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

TORREY BAUER, DAVID CERTO, and INDIANA RIGHT TO LIFE, INC.,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. 3:08-cv-196
RANDALL T. SHEPARD, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants Randall T. Shepard, *et al.*, respectfully submit this memorandum in support of their Motion for Summary Judgment.

STATEMENT OF ISSUES

I. Whether Plaintiffs are barred by Article III from continuing to challenge judicial canons that have been superseded.

II. Whether Plaintiffs have standing to challenge the new Indiana Pledges, Promises and Commitments (PPC) Canon, even though they have elucidated no predicate facts showing injury from the new PPC Canon and even though that Canon is substantially narrower than the canons it superseded.

III. If standing otherwise exists, whether, under *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007), the Plaintiffs are barred form bringing a pre-enforcement challenge to the Indiana PPC Canon.

IV. Even if Plaintiffs may bring a facial challenge to the old or new PPC Canons, whether the lack of Commission enforcement of either against candidates who answered the Indiana Right to Life questionnaire precludes an as-applied constitutional challenge.

V. Whether the Indiana PPC Canon is facially valid under the First Amendment.

VI. Whether the Indiana Recusal Canon is facially valid under the First Amendment.

VII. Whether Plaintiffs have standing to assert an as-applied challenge to the Indiana Recusal Canon when no occasion for recusal for answering the IRTL questionnaire has arisen.

VIII. Whether the Indiana canon prohibiting judges and judicial candidates from directly soliciting campaign contributions is facially valid under the First Amendment and as applied to Judge Certo.

IX. Whether the Indiana canon prohibiting judges from speaking on behalf of political parties is facially valid under the First Amendment and as applied to Judge Certo.

STATEMENT OF MATERIAL FACTS

The Challenged Canons

The Indiana Code of Judicial Conduct consists of a preamble and four Canons that are generally worded to cover a broad array of conduct. The Indiana Commission on Judicial Qualifications ("Commission") advises judges concerning the Canons, both formally and informally. Ex. A ¶ 2; *see also Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 546 (7th Cir. 2007) ("*Shepard I*"). The Commission's counsel, Margaret Babcock, is available to advise judicial candidates as to whether a proposed course of conduct would violate the Canons. Ex. A ¶ 2; *see also Shepard I*, 507 F.3d at 546.

Plaintiffs challenge canons pertaining to pledges of conduct in office, recusal, solicitation of contributions, and partisan activities, all of which were amended as of January 1, 2009. A chart comparing the old and new canons is included as Exhibit B, and is summarized as follows:

1. 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), 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." This memorandum will refer to it as the PPC Canon. There are two substantive differences between the old and new PPC 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." Second is the elimination of the rule prohibiting statements that "appear to commit" candidates with respect to issues likely to come before them.

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."

2. Recusal: The previous Recusal Canon, 3E(1), has been replaced and is now found under the broader Canon 2, which provides that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." 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.

3. Solicitation: The restrictions on solicitation of contributions were previously found in Canons 5A(1) and 5C(2). The solicitation rules are now found under the broader 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." Under Canon 4.1(C), judicial candidates may voluntarily contribute to and attend events sponsored by political organizations. These Canons are materially unchanged.

4. 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 are also materially unchanged from the prior version.

The Parties

1. Indiana Right to Life: Plaintiff Indiana Right to Life ("IRTL") is a non-profit corporation whose purpose is "to promote legislative and constitutional changes that promote the right to life." Am. Compl. Ex. 1 at 2 (Articles of Incorporation). In 2002, 2004, and 2008, IRTL sent a questionnaire to Indiana judicial candidates covering topics related to legal rights to abortion, physician-assisted suicide, and other similar matters. Ex. C, p. 3; Ex. D, p. 4; Ex. E, p. 4. According to Mike Fichter, executive director of IRTL, in 2008 IRTL "prepared to distribute the questionnaires knowing that a lawsuit would need to be filed to challenge the current judicial canons." Ex. F, 40.

As in 2004, several recipients of the 2008 IRTL questionnaire contacted Babcock for advice. Ex. A ¶ 9. Babcock has given 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." Ex. A, 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. Ex. A; Ex. G; Ex. H. She also quoted from the 2007 ABA Model Code of Judicial Conduct, Canon 4 (political activities), which, she said, "the Indiana Supreme Court will use . . . as a template for a revised Indiana Code." Ex. A; Ex. I.

IRTL claims injury resulting from the PPC Canon both because it believes some candidates refrained from answering the questionnaire for fear of violating the canons, and

because it fears that publishing the questionnaire answers will lead to discipline of candidates who have answered it. Am. Cmpl. ¶ 52; Ex. F, 73, 74. When asked why IRTL feared the PPC Canon would be enforced against judicial candidates who responded to the 2002 and 2004 IRTL questionnaires, IRTL executive director Fichter cited "the wording of the judicial canons." Ex. F, 53, 59. With respect to its plan to issue a questionnaire in 2008 as a predicate for this lawsuit, Fichter stated that IRTL fears enforcement "based on our view that the current canons are too broadly written and in addition that the Judicial Commission has never stated that they would not bring disciplinary action against candidates responding to the survey." Ex. F, 77.

Fichter concedes that the state may, consistent with the First Amendment, prohibit judges and judicial candidates from making some pledges, promises and commitments. Ex. F, 102-105, 118, 121. He believes, for example, that it would be permissible under the First Amendment to prohibit candidates from pledging to send all drunk drivers to jail. Ex. F, 159. Fichter agrees that a judicial candidate might make an improper (even in his view) pledge, promise, or commitment without using particular words (Ex. F, 80, 85), but he does not believe the IRTL questionnaire asks candidates to make any pledges, promises or commitments inconsistent with the Indiana judicial canons. Ex. F, 75, 77.

Indeed, the Plaintiffs all have, in response to defendant's interrogatory number 24, endorsed the idea that it would be appropriate for the State to prohibit pledges, promises, and commitments with respect to "particular cases or classes of cases" or where the judge's bias "is clear." Ex. J, 15. Fichter believes "class of cases" in that response refers to "any case dealing with a specific issue" such as abortion or physician malpractice (Ex. F, 86, 87), and concedes that "class of cases" is such a broad concept that its definition would be open to reasonable disagreement. Ex. F, 87, 88. Still, he adheres to the notion that "class of cases" is both a suitable

limit for the types of judicial candidate pledges, promises and commitments that the state may prohibit and a sound basis for compelling recusal. Ex. F, 86, 91. Even with respect to compelling recusal when there exists "clear bias," Fichter acknowledges that there is always going to be room for interpretation where reasonable people may disagree. Ex. F, 87, 88.

Fichter believes that the recusal canon, which applies where a judge's impartiality might reasonably be questioned (Ind. Code of Judicial Conduct, Canon 2.11), would require recusal of a judge who has answered IRTL's questionnaire that is confronted with one of the issues covered on the questionnaire. Ex. F, 95, 96. He also believes, however, that such a judge would not be required to recuse under the plaintiffs' proposed "classes of cases" or "clear bias" canon (Ex. F, 97), though he cannot explain the difference since both types of canons require some degree of individual interpretation. Ex. F, 97-99. Also, 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." Ex. F, 98. However, when asked how the two notions—issue bias and party bias—can be separated, Fichter responded, "I am unclear on that." Ex. F, 98. With respect to the types of promises that judges should be permitted to make, Fichter identified only a pledge along the lines of, "that my court will operate with integrity." Ex. F, 121, 123.

Fichter prefers that candidates answer the IRTL questionnaire in order to provide voters with an idea about the candidate's morals and judicial philosophy. Ex. F, 125, 126. Indeed, he specifically disagrees with Chief Justice John Roberts's refusal at his Senate confirmation hearing to give his personal views on the propriety of removing a feeding tube from a close relative in vegetative state. Ex. F, 130, 131, 158. Still, Fichter acknowledges that even efforts to

prompt judges to reveal details about their judicial philosophy can go too far, as when a judge promises to jail all drunk drivers. Ex. F, 159.

2. Judge David Certo: Plaintiff David Certo has spent many years involved in partisan politics. In high school, he participated in the Eastern Indiana Model Legislature, a civics-oriented exercise where students play roles as legislators, and there first discovered he was a Republican. Ex. K, 97; Ex. L, 19. As an adult, he has frequently returned to the program to advocate Republican Party politics. Ex. K, 121-23.

Over the years, Certo has maintained continuous involvement in Republican Party activities. 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. Ex. K, 102-104. In 2005, Certo ran for the Republican nomination for Treasurer of State, but withdrew when it became clear he would not have the support of Governor Mitch Daniels, who is a Republican. Ex. K, 98-101. In 2007, Certo served on a committee that successfully recruited the annual convention for the Young Republican National Federation, to take place in Indianapolis in June 2009. Ex. K, 103, 105-106. Certo was named "Young Republican of the Year" for the State of Indiana by the Indiana Republican Party in 2007. Ex. K, 105.

Certo was appointed by Governor Daniels to the Marion Superior Court bench in 2007. Ex. K, 101-102, 104. He accepted the appointment to judicial office knowing that the judicial canons would limit his partisan political activities. Ex. L, 16, 48. He originally thought these limits would be a minor nuisance, but has since deemed them to be a major intrusion on his political activities. Ex. L, 46. And while Certo assiduously abides by the Canons, he misses partisan campaigning and would like to undertake greater partisan activities. Ex. K, 96, 112.

Judge Certo's court covers a limited category of domestic disputes. It consists of requests for protective orders, emergencies in domestic and family violence, stalking or sex offenses, and charges of contempt for violating protective orders. Ex. K, 4, 109. Certo does not keep divorce or even criminal cases on his docket through final resolution. Ex. K, 4. He handles matters only at the stage where a protective order, or contempt issue arising from a protective order, arises. Ex. K, 4, 5. Asked to think of a case he might handle touching on the subjects of the IRTL questionnaire, Certo responded, "I can't think of any offhand, no." Ex. K, 42.

Judge Certo professes to believe in the concept of judicial independence, which in his view is important 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." Ex. K, 7. And while he views a judge's "actual" independence to be more important, Judge Certo recognizes that maintaining the appearance of independence is also important for a judge. Ex. K, 9, 74. Certo acknowledges that independence is more important for judges than elected legislators and executives, where political pressure is acceptable. Ex. K, 10-11. Certo says that judges elected on partisan tickets are "by definition" leaders in their political parties, such that merely being such a judge might put him in violation of the canons. Ex. M ¶ 6. Certo says that the First Amendment allows no limits on the partisan political leadership positions that an elected judge might assume, including the position of state party chair. Ex. M ¶ 6.

Judge Certo also professes to be concerned about money in judicial politics. As a matter of principle, he would prefer for his campaign not to accept any donations from lawyers—if only he could afford it. Ex. K, 25, 28. Certo recognizes the potential for an appearance of favoritism

or bias of a judge toward a lawyer who has donated to his campaign. Ex. K, 26. Still, with a need to pay for such things as $100 golf sponsorships, a $250 lunch, or $100 contributions to campaigns for state legislators (Ex. N; Ex. O), Certo feels he has no choice but to accept campaign contributions from everyone, including lawyers who practice in his court. Ex. K, 25-28, 30. And while Certo is seeking in this lawsuit the right to solicit political contributions directly, he claims that he "would rather not solicit lawyers if I could avoid it." Ex. K, 25. Indeed, he believes "the better practice 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." Ex. K, 26.

On this score, Certo says he does not "make a distinction" between merely *accepting* contributions from lawyers who appear in his court and *soliciting* contributions from lawyers who appear in his court. Ex. K, 26. Still, Certo claims he would never *solicit* contributions from lawyers appearing in his court, but says "I might" *accept* such contributions. Ex. K, 27. To clarify, Certo says that his philosophy is against accepting such contributions, but he has not returned any donations from lawyers who appear in his court because "[w]e still have a significant debt." Ex. K, 28. And, as it turns out, not even his disclaimer against *soliciting* lawyers who appear in his court is absolute. When asked whether that personal rule would depend in part on need, Certo replied, "I think so." Ex. K, 30.

With respect to the PPC Canon and its relation to the IRTL questionnaire, Judge Certo signed answers to interrogatories stating that "For each question on the Questionnaire, judicial candidates are not asked to pledge or promise certain results in a particular way. Rather, they are asked what their personal views are on disputed legal issues in broad terms." Ex. J, 5. Yet, at both the April 30, 2008 preliminary injunction hearing and his deposition, Judge Certo stated that

answering the questionnaire *would* violate the canons, even apart from what the Commission might think about the matter. Ex. K, 45-47; Ex. R at 34. In that regard he disagrees with his co-plaintiffs Torrey Bauer and Indiana Right to Life. Ex. K, 53; Ex. F, 75; Ex. P, 64, 75.

Judge Certo agrees with the general proposition that judges and judicial candidates can constitutionally be precluded from saying things that convey lack of impartiality to the public. Ex. K, 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." Ex. K, 39.

Still, Judge Certo signed responses to the defendant's interrogatories stating that a less restrictive alternative to the current canons would be to prevent judges or judicial candidates from "pledging or promising certain results in a particular case or class of cases." Ex. J, 15. Asked about this response at his deposition, Certo initially requested that it be repeated because "I don't deal with classes of cases." Ex. K, 55. When pressed about the meaning of "class of cases," he said "I don't know," (Ex. K, 55) and "[i]n this instance I don't know where that term came from" (Ex. K, 56), but allowed that promising jail time for drunk drivers and wife beaters "might be a class of case in the sense I would mean it where I think it would be harmful to how litigants and attorneys might view our court if I were to say things like that." Ex. K, 57. But when pressed as to whether the state should be permitted under the First Amendment to have a rule prohibiting judicial candidates from making such statements, Certo conceded, "I don't know." Ex. K, 59. Similarly, when asked whether "clear bias," the standard for recusal set forth in the plaintiffs' answer to interrogatory 24, differed from a circumstance where a judge's impartiality might reasonably be questioned, Certo said, "I don't know." Ex. K, 63.

Certo, however, does acknowledge that it is appropriate to have a rule requiring recusal in cases of "clear bias" or "actual bias" (Ex. K, 65), and indeed that "it matters little whether it's an issue or a party that brings you to that situation." Ex. K, 65. Certo also allows 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. Ex. K, 71.

Even before he became a lawyer, Judge Certo viewed judges as individuals who were community leaders, as "people who enjoyed respect, who had influence over civic affairs, people who were never addressed by first name." Ex. K, 80. He also agrees that lawyers view judges as powerful, and that, because of the power they project and respect they command from lawyers and non-lawyers alike, judges should be careful not to throw their weight around inside or outside the courtroom. Ex. K, 80-81.

3. Torrey Bauer: Plaintiff Torrey Bauer was a candidate for the Republican nomination for Superior Court in Kosciusko County in 2008 but was not nominated. Am. Compl. ¶¶ 28; Ex. P, 4. During the primary race, Bauer provided substantive answers to IRTL's 2008 questionnaire. Am. Compl. ¶¶ 28-29; Ex. P, 33. Bauer never contacted Babcock regarding IRTL's questionnaire (Ex. A ¶ 11), and he claims to have answered the questionnaire under the misapprehension that the Commission was enjoined from enforcing the Canons against those who responded to the IRTL questionnaire. Am. Compl. ¶ 28. After learning that no such injunction exists, Bauer claimed he was worried that he faced prosecution by the Commission for having answered the questionnaire. Am. Compl. ¶ 30.

With respect to plaintiffs' answer to interrogatory 24, Bauer elaborated that "I think you probably ask ten attorneys what a class of case is you may get ten different answers" and "[i]t is

what it is." Ex. P, 41-42. Regardless, Bauer 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 IRTL questionnaire. Ex. P, 52. Bauer conceded it would not be possible to have a canon conclusively answering whether responding to the IRTL questionnaire is permissible, that "there is no canon that can answer that question unless they specifically provide an exception." Ex. P, 63.

ARGUMENT

I. Regarding the PPC Canons, Substantial Article III Questions Remain

Threshold jurisdictional questions continue to plague this lawsuit.

1. First, no challenge to either the current or former PPC Canons is ripe under Article III because the Seventh Circuit 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 Commission has declared that it will enforce the PPC 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 IRTL questionnaire, despite multiple opportunities to do so. Ex. A ¶¶ 12-13; Ex. H, 2. Accordingly, in dismissing IRTL's previous lawsuit, the Seventh Circuit held that the Indiana Canons and the circumstances surrounding IRTL'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.

Indeed, because its 2008 Questionnaire is the same as the questionnaire that provided no justiciable controversy in the last lawsuit, IRTL is collaterally estopped from relitigating this issue. *See Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000). Two of the plaintiffs even *agree* that answering the questionnaire does not, in fact, transgress the PPC Canon. Ex. F, 75; Ex. P, 75. The third plaintiff, Judge Certo, claims that he brought this lawsuit to seek

"clarification of the matter." Ex. K, 50. As the Seventh Circuit ruled in the prior lawsuit, however, 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 Plaintiffs' purported "as-applied" challenge to the PPC Canon. With no enforcement record and no demonstrated intent of the Commission to enforce the canon against those who answer the IRTL questionnaire, there is no state enforcement rationale to weigh against the plaintiffs' asserted rights. In an as-applied challenge the state typically explains how the rationale for the statute supports enforcement under the particular circumstances. *See, e.g.*, *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 147 (2003). That cannot happen here because the Commission has never concluded that answering the IRTL questionnaire violates the PPC Canon. Consequently, any judgment the Court might make about the constitutionality of applying the PPC Canon to those who answer the questionnaire would not decide an actual dispute; it would merely advise the parties what the answer would be in the event such enforcement. Accordingly, at the very least the Court should rule that Plaintiffs have no standing to bring an as-applied challenge.

3. The Indiana Supreme Court's adoption of new canons effective January 1, 2009, also calls into question Plaintiffs' standing to challenge the prior PPC Canons. Just recently in *Kansas Judicial Review v. Stout*, No. 06-3290, 2009 WL 1026486 (10th Cir. April 17, 2009), the Tenth Circuit ruled that individuals and groups injured by a superseded set of judicial canons could not maintain a lawsuit seeking to invalidate them because the chance of enforcement of the

old canons against prior conduct was so remote. Particularly given the lack of enforcement of the old canons in Indiana, so, too, should this Court reject Plaintiffs' claims against the former PPC Canons.

4. Finally, the new PPC Canon has not caused any of the Plaintiffs sufficient Article III direct injury to justify a federal court challenge to it. Standing for challenging the prior PPC Canon was predicated entirely on the supposed applicability of the old canons to those who answered the 2008 IRTL questionnaire. Am. Compl. ¶¶ 60-71. Certainly the new Canons cannot apply to the conduct of judges or candidates who have answered that questionnaire in the past, so neither plaintiffs Bauer or Certo is injured by the new Canons. For the same reason, IRTL is not injured by the new Canon because no candidates have refused to answer IRTL's questionnaire in light of the new PPC Canon, which, as described in the Statement of Material Facts, is substantially narrower than the old PPC Canons. There is a distinct possibility that, if IRTL issues its questionnaire prior to the next Indiana judicial elections, no candidates will refuse to answer or express fear of enforcement because of the narrower scope of the new canons.

Accordingly, as to the challenge to both the old and new PPC Canons, the Court should grant summary judgment for lack of Article III jurisdiction.

II. The PPC Canon is Constitutional on Its Face

In facial First Amendment challenges, plaintiffs have the burden of proving the 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 should 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."). Nevertheless, because the PPC Canon "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms' – speech about the qualifications of candidates for public office," *White*, 536 U.S. at 774 (citation omitted), the Canon must be narrowly tailored to serve a compelling interest. *Id.* at 774-75.

The PPC Canon is, indeed, narrowly tailored to serve the State's compelling interesting in achieving an impartial judiciary and must therefore be upheld. In short, the PPC Canon strikes a constitutionally permissible balance because it permits candidates to announce their views on disputed issues likely to come before them as judges, as long as they do not also pledge closed-mindedness.

A. The State has a compelling need to protect litigants' due process rights

Protecting due process is one of the state's most compelling interests, and the Due Process Clause requires States to maintain an unbiased and impartial judiciary. *See White*, 536 U.S. at 776-77 (recognizing states have a compelling interest in protecting the due process rights of litigants by preserving an impartial judiciary); *In re Watson*, 794 N.E.2d 1, 5-8 (N.Y. 2003) (upholding New York's PPC Canons because the State had an "overriding" interest in "maintain[ing] a system that ensures equal justice and due process") (internal quotations omitted). This requirement justifies limitations on judicial speech, even in the context of political campaigns. In *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993), the Court stated, "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." Further, "the principle of impartial justice under law 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.

States advance the cause of impartiality by preserving judicial open-mindedness. "This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *White*, 536 U.S. at 778. Further, "impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. . . .[I]mpartiality in this sense, and the appearance of it, are desirable in the judiciary. . . ." *Id*. (emphasis in original).

B. The PPC Canon is narrowly tailored for this compelling State interest

Indiana's PPC Canon is narrowly targeted at providing "impartial justice"—and thus protecting litigants' due process rights. When it comes to protecting the important due-process rights of future litigants, States are not limited to the woefully inadequate precaution of prohibiting candidates from making pledges, promises, or commitments concerning only particular cases or issues that are *already* pending before a tribunal. A litigant's due process rights would be violated if the adjudicator presiding over his case had earlier promised to rule against him or against all defendants in his situation. By restricting judicial candidates from making pledges, promises, or commitments that are inconsistent with impartial adjudication about cases, controversies, and issues likely to come before them, Indiana's PPC Canon protects judicial impartiality and *future* litigants' due process rights. *See Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1231 (D. Kan. 2006) (holding Kansas canons to be "narrowly tailored to serve the state interest of impartiality, meaning open-mindedness"), *vacated on other grounds*,

2009 WL 1026486 (10th Cir. April 17, 2009). The new PPC Canon, in fact, eliminates the prior restriction against making statements that only "appear to commit" a judge or candidate to ruling a particular way. *Compare* Canon 5A(3)(d)(ii) *with* Canon 4.1(A)(13). It also broadens permissible speech to include anything consistent with impartial adjudication, even if it concerns cases, controversies and issues likely to come before the Court. *Id*. These changes eliminate any serious overbreadth concerns. *Cf. North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) (noting the "impermissible overbreadth" of "appear to commit" in North Dakota's PPC canon and holding that that language "renders the canon indistinguishable from the 'announce clause' which was struck down as unconstitutional in *White*.").

Critically, Indiana's Canon targeting judicial campaign promises that would erode equal justice is more narrowly targeted than the canon invalidated in *Buckley*. That canon prohibited judicial candidates from "announc[ing] [their] views on disputed legal or political issues . . . ." 997 F.2d at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). To be sure, the Illinois canon also prohibited "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id*. (quoting Ill. S. Ct. R. 67(B)(1)(c)). But that permits far less speech than the current PPC Canon, which allows any speech consistent with the impartial administration of justice, *i.e.*, consistent with judicial open-mindedness. Canon 4.1(A)(13); Code of Judicial Conduct, "Terminology." Furthermore, unlike the prior and current Indiana PPC Canons, the Illinois canon did not include a proscription against making statements that *commit* the candidate with respect to cases, controversies or issues likely to come before the court, but instead prohibited all announcements on disputed issues. *See* Canon 5A(3)(d)(ii); Canon 4.1(A)(13); *Buckley*, 997 F.2d at 225. As explained below, this difference is critical for purposes of understanding the limits of *Buckley*, particularly in the wake of *White*.

To begin, *Buckley* did not say that States were precluded from cabining judicial-candidate speech *at all*. Rather, the Court observed, canons that affect judicial-candidate speech implicate two conflicting principles demanding reconciliation: (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 law rather than with any express or implied commitments that they may have made to their campaign supporters or to others." *Id*. at 227. Both of these principles, the Court said, "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 with alarm that it "[a candidate] may not 'announce his views on disputed legal or political issues,' period." *Id*. at 228. In the Court's view, this 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*.

Compounding the problem, Illinois added a proviso that a judicial candidate "may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him." *Id*. at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). "[T]he problem is . . . that what is given with one hand is taken away with the other" because "[a]lmost anything a judicial candidate might say about 'improv[ing] the law' could be taken to cast doubt on his capacity to decide some case impartially, unless he confined himself to the most mundane and technical proposals for law reform." *Id*. at 229. The Illinois canon prevented improper judicial-candidate statements by prohibiting nearly all statements. *See id*. at 230.

The scope of the Indiana Canon, in contrast, is much narrower and avoids such substantial overbreadth. Indiana's PPC Canon includes exactly the sort of prohibition against commitments that the Seventh Circuit insinuated was fatally lacking—and likely valid—in *Buckley*. *See id*. Also, Indiana's Canons have not contained a prohibition against merely announcing a position since 1993, and the Commentary to Indiana's Canon clarifies that it does not prohibit pledges or promises concerning court administration. *See* Canon 4.1(A)(13), Comment 16; *see also Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 547 (7th Cir. 2007);. That leaves, in effect, a prohibition against only pledges, promises, or commitments concerning cases, controversies, or issues likely to come before the court. Rather than having a rule to prevent all potentially prejudicial statements at any cost, as in *Buckley*, Indiana has a rule to prevent only the most likely prejudicial statements—a rule even more narrowly tailored now than before 2009.

C. There are no useful, but more narrowly tailored, alternatives, which also negates Plaintiffs' void-for-vagueness claim

IRTL's suggestion that a less restrictive alternative would be a canon that prohibits pledges, promises and commitments only in "a particular case or class of cases" reinforces the state's compelling interest in having a canon that regulates judicial candidate commitments on matters outside of cases already pending. On cross-examination, each of the three Plaintiffs admitted that a rule against making commitments with respect to particular pending cases would not go far enough. Ex. K, 59; Ex. F, 82-83; Ex. P, 41. Each professed frustration with the PPC Canon as written because, in their view, it is insufficiently specific as to what speech is prohibited. Ex. K, 36-37; Ex. F, 77; Ex. P, 60. But when asked about the clarity of their own proposed alternative to prohibit commitments regarding a "class of cases," each admitted that it, too, was ambiguous. IRTL director Mike Fichter said that "class of cases" refers to "any case

dealing with a specific issue," which of course describes pretty much *all* cases. Ex. F, 86. When, asked to define "class of cases," Judge Certo could say only "I don't know." Ex. K, 55. Bauer said "class of cases" "is what it is" and conceded "I think you probably ask ten attorneys what a class of case is [and] you may get ten different answers." Ex. P, 41-42.

Hence, not only is the PPC Canon sufficiently narrowly tailored, but there is no legitimate concern about facially unconstitutional vagueness. It is reasonable to expect judges and judicial candidates to understand and to comply with broadly-worded canons. The judicial candidates in this case have a reasonable idea what the PPC Canon means concerning "issues likely to come before the court." Ex. F, 102-03; Ex. P, 37; Ex. K, 38.

Indeed, *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 equally vague terms. *See*, *e.g.*, Code of Conduct for U.S. Judges, Canon 2A (substantially the same as Indiana's Canon 1.2). As all plaintiffs have acknowledged, it is not realistic to think of all of the things that judges and judicial candidates might do to undermine the system, and then prohibit those actions precisely. Ex. P, 52; Ex. K, 38; Ex. F, 85.

As the next best alternative, 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 stake with respect to ordinary criminal and civil statutes applicable to the public, which may be more vulnerable to facial vagueness challenge.

Accordingly, there is no basis for preferring, as a constitutional matter, Plaintiffs' proposed nebulous canon over the canon that already exists. If the State is allowed to prohibit promises by judicial candidates extending beyond extant cases, as all Plaintiffs agree, then the PPC canon is perfectly suited for that purpose and cannot be narrowed in any useful way.

III. The Recusal Canon Facially Succeeds; No Facts Support As-Applied Claims

1. Recusal provisions such as Canon 2.11 have consistently been upheld against facial challenges. With only one exception, every district court given the opportunity to do so has rejected such a facial challenge. *See 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 Political Action Committee 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 requirement).

The reason is straightforward enough: the state interests served by recusal requirements are overwhelmingly compelling. Recusal requirements alleviate bias, which assures equal

protection and due process of law. *White*, 536 U.S. at 802 (Stevens, J., dissenting); *see also Wolnitzek*, 345 F. Supp. 2d at 707 (stating that protection against bias is "[c]ertainly . . . a compelling state interest inasmuch as the authority of the judiciary relies upon the public faith in the integrity of its judges."). Recusal requirements also serve the state interest in judicial open-mindedness in that they seek to guarantee each litigant "not an equal chance to win the case, but at least some chance of doing so." *Id*. at 708 (citing *White*, 536 U.S. at 778). In short, recusal requirements help ensure that judges apply the law equally and impartially, or step aside when, by all objective indications, they cannot. *See Wolnitzek*, 345 F. Supp. 2d at 708; *Feldman*, 380 F. Supp. 2d at 1084; *Bader*, 361 F. Supp. 2d at 1043-44.

Plaintiffs argue that Section 5 of the Recusal Canon is facially void for vagueness. To begin, however, the federal judiciary's recusal statute is similarly imprecise. *See, e.g.*, 28 U.S.C. § 455(a) ("Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."). By specifying that recusal is required in cases where judges have made statements that commit or appear to commit them to rule a particular way in the case, Section 5 is far more precise than the federal standard. And, even if the Canons might be vague to the public generally, it is reasonable to expect judges and judicial candidates to understand and comply with them, particularly considering that the Commission has issued an advisory opinion discussing what it means to "commit" or "appear to commit" to a particular position. *See* Ex. H, 2-5. Under the circumstances, judicial candidates have a reasonable idea what this notion means, just as federal judges do. *See Wolnitzek*, 345 F. Supp. 2d at 703 (stating that "a person of ordinary intelligence could determine most circumstances in which a statement might appear to commit him to an issue" and therefore "appear to commit" language is not "impermissibly vague").

2. IRTL also challenges the recusal canon "as applied" to the Questionnaire. Second Am. Compl. ¶¶ 79-81. The fundamental problem with this argument, however, is that the recusal canon has never been "applied" to the IRTL Questionnaire; the Commission has never threatened any such enforcement. This presents a lack of Article III ripeness, a doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003) (citation omitted). Here, with no threat of enforcement by the Commission—let alone any *actual* enforcement—there has been nothing approaching a "concrete action" applying the Canons that would define the "scope of the controversy." *Id*. at 808.

The lack of enforcement also creates a practical problem: there are no circumstances to use for an as-applied analysis. As-applied challenges require detailed examination of the conduct at issue, the enforcement actions of government officials, and the precise interests at stake on both sides of the equation. *See, e.g., Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 147-48 (2003). Here, IRTL is asking the Court to hypothesize how it would rule were the Commission to bring an enforcement action against a Judge who has (1) answered the questionnaire, but (2) refused to recuse himself from a case. The most obvious questions are, what case? Who are the parties? What are the issues? What circumstances does the Commission cite to justify its position? With such a factual vacuum, it is impossible to analyze in any responsible way whether enforcement of the Recusal Canon against a judge or candidate who has responded to the questionnaire would be constitutional.

IV. The Solicitation Canons Are Valid Protections Against Judicial Coercion

The Solicitation Canons go to the heart of what differentiates judges from lawmakers, and impartial decision-makers from partisans. By attacking these Canons, IRTL is attempting to leverage the popular election of judges into an excuse for anything-goes style politics of the bench. However, the Supreme Court expressly stated 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. And, as other courts have recognized, "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).

A. The Direct Solicitation Canon is valid facially because it prevents even implicit coercion, and valid as applied to Certo for the same reason

The Solicitation Canons are facially constitutional because they are a reasonable and meaningful way of achieving the vital state interests of protecting donors from even implicit coercion and the Judiciary from the corrupting effects of personal solicitation by judicial candidates. The Solicitation Canons satisfy any level of review.

1. Protecting donors from coercion is a compelling State interest

Judges who directly solicit campaign contributions carry a very real likelihood of having a coercive effect, intentional or not, on the prospective donor. As Judge Certo recognizes, judges are community leaders held in high regard by lawyers and non-lawyers, litigants and non-litigants, alike. Ex. K, 80. In his community growing up, Judge Certo says, judges were "people who enjoyed respect, who had influence over civic affairs, people who were never addressed by first name." Ex. K, 80. That kind of status, left unchecked, can intimidate.

In *Siefert v. Alexander*, 597 F. Supp. 2d 860, 886-88 (W.D.Wis. 2009), *on appeal*, the

court rejected the argument that a state's interest in preventing coercion of donors justifies a no-solicitation rule. In Judge Crabb's view, there was no basis for concluding "that judicial candidates are uniquely predatory compared to others soliciting campaign contributions." *Id*. at 887. While it may be that judicial candidates are no more *personally* intimidating than others, 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. Even Judge Certo recognizes that judges should be careful about throwing their weight around (Ex. K, 80-81), and he testified that he himself had 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

Ex. K, 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. *See, e.g., Former Vegas Judge Censured*, Assoc. Press Alert - Political, July 5, 2005, *available at* http://www.krnv.com/Global/story.asp?S=3546295&nav=8faObgVv (Nevada judge was censured for allegedly, while in conference with a lawyer, suggesting that the lawyer contribute to his campaign and asking another lawyer why he had attended a fundraiser for his opponent).

As other courts have made clear, the State has a compelling interest in preventing its judicial power from being misused, even if unintentionally, in this way. In *Stretton v. Disciplinary Bd. 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 those found in 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. In fact, the state's interests are so strong that *Stretton* and *Dunleavy* both held that the prohibition against personal solicitation satisfies even strict scrutiny. *Stretton*, 944 F.2d at 146; *Dunleavy*, 838 A.2d at 349-51; *see also Wersal v. Sexton*, No. 08-613, 2009 WL 279935 (D. Minn Feb. 4, 2009) (upholding Minnesota's personal solicitation clause as satisfying strict scrutiny).

2. The Direct Solicitation Canon is narrowly tailored to serve the State's compelling interest

Canon 4.1(A) is narrowly tailored because it allows candidates to solicit funds through committees. *See Stretton*, 944 F.2d at 145; *see also Fadeley*, 802 P.2d at 44 ("Solicitation of funds by a surrogate of the judge's choice is permissible; . . . *The Accused is free to urge his candidacy on anyone in any other way*") (emphasis added). This serves to limit coercion and impermissible influence by putting distance between the candidate and the donor, while still allowing the candidate to raise campaign funds. Moreover, candidates are free to urge their candidacy on anyone in many other ways, including by soliciting publicly stated support.

3. The Solicitation Canons are valid as applied to Certo

Judge Certo claims that he 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. Pls.' Summ. J. Mem. at 23-24. Because it is clear that the non-solicitation canon would in fact prohibit the solicitations that Certo wishes to make, an as-applied challenge is at least permissible here, in contrast with the recusal and PPC canons.

Certo strives "to be humble in [his] work, even with the pro se litigants" (Ex. K, 80-81), a task at which, he admits, "I don't always succeed" (Ex. K, 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. Ex. K, 81.

At bottom, however, Judge 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.

Ex. K, 84-85.

The concerns that justify the non-solicitation rule apply with equal force to Judge 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. All citizens, 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. And while Certo's solicitation of his mother and wife (and even his uncles) may not carry the same inherent threat of coercion, those applications restrict very little speech (his committee may still solicit them) and have even less impact—his wife, after all, donated anyway, and his mother was certainly aware of his candidacy. Ex. Q; Ex. L, 29-30.

In short, there is nothing special about Judge Certo that justifies suspending the no-solicitation rule for him. Just as the Indiana Voter ID law applies even when a voter personally knows the poll workers, so, too, does the no-solicitation canon apply even when the prospective donor is a relative, close friend, former roommate, or anyone else who might not feel coerced by

a particular judge's entreaties. *See, e.g., Crawford v. Marion County Election Board*, __ U.S. __, 128 S.Ct. 1610 (2008). The First Amendment does not compel case-by-case exceptions where the underlying rationale for a general rule may, by happenstance, not be 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 contributors.").

V. The Narrowly Drawn Partisan Activities Canons Advance Compelling Interests

A. Excessive partisan activities threaten judicial independence

1. Judge Certo agrees that the state has a compelling interest not only in having an independent judiciary, but also in having a judiciary that *appears* to be such. Ex. K, 9. In his view, that means having a system where judges are insulated from external pressures to decide cases in particular ways. Ex. K, 10-11. However, he does not agree that allowing judges to engage in unlimited partisan activities threatens judicial independence. Ex. K, 96. The only threat to judicial independence that Judge Certo is concerned about is the threat of telephone justice, where a party leader picks up the phone and asks a judge to rule a particular way. Ex. K, 90. In his view, judicial independence "has very little to do as far as I can tell with how a judge earns or keeps a position." Ex. K, 94. Consistent with that view, he thinks that electing *federal* judges in partisan elections would be "quite a good system." Ex. K, 95-96. Asked about the influence of greater partisan activities on judicial independence, Certo says, "I'm not concerned about that. I just don't believe it will have that effect." Ex. K, 96.

The State of Indiana, 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. *See In re Raab*, 793 N.E.2d 1287, 1290, 1292 (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"). Electing trial judges only 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." *Id.* at 1292-93. The Canons against speaking on behalf of a political party, Canon 4.1(A), and against acting as a leader of a political party are "carefully designed to alleviate this concern by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidate's ability to participate in their own campaigns." *Id.* at 1293.

In her recent decision invalidating Wisconsin's ban on candidate endorsements by judges and judicial candidates, Judge Crabb commented that "the prohibition on endorsements of partisan candidates can only mask a preference that a judge already has for a particular candidate. Forcing the judge to remain silent about his preference does not make his preference go away." *Siefert*, 597 F. Supp. 2d at 885. This statement is undoubtedly true as far as it goes, but what Judge Crabb implicitly denies is that there is compelling value in masking such partisan preferences for the purpose of upholding the integrity and the appearance of impartiality of the judiciary. If there is no such value, then the ban on partisan endorsements by *federal* judges (*see* Code of Conduct for United States Judges, Canon 7(A)(2)), is inexplicable and, ultimately,

unsupportable under the First Amendment. In short, when it comes to public confidence in the judiciary, appearances count, *White*, 536 U.S. at 778, so masking partisan sympathies carries value independent of eliminating such sympathies altogether.

On a broader level, First Amendment doctrine has long treated partisan endorsements different from statements about issues. As a means of preventing official corruption, Congress may prohibit corporations and unions from expressly advocating for or against a particular candidate within thirty days of a primary election and sixty days within a federal general election, *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203-204 (2003), but it may not preclude the same groups from announcing their positions on disputed public issues at any time. *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, __, 127 S.Ct. 2652, 2670 (2007); *McConnell*, 540 U.S. at 206.

Similarly, here, a judicial candidate who speaks on behalf of a political party will threaten the integrity of the system, and the appearance of such, much more than a candidate who merely announces his position on disputed political issues. *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."). Indeed, 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.

Indiana's Partisan Activities Canon does not ban all political activity. Judicial candidates subject to partisan elections may purchase tickets for and attend political gatherings, identify themselves as members of political parties, participate in and contribute to political organizations and their own campaigns, speak to gatherings on their own behalf, appear in media advertisements and distribute promotional campaign materials supporting their campaigns, and publicly endorse or oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running. *See* Canon 5C(1). As in *Wersal*, where the court upheld a Minnesota restriction against candidate endorsements, "[a] whole realm of speech remains available to that candidate. He can publicly state his position on any other issue. He can attend a political rally. He can send out campaign literature. He can solicit and accept endorsements from political and other organizations. He can associate himself with a political party and publicly state his political affiliations." 2009 WL 279935 at *9.

Furthermore, as in *Raab*, the Canon here distinguishes "between conduct integral to a judicial candidate's own campaign and activity in support of other candidates or party objectives." 793 N.E.2d at 1292. The Partisan Activities Canon allows candidates "a meaningful and realistic opportunity to fulfill their assigned role in the electoral process," *id.*, while also limiting that role in ways crucial to preserving judicial independence (and the appearance thereof). *See also Yost v. Stout*, No. 06-4122-JAR, 2008 U.S. Dist. LEXIS 107557, at *19 (D. Kan. Nov. 16, 2008) (upholding a canon that restricts even mere endorsements of other candidates because "it does not restrict speech concerning disputed political issues"); *In re Vincent*, 172 P.3d 605, 606, 608-09 (N.M. 2007) (upholding, as narrowly tailored, restrictions on partisan endorsements by judicial candidates).

2. Indiana also restricts judges from "act[ing] as a leader in or hold[ing] office in a political organization" because judicial candidates who lead parties erode "public confidence in the independence and impartiality of the judiciary." Comment 3 to Canon 4.1(A)(1); *see also, In re Katic*, 549 N.E.2d 1039 (Ind. 1990) (judge was suspended, without pay, for thirty days for, among other activities, deliberately and publicly acting as a leader in the Democratic party).

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 party activist—he was Indiana young republican of the year in 2007—Judge Certo would not, even if permitted by law, aspire to the job of state party chair. Ex. M ¶ 6. It is clear that, because he wants to be a good judge and a good citizen, Judge Certo strives to comply with all laws (Ex. L, 46, 51) and to be completely honest and straightforward in his dealings with others. Ex. L, 46. But, according to Certo, being state party chair "might be viewed as incompatible" with being a judge. Ex. L, 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." Ex. L, 54-55. And for his part, 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." Ex. L, 55. This is exactly the problem of having judges act as party leaders, whether as state chair or some other position. Dual roles erode credibility and independence, which the State need not tolerate.

3. Finally, plaintiffs assert that the Partisan Activities Canon is unconstitutionally vague because it does not adequately define "leader" or speech "on behalf of a political organization." There is nothing remotely vague about these terms. With respect to being a

"leader" in a party, it is certainly not the case, as Judge Certo asserts, that *all* elected judges are political leaders and therefore inherently in violation of the Canons. Ex. M ¶ 6. First, it is utterly implausible to suggest that a Canon first promulgated in 1993 was intended to encompass all judges elected on partisan tickets, considering that trial judges have been elected on partisan tickets in Indiana since 1851. *See* Report of the Fourth Annual Meeting of the State Bar Association of Indiana (1900) at 21-22, 78-98 (discussing and debating the role of political parties in judicial elections). Second, the Commission's long-running decision not to enforce the canon against any judges elected on partisan tickets would conclusively estop a contrary interpretation. *See Adair v. Sherman*, 230 F.3d 890, 893 (7th Cir. 2000).

Third, there is an obvious difference between being "a Republican elected official" and acting as a party leader. The former is merely the collision of two unrelated conditions (Republican Party membership and popular election), while the latter 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. The public would reasonably question the independence of a judge who serves as county or state party chair more than the independence of a judge who was merely nominated by a party.

Beyond that, the prohibition against party leadership would seem to encompass the assumption of any officially recognized role within the party. *See Katic*, 549 N.E.2d at 1031 (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).

Similarly, speaking "on behalf of a political organization" is a direct, reasonably understandable, command. A candidate may attend party functions and speak for himself, but may not speak at any gathering for *the party*. Plaintiffs Certo and Bauer, of course, are lawyers, and have spoken for others on numerous occasions in various contexts, Ex. K, 103-04; Ex. P, 5, and undoubtedly knew that they were doing so. They should not now be permitted to deny understanding the concept of representative speech.

CONCLUSION

The Court should grant Defendants' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been filed electronically, on this 1st day of May, 2009. Notice of this filing will be sent to the following parties by operation of the Court's electronic-filing system. Parties may access this filing through the Court's system.

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