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## Case-law Following *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

In the 2002 decision, *Republican Party of Minnesota v. White*, the United States Supreme Court held unconstitutional a clause in the Minnesota code of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues. Since that decision, numerous lawsuits have been filed in federal courts challenging restrictions on campaign and political conduct by judges and judicial candidates, and judges have raised constitutional challenges in judicial discipline proceedings. Following is an analysis of the decisions that have reached the merits (many have been dismissed on justiciability grounds) in challenges to the pledges, promises, and commitments clause; the personal solicitation clause; the endorsement clause; restrictions on partisan political activities; and the disqualification requirement.

### **Pledges, promises, and commitments**

There are 2 versions of the pledges, promises, and commitments clause. Canon 3A(3)(d) of the 1990 American Bar Association *Model Code of Judicial Conduct* provided that “a candidate for a judicial office shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” After the decision in *White*, the ABA amended the model code to provide that judicial candidates 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.” The substantive change was the elimination of the “appear to commit” clause in the latter version. When the model code was revised and reformatted in 2007, the pledges, promises, and commitments clause became Rule 4.1A(13).

Challenges to the pledges, promises, and commitments clause arose in the context of whether judicial candidates may answer questionnaires distributed by special interest groups. For example, the questionnaire from the North Dakota Family Alliance asked candidates to indicate whether they agreed with, disagreed with, were undecided about, or refused to respond to the statement, “I believe that the North Dakota Constitution does not recognize a right to abortion.” The cover letter with the questionnaire instructed candidates: “Your

responses indicate your current view on the legal issues and do not constitute any pledge, promise, or commitment to rule in any particular way if the legal issue involved comes before you for decision.”

2 federal district courts, sitting in Kentucky and North Dakota, have declared the 1990 version of the pledges, promises, and commitments clause unconstitutional, holding that the state was simply using the clause “as a de facto announce clause” (*Family Trust Foundation*)<sup>1</sup> and there was “little, if any, distinction” between the clause and the announce clause (*North Dakota Family Alliance*).<sup>2</sup>

The 7th Circuit, reviewing a challenge to the Indiana code, and 2 federal district courts, sitting in Pennsylvania and Wisconsin, have upheld the pledges, promises, and commitments clause as narrowly construed to allow judicial candidates to answer questionnaires.

A federal district court in Indiana originally enjoined enforcement of the pledges, promises, and commitments clause but vacated the injunction after the Indiana Supreme Court adopted a version that did not prohibit statements that “appear to commit” candidates. Affirming that decision on appeal in *Bauer*,<sup>3</sup> the 7th Circuit stated:

It is not clear to us that any speech covered by the commits clauses is constitutionally protected, as *White I* understands the first amendment. How could it be permissible to “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office”? . . .

The 7th Circuit acknowledged that “neither the commits clauses nor the Code’s definitions pin . . . down” what promises are inconsistent with the impartial performance of the adjudicative duties of judicial office, noting that “the principle is clear only in these extremes.” However, the 7th Circuit concluded that advisory opinions are a more appropriate method for clarifying the provision than summary condemnation by a federal court, stating “when a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system.”

In *Pennsylvania Family Institute*,<sup>4</sup> the defendants (members of the Judicial Conduct Board and the Office of Disciplinary Counsel) had proffered an interpretation of the clause that prohibited a candidate only from making pledges, promises, or commitments to decide an issue or a case in a particular way and that allowed a candidate to answer the questionnaires sent out by the Pennsylvania Family Institute. Agreeing that that interpretation was

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<sup>1</sup>*Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (Eastern District of Kentucky 2004) (preliminary injunction).

<sup>2</sup>*North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (District of North Dakota 2005).

<sup>3</sup>*Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

<sup>4</sup>*Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (Eastern District of Pennsylvania 2007).

reasonable, the federal district court concluded, “it is hard to imagine a restriction more narrowly tailored to Pennsylvania’s compelling interest in protecting the due process rights of future litigants.”

In *Dume*,<sup>5</sup> the federal district court held that the pledges, promises, and commitments clause did not prohibit judicial candidates from responding to a questionnaire from Wisconsin Right to Life and was not unconstitutional on its face. The court stated, “whether a statement is a pledge, promise or commitment is objectively discernable,” and “people are practiced in recognizing the difference between an opinion and a commitment.”

After a preliminary injunction enjoining enforcement of the commitments clause in 2004, the Kentucky Supreme Court adopted a revised version that provided: “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.” In *Carey*,<sup>6</sup> a suit challenging the new version, the 6th Circuit held that the amended clause was constitutional insofar as it applies to cases or controversies.

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. 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.”

However, the Court stated the clause’s application to issues was materially ambiguous, requiring a remand to the district court. In December 2010, the Kentucky Supreme Court amended the code to adopt the 2007 model code version of the commits clause and related comments.

The 6<sup>th</sup> Circuit upheld that version. The Court noted that “no one questions that Kentucky may prohibit judges from making commitments to decide specific cases in a certain way” but that the canon does more by also forbidding a judge from making a promise with respect to “issues.” The Court stated that the phrase “inconsistent with the impartial performance of the adjudicative duties of judicial office” “does much to fix the clause’s ‘serious level-of-generality problem,’” by allowing commitments on stare decisis, on the rule of law, on textualism, and so on. The Court acknowledged there was something to the plaintiff’s argument that that narrowing language makes clause unconstitutionally vague because it is impossible to know “what is (and what is not) an issue-based commitment that is inconsistent with the impartial performance of the adjudicative duties of judicial office.” However, out of “respect for a co-equal sovereign,” it assumed that Kentucky “will act sensibly and resolve the open questions in a way that honors candidates’ rights under the

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<sup>5</sup> *Dume v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007).

<sup>6</sup> *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010).

first amendment" and decided to "wait and see" if the Commonwealth's "process [] yields greater certainty" and firmer constitutionality.

Since *White*, state courts and judicial discipline commissions have enforced the pledges, promises, and commitments clause. Rejecting a First Amendment challenge based on *White*, the New York Court of Appeals censured a judge for pro-prosecutorial rhetoric in his campaign statements.<sup>7</sup> Assuming strict scrutiny analysis was appropriate, the Court noted that the pledges or promises prohibition is not a blanket ban because "a judicial candidate may promise future conduct provided such conduct is not inconsistent with the faithful and impartial performance of judicial duties" and "most statements identifying a point of view will not implicate the 'pledges or promises' prohibition." The Court stated that the rule "precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected." The Court held that the pledges and promises provision "furthers the State's interest in preventing party bias and promoting openmindedness, and the appearance of either, because it prohibits a judicial candidate from making promises that compromise the candidate's ability to behave impartially, or to be perceived as unbiased and openminded by the public, once on the bench."

Similarly, reprimanding and fining a judge for pro-prosecutorial statements and misrepresentations about her opponent's judicial action during her election campaign, the Florida Supreme Court rejected her constitutional challenge to the pledges and promises clause.<sup>8</sup> The court stated that "it is beyond dispute" that the clause serves a compelling state interest and held that the restraints were narrowly tailored to protect the state's compelling interests without unnecessarily prohibiting protected speech, noting that "a candidate may state his or her personal views, even on disputed issues" but that "to ensure that the voters understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law."

## False or misleading statements

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<sup>7</sup> *In the Matter of Watson*, 794 N.E.2d 1 (New York 2003). See also *In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009) (<http://www.cjc.ny.gov/Determinations/C/Chan.Margaret.2009.11.17.DET.pdf>) (agreed admonishment for, in addition to other misconduct, campaign literature that displayed pro-tenant bias); *In re McGrath*, Determination (New York State Commission on Judicial Conduct February 5, 2010) (<http://www.cjc.ny.gov/Determinations/M/McGrath.Patrick.2010.02.05.DET.pdf>) (agreed admonishment for, in addition to other misconduct, campaign letter that displayed bias in favor of pistol permit holders).

<sup>8</sup> *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida), *cert. denied*, 540 U.S. 825 (2003).

Rule 4.1(A)(11) of the 2007 American Bar Association *Model Code of Judicial Conduct* provides: “A judge or judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement.” The prohibition on false statements has withstood several constitutional challenges, but the 6<sup>th</sup> and 11<sup>th</sup> Circuit Courts of Appeals (in cases from Kentucky and Georgia), the U.S. District Court for the Southern District of Ohio, and the state supreme courts in Alabama, Michigan, and Ohio have held that a prohibition on misleading statements in judicial election campaigns violates the First Amendment.

### **False statements**

A judicial candidate challenged the prohibition on false statements in the Ohio code of judicial conduct when she was reprimanded for identifying herself as an incumbent judge when she was not.<sup>9</sup> The Ohio code of judicial conduct provided that:

During the course of any campaign for nomination or election to judicial office, a judicial candidate, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not knowingly or with reckless disregard . . . post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

Applying strict scrutiny, the Ohio Supreme Court held that the state has a compelling government interest in ensuring truthful judicial candidates, noting “the public interest is served not only by ensuring that Ohio’s judges are trustworthy, but also by promoting a collective public awareness of that trustworthiness” and “there is every reason to expect and insist that candidates will be truthful in their campaign speech when they are seeking a judicial position.” The Court concluded that the code’s limit on “a judicial candidate’s false speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowingly or with reckless disregard) and with a specific mental state as to the information’s accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity) is constitutional.”

In a challenge to the Kentucky code of judicial conduct, the U.S. Court of Appeals for the 6<sup>th</sup> Circuit held that the clause prohibiting false statements made knowingly or with reckless disregard for the truth “is constitutional on its face.”<sup>10</sup>

The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: "Don't

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<sup>9</sup> *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014).

<sup>10</sup> *Winter v. Wolnitzek*, 834 F.3d 681 (6<sup>th</sup> Circuit 2016).

want to violate the Canon? Don't tell a lie on purpose or recklessly." . . . Given the mens rea requirement, a judicial candidate will necessarily be conscious of violating this canon.

The Court noted that it had recently invalidated a ban on false statements that covered non-judicial candidates for political office in Ohio, but stated that the Ohio law was broader than the Kentucky rule and emphasized that Kentucky's interest in preserving public confidence in the honesty and integrity of its judiciary is narrower and "more compelling than Ohio's purported interest in protecting voters in other elected races from misinformation."

However much or however little truth-bending the public has come to expect from candidates for political jobs, "[j]udges are not politicians," and a "State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." . . . Kentucky has a "vital state interest" in safeguarding the public's confidence in the honesty of its judiciary, . . . and the State's ban on materially false statements by judicial candidates survives strict scrutiny -- at least facially.

### **Misleading statements**

Reviewing the recommendation of the Judicial Tenure Commission that a judge be suspended without pay for 90 days for misleading ads during his election campaign, the Michigan Supreme Court considered a provision then in its code providing that a judicial candidate "should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve."<sup>11</sup> The Court acknowledged that the canon serves the compelling state interests of preventing fraud and libel, preserving the integrity of the election process from distortions caused by false statements, and preserving the integrity of and public confidence in the judiciary. However, concluding that, to avoid the risk of discipline, a judicial candidate would merely state academic credentials, professional experience, and endorsements received, the Court found that the canon precludes meaningful debate concerning the overall direction of the courts and the role of individual judges in contributing to that direction, impeding the public's ability to influence the direction of the courts through the electoral process. The Court narrowed the canon to provide that a candidate for judicial office "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false," which, it stated, was an objective standard.

The Alabama Supreme Court noted that the state has a compelling interest in protecting the integrity of the judiciary but concluded that language then in its code prohibiting the dissemination of "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person" was "unconstitutionally overbroad because

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<sup>11</sup> *In re Chmura*, 608 N.W.2d 31 (Michigan 2000).

it has the plain effect of chilling legitimate First Amendment rights.”<sup>12</sup> The Court narrowed the canon to provide that a candidate for judicial office shall not disseminate demonstrably false information concerning a judicial candidate or an opponent with actual malice -- that is, with knowledge that it is false or with reckless disregard of whether it is false.

In 2002, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit held unconstitutional a Georgia canon prohibiting a judicial candidate from using or participating “in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.”<sup>13</sup> The Court concluded that the challenged speech restriction does not afford the requisite “breathing space” to protected speech because the “chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.” The Court held that “to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false -- i.e., an actual malice standard.”

Although it upheld the ban on false statements, the 6<sup>th</sup> Circuit held that the “ban on misleading statements fails across the board.”<sup>14</sup> It explained:

If "misleading" adds anything to "false," it is to include statements that, while technically true or ambiguous, create false implications or give rise to false inferences. But only a ban on conscious falsehoods satisfies strict scrutiny. . . . Unknowing lies do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement "more than offsets the danger of a misinformed electorate." This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment.

Similarly, the Ohio Supreme Court held that a clause “prohibiting the dissemination of information that ‘if true,’ ‘would be deceiving or misleading to a reasonable person’ is unconstitutional because it chills the exercise of legitimate First Amendment rights.”<sup>15</sup> It stated:

This portion of the rule does not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive some listeners.

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<sup>12</sup> *Butler v. Alabama Judicial Inquiry Commission*, 802 So. 2d 207 (Alabama 2001).

<sup>13</sup> *Weaver v. Bonner*, 309 F.3d 1312 (11<sup>th</sup> Circuit 2002).

<sup>14</sup> *Winter v. Wolnitzzek*, 834 F.3d 681 (6<sup>th</sup> Circuit 2016).

<sup>15</sup> *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014).

The language requires candidates to “attempt to determine whether a reasonable person would view their speech as somehow misleading or deceptive.” . . . As a result, candidates will often choose to avoid adverse action by remaining silent even when they have good reason to believe that what they want to say is truthful.

Severing the unconstitutional clause, the Court narrowed the rule to prohibit a candidate for judicial office from posting, publishing, broadcasting, transmitting, circulating, or distributing “information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false.”

That candidate won her campaign for the Court of Appeals and then wanted to use the term “Judge” in her campaign for the Ohio Supreme Court. She, therefore, challenged in federal court a comment to the Ohio code that states a sitting judge who is a candidate for a judicial office other than the court on which he or she currently serves shall not use the title “judge” without identifying the court on which the judge currently serves. Those defending the code argued her proposed phrases (such as “Elect Judge O’Toole to the Ohio Supreme Court”) were misleading. A federal district court agreed that voters could be misled but concluded that the examples do not represent false speech or even obviously misleading, speech and held that prohibiting true but misleading speech restricts more speech than is necessary to achieve the government’s aims.<sup>16</sup>

### **Personal solicitation clause**

Canon 5C(2) of the 1990 model code provided: “A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law.” Similarly, Rule 4.1(A)(8) of the 2007 model provides: “A judge or a judicial candidate shall not personally solicit or accept campaign contributions other than through a campaign committee . . . .”

In the 2015 decision *The Florida Bar v. Williams-Yulee*, by a 5-4 vote, the U.S. Supreme Court rejected a First Amendment challenge to the personal solicitation clause, affirming the judgment of the Florida Supreme Court publicly reprimanding a former judicial candidate for a letter asking for contributions to her campaign she had mailed and posted on her campaign web-site.<sup>17</sup> The Court noted that most of the states (30 of the 39) that elect judges, like Florida, prohibit judicial candidates from soliciting campaign funds personally, but allow them to raise money through committees.

The Court began with the key principle of its decision:

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<sup>16</sup> *O’Toole v. O’Connor*, 2016 U.S. Dist. LEXIS 109923 (August 18, 2016). (It did not grant judgment for the plaintiff but invited a motion for judgment on the pleadings.)

<sup>17</sup> *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656 (2015).



Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.

Applying strict scrutiny, the U.S. Supreme Court found that the Florida Supreme Court had “adopted Canon 7C(1) to promote the State’s interests in ‘protecting the integrity of the judiciary’ and ‘maintaining the public’s confidence in an impartial judiciary.’” The Court held that the state’s interest in preserving public confidence in the integrity of its judiciary was greater than “its interest in preventing the appearance of corruption in legislative and executive elections.”

The Court rejected the candidate’s argument that the canon was unconstitutionally underinclusive because it failed to restrict other speech equally damaging to judicial integrity and its appearance. The Court also rejected the candidate’s argument that the canon was not narrowly tailored because it applied not only to direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear before the candidate if elected, but to a letter posted on-line and distributed by mass mailing. The Court stated that the “considered judgments” of “most States with elected judges . . . that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary . . . deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who ‘sit as their judges.’” Finally, the Court rejected the candidate’s argument “that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits.”

Prior to *Williams-Yulee*, the 6<sup>th</sup>, 8<sup>th</sup> and, 11<sup>th</sup> Circuits, in cases from Georgia, Kentucky, and Minnesota, and a federal district court in Kansas had held the personal solicitation clause unconstitutional.<sup>18</sup> Sitting en banc, the 8<sup>th</sup> Circuit upheld a revised version of the personal solicitation clause in Minnesota. The 7<sup>th</sup> Circuit has twice upheld the solicitation ban in cases from Wisconsin and Indiana.<sup>19</sup> After *Williams-Yulee*, the 9<sup>th</sup> Circuit sitting en banc upheld the clause in the Arizona code of judicial conduct prohibiting judicial candidates from personally soliciting or accepting campaign contributions other than through a campaign committee.<sup>20</sup> The Arkansas Supreme Court rejected challenges to the

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<sup>18</sup> *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002) (Georgia); *Yost v. Stout*, 2008 U.S. Dist. LEXIS 107557 (2008), *appeal dismissed*, 607 F.3d 1239 (10th Circuit 2010); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010) (Kentucky); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005), *cert. denied*, *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006).

<sup>19</sup> *Siefert v. Alexander*, 608 F.3d 974, *petition for re-hearing en banc denied*, 619 F.3d 776 (7th Circuit 2010), *petition for certiorari denied*, 131 S. Ct. 2872 (2011); *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

<sup>20</sup> *Wolfson v. Concannon*, 811 F.3d 1176 (9th Circuit en banc 2016), *certiorari denied*, 85 U.S.L.W. 3165 (October 11, 2016).

constitutionality of the personal solicitation clause in judicial discipline or bar discipline proceedings.<sup>21</sup>

Relying on *Williams-Yulee* and affirming the judgment of the district court denying a motion for a preliminary injunction, the U.S. Court of Appeals for the 6th Circuit held that a judicial candidate's campaign committee failed to demonstrate a likelihood of success on the merits of its claim that the temporal restrictions on solicitation and receipt of campaign contributions in the Ohio code violated its First Amendment rights and the Equal Protection Clause of the 14th Amendment.<sup>22</sup>

Effective December 31, 2015, the New Mexico Supreme Court added a prohibition on personal solicitation of campaign contributions by judicial candidates to the state's code of judicial conduct. Rule 21-402A now provides: "Candidates shall not personally solicit or personally accept contributions for their own campaigns." The Court deleted a previous comment that had stated that "[c]andidates for judicial office may solicit contributions for their own campaigns, within the restrictions of this rule . . . ."

### **Party affiliation**

The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Circuits have overturned restrictions prohibiting judges and candidates from identifying themselves as members of a political party.

In *Carey*,<sup>23</sup> the 6th Circuit found the clause in Kentucky, which has non-partisan judicial elections, to be underinclusive because judges and candidates were still permitted to state their political party affiliations when asked, and "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." The Court also noted that the clause does not prohibit judges or candidates from belonging to political parties even though "a party's undisclosed potential influence on candidates is far worse than its disclosed influence." The Court believed that the party a candidate supports is an "issue of potential importance to voters" and announcing that support is "a shorthand way of announcing one's views on many topics of the day."

The Kentucky Supreme Court adopted a revised canon that provided: "Except as permitted by law, a judge or a candidate for election to judicial office shall not campaign as a member

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<sup>21</sup> *Simes v. Judicial Discipline and Disability Commission*, 247 S.W.3d 876 (Arkansas 2007).

<sup>22</sup> *Friends of O'Toole v. O'Connor* (6<sup>th</sup> Circuit September 21, 2015) (<http://www.ca6.uscourts.gov/opinions.pdf/15a0232p-06.pdf>).

<sup>23</sup> *Carey v. Wolnitzke*, 614 F.3d 189 (6th Circuit 2010). The challenged clause in the Kentucky code provided: "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."

of a political organization.” Another challenge was filed, and a federal district court certified several questions regarding interpretation of the rule to the state court. The Kentucky Supreme Court interpreted the canon to prohibit judges and judicial candidates from portraying “themselves, either directly or by implication, as the official nominee of a political party.” The 6<sup>th</sup> Circuit held that “[i]nterpreted that way . . . the canon is vague and unconstitutionally overbroad. . . . It’s unclear when a candidate crosses the line from exercising his constitutional right to portray himself as a member of a political party, . . . to impermissibly implying the endorsement of that party.”<sup>24</sup>

In *Siefert*,<sup>25</sup> the 7th Circuit held that the state did not have a compelling interest in prohibiting candidates from announcing their views by proxy through party membership. Further, the Court concluded that Wisconsin’s ban on party affiliation was not designed to prevent bias for or against parties, stating “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.”

In *White II*,<sup>26</sup> the 8<sup>th</sup> Circuit held that Minnesota’s prohibition was effectively meaningless because the political party affiliations of many candidates would be well known prior to the election or readily discoverable through public records.

The courts also concluded that the partisan activities restrictions were underinclusive because the code did not prohibit membership in many other groups with constitutional, legislative, public policy, and procedural beliefs (*White II*), even though “on the most polarizing issues, party membership is a significantly less accurate proxy for a candidate’s views on contested issues” (*Siefert*) and identification with such groups communicates more about a candidate’s political and judicial convictions than party membership and “do as much to call judicial open-mindedness into question as any party affiliation ever would” (*Carey*).

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<sup>24</sup> *Winter v. Wolnitzek*, 834 F.3d 681 (6<sup>th</sup> Circuit 2016).

<sup>25</sup> *Siefert v. Alexander*, 608 F.3d 974, *petition for re-hearing en banc denied*, 619 F.3d 776 (7th Circuit 2010), *petition for certiorari denied*, 131 S. Ct. 2872 (2011). The clause at issue in the Wisconsin code of judicial conduct prohibited judges, candidates for judicial office, and judges-elect from belonging to any political party.

<sup>26</sup> *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005), *cert. denied*, *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006). At issue were provisions in the Minnesota code of judicial conduct prohibiting judges and judicial candidates from identifying themselves as members of a political organization, attending political gatherings, and seeking, accepting, or using endorsements from a political organization.

## Endorsements

Canon 5A(1)(1) of the 1990 model code and Rule 4.1(A)(3) of the 2007 model code prohibit a judge or a judicial candidate from publicly endorsing or, except for the judge or candidate's opponent, publicly opposing another candidate for public office.

The 6<sup>th</sup> Circuit (in a case from Kentucky), the 7<sup>th</sup> Circuit (in a case from Wisconsin), the 8<sup>th</sup> Circuit (sitting en banc in a case from Minnesota), the 9<sup>th</sup> Circuit (sitting en banc in a case from Arizona), and a federal district court in a case from Kansas have upheld the endorsement clause. State supreme courts in New York and New Mexico have upheld the endorsement clause when challenged in a judicial discipline proceeding.

In *Winter*,<sup>27</sup> the 6<sup>th</sup> upheld the canon against a constitutional challenge, explaining that the the “endorsements clause is narrowly tailored to Kentucky's compelling interest in preventing judges from becoming (or being perceived as becoming) part of partisan political machines.”

In *Siefert*,<sup>28</sup> the 7<sup>th</sup> Circuit upheld the endorsement ban in the Wisconsin code, applying, not strict scrutiny, but a test that balanced the value of the rule against the value of the communication. The Court noted that the state's due process interest in the endorsement regulation was a weighty one. The 7<sup>th</sup> Circuit concluded that “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 . . . .” The Court noted that, under strict scrutiny, the rule's failure to prohibit endorsements in partisan elections could be fatal to the rule's constitutionality.

In *Wersal*,<sup>29</sup> the 8<sup>th</sup> Circuit held that the endorsement clause in Minnesota “targets precisely that speech which most likely implicates” the state's compelling interests of preserving impartiality and avoiding the appearance of impropriety by restricting “speech for or against particular parties, rather than for or against particular issues,” while allowing candidates to convey necessary information concerning their qualifications. 2 concurring judges argued that the endorsement clause was constitutional “based on a different compelling state interest than the impartiality interest(s) on which the majority relies, namely, Minnesota's asserted interest in protecting the political independence of its judiciary.”

In *Wolfson*,<sup>30</sup> the 9<sup>th</sup> Circuit, sitting en banc, upheld clauses in the Arizona code of judicial conduct prohibiting judicial candidates from making speeches on behalf of a political organization or another candidate for public office, publicly endorsing or opposing another

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<sup>27</sup> *Winter v. Wolnitzek*, 834 F.3d 681 (6<sup>th</sup> Circuit 2016).

<sup>28</sup> *Siefert v. Alexander*, 608 F.3d 974, *petition for re-hearing en banc denied*, 619 F.3d 776 (7<sup>th</sup> Circuit 2010), *certiorari denied*, 131 S. Ct. 2872 (2011).

<sup>29</sup> *Wersal v. Sexton*, 674 F.3d 1010 (8<sup>th</sup> Circuit), *cert. denied*, 133 S. Ct. 209 (2012).

<sup>30</sup> *Wolfson v. Concannon*, 811 F.3d 1176 (9<sup>th</sup> Circuit en banc 2016), *certiorari denied*, 85 U.S.L.W. 3165 (October 11, 2016).

candidate for any public office, soliciting funds for or paying an assessment to a political organization or candidate, making contributions to any candidate or political organization in excess of the amounts permitted by law, or actively taking part in any political campaign other than his or her own campaign for election, reelection, or retention in office. The Court stated “*Williams-Yulee* may have been about a prohibition on direct candidate solicitations of campaign contributions, but the Supreme Court’s reasoning was broad enough to encompass underinclusivity arguments aimed at other types of judicial candidate speech prohibitions such as Arizona’s Endorsement Clauses and its Campaign Prohibition.”

In *Yost*,<sup>31</sup> the federal district court in Kansas held:

When a case arises in front of a judge who has endorsed one of the parties for public office, there is at least an appearance that the endorsed party is more likely to win based on favoritism toward that party. The endorsement clause is narrowly tailored to eliminate that scenario.

In a judicial discipline case,<sup>32</sup> the New Mexico Supreme Court rejected a judge’s argument that his endorsement of a mayor’s re-election and authorization of the use of his name in an ad in the local newspaper was constitutionally protected speech. Applying a strict scrutiny test, the Court concluded that the endorsement clause “is intended to promote what we believe is an undeniable compelling state interest in promoting the reality and appearance of impartiality of our judiciary, which in this case means eliminating the potential for bias or the appearance of bias or against the parties appearing before a judge.” Under the facts of the case, the Court stated, the judge’s endorsement of the mayor “would certainly create the appearance of bias were the mayor or anyone associated with his administration to appear before respondent in an actual case.” The court stated that the endorsement clause was carefully and narrowly designed to alleviate the concern that a judge could be perceived as being beholden to a particular political leader or party and promotes “the State’s compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary.” The court rejected the judge’s argument that the code was under-inclusive because it allowed monetary contributions to a political organization, stating a contribution “should not be likened to the high-profile show of support that is embodied in a public endorsement published in a newspaper.”

It is the public pronouncement of support that most offends our notions of impartiality. A private promise of support to a candidate, like a private contribution of money, creates less of a perception of partiality. A public endorsement, like an advertised monetary contribution, hits closest to the mark. Our Code of Judicial Conduct aims only at public conduct that creates the highest degree of risk. In short, taken as a whole, our Code of Judicial Conduct, which includes the endorsement clause at issue in this case, is carefully and narrowly drawn to serve the compelling state interest in a judiciary that is impartial in fact and in appearance.

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<sup>31</sup> *Yost v. Stout*, 2008 U.S. Dist. LEXIS 107557 (Kansas 2008), *appeal dismissed*, 607 F.3d 1239 (10th Circuit 2010).

<sup>32</sup> *Inquiry Concerning Vincent*, 172 P.3d 605 (New Mexico 2007) (public reprimand).

The New York Court of Appeals also rejected a constitutional challenge in the endorsement clause as well as other clauses in the code of judicial conduct in a judicial discipline case.<sup>33</sup>

### **Partisan activities**

In *Bauer*,<sup>34</sup> the 7th Circuit, in a case from Indiana, rejected challenges to restrictions on judges and judicial candidates holding leadership roles in political parties and making speeches on behalf of political organizations. The court relied on U.S. Supreme Court cases (for example, *Civil Service Commission v. Letter Carriers*) holding that federal and state limitations on political conduct by employees are compatible with the First Amendment and concluded that similar limitations for judges are valid, for three principal reasons.

First, judges no less than FBI agents must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in “preventing judges from becoming party bosses or power-brokers,” something that would undermine actual impartiality, as well as its appearance. . . .

The Court concluded: “When a state requires judges to stand for office, it cannot insist that candidates remain silent about why they rather than someone else should be elected. That’s the holding of *White I*. But the rationale of *Letter Carriers* remains, and is not undercut by *White I*, for political races other than the judge’s own.”

In *Wolfson*,<sup>35</sup> the 9th Circuit, sitting en banc, upheld clauses in the Arizona code of judicial conduct prohibiting judicial candidates from making speeches on behalf of a political organization or another candidate for public office, publicly endorsing or opposing another candidate for any public office, soliciting funds for or paying an assessment to a political organization or candidate, making contributions to any candidate or political organization in excess of the amounts permitted by law, or actively taking part in any political campaign other than his or her own campaign for election, reelection, or retention in office. The Court stated “*Williams-Yulee* may have been about a prohibition on direct candidate solicitations of campaign contributions, but the Supreme Court’s reasoning was broad

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<sup>33</sup> *In the Matter of Raab*, 793 N.E.2d 1287 (New York 2003) (censure for, in addition to other misconduct, appearing at the party’s “phone bank” for a candidate for the county legislature and making phone calls on behalf of the candidate).

<sup>34</sup> *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *cert. denied*, 131 S. Ct. 2872 (2011). The challenged rules in the Indiana code prohibited a judge or judicial candidate from acting “as a leader in or hold an office in a political organization” and making “speeches on behalf of a political organization.”

<sup>35</sup> *Wolfson v. Concannon*, 811 F.3d 1176 (9th Circuit en banc 2016), *certiorari denied*, 85 U.S.L.W. 3165 (October 11, 2016).

enough to encompass underinclusivity arguments aimed at other types of judicial candidate speech prohibitions such as Arizona’s Endorsement Clauses and its Campaign Prohibition.”

In *Winter*,<sup>36</sup> the 6<sup>th</sup> Circuit held unconstitutional prohibitions on a judge or a judicial candidate making speeches “for or against a political organization” but rejected a constitutional challenge to the prohibitions on a judge or judicial candidate paying an assessment or making a contribution to a political organization or candidate and acting as a leader or holding an office in a political organization. With respect to the speeches restriction, the Court concluded was simultaneously too narrow and too broad.

In one sense, the speeches clause "does too little to advance the State's interest in impartiality and the avoidance of partisan influence." Kentucky allows "a judicial candidate [to] identify himself to the public as a member of a political party" in many ways. The candidate may tell any audience, no matter how big, that he is a Republican or a Democrat. He may give a speech for any political interest group, from the National Rifle Association to Planned Parenthood. And he may email, tweet, write, or say in an interview that he is for a political party. Banning him from giving a speech to the same effect creates serious under-inclusivity problems.

In another sense, the clause "suppresses too much speech to advance the government's interest." By banning speech functionally identical to the speech permitted by Carey -- that he supports a particular party, -- the clause suffers from debilitating over-inclusivity problems. Both problems establish a fit defect and preclude the canon from running the gauntlet of strict scrutiny.

However, the Court held that the prohibitions on contributing to a political organization or candidate and publicly endorsing or opposing a candidate for public office narrowly serve “the Commonwealth's compelling interest in preventing the appearance that judicial candidates are no different from other elected officials when it comes to quid pro quo politics.”

Similarly, with respect to the prohibition on a judge acting as a leader or holding any office in a political organization, the Court concluded, a “judge who heads up a political party entrenches, rather than diminishes, political parties in judicial selection. Whether the candidate wishes to act as a leader of a political organization or hold office in a political organization, she cannot do so without directly undermining Kentucky's legitimate policy choice to hold nonpartisan elections for judges.”

In a judicial discipline case,<sup>37</sup> rejecting the judge’s arguments that the code restrictions were unconstitutional, the Maine Supreme Judicial Court found that a probate judge had violated the code of judicial conduct by soliciting contributions for a political organization or candidate and running for the state senate without resigning his judicial position and but imposed no discipline. Applying strict scrutiny to the solicitation ban, the Court concluded

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<sup>36</sup> *Winter v. Wolnitzek*, 834 F.3d 681 (6<sup>th</sup> Circuit 2016).

<sup>37</sup> *In re Dunleavy*, 838 A.2d 338 (Maine 2003).

that the state had a compelling interest in preserving the appearance of, and the impartiality of, the state judiciary and that the canon is narrowly tailored to meet that interest because it applies only to conduct that presents the greatest risk to that interest by prohibiting sitting judges, as opposed to judicial candidates, from soliciting support for political candidates and political organizations and from purchasing tickets to political dinners or functions. The Court held: “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 a judicial discipline case,<sup>38</sup> the New York Court of Appeals also rejected a constitutional challenge to several clauses restricting political activity. The Court emphasized that “not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption.” Concluding that the “rules at issue, when viewed in their totality, are narrowly drawn to achieve these goals,” the Court stated, “critically, the rules distinguish between conduct integral to a judicial candidate’s own campaign and activity in support of other candidates or party objectives.” Under the rules, judicial candidates may participate in their own campaigns during the “window period,” beginning nine months before the primary election or nominating convention, including contributing to their campaigns, attending political gatherings and speaking in support of their own campaigns, appearing in media advertisements and distributing promotional campaign materials, and purchasing two tickets to and attending politically sponsored dinners and functions.” In contrast, the Court noted, “the rules restrict ancillary political activity, such as participating in other candidates’ campaigns (beyond appearing on a party’s slate of candidates), publicly endorsing other candidates or publicly opposing any candidate other than an opponent for judicial office, making speeches on behalf of political organizations or other candidates, or making contributions to political organizations that support other candidates or general party objectives.” The Court concluded:

The provisions allowing judicial candidates to engage in significant political activity in support of their own campaigns provide candidates a meaningful and realistic opportunity to fulfill their assigned role in the electoral process. Unlike other elected officials, however, judges do not serve particular constituencies but are sworn to apply the law impartially to any litigant appearing before the court. Once elected to the bench, a judge’s role is significantly different from others who take part in the political process and, for this reason, conduct that would be appropriate in other types of campaigns is inappropriate in judicial elections. Precisely because the State has chosen election as one means of selecting judges, there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties. The political

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<sup>38</sup> *In the Matter of Raab*, 793 N.E.2d 1287 (New York 2003) (censure for, in addition to other misconduct, appearing at the party’s “phone bank” for a candidate for the county legislature and making phone calls on behalf of the candidate).



activity rules are carefully designed to alleviate this concern by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns.

After the decision in *Williams-Yulee*, rejecting constitutional arguments raised by dissenting members, the New York State Commission on Judicial Conduct publicly admonished 2 part-time judges for improper contributions to national or local political organizations and candidates, directly and indirectly through their law firms, and, in 1 case, indirectly through his wife.<sup>39</sup>

## Disqualification

Based on the First Amendment, challenges have been filed to 3 disqualification requirements. Canon 3E(1) in the 1990 model code and Rule 2.11(A) of the 2007 model code require a judge to disqualify himself or herself when the “judge’s impartiality might reasonably be questioned.” The 1990 model code was amended after *White* to also require disqualification when the judge, “while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.” That provision was revised in Rule 2.11A(5) of the 2007 model code to require a judge to disqualify, if, “the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” The 7th Circuit, in a case from Indiana, and 2 district courts in Kentucky and North Dakota have rejected constitutional challenges to disqualification requirements,<sup>40</sup> finding the rule was narrowly tailored to serve a compelling state interest in impartiality and stating, if recusal laws were invalidated, the state’s ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised.

In *Bauer*,<sup>41</sup> the 7th Circuit held that “the recusal clause does not present a constitutional issue at all.”

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<sup>39</sup> *In the Matter of Sakowski*, Determination (New York State Commission on Judicial Conduct August 20, 2015) (<http://www.cjc.ny.gov/Determinations/S/Sakowski.Joseph.A.2015.08.20.DET.pdf>); *In the Matter of Fleming*, Determination (New York State Commission on Judicial Conduct August 20, 2015) (<http://www.cjc.ny.gov/Determinations/F/Fleming.Andrew.P.2015.08.20.DET.pdf>).

<sup>40</sup> *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (Eastern District of Kentucky 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (District of North Dakota 2005).

<sup>41</sup> *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari denied*, 131 S. Ct. 2872 (2011).

The recusal clause applies to a judge in his role as public employee, not his role as candidate. It specifies how a public employee will perform official duties (or, rather, which public employee will be assigned to which duties). . . . The state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge’s job does). Rule 2.11(A)(5) represents a decision by the State of Indiana to assign to each lawsuit a judge who has not made any statement “that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” That decision is unexceptionable.

No public employee is entitled to do any particular task; a state may select the employee who can best do the job. . . . [A] state may decide to assign each case to a judge whose impartiality is not in question. All Rule 2.11(A)(5) does is allocate cases among judges . . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.

In contrast, a federal district court in Wisconsin held that the requirement that “a judge shall recuse himself or herself in a proceeding when . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. an issue in the proceeding. 2. the controversy in the proceeding” was unconstitutionally overbroad and vague, and indistinguishable from the announce clause.<sup>42</sup> The court concluded:

While it is true that the recusal requirement is not a direct regulation of speech, the chilling effect on judicial candidates is likely to be the same. Although a candidate would not fear immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a position.

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<sup>42</sup> *Duwe v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007). The comparable model code provision (Rule 2.11(A)(5)) requires a judge to disqualify if “the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”