



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. (Many of the suits have been dismissed on justiciability grounds.)

Following is an analysis of the decisions that have reached the merits 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. (For a state-by-state summary of the developments, see www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf. Follow judicial ethics developments and other AJS news on twitter at http://twitter.com/ajs_org.)

Pledges, promises, and commitments¹

¹ 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 add a new section 10 to Canon 3B that provides: “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.” 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).

The federal challenges to the pledges, promises, and commitments clause have arisen 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 pledges, promises, and commitments clause unconstitutional,² holding that the state was simply using the clause “as a de facto announce clause” (*Family Trust Foundation*) and there was “little, if any, distinction” between the clause and the announce clause (*North Dakota Family Alliance*).

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.³

In Indiana, the federal district court had originally enjoined enforcement of the pledges, promises, and commitments clause but vacated the injunction when the Indiana Supreme Court adopted a version of the restriction that did not prohibit statements that “appear to commit” candidates. In *Bauer*, 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.”

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

³ *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari denied*, No. 10-425 (U.S. May 2, 2011); *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (Eastern District of Pennsylvania 2007); *Dune v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007).

In *Pennsylvania Family Institute*, 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 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 the Wisconsin challenge, 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 (*Dumve*). 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.”

The distinction between a commitment and an announced position on an issue is relevant to the health of the judiciary. One presumes that a person is likely to decide in accordance with an opinion or belief, but will only rely upon an actual commitment. As a result, reaction to breaking a commitment or promise is far stronger than to a decision that contradicts an opinion or belief. A genuine commitment creates a different expectation and poses a far greater threat to the impartiality and appearance of impartiality of the judiciary.

After a preliminary injunction enjoined enforcement of the commit 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 a suit challenging the new version, the 6th Circuit held that the amended clause was constitutional insofar as it applies to cases or controversies (*Carey*).⁴

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.

⁴ *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010).

Since *White*, state courts and judicial discipline commissions have enforced the pledges, promises, and commitments.⁵

⁵ *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003) (statements during campaign that demonstrated commitment to prosecution side of criminal cases); *In the Matter of Watson*, 794 N.E.2d 1 (New York 2003) (pro-prosecutorial rhetoric in campaign statements); *In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009) (www.scjc.state.ny.us) (campaign literature that displayed pro-tenant bias); *In re McGrath*, Determination (New York State Commission on Judicial Conduct February 5, 2010) (www.scjc.state.ny.us) (campaign letter that displayed bias in favor of pistol permit holders).

Personal solicitation clause⁶

The 11th, 6th, and 8th Circuits, in cases from Georgia, Kentucky, and Minnesota, and 1 federal district court in Kansas have held the personal solicitation clause unconstitutional.⁷ The 7th Circuit has twice upheld the solicitation ban in cases from Wisconsin and Indiana; a federal district court in Arizona also upheld the solicitation clause.⁸

The decisions overturning the clause hold that requiring the use of campaign committees does not effectively address concerns about partiality or coercion. The 11th Circuit stated that the risk that a contribution will tempt a judge to rule a particular way “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” (*Weaver*). The Kansas district court also found that allowing solicitation “by a campaign committee does not assure that the candidate is unaffected or even unaware of who does and does not contribute to the campaign” (*Yost*).

Noting that the clause does not prevent judicial candidates from thanking contributors or learning who contributed and who did not contribute to the campaign, the 6th Circuit stated, “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” (*Carey*). The court also concluded the prohibition does too much and too little, leaving “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.

⁶ 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.” 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”

⁷ *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002) (Georgia); *Yost v. Stout*, Memorandum and Order (District of Kansas November 16, 2008), *appeal dismissed*, 607 F.3d 1239 (10th Circuit 2010); *Carey v. Wolnitzke*, 614 F.3d 189 (6th Circuit 2010); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005). A 3-judge panel of the 8th Circuit also declared a revised version of the solicitation clause adopted in Minnesota unconstitutional in *Wersal v. Sexton*, 613 F.3d 821 (8th Circuit 2010), but the Court granted the appellees’ petition for rehearing en banc, vacated the opinion and judgment, and scheduled oral argument for January 2011.

⁸ *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*, No. 10-405 (U.S. May 2, 2011); *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari denied*, No. 10-425 (U.S. May 2, 2011); *Wolfson v. Brammer* (U.S. District Court for the District of Arizona September 29, 2011).

Are not the risks of coercion and undue appearance far less with the first (prohibited) solicitation than the second (permitted) one?”

Finally, the decisions hold that requiring recusal when anyone who was contributed appears in that judge’s court is a less restrictive alternative than a ban on personal solicitation (*Yost, Carey*).

In the remand of *Republican Party of Minnesota v. White*, the 8th Circuit held that the personal solicitation clause was unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signatures (the extent of the plaintiffs’ challenge). After that decision, the Minnesota Supreme Court revised its code to prohibit a judge or judicial candidate from personally soliciting and accepting campaign contributions except when speaking to groups of 20 or more people or by signing letters for distribution by the candidate’s campaign committee if the letters direct contributions to the committee and not the candidate. The clause also required a candidate 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” and prohibited a campaign committee from disclosing the identity of contributors to the candidate.

In contrast, the 7th Circuit reviewed the personal solicitation ban in the Wisconsin code of judicial conduct under the “closely drawn” scrutiny standard, which is less rigorous than strict scrutiny (*Siefert*). The court concluded “that the solicitation ban is drawn closely enough to the state’s interest in preserving impartiality and preventing corruption to be constitutional.”

A contribution given 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. . . .

“That a judge might become aware of who has or has not contributed to his campaign,” the 7th Circuit concluded, “does not fatally undercut the state’s interest in the ban” because “the personal solicitation itself presents the greatest danger to impartiality and its appearance.” The court also rejected the argument that recusal was a reasonable, less restrictive available alternative, noting that “it would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution.”

In *Bauer*, the 7th Circuit held that *Siefert* also demonstrated that Indiana’s solicitation clause was also not unconstitutional on its face and that the rule’s failure to contain an exception that would accommodate the plaintiff’s desire to solicit family members, which poses less of a risk of “mutual back scratching” and retaliation, did not render it unconstitutional. The court noted that “laws need not contain exceptions for every possible situation in which the reasons for their enactment are not present” and “Indiana may well be willing to make exceptions for close relatives” if the plaintiff asked for an advisory opinion on the issue, adding “a federal court should not assume that a state will act unreasonably.”

In *Wolfson*, the Arizona district court held that the state has a compelling interest in regulating campaign solicitations by a judicial candidate “to ensure the actual and perceived independence, impartiality, and fairness of its judiciary, free from political influence and pressure.”

We recognize the risk of bias arising from in-person solicitations. Successful judicial candidates may appear beholden to their campaign contributors, particularly if the contributor is a lawyer or litigant appearing before the judge. Public confidence in the independence and impartiality of the judiciary is eroded if judges or candidates are perceived to be subject to political influence.

Like face-to-face solicitations, methods of indirect solicitations, such as mass mailings signed by the candidate, or presentations to a large audience create the same risk of coercion and bias. By requiring the use of a campaign committee the State has struck a reasonable balance between the need of the candidate for funds and the need of the State for a judiciary not beholden to the lawyers who practice in its courts and their clients who become parties to litigation.

Several judicial candidates have recently been sanctioned for personally soliciting campaign contributions.⁹

Endorsements¹⁰

The 7th Circuit, in a case from Wisconsin, and 2 federal district courts, in cases from Arizona and Kansas, have upheld the endorsement clause.¹¹

⁹ See *Simes v. Judicial Discipline and Disability Commission*, 247 S.W.3d 876 (Arkansas 2007) (admonishment for personally soliciting campaign contributions from 2 attorneys who appeared before him; rejection of First Amendment challenge); *Inquiry Concerning Davis*, Order (Kansas Commission on Judicial Qualifications July 18, 2008) (ordering judicial candidate to cease and desist from publicly soliciting campaign contributions in text messages); *In re Dunleavy*, 838 A.2d 338 (Maine 2003) (finding that judge violated the code by soliciting contributions for his senate campaign; rejecting constitutional challenge; no discipline imposed); *In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009) (www.scjc.state.ny.us) (agreed public admonishment for, in addition to other misconduct, signing a letter that announced her candidacy and stated in part: “Running for elected office means I have to get my message out to voters through costly mailings and advertising. Your financial support will help me establish an effective campaign and deliver my message to the people that count, the constituents of the 2nd Judicial District”); *In re Singletary*, Opinion (December 1, 2008), Order (Pennsylvania Court of Judicial Discipline January 23, 2009) (www.cjdpa.org/decisions/jd08-01.html) (public reprimand for asking for campaign contributions at a biker rally).

¹⁰ 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 7th 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 (*Siefert*). The court noted that the state's due process interest in the endorsement regulation was a weighty one. The 7th 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.

The federal district court in the Kansas case held (*Yost*):

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 *Wolfson*, the district court held that Arizona has a compelling interest in preventing judges from "misusing the prestige of their office to further political aspirations of parties or candidates" and avoiding "the appearance and reality of a biased, partisan judiciary."

Preventing actual bias preserves litigants' due process rights. Preventing perceived bias preserves public confidence in a judiciary that is guided by the rule of law, not partisan politics.

Endorsements, making speeches, and soliciting funds on behalf of other candidates is not the same core political speech at issue in *White I*. *White I* authorized a candidate for judicial office to speak freely in support of his own campaign by announcing his views on disputed legal and political subjects. But publicly endorsing or speaking on behalf of other candidates is not the same as expressing one's own political views or qualifications for office. Instead, endorsements, speeches, and solicitations are made to advance other candidates' political aspirations, or to garner votes by way of political coattails. Judges and judicial candidates who publicly endorse, speak on behalf, or otherwise actively participate in the campaign of

¹¹ *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*, No. 10-405 (U.S. May 2, 2011); *Yost v. Stout*, Memorandum and Order (District of Kansas November 16, 2008), *appeal dismissed*, 607 F.3d 1239 (10th Circuit 2010); *Wolfson v. Brammer* (U.S. District Court for the District of Arizona September 29, 2011). See also *Inquiry Concerning Vincent*, 172 P.3d 605 (New Mexico 2007) (public reprimand for endorsing mayor for re-election; held that endorsement was not constitutionally protected speech). A 3-judge panel of the 8th Circuit also declared the endorsement clause adopted in Minnesota unconstitutional in *Wersal v. Sexton*, 613 F.3d 821 (8th Circuit 2010), but the Court granted the appellees' petition for rehearing en banc, vacated the opinion and judgment, and scheduled oral argument for January 2011.

another candidate undermine the appearance of impartiality and impair the public's confidence in the judiciary.

Partisan activities

The U.S. Courts of Appeals for the 6th, 8th, and 7th Circuits have overturned restrictions on judges' and candidates' partisan political activity in 3 states (Kentucky, Minnesota, and Wisconsin) in which judicial elections are supposed to be non-partisan by law.¹² In contrast, the 7th Circuit, in a case from Indiana, and a federal district court in Arizona rejected challenges to restrictions on partisan political activities in those states' respective codes of judicial conduct.¹³

The 8th Circuit considered the restrictions on partisan activities in Minnesota to be “remarkably pro-incumbent” and effectively meaningless because the political party affiliations of many candidates would be well known prior to the election or readily discoverable through public records (*White II*). The 6th Circuit found the clause in Kentucky to be underinclusive because judges and candidates were still permitted to state their political

¹² *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005); *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*, No. 10-405 (U.S. May 2, 2011). In *Carey*, 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.” In *White II*, the federal court overturned the 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. In *Siefert*, the Wisconsin federal court overturned a provision prohibiting judges, candidates for judicial office, and judges-elect from belonging to any political party. A 3-judge panel of the 8th Circuit also declared the prohibition on soliciting for a political organization or other candidates unconstitutional to the extent it prevents the plaintiff from soliciting funds for his own campaign in *Wersal v. Sexton*, 613 F.3d 821 (8th Circuit 2010), but the Court granted the appellees' petition for rehearing en banc, vacated the opinion and judgment, and scheduled oral argument for January 2011.

¹³ *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari denied*, No. 10-425 (U.S. May 2, 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.” *Wolfson v. Brammer* (U.S. District Court for the District of Arizona September 29, 2011). The challenged provisions in the Arizona code of judicial conduct provide that a judge or judicial candidate shall not (1) make speeches on behalf of a political organization or another candidate for public office, (2) solicit funds for or pay an assessment to a political organization or candidate, or (3) actively take part in any political campaign other than his or her own.

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” (*Carey*).

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 “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” (*Carey*).

The 6th Circuit also held that the Kentucky clause was underinclusive because it did 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” (*Carey*). The court believed that which 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.”

In *Siefert*, the 7th Circuit held that the state does not have a compelling interest in prohibiting candidates from announcing those views by proxy through party membership. Further, the court concluded that the 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 *Bauer*, considering the prohibitions on leadership roles in political parties and making speeches on behalf of political organizations in the Indiana code, the 7th Circuit relied on U.S. Supreme Court cases (for example, *Civil Service Commission v. Letter Carriers*) that held that the Hatch Act and comparable 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. Those considerations support limits on political leadership and speechifying

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.”

See discussion of the decision in *Wolfson* from Arizona above in the section regarding endorsements.

Disqualification

The 7th Circuit, in a case from Indiana, and 2 district courts in Kentucky and North Dakota have rejected constitutional challenges to disqualification requirements,¹⁴ finding the rule is 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*, the 7th Circuit held that “the recusal clause does not present a constitutional issue at all.”

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

¹⁴ *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari denied*, No. 10-425 (U.S. May 2, 2011); *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (Eastern District of Kentucky 2004) (preliminary injunction); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (District of North Dakota 2005). The canons challenged in the Kentucky and North Dakota required a judge to disqualify himself or herself when the “judge's impartiality might reasonably be questioned,” which is Canon 3E(1) in the 1990 model code and Rule 2.11(A) of the 2007 model code. The challenge in Indiana was to that general disqualification requirement and the “prior-commitment recusal requirement,” which requires a judge to disqualify, if, while a judge or a judicial candidate, the judge 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.”

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.¹⁵ 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.

¹⁵ *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.”