

**First Amendment Considerations for Judicial Campaigns:
The Impact of *Republican Party of Minnesota v. White* on
the New York State Code of Judicial Conduct**

Report by the New York City Bar Association
Committee on Government Ethics¹

Table of Contents

I. Introduction	1
II. Development and Impact of <i>White</i>	4
A. Historical Background of Campaign Speech Regulations at Issue in <i>White</i>	4
B. The <i>White</i> Opinions	6
C. Progeny of <i>White</i>	12
1. New York Federal and State Decisions	13
2. Other Key Federal and State Decisions	16
III. Constitutionality of Campaign Speech Regulations After <i>White</i>	19
IV. Constitutionality of Limitations on Political Activity of Judicial Candidates After <i>White</i>	25
V. Conclusion	31

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I. Introduction

Last year's United States Supreme Court decision, *Republican Party of Minnesota v. White*,² has sparked a lively debate in courts, bar associations, and other forums across the country, including in the state and federal courts of New York. In *White*, the Supreme Court ruled that a Minnesota statute prohibiting a candidate for judicial office from "announcing his or her views on disputed legal or political issues" (hereinafter the "announce clause") violated the First Amendment. While New York State's Code of Judicial Conduct ("CJC") does not contain a clause identical to that at issue in *White*, courts have applied *White* to question or to invalidate several provisions regulating campaign speech and political activity by judicial candidates.

Several provisions in New York's CJC regarding campaign speech and political activity by judicial candidates may be particularly threatened by *White*. The CJC's prohibition on judges making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"³ or statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court,"⁴ may be questioned in light of *White*. In addition, CJC provisions addressing political activity, including judicial campaign solicitations, may be susceptible to challenges.⁵

The recent federal district court decision in *Spargo v. New York State Commission on Judicial Conduct*⁶ has generated considerable discussion regarding the meaning and application of *White*. Relying on *White*, the *Spargo* court held that several provisions of the CJC regarding

² 536 U.S. 765 (2002).

³ 22 NYCRR § 100.5(A)(4)(d)(i) (2003).

⁴ *Id.* § 100.5(A)(4)(d)(ii).

⁵ *Id.* § 100.5(A)(5).

⁶ 244 F. Supp.2d 72 (N.D.N.Y. 2003).

campaign conduct are invalid on First Amendment grounds.⁷ The *Spargo* court’s application of *White* might easily be expanded to abrogate or to nullify other provisions in the CJC such as the pledge or promise clause, the commit clause, or restrictions on the solicitation of funds. However, the Court of Appeals for the Second Circuit did not reach the First Amendment issues in *Spargo* when it ruled more recently that the district court should have abstained on *Younger* grounds because a state disciplinary proceeding was pending. The Court held that “proper deference to New York’s paramount interest in regulating its own judicial system mandate[d] the exercise of *Younger* abstention over plaintiffs’ claims.”⁸

Subsequent to the district court’s *Spargo* decision, the New York Court of Appeals upheld the constitutionality of the pledge or promise clause in *In re Watson*⁹ and found that aspects of the political activity provisions at issue in *Raab v. State Commission on Judicial Conduct*¹⁰ were constitutional. This is thus a propitious time to examine the CJC provisions relevant to political campaigning.

Aiding in this analysis is the Interim Report of the Commission to Promote Public Confidence in Judicial Elections issued December 3, 2003 (the “Feerick Commission Report”), which recommended changes in the CJC that the Commission said it believed would “help

⁷ The court in *Spargo* invalidated 22 NYCRR §§100.1, 100.2(A), 100.5(A)(1)(c)-(g), 100.5(A)(4)(a). Sections 100.1, 100.2(A), and 100.5(A)(4)(a) set out general parameters of conduct appropriate for judges and candidates for judicial office: requiring judges to observe high standards of conduct, to avoid impropriety and the appearance of impropriety, to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and candidates for judicial office to act with dignity appropriate to judicial office and to act in a manner consistent with the integrity and independence of the judiciary. Section 100.5(A)(1)(c)-(g) prohibits a sitting judge and candidates for judicial office from engaging in any partisan political activity other than the candidate’s campaign, from participating in any political campaign, publicly endorsing or publicly opposing another candidate for political office, making speeches on behalf of a political organization or another candidate, and attending political gatherings.

⁸ 351 F.3d 65, 68 (2d Cir. Dec. 9, 2003).

⁹ 100 N.Y.2d 290 (2003).

¹⁰ 100 N.Y. 2d 305 (2003).

maintain the dignity of judicial elections and the integrity, impartiality and independence of the bench.”¹¹ The Feerick Commission recommended changes that closely track changes in the Model Code of Judicial Conduct adopted by the American Bar Association (the “ABA”) at its August 2003 meeting. The Feerick Commission recommended that the restrictions on judicial candidate speech found in the Chief Administrator’s Rules’ “should be limited to pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office and statements that commit the judicial candidate with respect to cases, controversies or issues that are likely to come before the court.”¹² The Feerick Commission Report also recommended that there no longer be a restriction on a judge’s or a judicial candidate’s speech in “the vague category of statements that *appear* to commit. Only those statements that *actually* commit a judge or candidate with respect to cases, controversies or issues that are likely to come before the court are prohibited.”¹³ The Feerick Commission Report would also clarify that these speech restrictions apply to both judicial candidates and sitting judges.

The ABA revised the Model Code of Judicial Conduct with regard to *White* and First Amendment challenges regarding judicial campaign speech. As part of a current review of the entire Code, the ABA is considering possible further revisions to the pledge or promise clause. As discussed, *infra*, the ABA’s August 2003 amendment, like the Feerick Commission Report, focuses on the judge’s impartiality rather than faithfulness, retains the pledge and promise clause and part of the commit clause, eliminating the "appear to commit" language, and limiting the

¹¹ Feerick Commission Report at 17.

¹² *Id.* at 19.

¹³ *Id.* at 19-20. (Emphasis in original.) It is to be noted that although the constitutionality of the “appear to commit” language of the CJC has not been decided by the New York courts, and may not be presented in the near future, that clause has served a useful purpose in practice by encouraging judicial candidates to hold themselves to a high standard and deterring such candidates from testing the limits of propriety in election campaigns.

clause to adjudicative conduct. The regulation of conduct of judges in their administrative role should be considered further by the bench and bar as case law develops. The New York Court of Appeals upheld New York's pledge or promise clause and other provisions regulating political activity. The New York courts have not ruled on the validity of the "commit clause" and the "appear to commit" language after *White*.¹⁴ As discussed, *infra*, at page 23, both the Feerick Commission Report and the ABA revisions provide a sound way to protect New York's judicial rules on political activities against constitutional challenge while leaving their content largely intact.

II. Development and Impact of *White*

A. Historical Background of Campaign Speech Regulations at Issue in *White*

In 1972, the ABA promulgated the Model Code of Judicial Conduct in order to specify enforceable rules of judicial comportment. The ABA CJC Canon 7(B)(1)(c) provided that a candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact." The second clause came to be known as the "announce clause." The New York State Bar Association adopted the ABA Model Code in 1973, with some amendments.¹⁵

In 1990, responding to concerns that the 1972 Model Code violated the First Amendment, the ABA revised the canon to provide that a candidate for judicial office "shall not (i)

¹⁴ The following analysis presumes New York will continue to have an elective system for certain judgeships. The Association of the Bar has long argued that judges should not be elected, but rather should be appointed through a merit selection system. See Association of the Bar of the City of New York, Task Force on Judicial Selection, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (October 2003), see <http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf>.

make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (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; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”¹⁶ New York adopted a modified version of the 1990 ABA canon in 1996.¹⁷ New York’s CJC contains campaign speech regulations substantially identical to those in the 1990 ABA canon.¹⁸ Section 100.5’s pledge or promise and commit clauses are verbatim adoptions of the 1990 ABA canon, while the knowing misrepresentation clause reads very similarly.¹⁹ In line with the 1990 ABA canon and case law from other jurisdictions that found the announce clause to violate the First Amendment, New York eliminated the announce clause altogether in 1996.²⁰

As of August 2003, seven states still have the announce clause in their Codes of Judicial Conduct (Alabama,²¹ Arizona,²² Colorado,²³ Iowa,²⁴ Maryland,²⁵ Missouri,²⁶ and New Mexico²⁷). Forty-one states have adopted language similar to the pledge or promise clause.²⁸

¹⁵ See Marjorie E. Gross, *Updated Rules on Judicial Conduct*, 215 N.Y.L.J. 1 (1996).

¹⁶ ABA MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(1990).

¹⁷ See Gross, *supra* n. 15, at 1.

¹⁸ See § 100.5(A)(4)(d).

¹⁹ “[K]nowingly make any false statements or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent.” § 100.5(A)(4)(d)(iii).

²⁰ See Gross, *supra* n. 15, at 8.

²¹ AL. ST. J. ETHICS Canon 7 (2003).

²² AZ. CODE OF JUD. CONDUCT Canon 5 (2003).

²³ CO. CODE JUD. CONDUCT Canon 7 (2003).

²⁴ IA. R. 51 Canon 7 (2003).

²⁵ MD. R CTS. J. AND ATTYS. R. 16-812, M.R.P.C 8.2; MD. R CTS. J. AND ATTYS. R. 16-813, CODE OF JUD. CONDUCT Canon 5 (2003).

²⁶ MO. R. BAR R. 2.03, Canon 5 (2003).

²⁷ NM. CODE OF JUD. CONDUCT R. 21-700 (2003).

²⁸ See STANDING COMM. ON JUD. INDEPENDENCE, AM. BAR ASS’N, REPORT OF THE WORKING GROUP ON THE FIRST AMEND. AND JUD. CAMPAIGNS 8 (2003).

Thirty states have adopted a version of the commit clause.²⁹

B. The *White* Opinions

In *Republican Party of Minnesota v. White*,³⁰ the Supreme Court invalidated the Minnesota Code of Judicial Conduct's announce clause on First Amendment grounds. It found that the clause, which stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues,"³¹ did not survive strict scrutiny review.³² The Minnesota CJC includes a related clause that asserts that a candidate shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"³³ but this provision was not at issue in *White*.³⁴

The *White* case concerned a candidate for associate justice of the Minnesota Supreme Court who alleged that he could not announce his views on disputed issues during a campaign for associate justice for the Minnesota Supreme Court, even in response to questions from the press and the public, because of concerns about violating the announce clause.³⁵ Both the district court and the Eighth Circuit held in favor of the respondents in the candidate's suit. The Eighth Circuit relied in part on narrowing interpretations by the Minnesota Board on Judicial Standards and the district court to construe the clause to reach only announcements of issues likely to come before the candidate if he or she is elected, and not criticism of past decisions or

²⁹ *Id.*

³⁰ 536 U.S. 765 (2002).

³¹ *Id.* at 768 (citing MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i)(2000)).

³² *Id.* at 774-75, 788.

³³ MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i).

³⁴ *Id.* at 770 (noting that the pledge or promise provision "is not challenged here and [is one] on which we express no view"). The Minnesota CJC does not include a commit clause similar to that contained in New York's CJC.

³⁵ *Id.* at 769-70. The candidate was never actually disciplined for announcing his views, however.

general discussions of case law and judicial philosophy.³⁶ The respondents, supported by the ABA, asserted that these narrowing interpretations rendered Minnesota's announce clause no broader than the commit clause in the 1990 ABA canon.³⁷

The organized bar generally supported the respondents. The Conference of Chief Justices, the Minnesota state bar, eight other state bar associations, and the ABA filed *amicus* briefs in support of the respondents. The American Civil Liberties Union and the Minnesota Civil Liberties Union, on the other hand, supported the petitioners.

In a 5-4 opinion authored by Justice Scalia, the Supreme Court held that the announce clause violated the First Amendment. Justices Kennedy and O'Connor joined the majority and filed concurring opinions, while Justices Breyer, Ginsburg, Souter, and Stevens dissented.³⁸ Determining that the clause impacted speech on the basis of content, and that speech about the qualifications of candidates for public office is "at the core of our First Amendment freedoms," the Court applied strict scrutiny to require that the clause be narrowly tailored to serve a compelling state interest.³⁹

The Court concentrated on examining the respondents' asserted compelling interests of preserving the impartiality of the state judiciary and the appearance of the impartiality of the state judiciary. Deeming the term "impartiality" to be vague, the Court assessed the viability of three alternate meanings. It determined that, if impartiality refers to the lack of bias for or against a party, the clause was not narrowly tailored "inasmuch as it does not restrict speech for

³⁶ *Id.* at 771-72.

³⁷ *Id.* at 773 n.5. The *White* Court commented that "[w]e do not know whether the announce clause (as interpreted by the state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question."

³⁸ Justices Stevens and Ginsburg each filed a dissent in which the other three dissenters joined.

³⁹ *Id.* at 774 (quoting *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)).

or against particular *parties*, but rather speech for or against particular *issues*.”⁴⁰ The Court acknowledged a point made in dissent by Justice Stevens that at times, this may be one and the same – for instance, “Justice Stevens’ example of an election speech stressing the candidate’s unbroken record of affirming convictions for rape.”⁴¹ It concluded that under strict scrutiny, however, the test is not whether the announce clause *sometimes* serves a compelling interest, but whether it is *narrowly* tailored to do so.⁴²

In addition, the *White* Court held that if “impartiality” were to mean a lack of preconception for or against a particular legal view, such a trait would be unlikely (“it is virtually impossible to find a judge who does not have preconceptions about the law”) and undesirable (“even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so [as p]roof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias”).⁴³ Thus, this interpretation of impartiality could not serve as a compelling interest.⁴⁴ Finally, the Court considered that the term could refer to open-mindedness, in the sense of remaining open to persuasion or to views that may be contrary to a judge’s preconceptions.⁴⁵ As the respondents argued, open-mindedness or the appearance of open-mindedness “relieves a judge from the pressure to rule a certain way in order to maintain consistency with the statements the judge has previously made.”⁴⁶ The Court ultimately rejected this reasoning as a compelling interest, however, because it found the clause to be

⁴⁰ *Id.* at 776 (emphasis in original).

⁴¹ *Id.* at 777 n.7.

⁴² *Id.*

⁴³ *Id.* at 777-78 (internal quotations omitted).

⁴⁴ *Id.* at 778.

⁴⁵ *Id.*

underinclusive.⁴⁷ Judges could publicly commit to legal positions at many points in their careers, after all, not just during election campaigns.⁴⁸

The Court noted that campaign promises, as opposed to announcements of views, could threaten judicial open-mindedness since an elected judge would then be reluctant to renege.⁴⁹ Though the Court expressed skepticism regarding popular reliance upon campaign promises (“one would be naive not to recognize that campaign promises are – by long democratic tradition – the least binding form of human commitment”), it pointed out that Minnesota had implemented a prohibition of pledges or promises to address this scenario,⁵⁰ and that was not at issue in *White*.⁵¹

Finally, the Court declined to decide whether the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns. Rather, it noted that “*even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms.”⁵² The Court faulted Justice Ginsburg, however, for “greatly exaggerat[ing] the difference between judicial and legislative elections” in her dissent.⁵³

Justices Kennedy and O’Connor filed separate concurring opinions in which they expressed concerns about the balance struck between interests in judicial impartiality and First

⁴⁶ *Id.*

⁴⁷ *Id.* at 780.

⁴⁸ *Id.* at 779-80.

⁴⁹ *Id.* at 780.

⁵⁰ *Id.*

⁵¹ *Id.* at 770.

⁵² *Id.* at 783 (emphasis in original).

⁵³ *Id.* at 784.

Amendment freedoms. Justice Kennedy argued that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling state interests.⁵⁴ He did expound, however, on the importance of judicial integrity in the eyes of the public: “Courts . . . elaborate principles of law in the course of resolving disputes. The power and prerogative of a court to perform this function rests, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.”⁵⁵ In her opinion, Justice O’Connor expressed concerns that judicial elections themselves undermine the state’s interest in an actual and perceived impartial judiciary.⁵⁶ Having chosen to select its judges through contested popular elections, she reasoned, the state voluntarily took on risks of judicial bias.⁵⁷ Justice O’Connor concluded that “[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”⁵⁸

In opinions that cover similar ground and are mutually reinforcing, Justice Ginsburg and Justice Stevens dissented vigorously. The central theme of Justice Ginsburg’s dissent was the distinction between the roles of judges and political actors, which she asserted permits greater regulation of judicial election campaigns under the First Amendment.⁵⁹ She noted that “a judiciary . . . owing fidelity to no person or party . . . is an essential bulwark of constitutional

⁵⁴ *Id.* at 793.

⁵⁵ *Id.* at 793.

⁵⁶ *Id.* at 788.

⁵⁷ *Id.* at 792.

⁵⁸ *Id.* at 792.

⁵⁹ *Id.* at 806-07.

government.”⁶⁰ Judges owe a duty to decide individual cases or controversies, to objectively apply legal principles, and “when necessary, [to] ‘stand[] up to what is generally supreme in a democracy: the popular will’.”⁶¹ In Justice Ginsburg’s view, the balance Minnesota sought to achieve—“allowing the people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised—should encounter no First Amendment shoal.”⁶² She then analyzed the clause and concluded that it complements and effectuates the pledge and promise provision, the constitutionality of which she found was “amply supported,”⁶³ and was narrowly tailored to achieve the compelling state interest of advancing the impartiality of the judiciary and the public confidence in the judiciary that follows therefrom.

In his dissent, Justice Stevens agreed with Justice Ginsburg’s central contention -- that there exists a “fundamental distinction between campaigns for the judiciary and the political branches.”⁶⁴ He maintained that “[e]lected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials” in that “it is the business of judges to be indifferent to unpopularity.”⁶⁵ Given this fundamental difference between judges and political officials and the compelling government interest in maintaining the judiciary’s reputation for impartiality and nonpartisanship that engenders public confidence in the judiciary, Justice Stevens contended that greater regulation of judicial election campaigns is permissible under the First Amendment.⁶⁶

⁶⁰ *Id.* at 804.

⁶¹ *Id.* (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.Rev. 1175, 1180 (1989)).

⁶² *Id.* at 808-09.

⁶³ *Id.* at 819.

⁶⁴ *Id.* at 796.

⁶⁵ *Id.* at 798.

⁶⁶ *Id.* at 802-803.

C. Progeny of *White*

In light of *White*, which one judge has deemed “an entirely new vision of judicial rights and obligations,”⁶⁷ many courts have attempted to apply the Supreme Court’s rationale to speech and conduct apart from the announcement of views. Some federal courts have expanded *White* to invalidate state judicial campaign codes. State courts, on the other hand, are generally reading *White* narrowly to permit their codes to remain intact.

The ABA has responded to *White* by implementing a two-year review of its 1990 judicial ethics canon.⁶⁸ It has created a task force, the Joint Commission to Evaluate the Code of Judicial Conduct, to coordinate this review.⁶⁹ In addition, the ABA House of Delegates approved several revisions to the 1990 canon related to the pledge or promise and commit clauses in August 2003, effective immediately.⁷⁰ The changes include a definition of “impartiality” that adheres to *White*: “‘impartiality’ denotes absence of bias or prejudice in favor of, or against, individual parties, classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”⁷¹ The pledge or promise clause has been combined with the commit clause to read: “A candidate for a judicial office shall not with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with impartial performance of the adjudicative duties of the office.”⁷² In addition, a new provision has been inserted that expands these speech prohibitions to all judicial duties, in

⁶⁷ 2002 M.T. 239, *74-75 (Mont. 2002)(Larson, D.J., specially concurring and dissenting).

⁶⁸ See Molly McDonough, *State Judicial Commission at a Standstill After Decision*, ABA JOURNAL E-REPORT (March 7, 2003).

⁶⁹ Telephone Interview with Eileen Libby, Associate Ethics Counsel, American Bar Association (August 23, 2003).

⁷⁰ *Id.*

⁷¹ ABA MODEL CODE OF JUD. CONDUCT, Terminology Section (amended 2003).

⁷² *Id.* Canon 5(A)(3)(d).

order to avoid the underinclusiveness issue raised by the *White* Court.⁷³

1. New York Federal and State Decisions

The federal district court in *Spargo* held that New York CJC's §§ 100.5(A)(1)(c)-(g) (provisions that limit the political activity of judicial candidates and sitting judges) and 100.5(A)(4)(a) (requirements for maintaining appropriate dignity during a campaign) were not narrowly tailored to serve a compelling state interest and were therefore "void as impermissible prior restraints upon the rights guaranteed by the First Amendment."⁷⁴ In *Spargo*, the New York State Commission on Judicial Conduct alleged that the plaintiff, a Town Justice subsequently elected to a Supreme Court position, violated various sections of New York's CJC.⁷⁵ The Commission charged Spargo with misconduct in connection with his campaign for the Supreme Court, such as offering items of value to induce votes on his behalf.⁷⁶ Among other charges, it also alleged that while serving as Town Justice, Spargo engaged in political activity, including demonstrating against Florida's recount process during the 2000 presidential election.⁷⁷ Spargo challenged the constitutionality of several provisions on First Amendment grounds, including §§ 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a).⁷⁸

Accepting the compelling interest of furthering judicial independence,⁷⁹ the *Spargo* court applied *White* to find that these sections' prohibitions on political activity were not narrowly

⁷³ See STANDING COMM. ON JUD. INDEPENDENCE, *supra* note 21, at 9 (referring to the insertion of Canon 3(B)(10)).

⁷⁴ *Spargo*, 244 F. Supp.2d at 92.

⁷⁵ *Id.* at 79-81. The plaintiff, Thomas J. Spargo, was charged with violating §§ 100.1, 100.2(A), 100.2(C), 100.3(E)(1), 100.4(D)(1)(a)-(g), and 100.5(A)(4)(a) of the CJC.

⁷⁶ *Id.* at 79.

⁷⁷ *Id.* at 80.

⁷⁸ *Id.* at 86.

⁷⁹ *Id.* at 87.

tailored.⁸⁰ The *Spargo* court reasoned that the prohibitions at issue were even broader than those of Minnesota’s announce clause since they precluded not just specific speech, but any participation in politics except for the judge’s own election campaign.⁸¹ It also noted that a judge must have participated in politics at some point in order to become a candidate, and that therefore a wholesale ban on political activity was overbroad.⁸² The court in *Spargo* also held that §§ 100.1 (upholding integrity and independence of judiciary) and 100.2(A) (avoiding impropriety and appearance of impropriety) were void for vagueness.⁸³ The Second Circuit Court of Appeals decided the matter on abstention grounds and did not reach the merits of the district court’s application of *White*.⁸⁴

On the state level, the Court of Appeals issued two significant decisions regarding judicial campaign speech and conduct in 2003. The court upheld the constitutionality of New York’s pledge or promise clause in *In re Watson*⁸⁵ and found that some of the political activity provisions struck by *Spargo* survived a First Amendment challenge in *Raab v. State Commission on Judicial Conduct*.⁸⁶

In *Watson*, Judge Watson had been removed from office by the Commission because of statements made while campaigning for city court judge where he declared that he would be pro-law enforcement and against criminal defendants.⁸⁷ He conveyed this campaign message by sending letters to law enforcement to elect him and “put a real prosecutor on the bench” who will

⁸⁰ *Id.* at 89.

⁸¹ *Id.* at 88.

⁸² *Id.* at 88-89.

⁸³ *Id.*

⁸⁴ 351 F.3d 65 (2d Cir. Dec. 9, 2003).

⁸⁵ 100 N.Y.2d 290 (2003).

⁸⁶ 100 N.Y.2d 305 (2003).

⁸⁷ *Watson*, 100 N.Y.2d at 296.

“work with the police, not against them.”⁸⁸ His published letters to a local newspaper also included statements asking for votes because as a past prosecutor, he had sent a message that drugs and crime would not be tolerated.⁸⁹ In other advertisements and published letters, he correlated the increase in local crime to the incumbents’ terms.⁹⁰ Finally, he made comments in newspaper articles that the city must establish a reputation for zero tolerance for crimes, that a city court judge was needed who would work with the local police department, and that a judge could use bail and sentencing to deter crime.⁹¹ The Court of Appeals found that Watson’s statements of intent to assist the police expressed a bias for law enforcement and against criminal defendants, and consisted of pledges to assist other branches of government.⁹²

After determining that Watson’s speech fell within the prohibitions of New York’s pledge or promise clause, the Court of Appeals assessed the constitutionality of the clause. Finding that *White* was inapplicable,⁹³ it held that the clause does not violate the First Amendment.⁹⁴ Unlike the announce clause, the pledge or promise clause does not prohibit judicial candidates from expressing their views.⁹⁵ Instead, it simply proscribes language that constitutes a pledge or promise of future conduct that compromises faithful and impartial performance of judicial duties.⁹⁶ The court reasoned that such a provision strikes an appropriate balance between the state’s interest in preserving the quality of its judiciary and the rights of

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 297.

⁹² *Id.* at 299.

⁹³ *Id.* at 301.

⁹⁴ *Id.* at 303.

⁹⁵ *Id.* at 302.

⁹⁶ *Id.* at 302-03.

candidates and voters.⁹⁷ Because other provisions of the CJC also prohibit conduct violative of the pledge or promise clause even outside of the campaign context,⁹⁸ the court held that this clause was narrowly tailored to serve the compelling interest of judicial impartiality⁹⁹ both in the sense of preventing actual and perceived party bias and furthering open-mindedness.¹⁰⁰

In *Raab*, the Court of Appeals upheld the constitutionality of several provisions of the CJC that restrict the political activity of candidates for judicial office. Supreme Court Justice Ira Raab was censured by the Commission on Judicial Conduct for improper political activity in connection with his campaign, among other things. He was found to have made an improper contribution to the Democratic Party, to have participated in a “phone bank” on behalf of a legislative candidate for the Working Families Party, and to have attended a Working Families Party candidate screening meeting.¹⁰¹ The Commission ruled that these activities violated § 100.5(A)(1) and, specifically, §§ 100.5(A)(1)(c)-(h) of the CJC.

Justice Raab argued that, under *White*, the restrictions on political activity found in the CJC provisions violated the First Amendment. The Court of Appeals disagreed, finding that “even applying strict scrutiny review, the rules are constitutionally permissible because they are narrowly tailored to further a number of compelling State interests, including preserving the impartiality and independence of our State judiciary and maintaining public confidence in New York State's court system.”¹⁰²

2. Other Key Federal and State Decisions

⁹⁷ *Id.* at 302.

⁹⁸ *Id.* at 303.

⁹⁹ *Id.* at 303.

¹⁰⁰ *See id.* at 202.

¹⁰¹ *Raab*, 100 N.Y.2d at 310.

¹⁰² *Id.* at 315.

On the federal level, the Eleventh Circuit in *Weaver v. Bonner* relied on *White* to declare unconstitutional a provision of the Georgia CJC that prohibited, among other speech, negligently-made false statements.¹⁰³ (The parallel New York provision, § 100.5(A)(4)(d)(iii), contains the “knowing” requirement and does not suffer from this infirmity.) In striking down the Georgia provision, the court adopted an expansive interpretation of *White*. It stated that *White* suggests that judicial elections and legislative or executive elections should be judged by the same First Amendment standard.¹⁰⁴ “We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns.”¹⁰⁵ The court also ruled that a prohibition on judicial candidates personally soliciting campaign contributions is an impermissible restriction on speech under the First Amendment.¹⁰⁶

In *Smith v. Phillips*, the district court applied *White* to hold the following Texas CJC canon unconstitutional:

a judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individuals’ judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.¹⁰⁷

In a brief opinion, the court found no distinction between Minnesota’s announce clause

¹⁰³ 309 F.3d 1312, 1319 (11th Cir. 2002) (discussing GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(d)).

¹⁰⁴ *Id.* at 1320-21.

¹⁰⁵ *Id.* at 1321.

¹⁰⁶ *Id.* at 1322 (discussing Canon 7(B)(2)).

¹⁰⁷ 2002 U.S. Dist. LEXIS 14913, *2-3 (W.D. Tex. 2002) (quoting the TEX. CODE OF JUD. CONDUCT Canon 5(1)).

struck by the *White* Court and this Texas provision.¹⁰⁸

In contrast to these federal court applications of *White*, the highest state court in Florida upheld the state's pledge or promise and commit clauses in *In re Kinsey*.¹⁰⁹ Florida's Judicial Qualifications Commission had found Judge Patricia Kinsey guilty of several violations stemming from her statements during an election campaign for the office of County Court Judge.¹¹⁰ The Supreme Court of Florida affirmed the Commission's findings regarding Kinsey's statements in campaign literature that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars;" comments in a radio interview that she would be in a "prosecution mode" as a judge; campaign efforts to portray herself as a pro-law enforcement judge; knowing misrepresentations in a campaign brochure; and publicizing information about defendants in two pending criminal cases in a manner that could impair the fairness and integrity of those proceedings.¹¹¹ Over Kinsey's First Amendment objections—in which she relied heavily on *White*—the court noted that Florida's CJC did not contain an announce clause.¹¹² Rather, Florida had "a more narrow canon" which prohibits judges and candidates for judicial office from making pledges and promises or statements that commit or appear to commit the candidate.¹¹³ Declining to apply *White*, the court found the pledge or promise and commit clauses to be prohibitions that are narrowly tailored to protect the state's compelling interests in "preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary" without unnecessarily

¹⁰⁸ *Id.* at *3.

¹⁰⁹ 842 So.2d 77, 87 (Fla. 2003), *cert. denied*, *Kinsey v. Florida Judicial Qualification Commission*, 124 S.Ct. 180, 157 L.Ed 2d 47 (2003).

¹¹⁰ *See id.* at 80-85.

¹¹¹ *Id.* at 87-91.

¹¹² *Id.* at 86-87.

prohibiting protected speech.¹¹⁴ Florida’s pledge or promise and commit clauses are identical to those of New York State.¹¹⁵

III. Constitutionality of Campaign Speech Regulations After *White*

A. Pledge or Promise Clause

The *White* case did not reach the question of the pledge or promise and commit clauses’ constitutionality. Comparing the announce clause to the pledge or promise clause, the court noted that Minnesota separately prohibited pledges or promises, and that this clause was not at issue in the case.¹¹⁶ It also suggested that campaign promises might present a greater threat to judicial open-mindedness because the candidate “when elected judge, will have a *particular* reluctance to contradict them.”¹¹⁷

Moreover, *White* may indicate that the First Amendment allows greater regulation of judicial campaigns than other types of campaigns. While the majority opinion in *White* noted that the distinction between judicial and legislative elections is not as great as described by Justice Ginsburg in her dissent, the Court nonetheless conceded the possibility of a difference

¹¹³ *Id.*

¹¹⁴ *Id.* at 22-23.

¹¹⁵ Georgia, Kentucky, Indiana, Ohio, and New York, among others, have stated that their pledge or promise and commit clauses are unaffected by *White*. STANDING COMM. ON JUD. INDEPENDENCE, *supra* note 28, at 8. *See also In re Dunleavy*, 2003 ME 124 (2003)(the Supreme Judicial Court of Maine upheld a prohibition in Maine's Code of Judicial Conduct, which prohibits a sitting judge from soliciting support for political candidates or political organizations; the context was an elected judge's attempt to run for the Legislature without resigning his judicial position, which is prohibited by the Maine Code. *White* and *Weaver v. Bonner* were distinguished); *Griffen v. Arkansas Judicial Discipline and Disability Commission*, 2003 Ark. Lexis 634 (2003)(the Supreme Court of Arkansas found that a canon prohibiting a judge from "consulting with..." a legislative body, "except when acting *pro se* in a matter involving the judge or the judge's interests" was not narrowly tailored, and did not give the judge fair notice of prohibited conduct; the Court quashed an admonition directed to a black judge for telling the Legislature's black caucus that they should block appropriations for the University of Arkansas because of the University's racist acts; the judge said he was speaking as an alumnus, and not as a judge).

¹¹⁶ *White*, 536 U.S. at 770.

¹¹⁷ *Id.* at 780 (emphasis in original).

between the two: “What we do assert, and what Justice Ginsburg ignores, is that *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny”¹¹⁸ Any regulation would still have to survive strict scrutiny, however. Conversely, *White* cannot be read to *mandate* equal First Amendment standards for judicial and other campaigns.

The Court of Appeals has confirmed these limitations on *White*. In *Watson*, the Court of Appeals found that *White* did not “compel a particular result” regarding a First Amendment challenge to the pledge or promise clause since only an announce clause was before the Supreme Court.¹¹⁹ The Court of Appeals also noted that the *White* Court itself distinguished the pledge or promise clause from the announce clause in its opinion.¹²⁰ In *Raab*, the Court of Appeals reasoned that *White* was “significantly distinguishable” from the review of political activity provisions presented in *Raab*.¹²¹ It interpreted *White* as failing to establish that “judicial candidates must be treated the same as non-judicial candidates or that their political activity or speech may not legitimately be circumscribed.”¹²² Thus, in both *Watson* and *Raab*, the Court of Appeals declined to extend the reasoning of *White* beyond the parameters of its review of the announce clause, or to necessitate equivalent First Amendment standards for judicial and other campaigns. This narrow construction of *White* is in accord with the Supreme Court of Florida’s reading of the case in *Kinsey*, where identical pledge or promise and commit clauses were at issue.¹²³

¹¹⁸ *Id.* at 783.

¹¹⁹ *Watson*, 100 N.Y.2d at 300

¹²⁰ *Id.*

¹²¹ *Raab*, 100 N.Y.2d at 313.

¹²² *Id.* at 312.

¹²³ *See* 842 So.2d 77.

White indicates that the pledge or promise clause will need to be able to withstand strict scrutiny. The New York Court of Appeals has stated that this clause is narrowly tailored to fulfill New York’s compelling state interests. The compelling state interests served by the provision include judicial impartiality, meaning both lack of actual and perceived bias regarding a party, and furthering open-mindedness and the appearance of open-mindedness.¹²⁴ The Court of Appeals underscored this concern in *Raab*: “the State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly a higher governmental interest than the State’s interest in the quality of its judiciary.”¹²⁵ This principle has been widely supported by the courts: “[t]he administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone’s concern”¹²⁶ The Second Circuit has also observed that “New York’s concern for the independence of its judiciary serves interests as fundamental to a constitutional democracy as those served by the Framers’ concern for the independence of Congress.”¹²⁷ The Court of Appeals in *Raab* and *Watson* asserted that the appearance of impartiality is equally as important as actual impartiality,¹²⁸ in part because of the state’s

¹²⁴ See *Watson*, 100 N.Y.2d at 302.

¹²⁵ *Raab*, 100 N.Y.2d at 313-314 (quoting *Matter of Nicholson v. State Comm’n on Judicial Conduct*, 50 N.Y.2d 597, 607-08 (N.Y. 1980)).

¹²⁶ *Bridges v. California*, 314 U.S. 252, 282 (1941); see also *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (discussing situations in which even the “probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable”); *Chisom v. Roemer*, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting) (“The word ‘representative’ connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense . . . the judge represents the Law—which often requires him to rule against the People.”); *Morial v. Judiciary Comm’n*, 565 F.2d 295, 302 (5th Cir. 1977) (“The state’s interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or persons is entitled to the greatest respect.”).

¹²⁷ *Signorelli v. Evans*, 637 F.2d 853, 861 (2d Cir. 1980); see also *Kamasinski v. Judicial Rev. Council*, 44 F.3d 106, 110 (2d Cir. 1994) (“The state’s interest in the quality of its judiciary . . . is an interest of the highest order.”).

¹²⁸ *Watson*, 100 N.Y.2d at 302. (citing *In re Duckman*, 92 N.Y.2d 141, 153 (N.Y. 1998)).

obligation to maintain public confidence in the system.¹²⁹ Courts have also broadly embraced this view, noting for example that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”¹³⁰

The Court of Appeals in *Watson* observed that the pledge or promise clause prohibits only speech that compromises the faithful and impartial performance of the duties of the office.¹³¹ Unlike speech that violates the announce clause discussed in *White*, speech that violates the pledge or promise clause outside the campaign context is also punishable under other rules.¹³²

B. The Commit Clause

In *White*, the Supreme Court explicitly noted that its analysis did not reach the issue of whether the announce clause as construed might be equivalent to the commit clause.¹³³ No post-*White* case has addressed the commit clause in isolation. The notion that a judge “commits” him or herself with respect to cases, controversies, or issues that are likely to come before the court can be seen as encompassed within the pledge or promise clause. While some may raise a concern that the “commit clause” could be viewed in the same vein as the announce clause that was struck down in *White*, the commit clause has not been of importance in recent actions by the Commission on Judicial Conduct, as statements by a sitting judge that commit or appear to commit him or her to rule a particular way may well render the judge subject to discipline under

¹²⁹ *Raab*, 100 N.Y.2d at 312.

¹³⁰ *Mistretta v. United States*, 488 U.S. 361, 407 (1989); *see also* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (quoting *In re Murchison*, 349 U.S. 133 (1955)) (“Justice must satisfy the appearance of justice”); *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (observing that a state may “properly protect the judicial process from being misjudged in the minds of the public.”).

¹³¹ *Watson*, 100 N.Y.2d at 302-303.

¹³² *Id.* at 303.

¹³³ *White*, 536 U.S. at 773 n.5.

other rules of the CJC.¹³⁴

B. The Feerick and ABA Recommendations

As noted above, the Feerick Commission Report would clarify the speech restrictions on judges and judicial candidates in a way that strikes an appropriate balance between free political speech and appropriate judicial conduct. The Commission follows the lead of a Working Group of the American Bar Association's Standing Committee on Judicial Independence, which drafted amendments to the ABA's Model Code of Judicial Conduct, meant to address concerns as to how, in light of *White*, states can effectively limit what they believed to be inappropriate judicial political campaigning. These amendments were adopted by the ABA's House of Delegates in August 2003.¹³⁵

The ABA changes collapse the commit clause into the pledges or promises clause, and redraft the language as follows:

A judge shall not, with respect to cases, controversies or issues that are likely to

¹³⁴ See, e.g., *In re Mulroy*, 94 N.Y.2d 652, 656, 658 (N.Y. 2000) (judge's record of attempting to influence dispositions, as well as other misconduct, subjected him to removal). See also, *In re La Cava*, 2000 Annual Report 123 (Comm. on Jud. Conduct, Sept. 16, 1999); Westlaw (1999 WL 994135), in which the Commission admonished a judge in 1999 for violating both the pledges and promises clause and the commit and appear to commit clause, for public campaign statements made by the judge on the abortion issue. Although the admonition was based on a stipulation between the respondent-judge and Commission counsel, the judge moved in U.S. District Court (S.D.N.Y.) to vacate the admonition in 2003, citing, *inter alia*, the Supreme Court decision in *White*. The District Court (McMahon, J) dismissed the petition, ruling that the Rooker-Feldman doctrine "bars federal district courts from overturning the decision of state disciplinary bodies that, like defendant Commission, hold hearings, take evidence and issue judicial disciplinary decisions that are then appealable as of right to the highest court of a state." *La Cava v. Commission on Judicial Conduct*, No. 03 Civ. 2040 (S.D.N.Y Dec. 11, 2003); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Whether LaCava's conduct would result in discipline were it to have occurred post-*White* is another matter. As Judge McMahon noted in a footnote: "If La Cava had stood his ground and pressed his own constitutional claim back in 1999, the principle of which he now seeks to take advantage might be known as the La Cava rule instead of the White rule." *La Cava v. Commission*, *supra*, p. 3 fn.

¹³⁵ This newly adopted language and the entire model Code are presently subject to review by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.

come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

A separate Canon makes clear that the same rule would apply to candidates for judicial office.

The Feerick Commission Report's approach to this question is substantially the same, except that it would break the clause in two, as follows:

A judge [or candidate] shall not:

- a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;
- b) make statements that commit the judge [or candidate] with respect to cases, controversies or issues that are likely to come before the court.

Both proposals effectively address a nettlesome issue posed by *White*, namely, the formulation of the “compelling state interest” that would justify restrictions on judicial speech. By focusing on “impartiality,” newly defined as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge,”¹³⁶ and by deleting the vague term “faithful” from the clause, the Feerick Commission and the ABA respond to *White*'s discussion of the compelling state interests at stake.

We find that the Feerick and ABA approaches represent a positive way for those considering changes to the Code of Judicial Conduct to approach any attempts to strengthen the Code in light of the recent explosion of case law. We also note that both the ABA and the

¹³⁶ ABA MODEL CODE OF JUD. CONDUCT, Terminology Section (amended 2003); Feerick Commission's proposed changes to Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, 22 NYCRR § 100.0 (Dec. 3, 2003). The Feerick Commission would also add definitions of “independent judiciary” and “integrity” as used in the Code.

Commission are considering further revisions, and one aspect which they might wisely address, with respect to judicial campaign speech, is whether the Code's language should be clarified to ensure that it encompasses statements related to a judge's administrative duties, not only "adjudicative" duties, so that a judicial candidate would not be permitted to "promise" favoritism in hiring decisions and the like.¹³⁷

IV. Constitutionality of Limitations on Political Activity of Judicial Candidates After *White*

The *White* decision also has called into question the constitutionality of the CJC's limitations on the political activity of judicial candidates. Several of these provisions have been held unconstitutional by lower courts and others are threatened. In New York, the Court of Appeals has held that the CJC's restrictions on the political activity of judicial candidates serve the state's compelling interest in promoting an impartial judiciary and public confidence in the courts and are narrowly tailored to those ends. The CJC attempts to maintain this balance by restricting a whole host of political activities. For example, candidates for judicial office are prohibited from engaging in partisan political activity, participating in political campaigns (other than their own), and attending political gatherings.¹³⁸ They may not solicit funds for or contribute to a political organization or candidate,¹³⁹ nor may they personally solicit funds for

¹³⁷ We would also note a divergence between the Commission, and the ABA, on the related issue of when campaign statements or other public statements should lead a judge to disqualify herself or himself in a proceeding. Both groups incorporate the current Code's "appear to commit" language in their disqualification provisions, a position we applaud. Both groups require disqualification when the judge, while a judge or a candidate, has made a public statement that *actually* commits the judge with respect to "an issue in the proceeding" or "the controversy in the proceeding." The ABA also would require disqualification when the statement "*appears* to commit" the judge, while the Commission proposes that the judge "may" disqualify himself or herself in this situation, upon application by a party. We take no position on this distinction. We also note that the "public statements" referenced by the Feerick Commission are limited to statements "not in the judge's adjudicative capacity," *i.e.*, judicial opinions are excluded. ABA Model Code as amended, Canon 3(E)(1); proposed amendment to 22 NYCRR §100.3(E)(1)(f) and (E)(2).

¹³⁸ 22 NYCRR §§ 100.5(A)(1)(c), (d), (g).

¹³⁹ *Id.* §§ 100.5(A)(1)(h).

their own campaigns.¹⁴⁰ They may, however, establish campaign committees to solicit and spend contributions and to manage their campaigns.¹⁴¹

These and other provisions of § 100.5(A) are designed to ensure that judges and candidates for judicial positions are divorced from partisan politics, and, moreover, are viewed by the public as being so separated. The need to separate the judiciary from political activity stems from the importance of both individual due process and the maintenance of the integrity of the judicial system as a whole. As the Court of Appeals has recognized, “litigants have a right guaranteed under the Due Process clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism.”¹⁴²

Where judges are elected, as in New York, it is likely that those seeking judicial office will have previously been active in partisan politics. Whether this is beneficial is currently a topic of debate, but, for purposes of constitutional analysis, it is a question of no importance. The Code permits candidates to make the transition from a political to a non-partisan environment and provides rules of conduct for a candidate to follow to achieve this objective. Significantly, it allows candidates who may be pressured by political parties to resist entreaties to be active in a partisan manner. Candidates are able to inform political leaders that the Code prohibits partisan activities and that the Code directs political leaders to allow their candidates to separate themselves from these activities. As such, it is a barrier that serves to assure those who seek judicial office that they can be independent of partisan politics and can demonstrate their

¹⁴⁰ *Id.* § 100.5(A)(5).

¹⁴¹ *Id.*

¹⁴² *Raab*, 100 N.Y.2d at 313.

independence to the voters. Weakening or eliminating these provisions of the Code would leave judicial candidates without any ability to resist the inevitable pressures from political leaders to support their parties' campaigns.

This Association, in its *amicus curiae* brief before the Second Circuit Court of Appeals in *Spargo*, argued that the strict scrutiny approach adopted in *White* should not even apply to restrictions on partisan political activity.¹⁴³ The brief maintained that prohibitions against incumbent judges and judicial candidates (i) engaging in partisan political activity other than their own campaign, (ii) participating in any political campaign or permitting a connection to a campaign, and (iii) attending political gatherings, are not content-based restrictions at all, and thus are not subject to strict scrutiny. The brief further argued that the prohibition against judges or judicial candidates endorsing other candidates or speaking on behalf of a political organization, while content-based, relate to actions with regard to others and thus, in addition to being narrowly tailored to serve a compelling state interest, were not at all the issue in *White*.

The New York Court of Appeals in *Raab* did not parse the analysis in this way, but rather held that all of the CJC political activity provisions are narrowly tailored to serve a compelling state interest, and thus meet the demands of strict scrutiny. The Court had declared that “[t]here can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary.”¹⁴⁴ The CJC provisions prevent judicial candidates from becoming overly entangled

¹⁴³ In an *amicus curiae* brief to the Court of Appeals in the *Raab* and *Watson* cases, the Brennan Center for Justice at NYU School of Law argued that “Both this Court and the United States Supreme Court have recognized that strict scrutiny does not apply to regulations that seek to ensure evenhanded application of the law by judges and other officials, even when the regulations burden the officials’ speech and associational rights to some extent.” Brief of Brennan Center for Justice at NYU School of Law et. al as Amici Curiae at 4, *Raab*, 100 N.Y.2d 290 (2003), and *Watson*, 100 N.Y.2d 305 (2003), (citing *Golden v. Clark*, 76 N.Y.2d 618, 628-30 (1990) and *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564-65 (1973)).

¹⁴⁴ *In re Nicholson v. State Comm’n on Judicial Conduct*, 409 N.E.2d 818, 822 (N.Y. 1980).

in partisan politics, avoiding the potential for undue influence that may accompany it.

Moreover, the CJC provisions are narrowly tailored to satisfy a number of competing interests. Because it has chosen to elect its judges, the state must balance its interests in a fair and impartial judiciary with “the First Amendment rights of judicial candidates and voters.”¹⁴⁵ New York’s rules “distinguish between conduct integral to a judicial candidate’s own campaign and activity in support of other candidates or party objectives,”¹⁴⁶ and are much more restrictive in regard to the latter. They allow judicial candidates the freedom to stage their own campaigns while preventing them from engaging in other partisan activity. As the Court of Appeals has recognized,

[p]recisely 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 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.¹⁴⁷

While the Court of Appeals has understood the delicate balance maintained by the CJC’s approach, recent federal court decisions have demonstrated the threat to regulations of political activity posed by an unduly expansive interpretation of *White*. Applying *White*, the district court in *Spargo*¹⁴⁸ found §§ 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) unconstitutional as impermissible prior restraints on judicial candidates’ First Amendment rights.¹⁴⁹ The *Spargo* court noted that the rules regulating political activity “prohibit judges and judicial candidates from any political

¹⁴⁵ *Raab*, 100 N.Y.2d at 315.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 316.

¹⁴⁸ *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 244 F.Supp.2d 72 (N.D.N.Y. 2003).

¹⁴⁹ *Id.* at 92. The court also held §§ 100.1 and 100.2(A) void for vagueness.

activity except their own judicial campaign,”¹⁵⁰ but it failed to understand fully the significance of that distinction. The court did not give credence to the argument that such prohibitions help maintain the independence of the judiciary and suggested that “if a judge were influenced, or biased, against or for a party to a proceeding, for political reasons or otherwise, the proper consequence would be recusal.”¹⁵¹ This view overstates the degree to which judges may be willing to admit to or even recognize their own biases. It also ignores the more important fact that the public’s perception of the judiciary is affected by judges’ mere participation in partisan political activity, regardless of whether they later recuse themselves.

In another decision, *Weaver v. Tinkler*,¹⁵² the Eleventh Circuit declared unconstitutional a provision of the Georgia Code of Judicial Conduct that was functionally equivalent to New York’s § 100.5(A)(5), which prevents judicial candidates from personally soliciting funds but allows them to establish campaign committees. Again the court applied the *White* test and found that the “provision fails strict scrutiny because it is not narrowly tailored to serve Georgia’s compelling interest in judicial impartiality.”¹⁵³ The court found that

even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate’s agent to seek these contributions and endorsements on the candidate’s behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support. [The challenged provision] thus fails strict scrutiny because it completely chills a candidate’s speech on these topics while hardly advancing the state’s interest in judicial impartiality at all.¹⁵⁴

However, campaign committees can play a valuable role in preventing corruption and the

¹⁵⁰ *Id.* at 88.

¹⁵¹ *Id.*

¹⁵² 309 F.3d 1312 (11th Cir. 2002).

¹⁵³ *Id.* at 1322.

¹⁵⁴ *Id.* at 1322-23.

appearance of corruption. The interest in deterring corruption or avoiding the appearance of corruption is a compelling governmental interest, as the Supreme Court affirmed in the context of reporting and disclosure requirements in *Buckley v. Valeo*.¹⁵⁵ Although allowing persons to run for judicial office does open the door to conduct that could undermine this compelling state interest in ways that an appointed judiciary system would not, we suggest that a state has the right and authority to pursue this goal to the maximum extent that is compatible with judicial elections.

The mandatory use of campaign committees in lieu of direct campaign solicitations appears to be narrowly tailored to serve that interest, for there are good reasons to believe the candidate will be less beholden if solicitations are performed by an agent rather than directly by the candidate. As the Florida Judicial Qualifications Commission argued in an *amicus* brief in *Weaver*,

[d]irect, personal solicitation by a judge or judicial candidate is fraught with the danger of undue pressure and the promise of favors or threats of reprisal. A lawyer directly solicited by a judge before whom that lawyer regularly appears well may feel undue pressure to make a contribution or express support. The possibility of such a solicitation while a major case or motion is pending before that judge creates obvious concerns and could lead to doubt about the eventual decision.¹⁵⁶

In addition, the Eighth Circuit upheld a prohibition on personal solicitation similar to § 100.5(A)(5) in the predecessor case to *White*. In *Republican Party of Minnesota v. Kelly*,¹⁵⁷ the court observed that

[j]udges, more than officeholders in other branches of government, risk the appearance that those who contribute to their campaigns can impermissibly

¹⁵⁵ 424 U.S. 1, 66-67 (1976). See also *McConnell v. FEC*, 124 S.Ct. 619 (2003).

¹⁵⁶ Brief of Florida Judicial Qualifications Commission as *Amicus Curiae* at 4, *Weaver*, 309 F.3d 1312 (11th Cir. 2002).

¹⁵⁷ 247 F.3d 854 (8th Cir. 2001), *rev'd on other grounds*, 536 U.S. 765 (2002).

influence governmental processes. When judges obtain funds from a group that has an interest in the outcome of litigation, such as the plaintiffs' or defendants' bar, judges can appear beholden to that group for their accession to office, creating the expectation that the judges will favor their benefactors accordingly. Even if judges receive contributions from a broad cross-section of persons and interests, the appearance of impropriety hangs over them if they adjudicate cases in which a litigant or counsel has contributed, or refused to contribute, to their campaign.¹⁵⁸

Though *White* reversed *Kelly*'s ruling with regard to the announce clause, it left the lower court's ruling on the campaign finance provision undisturbed.

It is of utmost importance that lawyers, judges, legislators, and citizens understand the importance of the CJC's restrictions on the political activity of judicial candidates. They are narrowly tailored to serve New York's compelling interest in promoting an impartial judiciary and public confidence in the legal system. We strongly urge courts at the state and federal levels to read *White* as applying narrowly to the announce clause, rather than as heralding the beginning of the end for valid—and invaluable—limitations on political activity by judicial candidates.

V. Conclusion

The Supreme Court's decision in *White* has already had far-reaching effects on the law of judicial elections. If read broadly, however, *White* could threaten the delicate balance that New York and other states have struck between preserving judicial independence and maintaining an elective judiciary. Some may even see further reason for moving away from an elective system. Indeed, as Justice O'Connor observed, the state's strong interest in preserving the impartiality of

¹⁵⁸ *Id.* at 883 (citations omitted).

its judiciary is ultimately compromised by an elective system.¹⁵⁹ Indeed, “[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”¹⁶⁰

So long as New York continues to have judicial elections, the State must have an effective way of limiting judicial campaigning and political activity so as to ensure the impartiality of the bench and the integrity of the judicial system. We agree with the ABA Standing Committee on Judicial Independence that *White* “can and should be read narrowly, leaving the door open for the drafting of campaign ethics restrictions that will pass constitutional muster.”¹⁶¹ The CJC rules are in the main effectively tailored to enhance impartiality and judicial independence. To the extent that the CJC could be strengthened in light of recent case law, the Feerick Commission Report and the ABA amendments have merit and deserve to be considered by drafters of any revisions to the code as a productive approach to restoring public confidence in the judiciary.

¹⁵⁹ *White*, 536 U.S. at 788 (O’Connor, J., concurring).

¹⁶⁰ *Id.* at 792.

¹⁶¹ See STANDING COMM. ON JUD. INDEPENDENCE, *supra* n.28, at 7.