STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

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October 5, 2010

HAND DELIVERED

Honorable Ron D. Parraguirre, Chief Justice
SUPREME COURT OF NEVADA
201 South Carson Street
Carson City, NV 89701-4702

ADKT 0458

Re: **NEVADA CODE OF JUDICIAL CONDUCT**
Legal Developments Impacting Public Endorsement and Partisan Identification

Dear Chief Justice Parraguirre:

The purpose of this letter is to inform the Supreme Court of Nevada of certain decisional law developments that may impact the Nevada Code of Judicial Conduct (the "NCJC"). This letter is submitted to the Court pursuant to Rule 2(4) of the Rules Governing the Standing Committee on Judicial Ethics and Election Practices.

In the last few months, there have been four decisions issued by the United States Courts of Appeal that may be interpreted to question the constitutional validity of NCJC Rules 4.1(A)(3) and 4.1(B)(2), as amended effective January 19, 2010, and several of the Comments pertaining to Rule 4.1. At this juncture, the Standing Committee has not convened as a body to discuss whether to make a recommendation to the Court, but in accordance with the tasks assigned to the Standing Committee by the enabling rules, we are prepared to provide substantive support to the Court in the event the Court should deem it appropriate and necessary.

By way of summary, the four federal circuit courts issued published opinions between June and August of 2010, which either directly or indirectly address the continuing validity of either the respective "public endorsement" provisions or the partisan affiliation clauses enacted by the highest courts in the states of Arizona, Minnesota, Kentucky and Wisconsin. The following is an abbreviated summary of each decision. A copy of each case is appended to this letter, and they are identified respectively as Exhibits A through D.

11-07476

Wolfson v. Brammer, --- F.3d ---, No. 09-15298 (Ninth Circuit, August 13, 2010). A three-judge panel of the court concluded that the plaintiff, who had unsuccessfully sought judicial office in Arizona, but contended he wanted to seek office again and endorse other candidates for office while doing so, had presented claims to the district court which were ripe for consideration. *See infra* **Exhibit A**.

Wersal v. Sexton, --- F.3d ---, No. 09-1578 (Eighth Circuit, July 29, 2010). A three-judge panel concluded that Minnesota's endorsement clause failed constitutional review under the strict scrutiny standard. *See infra* **Exhibit B**.

Carey v. Wolnitzek, --- F.3d ---, Nos. 086468/6538 (Sixth Circuit, July 13, 2010). A three-judge panel, applying a strict scrutiny test, concluded that Kentucky's ban on judicial candidates identifying their party affiliation was unconstitutional. *See infra* **Exhibit C**.

Siefert v. Alexander, --- F.3d ---, No. 09-1713 (Seventh Circuit, June 14, 2010). A three-judge panel, applying a strict scrutiny test, concluded that Wisconsin's partisan affiliation ban was constitutional but that its public endorsement clause was not. *See infra* **Exhibit D**.

Additionally, enclosed as examples are a few recent Advisory Opinions rendered by the Standing Committee that address Nevada's public endorsement clause or related political affiliation issues. *See infra* **Exhibit E**. The Standing Committee has experienced an increase in the number and complexity of the opinion requests that jurists are submitting on the particular topic of the endorsement clause and political party affiliations. Although this might be expected in an election year, we believe that the heightened interest in seeking interpretations of Rule 4.1 indicates the current provisions of the NCJC could be subjected to a prolonged and expensive court challenge that involves the Court, the Standing Committee, and the Commission on Judicial Discipline, or some combination of the three. Despite the amendments that occurred less than a year ago, in light of the recent federal court decisions the Court may deem prudent a reexamination of certain portions of its NCJC. Revisiting the NCJC through a rule-making proceeding may be a more effective mechanism to address any perceived deficiencies in the rules than leaving the issues to litigation.

The Standing Committee and its staff will be at the ready to provide further oral and written information and support to the Court. Please contact me if you have questions or concerns about this submission. Thank you for your consideration.

Sincerely,

Dan R. Reaser

Dan R. Reaser, Esq.

DRR:DFS:dai

Enclosures

cc: Doug Jones, Chairman, NJDC
Tracie Lindeman, Clerk, Nevada Supreme Court
David F. Sarnowski, Executive Director, SCJE/NJDC
Michael A.T. Pagni, Esq., Vice-Chairman, SCJE

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RANDOLPH WOLFSON,
Plaintiff-Appellant,

v.

J. WILLIAM BRAMMER, JR.; JOHN C. GEMMILL; ANGELA H. SIFUENTES; ROBERT M. BRUTINEL, Judge; SYLVIA PATINO-BRANFON; HARRIETT CHAVEZ; SHELIA S. POLK; LOUIS FRANK DOMINGUEZ; SHERRY L. GEISLER; CATHERINE M. STEWART; MARION WEINZWEIG; J. CONRAD BARAN; DAISY R. FLORES; JEFF MESSING; JOHN PRESSLEY TODD; WILLIAM W. HORSLEY; LAURA BELLAU; PAMELA M. KATZENBERG; TIMOTHY GOODING; KAREN OSBORNE; ROBERT B. VAN WYCK,
Defendants-Appellees.

No. 09-15298
D.C. No.
3:08-cv-08064-FJM
OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
March 11, 2010—San Francisco, California

Filed August 13, 2010

Before: J. Clifford Wallace, Susan P. Graber, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge Wallace;
Partial Concurrence and Partial Dissent by Judge Graber

COUNSEL

James Bopp, Jr., Esq., Bopp, Coleson & Bostrom, Terra Haute, Indiana, for plaintiff-appellant Randolph Wolfson.

Kimberly A. Demarchi, Esq., Lewis and Roca LLP, Phoenix, Arizona, for defendant-appellee Robert Van Wyck, Chief Bar Counsel of the State Bar of Arizona.

Charles A. Grube, Esq., Assistant Attorney General, Office of the Arizona Attorney General, Phoenix, Arizona, for defendants-appellees J. William Brammer, Jr., John C. Gemmill, Angela H. Sifuentes, Robert M. Brutinel, Sylvia Patino-Branfon, Harriett Chavez, Shelia S. Polk, Louis Frank Dominguez, J. Conrad Baran, Daisy R. Flores, Jeff Messing, John Pressley Todd, William W. Horsley, Laura Bellau, Pamela M. Katzenberg, Timothy Gooding, and Karen Osborne.

OPINION

WALLACE, Senior Circuit Judge:

While a candidate for judicial office in Arizona, appellant Randolph Wolfson initiated this action against the members of the Arizona Commission on Judicial Conduct, the members of the Arizona Supreme Court Disciplinary Commission, and Arizona Chief Bar Counsel Robert Van Wyck (collectively, defendants) challenging several canons of the Arizona Code of Judicial Conduct (Code) that restricted his political speech and campaign-related activities while a candidate for judicial office. While this action was pending, Wolfson lost the election. Because the Code applies only to judges and candidates for judicial office, and because Wolfson did not intend to seek judicial office in the next election, the district court dismissed the action as moot.

Wolfson now appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

I.

Wolfson is a practicing attorney and member of the Arizona Bar. He has twice unsuccessfully sought election to judicial office in the State of Arizona. In 2006, Wolfson ran for the office of Kingman Precinct Justice of the Peace in Mohave County, Arizona. During his campaign, Wolfson filed an action alleging that several canons of the Code imposed unconstitutional restrictions on his political speech and campaign activities. *Wolfson v. Brammer* (*Wolfson I*), No. CV-06-2357 (Judge Stephen M. McNamee). Wolfson alleged that he wanted to engage in certain campaign-related activities and political speech but refrained from doing so, believing the activities to be prohibited by the challenged canons of the Code. In November 2006, Wolfson lost the election. It is Wolfson's belief that the restrictions on his campaign imposed by the Code contributed to his loss.

Shortly after his defeat, Wolfson decided that he would again seek an elected judicial office in the 2008 elections. In early 2007, Wolfson announced his candidacy for the office of Superior Court Judge, Division V, Mohave County, Arizona. At this time, *Wolfson I* was still pending.

In August 2007, however, the district court dismissed *Wolfson I* on the basis of prudential ripeness. The district court concluded that Wolfson should seek an advisory opinion from Arizona's Judicial Ethics Advisory Committee (Ethics Committee), a body empowered by the Arizona Supreme Court to render, upon request, advisory opinions to judges and judicial candidates. *See Matter of Walker*, 736 P.2d 790, 795 (Ariz. 1987); Ariz. Sup. Ct. Rule 82(b)(1). An advisory opinion would clarify, to some degree, whether the campaign activities and political speech in which Wolfson wished to engage were prohibited by the Code. Following the district court's

dismissal, Wolfson submitted a request to the Ethics Committee for a formal advisory opinion. In April 2008, the Ethics Committee responded to Wolfson's request by issuing Advisory Opinion 08-01.

With the advisory opinion in hand, Wolfson filed the present action in May 2008. *Wolfson v. Brammer* (*Wolfson II*), No. CV-08-8064 (Judge Frederick J. Martone). The allegations in the present action are similar to those in *Wolfson I*: Wolfson alleges that he wanted to engage in certain campaign-related activities and political speech but refrained, believing that the contemplated activities were prohibited by the Code.

First, Wolfson asserts that he wanted to solicit campaign contributions personally, at live appearances and speaking engagements, by making phone calls, and by signing his name to letters seeking donations. Wolfson argues that such solicitations are prohibited by canons 5A(1)(c) and 5B(2) (revised rules 4.1(A)(4) and 4.1(A)(6), respectively) (collectively, the solicitation restrictions).

Second, Wolfson alleges that he wanted to endorse other candidates for office and to support their election campaigns. Wolfson asserts that canons 5A(1)(b) (revised rule 4.1(A)(2) & (3)) (the endorsement clause) and 5A(1)(d) (revised rule 4.1(A)(5)) (the campaigning prohibition) forbid a candidate for judicial office from endorsing other candidates or supporting their campaigns.

Third, Wolfson alleges that he wanted to answer questions from voters and to make presentations regarding his views on disputed legal and political issues, but was prohibited from doing so by canon 5B(1)(d)(i) (revised rule 4.1(A)(9)) (the pledges and promises clause) and canon 3E(1)(e) (revised rule 2.11(A)(5)) (the commits clause).

In November 2008, Wolfson lost the election. After Wolfson's defeat, the district court ordered him to submit a supple-

mental brief indicating whether he intended to seek judicial office in the next election. Wolfson replied that he did not. The district court concluded that the action was moot. The district court further held that the action did not meet the exception to mootness for actions "capable of repetition yet evading review."

After the district court's dismissal, the Arizona Supreme Court adopted a new Code of Judicial Conduct. The revised Code, effective September 1, 2009, renumbers and recodifies the canons at issue, but does not alter the substance of the challenged canons, with one exception. In the new Code, the text of the so-called "commits clause" has been substantially revised. The complaint alleged that the commits clause (in addition to the pledges and promises clause) impermissibly restricted the speech of judicial candidates regarding disputed legal and political issues. Wolfson concedes that his claims regarding the commits clause have been rendered moot by the revision of that clause, and so those claims are no longer before us.

II.

We review the district court's dismissal on the grounds of mootness de novo, as a dismissal for lack of subject matter jurisdiction. *Rosemere Neighborhood Ass'n v. United States EPA*, 581 F.3d 1169, 1172 (9th Cir. 2009). We review factual determinations underlying the district court's decision for clear error. *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1991). In this appeal, defendants invoke the additional jurisdictional defenses of standing and ripeness. Standing and ripeness, like the doctrine of mootness, predominantly present questions of law that we review de novo. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996).

[1] Article III of the United States Constitution limits federal court jurisdiction to "actual, ongoing cases or controver-

sies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). We lack jurisdiction "to decide moot questions or abstract propositions," because "moot questions require no answer." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (internal quotation marks, citations and alterations omitted). A case or controversy must exist at all stages of review, not just at the time the action is filed. *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). A case may become moot after it is filed, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003), *quoting Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001).

[2] An exception to the mootness doctrine exists, however, where an action is "capable of repetition, yet evading review." *So. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). This exception permits actions "for prospective relief to go forward despite abatement of the underlying injury only in exceptional situations . . . where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis*, 494 U.S. at 481 (internal quotation marks and citation omitted).

[3] Wolfson's action easily satisfies the first requirement, as a controversy evading review. "Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter*, 319 F.3d at 490; *see also Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) (election cases are likely to escape review because appellate review often cannot be completed during the brief duration of an election). Indeed, this is precisely the situation Wolfson has encountered: being unable to complete the litigation of his

claims within the brief time frame of his campaign for judicial office.

To satisfy the second requirement, that the action is capable of repetition, Wolfson must establish a reasonable expectation that he will be subjected to the same action or injury again. Wolfson is not presently bound to obey the Code, and will not be subject to the Code unless he again becomes a candidate for judicial office. Wolfson is not now, and he has never been, subject to any enforcement action or threat of enforcement action related to his campaign conduct. Wolfson argues, however, that this action is capable of repetition because he intends to seek elected judicial office in the future. In the alternative, Wolfson asserts that his intentions toward future candidacy, or lack thereof, are irrelevant to evaluating the application of the "capable of repetition, yet evading review" exception to mootness.

The district court found that Wolfson did not intend to seek judicial office in 2010 or in any other future election. This finding is clearly erroneous. While Wolfson concedes that he does not intend to seek office in the 2010 election, he has declared an intent to seek judicial office at some point in the future. The district court's finding relied on a supplemental brief filed by Wolfson, but that brief does not support such a finding. After Wolfson's defeat, the district court ordered him to submit a supplemental brief answering the following question: "Will you be a candidate for judicial office in the next election?" In his supplemental brief, Wolfson replied: "Plaintiff does not currently intend to be a candidate for judicial office in 2010." On the basis of Wolfson's supplemental brief, the district court concluded that Wolfson's action was not "capable of repetition," because he "affirmatively state[d] that he does not intend to be a candidate in the next election" and failed to "express an intention to be a candidate in any election in the near future."

[4] But Wolfson was not asked about his future intent. Wolfson's response was appropriate for the question posed.

The district court asked Wolfson if he would seek office "in the *next* election," and Wolfson replied that he currently did not intend to be a candidate for judicial office in 2010. The district court asked a narrow question: whether Wolfson intended to seek office in the "next" election. Wolfson responded that he did not. The district court did not order Wolfson to declare his intentions more generally. We do not fault Wolfson for answering the specific question posed in the district court's order, and we do not fault Wolfson for failing to volunteer information that the court had not requested.

[5] There is more than sufficient evidence to support a finding that Wolfson intends to seek judicial office in the future. Wolfson's complaint expresses an intention to seek judicial office in the future, and a desire to engage in prohibited conduct "both in the 2008 judicial election and in future judicial elections." Furthermore, eliminating any doubts regarding the record, Wolfson has represented in the present appeal that he intends to seek judicial office in a future election. The Court has declined to dismiss election cases as moot where the candidate-plaintiff has subsequently announced an intent to seek office in a future election. *See Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2769-70 (2008) (challenge to self-financing provisions of federal campaign finance law not moot where the plaintiff-candidate subsequently announced his intention to self-finance another campaign for office); *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) (citing 28 U.S.C. § 1653 for the proposition that defective jurisdictional allegations are curable at trial or on appeal, and holding that a challenge to certain provisions of Georgia election law was not moot, even though petitioner-candidate did not announce in the trial court his plans to run again, where he later "represented, as an officer of this Court, that he plans to run again"); *see also Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462-64 (2007) (challenge to advertising restrictions in federal campaign finance law not mooted by conclusion of election where plaintiff-organization expressed its intention to run similar ads in future elections);

Int'l Org. of Masters, Mates & Pilots v. Brown, 498 U.S. 466, 473 (1991) (holding an election case not moot because "[r]espondent has run for office before and may well do so again"). Wolfson has declared his intention to seek elected judicial office in the future and declared his desire, in connection with any future campaign, to engage in the same activities that are the subject of the complaint in this action. These expressions of intent are sufficient to establish a "reasonable expectation" that this action is "capable of repetition."

As an alternative, Wolfson asserts that his intentions regarding future candidacy are irrelevant to our application of the "capable of repetition, yet evading review" exception to mootness. To support this argument, Wolfson relies on our decision in *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000). There, plaintiff Schaefer was a resident of Nevada who sought to become a candidate in a special election to fill a vacant California seat in the House of Representatives. Schaefer challenged a residency requirement in California election law that prohibited his candidacy. Schaefer *refused* to disclose whether he intended to run for office in California in the future, arguing that his future political aspirations were irrelevant to evaluating the mootness exception. *Id.* at 1033. We decided that the capable-of-repetition exception should not be construed narrowly, observing that several cases had "proceeded to the merits without examining the future political intentions of the challengers." *Id.* at 1033, *citing Dunn v. Blumstein*, 405 U.S. 330, 333, n.2 (1972); *Joyner*, 706 F.2d at 1527. We did not hold "that *only* when a candidate plans to seek reelection is the case *not* moot," and concluded that Schaefer's action could proceed. *Id.* (second emphasis added), *quoting Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996).

Although the parties have vigorously disputed the viability, meaning, and import of *Schaefer*, we need not weigh in on the matter. The plaintiff in *Schaefer* refused to declare his future electoral intentions. Wolfson, in contrast, has affirmatively stated that he intends to become a candidate again. We have

already concluded that Wolfson has met the ripeness requirement by indicating his intent to run for judicial office in the future. *See, e.g., Davis*, 128 S. Ct. at 2769-70; *Chandler*, 520 U.S. at 313 n.2. We need not go further at this time. We therefore leave for another case the significance of *Schaefer* in this Circuit.

III.

Additional objections have been raised as to our jurisdiction. Defendants ask us to dismiss this case for the alternative reasons that Wolfson lacks standing and that Wolfson's claims are not ripe. These contentions are properly considered in this appeal. *See Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996) (jurisdictional challenges may be raised at any time).

A.

[6] "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007). At an "irreducible constitutional minimum," standing requires the party asserting the existence of federal court jurisdiction to establish three elements: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) causation; and (3) a likelihood that a favorable decision will redress the injury. *Lujan*, 504 U.S. at 560-61. In addition to these requirements, the doctrine of prudential standing requires us to consider, among other things, whether the alleged injury is more than a " 'mere generalized grievance,' whether the plaintiff is asserting her own rights or the rights of third parties, and whether the claim 'falls within the zone of interests to be protected or regulated by the constitutional guarantee in question.' " *Alaska Right to Life PAC v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007), *quoting Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983).

Defendants argue that the third element of constitutional standing, redressability, is absent here. They argue that Wolfson has failed to state a claim for relief from them, because they have no legal authority to change the Code. Instead, that authority is reserved to the Arizona Supreme Court. Defendants contend that Wolfson, if successful in this action, can obtain no effective redress because he cannot obtain a revision of the Code.

[7] Wolfson need not obtain a Code revision, however, in order to obtain a measure of relief. A plaintiff meets the redressability requirement if it is likely, although not certain, that his injury can be redressed by a favorable decision. *See Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004); *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994) (plaintiff "must show only that a favorable decision is *likely* to redress his injury, not that a favorable decision *will inevitably* redress his injury"). If a plaintiff is "an object of the [challenged action] . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62.

[8] These defendants have the power to discipline Wolfson and, if they are enjoined from enforcing the challenged provisions, Wolfson will have obtained redress in the form of freedom to engage in certain activities without fear of punishment. The Arizona Commission on Judicial Conduct has disciplinary jurisdiction over the actions of judges, including their actions as candidates. *See generally* Rules of the Commission on Judicial Conduct (explaining disciplinary authority of the Commission on Judicial Conduct); *see also* Ariz. Code Jud. Conduct, canon 5C (a successful candidate is subject to judicial discipline for campaign conduct); *id.* (2009), rule 4.1 cmt. 2 (same). The Arizona Supreme Court Disciplinary Commission has authority to impose various sanctions on members of the Arizona Bar, including censure, reprimand, probation, and restitution. Ariz. Sup. Ct. Rule

49(c)(2), 60; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 770 n.3 (2002) (naming officers of the Minnesota Board on Judicial Standards and the Lawyers Board as defendants in an action challenging the constitutionality of a canon restricting behavior of candidates for judicial office). The Arizona Chief Bar Counsel is charged with overseeing and directing the prosecution of discipline cases involving members of the bar. Ariz. Sup. Ct. Rule 51. Enjoining the defendants from enforcing the challenged canons will redress Wolfson's injury. Without a possibility of the challenged canons being enforced, those canons will no longer have a chilling effect on speech. Wolfson will thus be able to engage in the political speech and campaign activities he desires. It is true that Wolfson cannot obtain revision of the Code from these defendants, but Wolfson may nevertheless obtain a form of effective redress in this action.

B.

[9] Defendants also assert that Wolfson's claims are not ripe. "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (internal quotation marks omitted). The ripeness doctrine "is peculiarly a question of timing," *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974), designed "to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action," *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (internal quotation marks omitted). "[T]hrough avoidance of premature adjudication," the ripeness doctrine prevents courts from becoming entangled in "abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Wolfson is not presently bound to obey the Code and will only be required to do so if he again becomes a candidate for

judicial office. Wolfson is neither now, nor has he ever been, subject to any enforcement action related to these canons. Instead, Wolfson alleges that he wants to engage in three kinds of expressive activity that he believes the Code prohibits: (1) personally soliciting contributions, which is prohibited by the solicitation restrictions contained in canons 5A(1)(c) and 5B(2) (revised rules 4.1(A)(4) & 4.1(A)(6)); (2) endorsing other candidates for office and supporting their campaigns, actions which are prohibited by the endorsement clause and the campaigning prohibition contained in canons 5A(1)(b) & (d) (revised rules 4.1(A)(2) & (3), 4.1(A)(5)); and (3) answering questions from voters and making public speeches regarding disputed legal and political issues, which Wolfson believes is prohibited by the pledges and promises clause, canon 5B(1)(d)(i) (revised rule 4.1(A)(9)). Wolfson alleges that he has suffered the injury of self-censorship, and that he will be required to self-censor in any future campaign for elected judicial office. As the pledges and promises clause raises distinct issues from the solicitation, endorsement, and campaigning clauses, we will address the pledges and promises clause separately.

1.

We first turn to whether Wolfson's claims regarding the solicitation, endorsement, and campaigning prohibitions (canons 5A(1)(b), 5A(1)(c), 5A(1)(d), and 5B(2)) are ripe.

a.

Ripeness has both constitutional and prudential components. *Portman*, 995 F.2d at 902. The constitutional component of ripeness overlaps with the "injury in fact" analysis for Article III standing. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc); *see also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Whether framed as an issue of standing or ripeness, the inquiry is largely the same: whether the issues

presented are "definite and concrete, not hypothetical or abstract." *Thomas*, 220 F.3d at 1139 (internal quotation marks omitted).

[10] Wolfson is not currently subject to an enforcement action and therefore raises a pre-enforcement challenge to the canons. Neither the "mere existence of a proscriptive statute" nor a "generalized threat of prosecution" satisfies the "case or controversy" requirement. *Id.*, *citing San Diego County*, 98 F.3d at 1126-27; *see also Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983). It is true that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Reg'l Rail Reorg. Act Cases*, 419 U.S. at 143 (quotation marks and citation omitted); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (a plaintiff need not expose himself to prosecution in order to challenge the constitutionality of a statute "that he claims deters the exercise of his constitutional rights"). However, for a claim to be ripe, the plaintiff must be subject to a "*genuine* threat of *imminent* prosecution." *San Diego County*, 98 F.3d at 1126, *quoting Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 688 (9th Cir. 1984). When evaluating whether a claimed threat of prosecution is genuine, we consider: (1) whether the plaintiff has articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute. *Id.* at 1126-28.

Although the mere existence of a statute is insufficient to create a ripe controversy, we have applied the requirements of ripeness and standing less stringently in the context of First Amendment claims. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements"). In particular, we apply the principle that one need not await "consummation of threatened injury" before challenging a statute restrict-

ing speech, to guard the risk that protected conduct will be deterred. *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (internal quotation marks omitted); *see also LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154-55 (9th Cir. 2000). To avoid the chilling effect of restrictions on speech, the Court has endorsed "a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Bayless*, 320 F.3d at 1006 (citations omitted); *see also Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996); *accord Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997).

[11] Looking to the first consideration, whether Wolfson has a concrete plan to violate the law, we conclude that Wolfson has established an intent to violate the law that is more than hypothetical. *Cf. Thomas*, 220 F.3d at 1139. Wolfson has expressed an intention to run for office in the future, and a desire to engage in two kinds of campaign-related conduct that is likely to be prohibited by the Code.

First, Wolfson has expressed a desire to solicit campaign contributions personally, through live appearances, phone calls, and written requests. The solicitation restrictions, canons 5A(1)(c) and 5B(2) (revised rules 4.1(A)(4) & 4.1(A)(6)), state that a judicial candidate shall not "solicit funds for or pay an assessment to a political organization . . ." and that a candidate "should refrain from personally soliciting campaign contributions." Advisory Opinion 08-01 confirmed that Wolfson, while a candidate for judicial office subject to the Code, cannot personally solicit or receive campaign contributions.

Second, Wolfson has expressed a desire to endorse other candidates. The endorsement clause, canon 5A(1)(b) (revised rule 4.1(A)(2) & (3)), states that a judge or judicial candidate shall not "make speeches for a political organization or candidate or publicly endorse a candidate for public office." The campaigning prohibition, canon 5A(1)(d) (revised rule 4.1(A)(5)), states that a judicial candidate shall not "actively

take part in any political campaign other than his or her own election, reelection or retention in office." Several Advisory Opinions have confirmed that Wolfson cannot, while a candidate for judicial office, endorse another candidate or participate in another candidate's campaign. Advisory Opinion 08-01 stated that Wolfson could not endorse other candidates for office while himself a candidate. In Advisory Opinion 96-08, the Ethics Committee said that judges "may not participate in campaigns for or against political candidates, even those who take positions affecting the administration of justice," explaining that "Canon 5A(1) of the Code of Judicial Conduct prohibits judges from publicly endorsing a candidate, making speeches for a political organization or candidate, . . . or actively taking part in any political campaign other than their own." In Advisory Opinion 96-09, the Ethics Committee considered whether a judge could appear in an advertisement endorsing a ballot proposition that he had been involved in drafting. The Ethics Committee concluded that a judge could not endorse a proposition, even one that he or she had assisted in drafting, because "the code does not permit a judge to act as a spokesperson and advocate for others."

[12] Turning to the second consideration guiding the ripeness inquiry, the existence of an enforcement action or threat of the same, we start with the undisputed fact that Wolfson has never been threatened with enforcement proceedings. Wolfson asserts that his claims are nevertheless ripe because he has self-censored to comply with the Code. Self-censorship is a constitutionally recognized injury. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is "a harm that can be realized even without an actual prosecution"). In the context of First Amendment speech, a threat of enforcement may be inherent in the challenged statute, sufficient to meet the constitutional component of the ripeness inquiry. *Bayless*, 320 F.3d at 1006-07; *see also Getman*, 328 F.3d at 1095; *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("[T]he threat [of prosecution] is latent in the existence of the statute"). Especially where protected speech may be at

stake, a plaintiff need not risk prosecution in order to challenge a statute. *See, e.g., Bayless*, 320 F.3d at 1006; *Bland*, 88 F.3d at 736-37. The Supreme Court has repeatedly pointed out the necessity of allowing pre-enforcement challenges to avoid the chilling of speech. *See, e.g., Am. Booksellers Ass'n*, 484 U.S. at 393; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (recognizing the "sensitive nature of constitutionally protected expression," in permitting a pre-enforcement action involving the First Amendment).

[13] The third inquiry, past prosecution or enforcement, has little weight in our analysis. The Code is relatively new and the record contains little information as to enforcement or interpretation, other than the advice of the Ethics Committee to Wolfson. Nevertheless, this record is sufficient under the circumstances of this case. Wolfson's claims meet the constitutional component of ripeness.

b.

To evaluate the prudential component of ripeness, we weigh two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. We have held that " '[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.' " *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999), *quoting Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). " 'To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss.' " *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009), *quoting US West Commc'ns*, 193 F.3d at 1118. In our evaluation of a claim of hardship, "[w]e consider whether the regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with

serious penalties attached to noncompliance." *Id.* (internal quotation marks omitted).

[14] We hold that Wolfson's claims regarding the solicitation, campaigning, and endorsement clauses satisfy the concerns of prudential ripeness. Wolfson's claim is fit for decision, because it is primarily legal and does not require substantial further factual development. *See US West Commc'ns*, 193 F.3d at 1118; *San Diego County*, 98 F.3d at 1132. We also conclude that Wolfson is subject to a sufficient hardship. Wolfson has alleged a hardship through the constitutionally-recognized injury of self-censorship. Because we relax the requirements of standing and ripeness to avoid the chilling of protected speech, *Getman*, 328 F.3d at 1094, Wolfson need not await prosecution to seek preventative relief. *See Bayless*, 320 F.3d at 1006; *LSO*, 205 F.3d at 1155.

[15] Defendants assert that Wolfson's claims should be adjudicated in the future, if and when he is again a candidate for judicial office *and* subject to enforcement proceedings. Defendants ask too much. Wolfson alleges that he has already suffered the constitutionally-recognized injury of self-censorship in two separate election campaigns and that he will again be required to censor his speech in a future campaign. Defendants' approach would effectively relegate Wolfson to self-censorship in a third election: as Wolfson's two electoral bids and two actions demonstrate, it is unlikely that this litigation will be completed in the short time frame of an election. Even further, defendants would have any action by Wolfson deferred until an enforcement proceeding is brought. But an enforcement proceeding is not likely, given Wolfson's statement that he will self-censor to comply with the Code. Wolfson's compliance with his duties under the Code should not bar this action, because the principle that "one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases." *Bland*, 88 F.3d at 736-37; *see also Bayless*, 320 F.3d at 1006; *LSO*, 205 F.3d at 1155. Requiring Wolfson to violate the Code as a precondition to

bringing suit would, furthermore, "turn respect for the law on its head." *Bayless*, 320 F.3d at 1007; *see also Bland*, 88 F.3d at 737 (concluding that a plaintiff 's decision to obey the law was "reasonable and demonstrates a commendable respect for the rule of law"). Wolfson has stated an injury of self-censorship and therefore need not await consummation of the threatened injury to bring his claims. *See, e.g., Canatella v. California*, 304 F.3d 843, 855 (9th Cir. 2002) (challenge to state bar rules ripe where alleged harm of potential disciplinary measures damage to the expressive rights of attorneys who refrained from protected activity); *ACLU v. Fla. Bar*, 999 F.2d 1486, 1492-93 (11th Cir. 1993) (challenge to canons of judicial conduct ripe where plaintiff would have to refrain from protected speech to avoid disciplinary action).[1]

Defendants also argue that our decision in *Alaska Right to Life PAC v. Feldman* requires us to decline jurisdiction. 504 F.3d 840. The plaintiff in *Feldman* was a political action committee, Alaska Right to Life, which sought to elicit, through a questionnaire, sitting judges' viewpoints on several issues. *Id.* at 843. Few judges responded to the questionnaire in any way; of the few judges who did, all declined to provide substantive answers, citing the Alaska Code of Judicial Conduct. *Id.* Alaska Right to Life brought an action challenging the

[1]Judge Graber would have us dismiss the claims against the Arizona Commission on Judicial Conduct as unripe because the Commission on Judicial Conduct may not exercise authority over Wolfson unless he is actually elected. If elected, however, Wolfson would be required to answer for statements and conduct made while campaigning. Thus, he would be forced to self-censor in a future election even if the Commission on Judicial Conduct were the *only* body with authority to sanction campaign speech that violates ethical rules. Without preventative relief against the Commission on Judicial Conduct, Wolfson would be forced to self-censor while participating in a future election because of the *possibility* that he might win. Preventative relief against the Disciplinary Commission and Chief Bar Counsel is insufficient to redress Wolfson's injury of self-censorship. Whether or not he wins, Wolfson will be required to self-censor in a future election unless preventative relief is also extended to the Commission on Judicial Conduct.

constitutionality of the "pledges and promises" and "commits" canons of Alaska's Code of Judicial Conduct. *Id.* We concluded that the district court should have declined to exercise jurisdiction on prudential ripeness grounds. *Id.* at 849. There was no hardship to the plaintiff because the challenged canons did not apply to it, and by extension, no concrete factual situation framing the controversy. *Id.* at 851. Also weighing against the exercise of jurisdiction, the Alaska Supreme Court had not yet had an opportunity to construe the canons at issue. *Id.* at 850-52. Because Alaska's Code of Judicial Conduct indicated a preference for interpretation "in a manner that does not infringe First Amendment rights," we had no reason to expect that the Alaska Supreme Court would adopt a recommendation "that ran afoul of the First Amendment." *Id.* at 850; *see also Renne v. Geary*, 501 U.S. 312, 323 (1991) (consideration of constitutional questions should be postponed until a concrete controversy arises, allowing state courts the opportunity to construe a challenged law).

[16] *Feldman* does not compel dismissal of Wolfson's action. Wolfson is dissimilar from the *Feldman* plaintiff in several material respects. In *Feldman*, the plaintiff was not subject to the challenged code, was not threatened with any enforcement action, and had not suffered the injury of self-censorship. *Id.* In contrast, Wolfson's speech was constrained by the Code and he self-censored in order to comply with the Code. Unlike the *Feldman* plaintiff, Wolfson's action seeks principally to redress restrictions on his own speech, as a former candidate for judicial office and as a likely future candidate. *See, e.g., Porter*, 319 F.3d at 490-91. In further contrast to the *Feldman* plaintiff, Wolfson has already sought an advisory opinion regarding the challenged canons. Wolfson's claims relating to the solicitation, campaigning and endorsement canons of the Code are ripe.

2.

We turn to Wolfson's claims regarding the pledges and promises clause, canon 5B(1)(d)(i) (revised rule 4.1(A)(9)).

Wolfson alleges that, during his campaigns for judicial office, he wanted to give talks on certain disputed legal and political issues, and answer questions from voters regarding the same. For example, Wolfson alleges that he wanted to give talks regarding same-sex marriage and family values during the 2006 campaign. An initiative on Arizona's November 2006 ballot, Proposition 107, pertained to same-sex marriage. Believing that he was prohibited from discussing disputed legal and political issues while a candidate for judicial office, Wolfson censored his presentation to omit any discussion of Proposition 107.

a.

Although we apply the requirements of ripeness less stringently in the First Amendment context, a plaintiff must nevertheless establish that he or she possesses an "actual and well-founded fear that the law will be enforced against him or her." *Getman*, 328 F.3d at 1095 (internal quotation marks omitted). We have held that a plaintiff must have a *plausible* and *reasonable* fear of prosecution. *See id.*; *LSO*, 205 F.3d at 1154-55. Bare allegations that a plaintiff 's speech has been chilled by the challenged statute are insufficient to establish a reasonable fear of prosecution. *Getman*, 328 F.3d at 1095 ("The self-censorship door to standing does not open for every plaintiff"). Instead, a well-founded fear of prosecution "will only inure if the plaintiff 's intended speech arguably falls within the statute's reach." *Id.*, *citing Am. Booksellers Ass'n*, 484 U.S. at 392; *see also Majors*, 317 F.3d at 721 (a statute that "clearly fails to cover [plaintiff 's] conduct" does not give rise to a latent threat of enforcement or reasonable fear of prosecution).

In evaluating the ripeness of a claim, we typically consider whether the plaintiff intends to violate the law, whether enforcement proceedings have been threatened, and whether the enforcement history of the challenged statute corroborates a genuine threat. *See generally San Diego County*, 98 F.3d at

1126-29. Wolfson's claim regarding the pledges and promises clause displays none of these features. Wolfson admits that he has no "concrete plan" to violate the pledges and promises clause. *See id.* at 1127. In fact, Wolfson's complaint declares that he "does not wish to pledge or promise certain results in particular cases or classes of cases." Wolfson has never been subject to or threatened with an enforcement action, and does not submit any history of enforcement under the pledges and promises clause that would support his claimed fear of prosecution. *See id.* at 1127-29. Instead, Wolfson fears that the pledges and promises clause may be construed to prohibit judicial candidates from announcing their views on disputed legal and political issues.

[17] Wolfson can have no well-founded fear that he will be prosecuted for violating the pledges and promises clause because that clause does not unambiguously reach his proposed conduct. Arizona's pledges and promises clause provides that a judge or judicial candidate shall not "with respect to 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 the office." The pledges and promises clause prohibits *committing* oneself or *making promises*. The pledges and promises clause does not unambiguously prohibit the expression of one's views on issues that may come before the court. The Ethics Committee has explained that "a judicial candidate may publicly discuss his or her personal opinions on any subject under . . . [the pledges and promises clause] because a candidate may express views on any disputed issue." Advisory Opinion 08-01.

[18] Taking all of the above together, we conclude that Wolfson does not face a "*genuine* threat of *imminent* prosecution" with respect to the pledges and promises clause. *Cf. San Diego County*, 98 F.3d at 1126. Wolfson has no intent to violate the pledges and promises clause, and fails to demonstrate that the clause reaches any of his intended speech. *See Get-*

man, 328 F.3d at 1095. In effect, Wolfson's fear is that the pledges and promises clause might be construed in a particular manner. This falls short of "a credible threat" that the pledges and promises clause will be enforced against him. *Bayless*, 320 F.3d at 1006, *quoting LSO, Ltd.*, 205 F.3d at 1154-55. Wolfson's fear concerns a *possibility*, and is insufficient to satisfy the constitutional component of ripeness. *See Portman*, 995 F.2d at 902 (speculative injuries are not ripe for review); *Darring v. Kincheloe*, 783 F.2d 874, 877 (9th Cir. 1986) ("imaginary or speculative" fears of prosecution are not ripe), *quoting Younger v. Harris*, 401 U.S. 37, 42 (1971). We hold that Wolfson's claims regarding the pledges and promises clause do not satisfy the constitutional component of ripeness, and we need not decide whether they meet the prudential requirements of ripeness.

Taking a different tack, Wolfson asserts that the advice he received from the Ethics Committee failed to dispel his concerns regarding the scope of the pledges and promises clause. Wolfson twice sought an advisory opinion from the Ethics Committee. In December 2007, following the district court's dismissal of *Wolfson I*, Wolfson sought guidance on several issues, including whether he could state his opinions on "disputed legal and political issues," endorse other candidates, and personally solicit campaign contributions. In September 2006, during his campaign for judicial office, Wolfson inquired whether the Code's restrictions on political activity by judicial candidates would prohibit him from speaking publicly about a pending ballot initiative. In response to these requests, Wolfson received two Advisory Opinions, Nos. 08-01 and 06-05.

Wolfson asserts that the advisory opinions have *not only* failed to dispel the chilling effect of the pledges and promises clause, but actually *heightened* it. Wolfson does not, however, state *why* the advisory opinions increased the chilling effect of the pledges and promises clause. Both Advisory Opinion 08-01 and Advisory Opinion 06-05 state that "a candidate

may express views on any disputed issue," subject to and consistent with the pledges and promises clause. *See also White*, 536 U.S. 765, 781-82. The advisory opinions merely incorporate the pledges and promises clause. The opinions may not have provided Wolfson with the level of clarity he desired, but there is no basis on which to conclude they chilled his speech. Wolfson's conclusory assertion of chilling is therefore insufficient. *See Getman* 328 F.3d at 1905 (a plaintiff may not "challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute").

Insofar as Wolfson alleges a fear that the pledges and promises clause continues to restrict the speech of judges, such a claim is also not ripe. Wolfson is not a judge and may never become one. The application of the Code to Wolfson as a judge is a long step removed from Wolfson's claims as a candidate. A claim is not ripe for judicial resolution "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Wolfson cannot ground a claim against the pledges and promises clause on its hypothetical application to him as a judge. Wolfson can become a candidate of his own accord; Wolfson cannot similarly control his appointment to judicial office or the outcome of an election. Insofar as Wolfson purports to redress injuries to judges' speech, such claims are also not ripe. Wolfson cannot assert the constitutional rights of judges when he is not, and may never be, a member of that group. *See, e.g., Feldman*, 504 F.3d at 851 (political action committee plaintiff did not face hardship where "the organization would not itself have risked civil sanction or criminal penalty").

IV.

Defendants have also asserted that this action is barred by collateral estoppel. To support this argument, defendants

point to the district court's order dismissing *Wolfson I* on the basis of prudential ripeness. Defendants assert that Wolfson has not satisfied the preconditions to a subsequent action set forth by the district court's *Wolfson I* order and is therefore barred from bringing this action.

[19] "[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984). Under this doctrine, a party is precluded from relitigating an issue if four requirements are met: (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated; (3) there was final judgment on the merits; and (4) the person against whom collateral estoppel is asserted was a party to or in privity with a party in the previous action. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008). We review the availability of collateral estoppel de novo. *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994).

[20] Here, the district court's dismissal was not an adjudication of the merits. Rather, the district court set forth a curable defect in jurisdiction: ripeness. As a curable defect, a second action on the same claim is permissible after correction of the deficiency. *See* 18A Wright & Miller, Federal Practice & Procedure § 4436 (2000). The parties disagree, however, as to whether the deficiency has been corrected.

In *Wolfson I*, the district court concluded that Wolfson had satisfied the constitutional component of ripeness. Turning to prudential ripeness considerations, however, the district court exercised its discretion to decline jurisdiction, concluding that Wolfson faced "insufficient hardship to warrant the exercise of jurisdiction given the lack of any real or imminent threat of enforcement." The district court observed that Wolfson had sought, and timely received, an advisory ethics opinion from the Ethics Committee in the past. Wolfson could seek an eth-

ics advisory opinion again to obtain clarification regarding the scope of the Code, which might allay his concerns and avoid litigation.

Defendants draw their collateral estoppel argument from the following line in the district court's order: "since '[p]rudential considerations of ripeness are discretionary' [citation], the Court will exercise its discretion to decline jurisdiction over the dispute until Plaintiff actually faces either an enforcement proceeding or the imminent threat of one." Defendants assert that this means that Wolfson is collaterally estopped such that he "is not allowed to come back to federal court to challenge the Code unless and until he 'actually faces either an enforcement proceeding or the threat of one.' " The "curable defect" in jurisdiction, in defendants' view, relates to the existence of enforcement activity, and not a request for an advisory opinion.

[21] We hold that the district court's dismissal of *Wolfson I* was curable on Wolfson's submission of a request for an advisory opinion. The central consideration of the district court's order was that Wolfson could seek an advisory opinion from the Ethics Committee. With this alternative avenue of relief available, and little to no immediate hardship to Wolfson, the prudential balance weighed against the exercise of jurisdiction. Contrary to defendants' argument, the district court's dismissal of *Wolfson I* was not premised solely on the lack of "an enforcement proceeding or the threat of one."

[22] Even if the district court's order of dismissal was unclear whether Wolfson must request an advisory opinion or whether Wolfson must be subject to an enforcement action, we conclude that the present action is not barred by collateral estoppel. Where a decision " 'could have been rationally grounded upon an issue other than that which the defendant seeks to foreclose from consideration, collateral estoppel does not preclude relitigation of the asserted issue.' " *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading, Pa.*, 873 F.2d

229, 233 (9th Cir. 1989), *quoting Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518-19 (9th Cir. 1985); *see also Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding") (internal quotation marks omitted). Defendants' assertion of collateral estoppel is based on an isolated line of the district court's order. Because Wolfson's reading of the order is, at the very minimum, fair, collateral estoppel does not bar this action. *See, e.g., Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 n.2 (9th Cir. 1979).

[23] Subsequent to the dismissal of *Wolfson I*, and consistent with the district court's instruction, Wolfson sought and obtained a formal advisory opinion from the Ethics Committee. Wolfson has thereby cured the defect in jurisdiction identified by the district court in its discretionary declination of jurisdiction over *Wolfson I*.

V.

[24] The remaining issues will not take long. Certain defendants contend that this action is barred by Eleventh Amendment immunity, which "erects a general bar against federal lawsuits brought against a state." *Porter*, 319 F.3d at 491, *citing Papasan v. Allain*, 478 U.S. 265, 276 (1986). The Eleventh Amendment does not bar suits against a state official for prospective relief. *Id.*, *citing Ex parte Young*, 209 U.S. 123 (1908). The Eleventh Amendment poses no bar to Wolfson's claims here.

[25] Certain defendants also argue that the federal courts should abstain from deciding this case under the doctrine explained in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), sometimes known as "*Pullman* abstention." *Pullman* abstention "is an extraordinary and narrow exception to the duty of a [d]istrict [c]ourt to adjudicate a controversy." *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840,

845 (9th Cir. 1974) (internal quotation marks omitted), *overruled on other grounds as recognized by Heath v. Cleary*, 708 F.2d 1376, 1378-79 n.2 (1985). *Pullman* abstention is appropriate only where (1) there are sensitive issues of social policy "upon which the federal courts ought not to enter unless no alternative to its adjudication is open," (2) constitutional adjudication could be avoided by a state ruling, and (3) resolution of the state law issue is uncertain. *Id.* (internal quotation marks omitted). In First Amendment cases, the first *Pullman* element "will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). " 'Indeed, constitutional challenges based on the [F]irst [A]mendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when [F]irst [A]mendment rights are at stake.' " *Porter*, 319 F.3d at 492-93, *quoting J-R Distribs., Inc. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984), *overruled on other grounds by Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). We hold that *Pullman* abstention is not required here.

[26] Finally, Wolfson and defendants devote substantial attention in their briefs to the merits of this action. We will not address these contentions because it would be premature for us to do so. We are also precluded from considering the merits of this action as a matter of procedure. Wolfson's motion for summary judgment was denied by the district court. Denial of a motion for summary judgment is ordinarily not an appealable order. *See Hopkins v. City of Sierra Vista*, 931 F.2d 524, 529 (9th Cir. 1991); *see also Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992) (exceptions to general rule that denial of summary judgment not appealable). The district court's denial here of Wolfson's summary judgment motion is not an appealable order. *See Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 (9th Cir. 1979) ("denial of a motion for summary judgment is not an appealable order . . . even where an action

is incorrectly dismissed by the district court for lack of subject matter jurisdiction") (citation omitted).

VI.

In conclusion, the district court erred by dismissing this action as moot. This action falls within the exception to mootness for actions "capable of repetition, yet evading review." Wolfson has stated an intention to seek office in the future that is sufficient, under our law, to preserve jurisdiction. The district court's finding that Wolfson had not expressed an intention to seek elected judicial office in the future was clearly erroneous. We hold that some of Wolfson's claims against the solicitation, endorsement, and campaigning prohibitions are ripe, but Wolfson's claims regarding the pledges and promises clause are not ripe.

REVERSED and REMANDED.

GRABER, Circuit Judge, concurring in part and dissenting in part:

I respectfully concur in part and dissent in part. I agree with the majority on all issues except the ripeness of Plaintiff 's claims against the Arizona Commission on Judicial Conduct.

The majority holds that Plaintiff 's claims regarding the solicitation, campaigning, and endorsement clauses are both constitutionally and prudentially ripe as to all the defendants collectively. I agree with that conclusion. But, under the circumstances, we also should consider whether those claims are ripe as to each of the defendants. *See, e.g., Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 209 (4th Cir. 1992) (holding that a claim was ripe as to one defendant but not as to another, who could take action against the plaintiff only upon the occurrence of future contingent events). I

bear in mind that a claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

Here, the Arizona Chief Bar Counsel supervises the initial screening of matters and oversees the prosecution of discipline cases. Ariz. R. Sup. Ct. 51(a). Plaintiff would face a genuine threat of imminent prosecution by the Arizona Chief Bar Counsel if he were to campaign as he desires and intends to do. This claim rests on "a single factual contingency," namely, Plaintiff's participation in a judicial election, rather than on "a 'series of contingencies.' " *Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman)*, 560 F.3d 1000, 1005 (9th Cir. 2009). Thus, I conclude that Plaintiff's claims regarding the solicitation, campaigning, and endorsement clauses are ripe as to the Arizona Chief Bar Counsel.

Similarly, Plaintiff's claims regarding the solicitation, campaigning, and endorsement clauses are ripe as to the defendants who are members of the Disciplinary Commission of the Arizona Supreme Court. Those defendants would become involved in enforcing the canons if the Chief Bar Counsel were to prosecute Plaintiff—a threat that is genuine—and if either Plaintiff or the Arizona State Bar sought review of the hearing officer's report. Ariz. R. Sup. Ct. 49(c)(1), 57(l). Plaintiff's appeal of a report unfavorable to him is a foregone conclusion, and I would not rely on the speculation that the Bar might refrain from appealing a report unfavorable to it. Thus, I conclude that there is a genuine threat that the Disciplinary Commission would become involved in imminent enforcement of the canons against Plaintiff.

By contrast, under its own rules, the Arizona Commission on Judicial Conduct will have disciplinary jurisdiction over Plaintiff *only* if he runs for judicial office *and* wins. The outcome of an unspecified future election is plainly an uncertain "contingent future event[ ]" within the meaning of *Texas*. 523

U.S. at 300 (internal quotation marks omitted). Although the Commission ultimately might have retrospective jurisdiction over Plaintiff's actions as a candidate, if he were to be elected to judicial office, the possibility of that occurring remains purely speculative.

Even in the First Amendment context, a plaintiff must have a reasonable fear that the law in question will be enforced against him or her. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). Here, because the possibility of jurisdiction by the Commission is so speculative, Plaintiff faces no "*genuine* threat of *imminent* prosecution" before that body. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotation marks omitted). Because the potential for the Commission to discipline Plaintiff is speculative and rests on a series of contingencies, not all of which are within his control, I would hold that Plaintiff's claims against Defendants who are members of the Commission are not ripe and must be dismissed without prejudice. In all other respects, I join the opinion.

EXHIBIT B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1578

Gregory Wersal, Appellant, v. Patrick D. Sexton, in his official capacity as Chair of the Minnesota Board of Judicial Standards; William J. Egan, in his official capacity as a Member of the Minnesota Board of Judicial Standards; Douglas A. Fuller, in his official capacity as a Member of the Minnesota Board of Judicial Standards; Jon M. Hopeman, in his official capacity as a Member of the Minnesota Board of Judicial Standards; Cynthia Jepsen, in her official capacity as a Member of the Minnesota Board of Judicial Standards; E. Anne McKinsey, in her official capacity as a Member of the Minnesota Board of Judicial Standards; Gary Pagliaccetti, in his official capacity as a Member of the Minnesota Board of Judicial Standards; James Dehn, in his official capacity as a Member of the Minnesota Board of Judicial Standards; Kent A Gernarder, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; Vincent A. Thomas, in his official capacity as Vice	*	Appeal from the United States District Court for the District of Minnesota.

Chair of the Minnesota Lawyers Professional Responsibility Board; Kathleen Clarke Anderson, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Mark R. Anway, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Robert B. Bauer, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Joseph V. Ferguson, III, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Wood R. Foster, Jr., in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Susan C. Goldstein, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Sherri D. Hawley, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Lynn J. Hummel, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Geri L. Krueger, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Ann E. Mass, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Mary L. Medved, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility

Board; David A. Sasseville, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Debbie Toberman, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Dianne A. Ward, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Stuart T. Williams, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Jan M. Zender, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; William P. Donohue, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Marne Gibbs Hicke, in her official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Richard H. Kyle, Jr., in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Michael W. Unger, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Daniel R. Wexler, in his official capacity as a Member of the Minnesota Lawyers Professional Responsibility Board; Randy R. Staver, in his official capacity as a Member of the Minnesota Board of Judicial Standards; Honorable Terri Stoneburner, in her official capacity as

a Member of the Minnesota Board of Judicial Standards, *

Appellees. *

Submitted: December 16, 2009
Filed: July 29, 2010

Before BYE, BEAM, and COLLOTON, Circuit Judges.

BEAM, Circuit Judge.

This case presents the question of whether three provisions of the Minnesota Code of Judicial Conduct (Code) unconstitutionally infringe upon First Amendment rights of judicial candidates. Gregory Wersal, a candidate for Justice of the Minnesota Supreme Court, asserts that the so called "endorsement," "personal solicitation," and "solicitation for a political organization or candidate" clauses of Canon 4[1] are unconstitutional on their face or as applied to him. On cross-motions for summary judgment, the district court rejected Wersal's First Amendment claims and granted summary judgment to the appellees–members of the Minnesota Board of Judicial Standards and the Minnesota Lawyers Professional Responsibility Board. Wersal appeals, and we reverse.

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[1]When Wersal initiated this lawsuit, these clauses were set forth in Canon 5. Prior to this appeal, however, the Minnesota Supreme Court revised the Code. See Order Promulgating Revised Minn. Code of Judicial Conduct, No. ADM08-8004 (Minn. Dec. 18, 2008) (effective July 1, 2009), available at http://www.bjs.state.mn.us. As a result of those revisions, the challenged clauses are now located in Canon 4.

I. BACKGROUND

This case has its roots in Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (White I), and this court's prior en banc decision, Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005) (en banc) (White II). In those opinions, Wersal, among others, successfully challenged the so called "announce," "partisan-activities," and "solicitation" clauses of Canon 5 on First Amendment grounds. White I, 536 U.S. at 788 (announce clause); White II, 416 F.3d at 766 (partisan-activities and solicitation clauses). In an effort to bring the Code into compliance with the White decisions, the Minnesota Supreme Court removed the "announce" and "partisan-activities" clauses from the Code and amended the "solicitation clause." Wersal now maintains that the amendments to the solicitation clause do not cure its invasion of his First Amendment rights, and that the endorsement clause improperly restricts expression protected by the First Amendment.

The endorsement clause–Canon 4.1(A)(3)–and the solicitation clauses–Canon 4.1(A)(4) and (6)–each rein in a judicial candidate's[2] speech.[3] The endorsement clause prevents a judicial candidate from "publicly endors[ing] or, except for the judge or candidate's opponent, publicly oppos[ing] another candidate for public office." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(3). The personal solicitation clause prohibits a judicial candidate from "personally solicit[ing] or accept[ing] campaign contributions," id. at 4.1(A)(6), and the solicitation for a political organization or candidate clause provides that a judicial candidate shall not

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[2]The Code defines "judicial candidate" as "any person, including a sitting judge, who is seeking selection for judicial office by election or appointment." 52 Minn. Stat. Ann., Code of Judicial Conduct, Terminology.

[3]Notably, Canon 4 applies to both judicial candidates and to non-candidate judges. See 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1. We review the constitutionality of these clauses only as they apply to judicial candidates.

"solicit funds for a political organization or a candidate for public office," id. at 4.1(A)(4)(a).[4]

The facts of this case indicate the degree to which these particular provisions have chilled Wersal's speech. In early 2007, Wersal announced his intention to run for the office of Chief Justice of the Minnesota Supreme Court. As part of his campaign, Wersal wanted to publicly endorse certain other candidates for public office. Specifically, he desired to support Tim Tinglested, candidate for Associate Justice of the Minnesota Supreme Court, Glen Jacobsen, candidate for Minnesota District Court Judge, and Michele Bachmann, candidate for United States Congress. However, the endorsement clause prevented Wersal from engaging in any such public endorsement of these candidates.

Moreover, Wersal wanted to personally solicit funds for his 2008 campaign from non-attorneys by going door-to-door and by making personal phone calls asking for financial support although he pledged (and continues to pledge) to recuse himself from any case in which a known contributor is or becomes a party. However, the personal solicitation clause specifically barred him from engaging in such activity, and Wersal felt that the solicitation for a political organization or candidate clause further constrained his efforts in seeking financial contributions from non-attorneys. Accordingly, Wersal believed that he could not wage an effective campaign as long as the endorsement and solicitation clauses remained in force. He, therefore, asked for injunctive and declaratory relief in the district court. After it became apparent that Wersal would not be able to get adequate relief prior to the 2008 campaign, he decided not to run for the Minnesota Supreme Court in 2008, but to instead run for the

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[4]These clauses are subject to certain other requirements and exceptions listed in Canons 4.2 and 4.4 of the Code. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(A)(5), B(3) & 4.4(B)(1). We deal with these additional requirements and exceptions in more detail below.

Minnesota Supreme Court during the 2010 elections.[5] In furtherance of his 2010 campaign, Wersal wishes to engage in conduct parallel to that which he sought to engage during the 2008 campaign. However, just as in 2008, Wersal continues to feel limited by the contested clauses.

In granting the appellees' motion for summary judgment, the district court held (1) Wersal's challenge to the solicitation for political organization or candidate clause was not ripe; and (2) the endorsement and personal solicitation clauses were narrowly tailored to meet the state's legitimate interest in protecting judicial impartiality.

II. DISCUSSION

A. Judicial Selection and Political Speech

Minnesota chooses to elect the judges of its courts. Minn. Const. art. 6, § 7. While we have confessed "some bias in favor of a system for the appointment of judges," the sovereignty of the states within our federal system guarantees that "Minnesota may choose (and has repeatedly chosen) to elect its appellate judges." White II, 416 F.3d at 746, 747. But "[i]f Minnesota sees fit to elect its judges, which it does, it must do so using a process that passes constitutional muster." Id. at 748.

Minnesota has enacted Canon 4 of the Code in an effort to regulate judicial elections. In White I, the Supreme Court held the announce clause, which prohibited judicial candidates from stating their views on disputed legal issues, unconstitutional. In White II, an en banc court of this circuit held the partisan-activities and solicitation

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[5]According to the Minnesota Secretary of State, Wersal has now filed to run in 2010 against Associate Justice Helen Meyer for the position she now occupies on the Minnesota Supreme Court. Minnesota Secretary of State, Candidate Filings, http://candidates.sos.state.mn.us/ (follow "Judicial Offices" hyperlink) (last visited June 23, 2010).

clauses unconstitutional. It now falls to this panel to determine whether the endorsement, personal solicitation, and solicitation for a political organization or candidate clauses are permissible under the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Inherent within this protection is the "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); see also Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."). And, the First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995).

The political speech burdened by the clauses at issue in this case is "the very stuff of the First Amendment." White II, 416 F.3d at 748. Indeed, "'the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" Id. (alteration in original) (quoting Buckley, 424 U.S. at 15). Our system of representative democracy relies on such a protection of political speech, "for it is the means to hold officials accountable to the people." Citizens United v. FEC, 130 S. Ct. 876, 898 (2010); see also Buckley, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." Citizens United, 130 S. Ct. at 898.

Indeed, so strong is the protection of political speech that the Court recently indicated that "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter." Id. However, the Court stopped short of

placing a categorical ban on political speech restrictions, choosing instead to examine laws burdening political speech under "strict scrutiny." Id. Thus, we only permit restraint of political speech where, upon strict scrutiny, the regulation "advances a compelling state interest and is narrowly tailored to serve that interest." White II, 416 F.3d at 749.

Canon 4's restrictions on endorsements of candidates and solicitation of campaign funds directly limit judicial candidates' political speech. And, Canon 4's restriction on whom a candidate may endorse limits a candidate's right to associate with others who share common political beliefs and aims. Thus, Minnesota's endorsement and solicitation clauses burden political speech and must be examined under strict scrutiny.

B. Canon 4.1(A)(4)(a)'s Ripeness

Before we apply strict scrutiny to the clauses, we must first ask whether Wersal's challenge to the political organization or candidate solicitation clause–Canon 4.1(A)(4)(a)–is ripe for review. This clause provides that a judicial candidate shall not "solicit funds for a political organization or a candidate for public office."[6] 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(4)(a). The district court held that Wersal's challenge to this restriction was not ripe because the intent of this rule was to restrict candidate's from soliciting funds for political parties and other candidates. Specifically, the court held that the issue was not ripe because (1) the clause had never been applied to a candidate's solicitations for his or her own campaign; (2) Wersal's campaign committee was not a "political organization" as defined by the Code; (3) Wersal had not sought an advisory opinion as to whether the clause would apply to

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[6]Canon 4.1(A)(4)(b) also prohibits a judicial candidate from making "a contribution to a candidate for public office." Wersal has not challenged the application of the "contribution clause," and we refrain from reviewing it.

solicitations for his campaign; and (4) Wersal's interpretation was an absurd reading of the Code which was contrary to its plain meaning. We disagree.

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbot Labs. v. Gardner, 387 U.S. 136, 148 (1967), rev'd on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977). Before the federal courts may address a question, "there must exist 'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037-38 (8th Cir. 2000) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). Accordingly, to determine whether a dispute is ripe for judicial review we consider "(1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development." Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684, 692-93 (8th Cir. 2003) (citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998)).

The district court's ripeness analysis is flawed in four ways. First, the fact that the clause has never been applied to prohibit a candidate from soliciting contributions for his or her own campaign does not dispositively indicate that the provision would never be so applied. Second, although Wersal's own campaign committee is not a "political organization" under the Code,[7] the clause also prohibits a candidate from soliciting "funds for . . . a *candidate* for public office," which includes Wersal himself in this instance. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(4)(a)

[7]"For purposes of this Code, the term [political organization] does not include a judicial candidate's campaign committee . . . ." 52 Minn. Stat. Ann., Code of Judicial Conduct, Terminology, "Political Organization."

(emphasis added).[8] And, as we noted in White II, clauses which restrict a candidate from soliciting funds for his own campaign are content-based restrictions which burden core political speech. 416 F.3d at 763-64. Accordingly, a plain reading of this clause chills Wersal from engaging in speech–solicitation of funds–which this court has already held is protected First Amendment expression.

Third, we do not rigidly require that the plaintiff seek a pre-enforcement advisory opinion where, as here, the regulation at issue chills protected First Amendment activity. See Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129, 132 (8th Cir. 1997); see also Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988) (noting "self-censorship [is] a harm that can be realized without an actual prosecution"); Majors v. Abell, 317 F.3d 719, 721 (7th Cir. 2003) (stating that "[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute" (citations omitted)). Moreover, the appellees could very easily have drafted an advisory opinion in response to this litigation indicating that the clause would not be applied to a candidate's solicitation of funds for his own campaign. That the appellees did not to do so indicates that the clause more than likely does apply to Wersal's desires to solicit funds for his own campaign.

Fourth, our reading of this clause is neither absurd nor contrary to any other provision in the Code. Although the clause may have been intended to prevent a judicial candidate from soliciting funds for *another* candidate's campaign, neither the clause itself nor the Canon as a whole compels such a reading. We note that under our

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[8]Giving the term "candidate," its ordinary or natural meaning, see Crawford v. Metropolitan Government of Nashville and Davidson County, 129 S. Ct. 846, 850 (2009), means "a person who seeks an office." Random House Webster's Unabridged Dictionary 304 (2d ed. 1997). Since Wersal is seeking an elected office, he is a "candidate." Accordingly, under a plain reading of the clause, it prohibits Wersal from soliciting funds for his own candidacy.

reading, this clause is similar to, if not redundant with, the personal solicitation clause. But, the mere fact that a Code is redundant is not evidence of its absurdity. Morever, we decline to impart a different meaning to language that plainly prevents the soliciting of funds for one's own campaign.

Where a regulation, such as Canon 4.1(A)(4)(a), chills protected First Amendment activity, its hardship upon the plaintiff is sufficiently substantial to justify a pre-enforcement declaratory judgment action. Minn. Citizens, 113 F.3d at 132. Morever, we generally consider an issue to be fit for judicial decision when the issue involved is legal rather than factual. See id. Here, the issue presented requires no further factual development, is largely a legal question, and chills protected First Amendment expression. Thus, to the extent that the solicitation for a political organization or candidate clause prevents Wersal from soliciting funds for his own campaign, there exists a real, substantial and concrete dispute, and the issue is ripe for review.

C. Constitutional Framework

Having found that Wersal's challenge to the solicitation for a political organization or candidate clause is ripe, we now turn to the constitutional issues before us.

1. Facial vs. As-Applied Challenges

Wersal encourages us to examine the facial constitutionality of these clauses. Alternatively, Wersal asserts that the clauses are at least unconstitutional as-applied. Therefore, we begin our constitutional analysis by determining whether we will examine these challenges as an as-applied challenge or as a facial challenge.

The Supreme Court cautions against holding a law facially unconstitutional and encourages us to exercise "judicial restraint in a facial challenge." Wash. State

Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008). Indeed, "a plaintiff can [generally] only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [law] would be valid.'" Id. at 449 (second alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Accordingly, "a facial challenge must fail where the [law] has a plainly legitimate sweep." Id. (internal quotation omitted).

However, in the realm of regulations that chill speech, the Court has relaxed this standard, recently noting that "a [regulation] which chills [protected] speech can and must be invalidated where its facial invalidity has been demonstrated." Citizens United, 130 S. Ct. at 896. Moreover, "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." United States v. Edge Broad. Co., 509 U.S. 418, 430 (1993) (quotation omitted).

The endorsement clause chills speech "that is beyond all doubt protected[,] mak[ing] it necessary in this case to" review the facial validity of that regulation. Citizens United, 130 S. Ct. at 896. As to the solicitation clauses, Wersal's averments are very limited. He asserts only that his efforts to personally solicit funds for his own campaign from non-attorneys are thwarted by the clauses, Compl. ¶¶ 22, 44; Appellant's Br. 15, 55, apparently recognizing that solicitation from attorneys may well raise different issues, particularly in view of the "very specific information about campaign contributions . . . publicly available, notably on the Internet." White II, 416 F.3d at 765 n.16; see also Siefert v. Alexander, No. 09-1713, 2010 WL 2346659, at *14 (7th Cir. Jun. 14, 2010) (noting that recusal from all cases involving a broad range of attorneys from whom the candidate solicited contributions could present serious practical problems for the state judiciary). Accordingly, we review the constitutionality of the solicitation clauses only as-applied to Wersal's desire to solicit from non-attorneys for his own campaign.

2. Strict Scrutiny

Any regulation which curtails political speech violates the Constitution unless it can withstand strict scrutiny review. White II, 416 F.3d at 749. To survive strict scrutiny, the state must "show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest." Id. This examination "is best described as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest." Id. at 750.

To determine whether an interest (the end) is "important enough" to justify the abridgement of core constitutional rights, we examine the regulation (the means) purportedly addressing that end. Id.

> A clear indicator of the degree to which an interest is "compelling" is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being "compelling."

Id. If the interest is sufficiently compelling, then we ask whether the regulation (the means) used to meet that end is "narrowly tailored to serve that interest." Id. at 751. Determining whether a regulation is narrowly tailored requires an examination of several related factors. As we stated in White II,

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

Id. In other words, a regulation which burdens political speech will only withstand constitutional scrutiny if it is "as *precisely* tailored as possible" to meet a very important end. Id.

D. Minnesota's Purported Compelling State Interest: Impartiality

Minnesota maintains that its interests in maintaining judicial impartiality and the appearance thereof are compelling interests worthy of supporting its regulation of judicial candidates' speech.[9] In White I, the Supreme Court defined the bounds of Minnesota's interest in judicial impartiality, providing that impartiality in the judicial context had three potential meanings.

One such meaning of "impartiality" is a "lack of preconception in favor of or against a particular *legal view*." White I, 536 U.S. at 777. According to the Court, Minnesota does not have a compelling interest in seeking judges who "lack . . . predisposition regarding the relevant legal issues in a case." Id. This is because "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." Id. at 778 (quotation omitted). Thus, Minnesota has no compelling interest in preventing judicial preconceptions on legal issues. Id.

A second meaning of "impartiality" is "lack of bias for or against either *party* to [a] proceeding." Id. at 775. This notion "assures equal application of the law" because it "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." Id. at 776. The Supreme Court implied, and we have expressly held "that *this* meaning of impartiality describes a

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[9]As Justice O'Connor aptly notes, "If the State has a problem with judicial impartiality [or its appearance], it is largely one the State brought upon itself by continuing the practice of popularly electing judges." White I, 536 U.S. at 792 (O'Connor, J., concurring).

state interest that is compelling." White II, 416 F.3d at 753. Because protecting litigants from biased judges presents a compelling state interest, the only question remaining is whether each or any of the challenged clauses is narrowly tailored to meet this compelling interest. We address this question in Part E below.

The third meaning of "impartiality" is "described as openmindedness," meaning "not that [the judge has] 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 I, 536 U.S. at 778. In other words, it is impartiality that "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." Id. The Court refrained from determining whether impartiality articulated as "openmindedness" constitutes a compelling state interest, finding instead that even if it were a compelling interest, the announce clause was "woefully underinclusive" to meet such an interest. Id. at 780. In White II, we determined that the clauses at issue were similarly "woefully underinclusive" to serve an interest in openmindedness. 416 F.3d at 758, 766.[10] Likewise, the underinclusiveness of Canon 4's endorsement and solicitation clauses illustrates that they are, as well, woefully underinclusive in serving any such interest, whether it is compelling or not. We address this underinclusiveness below.

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[10]In White II, we noted that "the underinclusiveness of Canon 5's partisan activities clause clearly establishe[d]" that judicial openmindedness was not "sufficiently compelling to abridge core First Amendment rights." 416 F.3d at 759. Specifically, we held that "the partisan-activities clause [left] appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited, and thus Minnesota's argument that it protects an interest of the highest order fails." Id. at 760. While the same may be said of the clauses at issue in this case, we pass on the question of whether openmindedness constitutes a compelling interest, focusing our analysis instead on the narrow tailoring of the clauses.

E. Narrow Tailoring

Although Minnesota has a compelling interest in promoting impartiality defined as a lack of bias against parties and possibly has a compelling interest in promoting impartiality defined as openmindedness, the constitutionality of the challenged regulations turns on whether the regulations are narrowly tailored to meet either of these interests. As noted above, a regulation is narrowly tailored only where it is necessary, not overinclusive, not underinclusive, and is the least restrictive alternative to address the purported state interest. Id. at 751. Each of the three clauses must independently meet this analysis. We hold that all three fail.

1. The Endorsement Clause

The endorsement clause of Canon 4.1(A)(3) prohibits a judicial candidate from "publicly endors[ing] or, except for the judge or candidate's opponent, publicly oppos[ing] another candidate for public office." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(3).[11] This restriction depends wholly upon the subject matter of the speech for its invocation. Candidates are not barred from talking about other candidates for any purpose other than endorsing or opposing them. "Restricting speech based on its subject matter triggers the same strict scrutiny as does restricting core political speech." White II, 416 F.3d at 763-64. This is because "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Carey v. Brown, 447 U.S. 455, 462 n.6 (1980) (quotation omitted).

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[11] Wersal only challenges the "endorsement" provision of the clause.

Additionally, the endorsement clause burdens core political speech.[12] As we noted in White II

> "[A] candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known [and associate with like-minded persons] so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country public discussion is a political duty, applies with special force to candidates for public office. . . . [T]he First Amendment simply cannot tolerate [a] restriction upon the freedom of a candidate to speak [or associate] without legislative limit on behalf of his own candidacy."

416 F.3d at 757 n.8 (alterations in original) (quoting Buckley, 424 U.S. at 52-54). Thus, the endorsement clause burdens political expression because it impairs a candidate's ability to vigorously advocate the election of other candidates, associate with like-minded candidates, and, thus, vigorously advocate his or her own campaign. Such a burden on core political speech triggers strict scrutiny. Citizens United, 130 S. Ct. at 898; see also White II, 416 F.3d at 748-49. Accordingly, the endorsement clause, which is a content-based restriction on core political speech, is subject to strict scrutiny review.

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[12]Appellees argue that endorsements are not necessary to run an effective campaign. Such an inquiry, however, is irrelevant as to whether restricting endorsements burdens core political speech. Instead, the inquiry is whether the infringed expression would communicate *relevant* information to the electorate. See White I, 536 U.S. at 782 ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.").

a. Unbiased Judges

The appellees contend that the endorsement clause is narrowly tailored to serve Minnesota's compelling interest in impartiality articulated as a lack of bias for or against parties to a case. According to the appellees, endorsements pose a particularly acute danger to impartiality defined in this manner because a public endorsement for a candidate indicates a judicial candidate's bias towards the endorsed party. Thus, argue the appellees, the endorsement clause is a necessary evil to protect from such a display of favoritism towards potential litigants. We disagree.

To be sure, the endorsement clause appears more narrowly tailored to serve the state's interest in preserving a bench of judges who are unbiased towards parties than was the announce clause at issue in White I. In particular, in White I the Court noted that the announce clause was not directed to restrict "speech for or against particular *parties*, but rather speech for or against particular *issues*." 536 U.S. at 776. The endorsement clause, on the other hand, appears aimed at restricting speech for or against particular *parties*. But, "[t]he question under our strict scrutiny test . . . is not whether the [endorsement] clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest." Id. at 777 n.7. The endorsement clause fails this analysis.

The endorsement clause is overinclusive to meet this end, restricting more speech than is necessary to prevent a public display of favoritism. Although endorsements do indicate a particular connection between endorser and endorsee, a candidate may also use an endorsement as a proxy for expressing his or her views. Indeed, in some instances, endorsing a well-known candidate is a highly effective and efficient means of expressing one's own views on issues. For example, in 1984, much of the country was aware of Ronald Reagan's platform in his bid to serve a second term as President. A judicial candidate who agreed with President Reagan's well-established views on, for instance, a strict interpretation of the Constitution or the need for judicial restraint, might have better and more effectively publicized his own

subjective views by endorsing Mr. Reagan's candidacy, even though it was for a non-judicial office. The same would likely have been true if it had involved President Bill Clinton's campaign for re-election in 1996. Thus, whether it may be wise or necessary for one candidate to endorse another, from one simple statement the judicial candidate can announce his or her own views on a myriad of matters. And, it is highly unlikely that any such similar endorsee would become a party in a state judge's court. Therefore, though the endorsement clause is *aimed* more narrowly at restricting speech dealing with potential *parties*, its reach tends to prevent candidates from expressing views on *issues* as well.

The district court agreed that "endorsement of a particular candidate might serve as a proxy for a position on an issue" but distinguished the clause from our partisan-activities clause analysis in White II by concluding that such a "connection lacks the force and immediacy society applies to the political organization–political issue link." Wersal v. Sexton, 607 F. Supp. 2d 1012, 1022-23 (D. Minn. 2009). We think this analysis is flawed. As we noted in White II, engaging in partisan activities served to link a judicial candidate to the views espoused by the political party with which he aligns. White II, 416 F.3d at 754-55. In some respects, the association with another candidate is stronger indicia of the beliefs of the endorser than is an association with a political party. Particularly, a statement that one is a "Republican" or a "Democrat" or an "Independent" might tip the electorate off as to the type of policies that the candidate would support or reject. But, endorsing a well-established candidate denotes a particular subset of issues and policies with which the endorsing candidate may subscribe. Accordingly, we ascribe the same, if not greater, "force and immediacy" to the link between endorser and endorsee as we do between a candidate and a political party. Thus, the endorsement clause clearly restricts more speech than is necessary to serve an interest in impartiality articulated as a lack of bias for or against parties to a proceeding.

The overinclusiveness of the endorsement clause is further illustrated by the appellees' suggestion that the endorsement of certain candidates poses an acute risk

of a showing of bias for or against particular litigants. Specifically, the appellees are troubled by the notion that a judicial candidate could endorse candidates for sheriff and county attorney–persons who are likely to repeatedly appear as litigants or representatives of litigants in Minnesota courts. We understand this concern. But, the clause is not so cabined. It prohibits endorsements regardless of the likelihood that the endorsee will ever appear as a party in the state's courts. Indeed, the clause prohibits a judicial candidate from endorsing numerous candidates who are unlikely to ever personally appear as parties in Minnesota litigation, for instance the President of the United States or any Governor, Congressman or Senator from a state other than Minnesota. Given that the state's compelling interest in preserving a lack of bias extends only to preventing bias for or against a *party to a proceeding*, White I, 536 U.S. at 775, the endorsement clause easily restricts more speech than necessary to serve that asserted interest.

The endorsement clause is also underinclusive in purporting to serve the compelling interest of electing unbiased judges. In particular, the clause only prevents a candidate from endorsing other *candidates* for public office. Thus, a judicial candidate may endorse a public official or a potential candidate for office so long as the endorsee has not yet officially filed for office. Moreover, the endorsement clause would permit a candidate to endorse the acts and policies of non-candidates no matter the likelihood of their becoming litigants in a case before the court–that is businesses, labor unions, the ACLU or any public officials not running for office. Thus, the clause's underinclusiveness belies its purported purpose of preserving impartiality defined as a lack of bias for parties.

Finally, a categorical ban on endorsements is not the least restrictive nor the most effective means of limiting party bias or its appearance. Instead, where a person who received the judge's endorsement appears before that judge, "recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case." White II, 416 F.3d at 755. In fact, "[t]hrough recusal, the same concerns of bias or the appearance of bias that Minnesota

seeks to alleviate through the [endorsement] clause are thoroughly addressed without 'burn[ing] the house to roast the pig.'" Id. (third alternation in original) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)). Indeed, that Canon 2 requires a judge to recuse "himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," is evidence of that fact. 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 2.11(A). And, "[c]oncern about the mere *appearance* of bias is also addressed by recusal." White II, 416 F.3d at 755 (second alteration in original). This is because in Minnesota, "[t]he controlling [recusal] principle is that no judge . . . ought ever to [hear] the cause of any citizen, *even though he be entirely free from bias in fact*, if circumstances have arisen which give a bona fide appearance of bias to litigants." In re Collection of Delinquent Real Prop. Taxes, 530 N.W.2d 200, 206 (Minn. 1995) (emphasis in original).

The appellees contend that recusal is not the most effective means to address the bias allegedly created by endorsements. They fear that if the state required a judge to recuse from all cases where a party to the litigation was previously endorsed by that judge, they would be forced to recuse themselves from a great number of cases, or at least from a great number of important cases. We disagree.

First, even if a judge felt compelled to recuse himself from those cases in which he had previously endorsed a party to a lawsuit, it would seemingly be an ineffective campaign strategy for a judicial candidate to endorse persons almost certain to be future litigants. That is to say, to the extent the state is concerned about a judge endorsing the local sheriff and then having to recuse from all cases in which the sheriff is involved (whether as a party or material witness), it would be foolish as a matter of campaign strategy for a judicial candidate to follow such a course of action. It is almost certain that the electorate, especially if notified by a campaign opponent, would reject this tactic. Thus, we believe the electoral marketplace will adequately guard against the "parade of horribles" the appellees advance.

Second, and perhaps most importantly, contrary to the appellees' views, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009), is not inapposite. In Caperton, while a case was pending before the Supreme Court of Appeals of West Virginia, the CEO of an appealing corporation spent over $3 million supporting Brent Benjamin's campaign for a seat on the court of appeals. Id. at 2257. Once Benjamin won the seat, the appellee requested that Benjamin recuse himself. Benjamin refused. Id.

In the present case, the appellees contend that Benjamin's refusal to recuse in the face of enormous financial contributions evidences that recusal is an ineffective means of addressing potential bias. However, this argument ignores the fact that the Court remedied the due process harm in Caperton by requiring recusal. Id. at 2263-65. And, as the Supreme Court has recently noted "Caperton's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." Citizen's United, 130 S. Ct. at 910. The harm in Caperton was that the judge refused to recuse himself, not that he originally accepted the $3 million in contributions. Accordingly, Caperton's holding does not require that a judge refuse to speak during his or her campaign, only that due process demands that certain actions which occur during a judicial campaign may later require recusal. And, to the extent a judge remains reluctant to recuse from cases post-Caperton, Minnesota "remain[s] free to impose more rigorous standards for judicial disqualification" than due process requires. Caperton, 129 S. Ct. at 2267 (quotation omitted).

Accordingly, the endorsement clause is not narrowly tailored to serve any interest in electing unbiased judges and it is clearly not the least restrictive means of doing so. Thus, the clause fails strict scrutiny.

b. Openmindedness

To the extent that openmindedness constitutes a compelling state interest, the endorsement clause is woefully underinclusive. As with the announce clause in White

I and the partisan-activities clause in White II, the endorsement clause was not adopted for the purpose of preserving the openness of a judge to differing legal arguments. See White I, 536 U.S. at 778; White II, 416 F.3d at 756. And, we do not believe that a judicial candidate's endorsement of another candidate indicates that as a judge he or she will be any less open to alternate legal conceptions of a case. Moreover, while the endorsement clause may be an indicator of views on issues, "an affirmative enunciation of views during an election campaign more directly communicates a candidate's beliefs." White II, 416 F.3d at 758. "If, as the Supreme Court has declared, a candidate may *speak* about her views on disputed issues, what appearance of 'impartiality' is protected by keeping a candidate from simply *associating* with a party that espouses the same or similar positions on the subjects about which she has spoken?" Id. Finally, if, as this court has determined, a candidate may associate with a political party without affecting the judge's openness to legal views, then what actual or apparent impartiality is protected by keeping the candidate from associating with one or more individuals on the basis of their stated views? Given this "woeful underinclusiveness" of the endorsement clause, "it is apparent that advancing judicial open-mindedness is not the purpose that 'lies behind the prohibition at issue here.'" Id. (quoting White I, 536 U.S. at 779).

c. Other Purported Interests

The appellees contend that the endorsement clause is narrowly tailored to two other interests not addressed in either of the previous White decisions. The first such interest is the matter of preventing a judicial candidate from "abusing the prestige of office." To the extent that this interest is compelling, the endorsement clause is not narrowly tailored to address such an interest because it prevents both judicial candidates who are currently judges–those who could abuse the office–and candidates who are not currently judges–persons who cannot abuse any office because they currently hold no office–from making endorsements. Accordingly, the clause is overinclusive in meeting such an interest and fails strict scrutiny.

The second interest proffered by the appellees is an interest in "protecting the political independence of the judiciary."[13] The very fact that Minnesota has chosen to elects its judges is indicative of its desire to promote an electorally accountable judiciary. Accordingly, Minnesota, by its current system, has itself created a politically motivated judiciary, bedeviling any claim it has in removing politics from the process. Moreover, how an interest in "protecting the political independence of the judiciary" is any different from an interest in preserving impartiality eludes us. See White I, 536 U.S. at 775 n.6 (collapsing a purported interest in an "independent judiciary" with an interest in impartiality). Thus, if impartiality cannot save the clauses, neither can an interest in "protecting the political independence of the judiciary."

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[13]Relying on a notion of separation of powers, the White II dissent crafted a similar independence interest noting that "[t]he separation of powers interest is a concern for institutional independence that is distinct from concern for impartiality in any of the senses identified by [White I]." White II, 416 F.3d at 773 (Gibson, J., dissenting). The White II court, however, rejected such a "separation of powers" interest as a compelling interest. Id. at 752 n.7. In particular, we noted two reasons why judicial independence is not a compelling interest: (1) no other court "has ever determined that a state's interest in maintaining a separation of powers is sufficiently compelling to abridge core First Amendment freedoms;" and (2) "nothing in our opinion . . . serve[d] to further blur any existing lines between the judicial, legislative and executive branches of Minnesota state government." Id. Today, appellees continue to rely on the separation of powers to support the endorsement clause, yet they only cite one unreported district court case in which such an interest was even discussed: Carey v. Wolnitzek, No. 3:06-36-KKC, 2008 WL 4602786, at *9 n.10 (E.D. Ky. Oct. 15, 2008), aff'd in part, vacated in part, Nos. 08-6468/6538, 2010 WL 2771866 (6th Cir. July 13, 2010). However, undermining their assertions is the fact that the Wolnitzek court itself refused to identify a separate interest in judicial independence, noting that any such interest was "subsumed within the compelling state interests in prohibiting judicial bias against parties and preserving judicial open-mindedness." Id. Thus, we still find no court which finds the interest in maintaining a separation of powers sufficient to abridge core First Amendment expression. And, just as was the case in White II, nothing in our opinion today serves to blur the lines between the three branches of government.

2. Personal Solicitation Clause

The personal solicitation clause of Canon 4.1 provides, in relevant part, that a judicial candidate shall not "personally solicit or accept campaign contributions other than as authorized by Rules 4.2 and 4.4." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(6). Canons 4.2 and 4.4 permit a candidate to solicit contributions under certain circumstances. First, the candidate's campaign committee may solicit funds on behalf of the candidate but may not disclose to the candidate the names of contributors. Id. at Canon 4.2(B)(1) & 4.4(B)(3). Second, in response to White II, Canon 4.2(B)(3) permits a candidate to

> (a) make a general request for campaign contributions when speaking to an audience of 20 or more people;
>
> (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate; and
>
> (c) personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority.

Id. at Canon 4.2(B)(3). As stated previously, we review the validity of these clauses only as-applied to Wersal's desire to solicit contributions from non-attorneys.

In White II, we held the solicitation clause subject to strict scrutiny because (1) it restricted speech based wholly upon the subject matter of the speech and (2) it restricted the amount of funds a judicial candidate is able to raise, burdening political speech. 416 F.3d at 763-64. Although Minnesota has amended the solicitation clause in an effort to more narrowly tailor it to the state's interest in preserving judicial impartiality, the clause still serves as a content-based restriction which burdens core

political speech. Under strict scrutiny, the appellees must prove that applying the personal solicitation clause to Wersal's efforts to solicit from non-attorneys furthers a compelling interest and is narrowly tailored to achieve that interest. See FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007).

a. Unbiased Judges

"Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case." Id. at 416 F.3d at 765. Moreover, the solicitation of funds may in fact create the appearance of impropriety in terms of the appearance of a *quid pro quo*. And, pursuant to Caperton, "there is a serious risk of actual bias . . . when a person with a personal stake in a particular case ha[s] a significant and disproportionate influence in placing the judge on the case by raising funds [for the judge's campaign] . . . when the case was pending or imminent." 129 S. Ct. at 2263-64. Accordingly, when judicial candidates fundraise, there is a risk that the candidate will be biased towards contributors and against non-contributors. Such a risk, however, inheres in the very practice of judicial elections. See White I, 536 U.S. at 789-90 (O'Connor, J., concurring) ("[T]he cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups."). In other words, as long as Minnesota chooses to elect its judges using a system of private financing, it will be faced with the concern that contributions may impair at least the appearance of a judge's impartiality.

We note that the personal solicitation clause, as amended, is certainly *more* narrowly tailored to an interest in impartiality than was its predecessor. Yet, "[i]t seems unlikely . . . that a judicial candidate, if elected, would be a 'judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case],'" based on whether the judicial candidate had solicited that litigant for a contribution. White II, 416 F.3d at 765 (third, fourth and fifth

alterations in original) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). This is because such a risk comes not in the mere solicitation–the "ask"–but rather in the resulting contribution. As we noted in White II, the real due process harm comes not from the fundraising itself, but rather from a judicial candidate being able to trace contributions back to individual donors. White II, 416 F.3d at 765; see also Weaver v. Bonner, 309 F.3d 1312, 1323 (11th Cir. 2002) ("Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support."). Accordingly, restricting a candidate from personally soliciting funds does not address the state's interest in a non-biased judiciary. Indeed, the personal solicitation clause is underinclusive in addressing such an interest because the Canon permits the candidate's agent–the committee–to solicit funds, but prohibits the candidate from personally soliciting the same funds. Since the identity of the solicitor is irrelevant to the candidate's ultimate bias toward a party, Minnesota's rules on personal solicitation are not narrowly tailored to serve this interest. See Weaver, 309 F.3d at 1322-23 (noting that the risk that a judge "will be tempted to rule a particular way because of contributions . . . is not significantly reduced by allowing the candidate's agent to seek these contributions . . . on the candidate's behalf rather than the candidate seeking them himself").

Minnesota has already provided a less restrictive alternative to prevent the candidate from tracing funds. Specifically, Canon 4 provides that a judicial candidate shall "take reasonable measures to ensure that the candidate will not obtain any information identifying those who contribute or refuse to contribute to the candidate's campaign." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.2(A)(5). Canon 4 also specifically provides that a candidate may not "personally . . . accept campaign contributions," id. at Canon 4.1(A)(6), and prohibits the campaign committee from disclosing the identity of contributors to the candidate, id. at Canon 4.4(B)(3). And, Wersal does not challenge these requirements and prohibitions. We believe that a candidate could be allowed to make one-on-one solicitations without learning the identity of contributors. This would effectively insulate the candidate from bias-producing knowledge and would be a less restrictive alternative than a total ban on all

face-to-face fund requests. Accordingly, the solicitation clause's categorical ban on solicitations is not narrowly tailored to serve the end of unbiased judges.

Nonetheless, the appellees maintain that soliciting door-to-door poses an acute risk because through such on-the-spot canvassing, a judicial candidate will be able to tell whether an individual is likely to contribute or not. We think not. While it may be possible that a judicial candidate through direct contact may be able to tell whether a person is likely to contribute or not, Canon 4 requires that the candidate take reasonable measures to ensure that the candidate will not learn whether the person actually contributed. In any event, we think it highly unlikely that after such a fleeting encounter, a candidate will remember which solicited person indicated a likelihood of contributing to the campaign or indicated a refusal to do so.

Finally, to the extent that Minnesota is rightly concerned with personal solicitations and campaign contributions that affect the public's confidence in an unbiased judiciary, the least restrictive means of preventing such harm is recusal under the standards of Canon 2.11 should the judge become aware of receipt of a litigant's campaign contribution (or of his or her refusal to do so). Indeed, Wersal represents that he would recuse himself from any proceeding in which a contributor is a party. As with the endorsement clause, recusal serves both to protect a litigant's due process rights and a candidate's right of speech through receipt of campaign contributions. Since "it is our law and our tradition that more speech, not less, is the governing rule," Citizens United, 130 S. Ct. at 911, we think the Constitution favors stricter recusal standards and fewer speech restrictions. Moreover, just as in Citizens United, the personal solicitation clause is a "categorical ban[] on speech that [is] asymmetrical to preventing *quid pro quo* corruption." Id. Accordingly, the application of the solicitation clause to Wersal's desire to solicit from non-attorneys simply is not narrowly tailored to address Minnesota's interest in impartiality defined as a lack of bias for or against parties to a proceeding.

b. Openmindedness

We next address whether allowing a judicial candidate to personally solicit face-to-face or to groups of smaller than twenty people would "in some way damage that judge's 'willing[ness] to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.'" White II, 416 F.3d at 766 (alteration in original) (quoting White I, 536 U.S. at 778). Since the provisions in Canon 4 prohibit the judge from knowing the identity of contributors or being able to trace funds back to contributors, we find that it stretches credulity to believe that solicitations will in some way affect a judge's willingness to consider differing legal views. Accordingly, applying the personal solicitation clause to solicitations addressed to non-attorneys is barely tailored, if at all, to affect the openmindedness of a judge, and fails strict scrutiny.

3. Solicitation for a Political Organization or Candidate Clause

The solicitation for a political organization or candidate clause provides, in relevant part, that a judge or candidate shall not "solicit funds for a political organization or a candidate for public office." 52 Minn. Stat. Ann., Code of Judicial Conduct, Canon 4.1(A)(4)(a). As we noted in the ripeness discussion above, Wersal's challenge to this provision is only ripe to the extent that the clause restricts him from soliciting money from non-attorneys for his own candidacy. Accordingly, we review this clause only to that extent. Because we have already addressed the fact that restricting a candidate from soliciting contributions from non-attorneys for his or her own campaign does not meet the strictures of strict scrutiny, we simply incorporate our earlier analysis here. And, we hold that the solicitation for a political organization or candidate clause, to the extent it prohibits Wersal from soliciting funds for his own campaign from non-attorneys, fails strict scrutiny review.

III. CONCLUSION

In White I, the Supreme Court struck down the announce clause as violating a judicial candidate's free speech rights. Similarly, in White II, we held that the partisan-activities and solicitation clauses did not survive strict scrutiny and thus violated the First Amendment. Today, after once again considering Minnesota's Code of Conduct, we find that the endorsement, personal solicitation, and solicitation for a political organization clauses similarly fail strict scrutiny. We therefore reverse the district court, and remand with instructions to enter summary judgement for the appellant.

BYE, Circuit Judge, dissenting.

I respectfully dissent. The Court today invalidates provisions of the Minnesota Code of Judicial Conduct prohibiting judicial candidates, including sitting judges, from publicly endorsing other candidates for public office and personally soliciting campaign contributions. Broadly speaking, the Court makes two fundamental errors in its analysis. First, the majority consistently undervalues Minnesota's compelling interest in promoting impartiality and the appearance of impartiality in the Minnesota judicial system. Second, the majority misapprehends the extent to which the provisions of the Code of Judicial Conduct at issue today are both necessary and narrowly tailored to Minnesota's critical interests. In striking down Minnesota's judicial endorsement and solicitation restrictions, the Court today has unnecessarily weakened our courts–and ultimately, I fear, weakened our democracy.

I

As a preliminary matter, I disagree with the majority's conclusion that appellant Gregory Wersal's challenge to Rule 4.1(A)(4) of the Minnesota Code of Judicial Conduct (Code) is ripe for disposition. "Ripeness is demonstrated by a showing that a live controversy exists such that the plaintiffs will sustain immediate injury from the

operation of the challenged [action], and that the injury would be redressed by the relief requested." Employers Ass'n, Inc. v. United Steelworkers, 32 F.3d 1297, 1299 (8th Cir. 1994).

At the district court, Wersal argued Rule 4.1(A)(4), which, in part, bars a judicial candidate from "solicit[ing] funds for a political organization or a candidate for public office," prevented him from soliciting funds for his own campaign, because his own campaign is a "political organization" within the meaning of the rule. The district court held that by reading Rule 4.1(A)(4) in context with the surrounding rules, nothing in Rule 4.1(A)(4) prevented Wersal from soliciting funds (as allowed by the remaining rules) for his own campaign committee. Wersal v. Sexton, 607 F.Supp.2d 1012, 1018 (D. Minn. 2009).

After the district court ruled, but before we heard this appeal, the Minnesota Supreme Court amended the Code to state that "[f]or purposes of this Code, the term [political organization] does not include a judicial candidate's campaign committee created as authorized by Rule 4.4." See Code Terminology Section. Thus, without a colorable argument that his campaign committee qualifies as a political organization, Wersal modified his argument on appeal; Wersal now argues that Rule 4.1(A)(4)'s ban on solicitation for "a candidate for public office" operates to prevent him from soliciting funds for his own campaign. I agree with the majority that Wersal is a candidate for public office under the plain meaning of the phrase, but this point should not end our analysis. While Wersal himself is a candidate for public office, his campaign committee is surely not. As illustrated by Rule 4.4, the campaign committee is an entity separate and distinct from the judicial candidate himself, often serving as a buffer between the judicial candidate and some of the day-to-day campaign activities. For example, Rule 4.4(B)(3) states that "[a] judicial candidate . . . shall direct his or her campaign committee . . . not to disclose to the candidate the identity of campaign contributors . . . ."

To be sure, if Wersal were seeking to solicit contributions and operate his campaign without a campaign committee, then we would have no choice but to confront the constitutionality of Rule 4.1(A)(4). But, as the majority acknowledges, Wersal does not challenge the provisions of the Code involving the use of a campaign committee. Therefore, I would conclude that Wersal's challenge to Rule 4.1(A)(4) is not ripe. Nothing in the Rule–neither the ban on soliciting funds for "a political organization" nor the ban on soliciting funds for "a candidate for public office"–operates to prevent Wersal from soliciting funds for his campaign committee, which is all Wersal seeks to do. By reaching out to partially invalidate Rule 4.1(A)(4), the majority today unnecessarily strikes down a provision of the Code which is simply not implicated in this case. Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Because Wersal's challenge to Rule 4.1(A)(4) is not ripe, I would leave review of Rule 4.1(A)(4) for another day.

II

Although Wersal's challenge to Rule 4.1(A)(4) is not ripe, the constitutionality of the endorsement clause (Rule 4.1(A)(3)) and the solicitation clause (Rule 4.1(A)(6), 4.2(B)(3)(a)) is squarely before this Court. We review de novo a district court's grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party. Dunning v. Bush, 536 F.3d 879, 885 (8th Cir. 2008).

A

Because I am in basic agreement with the majority's identification of the governing constitutional framework, I will not repeat it at length here. In brief, Wersal argues the prohibitions Minnesota has placed on judicial candidates, barring

them from endorsing other candidates for public office and from personally soliciting campaign contributions, violate the First Amendment to the United States Constitution. The First Amendment, made applicable to the states, see McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n. 1 (1995), provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. Because the Code's prohibitions on endorsement and solicitation restrict speech by reference to the content of the targeted speech, we must examine the challenged provisions using an analytical framework commonly known as strict scrutiny. Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002) (White I). Under the strict scrutiny analysis, the state bears the burden of proving that the challenged provisions are (1) narrowly tailored, to serve (2) a compelling state interest. Id.

B

Like the majority, I begin my analysis with an examination of the interests served by Minnesota's Code of Judicial Conduct.

Minnesota[14] asserts several interests which it argues are compelling: (1) maintaining judicial impartiality, defined as the lack of bias for or against either party to a proceeding; (2) maintaining the appearance of judicial impartiality; (3) promoting open-mindedness, defined as a willingness to consider views that oppose preconceptions, and remain open to persuasion; (4) preventing candidates from abusing the prestige of office; and (5) protecting the political independence of the judiciary.

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[14]Wersal sued every member of the Minnesota Board of Judicial Standards and Minnesota Lawyers Professional Responsibility Board in his or her official capacity. For ease of reading, I will refer to the defendants–appellees here–in this case as "Minnesota."

As we observed in Republican Party of Minnesota v. White, 416 F.3d 738, 749 (8th Cir. 2005) (en banc) (White II), precisely what constitutes a "compelling interest" is not easily defined. The Supreme Court has alternatively described the concept as an: "interest[] of the highest order," "overriding state interest," "unusually important interest." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); McIntyre, 514 U.S. at 347; Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting). Some cases have found an interest compelling based on policy grounds. For example, courts have recognized compelling interests in apprehending highly mobile criminal suspects, deterring murder, avoiding the harms of illicit drugs, realizing consumer benefits in licensing requirements for professionals, and upholding the administration of justice. See Stephen E. Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication, 68 B.U. L.Rev. 917, 935 n. 85 (1988) (collecting cases). Other examples of compelling government interests recognized by the Supreme Court include "[p]ressing public necessity" during wartime, see Korematsu v. United States, 323 U.S. 214, 216 (1944), combating terrorism, see Holder v. Humanitarian Law Project, --- S.Ct. ----, 2010 WL 2471055, at *23 (June 21, 2010), the need to remedy specific instances of past discrimination, see Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986), attaining "student body diversity" in higher education, see Grutter v. Bollinger, 539 U.S. 306, 325 (2003), and maintaining "prison security and discipline," see Johnson v. California, 543 U.S. 499, 512 (2005). Other cases have found a basis for recognizing a compelling interest in "the realization of constitutional guarantees." White II, 416 F. 3d at 750 (citations omitted).

There is broad agreement that states have a compelling interest in employing judges who are actually impartial. Indeed, due process requires that judges be impartial. See, e.g., Tumey v. Ohio, 273 U.S. 510, 512 (1927). Actual impartiality means a judge's lack of bias for or against either party to a proceeding. White I, 536 U.S. at 775.

With respect to Minnesota's asserted interest in promoting the *appearance* of impartiality, we have thus far provided little–too little–examination of the subject. During oral argument in this case, I asked Wersal's counsel whether the state of Minnesota has "a compelling interest here in maintaining the appearance of impartiality set apart from the state's interest in promoting actual impartiality?" Counsel responded, "Yes, I think they have both." Notwithstanding the parties' agreement on the subject, I want to take a moment to explore the meaning and potential importance of Minnesota's interest in promoting the appearance of impartiality in the state's judiciary.

Drawing from the "core" definition of impartiality recognized in White I, the appearance of impartiality, as the phrase is used in this dissent, means the perception of a judiciary made up of judges who lack bias for or against a particular party (or parties) to a given proceeding. To be sure, the concepts of actual and perceived impartiality are related, but they are not entirely coextensive. For example, a hypothetical judge who harbors a bias towards Catholics but shows no outward manifestations of her bias lacks impartiality (at least in a case where one party is Catholic), but may not create the appearance of impartiality. Likewise, a judge who uses disrespectful language when addressing criminal defendants will likely be perceived as lacking impartiality, even if the judge lacks an actual bias against any particular party. Cf. Inquiry into Conduct of Blakely, 772 N.W.2d 516, 523-26 (Minn. 2009) (per curiam) (discussing the difference between actual and perceived impropriety by a judge, and the appropriate sanction for each necessary "to protect the public by preserving the integrity of the judicial system"); Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (discussing the differences between actual and perceived corruption in our political system). Two features serve to distinguish the concepts of actual impartiality and the appearance of impartiality. First, while the existence of actual impartiality turns on a particular judge's mental state, the appearance of impartiality springs from the perceptions of people who see, hear, read about, or otherwise interact with one or more judges in the judicial system. Second, while an examination of actual impartiality will use a narrow lens, usually focusing on an individual

assessment of one particular judge, an inquiry into the appearance of impartiality will often focus on the aggregate: how the judiciary is perceived by the people it serves.[15]

Turning to the relative importance of maintaining the appearance of impartiality, several sources help illuminate the compelling nature of Minnesota's interest in fostering the appearance of impartiality. There is no question that maintaining the appearance of impartiality is a central pillar to the Minnesota Code of Judicial Conduct, reflecting the Minnesota Supreme Court's empirical judgment on the relative importance of maintaining the appearance of impartiality in the state judiciary. The Code states that "[i]nherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." Code Preamble. In addition, judges are admonished to "avoid both impropriety and the appearance of impropriety" and "aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." Id. The Constitution itself points in the same direction. Our law dictates that a mere appearance of bias, without a showing of actual bias, is sufficient in some circumstances to violate the due process rights of litigants. See Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2257 (2009) (holding that a party's due process rights are violated when "the probability of actual bias on the part of the judge or decisionmaker is too high."). Finally, relevant historical sources evince a long-held view on the importance of maintaining the appearance of impartiality in the judiciary. Writing in support of ratifying the newly-written United States Constitution, Alexander Hamilton wrote:

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[15]In this sense, the interest in maintaining the appearance of judicial impartiality is a close cousin to the "weighty interest[]" in preventing the "appearance of corruption," which the Supreme Court described in Buckley as "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Buckley, 424 U.S. at 27, 29.

> The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

The Federalist No. 78 (Alexander Hamilton).

The "universal distrust and distress" Hamilton described can take hold in an atmosphere where the public has lost confidence–rightfully or not–in the impartiality of its judiciary. A perception of systemic bias can cause a chilling effect on the exercise of legal rights: parties or potential parties "may be reluctant to expend time and resources in a judicial system perceptibly stacked against them on account of who they are." Tobin A. Sparling, Keeping Up Appearances: the Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias, 19 Geo. J. Legal Ethics 441, 472 (2006). More broadly, it is not an overstatement to say that public confidence in the judiciary is necessary to a functioning democracy and civil society. One need not look very far beyond our borders to see the consequences where judiciaries–rightfully or not–have lost their reputation for delivering justice. Judicial institutions are replaced by less refined methods of problem solving. Gangs, warlords, militias, and vigilante justice can easily become de facto judges and juries.

For the foregoing reasons, I would conclude, independent of the parties' agreement, that Minnesota has met its burden of demonstrating a compelling state interest in (1) maintaining actual judicial impartiality and (2) maintaining the

appearance of judicial impartiality.[16] Cf. Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 290 (1917) ("[T]he court cannot be controlled by agreement of counsel on a subsidiary question of law.").

The mere identification of Minnesota's compelling state interests, however, does not, standing alone, justify the provisions of the Code Wersal challenges. Where a state seeks to protect its interests through content-based speech restrictions, as Minnesota does here, courts must engage in an exacting review, examining the extent to which the challenged provisions are "narrowly tailored" to the identified interests. White I, 536 U.S. at 774-75. It is to that review I now turn.

C

As we stated in White II, "whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest." 416 F. 3d at 751.

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

Id.

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[16]Because I ultimately conclude that the provisions of the Code challenged in this litigation are narrowly tailored to these two interests, I need not confront today whether the remaining interests proffered by Minnesota are compelling.

I turn first to the endorsement clause. Rule 4.1(A)(3) provides that a judge or judicial candidate shall not "publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office."

The endorsement clause advances the state's interest in maintaining actual judicial impartiality and the appearance of impartiality. When a judge or judicial candidate endorses another candidate, the act of endorsement creates a risk that the judge will not be impartial. There is a risk the judge will harbor a bias in favor of the endorsed candidate and those who associate with or support that candidate. Equally important, there is a risk the judge will harbor a bias *against* other candidates in the same race as the endorsed candidate, and those who associate with or support the candidates who did not receive the endorsement. Even more fundamentally, the act of endorsement directly undercuts the state's interest in maintaining the appearance or impartiality. By moving past the role of mere participant in the political system to the role of political power broker trading on the currency of his position, a judge who gives political endorsements creates the perception of a judicial branch beholden to political interests. Indeed, in a recent survey of Minnesotans, ninety-one percent thought "the courts are supposed to play a unique role in our democratic system and should be free of political pressures;" only five percent believed "the Minnesota State Courts are just like the Executive and Legislative branches of government and should not be free of political pressures." See The Minnesota Difference: The Minnesota Court System and the Public (2007), available at http://www.courts.state.mn.us/documents/0/Public/Court_Information_Office/Minnesota_Courts_Final_Report_FINAL.doc. By placing political pressures on the endorsing judge, the endorsement effectively erodes the appearance of judicial impartiality.

In addition, the endorsement clause does not sweep too broadly. The majority first attempts to analogize the endorsement clause to the much broader announce

clause struck down in White I. But the majority's analysis on this point is seriously flawed. The Supreme Court held that the announce clause, which stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues," was not narrowly tailored to the state's interest in maintaining actual impartiality or the appearance of impartiality. White I, 536 U.S. at 770. The Court reasoned that the announce clause "d[id] not restrict speech for or against particular parties, but rather speech for or against particular issues." Id. at 776 (emphasis in original). It seems plain enough that this case presents precisely the opposite scenario: the endorsement clause restricts speech for or against parties, not issues.

The majority attempts to circumvent the clear hurdle presented by White I by positing that the endorsement clause is really just another announce clause in disguise. To illustrate its point, the majority explains that an endorsement of Ronald Reagan for President could convey a judicial candidate's support for strict interpretation of the Constitution. The majority's point that speech can and does serve as a proxy for other, underlying ideas is well taken. But, under the lens of strict scrutiny, our focus must remain on the speech that is regulated by reference to its *content*. See Eu, 489 U. S. at 222. To be sure, the endorsement clause is content-based, because the clause prohibits judicial candidates from expressing the idea of endorsement itself, while leaving unregulated speech on every other subject matter. But the endorsement clause, unlike the announce clause, does not regulate underlying ideas conveyed by the endorsement by reference to their content. With respect to a judicial candidate's views on strict interpretation of the Constitution, or abortion, or same-sex marriage, or any other idea the judicial candidate wishes to convey, the endorsement clause is entirely content-neutral. The candidate is free to state: "I support (or oppose) a strict interpretation of the Constitution." The candidate could even say "I support strict interpretation, as articulated by Ronald Reagan." The only idea the candidate is barred from expressing is the idea of endorsement itself–an idea that does not burden any other ideas or viewpoints on an unequal basis. The announce clause, by contrast, directly regulated a large class of ideas according to their content, forbidding speech on disputed legal or political issues, but leaving unregulated speech on all undisputed

issues, as well as disputed issues not of a political or legal nature. See White I, 536 U.S. at 768.

The majority's analysis thus effectively renders pointless the idea/party distinction drawn in White I. Under the majority's analysis, even a speech restriction on statements showing bias against a party to a proceeding would fail strict scrutiny. Following the majority's reasoning, such a restriction would also necessarily limit the expression of secondary ideas conveyed by the statement of bias. For example, the statement "I am biased against plaintiff Smith" could also theoretically convey a judicial candidate's view that the court system is overburdened by frivolous lawsuits. If, as the majority suggests, we must take account in our strict scrutiny analysis of all possible secondary meanings of the statement of bias–even those not regulated by reference to their content–then even a ban on speech showing bias towards a party would be overinclusive with respect to a state's compelling interest in judicial impartiality. This is so because the ban on biased statements would impermissibly limit, according to the majority's analysis, the judicial candidate from expressing his views on frivolous lawsuits. In contrast to the majority's incorrect analytical approach, the Supreme Court has consistently confined its strict scrutiny overinclusiveness analysis to speech regulated by its content by the terms of the speech restriction itself. For example, in Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991) the Supreme Court struck down a New York law preventing criminals from profiting by selling books describing their crimes. Id. at 123. The Court held the law overinclusive with respect to New York's compelling interest in preventing criminals from profiting from their crimes, as the law would apply to "such works as the Autobiography of Malcolm X," Civil Disobedience by Henry David Thoreau, as well as works by Martin Luther King, Jr. Id. at 121. The Court concluded that the law "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime." Id. at 122.

Our focus, therefore, when asking whether the endorsement clause sweeps too broadly, should not extend beyond the ideas regulated by the endorsement clause

because of their content. With the proper legal standard in mind, I would conclude the endorsement clause does not sweep too broadly. Because, as previously discussed, every endorsement of a person carries the risk of bias, or the appearance of bias, the endorsement clause targets precisely the speech most likely to implicate Minnesota's compelling interests.[17]

Nor is the endorsement clause underinclusive. The endorsement clause must be read in concert with Rule 4.1(A)(10) of the Code, which states that "a judge or judicial candidate shall not . . . make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . . ." By its plain terms, Rule 4.1(A)(10) prevents a judge or judicial candidate from making any statement showing bias for or against any party, in either a pending or impending proceeding, as such a statement would "impair the fairness" of the case. Rule 4.1(A)(10), together with the endorsement clause, ensures that no speech directly bearing on a judicial candidate's bias towards a party is left unregulated.

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[17]The majority finds fault with the endorsement clause for the independent reason that not all persons who receive endorsements will become parties in Minnesota courts. The majority's reasoning misses the mark in three respects. First, any candidate for public office could become a party to a proceeding in Minnesota, and it is impossible to determine beforehand who will appear in court as a party and with what frequency. More importantly, the majority makes the faulty assumption that a judge who makes an endorsement would only potentially be biased in favor of the recipient of the endorsement herself. As previously discussed, such bias could easily extend to the endorsee's supporters and associates, as well as other candidates who did not receive the judicial candidate's endorsement, along with their friends and supporters. Therefore, the risk of actual bias is much greater than the majority lets on, even in cases where the endorsed candidate never appears as a party in court before the judicial candidate. Finally, the majority, as it does throughout its opinion, ignores the extent to which each and every endorsement creates the *appearance* of bias irrespective of whether the endorsed candidate ever appears in court.

The majority attempts to illustrate the endorsement clause's underinclusiveness by asserting that "a judicial candidate may endorse a public official or a potential candidate for office so long as the endorsee has not yet officially filed for office." Ante at 21. But the majority's assertion is incorrect in two important respects. First, in the vast run of cases, Rule 4.1(A)(10) will prevent a judicial candidate from endorsing a public official. For example, a judicial candidate would be prevented from "endorsing"[18] a lame duck county sheriff or county attorney because doing so would "impair the fairness of a matter pending or impending in any court," as sheriffs and county attorneys continually appear in court. Second, the majority assumes, wrongly, that a potential recipient of an endorsement is not a "candidate for public office" within the meaning of the endorsement clause until she "officially file[s] for office." Ante at 21. In the case of judicial candidates endorsing other judicial candidates, the majority's assertion is demonstrably false:

> A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office.

Code Terminology Section. Although the Code is silent on precisely when a non-judicial candidate becomes a "candidate for public office," I would construe the endorsement clause's "candidate for public office" language consistently with the Code's definition of a candidate for judicial office. In other words, a person becomes a candidate for public office when he (1) makes a public announcement of candidacy, (2) files, (3) authorizes or engages in solicitation, or (4) is nominated for office. Such a construction helps alleviate the underinclusiveness identified by the majority. See Edward J. DeBartolo Corp., 485 U.S. at 575 (avoidance canon of statutory

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[18]Obviously the concept of endorsement here would mean something different than an endorsement for office, as the public official, by hypothesis, is not a candidate for public office.

interpretation). In the narrow subset of cases where an "endorsement" of a person would not be barred by either the endorsement clause or Rule 4.1(A)(10), the speech is left unregulated precisely because these cases do not implicate Minnesota's interests in promoting impartiality or its appearance. Endorsing persons who are not involved in current or impending litigation before any court and who are not running for public office presents little risk of creating actual bias, and does not raise the same quid pro quo and political independence concerns that would lead a reasonable person to perceive a decreased appearance of judicial impartiality.

The majority also finds the endorsement clause underinclusive because, in the majority's words, "the endorsement clause would permit a candidate to endorse the acts and policies of non-candidates [such as] businesses, labor unions, the ACLU or any public officials not running for office." But the absence of the hypothetical speech restrictions outlined by the majority cannot be evidence of the endorsement clause's underinclusiveness because the speech restrictions described by the majority would be *unconstitutional*. As an illustration, the American Civil Liberties Union lists "free speech" as one of the organization's "key issues," stating that "[s]ince 1920, the ACLU has worked to preserve our freedom of speech." See http://www.aclu.org/key-issues. If Minnesota attempted to prohibit judicial candidates from echoing the ACLU and announcing their views that, for example, they "work to preserve our freedom of speech," it is beyond dispute that the prohibition would violate judicial candidates' First Amendment rights. See White I, 536 U.S. at 770. Indeed, the speech restrictions on "acts and policies of non-candidates" suggested by the majority would be woefully overinclusive according to the majority's own analysis contained just one page earlier in its opinion! I would not require Minnesota to violate the Constitution in order to craft a constitutional endorsement clause.

Finally, I disagree with the majority's conclusion that recusal would adequately address Minnesota's interests in maintaining judicial impartiality and the appearance of judicial impartiality. In White II, we relied, in part, on the availability of recusal

as a less-restrictive alternative in striking down the prior Code's partisan activities clause and parts of the solicitation clause. White II, 416 F. 3d at 754, 765-66. Implicit in our conclusion in White II was our understanding that recusals would not be so frequent as to seriously disrupt the proper functioning of the judicial system. In contrast to White II, however, recusal is an inadequate remedy in a judicial system where judges and judicial candidates are permitted to endorse each other and other candidates for public office. As the district court observed, recusal is unworkable "when a judge endorses an individual who is elected to a position where he or she is frequently a litigant." Wersal, 607 F. Supp. 2d at 1023. For example, if a district court judge in a rural area endorsed the county sheriff and county attorney for re-election, the judge would be required to recuse himself in almost every criminal case–and few, if any, other judges would be available to take over the case load. Similarly, if an appellate court judge endorsed a slate of district court judges, the appellate court judge would have to recuse himself in every appeal reviewing the judgment of any of the endorsed district court judges. The same is true of a judicial candidate who endorsed prominent political figures in Minnesota, who are frequently parties to judicial proceedings. See, e.g., Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009); Brayton v. Pawlenty, 781 N.W.2d 357 (Minn. 2010).

In short, a system of open endorsements would create a tangled web of conflicts that could not be solved by recusals. Perhaps more fundamentally, even if judges managed to recuse themselves whenever an endorsee was a party (or witness) to a proceeding, the recusals would do little to change the perception that the judiciary as a whole lacks impartiality. Perceptions of bias would be justified in cases involving not just endorsees, but also their friends, family, associates, supporters, opposing candidates, and their supporters. Some citizens might conclude, reasonably, that the judicial system is simply too compromised by partisan politics, and resolve their disputes through alternative means. Although recusals would undoubtably mitigate bias in some instances, they would not–in a climate of pervasive endorsements by judges and judicial candidates–protect Minnesota's interests in maintaining impartiality and the appearance of impartiality at even a tolerable level.

For the forgoing reasons, I would conclude that Minnesota has met its heavy burden in demonstrating that the endorsement clause is narrowly tailored to the state's compelling interests. In so concluding, I would join what was, before today, the unanimous judgment of state and federal courts affirming the constitutionality of judicial endorsement prohibitions. See Siefert v. Alexander, --- F.3d ----, No. 09-1713, 2010 WL 2346659, at *7 (7th Cir. June 14, 2010); In re Matter of William A. Vincent, Jr., 172 P.3d 605, 606, 608-09 (N.M. 2007) (upholding a judicial canon that prohibited a judge or judicial candidate from "publicly endors[ing] or publicly oppos[ing] a candidate for public office through the news media or in campaign literature" finding that the clause was "narrowly tailored to serve the State's compelling interest in a judiciary that is both impartial in fact and in appearance"); In re Matter of Ira J. Raab, 793 N.E.2d 1287, 1292 (N.Y. 2003); Yost v. Stout, No. 06-4122-JAR, slip op. at 12 (D. Kan. Nov. 16, 2008) (upholding endorsement clause because provision "restricts a judge or judicial candidate from publicly endorsing other candidates for public office; it does not restrict speech concerning disputed political issues.").

2

I turn next to the solicitation clause. Rule 4.1(A)(6) of the Code bars judges and judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions other than as authorized by Rules 4.2 and 4.4." Rule 4.2(B)(3)(a) permits a judge or judicial candidate to "make a general request for campaign contributions when speaking to an audience of 20 or more people." In addition, Rule 4.2(B)(3)(c) permits a judge or judicial candidate to "personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority." However, as previously discussed, the Code does not allow what Wersal seeks to do: personally solicit campaign contributions by walking door-to-door and making phone calls.

As a preliminary matter, I disagree with the majority's decision to analyze Wersal's challenge to the Code's solicitation clause as an as-applied, rather than facial, challenge. In White II, we sustained a facial challenge to the solicitation clause (as then written) despite the fact that the challenge was limited to the clause's prohibition on soliciting contributions from large groups and using a candidate's signature on campaign committee literature. White II, 416 F. 3d at 765-66. Further, the majority predicates its decision to analyze the solicitation clause as-applied on the alleged fact that Wersal wishes to solicit funds only from non-attorneys. Ante at 13, 26. Nowhere in the record does Wersal state, or even imply, that he would limit his solicitation entirely to non-attorneys. On the contrary, Wersal states he wishes to "personally solicit contributions from potential donors both by going door-to-door [and] making personal phone calls." Wersal does state that he "does not wish to solicit funds from those he knows to be attorneys," but Wersal would undoubtably encounter persons whom he does not know to be attorneys in the course of his proposed solicitation. Without any suggestion to the contrary from Wersal, it is unreasonable to infer from the facts in the record before us that Wersal only intends to solicit funds from non-attorneys. See Dunning , 536 F.3d at 885 (in reviewing summary judgment orders, appellate court must view the evidence in the light most favorable to the nonmoving party).[19]

Turning to the merits, I would conclude the solicitation clause furthers Minnesota's compelling interest in maintaining the appearance of judicial impartiality. As Justice O'Connor observed in White I, "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine

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[19]Wersal does state once in his brief that he wishes to personally solicit campaign contributions only from non-attorneys. App. Br. at 55. It is axiomatic, however, that appellate courts will "not take[] into consideration matters included in the [a party's] brief which were not before the trial court and are no[t] part of the record on appeal." Nelson v. Swing-A-Way Mfg. Co., 266 F.2d 184, 189 (8th Cir. 1959).

the public's confidence in the judiciary." White I, 536 U.S. at 790 (O'Connor, J., concurring). Indeed, "there is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court." Stretton v. Disciplinary Bd. of Supreme Court of Penn., 944 F.2d 137, 145 (3d Cir. 1991) (footnote omitted) (upholding prohibition on personal solicitation). And as the Oregon Supreme Court observed:

> The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. . . . A judge's direct request for campaign contributions offers a quid pro quo or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity.

In re Fadeley, 802 P.2d 31, 40 (Or. 1990) (upholding prohibition on personal solicitation of funds).

Whether personal solicitation by judicial candidates impacts the appearance of impartiality is an empirical question. Cf. Holder v. Humanitarian Law Project, --- S.Ct. ----, Nos. 08-1498, 09-89, 2010 WL 2471055, at *19 (June 21, 2010) ("Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question."). Recent polls found that seventy percent of the public thinks raising money for their elections affects judges' rulings to a moderate or great extent. Kathleen Hall Jamieson and Michael Hennessy, Public Understanding and Support for the Courts: Survey Results, 95 Geo. L.J. 899, 901 (2007). According to a 2002 written survey, forty-eight percent of state supreme court judges believe that campaign contributions to judges have "a great deal" or "some" influence on judges' decisions. Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake State Judges Frequency Questionnaire, Q.12 at 5 (2002). Turning the focus to Minnesota, a 2008 poll found that fifty-nine percent of Minnesotans said that contributions have "a great deal"

or "some" influence on judges. Decision Resources Ltd., Justice at Stake Study, Minnesota Statewide, Q. 35 (January 2008). And forty-nine percent of Minnesotans thought that "individuals or groups who give money to judicial candidates in Minnesota get favorable treatment." See The Minnesota Difference: The Minnesota Court System and the Public (2007), available at http://www.courts.state.mn.us/documents/0/Public/Court_Information_Office/Minnesota_Courts_Final_Report_FINAL.doc.

The majority skips past this data and finds the solicitation clause overinclusive because the risk of bias "comes not in the mere solicitation–the 'ask'–but rather in the resulting contribution." Ante at 28. I disagree. At the outset, the majority's statement runs counter to our statement in White II that "[k]eeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality . . . ." 416 F.3d at 765. Additionally, when a judge or judicial candidate asks for money, one-on-one, the potential donor is presented with an unseemly choice: contribute, and perpetuate the appearance of impartiality, or decline to contribute, and risk retribution. As the Supreme Judicial Court of Maine stated:

> It is exactly this activity that potentially creates a bias, or at least the appearance of bias, for or against a party to a proceeding. If a contribution is made, a judge might subsequently be accused of favoring the contributor in court. If a contribution is declined, a judge might be accused of punishing a contributor in court.

In re Dunleavy, 838 A.2d 338, 351 (Me. 2003). Contrary to the majority's assertion, it is precisely the act of asking for money one-on-one that creates the appearance of impartiality. And no matter what course of action the potential donor chooses, the appearance of judicial impartiality is diminished. As the Seventh Circuit aptly stated, "[a] direct solicitation closely links the quid–avoiding the judge's future disfavor–to the quo–the contribution." Siefert, 2010 WL 2346659, at *30-31.

Such a result inheres in the Supreme Court's decision in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), overruled in part on other grounds, Citizens United v. FEC, 130 S. Ct. 876, 886 (2010). There, the Supreme Court upheld against a First Amendment challenge a provision of the Bipartisan Campaign Reform Act of 2002 prohibiting (with limited exceptions) federal candidates and officeholders from soliciting soft money contributions. Id. at 183-84; id. at 314 (Kennedy, J., concurring). Directly contrary to what the court holds today, the Supreme Court stated that "soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder," and "the value of the donation to the candidate or officeholder is *evident from the fact of the solicitation itself*." Id. at 182 (emphasis added). See also Siefert, 2010 WL 2346659, at *31.

I also disagree with the majority's assertion that less restrictive means exist to protect Minnesota's compelling interests. In Minnesota, judicial candidates are required to "take reasonable measures to ensure that the candidate will not obtain any information identifying those who contribute or refuse to contribute to the candidate's campaign." Code Rule 4.2(A)(5). Although the rule banning judicial candidates from learning the identity of donors certainly helps maintain the appearance of impartiality, the efficacy of the rule is greatly undermined without an operative solicitation clause. As anyone familiar with retail politics can attest, potential donors will often interrupt the pitch for money with an answer, or a door in the face. In other cases, verbal cues and body language by the potential donor will leave the judicial candidate with a strong impression of the potential donor's likelihood of making a contribution. Thus, the act of solicitation itself will, in many cases, significantly undermine Minnesota's goal of preventing the judicial candidate from learning the identity of those who contribute or refuse to contribute.

Neither is recusal an adequate alternative to the solicitation clause. The recent Caperton case illustrates why. In Caperton, a West Virginia jury returned a verdict that found the defendants, A.T. Massey Coal Co. and its affiliates, liable for $50

million in damages. Caperton, 129 S. Ct. at 2257 (2009). While the coal company's appeal was pending, Don Blankenship, Massey's chairman and chief executive officer spent over $2.5 million in support of a candidate running against an incumbent for a seat on the Supreme Court of Appeals of West Virginia. Id. The candidate, Brent Benjamin, won the election. Id. Later, when Massey's appeal was heard by the Supreme Court of Appeals of West Virginia, then-Justice Benjamin refused to recuse himself and cast the deciding vote in the court's decision reversing the $50 million verdict. Id. at 2257-58. The United States Supreme Court ultimately held that the Due Process Clause required Justice Benjamin to recuse himself. Id. at 2265. I cite Caperton not for its legal holding, but rather as a cautionary tale illustrating two points. First, judges whose contributions give rise to the appearance of partiality may be reluctant to recuse themselves. Second, and most fundamentally, by the time a case rises to the level of egregiousness where the Due Process Clause, by its own force, *requires* recusal, the judiciary's appearance of impartiality has already been severely undermined. I would not force Minnesota to follow West Virginia's path. The state's interest in maintaining the appearance of impartiality in its judiciary goes far beyond protecting the absolute baseline of fundamental fairness required by due process. Having recognized Minnesota's interest in maintaining the appearance of impartiality as compelling, I would conclude that the solicitation clause is narrowly tailored to serve this interest.

I would conclude, therefore, that the solicitation clause does not violate the First Amendment.[20]

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[20]Although I concluded that Wersal's challenge to Rule 4.1(A)(4) was not ripe, the majority reached the issue. If required to confront the merits, I would similarly uphold Rule 4.1(A)(4) for the same reasons I would sustain the solicitation clause.

III

Although not essential to the legal conclusions I reach today, I wish to comment briefly on the development of our caselaw in this area.

Underlying today's decision, as well as our prior decisions, are somewhat competing philosophies with respect to judicial elections. These differences were most evident in White I. In White I's majority opinion, written by Justice Scalia, the Court made clear that judicial elections should be played out under the same rules as any other election for public office. By contrast, Justice Ginsburg, in her dissenting opinion, presented a competing philosophy, which would "differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons." White I, 536 U.S. at 805 (Ginsburg, J. dissenting). Although White I may not have provided the final word on the larger philosophical debate, it did provide us with the appropriate framework for deciding constitutional challenges arising in the context of judicial elections. Once the Court made the threshold choice to apply the strict scrutiny framework to speech restrictions governing judicial elections, the result in White I was clear: the suppression of views on disputed legal and political issues is, as the Court noted, only tenuously related to any interest in maintaining an impartial judiciary.

White II was this court's first opportunity to apply the strict scrutiny framework announced in White I to a relatively more difficult set of provisions in the Minnesota Code of Judicial Conduct. I joined this court's opinion in White II because I concluded that Minnesota's ban on partisan activities and solicitation from large groups, although perhaps important, were not essential to the state's interests in maintaining judicial impartiality or its appearance.

In parting ways with the court today, I note my increasing discomfort with the court's analytical approach. As I see it, the court's analysis, at the most basic level,

amounts to an examination of whether a given speech restriction placed on judges is essential–in every case–to fully realize the protections of due process. Without prejudicing the outcome of future challenges, no speech restriction, whether it is imposed on judicial candidates or simply judges, is essential to due process in every case. The majority's approach, in my view, significantly discounts the role states play in maintaining a judicial system that serves its people with a higher standard of fairness and impartiality. Although the Constitution guarantees a minimum standard of fundamental fairness, Minnesota has endeavored to hold itself to a higher standard. Implicit in the majority's opinion is the notion that any effort to maintain judicial impartiality or its appearance beyond what the Constitution requires is nonessential and expendable. To be sure, White I counsels us to review restrictions on speech with exacting scrutiny. But where a state has crafted its restrictions carefully to maintain a fair and impartial judiciary, in both practice and appearance, as Minnesota has done here, the First Amendment must yield.

IV

For the foregoing reasons, I respectfully dissent.

EXHIBIT C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0199p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARCUS CAREY,
Plaintiff-Appellant/Cross-Appellee,

v.

STEPHEN D. WOLNITZEK, in his official capacity as Chairperson of the Kentucky Judicial Conduct Commission; MICHELE M. KELLER, in her official capacity as a member of the Kentucky Judicial Conduct Commission; EDDY COLEMAN, in his official capacity as a member of the Kentucky Judicial Conduct Commission; SUSAN M. JOHNSON, in her official capacity as a member of the Kentucky Judicial Conduct Commission; DIANE E. LOGSDON, in her official capacity as a member of the Kentucky Judicial Conduct Commission; JOYCE KING JENNINGS, in her official capacity as a member of the Kentucky Judicial Conduct Commission; LEE E. SITLINGER, JR., in his official capacity as chairperson of Panel A of the Kentucky Inquiry Commission; REED N. MOORE, JR., in his official capacity as chairperson of Panel B of the Kentucky Inquiry Commission; STEPHEN L. BARKER, in his official capacity as chairperson of Panel C of the Kentucky Inquiry Commission; LINDA A. GOSNELL, in her official capacity as Bar Counsel in Kentucky,
Defendants-Appellees/Cross-Appellants.

Nos. 08-6468/6538

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort.
No. 06-00036—Karen K. Caldwell, District Judge.

Argued: January 13, 2010

Decided and Filed: July 13, 2010

Before: BATCHELDER, Chief Judge; SUTTON, Circuit Judge; WISEMAN, District Judge.*

COUNSEL

ARGUED: James Bopp, Jr., BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Mark R. Overstreet, STITES & HARBISON, PLLC, Frankfort, Kentucky, for Appellees. **ON BRIEF:** James Bopp, Jr., Anita Y. Woudenberg, BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellant. Mark R. Overstreet, STITES & HARBISON, PLLC, Frankfort, Kentucky, Bethany A. Breetz, STITES & HARBISON, PLLC, Louisville, Kentucky, R. Gregg Hovious, FULTZ MADDOX HOVIOUS & DICKENS PLC, Louisville, Kentucky, for Appellees. Benjamin C. Mizer, David M. Lieberman, Emily S. Schlesinger, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Amici Curiae.

SUTTON, J., delivered the opinion of the court, in which BATCHELDER, C. J., joined. WISEMAN, D. J. (p. 44), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SUTTON, Circuit Judge. Imagine if a State imposed these restrictions on candidates for election to the legislature: (1) They "shall not identify" themselves "as a member of a political party in any form of advertising or when speaking to a gathering"; (2) they "shall not solicit campaign funds"; and (3) they "shall not . . . make a statement that a reasonable person would perceive as committing" the candidate to vote "a certain way on a[n] . . . issue" likely to come before the legislature. A court faced with a First (and Fourteenth) Amendment challenge to the law would make short work of it. Legislative candidates have a First Amendment right to associate publicly with a political party, *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986), to solicit campaign funds, *see Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 796 (1988), and to communicate to their constituents how they will vote on the issues of the

*The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

day, *see Brown v. Hartlage*, 456 U.S. 45, 55–59 (1982). It is doubtful that a single federal or state court judge in the country would see it differently.

Yet what happens if the same restrictions apply to judicial elections, not legislative elections? Some say the answer is the same. Elections are elections, and the same First Amendment applies to all of them. When the government suppresses election speech based on its content—prohibiting candidates from mentioning a political party with whom they affiliate, barring them from putting their name on a fund-raising letter or telling them what they can and cannot say about their judicial philosophy—the most rigorous form of constitutional second-guessing applies, and no categorical exemption from the First Amendment spares the government from this burden. In modern America, judicial elections are no less relevant to the public policy concerns of the citizenry than legislative elections, and the First Amendment protects electioneering speech in the one context as vigorously as it does in the other. Concerns about impartiality and open-mindedness that might result from unfettered judicial campaigning can be handled after the elections, not before, through the application of case-by-case judicial recusal rules that all States require their judges to follow before they agree to hear a case. Any remaining concerns flow not from the absence of speech restrictions on judicial candidates but from the State's insistence on holding elections for judicial office in the first place. A State cannot simultaneously insist that judges be held accountable to the electorate at regular intervals but deny to sitting judges and candidates alike the communicative tools for explaining how they will be held to account.

Others say it is not that easy. Judges do not represent constituents. They apply the law to the facts one case at a time, and, if they represent anyone or anything, it is the rule of law, which is why they sometimes must rule *against* the policy preferences of a majority of the voters. The judicial process works only when it is done in a disinterested manner, which is inconsistent with campaigns in which judges commit to rule, or appear to commit to rule, in a certain way in certain cases. It is one thing when a legislator solicits money during a campaign; it is quite another when a judicial candidate, a sitting judge above all, does the same. With a few modest exceptions, *see, e.g.*, *Caperton v. A.*

T. Massey Coal Co., ___ U.S. ___, 129 S. Ct. 2252 (2009); Mich. Court Rule 2.003, judicial-recusal rules are self-enforced and therefore may not provide adequate safeguards against the risks that flow from treating judicial elections like legislative ones. Unlike the other branches of government, the authority of the judiciary turns almost exclusively on its credibility and the respect warranted by its rulings, both of which are likely to be diminished by free-flowing electoral speech that permits the malignant inference that there is such a thing as caucus-bound blue-robed judges and caucus-bound red-robed judges. In some settings, there can be too much of a good thing, and unfettered free speech in judicial elections is one of them.

This is a complicated debate, and today's case requires us to take a side on some of these issues. Most recently in 2005, the Kentucky Supreme Court promulgated a judicial canon along the lines of the hypothetical legislative campaign rules mentioned above. As sitting judges ourselves, we have considerable sympathy for the concerns that prompted the canon, so much so that we embrace a central premise of it: Judicial elections differ from legislative elections, and the Kentucky Supreme Court has a compelling interest in regulating judicial campaign speech to ensure the reality and appearance of an impartial judiciary. Yet because two clauses of the canon overlooked narrower ways of advancing this interest and because, as written, they remain incompatible with the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), we must invalidate them. The third clause is constitutional in the main but contains a material ambiguity, which requires further consideration by the district court. The district court's decision is affirmed in part and vacated in part.

I.

A.

In 1792, Kentucky became the fifteenth State (and the fourth Commonwealth). The original Kentucky Constitution permitted the Governor to appoint judges, *see* Ky. Const. art. 2, § 8 (1792), but the Commonwealth, in the aftermath of the Age of Jackson,

amended its Constitution in 1850 to require its judges to stand for popular election to eight-year terms. *See* Ky. Const. § 117; Ky. Const. art. 4, §§ 4, 6 (1850). Since 1975, judicial elections in Kentucky have been "nonpartisan," *compare* Ky. Const. §116 (1891) *with* Ky. Const. §117 (1976), meaning that political parties have no formal role in any stage of the judicial selection process. Prospective candidates submit petitions for nomination to the Secretary of State. Ky. Rev. Stat. Ann. § 118A.060. The Commonwealth holds a single primary election for each judicial seat with no party identifiers and random ballot positioning. *Id.* The top two vote-getters in the primary election receive a spot on the general election ballot, which also is held without any party identifier. *Id.*

In competing for judicial seats, all candidates must abide by the Kentucky Code of Judicial Conduct. Promulgated by the Kentucky Supreme Court, it generally prohibits "a judge or judicial candidate" from "inappropriate political activity." Rules of Supreme Court of Kentucky 3.130(8.2); 4.300, Canon 5. Sitting judges or judicial candidates violate this admonition, the Code says, if they fail to follow these clauses of Canon 5, among others:

> *The party affiliation clause*. "A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering. If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party." Canon 5A(2).
>
> *The solicitation clause*. "A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy." Canon 5B(2).
>
> *The commits clause*. "A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court . . . ." Canon 5B(1)(c).

The Kentucky Judicial Conduct Commission, a constitutionally mandated state body subject to judicial review by the Kentucky Supreme Court, *see* Ky. Const. § 121, enforces the Code of Judicial Conduct. It may impose sanctions on violators of the Code, which run the gamut from a private reprimand to a public censure to removal from office to a referral to the Kentucky Bar Association for disbarment from the practice of law. Rules of Supreme Court of Kentucky 4.020. The Kentucky Inquiry Commission and the Office of Bar Counsel also police ethical violations by Kentucky attorneys, including violations of the rule that "[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." Rules of Supreme Court of Kentucky 3.130(8.2); 3.160(1).

B.

In June 2006, Marcus Carey, then a candidate for a seat on the Kentucky Supreme Court, filed a complaint in federal district court claiming that the party affiliation, solicitation and commits clauses violated his speech and associational rights under the First and Fourteenth Amendments of the U.S. Constitution. The named defendants sit on the Kentucky Judicial Conduct Commission, sit on the Kentucky Inquiry Commission or serve as Bar Counsel.

Carey complained that he wanted to disclose his party status, yet he feared the party affiliation clause barred him from doing so. He wanted to ask for campaign contributions by signing fund-raising letters, yet he feared the solicitation clause barred him from doing so. And he wished to respond to a judicial questionnaire distributed by Kentucky Right to Life, raising questions for the candidates about their judicial philosophy and about their positions on specific issues, yet he feared the commits clause barred him from doing so. He asked the court to declare the clauses unconstitutional on their face and to enjoin their enforcement.

In October 2006, roughly one month before the election, the district court preliminarily enjoined enforcement of the party affiliation and the solicitation clauses but dismissed Carey's challenge to the commits clause on ripeness and standing grounds. On November 2, Carey moved to amend his complaint, re-challenging the commits

clause, this time detailing the statements he proposed to make in possible violation of the clause. About a week later, Carey lost the election.

In September 2007, the court ruled that Carey's amended challenge to the commits clause was ripe for review and allowed it to proceed along with Carey's challenges to the party affiliation and solicitation clauses. The parties all moved for summary judgment. In ruling on the motions, the district court determined that strict scrutiny applied to all of the challenges. It then invalidated the party affiliation and solicitation clauses on their face but rejected Carey's facial challenge to the commits clause. The state defendants appeal the court's ruling on the party affiliation and solicitation clauses, and Carey appeals the court's ruling on the commits clause.

II.

Before turning to the merits, we must consider two jurisdictional questions implicated by these challenges: Did Carey file his claims too early, making them unripe for judicial review, or too late, making them moot? *See Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc).

Ripeness. Designed to ensure that the federal courts resolve "existing, substantial controversies," *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002), not disputes "anchored in future events that may not occur as anticipated" or may not occur "at all," *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997), the ripeness doctrine ensures that a dispute is concrete and real before the judicial branch resolves it. Three considerations inform the doctrine: Is the alleged injury likely to occur? Is the factual record sufficiently developed to resolve the question? And what kinds of hardships, if any, will the parties face if the court delays resolution of the question? *Warshak*, 532 F.3d at 525. In the context of a free-speech overbreadth challenge like this one, a relaxed ripeness standard applies to steer clear of the risk that the law "may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Carey meets these requirements. In future judicial elections, as in prior ones, he claims an interest in engaging in protected speech that implicates, if not violates, each clause. He wants to let voters know his party affiliation. He wants to solicit campaign funds directly, as opposed to indirectly via an election committee. And he wants to answer judicial questionnaires propounded by a local right-to-life organization. These aspects of the canon at least chill, and in some instances prohibit, these forms of communication, and in the course of the November 2006 election, at least until the entry of the October 2006 injunction, Carey censored himself on each topic. All of this establishes a "credible fear of enforcement," *Norton*, 298 F.3d at 554, sufficient to overcome any ripeness concerns.

The Kentucky Judicial Conduct Commission persists that the Kentucky Supreme Court and its ethics branch, the Kentucky Judicial Ethics Committee, have yet to apply these clauses to Carey, noting that "an authoritative construction of the canons may significantly alter the constitutional questions." Commission's Opening Br. at 22. That is all true, but it is a peculiar ground for staying our hand now with respect to *all* of these challenges, some of which involve clauses with little ambiguity. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11 (1988). This challenge dates from July 2006, and a related challenge, supported by the same counsel, dates from September 2004, *see Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). The Commission has had ample time to request interpretations or modifications of Canon 5 by the Committee or the Court, yet apparently has not done so. Nor has the Commission, or anyone else in this case, asked the federal courts to certify any questions to the Kentucky Supreme Court. These claims are ripe for review.

Mootness. In one sense, Carey's original challenge seems moot because the November 2006 election has come and gone. Carey filed his original complaint months ahead of the election, and moved to amend it a week before the election, yet here we are more than three years after the election, still considering his claims. Carey, however, retains the right to run for judicial office again, and all candidates for judicial office in Kentucky, whether sitting judges or not, are subject to Canon 5. Under these

circumstances, the claims may proceed: The alleged wrongs are "capable of repetition, yet evading review," saving them from mootness, as the district court correctly held and as the parties do not dispute. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 492–93 (6th Cir. 1995).

III.

A.

Two recent decisions of the Supreme Court—*White* and *Caperton*—set the stage for resolving the merits of this dispute. At issue in *White* was a judicial canon, first promulgated by Minnesota in 1974, providing that "a candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i); *White*, 536 U.S. at 768. Applying strict scrutiny, the Court rejected Minnesota's contention that the canon preserved judicial "impartiality" in a permissible way.

To the extent the Minnesota announce clause sought to preserve judicial "impartiality" in one sense—a "lack of bias for or against either *party* to the proceeding," *id.* at 775—the Court accepted the State's interest as a compelling one. *Id.* at 777 n.7. But the clause suffered from a means-end problem because it did "not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *Id.* at 776. It may be, the Court acknowledged, that, "when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose," but that is not due to "any bias against that party" for "[*a*]*ny* party taking that position is just as likely to lose." *Id.* at 776–77.

To the extent the State meant to advance "impartiality" in another sense—an absence of judicial "preconception in favor of or against a particular *legal view*"—that was not a compelling interest. *Id.* at 777. "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to

preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either." *Id.* at 778.

And to the extent the State meant to promote "impartiality" in the sense of judicial "open-mindedness"—the "willing[ness] to consider views that oppose [one's] preconceptions"—the Court found it unnecessary to decide whether this "desirable" quality amounted to a compelling interest. *Id.* at 778. It held that the clause was so poorly tailored to any interest in open-mindedness that the Minnesota Supreme Court could not have "adopted the announce clause for that purpose." *Id.* Judges, both incumbent and prospective, it reasoned, retained so many ways to communicate their views on legal issues other than through election statements that the clause gratuitously limited speech while "leav[ing] appreciable damage to that supposedly vital interest unprohibited." *Id.* at 780.

Caperton dealt with a sitting state supreme court justice whose top campaign donor in the previous election, the head of a mining company, had spent $3 million on his behalf—more than all of his other supporters combined. *See Caperton*, 129 S. Ct. at 2257. When a high-stakes dispute involving the mining company came before the court, the justice refused to recuse himself from hearing it and ultimately joined the 3–2 majority in ruling for the company. *See id.* at 2258. The losing party claimed that the justice's participation in the case violated its due process rights. The Supreme Court agreed, holding that, by refusing to disqualify himself, the justice had unconstitutionally deprived the parties of a fair hearing. *See id.* at 2265. When "there is a serious risk of actual bias," the Court reasoned, the Constitution requires judges to disqualify themselves, though the Court cautioned that this was "an extraordinary situation," emphasizing the size of the mining company's support relative to other donors' support, the apparently decisive effect of this support on the justice's election and the close temporal connection between the justice's election and the company's case. *Id.* at 2263, 2265.

B.

Strict scrutiny applies to all three aspects of this First Amendment challenge. *White*, for one, suggests as much, even if the decision does not compel that conclusion. In striking down Minnesota's announce clause, the Court said the following about the standard of review:

> As the Court of Appeals recognized, the announce clause 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. 247 F.3d at 861, 863. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, *id.*, at 864; the parties do not dispute that this is correct.

536 U.S. at 774.

The state defendants seize on the modest length of the Court's analysis and Minnesota's concession, arguing that we need not apply strict scrutiny here. But *White*'s brevity on this score and Minnesota's concession may suggest something else: that the counter-argument has little to support it. The multi-State amicus brief filed in support of Minnesota did not question the applicability of strict scrutiny in *White*. *See* Brief Amicus Curiae of California, *et al.* in Support of Respondents, Republican Party of Minn. v. Kelly, 536 U.S. 765 (2002) (No. 01-521). Not one of the Justices, not even one of the four dissenters, objected to the application of strict scrutiny. And if strict scrutiny does not apply to judicial canons like this one and the one at issue in *White*, it is difficult to understand why the Court exercised its discretion in reviewing *White*, given that virtually the entire analysis is premised on the applicability of strict scrutiny and given that the outcome of the case under a lower level of scrutiny is far from clear.

Free-speech first principles also suggest that strict scrutiny *should* apply. The three canons censor speech based on its content in the most basic of ways: They prevent candidates from speaking about some subjects (judicial philosophy, the legal issues of the day, party affiliation) but not others (experience); and they prevent candidates from

asking for support in some ways (campaign funds) but not others (a vote, yard signs). The canons refer directly to, and are "justified with[] reference to," the content of candidates' speech, meaning they are not eligible for the relaxed review that content-neutral restrictions receive. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Content-based restrictions on speech generally face strict scrutiny, *see United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000), and thus are "presumptively invalid" unless the restriction discriminates on the basis of categorically "proscribable" speech, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). *See also United States v. Stevens*, No. 08-769, slip. op. at 5 (April 20, 2010). None of the categorical carve-outs apply. The canons do not address "fighting words" or incitement, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), defamation, *see Beauharnais v. Illinois*, 343 U.S. 250 (1952), obscenity, *see Roth v. United States*, 354 U.S. 476 (1957), or child pornography, *see New York v. Ferber*, 458 U.S. 747, 764 (1982). Far from implicating these exceptions, today's regulations implicate a core area of free-speech protection: elections. *See Brown*, 456 U.S. at 53–54; *see also Stevens*, slip op. at 9 (declining to declare "depictions of animal cruelty" as a "new categor[y] of speech outside the scope of the First Amendment").

Nor does the nature of the restrictions implicate any of the other areas or types of regulation—time, place and manner restrictions, commercial speech, expressive conduct—in which the Court has applied less-than-rigorous review. The canons instead are of a piece with the kinds of speech regulation—telling candidates what they can and cannot say before an election—that the courts have scrutinized most rigorously. *See, e.g.*, *Brown*, 456 U.S. at 53–54; *see also* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 Ind. L. Rev. 735, 740–742 (2002) (explaining that strict scrutiny should apply to First Amendment challenges to judicial canons like these); Mark Spottswood, Comment, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 Nw. U. L. Rev. 331, 347 (2007) (same).

The Commission does not cite a single case, and we have not found one on our own, applying anything less than strict scrutiny to comparable free-speech challenges to judicial election canons. After *White*, the Eighth Circuit applied strict scrutiny to Minnesota's party affiliation and solicitation clauses. *See Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (en banc) ("*White II*"). After *White*, the Eleventh Circuit did the same in invalidating Georgia's rules prohibiting judicial candidates from soliciting campaign funds. *See Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). After *White*, the Seventh Circuit applied strict scrutiny to Wisconsin's party affiliation clause and held that Wisconsin's solicitation clause survived both intermediate and strict scrutiny. *See Siefert v. Alexander*, ___ F.3d ___, No. 09-1713, slip op. at 5, 12 (7th Cir. June 14, 2010). And, before *White*, the Third Circuit applied strict scrutiny in upholding some judicial speech restrictions. *See Stretton v. Disciplinary Bd. of Supreme Court of Pa.*, 944 F.2d 137, 141–42 (3d Cir. 1991).

The Commission urges us to apply a form of intermediate scrutiny, which balances the "competing fundamental rights" of some judicial candidates (who have a right to engage in campaign speech) and some litigants (who have a right to an impartial judiciary). Commission's Opening Br. at 10. But the reality that judicial impartiality is a "vital state interest," protected by the Due Process Clause, *Caperton*, 129 S. Ct. at 2266–67, does not require us to dilute the First Amendment. It establishes instead that Kentucky has a compelling interest in preserving the canon, proving that the State can satisfy the first requirement of strict scrutiny, not that, having satisfied this requirement, it may water down the remaining requirements.

The Commission's analogy to *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), does not hold up. *Gentile* "balance[d]" litigants' fair trial rights with attorneys' free speech rights in upholding a rule prohibiting attorneys involved in a pending trial from making statements likely to prejudice the proceedings. *Id.* at 1075. As these features of the decision suggest, *Gentile* applies only to speech restrictions imposed on attorneys during a pending case, *see id.* at 1073 n.5, which is one reason—there are others—why a comparable law restricting judges from telling the press about the

outcome of a pending case would not be an unconstitutional prior restraint on speech. Today, however, we have a speech restriction aimed not at judges performing court functions but at judges and judicial candidates making campaign statements or solicitations outside of court and outside of the process of deciding cases in their official capacity—all for the purpose of communicating information to voters about whom they should elect. That *Gentile* upholds a law restricting a lawyer's speech during a trial does not mean that it allows restrictions on lawyers in all settings. Otherwise, a lawyer running to be the Attorney General or Governor of a State could be censored simply because she is an "officer of the court." That is not the case.

The Commission insists that the solicitation clause is an especially poor candidate for strict scrutiny review, because the Supreme Court applies a "lesser" standard of review to restrictions on political donations. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003). But this argument gives analogy a bad name. The solicitation clause does not set a contribution limit, as in *McConnell* and similar cases. *See, e.g., Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982). It flatly prohibits *speech*, not donations, based on the topic (solicitation of a contribution) and speaker (a judge or judicial candidate)—precisely the kind of content-based regulations that traditionally warrant strict scrutiny.

C.

Because strict scrutiny applies, the Commission faces a daunting gauntlet, as "it is the rare" law that "survives" this kind of review. *Burson v. Freeman*, 504 U.S. 191, 211 (1992). To survive, the three canons must be "narrowly tailored" to advance a "compelling state interest." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

At the same time, Carey seeks to invalidate these clauses not just as applied to him but in all of their applications, which is to say on their face. In most constitutional cases, that exceptional remedy requires the claimant to "show one of two things: (1) that there truly are 'no' or at least few 'circumstances' in 'which the Act would be valid,' *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449–50 (2008); or (2) that a court cannot sever the unconstitutional textual provisions of the law or enjoin its unconstitutional applications." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (en banc). The courts, however, "rightly lighten this load in the context of free-speech challenges to the facial validity of a law." *Id.* In view of the risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[] the free exchange of ideas," the overbreadth doctrine permits courts to invalidate a law on its face "if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, No. 08-769, slip op. at 10 (quoting *Wash. State Grange*, 522 U.S. at 449 n.6).

IV.

A.

Party affiliation clause. This clause prohibits judges and candidates from disclosing their party affiliation "in any form of advertising, or when speaking to a gathering," save in answer to a question by a voter in one-on-one or "very small private informal" settings. Rules of Supreme Court of Kentucky 4.300, Canon 5(A)(2); Kentucky Judicial Ethics Opinion JE-105 (2004). The clause advances at least two interests, both sufficiently compelling to satisfy the First Amendment. It furthers the Commonwealth's goal of having a judiciary that is neither biased in fact nor in appearance. *See White*, 536 U.S. at 775–79. And it furthers the Commonwealth's interest in diminishing reliance on political parties in judicial selection, a policy grounded in the Kentucky Constitution's requirement that judicial elections be nonpartisan in nature.

The problem, however, is not the Commonwealth's laudable interests in promulgating this canon; it is the Commonwealth's methods in furthering them. The Court frequently says that censoring speech must be a government's measure of "last—not first—resort" in advancing its policy interests, *e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), and the narrow-tailoring requirement is proof that

the Court means it. If a law does too much, or does too little, to advance the government's objectives, it will fail. *See Eu*, 489 U.S. at 222. This canon does both.

The canon's first problem is a *White* problem—that it suppresses too much speech to advance the government's interest. In invalidating Minnesota's announce clause, *White* established that a State may not prohibit a judicial candidate from disclosing, say, that "I am for limited government," "I support a woman's right to choose," "I prefer tough-on-crime laws," or, to use an example from *White*, "I think it is constitutional for the legislature to prohibit same-sex marriage." 536 U.S. at 779. The party affiliation clause prohibits all of this, only more so. It prohibits candidates from announcing their position on one issue of potential importance to voters: the party they support. And it prohibits them from announcing their position on many issues of potential importance to voters: the party platform with which they affiliate. A party platform after all is nothing more than an aggregation of political and legal positions, a shorthand way of announcing one's views on *many* topics of the day. If the single-issue announce canon at play in *White* prevented candidates from "communicating relevant information to voters" on "matters of current public importance," and did not narrowly advance the State's interest in a non-partisan judiciary, *id.* at 781–82, the same is true of Kentucky's canon, which potentially prevents candidates from announcing their views on *many* issues at once. *See id.* at 782 ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.").

At the same time, the canon does too little to advance the State's interest in impartiality and the avoidance of partisan influence. Party affiliation, as it turns out, is not a forbidden topic. It is forbidden only when the candidate raises the point. If, by contrast, a voter asks the question in a one-on-one setting or in a small gathering, the candidate is free to say what she wants. That reality undermines the suggestion that a candidate deals a fatal blow to judicial impartiality by revealing her party affiliations. And of course, once that information is disclosed, whether in answer to a question or based on prior publicly known affiliations (including holding other elected offices),

nothing in the canon prohibits *others*, whether newspapers or political parties or interest groups, from disclosing to the world the candidate's party affiliation. "A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 780.

The clause undershoots its target in another respect. Although candidates may not reveal their party affiliation, they may discuss their membership in, affiliation with or support of any other type of organization, including organizations that take positions on judges and judicial philosophy. Although the two major political parties take positions on a wide array of issues, many interest groups advance a narrower set of positions and often do so more vocally, particularly with respect to judges. By identifying themselves with such groups, candidates can communicate more about their political and judicial convictions than they ever could by carrying a party membership card—and, in the process, may do as much to call judicial open-mindedness into question as any party affiliation ever would.

The canon also prohibits only *disclosure* of a candidate's party membership, not party membership itself. Yet the appearance of judicial closed-mindedness is part and parcel of its reality, not a device designed to disguise reality. If concern over judicial partisanship and the influence of political parties on judging truly underlies the clause, the authorization to belong (secretly) to a political party amounts to a gaping omission. A party's undisclosed potential influence on candidates is far worse than its disclosed influence, as the one allows a full airing of the issue before the voters while the other helps to shield it from public view.

Kentucky responds that the restriction supports the Kentucky Constitution's requirement that judicial elections be nonpartisan—that they operate with no partisan primaries and with no partisan identifiers at the ballot booth. *See* Ky. Const. § 117; Ky. Rev. Stat. § 118A.060. The point, however, cuts both ways. In one sense, it establishes the bona fides of the Commonwealth's policy. But in another sense, it undermines the Commonwealth's professed need to suppress speech in the process. Carey does not

challenge the validity of prohibiting party identifiers on the ballot or the validity of holding non-partisan primaries. He just wishes to communicate about a matter of potential interest to the voters and one that is often already a point of public knowledge—party affiliation—on his own terms.

Most States have not made the choice Kentucky did. Fifteen States choose their Supreme Court justices in contested, "nonpartisan" elections, and only five, including Kentucky, prohibit candidates in those elections from revealing their partisan affiliations. *See App'x A.* (Three more prohibit candidates from claiming to be "a candidate of a political organization" but do not prohibit revealing membership or affiliation. *Id.*) And two of these five canons—this one and Wisconsin's—have been invalidated. *See Siefert*, slip op. at 16. That a majority of the States with nonpartisan Supreme Court elections have opted not to censor their candidates in this way of course does not establish the invalidity of the clause, but it does call into question the necessity of implementing Kentucky's nonpartisan judicial election system in this way and whether it amounts to the "least restrictive means" of protecting the Commonwealth's interests. *Playboy Entm't Group*, 529 U.S. at 813.

The Commission says that the clause restricts as little speech as possible while preventing Kentucky's elections from turning into ultra-partisan affairs. It allows judges, the Commission adds, to join political parties, to participate in them and to disclose party affiliation if asked in the proper setting—allowing voters who care about a candidate's partisan affiliation to discover it while preventing widespread advertisement of a candidate's party membership and preventing "judicial races [from] turning into partisan political campaigns." Commission's Opening Br. at 66. Yet this argument looks at the problem through the wrong end of the telescope: It merely demonstrates that the clause does not restrict as much speech as it might, not that the clause restricts no more speech than is necessary.

We do not doubt one of the premises of the canon—that party affiliation may not be a reliable indicator of the qualities that make a good judge. Yet "[i]t is simply not the function of government to select which issues are worth discussing or debating in the

course of a political campaign," *White*, 536 U.S. at 782 (quotation omitted), and it is difficult to see how Kentucky's speech restriction does not do just that. Informational bans premised on the fear that voters cannot handle the disclosure have a long history of being legislatively tried and judicially struck, whether in the election setting or elsewhere. *See, e.g.*, *Brown*, 456 U.S. at 60 ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). Voters often resort to a variety of proxies in selecting judges and other office holders, some good, some bad. And while political identification may be an unhelpful way to pick judges, it assuredly beats other grounds, such as the all-too-familiar formula of running candidates with familiar or popular last names. In that respect, this informational ban increases the likelihood that one of the least relevant grounds for judicial selection—the fortuity of one's surname—is all that the voters will have to go on. As the district court correctly concluded, this clause violates the First Amendment on its face.

B.

Solicitation clause. Kentucky prohibits judicial candidates from "solicit[ing] campaign funds," a restriction that extends to all fundraising by the candidate, including in-person solicitations, group solicitations, telephone calls and letters. Rules of Supreme Court of Kentucky 4.300, Canon 5(B)(2). The clause permits the candidate to establish a committee that may solicit campaign donations, and it permits the committee to disclose to the candidate the names of people who donated to the campaign and those who declined. *See id.* Kentucky says that the clause satisfies the First Amendment, but we, like the district court, conclude that it does not.

As with the party affiliation clause, we do not doubt the bona fides of the solicitation clause: that it serves Kentucky's compelling interest in an impartial judiciary. The same goes for its interest in preserving the appearance and reality of a non-corrupt judiciary, an objective often served by fundraising limitations. *See Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97

(1985). Litigants have a due process right to a trial before a judge with no "direct, personal, substantial pecuniary interest" in the outcome, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), and the legitimacy of the judiciary rests on delivering on that promise and in furthering the public's trust in the integrity of its judges, *see Mistretta v. United States*, 488 U.S. 361, 407 (1989). *See generally Caperton*, 129 S. Ct. 2252.

Preserving these interests, we also acknowledge, grows more complicated when a State exercises its sovereign right to select judges through popular elections. Judicial elections, like most elections, require money—often a lot of it. Kentucky's 2006 Supreme Court election, which featured four contested races and one uncontested race, saw ten candidates raise a total of $2,119,871, of which the candidates spent $772,563 on 2,357 television commercials. Brennan Center for Justice at NYU School of Law, *The New Politics of Judicial Elections 2006* at 3, 16. "Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising." *White*, 536 U.S. at 789–90 (O'Connor, J., concurring). Complicating matters further, the general public often, though not invariably, pays less attention to judicial elections than other elections, forcing judicial candidates to focus their fundraising efforts on the segment of the population most likely to have an interest in judicial races: the bar. "This leads to the unseemly situation in which judges preside over cases in which the parties are represented by counsel who have contributed in varying amounts to the judicial campaigns." *Stretton*, 944 F.2d at 145.

That the clause advances important government interests, however, does not establish that it does so narrowly. Prohibiting candidates from asking for money suppresses speech in the most conspicuous of ways and, in the process, favors some candidates over others—incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders. For these reasons, it is tempting to say that *any* limitation on a candidate's right to ask for a campaign contribution is one limitation too many. But

there are at least two areas covered by the clause that test such an interpretation—face-to-face solicitations, particularly by sitting judges, and solicitations of individuals with cases pending in front of the court. Yet we need not decide the validity of such restrictions today because Kentucky goes well beyond them.

Besides covering in-person solicitations and those directed at individuals with pending cases, the canon prohibits a range of other solicitations, including speeches to large groups and signed mass mailings. Such indirect methods of solicitation present little or no risk of undue pressure or the appearance of a quid pro quo. No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge. Nor would a speech requesting donations from a large gathering have a "coercive effect" on reasonable attendees. Commission's Opening Br. at 55; *compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465–66 (1978) (State may regulate lawyers' in-person for-profit solicitation of clients because of "intrusive[ness]" of "persuasion under circumstances conducive to uninformed acquiescence") *with In re Primus*, 436 U.S. 412, 435–36 (1978) (regulation of lawyer's written, not-for-profit solicitation merited heightened scrutiny because it did not "afford any significant opportunity for overreaching or coercion") *and Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 475 (1988) ("Targeted, direct-mail solicitation is distinguishable from the in-person solicitation" because there is no "badgering advocate breathing down [a potential client's] neck," asking for "an immediate yes-or-no answer.").

At the same time, the clause does too little to protect the Commonwealth's interests. Although the candidate himself may not solicit donations, his campaign committee may. And nothing prevents a committee member from soliciting donations in person. That leaves a rule preventing a candidate from sending a signed mass mailing to every voter in the district but permitting the candidate's best friend to ask for a donation directly from an attorney who frequently practices before the court. Are not the risks of coercion and undue appearance far less with the first (prohibited) solicitation than the second (permitted) one?

Although the clause prevents judicial candidates from saying "please, give me a donation," it does not prevent them from saying "thank you" for a donation given. The clause bars any solicitation, whether in a large group or small one, whether by letter or one on one, but it does not bar the candidate from learning how individuals responded to the committee's solicitations. That omission suggests that the only interest at play is the impolitic interpersonal dynamics of a candidate's request for money, not the more corrosive reality of who gives and how much. If the purported risk addressed by the clause is that the judge or candidate will treat donors and non-donors differently, it is knowing who contributed and who balked that makes the difference, not who asked for the contribution. If Kentucky fears that judges will allow campaign donations to affect their rulings, it must believe that "[s]uccessful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support." *Weaver*, 309 F.3d at 1323.

Two other circuits have considered the validity of similar canons and have come to similar conclusions. In *Weaver*, the Eleventh Circuit considered a Georgia rule providing that judicial candidates "shall not themselves solicit campaign funds." 309 F.3d at 1315. Relying on many of the same means-end problems identified here, the court concluded that the canon was "not narrowly tailored to serve Georgia's compelling interest in judicial impartiality." *Id.* at 1322. In *White II*, on remand after the Supreme Court invalidated Minnesota's "announce" clause, the Eighth Circuit invalidated a canon that prohibited judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions." 416 F.3d at 745. In *Siefert*, ___ F.3d ___, the Seventh Circuit upheld Wisconsin's prohibition on judges' "personal[] solicit[ation]" of campaign contributions. *See* slip op. at 32–33. But, in doing so, it focused on the problems associated with "direct" solicitation and did not consider the validity of applying the canon to mass mailings and group solicitations—the most troubling scenarios here. *See id.* at 30–32.

The state defendants push back, arguing that, even though a candidate may discover her donors' identities from the campaign committee, the solicitation clause makes "favoritism" toward contributors "more difficult." Commission's Opening Br.

at 57. After all, they reason, when a candidate asks for a donation in person, she immediately will find out whether the donor gives and how much. *Id.* That may or may not be true. But even if we grant the Commonwealth's premise—that in-person solicitations always lead to more immediate information about donations or rejections—that suggests only that the solicitation clause may be constitutional in some settings. It does not resolve the clause's considerable overbreadth: its application to mass-mailing solicitations or speeches to a large audience.

But the solicitation clause must be constitutional, the state defendants add, because most other States with judicial elections also prevent candidates from soliciting funds. *See* Commission's Opening Br. at 53. The argument is not as helpful as they suggest. By our count, twenty-two States currently elect judges to their highest courts in contested elections. (States with retention elections are less relevant because by definition they do not involve two candidates competing for the same seat.) Of these twenty-two States, thirteen, including Kentucky, prohibit candidates from soliciting campaign contributions. *See App'x B.* (Two more have hortatory canons telling candidates they "should not" or are "strongly discouraged" from personally soliciting. *Id.*) Yet this bare majority is no more dispositive here than it was in *White*, where twenty-six States had some form of announce clause. *See White*, 536 U.S. at 786. No less importantly, we do not decide today whether a State *could* enact a narrowly tailored solicitation clause—say, one focused on one-on-one solicitations or solicitations from individuals with cases pending before the court—only that this clause does not do so narrowly.

The Commonwealth to its credit wishes to avoid cases like *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 247 S.W.3d 876 (Ark. 2007), where a judge "made direct, personal solicitations" to attorneys who "had cases currently pending in the judge's court." *Id.* at 880. But Kentucky's clause goes well beyond these sorts of solicitations. Kentucky has chosen to elect its judges in competitive elections and must abide by some of the risks that go with that decision. *See White*, 536 U.S. at 792 (O'Connor, J., concurring). While we do not question Kentucky's right to select judges

through popular elections, the Commonwealth cannot exempt itself from the demands of the First Amendment in the process. *See id.* at 788 (majority); *Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (en banc) (Reinhardt, J., concurring) ("The State . . . cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate."), *vacated on other grounds by Renne v. Geary*, 501 U.S. 312 (1991). The solicitation clause is overbroad and thus invalid on its face.

C.

The commits clause. In prohibiting judicial candidates from "intentionally or recklessly mak[ing] a statement that a reasonable person would perceive as committing a judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court," Canon 5B(1)(c), the commits clause covers a range of campaign statements. Some of those restrictions are legitimate. Others may not be. And there is a "vast middle ground of uncertainty" between the two. *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161 (D.C. Cir. 2005) (Roberts, J.).

In what seems to be its core sense, the clause, found in one form or another in 39 States, *see App'x C*, runs the gauntlet of strict scrutiny. By preventing candidates from making "statement[s]" that "commit[]" them "to rule a certain way in a case [or] controversy," the clause secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read. *See Caperton*, 129 S. Ct. at 2266–67; *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997). Whatever else a fair adjudication requires, it demands that judges decide cases based on the law and facts before them, not based on "express . . . commitments that they may have made to their campaign supporters." *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993). No one, Carey included, disputes that the Commonwealth has a compelling interest in "prohibit[ing] candidates from promising to rule a certain way on cases." Carey's Opening Br. at 14–15.

Nor does Carey dispute that the clause narrowly advances this interest—if, that is, the clause is confined to campaign "commitments" with respect to "cases" or

"controversies." So limited, the clause targets the kinds of interests *White* suggests the States may protect, as judicial commitments with respect to cases and controversies implicate not just a lack of open mindedness about the law but a lack of impartiality in its most essential sense—a commitment to rule for one *party* over another. *See White*, 536 U.S. at 775–76 ("[I]mpartiality" in "the traditional sense" means "apply[ing] the law to [one party] in the same way [one] applies it to any other party."). The First Amendment permits a State to limit speech when the Due Process Clause demands nothing less.

But the canon does not stop there. It also prevents candidates from making commitments about "issues." A commitment to rule a certain way on "issues likely to come before the court" covers a raft of electioneering stands, and it unmoors the prohibition from "cases" or "controversies" and the party-specific connotations that come with those terms. As *White* reminds us, "there is almost no legal or political *issue* that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *White*, 536 U.S. at 772 (emphasis added and quotation omitted). To make matters worse, the commentary to the clause says that it covers the "appearance" of making "issue"-related commitments. Canon 5B(1)(c), Cmt.

Think back to *White*. How is a judicial candidate's "announcement" of a position on a legal "issue" during an election campaign not likely to create the "appearance" that the candidate has "committed" to "rule a certain way" on the "issue"? And, if that is so, how can this aspect of the canon survive *White*, given that it seems to ban what *White* permits? These are good questions, but they prompt an even more basic one: what exactly does the "issues" prohibition cover?

The clause contains a serious level-of-generality problem. At the broadest level of meaning, it would seem to cover issue-related promises like these: "I commit to follow *stare decisis*"; "I commit to follow an originalist theory of constitutional interpretation" or for that matter "a living constitutionalist theory"; "I commit to a purposive method of statutory interpretation" or for that matter a "textual" one; "I commit to use (or not to use) legislative history"; or "I commit to be a rule-of-law

judge." One might reasonably say that the clause covers all of these statements, as they all relate to "issues" likely to come before a court and they all create an "appearance" of commitment. Yet if that is what the clause means, it is hard to square with the Constitution. A restriction on such promises does nothing to prevent the kind of "impartiality" that the States have an interest in securing—defined as bias (or the appearance of bias) toward particular parties or cases. *See White*, 536 U.S. at 776–77.

In a narrower sense, however, the "issues" prohibition may serve that interest. In *White* itself, the Court contemplated that a State could prevent a candidate from highlighting an "unbroken record of affirming convictions for rape" because such statements would "exhibit a bias against parties," namely against these types of criminal defendants and in favor of the prosecutor in these types of appeals. 536 U.S. at 777 n.7; *id.* at 800–01 (Stevens, J., dissenting). An interpretation of the clause confined to these kinds of statements thus might advance a compelling state interest and do so narrowly.

In a facial challenge like this one, the ultimate question is one of overbreadth: Does the law "prohibit[] a substantial amount of protected speech both in an absolute sense and relative to [the canons'] plainly legitimate sweep"? *Connection Distrib. Co.*, 557 F.3d at 336 (internal quotations omitted). To determine the extent of a law's illegitimate reach, one needs to know what it means, as "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008).

That inquiry has not happened here—at least with respect to the "issues" prohibition. In upholding this clause, the district court focused on its application to "cases" and "controversies" and, to that extent, we agree with its analysis for the reasons noted. But the district court did not explore the clause's applicability to "issues," the array of settings in which that part of the clause and commentary may apply and the tension of several of them with *White*. At oral argument, we asked the parties about the point. Carey agreed that the commits clause would satisfy the First Amendment if the clause did not contain an "issues" component to it, and saw the addition of the "issues" language (together with the commentary) as having two impermissible effects: chilling

candidates' free-speech rights to discuss their legal philosophies freely, and effectively sidestepping *White* by prohibiting candidates from announcing their positions on legal issues. The state defendants suggested that a narrowing construction of the "issues" clause could save it.

Under these circumstances, discretion, to say nothing of respect for a co-equal sovereign, is the better part of valor. At this point it is not clear what the Commonwealth's position on the term is, and the district court has not yet explored these issues. If we remand this aspect of the case to the district court, the court will have that chance. So too will the parties—particularly the state defendants, who retain considerable authority over shaping the clause and the commentary that goes with it. The state defendants may be able to obtain authority to remove the "issues" language; they may be able to identify an acceptable narrowing construction of the "issues" language along with a modification to the commentary; or they may suggest certification to the Kentucky Supreme Court. Any of these options may spare the federal courts the task of resolving a difficult constitutional question, and at a minimum they will give the Commonwealth a first shot at addressing the question.

* * *

There is room for debate about whether the election of state court judges is a good idea or a bad one. Yet there is no room for debate that, if a State opts to select its judges through popular elections, it must comply with the First Amendment in doing so. In this case, we have upheld some components of Kentucky's Code of Judicial Conduct, invalidated others and sought clarification of still one other provision. Through it all, no one should lose sight of the reality that a judicial candidate's right to engage in certain types of speech says nothing about the desirability of that speech. The First Amendment protects the meek and brazen, the "offensive" and agreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Today's case is about the meaning of the First Amendment, not about the virtues of some types of judicial campaign speech relative to others.

V.

For these reasons, we affirm the district court's judgment as to the party affiliation and solicitation clauses and vacate its judgment as to the commits clause and remand the case for further consideration of the meaning and validity of that clause.

APPENDIX A

State	Party Affiliation Clause
Kentucky	"A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering." Ky. Code of Jud. Conduct, Canon 5A(2).
Partisan Election	
Alabama	Judges should refrain from inappropriate political activities, but "it is realized that a judge or a candidate for election to a judicial office cannot divorce himself or herself completely from political organizations and campaign activities . . . ." Ala. Canons of Jud. Ethics, Canon 7A(1).
Illinois	"A judge or candidate may . . . at any time . . . identify himself or herself as a member of a political party." Ill. Code of Jud. Conduct, Canon 7(B)(1).
Louisiana	"A judge or a judicial candidate may at any time . . . identify himself or herself as a member of a political party." La. Code of Jud. Conduct, Canon 7(C)(1).
New Mexico	"A judge may . . . identify the political party of the judge . . . ." N.M. Code of Jud. Conduct, Rule 21-700A(2)(b).
Pennsylvania	Judges and candidates may "identify themselves as a member of a political party . . . ." Pa. Code of Jud. Conduct, Canon 7A(2).
Texas	"A judge or judicial candidate . . . may indicate support for a political party." Tex. Code of Jud. Conduct, Canon 5(2).
West Virginia	"A judge or a candidate subject to public election may . . . at any time . . . identify himself or herself as a member of a political party . . . ." W. Va. Code of Jud. Conduct, Canon 5C(1).
Partisan Nomination and Nonpartisan Election	
Michigan	No comparable rule.
Ohio	"A judicial candidate shall not . . . [,] [a]fter the day of the primary election, identify himself or herself in advertising as a member of or affiliated with a political party." Ohio Code of Jud. Conduct, Rule 4.2(B)(4).
Nonpartisan Election	
Arkansas	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a candidate of a political organization . . . ." Ark. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
Georgia	No comparable rule.
Idaho	No comparable rule.

Minnesota	No comparable rule.
Mississippi	"Judges . . . or candidates for such office, may . . . identify themselves as members of political parties . . . ." Miss. Code of Jud. Conduct, Canon 5C(1).
Montana	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a candidate of a political organization . . . ." Mont. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
Nevada	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a candidate of a political organization . . . ." Nev. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
North Carolina	"A judge or a candidate may . . . identify himself/herself as a member of a political party . . . ." N.C. Code of Jud. Conduct, Canon 7B(3).
North Dakota	No comparable rule.
Oregon	"[A] judicial candidate shall not knowingly . . . [p]ublicly identify the judicial candidate, for the purpose of election, as a member of a political party other than by registering to vote . . . ." Or. Code of Jud. Conduct, JR 4-102(C).
Washington	"Judges or candidates for election to judicial office shall not . . . identify themselves as members of a political party . . . ." Wash. Code of Jud. Conduct, Canon 7A(1)(e).
Wisconsin	"No judge or candidate for judicial office or judge-elect may . . . [b]e a member of any political party." Wis. Code of Jud. Conduct, Rule 60.06(2)(b)(1). *But see Siefert v. Alexander*, ___ F.3d ___, No. 09-1713 (7th Cir. June 14, 2010).
Retention Election	
Alaska	No comparable rule.
Arizona	No comparable rule.
California	No comparable rule.
Colorado	No comparable rule.
Florida	"A judicial candidate involved in an election or re-election . . . should refrain from commenting on the candidate's affiliation with any political party or other candidate, and should avoid expressing a position on any political issue. A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party, a political issue, or another candidate." Fla. Code of Jud. Conduct, Canon 7C(3).
Indiana	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a member or candidate of a political organization . . . ." Ind. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
Iowa	No comparable rule.

Kansas	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a candidate of a political organization . . . ." Kan. Code of Jud. Conduct, Canon 4, Rule 4.1(B)(5); *cf.* Kan. Code of Jud. Conduct, Canon 4, Rule 4.2(D)(1)(b) (Trial court judges subject to partisan election may "identify" themselves "as a member of a political party" "at any time").
Maryland	No comparable rule.
Missouri	No comparable rule.
Nebraska	No comparable rule.
Oklahoma	No comparable rule.
South Dakota	"A judge or candidate subject to public election may . . . at any time . . . identify himself or herself as a member of a political party . . . ." S.D. Code of Jud. Conduct, Canon 5C(1)(a)(ii).
Tennessee	"A judge or a candidate subject to election may . . . at any time . . . identify himself or herself as a member of a political party . . . ." Tenn. Code of Jud. Conduct, Canon 5C(1)(a)(ii).
Utah	"[A] judge or a judicial candidate shall not . . . publicly identify himself or herself as a member of a political organization . . . ." Utah Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
Wyoming	No comparable rule.
Legislative Election	
South Carolina	No comparable rule. *See* S.C. Code of Jud. Conduct, Canon 5A(1). Judges subject to "public election," *e.g.*, S.C. Code Ann. § 14-23-30 (probate judges), may reveal political party membership "at any time." S.C. Code of Jud. Conduct, Canon 5C(1)(a)(ii).
Virginia	No comparable rule.
Appointment	
Connecticut	No comparable rule.
Delaware	No comparable rule.
Hawaii	No comparable rule.
Maine	No comparable rule.
Massachusetts	No comparable rule.
New Hampshire	No comparable rule.
New Jersey	No comparable rule.
New York	"A sitting judge . . . [may] . . . identify himself or herself as a member of a political party . . . ." N.Y. Code of Jud. Conduct, Canon 5A(1)(ii).
Rhode Island	No comparable rule.

Vermont	No comparable rule.

APPENDIX B

State	Solicitation Clause
Kentucky	"A judge or candidate for judicial office shall not solicit campaign funds . . . ." Rules of the Supreme Court of Kentucky 4.300, Canon 5B(2).
Partisan Election	
Alabama	"A candidate is strongly discouraged from personally soliciting campaign contributions." Ala. Canons of Jud. Ethics, Canon 7B(4)(a).
Illinois	"A candidate shall not personally solicit or accept campaign contributions." Ill. Code of Jud. Conduct, Canon 7B(2).
Louisiana	"A judge or judicial candidate shall not personally solicit or accept campaign contributions." La. Code of Jud. Conduct, Canon 7D(1).
New Mexico	"[C]andidates . . . may solicit contributions for their own campaigns" but they "shall not accept any contribution that creates an appearance of impropriety" and "shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. . . . Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee." N.M. Code of Jud. Conduct, Rules 21-800A–F.
Pennsylvania	"Candidates . . . should not themselves solicit or accept campaign funds, or solicit publicly stated support . . . ." Pa. Code of Jud. Conduct, Canon 7B(2).
Texas	Judges and judicial candidates may accept "political contribution[s]" during a specified period of time around the election. Tex. Elec. Code Ann. § 253.153.
West Virginia	"A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." W. Va. Code of Jud. Conduct, Canon 5C(2).
Partisan Nomination and Nonpartisan Election	
Michigan	"A judge should not personally solicit or accept campaign funds . . . ." Mich. Code of Jud. Conduct, Canon 7B(2)(a).
Ohio	"A judicial candidate shall not personally solicit or receive campaign contributions." Ohio Code of Jud. Conduct, Rule 4.4(A).
Nonpartisan Election	
Arkansas	"[A] judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . . ." Ark. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(8).
Georgia	"Candidates . . . may personally solicit campaign contributions and publicly stated support." Ga. Code of Jud. Conduct, Canon 7B(2).

Idaho	"A candidate shall not solicit campaign contributions in person. . . . Except as required by law, a candidate's judicial election committee should not disclose the names of contributors to judicial campaigns and judicial candidates and judges should avoid obtaining the names of contributors to the judicial campaign." Idaho Code of Jud. Conduct, Canon 5C(2).
Minnesota	"[A] judge or judicial candidate shall not . . . personally solicit or accept campaign contributions," except that he or she may "make a general request for campaign contributions when speaking to an audience of 20 or more people; sign letters . . . soliciting campaign contributions . . . [and] personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority." Minn. Code of Jud. Conduct, Canon 4, Rules 4.1(A)(6), 4.2(B)(3).
Mississippi	"A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." Miss. Code of Jud. Conduct, Canon 5C(2).
Montana	Candidates may solicit. *See* Mont. Code of Jud. Conduct, Canon 4, Rule 4.4, Cmt. 1 (permitting candidates "to solicit financial or in-kind campaign contributions personally or to establish campaign committees to solicit and accept such contributions").
Nevada	Candidates may solicit. *See* Nev. Code of Jud. Conduct, Canon 4, Rule 4.4, Cmt. 1 ("A candidate may personally solicit or accept campaign contributions . . . .").
North Carolina	"A judge or a candidate may . . . personally solicit campaign funds and request public support from anyone for his/her own campaign . . . ." N.C. Code of Jud. Conduct, Canon 7B(4).
North Dakota	"A candidate shall not directly and personally solicit or accept campaign contributions," but "the candidate may orally solicit contributions . . . in front of large groups or organizations" and "[t]he candidate's actual signature or a reproduction of the signature may appear on letters or other printed or electronic materials distributed by the committee which solicit contributions . . . from individuals or large groups." N.D. Code of Jud. Conduct, Canon 5C(2). Additionally, "[t]he candidate must take reasonable measures to ensure the names and responses, or lack thereof, of the recipients of solicitations for contributions will not be disclosed to the candidate." *Id.*
Oregon	"[A] judicial candidate shall not knowingly . . . [p]ersonally solicit campaign contributions in money or in kind . . . ." Or. Code of Jud. Conduct, JR 4-102(D).
Washington	"Candidates, including incumbent judges, for a judicial office that is filled by public election between competing candidates shall not personally solicit or accept campaign contributions." Wash. Code of Jud. Conduct, Canon 7B(2).

Wisconsin	"A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions." Wis. Code of Jud. Conduct, Rule 60.06(4).
Retention Election	
Alaska	"A judge who is a candidate for retention in judicial office shall not personally solicit or accept any funds to support his or her candidacy . . . ." Alaska Code of Jud. Conduct, Canon 5C(3).
Arizona	"A judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . . ." Ariz. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
California	Candidates may solicit. *See* Cal. Code of Jud. Ethics, Canon 5A, Cmt. ("[J]udges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys.").
Colorado	"If there is active opposition to the retention of a candidate judge . . . any committee . . . may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds . . . ." Colo. Code of Jud. Conduct, Canon 7B(2)(d).
Florida	"A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds . . . ." Fla. Code of Jud. Conduct, Canon 7C(1).
Indiana	"[A] judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . . ." Ind. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(8).
Iowa	No rule directly addressing personal solicitation. *See* Iowa Code of Jud. Conduct, Canon 7B(2) ("A judge . . . whose candidacy has drawn active opposition, may campaign in response thereto and may establish committees of responsible persons to obtain publicly stated support and campaign funds.").
Kansas	"A judicial candidate may also personally solicit or accept campaign contributions." Kan. Code of Jud. Conduct, Canon 4, Rule 4.4(A).
Maryland	No comparable rule. *See* Md. Code of Jud. Conduct, Canon 5B, Comm. Note (a prohibition on personal solicitation "may be too restrictive").
Missouri	"A candidate, including an incumbent judge, for a judicial office . . . shall not solicit in person campaign funds from persons likely to appear before the judge. A candidate may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge." Mo. Code of Jud. Conduct, Canons 5B(2)–(3).

Nebraska	"A judicial candidate for retention election whose candidacy has drawn active opposition shall not personally solicit or accept campaign contributions . . . ." Neb. Code of Jud. Conduct, Canon 5(C)(2).
Oklahoma	"A candidate should not personally solicit campaign contributions . . . ." Okla. Code of Jud. Conduct, Canon 5C(2).
South Dakota	"Candidates, including an incumbent judge, may personally solicit campaign contributions . . . from individuals and organizations other than political parties." S.D. Code of Jud. Conduct, Canon 5C(2).
Tennessee	"A candidate shall not personally solicit or accept campaign contributions." Tenn. Code of Jud. Conduct, Canon 5C(2)(a).
Utah	"The judge shall not directly solicit or accept campaign funds . . . ." Utah Code of Jud. Conduct, Canon 4, Rule 4.2(B)(2).
Wyoming	"[T]he judge shall not solicit funds personally or accept any funds . . . and . . . the judge shall not be advised of the source of funds raised by the committees." Wyo. Code of Jud. Conduct, Canon 4, Rules 4.2(B)(4)–(5).
Legislative Election	
South Carolina	"A candidate for appointment to judicial office . . . shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy." S.C. Code of Jud. Conduct, Canon 5B(1).
Virginia	No comparable rule.
Appointment	
Connecticut	No comparable rule.
Delaware	No comparable rule.
Hawaii	No comparable rule.
Maine	No comparable rule as to appointed judges. Candidates for "election or reelection as a judge of probate shall not personally solicit or accept campaign contributions or personally solicit stated support." Maine Code of Jud. Conduct, Canon 5(C).
Massachusetts	No comparable rule.
New Hampshire	No comparable rule.
New Jersey	No comparable rule.
New York	"A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions . . . ." N.Y. Code of Jud. Conduct, Canon 5A(5); *see also* Cmt. 5.1 ("Canon 5 generally applies to all incumbent judges . . . .").

Rhode Island	"A candidate for appointment to judicial office . . . shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy." R.I. Code of Jud. Conduct, Canon5B(1).
Vermont	"A candidate for appointment to . . . state judicial office . . . shall not . . . solicit or accept funds, personally or through a committee or otherwise, to support the candidacy . . . ." Vt. Code of Jud. Conduct, Canon 5B(4)(d).

APPENDIX C

State	Commits Clause
Kentucky	"A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court . . . ." Rules of the Supreme Court of Kentucky 4.300 Canon 5B(1)(c).
Partisan Election	
Alabama	"A candidate for judicial office . . . [s]hall not make any promise of conduct in office other than the faithful and impartial performance of the duties of the office [and] shall not announce in advance the candidate's conclusions of law on pending litigation . . . ." Ala. Canons of Jud. Ethics, Canon 7B(1)(c).
Illinois	A "candidate for judicial office" shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court." Ill. Code of Jud. Conduct, Canon 7A(3)(d)(i).
Louisiana	A "judge or judicial candidate . . . shall not . . . with respect to 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 the office." La. Code of Jud. Conduct, Canon 7B(1)(d)(i).
New Mexico	"A judge shall not, with respect to 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 the office." N.M. Code of Jud. Conduct, Rule 21-300B(11).
Pennsylvania	"Candidates . . . should not . . . make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Pa. Code of Jud. Conduct, Canon 7B(1)(c).
Texas	"A judge or judicial candidate shall not . . . make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge . . . ." Tex. Code of Jud. Conduct, Canon 5(1)(i).
West Virginia	"A candidate for judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." W. Va. Code of Jud. Conduct, Canon 5A(3)(d)(ii).

Partisan Nomination and Nonpartisan Election	
Michigan	"A candidate . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office . . . ." Mich. Code of Jud. Conduct, Canon 7B(1)(c).
Ohio	"A judge or judicial candidate shall not . . .[i]n 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." Ohio Code of Jud. Conduct, Rule 4.1(A)(7).
Nonpartisan Election	
Arkansas	"[A] judge or a judicial 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." Ark. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(13).
Georgia	"Candidates . . . shall not make statements that commit the candidate with respect to issues likely to come before the court . . . ." Ga. Code of Jud. Conduct, Canon 7B(1)(b).
Idaho	"A candidate for judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." Idaho Code of Jud. Conduct, Canon 5A(4)(d)(ii).
Minnesota	"[A] judge or a judicial 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." Minn. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(11).
Mississippi	"A candidate for judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." Miss. Code of Jud. Conduct, Canon 5A(3)(d)(ii).
Montana	"[A] judge or a judicial 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." Mont. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(12).
Nevada	"[A] judge or a judicial 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." Nev. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(13).
North Carolina	No comparable rule. *See* N.C. Code of Jud. Conduct, Canon 7C. Judges should "abstain from public comment about the merits of a pending proceeding." *Id.*, Canon 3A(6).

North Dakota	"A candidate for a judicial office . . . shall not . . . with respect to 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 the office . . . ." N.D. Code of Jud. Conduct, Canon 5A(3)(d)(i).
Oregon	"[A] judicial candidate shall not knowingly . . . [m]ake pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the office . . . ." Or. Code of Jud. Conduct, JR 4-102(B).
Washington	"Candidates, including an incumbent judge, for a judicial office . . . should not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." Wash. Code of Jud. Conduct, Canon 7B(1)(c)(ii).
Wisconsin	"A judge, judge-elect, or candidate for judicial office shall not make or permit or authorize others to make on his or her behalf, with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." Wis. Code of Jud. Conduct, Rule 60.06(3)(b).
Retention Election	
Alaska	"A candidate for judicial office . . . shall not . . . make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court . . . ." Alaska Code of Jud. Conduct, Canon 5A(3)(d)(ii).
Arizona	"A judge or a judicial 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." Ariz. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(10).
California	"A candidate for election or appointment to judicial office shall not . . . make statements to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts . . . ." Cal. Code of Jud. Ethics, Canon 5B.
Colorado	"A judge who is a candidate for retention in office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce how the judge would rule on any case or issue that might come before the judge . . . ." Colo. Code of Jud. Conduct, Canon 7B(1)(c).
Florida	"A candidate for a judicial office . . . shall not . . . with respect to parties or classes of parties, 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 the office . . . ." Fla. Code of Jud. Conduct, Canon 7A(3)(e)(i).

Indiana	"[A] judge or a judicial 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." Ind. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(13).
Iowa	"A judge who is a candidate for retention in judicial office . . . [s]hould not, with respect to 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 the office." Iowa Code of Jud. Conduct, Canon 7B(1)(e).
Kansas	"A judge or a judicial 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." Kan. Code of Jud. Conduct, Canon 4, Rule 4.1(A)(6).
Maryland	"A judge who is a candidate for election or re-election to or retention in a judicial office . . . with respect to a case, controversy or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office . . . ." Md. Code of Jud. Conduct, Canon 5B(1)(d).
Missouri	"A candidate . . . shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office . . . ." Mo. Code of Jud. Conduct, Canon 5B(1)(d).
Nebraska	"A candidate for a judicial office . . . [s]hall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court . . . ." Neb. Code of Jud. Conduct, Canon 5(A)(3)(d)(ii).
Oklahoma	"A candidate for judicial office . . . should not . . . with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with impartial performance of the adjudicative duties of the office . . . ." Okla. Code of Jud. Conduct, Canon 5A(3)(d)(i).
South Dakota	"A candidate for a judicial office . . . shall not . . . with respect to 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 the office . . . ." S.D. Code of Jud. Conduct, Canon 5A(3)(d)(i).
Tennessee	"A candidate for a judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court . . . ." Tenn. Code of Jud. Conduct, Canon 5A(3)(d)(ii).
Utah	"[A] judge or a judicial candidate shall not . . . make pledges, promises, or commitments other than the faithful, impartial and diligent performance of judicial duties." Utah Code of Jud. Conduct, Canon 4, Rule 4.1(A)(11).

Wyoming	"A judge who is a candidate for retention in office shall . . . not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce how the judge would rule on any case or issue that might come before the judge . . . ." Wyo. Code of Jud. Conduct, Canon 4, Rule 4.2(A)(5).
Legislative Election	
South Carolina	"A candidate for a judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." S.C. Code of Jud. Conduct, Canon 5A(3)(d)(ii).
Virginia	No comparable rule.
Appointment	
Connecticut	No comparable rule.
Delaware	No comparable rule.
Hawaii	"[A] judge 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." Haw. Code of Jud. Conduct, Canon 4, Rule 4.1(a)(13).
Maine	"A candidate for appointment to judicial office . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court . . . ." Maine Code of Jud. Conduct, Canon 5(B).
Massachusetts	No comparable rule.
New Hampshire	"A candidate for judicial office . . . shall not . . . with respect to 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 the office . . . ." N.H. Code of Jud. Conduct, Canon 5B(1)(b)(i).
New Jersey	No comparable rule.
New York	"A judge or a non-judge who is a candidate for public election to judicial office shall not . . . with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office . . . ." N.Y. Code of Jud. Conduct, Canon 5A(4)(d)(ii).
Rhode Island	"A candidate for a judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ." R.I. Code of Jud. Conduct, Canon 5A(3)(d)(ii).

Vermont	"A candidate for appointment to . . . state judicial office . . . shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court . . . ." Vt. Code of Jud. Conduct, Canon 5B(4)(b).

CONCURRING IN PART AND DISSENTING IN PART

WISEMAN, District Judge, concurring in part and dissenting in part. I concur in the judgment of affirmance of the District Court on the party affiliation and solicitation clauses, as well as affirmance of the "cases and controversies" portion of the commits clause. I would go further and affirm the District Court in upholding the entire commits clause, including the issues portion. The majority's concern with an overly broad interpretation of what constitutes a commitment to vote a certain way or bias toward a party based on campaign promises regarding an "issue," amounts to the construction of a straw man. I believe a candidate for judge knows exactly when she is making a commitment, or giving the appearance of such a commitment. I believe the same is true of the enforcer of the canons. Is there any doubt about commitment when a candidate professes to believe that life begins at conception? Is there any committed bias in favor of a potential party when a candidate for judge states a "strong belief in the right to keep and bear arms?" Maybe the definition of *White-permitted* issue commitments is like the definition of pornography. Anyone with common sense knows the portent of a campaign commitment when he hears it. Yet by remand we are asking the District Court to do what the Supreme Court could not do in *White* and we are unable to do here.

Maintenance of public confidence that a litigant will receive an unbiased hearing in the courts is as compelling an interest as any possessed by the Commonwealth of Kentucky. The canon here appropriately addresses that interest. Definitional disagreements, if they arise, can be addressed when they arise.

I respectfully dissent from the holding of the majority vacating the District Court in respect to the commits clause.

EXHIBIT D

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-1713

THE HONORABLE JOHN SIEFERT,

Plaintiff-Appellee,

v.

JAMES C. ALEXANDER, et al., in their official capacity as members of the Wisconsin Judicial Commission,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 08-cv-126-bbc—**Barbara B. Crabb**, *Judge.*

ARGUED SEPTEMBER 17, 2009—DECIDED JUNE 14, 2010

Before FLAUM, ROVNER, and TINDER, *Circuit Judges.*

TINDER, *Circuit Judge.* The plaintiff, John Siefert, is an elected Wisconsin circuit court judge in Milwaukee County. He would like to state his affiliation with the Democratic Party, endorse partisan candidates for office, and personally solicit contributions for his next election campaign, but is concerned because these

activities are prohibited by the Wisconsin Code of Judicial Conduct. Rather than violate the code and face discipline, Siefert filed suit under 42 U.S.C. § 1983 for declaratory and injunctive relief against the members of the Wisconsin Judicial Commission, the body that enforces the Code of Judicial Conduct. After considering the parties' cross-motions for summary judgment, the district court granted Siefert's motion, declared the rules prohibiting a judge or judicial candidate from announcing a partisan affiliation, endorsing partisan candidates, and personally soliciting contributions unconstitutional, and enjoined the defendants from enforcing these rules against Siefert. The Commission appeals. We affirm the district court's holding on the partisan affiliation ban but reverse the district court's ruling that the bans on endorsing partisan candidates and personally soliciting contributions are unconstitutional.

I. Background

Plaintiff John Siefert was first elected to the circuit court for Milwaukee County in 1999 and has served as a judge since. Prior to being elected a circuit court judge, he was a member of the Democratic Party and participated in a number of partisan activities. He served as a delegate to the Democratic National Convention, twice ran as a Democrat for the state legislature, twice ran as a Democrat for county treasurer (holding that office from 1990 to 1993), and served as an alternate elector for President Bill Clinton in 1992. He would like to

once again join the Democratic Party and list his party membership in response to candidate questionnaires. He believes membership in the Democratic Party would communicate his desire for social justice and peace, but does not wish to appeal to partisanship as a candidate or as a judge. Siefert would also like to endorse partisan candidates for office. At the time he initiated this suit, he sought to endorse now-President Barack Obama; he expressed a desire to endorse Jim Doyle for governor of Wisconsin in 2010[1] and President Obama if he decides to run for reelection in 2012. Finally, Siefert would like to solicit contributions for his upcoming 2011 campaign by making phone calls to potential contributors, signing his name to fundraising letters, and by personally inviting potential donors to fundraising events. He would continue to use a campaign committee to handle the ministerial tasks of fundraising and to collect and report donations.

The defendants are the executive director and members of the Wisconsin Judicial Commission (the "Commission"). The Commission investigates and prosecutes potential violations of the Wisconsin Code of Judicial Conduct. The Commission also issues, from time to time, advisory opinions on the interpretation of the Code of Judicial Conduct.

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[1] Jim Doyle has since announced that he will not run for another term as governor. *See* Lee Bergquist, Stacy Forster & Patrick Marley, *Doyle Won't Seek Reelection in 2010*, Milwaukee Journal Sentinel, Aug. 15, 2009, *available at* http://www.jsonline.com/news/statepolitics/53302852.html.

Wisconsin conducts two sets of elections; one set (i.e., a primary and then general election) is held in the spring for positions filled through nonpartisan elections and the other is held in the fall for the partisan elected positions. Nonpartisan officeholders include judges of the circuit courts, court of appeals, and supreme court, as well as the state superintendent of public instruction, county board members, county executives, and municipal and school district officers. The election for these positions is nonpartisan in the sense that all candidates (who meet the eligibility requirements) appear on the ballot without party identification. Similarly, political parties have no power to slate candidates in the nonpartisan election. Wis. Const. art. VII, § 9; Wis. Stat. §§ 5.58, 5.60. A spring primary is necessary if more than two candidates meet the nomination requirements for a nonpartisan position. The top two vote-getters in the primary proceed to the nonpartisan April election, which is, in essence, a runoff. Wis. Stat. § 8.11; Wis. Blue Book 884 (2009-10). If only one or two candidates meet the nomination requirements, no primary is necessary. (Practically, it appears that incumbent judges, at least recently, are rarely challenged, and if so, are challenged by one opponent only and thus subject to only one election in April. *See* Laurel Walker, *Judicial Selections Not Quite Non-Partisan*, Milwaukee Journal Sentinel, Dec. 25, 2009, *available at* http://www.jsonline.com/news/statepolitics/80121422.html). Voting for offices filled through partisan elections, including sheriff and district attorney, takes place in the fall with a primary election to choose a single

candidate for each of the two major parties, followed shortly thereafter by a head-to-head partisan general election. Wis. Blue Book 884; *see* Wis. Stat. §§ 5.64, 8.16.

Party affiliation has been absent from the ballot in Wisconsin's judicial elections since 1913, and the district court found, based on the work of a historian employed by the Commission, that a tradition of nonpartisanship had taken hold among judicial candidates even earlier. However, Wisconsin did not expressly prohibit judges from joining a political party until 1968, when it adopted a comprehensive code of judicial conduct. *See* Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 Marq. L. Rev. 1, 2-3 (1999). In October 2004, the supreme court amended the code to extend a number of rules to cover judicial candidates in addition to sitting judges, including the prohibitions on party membership, partisan endorsements, and personal solicitation of campaign contributions. *See Wisconsin Supreme Court Order 00-07*, 2004 WI 134 (Oct. 29, 2004).

The plaintiff challenges three distinct provisions of the rules adopted in 2004. The challenged provisions are all contained in Wisconsin Supreme Court Rule 60.06:

> **SCR 60.06 A judge or judicial candidate shall refrain from inappropriate political activity.**
>
> . . .
>
> (2) Party membership and activities.
>
> (a) Individuals who seek election or appointment to the judiciary may have aligned themselves

with a particular political party and may have engaged in partisan political activities. Wisconsin adheres to the concept of a nonpartisan judiciary. A candidate for judicial office shall not appeal to partisanship and shall avoid partisan activity in the spirit of a nonpartisan judiciary.

(b) No judge or candidate for judicial office or judge-elect may do any of the following:

1. Be a member of any political party.

2. Participate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of a political party or of a candidate for partisan office.

3. Make or solicit financial or other contributions in support of a political party's causes or candidates.

4. Publicly endorse or speak on behalf of its candidates or platforms.

(c) A partisan political office holder who is seeking election or appointment to judicial office or who is a judge-elect may continue to engage in partisan political activities required by his or her present position.

. . .

(4) Solicitation and Acceptance of Campaign Contributions. A judge, candidate for judicial office, or judge-elect shall not personally solicit or accept campaign contributions. A candidate

> may, however, establish a committee to solicit and accept lawful campaign contributions. The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers. A judge or candidate for judicial office or judge-elect may serve on the committee but should avoid direct involvement with the committee's fundraising efforts. A judge or candidate for judicial office or judge-elect may appear at his or her own fundraising events. When the committee solicits or accepts a contribution, a judge or candidate for judicial office should also be mindful of the requirements of SCR 60.03 and 60.04(4).

Siefert challenges the ban on party membership in SCR 60.06(2)(b)1, the ban on partisan endorsements in SCR 60.06(2)(b)4, and the ban on personal solicitation of campaign contributions in SCR 60.06(4). He does not challenge the ban on "appeal[s] to partisanship and . . . partisan activity" in SCR 60.06(2)(a) or the balance of SCR 60.06(2)(b). Nor does he challenge SCR 60.05, which directs judges to conduct their extra-judicial activities in a manner that does not cast doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties.

II. Discussion

A little background on the law surrounding the First Amendment rights of elected judges and judicial candidates is helpful to understanding what follows. In 2002,

the Supreme Court decided *Republican Party of Minn. v. White* (*White I*), 536 U.S. 765 (2002). *White I* struck down a Minnesota canon of judicial conduct that prohibited judges and judicial candidates from announcing their views on disputed legal and political issues. *Id.* at 788. The Court, applying a strict scrutiny approach, recognized a compelling state interest in preventing bias for or against particular litigants, but held that the state did not have a compelling interest in preventing a judge from having a preconception for or against particular views. *Id.* at 776-77.

At the same time, *White I* left open some of the questions we deal with today. Justice Kennedy, a member of the five-vote majority and author of a separate concurrence, noted specifically that states are obligated to regulate the behavior of their judges to protect the integrity of their courts. "To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt." *Id.* at 794 (Kennedy, J., concurring). Justice Kennedy noted that elected judges "have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity." *Id.* at 796. We think it beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop, these independent-minded and faithful jurists. *See Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2259 (2009); *In re Murchison*, 349 U.S. 133, 136 (1955). State rules are the means of their development. *White I*, 536 U.S. at 794 (Kennedy, J., concurring).

But *White I* makes clear that there are boundaries to the state's regulation of judicial elections. On remand, the Eighth Circuit, adopting the Supreme Court's strict scrutiny approach from *White I*, invalidated Minnesota's ban on partisan activities by judges and the portion of Minnesota's ban on direct solicitation of contributions that prohibited judges from signing fundraising letters or speaking to large groups of potential donors at fundraisers. *Republican Party of Minnesota v. White* (*White II*), 416 F.3d 738, 754, 765-66 (8th Cir. 2005) (en banc). Siefert relies heavily on these cases to challenge Wisconsin's code of judicial conduct, which contains provisions that are similar but not identical to those at issue in *White II*.

The Commission relies on two government employment cases, *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548 (1973) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to argue that a less stringent standard applies. *Letter Carriers* upheld the constitutionality of Section 9(a) of the Hatch Act, which prohibited federal employees from taking "an active part in political management or in political campaigns." *Garcetti* dismissed a § 1983 claim brought by a deputy district attorney who claimed that his employer, a county, took adverse employment action against him after he wrote a memorandum in which he recommended dismissal of a criminal case based on government misconduct, and that this action amounted to retaliation for exercising his First Amendment right to free speech. Both of these cases in turn relied on the deferential standard of review articulated in *Pickering v. Bd. of Ed. of Twp. High*

Sch. Dist. 205, Will County, Ill., 391 U.S. 563 (1968), which balances the public employee's right to speak out on matters of public concern against the government's interest in "promoting the efficiency of the public services it performs through its employees." *Id.* at 568. In *White I*, the Supreme Court reserved the question of whether this line of cases could justify restrictions on the speech "of judges because they are judges." 536 U.S. at 796 (Kennedy, J., concurring) ("Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, and *Connick v. Myers* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here." (internal citations omitted)).

The Commission is correct that, ordinarily, governmental entities have some leeway to proscribe certain categories of speech among citizens to promote the efficient performance of governmental functions. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010) (collecting cases). "[T]here are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Id.* The First Amendment allows, for instance, certain prohibitions on students' use of vulgar terms at school, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), state employees' speech about working conditions, *Connick v. Myers*, 461 U.S. 138, 146 (1983), prisoners' union-organizing activity, *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 131-32 (1977), military members' dissent, *Parker v. Levy*, 417 U.S. 733, 758 (1974), federal employees' political

activity, *Letter Carriers*, 413 U.S. at 564, state employees' political activity, *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973), and public school teachers' speech, *Pickering*, 391 U.S. at 568. But *White I* is clear that in the context of elections, judges are free to communicate their ideas to voters. Much of our discussion involves our attempt to harmonize these two strains of First Amendment law.

A. SCR 60.06(2)(b)1: Party Membership

SCR 60.06(2)(b)1 states that "No judge or candidate for judicial office or judge-elect may . . . [b]e a member of any political party." We think this rule falls squarely within the ambit of the Supreme Court's analysis in *White I*. Just as in *White I*, the party affiliation ban forbids "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 I*, 536 U.S. at 774. We agree with Judge Siefert that the partisan affiliation ban acts to prohibit his speech on both his political views and his qualifications for office. Therefore, the clause is a content-based restriction on speech subject to strict scrutiny. *Id.*; *United States. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

To survive strict scrutiny, SCR 60.06(2)(b)1 must be narrowly tailored to serve a compelling state interest. *White I*, 536 U.S. at 774-75. To show that a restriction on speech is narrowly tailored, the state must show that it "does not 'unnecessarily circumscrib[e] protected ex-

pression.'" *Id.* at 775 (citing *Brown v. Hartledge*, 456 U.S. 45, 54 (1982)).

The Commission argues that the ban is necessary to preserve both "impartiality," defined as the "absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge," SCR 60.01(7m), and the appearance of impartiality.[2]

In *White I*, the Supreme Court cautioned against vague invocations of "impartiality." 536 U.S. at 775. Insofar as impartiality refers to "the lack of bias for or against either *party* to the proceeding," it is a compelling state interest. *Id.* (emphasis in original). This is consistent with the constitutional guarantee of due process, which requires recusal in cases where there is a strong probability of "actual bias." *See, e.g., Caperton*, 129 S. Ct. at 2265 (holding that due process required a justice of the West Virginia Supreme Court of Appeals to recuse himself from a case involving a company whose president spent approximately $3 million to elect the justice while the company's appeal was pending). On the other hand, the *White I* Court squarely rejected

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[2] The Commission also argues that "nothing in the Constitution requires Wisconsin to establish a partisan judiciary." However, this is not a case about whether partisan affiliation will appear on the ballot, whether parties will play a formal role in nominating judicial candidates for the general election, or any of the other mechanics of the electoral process.

the argument that a state has a compelling interest in guaranteeing that judges do not have a "preconception in favor of or against a particular *legal view*." 536 U.S. at 777 (emphasis in original). We not only allow, but expect, judges to have preconceived views on legal issues. *See Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem. of Rehnquist, J.) ("Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."). Finally, the *White I* Court left open the possibility that "open-mindedness"—the willingness to consider opposing views and remain open to persuasion—is a compelling state interest. 536 U.S. at 778. Because the Court found that the canon at issue did not serve the interest of open-mindedness, it did not decide whether such an interest was in fact compelling. *Id.*

The crux of the state's concern here seems to be that a judge who publicly affiliates with a political party has indicated that he is more inclined toward that party's stance on the variety of legal issues on which that party has a position. But that is the purported compelling state interest that *White I* squarely rejected. 536 U.S. at 777-78. The state does not have a compelling interest in preventing candidates from announcing their views on legal or political issues, let alone prohibiting them from announcing those views by proxy.[3] Nor can casting

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[3] Wisconsin's politics, like our nation's, are dominated by two large parties which are by no means ideologically homogenous. (continued...)

the argument in terms of the "appearance of bias" save it—because "avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either." *Id.* at 778.

The Commission also argues that the ban on party affiliation is designed to prevent bias for or against parties to a particular case, or the appearance of that bias. While this interest was certainly recognized in *White I*, this rule is not tailored to it.[4] Arguably, party membership is an association that could call into

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[3] (...continued)
Even on the most polarizing issues, party membership is a significantly less accurate proxy for a candidate's views on contested issues than membership in special interest or advocacy groups, which the Wisconsin Code of Judicial Conduct does not expressly prohibit. Relying on an advisory opinion issued by the Commission, the defendants argue that the Code prohibits judges and judicial candidates from taking a leadership role in groups such as the Sierra Club or Mothers Against Drunk Driving, which advocate "social goals through litigation and legislative action." Regardless of whether Wisconsin courts eventually adopt the Commission's interpretation of the Code, the flat ban in SCR 60.06(2)(b)1 treats party membership more harshly than any other affiliation.

[4] The Commission does not articulate an argument that SCR 60.06(2)(b)1 furthers impartiality in the sense of open-mindedness, so we need not decide to what extent, if any, this interest is compelling.

question the impartiality of a judge when sitting on a case involving that party, or perhaps that party's main rival. *But see White II*, 416 F.3d at 755 ("[T]he fact that the matter comes before a judge who is associated with the Republican or Democratic Party would not implicate concerns of bias for or against that party unless the judge were in some way involved in the case beyond simply having an 'R' or 'D' . . . after his or her name.") However, nothing in the record suggests that political parties themselves are such frequent litigants that it would be unworkable for a judge who chooses to affiliate with a political party to recuse himself when necessary.

The Commission attacks the practicality of recusal by arguing that a judge who declared a partisan affiliation would have to recuse himself in every case where a party member was a litigant, or where the political party was supporting a particular outcome, making recusal impractical. But this significantly overstates the likelihood of bias toward particular litigants. Membership in a political party is not the same as membership in a smaller, more cohesive organization. Furthermore, mere membership does not connote the type of intricate relationship with party politics that would create the appearance of bias. Without some specific, individualized relationship, the affiliation between a judge who is a member of a political party and other members of that political party is simply too diffuse to make it reasonable to assume that the judge will exhibit bias in favor of his fellow party members. Indeed, twelve states employ partisan elections with respect to at least some judgeships. *See* American Judicature Society, *Methods of Judicial*

Selection, http://www.judicialselection.us/judicialselection/methods/selection_of_judges.cfm?state= (last visited June 9, 2010) (identifying Alabama, Illinois, Indiana, Kansas, Louisiana, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia as states that employ partisan judicial elections). There is no evidence to suggest that these states have faced an unworkable number of recusals as a result of their partisan judicial elections, nor that their partisan system of elections works a denial of due process. *Cf. White I*, 536 U.S. at 776 (noting that due process requires an "impartial" judge in the sense of a judge lacking a bias for or against either party to a proceeding). In short, defendants have failed to show why recusal, which does not restrict speech, is an unworkable alternative to Wisconsin's ban on judges and judicial candidates announcing a party affiliation.

B. SCR 60.06(2)(b)4: Endorsement of Partisan Candidates

SCR 60.06(2)(b)4 prohibits judges and judicial candidates from "[p]ublicly endors[ing] or speak[ing] on behalf" of any partisan candidate or platform. Judge Siefert argues that, like the choice to identify as a member of the Democratic Party, the choice to endorse another candidate is simply a means of expressing his political views. We disagree. An endorsement is a different form of speech that serves a purpose distinct from the speech at issue in *White I* and in the party identification rule discussed above. Accordingly, we believe that it should be subject to a distinct analysis. In keeping with a long line of Supreme

Court precedent determining the rights of government employees going back to at least *Ex Parte Curtis*, 106 U.S. 371 (1882), a balancing approach, not strict scrutiny, is the appropriate method of evaluating the endorsement rule.

While the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office," *Citizens United*, 130 S. Ct. at 898 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation omitted)); *see also White I*, 536 U.S. at 774 (noting that "speech about the qualifications of candidates for public office" is "at the core of our First Amendment freedoms"), a public endorsement does not fit neatly in that category. Endorsements are not simply a mode of announcing a judge's views on an issue, or a shorthand for that view. In fact, the American Bar Association model code from which the rule is derived justifies the restriction on endorsement based on the danger of "abusing the prestige of judicial office to advance the interests of others." Model Code of Judicial Conduct R. 4.1 cmt. [4] (2007). The Commission identifies its interest in the rule as an attempt to preserve the appearance of impartiality in the judiciary. Appellant's Br. at 36.

While an interest in the impartiality and perceived impartiality of the judiciary does not justify forbidding judges from identifying as members of political parties, a public endorsement is not the same type of campaign speech targeted by the impermissible rule against party affiliation in this case or the impermissible rule against

talking about legal issues the Supreme Court struck down in *White I*. As Judge Siefert notes, "[e]ndorsements primarily benefit the endorsee, not the endorser" and endorsements may be exchanged between political actors on a quid pro quo basis. Appellee's Br. at 37 & n.11. This amounts to a concession that offering an endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker.

This distance between an endorsement and speech about a judge's own campaign justifies a more deferential approach to government prohibition of these endorsements. *See Letter Carriers*, 413 U.S. at 556; *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 99 (1947); *see also Biller v. U.S. Merit Sys. Prot. Bd.*, 863 F.2d 1079, 1089 (2d Cir. 1988) (noting that the Supreme Court has drawn a careful line between "partisan political activities" and "mere expressions of views"). When judges are speaking as judges, and trading on the prestige of their office to advance other political ends, a state has an obligation to regulate their behavior. We thus see a dividing line between the party affiliation rule, which impermissibly bars protected speech about the judge's own campaign, and the public endorsement rule, which addresses a judge's entry into the political arena on behalf of his partisan comrades. *See Citizens United*, 130 S. Ct. at 899 (noting that while political speech restrictions are subject to strict scrutiny, "a narrow class of speech restrictions" are constitutionally permissible if "based on an interest in allowing governmental entities to perform

their functons."). We note that *Citizens United*, even as it broadly prohibited restrictions on "political speech," reconfirmed the validity of the *Letter Carriers* line of cases, which specifically targeted political activity by government employees. *Id.* And we reiterate that the Supreme Court's holding in *White I* does not necessarily forbid any regulation of a judge's speech. In fact, Justice Kennedy's concurrence indicates just the opposite. Furthermore, unlike restrictions designed, for example, to regulate federal employees' political activity, restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause. This provides a state with a sufficient basis for restricting certain suspect categories of judicial speech, even political speech. The only question is whether a ban on public endorsements serves this state interest.

Judge Siefert argues that judges are different from "employees" because they are more akin to legislative actors who are "ultimately accountable to the voters." *See Jenevien v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007). However, this conception of a judge's role is improperly limited. The Hatch Act, as considered in *Letter Carriers*, was not confined to low-level bureaucrats, but covered the entire executive branch of the federal government, with specific exemptions for the President, Vice President, and "specified officials in policy-making positions." *Letter Carriers*, 413 U.S. at 561. While Wisconsin judges receive job evaluations from the voting public, they are employed in the essential day-to-day task of operating a judicial system that must not only be fair and impartial, but must also appear to the public to be fair and impar-

tial. To the extent that Wisconsin chooses to restrict those employed to perform important judicial functions from being in the business of trading political endorsements, important due process interests are served.

Furthermore, while *Garcetti*, *Connick*, *Letter Carriers*, and *Pickering* all concern public employees, the ability of the government to regulate the speech of the employees in those cases is not solely dependent on its authority as an employer. *See Connick*, 461 U.S. at 143-44 (tracing the development of the law in this area). Instead, by the time it decided *Pickering*, the Supreme Court had recognized that the doctrine that the government was allowed to subject its employees "to any conditions, regardless of how unreasonable" had been "uniformly rejected." *Pickering*, 391 U.S. at 568 (citation omitted). "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Mitchell*, 330 U.S. at 96 ("Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government."). The rationale behind government restriction identified in *Pickering*, therefore, is related both to

the government's power as an employer and its duty to promote the efficiency of the public services it performs. Here, we emphasize again, we are not concerned merely with the efficiency of those services, but that the work of the judiciary conforms with the due process requirements of the Constitution; this tips the balance even more firmly in favor of the government regulation.

The observation that elected judges are "ultimately accountable to the voters" seems irrelevant to the due process issue. A judge must also be accountable to her responsibilities under the Fourteenth Amendment. It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time. As Justice Kennedy pointed out in his concurrence in *White I*, state rules fill the gap between elections in order to develop the fair jurists to whom each litigant is entitled. *White I*, 536 U.S. at 794 (Kennedy, J., concurring).

So, as in *Pickering*, we have to find the balance between the state's interest and the judge's. Under the *Pickering* approach, narrow tailoring is not the requirement; the fit between state interest and regulation need not be so exact. Instead, the state's interest must be weighed against the employee's interest in speaking. *Pickering*, 391 U.S. at 568; *Bridges v. Gilbert*, 557 F.3d 541, 549 (7th Cir. 2009). And the state's interest in the endorsement regulation is a weighty one. Due process requires both

fairness and the appearance of fairness in the tribunal. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The Commission's concern is that judges who "publicly endorse or speak on behalf of [a party's] candidates or platforms" undermine this appearance of impartiality.

At the same time, the constitutional protection in a political endorsement is tempered by the limited communicative value of such an endorsement. Judge Siefert concedes that endorsements may be less about communicating one's qualifications for office than bolstering another politician's chances for office. Appellee's Br. at 37 & n.11. While *White I* teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is.

The Conference of Chief Justices, as amicus, points to the same quid pro quo concerns conceded by Judge Siefert to justify the endorsement ban. "Without this rule, judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement." Br. of Conf. of Chief Justices, amicus, at 23. The Commission justifies its interest in the ban based on the danger that parties whom the judge has endorsed may appear in the judge's court, and argues that the risk of bias is not mitigated by the remedy of recusal, due to both the volume of litigation involving the government in Wisconsin and the number of small circuit courts in

Wisconsin, where recusal would be impracticable. Both the Commission's and the Chief Justices' concerns are valid. Any suggestion that the rule should only forbid Judge Siefert from making endorsements while identifying himself as "Judge" is dubious (he would be prohibited from using his title anyway by SCR 60.03(2)); the Commission is entitled to believe that simply removing the honorific "judge" will not conceal Siefert's true identity from the public.

Judge Siefert, arguing for a strict scrutiny standard, suggests that the availability of recusal, a less restrictive alternative to the ban on endorsements, dooms the prohibition. The example Judge Siefert uses to dispute the Commission's argument that recusal is too onerous for some of its courts—his endorsement of President Obama—is a particularly good example of why strict scrutiny is the inappropriate inquiry. The value of that endorsement to the President would be directly congruent to Judge Siefert's status in the community, the publicity his endorsement would engender, and the narrowness of the margin in public support for the President. While all of these factors enhance the value of the endorsement, they similarly enhance its problematic nature. A local judge who tips the outcome of a close election in a politician's favor would necessarily be a powerful political actor, and thus call into question the impartiality of the court. Conversely, if Judge Siefert's public endorsement carried no weight, why preserve his right to make this public endorsement by jeopardizing the efficiency of Wisconsin's courts? *See Broadrick*, 413 U.S. at 613 ("Application of the overbreadth

doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort."). Once we accept that public endorsements are not the type of speech contemplated in *White I*, our task is to balance the value of the rule against the value of the communication. The concerns the Commission and its amici articulated also speak to a broader concern that freely traded public endorsements have the potential to put judges at the fulcrum of local party politics, blessing and disposing of candidates' political futures. Given that Wisconsin's interest in preventing its judges' participation in politics unrelated to their campaigns is justified based on its obligations under the Due Process Clause, as well on its obligation to prevent the appearance of bias from creeping into its judiciary, and that the endorsement restriction does not infringe on a judge's ability to inform the electorate of his qualifications and beliefs, the regulation is permissible.

We note that the rule only bans endorsements in partisan elections. Wisconsin also holds nonpartisan elections for judges, as well as the state superintendent of public education, county board members, county executives, and municipal and school district officers. Wis. Blue Book 884; *see* Wis. Stat. §§ 5.58, 5.60. According to the text of the rule ("No judge or candidate for judicial office . . . may publicly endorse or speak on behalf of [a political party's] candidates or platforms"), endorsements in these nonpartisan elections may be freely given. Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality.

But, because we are applying a balancing test, the question we ask is whether the exception for nonpartisan elections so weakens the ban (and therefore the state's asserted interest in enforcing it) that the scales tip in favor of the plaintiff's right to speak. *See SEIU, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 425 (3d Cir. 2006) ("[T]o the extent that the [regulation] is not tailored to the [state's] stated interest, there is a commensurate reduction in the [state's] interest in its enforcement." (quotation omitted)). We think it does not for two reasons.

First, the Commission justifies the ban based on the onerous nature of recusal in the case where a judge endorses a prosecutor or sheriff who frequently appears in front of the court. None of the nonpartisan officials appear as frequently before the court as law enforcement officials. Of these nonpartisan officials, only judges are necessarily lawyers, and the frequency with which a private practitioner appears before a court pales in comparison with prosecutors and sheriffs who are involved in litigation nearly every day. Even nonpartisan candidates that may come before the court as part of a suit against their institution (for instance, school board members) will not appear as frequently before the court as the partisan law enforcement officials that the ban reaches.

Second, the difficulty of recusal is but one factor in favor of the ban; the other is Wisconsin's interest in preventing judges from becoming party bosses or power-brokers. Wisconsin has a justified interest in having its

judges act and appear judicial rather than as political authorities. This interest is directly implicated by endorsements in partisan elections and much less so, if at all, in nonpartisan elections. In a nonpartisan election, an endorsement connotes the quality of one candidate among several. In a partisan election, an endorsement can still mean an assessment of the quality of the endorsed candidate, but it also carries implications that the endorsement is given because of party affiliation; in other words, it suggests that the political party of the endorsing judge is behind the candidate. In that sense, the judge becomes a spokesperson for the party. The state's interest in preventing partisan endorsements, then, is appropriately given more weight than nonpartisan endorsements.

Our treatment of the endorsement prohibition is based on the claims that Judge Siefert, an incumbent, brings. This is not the appropriate case to address the issue of regulations for judicial candidates who are not judges. Their potential role on a court or the impact that such endorsements could have on a judicial election as a whole may justify the type of regulation we have here, but that is for another day. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) ("[I]f there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns."). Wisconsin has an interest in regulating the non-campaign political activities of its judges, and prohibiting public endorsements serves this interest.

C. SCR 60.06(4): Personal Solicitation

The final portion of the Wisconsin Judicial Code of Conduct at issue here is the ban on the personal solicitation of contributions by judges or judicial candidates. SCR 60.06(4) allows a judge to set up a finance committee to raise campaign contributions, serve on that committee, and appear at fundraising events. The canon prohibits judges from directly soliciting or accepting contributions. Finally, judges are admonished to avoid "direct involvement" in their campaign's fundraising efforts, although no particular level of involvement is expressly forbidden.

At heart, the solicitation ban is a campaign finance regulation. As such, it is reviewed under the framework set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). *See also Stretton v. Disciplinary Bd. of Supreme Ct. of Penn.*, 944 F.2d 137, 145-46 (3d Cir. 1991) (a pre-*White I* case upholding Pennsylvania's personal solicitation ban under a deferential standard). In *Buckley*, the Supreme Court recognized a compelling state interest in preventing corruption or the appearance of corruption in elections through some campaign finance regulation. *Id.* at 26-27; *see also Citizens United*, 130 S. Ct. at 908. The Court reasoned that restrictions on raising funds were typically less burdensome to speech than restrictions on spending funds, and thus created a two-tiered scheme of review for campaign finance regulation. *Buckley*, 424 U.S. at 20-21. Under *Buckley*, restrictions on spending by candidates and parties is reviewed with strict scrutiny, while restrictions on contributions are reviewed under

less rigorous "closely drawn" scrutiny. *Id.* at 25. We note that *Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates. *Citizens United*, 130 S. Ct. at 909-11; *see also* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 Harv. J.L. & Pub. Pol'y 283, 290-92 (2010). Since we are dealing with regulation of campaign contributions, we therefore proceed with the analysis under *Buckley*.

Because the direct solicitation ban does not restrict the amount or manner in which a judicial candidate can spend money on his or her campaign, we apply closely drawn scrutiny. This is consistent with the approach the Supreme Court took in analyzing the various solicitation bans in the Bipartisan Campaign Finance Reform Act. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136-38 & n.40 (2003), *overruled in part on other grounds by Citizens United*, 130 S. Ct. at 913; *see also id.* at 177, 181-82. *But see id.* at 314 (Kennedy, J., concurring in part in the judgment and dissenting in part) (applying strict scrutiny to solicitation ban); *White II*, 416 F.3d at 765-66 (applying strict scrutiny to solicitation ban without discussion of *McConnell*). We note, however, that even if strict scrutiny applied, a solicitation ban may still survive if it is narrowly tailored to prevent corruption or the appearance of corruption. *See McConnell*, 540 U.S. at 314 (Kennedy, J., concurring in part in the judgment and dissenting in part) (concluding that the Federal Election Campaign Act § 323(e), which prohibits federal candidates from soliciting soft-money contributions,

survives strict scrutiny); *White II*, 416 F.3d at 765-66 (suggesting that portion of Minnesota's solicitation ban that prohibits judges from knowing the identity of contributors or non-contributors would survive strict scrutiny). We believe it survives under either standard. *But see Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2002) (striking down personal solicitation ban after applying strict scrutiny).

The Commission suggests that this ban ensures that "no person feel directly or indirectly coerced by the presence of judges to contribute funds to judicial campaigns," Order No. 00-07 at 11 (Abrahamson, C.J., concurring), and eliminates the potential bias or appearance of bias that would accompany lawyers who frequently appear before a judge being personally solicited for campaign contributions. Siefert argues that the solicitation ban does not serve the impartiality interest as defined in *White I* and that the interest advanced by the state in protecting potential donors from coercion is not one that we should recognize as compelling.

Wisconsin's personal solicitation ban serves the anti-corruption rationale articulated in *Buckley* and acts to preserve judicial impartiality.[5] A contribution given

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[5] These two interests are closely linked and may be best understood as different ways of stating the same concern. *Cf. White II*, 416 F.3d at 769 (Gibson, J., dissenting) (" 'Open-mindedness,' in Justice Scalia's terminology, is in reality simply a facet of the anti-corruption interest that was recognized

(continued...)

directly to a judge, in response to a judge's personal solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge's campaign committee at the request of someone other than the judge, or in response to a mass mailing sent above the judge's signature. In *White II*, for example, the Eighth Circuit recognized that a ban prohibiting "candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case," 416 F.3d at 765, but concluded that prohibiting a candidate from personally signing a solicitation letter or making a blanket address to a large group does not advance that interest, *id.* at 765-66. Similarly, while we decline to recognize here a compelling state interest in protecting potential contributors from feeling "coerced," we note that the perceived coerciveness of direct solicitations is closely related to their potential impact on impartiality.[6] A direct solicitation closely links the

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[5] (...continued)
in *Buckley v. Valeo* and subsequent campaign finance cases."(citations omitted)).

[6] Because we do not adopt the "coercion" rationale to support SCR 60.06(4), we need not reach Siefert's argument that the direct solicitation ban is significantly underinclusive because it does not apply to candidates for legislative office. In any event, this argument misapprehends the respective

(continued...)

quid—avoiding the judge's future disfavor—to the quo—the contribution. We do not mean to suggest that judges who directly solicit contributions are necessarily behaving inappropriately, but the appearance of and potential for impropriety is significantly greater when judges directly solicit contributions than when they raise money by other means.

The question remains whether the solicitation ban hews closely enough to the anti-corruption rationale that purportedly justifies it. Wisconsin allows judges to serve on their own finance committees, and while it directs them to avoid involvement with the committee's fundraising efforts, it does not specifically prohibit them from reviewing lists of contributors. *Cf. White II*, 416 F.3d at 766 (concluding that where judicial canon prohibited judges from knowing the identities of contributors and non-contributors, additional restrictions on blanket solicitations to large groups were unconstitutional). Wisconsin also allows judges to appear at their own fundraising events, where they will come into

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[6] (...continued)
roles of legislators and judges. Legislators are not expected to be impartial; indeed, they are elected to advance the policies advocated by particular political parties, interest groups, or individuals. Judges, on the other hand, must be impartial toward the parties and lawyers who appear before them. In addition, legislators can only act with the support of their colleagues. Judges—particularly trial court judges—exercise wide and largely unreviewable discretion over discrete cases involving specific parties and lawyers.

contact with people who they will likely presume are contributors. Finally, the ban reaches solicitations that do not implicate the risk of a quid pro quo, such as solicitations directed at family members.

We conclude that the solicitation ban is drawn closely enough to the state's interest in preserving impartiality and preventing corruption to be constitutional. The fact that a judge might become aware of who has or has not contributed to his campaign does not fatally undercut the state's interest in the ban. As discussed earlier, the personal solicitation itself presents the greatest danger to impartiality and its appearance. Like SCR 60.06(4), the solicitation ban at issue in *McConnell* did not prohibit officeholders from becoming aware of soft-money contributions and contained an exception for fundraising events. *See* 2 U.S.C. § 441i(e) (codifying FECA § 323(e)). Finally, to the extent that the ban affects, at the margins, some solicitations that do not pose a risk to impartiality, that impact is not fatal to the ban. Just as the state may enact a contribution limit, rather than ask of each individual contribution whether it poses the risk of corruption, the state may enact a ban on direct solicitations, a ban tailored to the specific behavior that poses the greatest risk. *Cf. Buckley*, 424 U.S. at 26-28. Moreover, the ban's effect on innocuous contributions is small because the judge's campaign committee remains free to solicit those individuals. And unlike the partisan affiliation and endorsement bans, there is no reasonable, less restrictive means available here. It is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom

will appear before the candidate who wins. It would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution. Because the ban on direct solicitation of contributions by judicial candidates prevents corruption and preserves impartiality without impairing more speech than is necessary, we reverse the district court's decision on SCR 60.06(4).

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment in favor of Siefert with respect to the party affiliation ban, SCR 60.06(2)(b)1, but REVERSE the district court's judgment with respect to the public endorsement and personal solicitation bans, SCR 60.06(2)(b)4 and SCR 60.06(4).

ROVNER, *Circuit Judge*, dissenting in part. Protecting judicial integrity is a government interest of highest magnitude, as is protecting the rights guaranteed by the First Amendment. Reconciling these two competing interests is no small feat, and when evaluating the party membership restrictions in Section II.A and the personal solicitation restriction in Section II.C, I believe

the majority successfully navigates the competing concerns. As for the ban on endorsements of partisan candidates, the majority and I begin at the same starting point—with the notion that endorsements of candidates in political elections are troubling and have the potential to compromise judicial impartiality. I part ways with the majority, however, where it applies the balancing test from *Pickering* and *Connick* to the endorsement ban. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 142 (1983). Because I believe this is the wrong test to apply, I respectfully dissent.

Laws and regulations that restrict speech on the basis of content are subject to the high hurdle of the strict scrutiny test. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Such laws are "presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (internal citations omitted); *Playboy Entm't Group*, 529 U.S. at 813, 817. In addition, speech about the qualifications of candidates for public office is at the core of First Amendment freedoms and is thus also strictly scrutinized. *Republican Party of Minn. v. White*, 536 U.S. 765, 774, 781 (2002); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989). The law presumes that these intrusions on First Amendment rights are invalid and shifts the burden of proof to the government to demonstrate that these regulations are narrowly tailored to serve a compelling government interest. *Stevens*, 130 S. Ct. at 1584; *Eu*, 489 U.S. at 222. There could be no clearer example of a restriction that is

both content-based and that burdens speech regarding qualifications for office than the one at issue here: Wisconsin Supreme Court Rule 60.06(2)(b)4 states that no judge or candidate for judicial office may "[p]ublicly endorse or speak on behalf of [a party's] candidates or platforms." SCR 60.06(2)(b)4. The majority concedes that under a strict scrutiny analysis, the regulation at issue here would fail. *Supra* at 24. Rather than reach that unpalatable result, however, it has manufactured a new balancing test not heretofore applied to the First Amendment rights of elected judges.

It is true, of course, that some forms of speech fall outside the protections of the First Amendment, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See Stevens*, 130 S. Ct. at 1584. And in the case of public employees, the Supreme Court has relaxed the scrutiny it applies to regulation of government employee speech, holding that a public employee's right to speak on matters of public concern must be balanced against the government's need for efficient operation of government functions. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006); *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568. Neither this court nor the Supreme Court, however, has ever held that these decisions limiting the speech of public employees can be applied to elected officials' speech, including the speech of elected judges.

In the seminal case on free speech and judicial codes of conduct, the Supreme Court applied strict scrutiny in evaluating the challenged provisions of Minnesota's

Code of Judicial Conduct. *White*, 536 U.S. at 774. Although the *White* decision considered the rights of candidates seeking judicial office as opposed to those already holding office, the language of the decision reflects two important principles that apply to the case before us today—the Court's recognition that political speech is highly protected and that content-based restrictions must be viewed most skeptically. *Id.* The court in *White* stated,

> the notion that the special context of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

Id. at 781 (internal citations omitted) (emphasis in original).

In *White*, it was undisputed and uncontroversial that the court should apply strict scrutiny in evaluating the content-based restrictions of the canons of judicial conduct. *Id.* at 774. Even the two dissenting opinions, which vigorously defended the particular speech restrictions on judges, did so while applying strict scrutiny. *See White*, 536 U.S. at 800 (Stevens, J., dissenting) ("Minnesota has a compelling interest in sanctioning such statements."); *Id.* at 817 (Ginsburg, J., dissenting) ("In addition to protecting litigants' due process rights, the parties in this

case further agree, the pledges or promises clause advances another compelling state interest: preserving the public's confidence in the integrity and impartiality of its judiciary."). In short, both the majority and dissent in *White* applied strict scrutiny to a content-based speech prohibition for judicial candidates.[1]

Nevertheless, as Justice Kennedy noted in his concurrence, the *White* decision left open the question as to whether "the rationale of *Pickering* and *Connick* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice. . . ." *White*, 536 U.S. at 796 (internal citations omitted).

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[1] In his concurrence, Justice Kennedy noted that he would go further and hold that "content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." *White*, 536 U.S. at 792-93 (Kennedy, J., concurring).

Although the *White* court left the question unanswered, that opinion and others provide compelling support for the proposition that strict scrutiny is the proper test for evaluating restraints on an elected judge's speech. The Supreme Court has long found the speech of elected officials to be as protected as that of ordinary citizens. In *Bond*, the Supreme Court held that the State of Georgia could not exclude a state representative from membership in the legislature based on his criticism of the Vietnam War. *Bond v. Floyd*, 385 U.S. 116, 133 (1966). The Court specifically noted that the interest of the public in hearing all sides of a public issue is advanced by extending the same First Amendment protections to legislators as to ordinary citizens. *Id.* at 136. The Court later held the same for a sheriff who questioned the motivations of a judge's charge to a grand jury. The Court reasoned that "the role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962). Forty years later, a majority of the Supreme Court repeated this same statement in evaluating the restrictions imposed by a canon of judicial conduct. *White*, 536 U.S. at 781-82. After reviewing *White*, and its analyses of these earlier cases, the Fifth Circuit concluded that strict scrutiny was the appropriate test for evaluating a state's interest in suppressing a sitting judge's speech. *Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir. 2007).

In contrast, non-elected employees, like those covered by the Hatch Act, are subject to a test which balances the interests of the employee as a citizen, in commenting

upon matters of public concern, against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *See U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 561 (1973). The Hatch Act restricts the speech of government employees by prohibiting them from taking an active part in political management or political campaigns, but notably exempts the two elected executive branch employees, the president and vice president, from coverage. 5 U.S.C. § 7322(1); *See also Letter Carriers*, 413 U.S. at 561. In sum, no Supreme Court decision or Seventh Circuit case has applied a balancing test to the speech of elected officials.

It would be folly, of course, to ignore the reality that elected judges are different from elected legislators and executives. "Legislative and executive officials act on behalf of the voters who placed them in office; judges represent the Law." *White*, 536 U.S. at 803 (Ginsburg, J., dissenting) (internal citations omitted). *See also Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("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.").

This distinction, however, does not warrant abandoning a strict scrutiny analysis of content-based regulations of speech about the political qualifications of candidates for elected office. Content-based regulations are, after all, some of the most reviled by the First Amendment and election speech among the most protected.

There is no doubt that the due process rights guaranteed by the Fourteenth Amendment are equally compelling, but we need not abandon well-settled First Amendment jurisprudence and set aside strict scrutiny to protect due process, as the majority claims. Rather, the solution is to apply strict scrutiny but give proper weight to the exceedingly compelling interest the state has in ensuring an impartial and fair judiciary. *See id.* at 228 (noting that the fact that elected judges are different from elected legislators and executive officials bears on the strength of the state's interest in restricting their freedom.). *See also White*, 536 U.S. at 783 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."). In evaluating a restraint on judge's speech under a strict scrutiny analysis, a court must consider its hefty obligation to provide litigants with a fair adjudicative proceeding by an impartial and disinterested tribunal—a right guaranteed by the Due Process Clause of the Fourteenth Amendment, as well as its obligation to preserve public confidence in the integrity and impartiality of the judiciary. *See White*, 536 U.S. at 813, 817 (Ginsburg, J., dissenting).

Furthermore, although elected judges are not the same as elected legislators and executives, they are also not entirely like judges appointed for life or for fixed terms—immune from the influence of popular opinion. As Justice Scalia pointed out in *White*, a judge contemplating releasing a notorious terrorist is well aware that she faces the pressure of being voted out of office come

the next election cycle. *Id.* at 782. Thus, in some limited sense, elected judges, for better or for worse, know that they serve at the pleasure of the public. And although a state is free to establish any constitutional system it wishes to populate its benches, states that choose to elect judges have made a particular decision about the role of the public in the selection of judges.

Our federal Constitution, of course, provides for appointment of judges for life. As Justice O'Connor recounted in *White*, the first twenty-nine states did not use elections for selecting judges. *White*, 536 U.S. at 791 (O'Connor, J., concurring). In the 1830's and 1850's as part of the Jacksonian movement toward greater popular control of public office, many states turned from appointing judges to popular elections. *Id.* Thirty-one states have turned from non-electoral systems to popular elections. *Id.* at 792. There may be many reasons why a state opts to elect judges, but such a decision reflects, at least in part, a policy decision that to the extent that judges have any discretion to mold the law—and of course they do—the people should be able to have some say in how that discretion will be used. For example, in the area of sentencing where discretion can be large, the public may choose to elect candidates who are "tough on crime" or who "judge with compassion." The choice to elect judges may also represent an attempt to allow the people to choose among the populace the person they see as most fit to judge, but embedded in this choice is most certainly some consideration about how that candidate understands and would apply

the law. The decision to hold judicial elections, therefore, may negatively impact the integrity of the judiciary in ways that are unavoidable, *see White*, 536 U.S. at 782; *see also id.* at 789 (O'Connor, J., concurring) (explaining why the very practice of electing judges undermines the interest in an impartial judiciary), but it is, nevertheless, a legitimate choice by a state.

Having made a policy decision allowing the public to shape the bench, a state must allow judges greater leeway to communicate their opinions. Thus, although elected judges are not like other elected officials, they are also not like public employees subject to *Pickering*—that is, employees who answer only to the government as employer and not to the public at large. As the majority in *White* pointed out, "if the State chooses to tap the energy and the legitimizing power of the democratic process [in the election of judges], it must accord the participants in that process the First Amendment rights that attach to their roles." *White*, 536 U.S. at 788. "Opposition [to electing judges] may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." *Id.* at 787-88. Endorsements are part of that discussion in much the same way that announcing one's views on the legal issues of the day are—the issue before the court in *White*. We are, after all, often judged by the company we keep. There is much to say about the utility and harm of endorsements, but because my disagreement with the majority is over the level of scrutiny

to be applied to the regulation, I need not spill ink evaluating the benefits and harms of endorsements. Most importantly, it is important to note that applying strict scrutiny will not mean that the speech of sitting judges cannot be regulated more restrictively than the speech of other elected officials; it most certainly can. The state, after all, has an exceptionally compelling interest in protecting the integrity of the judiciary and the due process rights of litigants.

In short, I would apply a strict scrutiny test to the announce clause at issue in this case. Whatever the result may be in an ordinary case where a state passes a blanket prohibition on endorsements by sitting judges, the result here is made simple by the fact that Wisconsin allows endorsements for non-partisan but not partisan elections. As even the majority concedes, the under-inclusiveness of the provision is fatal to the rule's constitutionality when applying strict scrutiny. *See White*, 536 U.S. at 780.

Wisconsin has opted to allow judges to endorse candidates in non-partisan elections. Such endorsements threaten judicial fairness and the appearance of fairness no less than endorsements in partisan elections. Lawyers and judges who lose non-partisan judicial elections, for example, go right back to practicing (and perhaps appearing as litigants) in the same small circuits in Wisconsin in which they ran and were endorsed by sitting judges. A criminal defendant prosecuted by such an endorsed attorney will not question the fairness of his trial any less because the prosecuting attorney ran in

a non-partisan rather than a partisan election. And a judge who makes or breaks a non-partisan candidate's career is no less of a power broker than one who endorses a partisan candidate. It may be true that party-affiliated sheriffs and prosecutors appear frequently in courtrooms, but it is also true that frequent litigators, who are the very same lawyers who are most qualified and most likely to run for judge, should they lose, will go right back to litigating before those same judges who endorsed them.

By allowing endorsements in non-partisan elections, Wisconsin has largely eviscerated the force of any asserted concern. A regulation that is so under-inclusive diminishes the credibility of the government's rationale for restricting speech. *White*, 536 U.S. at 780.

It may be that the endorsement provision causes us such unease because we expect a judge not to use her office for personal gain—either her own or others'. In fact, Wisconsin Supreme Court Rule 60.03(2) prohibits improper use of the visibility and prestige of the judicial office. Endorsements arguably use the visibility and prestige of the judicial office in an improper manner. Wisconsin, however, has not articulated this as its interest and indeed cannot, as it allows endorsements in non-partisan races.

Although I disagree with the majority about the proper test to apply, it is likely that under different circumstances our outcome would nevertheless be the same and I would find myself concurring in the result. My dissent stems entirely from the unique situation

presented here. Wisconsin has opted to elect judges in popular elections and has further mired those judges in that political process by allowing them to make non-partisan endorsements. Endorsements undermine the integrity of the judiciary regardless of whether they focus on partisan or non-partisan races. Once Wisconsin greased the slope for non-partisan endorsements, it should not have been surprised that partisan endorsements could come sliding after. Wisconsin has failed to demonstrate that its endorsement ban is narrowly tailored to prevent the harm it asserts.

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: February 26, 2010 **ADVISORY OPINION: JE10-001**

PROPRIETY OF A CANDIDATE FOR ELECTION TO NEVADA JUDICIAL OFFICE ACCEPTING A CAMPAIGN CONTRIBUTION FROM A PARTISAN POLITICAL ORGANIZATION.

ISSUE

May a candidate for election to Nevada state judicial office accept a campaign contribution from a partisan political organization?

ANSWER

Yes.

FACTS

A partisan political organization – for instance a county central committee – has offered a campaign contribution to a person who has declared his or her candidacy for election to an elective state judicial office in Nevada. The candidate has inquired whether he or she may accept the proffered campaign contribution and whether the amount of the proposed contribution – as an example $100.00 or less – influences the analysis of this issue.

DISCUSSION

The Committee is authorized only to render an opinion that evaluates compliance with the requirements of the Nevada Code of Judicial Conduct. *Rule 5 Governing the Standing Committee on Judicial Ethics & Election Practices.* Accordingly, this opinion is limited by the authority granted by Rule 5.

Rule 4.1 to Canon 4 of the Nevada Code of Judicial Conduct (the "NCJC") states in pertinent part:

> (a) Except as permitted by law, or by Rules 4.2 and 4.4, a judge or a judicial candidate shall not . . . seek, accept, or use endorsements or publicly stated support from a political organization . . ..

Nevada Code of Judicial Conduct, Canon 4, Rule 4.1(A)(7).

The commentary to Canon 4 observes:

> Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. A judge or candidate for judicial office retains the right to participate in the political process as a voter, be a member of a political organization, and contribute personal funds to a candidate or political organization.
>
> . . . .

A judge or judicial candidate's donation to a candidate or political organization that is otherwise permitted by state or federal law is not considered a public endorsement of a candidate for public office.

Relevant portions of NCJC Rule 4.2 state:

(A) A judicial candidate in a public election shall:

(2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;

. . . .

(5) report contributions received and campaign expenses in accordance with NRS Chapter 294A.

. . . .

(B) A candidate for elective judicial office may, unless prohibited by law:

. . . .

(4) in accordance with Rules 4.2(C), 4.2(D) and other applicable law, solicit and accept campaign contributions, either personally or through a campaign committee.

(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization.

Nevada Code of Judicial Conduct, Canon 4, Rule 4.2(A)(2), (5) & 4.2(B)(4)-(5).[1]

Considering the applicable provisions of Rule 4.1 and 4.2, and in light of the commentary to Rule 4.1, a candidate for election to Nevada state judicial office may accept a campaign contribution from a partisan political organization unless prohibited by other state or federal law.[2] Rule 4.2 and the commentary to Rule 4.1 demonstrate that the Supreme Court of Nevada recognizes a distinction between campaign contributions from a partisan political organization and endorsements for partisan political organization. The latter is unequivocally prohibited by Rule 4.2(B)(5), while Rule 4.2(B)(4) places no comparable restriction on a judicial candidate accepting campaign contributions from such organizations. Moreover, the Rule 4.1 commentary establishes that the Supreme Court of Nevada does not equate acceptance of a campaign contribution with acceptance of an endorsement.

In this regard, we note that the amount of the campaign contribution does not influence the analysis of the specific question presented, although the amount of any contribution may affect the manner in which the candidate for elective judicial office complies with reporting requirements in accordance with Rule 4.2(A)(2) and

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[1] The provisions of Rules 4.2(C) and 4.2(D) are inapplicable to our evaluation of the question presented here.

[2] As noted at the outset of our advisory opinion, under Rule 5 the Committee only has jurisdiction to evaluate compliance with the requirements of the NCJC.

4.2(A)(5). That said, the Committee further notes that the amount of a campaign contribution from a partisan political organization may in a particular instance be in an amount that could erode public confidence in the independence and impartiality of the judiciary by creating the perception that a judge or judicial candidate is subject to political influence.

We also observe that while the candidate for elective judicial office may accept the campaign contribution from a partisan political organization, the fact of such contribution may not be used by the candidate in any manner as an endorsement of such organization, which is affirmatively proscribed by Rule 4.2(B)(5).

Our opinion does not evaluate in any respect whether and in what circumstances the acceptance of a campaign contribution from a partisan political organization by a person who is a candidate for elective judicial office may be a basis for disqualification of that person if he or she is an elected and serving member of the judiciary.

CONCLUSION

A candidate for election to Nevada state judicial office may accept a campaign contribution from a partisan political organization.

REFERENCES

Rule 5 Governing Standing Committee On Judicial Ethics & Election Practices; Nevada Code Of Judicial Conduct, Canon 4, Rules 4.1(A)(7), 4.2(A)(2), (5) & 4.2(B)(4)-(5) & *Commentary [4]* to Rule 4.1.

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding on the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity requesting the opinion.

Dan R. Reaser

Dan R. Reaser, Esq.
Committee Chairman

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: August 2, 2010 **ADVISORY OPINION: JE10-005**

PROPRIETY OF A JUDGE CONDUCTING A MEET AND GREET EVENT FOR ANOTHER JUDICIAL CANDIDATE IN THE PRIVACY OF HIS HOME

ISSUE

May a judge conduct a "meet and greet" event in the privacy of his home for the benefit of a fellow judge who is seeking re-election?

ANSWER

No. A "meet and greet" event hosted by a judge would run afoul of Rules 1.3 and 4.1, which prohibit a judge from endorsing candidates for public office.

FACTS

A judge asks whether a sitting judge may host a "meet and greet" event in his private residence, for the benefit of a fellow judge who is campaigning for reelection. For purposes of this opinion, the Committee has assumed that the "meet and greet" event is being conducted for the benefit of introducing the judicial candidate to prospective voters and members of the public and soliciting their support of the candidate.

DISCUSSION

Canon 4 states that "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary." More specifically, Rule 4.1(A)(3) provides that "a judge or judicial candidate shall not: .... (3) publicly endorse or oppose a candidate for public office." The Committee's opinion on this issue turns on whether, under the facts presented here, a judge would be considered as implicitly or explicitly "publicly endorsing" a judicial candidate by conducting a meet and greet event for the judicial candidate in the privacy of the judge's home.

Rule 4.1 specifically prohibits a judge from publicly endorsing or publicly opposing a candidate for public office. The prohibition applies to all endorsements, whether by action or words, and is absolute in application. As recognized in the Comments to Rule 4. 1, "this Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates" for the purpose of "prevent[ing] them from abusing the prestige of judicial office to advance the interests of others." Rule 4.1, Comment 1 and 3; see also Rule 1.3. The Committee notes that nothing in this opinion implicates a judge's ability "to participate in the political process as a voter . . . and contribute personal funds to a candidate or

political organization." See comment 3, Rule 4.1.

The Committee finds that "meet and greet" events are campaign related events whose purpose is to further the campaign of candidates for public office and solicit public support of candidates. These campaign events provide a forum for candidates to meet and seek support, whether financial or otherwise, from prospective voters. While not the sole purpose, such functions often involve solicitations for campaign contributions or endorsements through placement of yard signs, etc., implicating additional issues under Rule 4.1(A)(4) (prohibiting judges from soliciting funds for a candidate). The Committee concludes that hosting a meet and greet event for a candidate would appear to reasonable minds as an explicit endorsement (if not an implicit endorsement) of the candidate on whose behalf the event is held, contrary to Rule 4.1(A)(3).

The Committee finds the act of hosting the event of particular note. Hosting a campaign related event at a judge's home for another candidate may have an inherent, coercive tendency creating pressure on attendees to support or contribute funds to the judicial candidate supported by the judge, and in so doing arguably lend "the prestige of judicial office to advance the personal or economic interests of ... others", in violation of Rule 1.3 ("A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so"). The fact the judge would act as the host and would conduct the event in his home also distinguishes this conduct from that permitted under Rule 4.1(C), which Rule allows a judge to "attend political gatherings . . . *sponsored by a political organization or a candidate* for public office." Emphasis added.

Finally, the Committee notes that it has issued prior opinions which addressed what might be perceived as implicit public endorsement under former Canon 5A(1)(b) (which contained nearly identical prohibitions as Rule 4.1). See Opinion JE07-013. In Opinion JE07-013, the Committee discussed at some length when an implied violation should be found despite the absence of a direct violation of the relevant Canon. The Committee noted that in the past where the Committee has been concerned with whether a judge's conduct might create in reasonable minds a perception that an activity is in violation of an express provision of the Canons, the Committee has considered Canon 1 (formerly Canon 2) which requires a judge to promote the independence and integrity of the judiciary and "avoid impropriety and the appearance of impropriety." The Committee has also cited comments to the Canons (currently set forth in comments to Rule 1.2), that state a judge "should expect to be the subject of public scrutiny" and therefore must accept the restrictions that might be viewed as burdensome if applied to other citizens.

Opinion JE 07-013 concluded that under the facts presented in that case, the Committee was reluctant to find an implied violation where no direct violation existed. The Committee believes the present facts are distinguishable, as hosting a campaign event in a judge's residence for the purpose of soliciting public support of another candidate directly implicates the endorsement prohibitions in Rule 4.1. The Committee notes that the Canons do, nonetheless, impose upon judges more burdensome restrictions than other citizens in the endorsement arena, and that

appearances, perception and promotion of public confidence in the judiciary remain matters of significant concern in the Revised Code of Judicial Conduct adopted in 2009. See Canon 1.

Finally, the Committee notes that there is an ongoing debate in jurisdictions regarding the constitutionality of the endorsement clause contained in Rule 4.1(A)(3). See Wersal v. Sexton, et. al., --- F.3d---, 2010 WL 2945171, (8th Cir., 2010). To the extent such issues may arise in the future under Nevada's Revised Code of Judicial Conduct, the Committee believes such constitutional questions are best addressed by courts of appropriate jurisdiction.

CONCLUSION

It is the opinion of the Committee that Canons 1 and 4, specifically Rule 1.3 and 4.1(A)(3), prohibit a judge from hosting and conducting a "meet and greet" campaign event for another candidate in the judge's private residence, as such a campaign function would appear to reasonable minds as an endorsement by the judge in support of the candidate.

REFERENCES

Revised Nevada Code of Judicial Conduct, Canon 1;Canon 4; Rule 1.3; Rule 4.1(A)(3); Rule 4.1(A)(4); Rule 4.1(C); Commentary to Rule 1.3; Comment 1 and 3 to Rule 4.1; Advisory Opinion JE07:013; Former Canon 5A(1)(b)

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding on the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity requesting the opinion.

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Committee Vice-Chairman

STATE OF NEVADA

STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

DATE ISSUED: August 12, 2010 **ADVISORY OPINION: JE10-007**

PROPRIETY OF A JUDGE DISPLAYING A CANDIDATE SUPPORT SIGN FOR ANOTHER CANDIDATE FOR PUBLIC OFFICE

ISSUE

May a judge display a candidate support sign for another candidate for public office on his or her residential property or other property readily identified in the community as being owned by the judge?

ANSWER

No. Displaying a candidate support sign under these circumstances would run afoul of Rules 1.3 and 4.1, which prohibit a judge from endorsing candidates for public office.

FACTS

A justice of the peace asks whether a judge may display a candidate support sign for another candidate for public office on property owned by the judge. For purposes of this opinion, the Committee has assumed that the property upon which the candidate support sign would be displayed is either the judge's personal residence or is other property readily identified in the community as being solely owned by the judge.

DISCUSSION

Canon 4 states that "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary." More specifically, Rule 4.1(A)(3) provides that "a judge or judicial candidate shall not: .... (3) publicly endorse or oppose a candidate for public office." The Committee's opinion on this issue turns on whether, under the facts presented here, a judge would be considered as implicitly or explicitly "publicly endorsing" a candidate by displaying a candidate support sign at the judge's personal residence or on other property readily identified as owned solely by the judge.

In Advisory Opinion JE10-005, the Committee recently discussed the scope of the endorsement clause in Rule 4.1. As recognized in that opinion,

> Rule 4.1 specifically prohibits a judge from publicly endorsing or publicly opposing a candidate for public office. The prohibition applies to all endorsements, whether by action or words, and is

absolute in application. As recognized in the Comments to Rule 4. 1, "this Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates" for the purpose of "prevent[ing] them from abusing the prestige of judicial office to advance the interests of others." Rule 4.1, Comment 1 and 3; see also Rule 1.3. The Committee notes that nothing in this opinion implicates a judge's ability "to participate in the political process as a voter . . . and contribute personal funds to a candidate or political organization." *See* comment 3, Rule 4.1.

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The Committee finds that displaying candidate support signs on a judge's residential property or property readily identified as being solely owned by a judge constitutes an impermissible endorsement of candidates for public office contrary to Rule 4.1(A)(3). The Committee notes that this opinion is limited to the facts presented and display of other candidate signs at either the personal residence of the judge or other property owned solely by the judge and which is readily identified in the community as being owned by the judge. The Committee renders no opinion on circumstances involving other commercial or investment properties in which the judge is a co-owner or in which the property is not commonly recognized as being owned by the judge. The Committee also notes the foregoing conclusion would not apply to the judge's own campaign signs supporting his or her election or re-election.

Finally, the Committee notes that there is an ongoing debate in other jurisdictions regarding the constitutionality of the endorsement clause contained in Rule 4.1(A)(3). *See Wersal v. Sexton, et. al.*, --- F.3d ----, 2010 WL 2945171, (8th Cir., 2010). To the extent such issues may arise in the future under Nevada's Revised Code of Judicial Conduct, the Committee believes such constitutional questions are best addressed by courts of appropriate jurisdiction.

CONCLUSION

It is the opinion of the Committee that Canons 1 and 4, specifically Rule 1.3 and 4.1(A)(3), prohibit a judge from displaying a candidate support sign for another candidate at the judge's personal residence or on other property owned solely by the judge which is readily identified in the community as being owned by the judge.

REFERENCES

Revised Nevada Code of Judicial Conduct, Canon 1;Canon 4; Rule 1.3; Rule 4.1(A)(3); Commentary to Rule 1.3; Rule 4.1;

Comment 1 and 3 to Rule 4.1; Advisory Opinion JE10-005; *Wersal v. Sexton, et. al.*, --- F.3d ----, 2010 WL 2945171, (8th Cir., 2010).

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