SUPPLEMENTAL COMMENT OF JAMES MADISON CENTER FOR FREE SPEECH ON JUDICIAL CANONS 2.11(c), 2.12(5) AND 5 FOR THE ABA'S JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

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INTRODUCTION

The ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct has solicited comments to its preliminary draft of the Code. On March 15, 2005, the James Madison Center for Free Speech, by General Counsel James Bopp, Jr.,[1] timely filed its Comments on proposed Rule 5.02(d). The James Madison Center now files its Supplemental Comments addressing Rules 2.11(c), 2.12(5) and 5.

SUPPLEMENTAL COMMENTS

> *[F]irst **we're not bound by any foreign law**. . . . But this is a world in which more and more countries have come to have democratic systems of government with documents like our Constitution to protect things like free expression, and there are judges, and the judges have a job somewhat similar to mine . . . But why not learn something, if we can.*
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> *[T]o tell you the truth, in some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And, **if we cite them sometimes, not as binding, I promise, not as binding**, well, that gives them a little boost sometimes . . . [I]t sort of gives them a little leg-up for [the] rule of law and freedom.*[2]

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[1] James Bopp, Jr., served as a Special Advisor to the ABA Working Group for First Amendment and Judicial Elections in 2002-2003 and successfully argued *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

[2] Stephen Breyer, *Is the Independence of the Judicial at Risk?*, ABA Annual Meeting Panel (August 9, 2005), *at* http://www.abanet.org/media/docs/judiciarydebatetrans8905.pdf, at 3 (emphasis added); Abdon M. Pallasch, *Justice Breyer Takes a Stand*, CHICAGO SUN-TIMES, August 10, 2005, http://www.suntimes.com/outputnews/cst-nws-aba10.html.

Thus, in his address before this year's annual meeting of the American Bar Association, Justice Stephen Breyer addressed one of the more contentious legal issues currently being debated by members of Congress, the legal community and the Court. At the same meeting, the Joint Commission continued to consider proposed amendments to Model Code of Judicial Conduct that, if adopted, would severely punish Justice Breyer's statement. Under proposed Rules 2.11(c) and 5.01(m), Justice Breyer would be subject to discipline for having "made a promise" "with respect to [an] issue that [is] likely to come before the court." Further, under proposed Rule 2.12(5), Justice Breyer would be required to disqualify himself in any future case where the Supreme Court might consider citing law from foreign jurisdictions, since he had "made a public statement that commits, or appears to commit the judge with respect to an issue in the proceeding." Thus, the proposed Rules have serious long term consequences.

Continuing to discipline judges and judicial candidates for expressing an opinion on an issue cannot be squared with the First Amendment. More importantly for these Supplemental Comments, the use of disqualification to punish and chill judges and judicial candidates for expressing an opinion on an issue is unprecedented in our judicial history, presumes without warrant that judges are incapable of following their oath, and will have serious adverse consequences on the judiciary.

I. The Supreme Court's decision in *Republican Party of Minnesota v. White* has fundamentally changed the permissible scope of regulation of judicial campaigns.

The decision of the United State Supreme Court in *Republican Party of Minnesota v.*

White has created "a sea change in the law of extrajudicial speech."[3] As a result, "*White's* treatment of the judicial impartiality rationale and its application of the narrow tailoring requirement rases questions about whether *any* judicial campaign restriction could pass strict scrutiny. The decision casts a shadow of unconstitutionality over the entire project of judicial election campaign regulation."[4]

The courts have readily recognized that the *White* case was a landmark decision regarding judicial speech with principles that are applicable to not just judicial candidate's right to announce their views, but to other canons affecting judicial speech: "With its decision in *Republican Party of Minnesota v. White*, the United States Supreme Court changed the landscape for judicial ethics, at least with respect to political campaigns."[5] This occurred because of the Supreme Court's emphatic rejection of the longstanding justification for restrictions on judicial speech, that judicial elections were fundamentally different that elections for legislative and executive office. As the Eleventh Circuit explained it:

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[3]Thomas Penfield Jackson, *Beyond* Republican Party v. White: *A Plea for a Rule of Reason for Extrajudicial Speech*, 32 HOFSTRA L. REV. 1163, 1165 (2004). *See also* Geoffrey C. Hazard, Jr., *"Announcement" By Federal Judicial Nominees*, 32 HOFSTRA L. REV. 1281 (2004).

[4]Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PENN. L. REV. 183, 184 (2004).

[5]*Griffen v. The Arkansas Judicial Discipline and Disability Comm'n*, 130 S.W.3d 524, 535 (Ark. 2003).

> Appellees argue that we should adopt lower standards for judicial elections than for other types of elections because speech by judicial candidates is entitled to less protection than speech by legislative and executive candidates. We disagree. Although there is some support for appellees' position, we believe that the Supreme Court's decision in White suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.[6]

Thus, three circuits have applied *White* standard to provisions other than the announce clause. The Eighth Circuit in an *en banc* decision applied the *White* Court's analysis to Minnesota's partisan-activities and solicitation clauses, finding them unconstitutional.[7] The Eleventh Circuit relied on *White* to apply strict scrutiny to strike down Georgia's canons that prohibited judicial candidates from making negligent false statements and misleading or deceptive true statements and from personally soliciting campaign funds, as well as a provision permitting the commission to issue a cease and desist order to the candidate for violating those

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[6]*Weaver v. Bonner*, 309 F.3d 1312, 1320-21 (11th Cir. 2002) (citations omitted). *See also O'Neill v. Coughlan*, No. 04 Civ. 1612, slip op. at 9 (N.D. Ohio Sept. 14, 2004) ("Ohio might also argue that this canon advances its compelling interest in maintaining a judicial system free from the partisan allegiances, biases, and machination that characterize the legislative and executive branches. But the Supreme Court's decision in *White* resoundingly forecloses this line of argument.").

[7]*Republican Party v. White*, 2005 U.S. App. LEXIS 15864 (8th Cir. Aug. 2, 2005).

provision.[8] And the Sixth Circuit applied *White* to Kentucky's pledges and promises clause and commits clause to find that the defendants could not demonstrate a likelihood of success on the merits to justify staying the lower court's preliminary injunction.[9]

District courts have been doing the same. Soon after *White*, a Texas district court enjoined a judicial canon that prohibited a judicial candidate from "mak[ing] statments that indicate an opinion on any issue" that may come before him or her.[10] A New York district court held that canons which restricting political activity of judicial candidates by requiring judges to uphold the integrity and independence of the judiciary, to promote public confidence in the integrity and impartiality of the judiciary, and to decline to engage in certain specified partisan political activity were unconstitutional under *White.*[11] More recently, a district court applied the *White* Court's analysis to Ohio's political-affiliation clause, an advertising provision, and a requirement to "maintain the dignity appropriate to judicial office."[12] Additionally, district courts

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[8]*Weaver*, 309 F.3d 1312.

[9]*Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004).

[10]*Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 (W.D. Tex. 2002).

[11]*Spargo v. State Comm'n on Judicial Conduct*, 244 F. Supp.2d 72, 86-87, 88-89 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003).

[12] *O'Neil*, No. 04 Civ. 1612 (N.D. Ohio Sept. 14, 2004).

have used the *White* analysis to determine the unconstitutionality of the pledges and commits provisions identical to those struck down in Kentucky.[13]

II. Proposed Rule 2.12(5) unconstitutionally penalizes protected candidate speech and is unwise as a matter of policy.

A. Proposed Rule 2.12(5) and its justifications.

Proposed Rule 2.12(5) requires a judge to disqualify[14] himself or herself where:

> the judge, while a judge or a candidate for judicial office, has made a public

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[13]*Alaska Right to Life v. Feldman*, No. A04-0239 CV (RRB) (D. Alaska July 29, 2005); *North Dakota Family Alliance v. Bader*, 361 F. Supp.2d 1021 (D. N.D. 2005).

[14]The term "disqualification" is customarily used when recusal of a judge is required by statute, rule or the Constitution, while "recusal" customarily refers to the circumstances where a judge voluntarily steps aside when "disqualification" is not required. Occasionally, the terms are used interchangeably. *See Public Citizen v. Bomer*, 274 F.3d 212, 215 n.2 (5th Cir. 2001).

statement that commits, or appears to commit the judge with respect to an issue in the proceeding or the controversy in the proceeding.

This proposed rule "is designed to make the disqualification ramifications of prohibited speech violations explicit" and it "reflects the goals of Canon 5A(3)(d) (now Rule 5.01(j) and (m))."[15]

B. Recusal has never been required for expressing a view on an issue.

However, recusal for announcing one's views is unprecedented.[16] It is uniformly

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[15]Am. Bar Ass'n, Standing Committee on Judicial Independence, Report to the House of Delegates 11 (2003) *available at* http://www.abanet.org/judind/judicialethics/amendments.pdf (hereinafter Report to the House of Delegates). This proposed rule was adopted by the ABA as an amendment to the Model Code of Judicial Conduct in 2003. Notable is the fact that this new disqualification rule is virtually identical to the "commits" clause in Canon 5A(3)(d)(ii) of the 1990 ABA Model Canons. The ABA revised this canon in 2003, in part because the Working Group believed that those revisions were necessary because of *White*. *Id.* at 11-12. The original problematic formulation of the "commits" clause, however, was imported into the disqualification provision.

[16]There is one decision where a judge was required to disqualify himself for prior announcement of views on an issue. *See Republic of Panama v. American Tobacco Co.*, 265 F.3d 299 (5th Cir. 2001), *rev'd on other grounds sub nom. Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co*., 535 U.S. 229 (2002) (holding that a judge who had previously been associated with a view of a legal issue must recuse himself from a case involving that legal issue). In his dissent on the request for rehearing en banc, Judge Wiener states: "The panel opinion for this case marks the first time in the history of American

accepted in both federal law,[17] and under the ABA model judicial canons that disqualification is

> only required if there is bias concerning a *party*,[18] as distinguished from bias concerning an *issue* in the case. . . . [Thus] a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects[19] – all activities expressly permitted under [1990 ABA] Canon 4B. Indeed, after deciding cases and creating precedent for years, it would be incredible if the judge

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jurisprudence that an appellate court has reversed a trial judges's discretionary refusal to recuse himself – and has ordered the judge recused – based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and . . . [that view] is now being espoused by one of the parties in a case pending before him." *Id.* at 300. The Supreme Court, however, summarily reversed, per curiam, on other grounds.

[17]28 U.S.C. § 455(b)(1).

[18]Disqualification requires "deep-seated and unequivocal antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also id.* at 558 (Kennedy, J., concurring) ("[A] judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.").

[19]Nor could judges have web logs like Judge Posner does at <http://www.becker-posner-blog.com>.

did not form some fixed ideas about the law.[20]

This has been the longstanding position of the ABA[21] and the Supreme Court, which has found that prior expressions of views on issues that then came before administrative adjudicators did not require disqualification.[22] This has lead the courts to say unequivocally that recusal was not required by "the mere fact that a judge has previously expressed an opinion on a point of law."[23]

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[20]Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original).

[21]See, for example, the ABA's position in the 1972 ABA model canons. The original draft of the 1972 ABA Canon 3C(1)(a), which required disqualification if a judge "had a fixed belief concerning the merits," was changed to the "personal bias or prejudice" standard for fear the original draft would require a judge "to disqualify himself if he had a fixed belief about the law applicable to a given case." Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 61 (1973). "[T]he [ABA drafting] committee recognized the necessity and the value of judges having fixed beliefs about constitutional principles and many other facets of the law." *Id*.

[22]*See, e.g., FTC v. Cement Institute*, 333 U.S. 683 (1948); *United States v. Morgan*, 313 U.S. 409 (1941).

[23]*Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). *See Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (Rehnquist, J., on motion to recuse); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001) (holding that a judge who previously as a legislator supported a bill restoring the death penalty was not required to recuse himself from a death penalty case); *United States v.*

Further, due process[24] does not require recusal for having expressed a view on an issue.[25]

Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996) (holding that a judge's views on legal issues may not serve as a basis for a motion to disqualify that judge); *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993); *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946, 949 n.1 (6th Cir. 1987); *Southern Pac. Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984) (stating that the mere fact that judge has views on the law or policies at issue in a case before him does not require his recusal); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982) (stating that the judge was not required to recuse himself holds and expresses certain views on a general subject); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980) (stating that the views of a judge on legal issues are not an adequate basis for motions to disqualify); *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). *See also United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992) (holding that a judge's bias can only be disqualifying if it stems from an extrajudicial source and makes the judge's impartiality reasonably questionable); *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991) (holding that expertise or exposure to a subject does not require a judge to recuse himself); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987) (personal bias based upon a judge's background and associations alone does not require recusal).

[24]"Statutory grounds for disqualification are stricter than the requirements of due process." *United States v. Alabama*, 828 F.2d 1532, 1540 n.22 (11th Cir. 1987). As a result, due process concerns are already meet, if statutory disqualification requirements are satisfied.

Due process requires trial before an unbiased judge.[26] However, due process disqualification is required "only in the most extreme of cases."[27] It must be shown that the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[28] Thus, due process requires a judge to recuse if he or she has a personal bias or prejudice concerning a party, not an opinion on an issue[29] or an association with a group because of the particular issues

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[25]*But see* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996) for the contrary view.

[26]*Johnson v. Mississippi*, 403 U.S. 212 (1971)Johnson v. Mississippi, 403 U.S. 212, 216 (1971).

[27]*Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986)Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821, 825-26 (1986).

[28]*Id*. at 821-22 (citation and quotations omitted).

[29]With respect to the role of the Announce Clause in protecting judicial impartiality, the Court was correct in its conclusion that the Clause was poorly aimed at the prevention of bias against parties and, more importantly, that impartiality cannot be equated with an absence of preconceptions about legal issues. Surely, any candidate with significant experience in law has some preconceptions about legal issues. All the Announce Clause could

embraced by the group.[30]

However, opinions on issues must be distinguished from "pre-hearing pronouncements concerning the proper decision of *cases* made by judges likely to hear those very cases. Pronouncements of this description are inconsistent with the core judicial responsibility of hearing before deciding."[31] Thus,

> due process would not be offended if a judge presiding over a case expressed a general opinion regarding a law at issue in a case before him or her. The problem arises when the judge has prejudged the facts or the outcome of the dispute before her. In those circumstances, the decisionmaker cannot render a decision that

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> do was preclude candidates from telling the electorate about their preconceptions. And if the articulation of views concerning legal issues is treated as an absence of impartiality, many veteran judges with consistent jurisprudential approaches in certain types of cases would be barred from hearing those cases in the future.

Briffault, *supra* note 4, at 206.

[30]*White*, 2005 U.S. App. LEXIS 15864 at *34-37.

[31]Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 25 (2004).

comports with due process,[32]

and recusal is required.[33] The proposed Rule, however, does not honor this distinction.

C. Requiring recusal presumes that judges are incapable of following their oath.

It has long been established that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[34] Thus, "[t]here is a presumption of impartiality on the

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[32]*Franklin v. McCaughtry*, 398 F. 3d 955, 962 (7th Cir. 2005) (citations and quotations omitted); *id.* ("[T]he only inference that can be drawn from the facts of record is that Judge Schroeder decided that Franklin was guilty before he conducted Franklin's trial. This is a clear violation of Franklin's due process rights.").

[33]*Id.* at 27. *See, e.g., In re: Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001) ("Judge Gertner's statement . . . could be construed as a comment on the merits of the pending motions for preliminary injunction and class certification."); *Cooley*, 1 F.3d at 995 (The judge's statements on television "unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator. We conclude that at least after the judge's volunteer appearance on national television to state his views regarding the ongoing protests, the protesters, and his determination that his injunction was going to be obeyed, a reasonable person would harbor a justified doubt as to his impartiality in the case involving these defendants.").

[34]*See Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 820 (1986) (*citing* 3 W. Blackstone,

part of judges,"[35] that they "are honest, upright individuals . . . [who] rise above biasing influences,"[36] and that, because a "judge is sworn to administer impartial justice, [the judge] is qualified and unbiased."[37] Further, the Supreme Court has accepted "the notion that the conscientious judge will, as far as possible, make himself aware of his biases of their character, and, by that very self-knowledge, nullify their effect."[38] Thus, while the presumption of impartiality may be overcome in particular cases through judicial disqualification, wholesale and categorical rejection of the presumption for all judges who state their views carries "a much more difficult burden of persuasion."[39] The court must be convinced that "under a realistic appraisal of psychological tendencies and human weakness," public expression of a judge's general views on the law during a campaign "poses such a risk of actual bias or prejudgment that

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[35]*Wilson v. Neal*, 16 S.W.3d 228, 287 (Ark. 2000).

[36]*Franklin*, 398 F.3d at 959.

[37]*Dillard's v. Scott*, 2005 Miss. LEXIS 286 at *17 (Miss. 2005).

[38]*Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (citations and quotations omitted).

[39]*Withrow v. Larkin*, 421 U.S. 35 (1975)Withrow v. Larkin, 421 U.S. 35, 47 (1975).

the practice must be forbidden."[40]

Certainly it is true that judges have opinions on the law and that these opinions will influence their judging.[41] The Preliminary Draft recognizes that.[42] But it is readily apparent that judges are obligated to set aside those opinions[43] and that the process of judging can cause judges to decide cases contrary to those views.[44] Thus,"[t]he fact that some aspect of [a judge's] propensities [on issues] may have been publicly articulated prior to coming to this Court cannot . . . be regarded as anything more than a random circumstance that should not by itself form a

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[40]*Id. See also Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1361, 1375-77 (7th Cir. 1994) (en banc).

[41]Briffault, *supra* note 4, at 198-201.

[42]Preliminary Draft, ABA Model Code of Judicial Conduct, Canon 2 at 2 (June 30, 2005) (Rule 2.04A[2]: "Although a judge's background and personal philosophy may influence the way in which the judge analyzes and interprets a legal issue, a judge must interpret and apply the law without regard to whether the judge personally approves or disapproves of the law in question.").

[43]*Id.*

[44]Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION LAW J. 79, 88 (2003).

basis for disqualification."[45] Expression of a view on an issue simply does not overcome the presumption of impartiality of all judges and cannot be a basis for wholesale disqualification.

There have been numerous applications of this view. Disqualification is not required where a judge gave a lecture to police officers about increasing the prospects for conviction in narcotics cases, while handling drug cases,[46] for writing on a legal issue, commending the present law or proposing legal reform,[47] and for engaging in a wide variety of extrajudicial activities to promote the law.[48] Further, disqualification cannot be based on prior judicial rulings in a proceeding or prior proceeding,[49] or because the judge has been involved with the

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[45]*Laird v. Tatum*, 409 U.S. 824, 836 (1972).

[46]*United States v. Pitera*, 5 F.3d 624 (2d Cir. 1993).

[47]Committee on Codes of Conduct, Formal Op. 55 (1977, revised 1998) (*citing* Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 74 (1973)). In fact, the Preliminary Draft encourages judges "to contribute to the improvement of the law" by "speaking, writing, teaching or participating in other extrajudicial activities," Preliminary Draft, *supra* note 42, Rule 4.01[3], Canon 4 at 1, and to share that expertise on matters of law with governmental bodies. *Id.* Rule 4.02[1], Canon 4 at 2.

[48]Committee on Codes of Conduct, Formal Op. 93 (1997, revised 1998).

[49]*Liteky v. United States*, 510 U.S. 540, 555 (1994).

development of the law in government or through scholarly writings.[50] Finally, disqualification is not justified because a judge is a minority handling a civil rights case, was a civil rights lawyer, was a political figure or member of the state senate who took public positions concerning the public institutions before the court, or had stated strong views prior to joining the bench.[51]

D. Proposed Rule 2.12(5) is unconstitutional under *White*.

Thus, it is clear that the proposed rule is not "designed to make the disqualification ramifications of prohibited speech violations explicit,"[52] since disqualification for stating a view on an issue was never implicit in the disqualification canon. So, the animating purpose is to enforce the limits on judicial speech found unconstitutional in *White*, which the drafters of the rule acknowledge.[53]

By employing disqualification to enforce judicial candidate speech rules, Rule 2.12(5) penalizes judges by denying them employment, resulting in a chilling effect on judicial candidates who seek to avoid such an unconstitutional condition.[54] Rule 2.12(5), therefore,

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[50]*Laird*, 409 U.S. at 828-33; *Del Vecchio*, 31 F.3d at 1377 n.3.

[51]*Alabama*, 828 F.2d at 1542-44.

[52]Report to the House of Delegates, *supra* note 14, at 11.

[53]*Id.* (The Rule "reflects the goals of Canon 5A(3)(d)." (now Rule 5.01(j) and (m)).

[54]*See Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (stating that the government cannot require a person to give up a constitutional right to receive a discretionary benefit); *Perry*

restricts a core First Amendment freedom and is subject to strict scrutiny.[55] Since the scope of the prohibition of Rule 2.12(5) on expressing an opinion on issues is virtually identical to the announce clause struck down in *White*,[56] Rule 2.12(5) is virtually certain to be struck down.[57]

Under *White*, the analysis is quite straightforward. Because Proposed Rule 2.12(5) is subject to strict scrutiny, Rule 2.12(5) must both serve a compelling interest and be narrowly

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v. Sindermann, 408 U.S. 593, 597 (1972) (stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech," even though he is not entitlement to that benefit)*; Speiser v. Randall*, 357 U.S. 513, 529 (1958) (finding an unconstitutional condition existed where the taxpayer had to execute an oath in order to receive a tax exemption). *See also McDaniel v. Paty*, 435 U.S. 618, 633 (1977).

[55]*See White*, 536 U.S. at 775 (*quoting Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

[56]"Minnesota's announce clause has the same scope as the corresponding provision in the 1990 ABA Model Code - namely, it prevents judicial candidates from seeking political support on the basis of commitments or apparent commitments on how they would decide cases if elected." Brief of the American Bar Association as *Amicus Curiae* at 5, *White*, 536 U.S. 765.

[57]*See* Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072 (2004); Hon. Howland W. Abramson & Gary Lee, *The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications*, 20 TOURO L. REV. 729 (2004).

tailored to serve that interest.[58]

The *White* Court recognized judicial impartiality as a compelling interest when defined as the "lack of bias towards the parties" or "openmindedness."[59] Rule 2.12(5) is not narrowly tailored to reflect this interest in judicial impartiality.

First, the language of Rule 2.12(5) does not reflect an interest in lack of bias towards the parties. Like the announce clause, Rule 2.12(5) does not restrict speech for or against particular parties, but rather requires recusal for "a public statement that commits, or appears to commit the judge with respect to an *issue* in the proceeding or the controversy in the proceeding."[60] Just as the announce clause was found to be too broadly tailored to serve this interest, Rule 2.12(5) will likely be viewed as insufficiently tailored because it only addresses impartiality as to issues, not parties.[61]

Second, Rule 2.12(5) is not adequately drafted to preserved openmindedness. Specifically, Rule 2.12(5) is underinclusive. Like the announce clause in *White*, Rule 2.12(5) only encompasses commitments made by judicial candidates, and it does not address

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[58]*White*, 536 U.S. at 775.

[59]*White*, 536 U.S. at 765, 775-80.

[60]Preliminary Draft, *supra* note 42, Rule 2.12(5), Canon 2 at 10 (emphasis added).

[61]*See White,* 536 U.S. at 776; *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp.2d 672, (2004); *Family Alliance v. Bader*, 361 F. Supp.2d 1021, 1039 (2004); *Alaska Right to Life v. Feldman*, No. A04-0239 CV (RRB), slip op. at 5 (D. Alaska July 29, 2005).

commitments made before the judge became a candidate.[62] Judges often have already committed themselves on legal and political issues well before they became candidates for judicial office, either in the form of lectures, books, law review articles, or previous rulings.[63] In essence, Rule 2.12(5) permits judges to sit on cases involving issues on which the judges may have committed themselves on legal issues until the day they declare their candidacy, after which such commitments subject them to recusal under Rule 2.12(5). This effectively joins Rule 2.12(5) with the announce clause in its underinclusiveness, and like the announce clause, renders Rule 2.12(5) insufficiently tailored to satisfy strict scrutiny.[64]

Further, a narrower construction can be fashioned to serve the interest in judicial impartiality. Requiring recusal of judges who have pledged or promised "certain results in a particular case" is a more narrowly tailored construction that would adequately serve the State's interest in impartiality.[65] This would preserve the State's interest in an openminded judge

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[62] *See White*, 536 U.S. at 779-80.

[63] *Id.* at 779.

[64] *See Wolnitzek*, 345 F. Supp.2d at 696; *Bader*, 361 F. Supp.2d at 1039; *Feldman*, No. A04-0239 CV (RRB), slip op. at 5.

[65] *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F. 2d 224, 230 (7th Cir. 1993); *Wolnitzek*, 345 F. Supp.2d at 698.

without also forbidding privileged speech.[66] Rule 2.12(5) is not so tailored to reflect an interest in openmindedness and judicial impartiality.

Rule 2.12(5) is not narrowly tailored to serve a interest in judicial impartiality when analyzed under *White*. Instead it reaches protected First Amendment speech. As such, it will likely be found unconstitutional if adopted.[67]

E. Proposed Rule 2.12(5) is unconstitutionally vague.

Further, because Rule 2.12(5) encompasses "a public statement that . . . *appears to commit* the judge with respect to an issue," the Rule is unconstitutionally vague,[68] which the ABA itself has already recognized.[69]

F. Required recusal for expressing an opinion on an issue is bad policy.

Of course, the first and most obvious effect of Rule 2.12(5) is to chill judicial candidates from announcing their views on disputed legal and political issues. As a result, voters would be deprived of the information on the candidate's views that the First Amendment protects.

But the damage and disruption to the judicial system is less obvious, but possibly more

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[66]*Buckley*, 977 F. 2d at 230.

[67]*See Family Trust Foundation of Kentucky v. Kentucky Judicial Conduct Commission*, 388 F.3d 224, 226 (2004); *Wolnitzek*, 345 F. Supp.2d at 695; *Bader*, 361 F. Supp.2d at 1039; *Feldman*, No. A04-0239 CV (RRB), slip op. at 5.

[68]Briffault, *supra* note 4, at 216-17.

[69]Report to the House of Delegates, *supra* note 14, at 12.

dramatic and devastating. The effect on Justice Breyer has already been noted, but the wide-ranging implications for all judges must cause one to pause. Judges have not only the duty to recuse, if warranted, but the obligation "not to recuse when there is no occasion for him to do so."[70] In fact,

> unwarranted disqualification may bring public disfavor to the bench and to the judge personally. The dignity of the bench, the judge's respect for fulfillment of judicial duties and a proper concern for the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or distasteful issues."[71]

Thus, Rule 2.12[5] increases exponentially the opportunity for strategic recusal, where parties manipulate which judge considers his or her case. Thus,

> the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtain the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[72]

The adoption by the ABA of this Rule in 2003 has already spawned speculation on whether

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[70]*Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987).

[71]Preliminary Draft, *supra* note 42, Rule 2.02 [1], Canon 2 at 1.

[72]*In re Allied-Signal*, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original).

Justice O'Connor should have recused for *Bush v. Gore*.[73] Lawyers hardly need more encouragement to bring disqualification demands.

III. Proposed Rule 2.11(c) and 5 is based on the faulty premise that *White* only necessitates minor tinkering in the Model Canons.

The Madison Center's original comments only addressed proposed Rule 5.02(d), recommending that Rule 5.02(d) should be revised to only prohibit pledges or promises of certain results in particular cases. Since the publication of the Preliminary Draft of June 30th and the *en banc* decision of the 8th Circuit, the Joint Commission has directed the Reporter to draft a revised Canon 5 that would bring its provisions "into harmony with only the clearest points expressed in the *White* opinion."[74] Because this revised Canon 5 is not yet available for comment, the James Madison Center will defer any comments until the revision is available.

CONCLUSION

One general point needs to be made, however, in conclusion. To date, the ABA has taken the narrowest possible reading of the *White* case and its progeny. The original ABA Working Group "believe[d] that the decision [in *White*] can and should be read narrowly, leaving the door

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[73]Grant Geyerman & David Suggs, *The 2003 Amendments to the Model Code of Judicial Conduct and* Bush v. Gore: *An Adventure into Fantasyland*, 17 GEO. J. LEGAL ETHICS 773 (2004).

[74]Joint Commission, Minutes at 1 (August 5, 2005).

open for the drafting of campaign ethics restrictions that will pass constitutional muster."[75] The Preliminary Draft claimed that "judicial elections differ greatly from elections for other types of office,"[76] and then proceeded to make only the most negligible changes in the scope of regulation of judicial campaigns in Canon 5 and to attempt to salvage its regulation of viewpoint expression by judicial candidates by adding the unprecedented threat of disqualification. Ever now, in response to the 8th Circuit's *en banc* decision, the Reporter has only been directed to make minimal revisions in Canon 5 to reflect "only the clearest points" expressed in the decision.

But it has become clear now, if it was not before, that the Supreme Court, in *White*, destroyed the foundation of edifice of regulation built by the ABA. Despite this fact, the Joint Commission still seems to think that all that is needed is a few windows repaired. If the ABA would recognize the full significance of the *White* decision, as the federal courts have, the ABA could play a very constructive role. However, the current resistance can only help induce State Supreme Courts to continue to impose unconstitutional restraints on judicial elections – to great damage to judicial candidates, to the voters, to the courts, and ultimately to the ABA itself. The Madison Center urges the Joint Commission to reconsider its fundamental approach to this issue.

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[75]Report to the House of Delegates, *supra* note 14, at 8.

[76]Preliminary Draft, *supra* note 42, Preamble Section at 3.