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 OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendants Randall T. Shepard, *et al.*, respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

STATEMENT OF GENUINE ISSUES

1. Plaintiffs Torrey Bauer, David Certo, and Indiana Right to Life, Inc. (collectively, "IRTL") state that "th[e] former commits clause has been interpreted in Preliminary Advisory Opinion #1-02 ('Advisory Opinion') to reach 'broad statements relating to the candidate's position on disputed social and legal issues' because they 'incur[] the risk of violating the 'commitment' clause and/or the 'promises' clause.'" Pls.' Summ. J. Mem. at 2. This is false and represents a gross misstatement of the Preliminary Advisory Opinion. The full passage from the Opinion, without selective editing, reads as follows:

> As a judicial candidate makes more specific campaign statements relating to issues which may come before the court beyond, for example, the somewhat amorphous "tough on crime" statement, or broad statements relating to the candidate's position on disputed social and legal issues, the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause.

Ex. H, 3.[1] Thus, contrary to IRTL's assertion, the Indiana Commission on Judicial Qualifications ("Commission") has never advised that the judicial canons would "reach" or prohibit broad statements relating to the candidate's position on disputed social and legal issues. Rather, the Commission's advisory opinion clearly states that only *more specific* statements going *beyond* broad statements could potentially violate the canons.

2. IRTL also states that "Ms. Babcock, as counsel to the Commission on Judicial Qualifications ('CJQ'), also advised judicial candidates not to answer the 2004 Questionnaire."

[1] Unless otherwise noted, all exhibit citations refer to the exhibits submitted in support of Defendants' Motion for Summary Judgment.

Pls.' Summ. J. Mem. at 2. While this statement is literally true, it is misleading without context. To begin, although Babcock advised candidates against answering the questionnaire, she did not threaten discipline against any candidate who chose to respond. *See* Parties' Agreed Prelim. Inj. Ex. C ¶ 8. Furthermore, Babcock stated, "My impression was that the judicial candidates did not want to answer the Questionnaire and were seeking my concurrence, which I gave." Parties' Agreed Prelim. Inj. Ex. C ¶ 6. Babcock perceived that the judges and candidates who called her seeking advice "had already determined they were not going to answer the survey." Parties' Agreed Prelim. Inj. Ex. 16 at 42. It was not the case, therefore, that the parties sought Babcock's advice, wanted to answer, and were told not to or be subject to discipline. Parties' Agreed Prelim. Inj. Ex. 16 at 42.

Bottom line: The evidence does not show that Babcock told candidates not to answer the questionnaire because doing so would violate the canons. Without such evidence, there is no realistic threat of enforcement of the canons in this circumstance, and no Article III jusiticiability, as the Seventh Circuit has already held. *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007) ("*Shepard I*").

ARGUMENT

I. The PPC Canon Is Facially Valid, And There Has Been No Application Of The Canon That Can Be Reviewed

A. Plaintiffs' claims are moot as to the former Commits Canon and unripe as to the current PPC Canon

Despite this Court's explicit instructions to the contrary, IRTL persists in challenging the former Commits Canon, which, of course, is no longer in effect. Although they acknowledge having received the remedy they sought against the former Commits Canon in the form of a preliminary injunction, they nonetheless continue to seek a permanent injunction in order to

"prevent the collateral consequence of judicial discipline for the speech engaged in under the protection of that injunction." Pls.' Summ. J. Mem. at 11.

In its Opinion and Order of March 23, 2009, this Court denied Plaintiffs' Motion for Summary Judgment precisely because "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." Opinion and Order, *Bauer v. Shepard*, No. 3:08-cv-196, 2009 WL 791548 at *1 (N.D. Ind. Mar. 23, 2009). The law of the case doctrine says that "a court generally should not reopen issues decided in earlier stages of the same litigation." *U.S. v. Harris*, 531 F.3d 507, 513 (7th Cir. 2008) (citing *Agostini v. Felton*, 521 U.S. 203, 236 (1997)). Previous rulings may be reconsidered "if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Id.* (internal quotation omitted). There is no such compelling reason here.

Furthermore, in consolidating all of the issues previously presented in this case into the summary judgment briefing, the Court noted its desire to "further the interests of judicial economy and efficiency." Opinion and Order, *Bauer v. Shepard*, No. 3:08-cv-196, 2009 WL 791548 at *1 (N.D. Ind. Mar. 23, 2009). To continue pressing a claim that has already been deemed moot does nothing to further these interests.

Moreover, the concerns animating IRTL's challenge to the former Commits Canon are unfounded. IRTL worries that because the Commission "active[ly]" advised candidates regarding the questionnaire prior to the preliminary injunction, there is a "reasonable and real concern" that the Commission might take disciplinary action against candidates who answered the questionnaire while under the protection of the preliminary injunction. Pls.' Summ. J. Mem. at 12. However, as the Commission has stated time and again, it will enforce the canons only in

light of *White* and has never enforced the Pledges, Promises, and Commitments ("PPC") Canon (current or former) against anyone who has answered the questionnaire despite having multiple opportunities to do so. *See* Defs.' Summ. J. Mem. at 12; Ex. A, ¶¶ 12-13; Ex. H, 2. Indeed, this was one of the reasons the Seventh Circuit dismissed IRTL's previous lawsuit, finding that there was "no evidence of a real threat of enforcement," which meant that "the case was not ripe." *Shepard I*, 507 F.3d at 550; *see also Carey v. Wolnitzek*, No. 3:06-CV-36-KKC, 2006 WL 2916814, at *13-14 (E.D. Ky. Oct. 10, 2006) (challenge to canon unripe where no instances of enforcement). Here, again, this Court should enter judgment against the Plaintiffs on *all* their PPC claims for the same reason.

The only circumstance that has changed since the prior lawsuit is the preliminary injunction. Thus, it is even *more* unlikely that the Commission will suddenly decide to enforce the canons against judges who answered the questionnaire, particularly since the former Commits Canon "no longer has legal effect." Opinion and Order, *Bauer v. Shepard*, No. 3:08-cv-196, 2009 WL 791548 at *1 (N.D. Ind. Mar. 23, 2009). Indeed this situation is analogous to the one recently confronted by the Tenth Circuit when Kansas similarly amended its judicial code. *See Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009). In that case, the Court determined that the collateral consequences at issue were too speculative and remote. *Id.* at 1248 (noting that "we do not have before us any official adjudication that [the plaintiffs] violated the old canons; quite to the contrary, enforcement of the Clauses was enjoined *before* they were applied against the plaintiffs. Because there has been no official sanction and nothing in the record suggests that disciplinary proceedings are threatened, we reject plaintiffs' request that we keep this case going."). The same is true here.

Accordingly, it is a waste of the parties' and this Court's resources to continue litigating this issue. This Court has already held that IRTL's challenge to the former Commits Canon is moot and that holding should stand.

B. The PPC Canon withstands strict scrutiny analysis

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. Nor must they regulate on equal terms pledges, promises, or commitments by lawyers who are not even candidates on the grounds such lawyers may one day become candidates, or state in precise terms exactly what statements are prohibited. Indiana's 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.

The PPC Canon is narrowly tailored to serve the State's compelling interest in achieving an impartial judiciary and must therefore be upheld.

1. The State must protect litigants' due process rights through the preservation of an impartial and openminded judiciary

Plaintiffs argue 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." Pls.' Summ. J. Mem. at 8. Therefore, Plaintiffs conclude that the preservation of judicial openmindedness cannot possibly be a compelling State interest warranting the restriction of judicial candidate speech. *Id*. at 8-9.

As the Plaintiffs themselves acknowledge, however, judicial openmindedness requires of a judge "not that he have no preconceptions on legal issues, but that he be willing to consider

views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *Id*. at 8 (quoting *Republican Party of Minnesota v. White*, 536 U.S. 765, 778 (2002)). Preserving judicial openmindedness, therefore, requires nothing so mystical as "hypothesizing about the inner workings of a judge's psyche," as Plaintiffs contend. *Id*. at 9. What it requires is that judicial candidates be restricted from making statements that are inconsistent with the impartial administration of justice in cases likely to come before them as judges.

Undoubtedly, such a restriction "does not preclude judges from having opinions on legal issues . . . ." *Id*. at 8. This argument, however, discounts the compelling value in masking such opinions for the purpose of 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 PPC Canon to eliminate a judicial candidate's opinions and preconceptions. Rather, the goal is to ensure that *despite* whatever opinions a judge or candidate already has, he is willing to keep an open mind and be open to persuasion, and that the public reasonably believe that to be the case. This does not prevent a candidate from announcing his opinion on disputed legal issues; it prevents him only from pledging closed-mindedness. 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 states have a compelling interest in protecting the due process rights of litigants by preserving an impartial judiciary).

2. The PPC Canon is narrowly tailored to advance impartiality

a. IRTL argues that because the PPC Canon "restrict[s] speech about issues rather than parties, [it is] only 'barely tailored' to Indiana's interest in preserving judicial impartiality

toward parties." Pls.' Summ. J. Mem. at 13. However, a candidate's pledge to rule a certain way on a certain issue is effectively a pledge to rule either for or against a party coming before the judge on that issue. In other words, allowing judges and judicial candidates to pledge or commit to rule on a specific issue in a specific way removes any chance that litigants in those cases will receive due process of law from an impartial arbiter. As the United States Supreme Court noted in *White*, "A candidate who says, 'If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages' will positively be breaking his word if he does not do so." 536 U.S. at 780. Thus, restricting speech about issues directly furthers the State's interest in preserving impartiality toward parties.

b. Similarly unavailing is IRTL's argument that the PPC Canon is not narrowly tailored because it only encompasses statements made by judges and judicial candidates and does not address statements made by lawyers before they announce their candidacy. Pls.' Summ. J. Mem. at 13. Thus, according to IRTL, the PPC Canon "permit[s] lawyers to take positions on legal issues until the day they declare their candidacy, after which such statements are prohibited." *Id*.

White criticized the Minnesota Announce Clause for drawing a transparently artificial distinction between announcements of a position a lawyer makes after formally declaring as a candidate and those announcements the lawyer makes before declaring. *See White*, 536 U.S. at 779-80. However, unlike the vast scope of plain, uncommitted viewpoint announcements prohibited by the canon invalidated in *White*, there is a vivid and distinct difference between pledges, promises, or 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." *Family Trust Found. of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672,

696 (E.D. Ky. 2004). "By comparison, an announcement carries the same meaning whether made before, during, or after an election." *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1230 (D. Kan. 2006), *vacated as moot*, 562 F.3d 1240 (10th Cir. 2009); *see also Duwe v. Alexander*, No. 06-C-766-S, 2007 WL 840121 at *2 (W.D. Wis. Feb. 13, 2007) (pledges and commitments clauses likely would "be found to satisfy strict scrutiny" because they avoid the "underinclusiveness concern of *White*").

A promise made by a non-candidate, non-judge lawyer to decide a case or an issue in a certain way is an empty promise because that lawyer is not in a position to effectuate it. But a *candidate* who makes that promise is manifestly attempting to attain such a position, which makes the promise far more significant for due process purposes. The fact that voters may react to that promise by voting the candidate into office is precisely the reason why this problem arises. If that were to happen, as the Court recognized in *White*, the elected judge would be highly unlikely to be open-minded about reconsidering his position, and due process would suffer. *See* 536 U.S. at 780. The State is entitled to prevent that circumstance. Extending the canon to prohibit pledges, promises, or commitments made outside a campaign by a non-judge lawyer would not address that problem.

c. IRTL also contends that the PPC Canon is overinclusive and compares Indiana's canon to the canon invalidated in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993). *See* Pls.' Summ. J. Mem. at 14 ("Because the provision [in *Buckley*] banned speech far beyond what could be legitimately restricted, the Seventh Circuit concluded that the pledges and promises clause was unconstitutional, and a similar result should follow here."). As explained in detail in the Commission's memorandum in support of its motion for summary judgment, however, Indiana's PPC Canon is more narrowly tailored than the Illinois canon

invalidated in *Buckley*. *See* Defs.' Summ. J. Mem. at 17-19. The Illinois canon prohibited judicial candidates from "'announc[ing] [their] views on disputed legal or political issues . . . [and] mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.'" *Buckley*, 997 F.2d at 225 (quoting Ill. S. Ct. R. 67(B)(1)(c)). But unlike the Indiana PPC Canon, the Illinois canon did not include a proscription against "mak[ing] statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *See* Ind. Code of Judicial Conduct, Canon 4.1(A)(13); *Buckley*, 997 F.2d at 225. Thus, Indiana's PPC Canon includes exactly the type of prohibition whose absence was fatal to the Illinois canon. *See Buckley*, 997 F.2d at 230.

Moreover, Indiana's canon should get a fresh look notwithstanding *Buckley's* invalidation of a similarly worded canon. Indiana's scheme of combining its pledges, promises, and commitments clauses in one canon is facially narrower as a whole than Illinois' over-deterrent pairing of "announce" and "pledges" canons. That is, the whole textual focus in Indiana is on a narrower, more problematic set of candidate statements—those that threaten to bind the candidate as judge in the future.

d. Although IRTL attempts to equate the two, Indiana's PPC Canon is also more targeted than the "announce" canon invalidated in *White*. *See* Pls.' Summ. J. Mem. at 15. Here, unlike in *White*, the due process interests of state court litigants explain and justify both the limited context—judicial campaigns—in which the Canon applies and the (more limited) breadth of the statements it prohibits. What is more, the record shows the Indiana PPC Canon is enforced and administered with sensitivity for the unique facts of specific cases, which is a virtue for First Amendment purposes.

To begin, the Commission's Preliminary Advisory Opinion #1-02 issued in October 2002, following the Supreme Court's decision in *White*, explicitly distinguished the pre-2009 PPC Canons, as the Commission understood them in light of *White*, from an announce canon. Ex. H, 1. Recognizing it had, prior to *White*, broadly interpreted the PPC Canons to function like an announce canon, the Commission stated it was "amending its advice about certain campaign speech where the prior limitations would not be enforceable under *White*." Ex. H, 1. The Opinion *expressly recognized* that judicial candidates have a constitutional right to state their views on disputed social and legal issues, such as, for example, abortion or the death penalty, by characterizing themselves as "conservative," "tough on crime," "pro-life," or with any other general statement. *Id*. at 2. *Compare* Pls.' Summ. J. Mem. at 16 (arguing that, read literally, the PPC Canon "could be taken to ban even such innocuous statements of a candidate as that she 'pledges to give a better shake to indigent litigants or harried employers,' 'promises to be tough on crime,' or 'is committed to upholding the First Amendment.'"). These statements clearly would have been prohibited by an announce canon, but were explicitly deemed acceptable under the pre-2009 PPC Canons. *Cf. Wolnitzek*, 345 F. Supp. 2d at 699 (striking down Kentucky's canons because Kentucky "has not given *any* indication it intends to limit its promises and commit clauses in light of the Supreme Court's ruling in *White*.").

Thus, the Commission's advisory opinion—a document upon which IRTL places great weight—conclusively and demonstrably negates IRTL's argument that the PPC Canon covers the same territory of speech as an announce canon. The Opinion's examples of acceptable announcements are far from exhaustive, of course. But they demonstrate the larger principle that promising and committing oneself with respect to a legal question is qualitatively different from merely announcing one's position on an issue. *See White*, 536 U.S. at 770, 780 (observing that

"'announcing . . . views' on an issue covers much more than *promising* to decide an issue a particular way," and that "campaign promises" could plausibly be restricted on the theory "that statements made in an election campaign pose a special threat to open-mindedness because the candidate, when elected judge, will have a particular reluctance to contradict them."). Further, Comment 15 to the PPC Canon clearly states 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."

e. IRTL asserts that silence by judicial candidates could lead to heightened suspicion of the judiciary. Pls.' Summ. J. Mem. at 15. However, the PPC Canon does not mandate silence or prohibit judicial candidates from announcing their views on disputed issues; rather, it merely prohibits them from making pledges, promises, or commitments in connection with cases, controversies, or issues that may come before the court. "While voters may expect that judges have views, they do not expect that judges are committed to ruling in a particular way regardless of the evidence or legal argument yet to be presented to them." *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786 at *14 (E.D. Ky. Oct. 15, 2008). Prohibiting commitments will not increase voter distrust of judges. Instead, and much to the contrary, allowing judicial candidates to make commitments to rule a particular way "will decrease public confidence in the judiciary." *Id*.

In any event, given a choice between risking public distrust of judges because they are not sufficiently transparent, and risking public distrust of judges because in all their transparency they pledge closed-mindedness, the State is surely entitled to choose the former, which seeks to protect a litigant's due process rights. That choice is precisely what the State is tasked with

making given the competing constitutional rights—litigant due process and candidate speech—that are in tension. *Id.* at *7.

f. To the extent that IRTL's overbreadth argument is focused primarily on the "appear to commit" language in the former Commit Canon, the absence of that language from the revised PPC Canon removes any overbreadth that may have existed and renders IRTL's argument moot. For this same reason, IRTL's void-for-vagueness argument with respect to the former Canon is also moot.

3. There are no useful, but more narrowly tailored alternatives

As an alternative, IRTL argues that the State's compelling interest in preserving judicial impartiality through open-mindedness is better served through the election process itself. This argument is unsupportable.

The unregulated election process is not a safeguard for judicial open-mindedness. Indeed, as the Court recognized in *White*, elections actually encourage closed-mindedness by tempting judicial candidates to make promises as to how they would rule on issues likely to come before them in their efforts to secure their candidacy and ultimate election. *White*, 536 U.S. 780; *see also Pennsylvania Family Institute, Inc. v. Celluci*, 521 F. Supp. 2d 351, 385 n.38 (E.D. Penn. 2007) (holding that the election process "would do little to help [the state] achieve its compelling interest in preserving an openminded judiciary."). Indeed, "[i]f judges are partial to a position that most of their electorate agrees with, they would likely lower their risks of being rejected at the polls." *Wolnitzek*, 2008 WL 4602786 at *13. Where campaign promises are unregulated, the whole point is for voters to elect candidates based on predictability about the decisions the candidates will make once in office, not based on non-commital openmindedness. This phenomenon is highly desirable for legislative elections, but not for judicial elections.

Further, the Due Process Clause requires States to maintain an unbiased and impartial judiciary. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("[N]o person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him."). This protection is afforded to all litigants, not just those in the electorate. The election process does not adequately defend the rights of minors, litigants from other states or countries, and those who do not favor the majority position who must also come before that elected judge. That is, when judges are elected, they must retain a commitment to the rule of law, even when the law runs counter to majority viewpoints. Unfettered campaign promises undermine that duty.

C. The PPC Canon is not unconstitutionally vague

IRTL contends that the phrase "likely to come before the court" renders the PPC Canon unconstitutionally vague. According to IRTL, a judicial candidate cannot possibly know what issues are likely to come before him and, therefore, this construction creates vagueness and may result in chilling judicial candidates' speech. Pls.' Summ. J. Mem. at 17. At least two of the Plaintiffs, however, have indicated that they have a reasonable idea of what this means. *See* Ex. F, 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."); Ex. P, 37 ("I think [the amended PPC 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.").

Grasping for further vagaries in the Canon, IRTL argues that the PPC Canon is impermissibly vague because "[i]t is unclear how a pledge or promise is different from a commitment." Pls.' Summ. J. Mem. at 18. IRTL 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 commits clauses, 'commit' must mean more than a 'pledge or promise.'" *Id*.

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 Plaintiffs now undertake. The canons, in other words, 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." Along the same lines, Comment 15 to the new PPC Canon states that "[t]he making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result."

Further resolving Plaintiffs' professed overbreadth concern, 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 IRTL still complains that the Comments are unhelpful and vague because they indicate that "application of the current commits clause is dependent on the perceptions of the listener . . . not the objective meaning of what the judicial candidate says." Pls.' Summ. J. Mem. at 18. But given that the Canons are intended to preserve actual impartiality in the judiciary as well as the *appearance* of

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. *See White*, 536 U.S. at 778 (stating that "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 . . . .").

D. There are no grounds for an as-applied challenge

With no enforcement record and no demonstrated intent of the Commission to enforce the PPC Canon against candidates who answer the IRTL questionnaire, there is no State enforcement rationale to weigh against the Plaintiffs' asserted rights. As the Commission explained in its memorandum in support of its motion for summary judgment, in an as-applied challenge the State typically explains how the rational for the statute supports enforcement under the particular circumstances. *See, e.g., Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 147 (2003). That cannot happen here because the Commission has never concluded that answering the 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 of such enforcement. Accordingly, there is no basis for an as-applied challenge with respect to the PPC Canon.

* * * *

By promoting open-mindedness, the PPC Canon helps to ensure impartiality in the judiciary and the appearance thereof. The Canon sufficiently balances precision with flexibility to protect the rights of candidates and litigants alike. *See In re Kinsey*, 842 So.2d 77, 85-89 (Fla. 2003) (upholding pledges and commitments clauses as narrowly tailored because they allowed

for discussion "even on disputed issues," yet ensured that candidates would not contradict the notion that "as judges, they will uphold the law"); *In re Watson*, 794 N.E.2d 1, 5-8 (N.Y. 2003) (upholding pledges and commitments canons as "sufficiently circumscribed to withstand exacting scrutiny under the First Amendment" and "effectively and appropriately balance[d] [between] the interests of litigants and the rights of judicial candidates and voters."). The PPC Canon is narrowly tailored to further the State's compelling interest in protecting the due process rights of litigants. It therefore withstands strict scrutiny analysis and should be upheld.

II. The Recusal Canon Is Facially Valid And No Basis Exists For An As-Applied Challenge

A. The Recusal Canon is neither unconstitutionally vague nor overbroad

IRTL argues that Section 5 of the Recusal Canon is unconstitutionally vague because its "commits or appears to commit" language "defines the scope of prohibited conduct in terms of how the statement 'appears' to third parties, rather than how the statements was intended." Pls.' Summ. J. Mem. at 22. Thus, IRTL claims, "[t]here is no indication as to what type of statements 'appear' to commit a candidate, leaving judicial candidates vulnerable to improper enforcement of the canon by the Defendants and chilled from announcing their views on disputed legal and political issues." *Id*.

However, even if the Recusal Canon might be vague to the public generally, it is reasonable to expect judges and judicial candidates to understand what the Canon means and when recusal is warranted, particularly in light of the Commission's Advisory Opinion, which discusses what it means to "commit" or "appear to commit" to a particular position. *See* Ex. H, 2-5; *see also 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.").

Indeed, Indiana's Recusal Canon is far more precise than the federal judiciary's recusal statute, which states only that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." 28 U.S.C. § 455(a). And yet, the federal judiciary seemingly has no trouble interpreting and complying with this highly imprecise standard.

It is difficult to grasp IRTL's persistent complaint that the Recusal and PPC Canons define the scope of prohibited speech in terms of how the listener perceives the statement rather than how the statement was intended. For one thing, it is entirely unclear what the alternative would be. Should the Commission set about compiling an exhaustive list of every prohibited word, statement, or action? How would the Commission even go about defining that universe? Short of that alternative, judicial candidates will simply have to make some judgment calls regarding what statements or actions are appropriate and which ones might result in a violation of the canons. It is entirely reasonable to expect judges and candidates for judicial office to be capable of making such a determination, even if that means exercising self-restraint in close cases.

And, again, given that the canons are intended to preserve actual impartiality in the judiciary as well as the *appearance* of impartiality, it makes sense that the canons define the scope of permissible speech in terms of how the reasonable person would perceive it. If a judge has made a statement that a litigant appearing before him perceives as committing the judge to rule against him and the judge does not recuse himself, then the due process interest in judicial impartiality is not served.

That the Recusal Canon defines the scope of prohibited speech in terms of statements that commit or appear to commit a judicial candidate to reach a particular result or rule a particular

way does not render the Canon vague or overbroad. Judges and judicial candidates can and should be expected to have a reasonable idea what this notion means.

B. The Recusal Canon withstands strict scrutiny analysis

As IRTL acknowledges, in fashioning a recusal rule, a State may "adopt recusal standards more rigorous than due process requires." *White*, 536 U.S. at 794 (Kennedy, J., concurring). Nonetheless, IRTL argues, Indiana's Recusal Canon cannot withstand strict scrutiny analysis because it is not narrowly tailored to the State's interest in promoting judicial openmindedness. Pls.' Summ. J. Mem. at 24. As with the PPC Canon, IRTL argues here that the Recusal Canon is not narrowly tailored because it does not address statements made by lawyers before they become judicial candidates. *Id*. For the same reasons this argument fails with respect to the PPC Canon, it also fails here. Again, a commitment by a non-judge lawyer to decide a case a certain way is not a commitment at all because that lawyer is not in a position to make good on that commitment. Thus, it matters not what a non-judge lawyer said or wrote in lectures, law review articles, or books prior to becoming a candidate for judicial office. *See id*. at 25. But a candidate who makes such a commitment is overtly attempting to attain such a position precisely by trading on that promise, which makes the statement far more significant for due process purposes. *See Stout*, 440 F. Supp. 2d at 1230.

IRTL also repeats its argument here that the electorate places a restraint on judges and that "judges themselves also serve as a natural restraint to preserve judicial impartiality." Pls.' Summ. J. Mem. at 25. The "awareness of bias," according to IRTL "is enough to limit its impact on [judges'] decisions." *Id*. at 26. If this was the case, however, there would be no need for any recusal requirements at all. It would be unnecessary, for example, for a judge to recuse himself from a proceeding in which he has a fiduciary interest. Under IRTL's theory, it would be

enough for the judge to be aware of his bias and to act to limit its impact on his decision. However, IRTL concedes that the other provisions of the Recusal Canon are perfectly valid and enforceable. *Id*. at 20, 24. If self-policing has been deemed an unacceptable alternative to the other recusal provisions, then it also must be deemed an unacceptable alternative with respect to Section 5 of the Recusal Canon.

C. No basis exists for an as-applied challenge to the Recusal Canon

IRTL also challenges the Recusal Canon "as applied" to the questionnaire. Pls. Summ. J. Mem. at 25. However, as explained in more detail in the Commission's memorandum in support of its motion for summary judgment, this argument is a non-starter, as the Recusal Canon has never been "applied" to the IRTL questionnaire and the Commission has never threatened any such enforcement. This presents a lack of Article III ripeness. *See Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003).

It also presents a practical problem in that there are no circumstances upon which to base an as-applied analysis. It would require a substantial amount of hypothesizing to analyze whether enforcement of the Recusal Canon against a judge or candidate who answered the questionnaire would be constitutional. Thus, an as-applied challenge is inappropriate here.

III. The Solicitation Canons Are Constitutional Both On Their Face and As Applied to Judge Certo

A. The Solicitation Canons withstand strict scrutiny analysis

Judge Certo argues that the Solicitation Canons do not advance the State's interest in preserving impartiality by preventing bias towards parties. Pls.' Summ. J. Mem. at 27. This is because "[j]udicial candidates, such as Judge Certo, know who has donated to their campaign" even if the candidate did not solicit the donations personally. *Id*. Furthermore, according to Certo, the Solicitation Canons are overbroad because they ban all personal solicitations, rather

than just quid pro quo solicitations. *Id*. at 29-30. Both arguments can be dispensed with very quickly.

The rationale behind the Solicitation Canons is to prohibit coercion of donors. *See Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137, 145 (3d Cir. 1991) (solicitation clause narrowly tailored even though the candidate "may review lists of those who have contributed and the amounts"). Restricting only quid pro quo solicitations would not protect donors from the inherent coercion of a direct solicitation by a judge, and a judge's ability to learn the identity of donors does not make committee solicitations inherently coercive. The interest in protecting donors from coercion is a compelling one that is directly advanced by the Solicitation Canons. As Judge Certo himself acknowledges, judges are influential, highly-regarded community leaders. Ex. K, 80. The power of judicial office, therefore, can bring an added element of coercion to direct solicitations by judicial candidates that is not found in other contexts. Other courts have recognized as compelling the State interest in preventing such coercion. *See, e.g., Stretton*, 944 F.2d at 146; *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003); *In re Fadeley*, 802 P.2d 31, 42-43 (Or. 1990). *See also* Defs.' Summ. J. Mem. at 25-26 (describing in greater detail the preceding cases and the State's interest in protecting donors from coercion).

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." *Stretton*, 944 F.2d at 144-46. Further, the fact that personal solicitation is viewed 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*. The courts in both *Stretton* and

Dunleavy held that the State's interests were so strong that the prohibition against personal solicitation satisfied even strict scrutiny.

Indiana's Solicitation Canons should likewise satisfy strict scrutiny analysis. The Canons are narrowly tailored to further the compelling state interest in preventing coercion because they allow candidates to solicit funds through committees. *See Stretton*, 944 F.2d at 145; *Fadely*, 802 P.2d at 44. The use of a committee puts an arm's length between candidate and donor. Thus, the candidate is still able to raise campaign funds, but the donor is free from the coercive effect of being solicited directly by the candidate.

B. 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 26. While the Solicitation Canons would, indeed, prohibit these kinds of solicitations, the Canons are nonetheless valid as applied to Certo.

As explained in the Commission's summary judgment memorandum, the identities of the individuals Judge Certo wishes to solicit do not affect the application of the no-solicitation rule to him. *See* Defs.' Summ. J. Mem. at 28-29. 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."). In short, there is

nothing special about Judge Certo or his circumstances that justify suspending the prohibition on solicitations for him.

IV. The Partisan Activities Canon Is Valid Both Facially And As Applied To Judge Certo

Judge Certo views the Eighth Circuit's holding in *White II* as providing the conclusive rationale for why Indiana's Partisan Activities Canon is unconstitutional. *See* Pls.' Summ. J. Mem. at 31. Unlike the canon invalidated in *White II*, however, Indiana's canon puts no limits on 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, 745 (8th Cir. 2005) ("*White II*"). Indiana limits direct advocacy for political organizations by judicial candidates and judges, but allows judges and candidates the freedom to associate with their parties and announce their views on issues. This arrangement strikes a better balance between the political freedom of judges and the interest of the State in an impartial judiciary, and is entirely consistent with the result in *White II*.

Indeed, the Partisan Activities Canon is narrowly tailored to advance the State's compelling interest in maintaining judicial independence. The Canon is "carefully designed to alleviate th[e] concern [of elected trial judges] 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." *In re Raab*, 793 N.E.2d 1287, 1293 (2003) (*per curiam*).

Judge Certo argues, however, that the Canon is not narrowly tailored and is, in fact, underinclusive for three reasons: (1) the Canon only applies to candidates and does not address political activity engaged in before becoming a candidate; (2) while the Canon prohibits judges and judicial candidates from being party leaders and making speeches on behalf of political

organizations, it nonetheless allows judges and candidates to identify themselves as members of a political party, contribute to and attend meetings of political organizations, and attend dinners and other events sponsored by political organizations; and (3) the Canon does not prohibit judges and candidates from serving as leaders of or making speeches for other types of political associations, such as groups like the NRA or the Sierra Club, among others. Pls.' Summ. J. Mem. at 32-33.

As with the PPC Canon, however, there is no valid argument that the Partisan Activities Canon is infirm because it does not regulate *enough* speech. Seeking to preserve the independence of the judiciary from the appearance of overwhelming partisan influence does not require debarring all who have been partisans in the past. The State may undertake reasonable measures in this regard without hermetically sealing the process from all possible negative inferences of partisanship. Banning speeches supporting political parties reasonably helps reinforce the image of judges as impartial decision-makers, even if they are identified with political parties. It is one thing to be identified as a Republican, to be seen at Republican gatherings, and to make speeches at such gatherings when concerning one's own race. It is another thing entirely to take to the hustings to speak 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 partisans rather than neutral decision-makers.

For similar reasons, the State is not required to ban speeches supporting the NRA and the Sierra Club if it bans speeches supporting political parties. Parties nominate candidates for office—they thus control to a large degree the electoral playing field. *See, e.g.*, Ind. Code § 3-8-4-10. In this way, at least, political parties play a direct role in elections that other organizations

do not, even when those organizations undertake other types of political activities. The point of this Canon is not to remove any suggestion that judges have views on public issues, but to keep to a minimal level the inference that judges are motivated in their official roles based on electoral partisanship and the need to be in the good graces of those who control access to partisan nominations.

As a more narrowly tailored alternative, Judge Certo urges reliance on Canon 2.11, which requires recusal where a judge's impartiality might reasonably be questioned. Pls.' Summ. J. Mem. at 32. This is a curious argument considering that the Plaintiffs are challenging the constitutionality of that very Canon. *See* Part III, *supra*. Presumably they mean to say that an acceptable less restrictive alternative is to require recusal when, to quote their own suggested recusal canon, "bias for or against a party is clear." Ex. K, 63.

Regardless, it should be plain that recusal under any standard is not enough by itself to ensure judicial independence and the appearance of impartiality. Recusal does not have the broad reach of the Partisan Activities Canon to prevent the appearance of impartiality before it reaches the immediate case level. The point of the Partisan Activities Canon 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. To achieve that end, the State should be able to permit limited partisan engagement for elected judges while curbing the political immersion of judges and judicial candidates.

CONCLUSION

The Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been filed electronically, on this 15th 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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