, who, he says, "would have no impact on a candidates' ability or inability to be impartial." Br. at 12. Again, however, the interest here is coercion and misuse of power, not bias.

That said, Certo also strives "to be humble in [his] work, even with the pro se litigants" Supp. App. 208 Tr. at 80-81, a task at which, he admits, "I don't always succeed" Supp. App. 208 Tr. at 80. Consistent with that goal, Certo also

admits to wariness of being perceived as coercive by lawyers who appear in his courtroom that he might solicit. "It concerns me enough," he says, "that I would intend, given the chance, not to solicit lawyers who appear in my court, yes," though even that intention is subject to how much his campaign needs the money. Supp. App. 208 Tr. at 81. Nor have those concerns caused him to consider recusing himself when lawyers who supported his campaign came before him in court. *See* Supp. App. 208 Tr. at 23-24.

At bottom, however, Certo objects to the solicitation canon because he does not believe that either he, or other judges, can be unintentionally coercive or intimidating, or at least that *he* can be trusted in that regard:

> **Q**. Do you think it's possible that other judges who might solicit directly will go beyond the limited range of friends and family you're talking about?
>
> **Certo**: It's possible.
>
> **Q**. Does it concern you that they might be coercive when they do that?
>
> **Certo**: I would hope they wouldn't.
>
> **Q**. Well, one would hope. Does it concern you that they might?
>
> **Certo**: No, sir. I don't believe judges would.
>
> **Q**. You don't think judges would be coercive in general when directly soliciting contributions?
>
> **Certo**: No, sir, I don't.

> **Q**. Do you think that non-lawyers or even lawyers who don't appear before them, regardless of the judge's intention, might perceive some coercion?
>
> **Certo**: I could speculate about it. I don't know.
>
> **Q**. Doesn't occur to you that that might be a problem?
>
> **Certo**: Wouldn't be for me.
>
> **Q**. What do you mean by that, wouldn't be for you? Because --
>
> **Certo**: I mean, because I have in my mind the idea of the people I want to solicit, and I'm not going to solicit people who are going to take that perception. I'm not going to solicit from battered women or the men who beat them or –
>
> **Q**. Don't you think we have to think more broadly here than just you?
>
> **Certo**: Mr. Fisher, I'm going to be blunt. No, not in my case for this litigation. I'm focused on the narrow range of things I want to do that I'm prohibited from doing.

Supp. App. 208 Tr. at 84-85.

The Indiana Supreme Court and the Commission, however, have a larger purview, and they are not required to subscribe to the view that no judge will coerce donations or misuse power through direct solicitations. Moreover, the concerns that justify the no-solicitation rule apply with equal force even to Certo and his proposed solicitations. Regardless of whether non-attorneys, out-of-staters, or the young are unlikely to wind up in Certo's court, there is a substantial risk that a direct solicitation by *any* judge carries with it a latent threat of coercion.

Finally, even if some relationships between judges and others may not be affected by the general respect judges enjoy, that does not make Indiana's decision to require all contributions to go through a committee overbroad. The First Amendment does not require case-by-case exceptions where the underlying rationale for a general rule may, by happenstance, not be entirely vindicated. *See Buckley v. Valeo*, 424 U.S. 1, 53 n.59 (1976) ("Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily members."). Indiana is not required to create no-solicitation exceptions for potentially infinite categories of family members, friends, non-lawyers, out-of-staters, youth or anybody else a judge claims he will not coerce.

V. The Partisan Activities Canons Help Preserve Citizen Confidence in the Independence of the Judiciary

The partisan activities canons, Rules 4.1(A)(1) and (2), prohibit judges and judicial candidates from acting as leaders of or holding offices in partisan political organizations, as well as making speeches on behalf of political organizations. For judges to maintain their legitimacy, the public must maintain confidence in their independence from partisan influences; these rules protect the role of judges as

independent arbiters, uninfluenced by political agendas. *See* Comment 1 to Rule 4.1.

For Certo, judicial independence "has very little to do as far as I can tell with how a judge earns or keeps a position." Supp. App. 208 Tr. at 94. Consistent with that view, he thinks that electing *federal* judges in partisan elections would be "quite a good system." Supp. App. 208 Tr. at 95-96. Asked about the influence of additional partisan activities on judicial independence, Certo says, "I'm not concerned about that. I just don't believe it will have that effect." Supp. App. 208 Tr. at 96.

The Indiana Supreme Court, however, *is* concerned about the issue and believes that greater partisan activities by elected judges *do* jeopardize judicial independence and the appearance of it. As part of maintaining an independent, and *apparently* independent judiciary, Indiana has a compelling interest in keeping its judiciary both independent and free from the taint of political bias.

A. The Partisan Activities Canons are not impermissibly vague

Certo asserts that the partisan activities canons are unconstitutionally vague because they fail to define "acting as a leader" and "making speeches on behalf" of political organizations. Br. at 54-55. As the district court observed, "[j]udges and judicial candidates are capable of determining what it means to act as leaders . . .

and hold offices in political organizations and what it means to make a speech on behalf of a political organization." App. 67.

Certo asks, if he is not "of necessity a leader in the state Republican Party" by virtue of holding a partisan judicial office, then "what does" constitute acting as a leader? Br. at 54. Some rather obvious examples include serving as a precinct chair, ward chair, or area chair for the Republican Party, all of which Certo has undertaken in the past. Supp. App. 208 Tr. at 102-105; *see also In re Katic*, 549 N.E.2d 1039, 1031 (Ind. 1990) (finding that the judge acted as leader of the Democratic party by (1) personally opposing the candidacy of someone running for trustee and making his position known to the public and the media; (2) threatening to relinquish his judicial position, and be replaced by a member of the Republican party, in order to run for trustee if his party did not find a different candidate; (3) personally and publicly encouraging the candidacy of certain individuals).

More broadly, "acting as a leader" is a conscious act by an individual to provide overt guidance and leadership as a member of a political organization, and the organization's reciprocal embrace of the individual's overall political vision and leadership. This is not the same as being an elected Republican official, which merely requires that the individual be both elected and Republican.

Speaking "on behalf of a political organization" is likewise a direct, reasonably understandable command. A candidate may attend party functions and

speak for himself, but may not speak at any gathering as a representative *for the party*. No judge or candidate could reasonably understand that prohibition as a "ban on all speech made in favor of a political party," Br. at 53, especially in light of the Commission's acknowledgment of the decision in *White I*. Supp. App. 173 p. 2.

Plaintiffs Certo and Bauer, of course, are lawyers, and have spoken for others on numerous occasions in various contexts, Supp. App. 208 Tr. at 103-04; 304 Tr. at 5, and undoubtedly knew that they were doing so. They should not now be permitted to deny understanding the concept of representative speech, nor is it reasonable to believe that any judicial candidate or judge would similarly lack such knowledge.

B. The Partisan Activities Canons Protect Judicial Independence

The district court ruled that the partisan activities canons "serve the compelling interests in judicial independence . . ., judicial integrity . . ., and judicial impartiality . . ., as well as the principles of justice and the rule of law." App. 64-65. *See also In re Raab*, 793 N.E.2d 1287, 1290, 1292 (N.Y. 2003) (*per curiam*) (allowing restrictions imposed on judges' ability to engage in political conduct in order to preserve the impartiality and independence of the state judiciary and maintain public confidence in the court system, thus ensuring a

"judicial system [that] is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption").

While Certo will not concede that there should be any legal limits on the political party offices judges might hold, he ultimately recognizes, as a matter of personal ethics, that trouble can arise in positions of political leadership. Despite all of his success as a Republican activist—he was Indiana Young Republican of the Year in 2007—Certo would not, even if permitted by law, aspire to the job of state party chair. Supp. App. 273 ¶ 6. Because he wants to be a good judge and a good citizen, Certo strives to comply with all laws (Supp. App. 246 Tr. at 46, 51) and to be completely honest and straightforward in his dealings with others. Supp. App. 246 Tr. at 46. But, according to Certo, being state party chair "might be viewed as incompatible" with being a judge. Supp. App. 246 Tr. at 54. He is concerned, for example, that the current chair of the Indiana Republican Party "often says things that I believe maybe he doesn't feel is absolutely true." Supp. App. 246 Tr. at 54-55. Certo says, "I don't want, as a judge, to be in that sort of position where I'm a high ranking spokesperson for a party and people will look at me and say, I'm not sure I believe what he's saying because of his job." Supp. App. 246 Tr. at 55.

This is exactly the problem of having judges act as party leaders, whether as state chair or some other position. Dual official roles erode credibility and

independence, which the State need not tolerate. Electing trial judges heightens the risk that "the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties." *In re Raab*, 793 N.E.2d at 1292- 93.

A judge or judicial candidate acting as a leader and making speeches on behalf of political parties would solidify, in the judge's own mind as well as the minds of the citizens, that Indiana's judges are political party operatives. These activities are inimical to judicial independence in a way that mere party membership or attendance at political meetings could never be. *See, e.g., Wersal v. Sexton*, No. 08-613, 2009 WL 279935 at *9 (D. Minn. Feb. 4, 2009) (rejecting the analogy of partisan endorsements to announcements of positions on issues because "[t]he only political right impinged by the endorsement clause is the right to state one's opinion about whether another candidate should be elected; and that right may be circumscribed, as long as it is done narrowly, in furtherance of the state's interest in prohibiting judicial bias and the appearance of judicial bias.").

Finally, as the commentary to the Canon observes, the restriction against speaking on behalf of a political organization is not only directed at preserving judicial independence, but also at preventing the abuse of using judicial prestige in the service of other private interests. Comment 4 to Canon 4.1. In this regard, the

Partisan Activities Canon resembles the no-solicitation Canon. Both are designed to preclude abuse, intentional or not, of judicial prestige.

C. The Partisan Activities Canons are narrowly tailored

1) The Indiana Canons Are More Carefully Balanced than the Minnesota Canons invalidated in *White II*

Certo relies principally on *White II* for his argument that the Indiana Partisan Activities Canons are fatally overbroad. *See* Br. at 49-53. Unlike in *White II*, however Indiana does not limit a candidate's ability to identify himself as a member of a political organization or to attend political gatherings. *See Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) ("*White II*") ("[Minnesota's partisan activities canon], in relevant part, forbids a judicial candidate from identifying with a political organization, making speeches to a political organization, or accepting endorsements from or even attending meetings of a political organization").

Indiana chose to restrict only those partisan activities that are particularly harmful to the reputation and integrity of its judiciary. The district court found that "[t]he Indiana Supreme Court has carefully designed the rule and the exceptions to serve these interests and has tailored them to address the different methods of judicial selection in Indiana . . . and to enhance the role of the electorate in selecting and retaining its judiciary." App. 65. In fact, "[u]nder the [partisan activities clauses], the type and the level of partisan activities permitted vary

depending upon the applicable method of selection, and this fine-tuning of the restriction serves to adjust the means (the regulation of partisan activities) to fit the ends (the identified interests)." *Id*.

Acting as a leader of, and making speeches on behalf of, political parties is the sort of political conduct that is most likely to harm the reputation and integrity of the judicial branch. These activities suggest firmly rooted political party membership and adherence, and Indiana has chosen to proscribe them in order to preserve actual and apparent judicial independence. These limitations serve as reminders to both the candidates and voters that judges are not legislators, that they are being elected to follow the rule of law, and that the interest in impartiality must be placed above all others, no matter how deeply involved the candidate was in politics prior to his campaign. At the same time, the canons do not preclude judges from identifying with parties or attending party functions. Indiana's limitations on partisan activities strike a better balance between political freedom and judicial impartiality and openmindedness than Minnesota's former canons. These differences render *White II* inapposite.

2) The Partisan Activities Canons Prohibit Speech Only *On Behalf of* a Party, not Speech *Supporting* a Party

Certo argues that the partisan activities canon impermissibly bans "all speech made in favor of a political party" and thereby "effectively prohibits

candidates from announcing their views." Br. at 53. Under no reasonable interpretation does Rule 4.1(A)(2), which merely provides that "A judge or judicial candidate shall not . . . make speeches on behalf of a political organization," prohibit a judge or judicial candidate from announcing support for, or from, a political party. In fact, a separate canon, Rule 4.1(C), expressly protects those rights: "A judge in an office filled by partisan election, a judicial candidate seeking that office, and a judicial officer serving for a judge in office filled by partisan election may at any time . . . identify himself or herself as a member of a political party." Thus, the district court properly found that the 2009 Code permits Certo "to engage in a broad range of speech (including expressions of views on legal, political, and social issues) and to identify with a political organization and attend political events." App. 66.

The district court correctly held that prohibiting such activities as serving as a delegate to a state party convention "addresses concerns raised by public and official involvement with political organizations and their agendas[.]" App. 67. Furthermore, the restrictions serve the important need of maintaining a judiciary with "independence, integrity, and impartiality, as well as the principles of justice and the rule of law." *Id.* at 66. The Canons are narrowly tailored to assure that judges act under the rule of law rather than based upon partisan interests; they

prohibit activities with the greatest potential for harm but allow activities with less potential for harm. *Id.* at 66-67.

Certo argues that leading a political party and speaking on behalf of a political party would not prevent him from being impartial. But in *Caperton* the Court recognized that a "judge's own inquiry into actual bias . . . is not one that the law can easily superintend or review." *Caperton*, 129 S. Ct. at 2263. Rather, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral." *Id*. at 2262. Given these guidelines, why should citizens and litigants have to take Certo's word on his impartiality, and, in any event, how would anyone know if he was being honest? Indiana's citizens should, from the start, have the confidence that its judges and judicial candidates are impartial and independent. Demonstrating independence requires that judicial candidates and judges maintain some distance from entanglement with political parties. Otherwise the public may perceive the judge's decisions to be preordained by the party platform. The canons serve this interest by preventing judges from, in effect, shaping the party platform by means of party leadership and speaking "on behalf of" the party.

3) Recusal for actual bias would not accomplish the same goals

Certo also claims that recusal is a more appropriate remedy for handling any impartiality concerns that might arise from a judicial candidate's excessive display of partisanship. After-the-fact recusal, however, is a far inferior method of addressing the forces of bias and the appearance of bias.

Ex post recusal does not prevent the *ex ante* appearance of bias and political control. The point of the partisan activity canons is to prevent the entire judicial system from falling into disrepute as nothing but another body of elected partisans who act based on political will rather than the rule of law. The moral persuasion of the judiciary is at stake. Former Texas Supreme Court Chief Justice Thomas R. Phillips wrote: "[i]f future elections continue to reinforce the idea that judges are mere political players, very serious consequences could ensue," the main being that by bypassing the normal avenues of law creation, *i.e.* constitutions and ballots, statutes and regulations as well as the common law, "[t]he basic notion that we are a nation of laws, interpreted and applied by judges but ultimately made by the people themselves . . . would sustain a terrible blow." *The Merits of Merit Selection*, 32 Harv. J. L. & Pub. Pol'y 67, 87-88 (2009).

To protect the integrity of the judiciary, the State should be able to permit limited partisan engagement for elected judges while curbing the political immersion of judges and judicial candidates. By limiting partisan activity, the

State helps promote trust in the judicial system and avoids frequent recusal requests, which undermine the efficiency and integrity of the judicial system by placing judge's actions and intentions under a microscope.

D. The Partisan Activities Canons are not underinclusive

Additionally, Certo asserts that the partisan activities canons are *underinclusive* because they fail to account for judges who have been life-long members of political parties, allow judges to participate in some political activities, and don't prevent judges from acting as leaders of, or making speeches on behalf of, other "political" organizations. Again, however, a law regulating speech is fatally underinclusive only where its coverage is so minimal that it cannot hope to achieve its objectives and its purported justification is undermined. *See White I*, 536 U.S. at 781.

1. The partisan activities canons are not underinclusive with regard to lifelong political party members. The canons do not purport to limit *who* may become a judge; rather, they limit what candidates, regardless of activities in the past, may do now. They are designed to ensure that, when they are most visible, judges and judicial candidates do not carry on as pawns in the political chess game.

Judges are not legislators. There are restrictions on what judges and candidates may do because without them, people would see judges as another extension of the major political parties, beholden to a higher power, legislating

from the bench if necessary to further the party's interests. Protecting the integrity of the judiciary does not require prohibiting former politicians from being judges. It requires ensuring that, regardless of who is elected, the judge will be independent and impartial rather than apparently subject to party direction and control. *See* App. 66-67 ("some individuals with long political histories become judges, but they too become subject to the same rules governing judicial impartiality, independence, and integrity, which helps to put their political and partisan histories in the past").

2. Certo's assertion that the canons are infirm because they do not cover all political activities is similarly flawed. Certo points to Canon 4.1(C), which allows candidates or judges to "(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," as proof that the State has arbitrarily decided that a 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." Br. at 52.

At some point the plaintiffs need to decide what it is that they want from the Code of Judicial Conduct. On one hand they argue that the Partisan Activities Canon goes too far, like the canon invalidated in *White II* for precluding party affiliation. Br. 49-50. On the other hand they argue that, if Indiana is going to

preserve openmindedness, it must go so far as to prevent judges from identifying with parties, donating to parties, and attending party functions. Br. at 51-52. They cannot have it both ways.

As the Plaintiffs seem to understand when drawing comparisons to *White II*, the First Amendment's narrow tailoring requirement compels the State to reach only those partisan activities necessary to serve the compelling interest of preserving judicial independence. *White I*, 536 U.S. at 775. The district court acknowledged this requirement, stating that "partisan activities of judges and judicial candidates should be regulated so as to permit those with less potential for harm and prohibit those with the greatest potential for harm." App. 67.

The state has identified two primary categories of activities—taking party leadership posts and speaking on behalf of a party—that it believes are most destructive to judicial integrity and the public's perception of the judiciary's propriety. The leaders of partisan political organizations are tasked with upholding and supporting the governing philosophy that the political party stands for. A judge assuming such a role implicitly conveys the primacy of such partisan interests rather than the rule of law. Similarly, it is one thing to be identified as a Republican, to be seen at Republican gatherings, and to make speeches at such gatherings concerning one's own campaign. It is another thing entirely to take to the hustings to speak, as a party activist, of the glories of one's political party, or to

assume a leadership role within the party. That sort of endorsement and engagement is much more likely to convince the public that judges act as partisan vessels for carrying out the party platform rather than as neutral decision-makers.

As the district court held, the activities restricted under Rule 4.1(A)(1) and (2) "address[] concerns raised by public and official involvement with political organizations and their agendas, but these concerns do not arise or do not rise to the same level with campaign activities permitted by Rules 4.1 and 4.2." App. 67. The Partisan Activities Canons are therefore not fatally underinclusive.

3. Finally, the partisan activities canons are not rendered underinclusive by failing to encompass all organizations with political agendas. Participating in the Sierra Club or the NRA is not the same as acting as a leader or making speeches on behalf of "a political party or organization, the principal purpose of which is to further the election or appointment of candidates to political office." *See* Ind. Code of Judicial Conduct, *Terminology*. Organizations such as the Sierra Club and the NRA exist to advocate for certain issues and rights. These groups may be involved in the electoral process through donations, endorsements and advertisements, but not to the extent of a political party.

Political parties nominate candidates for office and thereby control to a large degree the electoral playing field. *See, e.g.*, Ind. Code § 3-8- 4-10. A judge's party leadership suggests some degree of control over the political landscape, which is

inconsistent with being an independent and impartial arbiter. As the district court observed, "[t]he rules regulating the political and campaign activities of judges and judicial candidates are tailored to address the special threats to judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law, that are posed by involvement in ordinary political and campaign activities in public elections." App. 67. If States are to be given any leeway in balancing the compelling interests of judicial integrity and independence with the First Amendment rights of judges and judicial candidates, they must be permitted to draw these sorts of distinctions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

The undersigned, counsel for the Defendants-Appellees, Randall T. Shepard, *et al.*, furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 13,992 words.

Dated: October 12, 2009.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)(1)

The undersigned, counsel of record for the Defendant-Appellees, Randall T. Shepard, *et al.*, furnishes the following in compliance with Seventh Circuit Rule 31(e)(1):

I hereby certify that a digital version of this Brief, including a Supplemental Appendix pursuant to Seventh Circuit Rule 30(e), was furnished to the Court at the time the paper brief was filed.

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CERTIFICATE OF SERVICE

The undersigned, counsel for Defendants-Appellees, Randall T. Shepard, *et al.*, hereby certifies that on this 12th day of October, 2009, two paper copies of the foregoing "Brief of Defendants-Appellees" and one copy of the separate Supplemental Appendix, as well as a digital version of the "Brief of Defendants-Appellees" has been served via United Parcel Service, overnight delivery, to:

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