IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

FLORIDA FAMILY POLICY COUNCIL,

Plaintiff,

v. CASE NO. 4:06cv395-RH/WCS

THOMAS B. FREEMAN et al.,

Defendants.

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ORDER OF DISMISSAL

The issue in this action is the validity of a provision of the Florida Code of Judicial Conduct requiring the disqualification of a judge whose impartiality might reasonably be questioned, including on grounds that, while a judge or candidate for judicial office, the judge made or appeared to make a commitment with respect to the parties or issues or controversy in the proceeding. I conclude that the provision is constitutional and grant defendants' motion to dismiss.

I

Judges on Florida's circuit courts—the state's trial courts of general jurisdiction—are elected to six year terms. They run in nonpartisan elections in

circuits that typically encompass several counties.

Prior to the September 2006 election, plaintiff Florida Family Policy Council, Inc., sent a questionnaire to circuit judge candidates around the state. Plaintiff intended to tabulate and publish the results, including on the internet. Before that could be done, the Florida Judicial Ethics Advisory Committee issued an opinion on whether judicial candidates appropriately could respond to questionnaires of this type. The opinion, which under Florida law is not binding, said a candidate could respond so long as (1) the candidate did not promise to rule in a certain way in a case, (2) the candidate acknowledged the obligation to follow binding legal precedent, (3) the candidate did not endorse any other candidate or the platform of any political party, and (4) any comment on past judicial decisions was analytical, informed, respectful, and dignified. The opinion did not definitively resolve the issue of whether judges who responded to these questions would be required to disqualify themselves in cases that might come before them. In response to the opinion, plaintiff modified and redistributed its questionnaire, advising candidates that responses to the original questionnaire would not be used.

The modified questionnaire began with a boldface disclaimer apparently intended to comply with the requirements of the advisory opinion:

> By answering and signing this Questionnaire, you warrant that you understand that, as a judge, your decisions will follow binding precedents and that *your answers do not constitute a promise to rule*

> *in a certain way in a case*. You are free to offer further explanations of your answers on this or in a separate document, and your comments will be made available. Any comments should be analytical, informed, respectful, and dignified. *See* Florida Supreme Court Judicial Ethics Advisory Committee Opinion, No. 06-18 (August 7, 2006), provided with this Questionnaire.

Complaint, Ex. 8, at 2 (Document 1, ex. 11, at 2) (initial emphasis added).

The questionnaire asked for personal information (for example, marital status, number of children, military service, involvement in and contributions to charitable and religious organizations); asked which justices of the United States and Florida Supreme Courts best reflected the candidate's judicial philosophy; and asked the candidate to agree or disagree with various statements, some purportedly describing the holdings of specific cases. An example of a statement with which the candidate was asked to agree or disagree was, "The Florida Constitution recognizes a right to same sex marriage." *Id.* An example of a question addressing a specific case was this:

> *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), held that Florida's educational voucher program (the "Florida Opportunity Scholarship Program") violated the Florida Constitution because it "diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Florida Constitution for the State to provide for the education of Florida's children." Do you agree with the reasoning of *Bush v. Holmes*?

Complaint, Ex. 8, at 3 (Document 1, ex. 11, at 3).

The questionnaire afforded a candidate five responses to questions of this

type: agree, disagree, undecided, decline to respond, refuse to respond. A footnote to the "decline to respond" choice defined this response as indicating the candidate would have answered but believed doing so would trigger an obligation, under the canon now at issue, to disqualify "in any proceeding concerning this answer." *Id*., at 3. A substantial number of candidates chose the "decline to respond" option for some or all of the statements. Other candidates said they agreed or disagreed with various statements.

Plaintiff filed this action asserting the canon at issue is unconstitutional on its face and as applied to the modified questionnaire. Defendants are members of the Florida Judicial Qualifications Commission, the body with authority to initiate disciplinary proceedings against Florida judges, including for a judge's failure to disqualify when required by the Code of Judicial Conduct.[1] Defendants have moved to dismiss the complaint.[2]

II

The challenged canon provides in relevant part:

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[1] Plaintiff originally named as additional defendants certain attorneys employed by the Florida Bar, the entity that may take disciplinary action against Florida attorneys. Plaintiff voluntarily dismissed its claims against these defendants.

[2] The motion raises not only the merits (as addressed in this order) but also procedural grounds that were denied in an earlier order, including absence of a case or controversy, lack of standing, abstention doctrines, and ripeness.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . . .
>
> (f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:
>
> (i) parties or classes of parties in the proceeding;
>
> (ii) an issue in the proceeding; or
>
> (iii) the controversy in the proceeding.

Florida Code of Judicial Conduct, Canon 3E(1).

Impartiality, within the meaning of the canon, "denotes 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." Florida Code of Judicial Conduct, Definitions.

When properly interpreted in light of this definition of impartiality, Canon 3E(1) requires a judge's disqualification in two situations. The first is when an objectively reasonable person might question whether the judge is free from bias or prejudice in favor of or against particular parties or classes of parties. Plaintiff takes no issue with this requirement and could not reasonably do so. Few if any would contend a judge should sit in a case in which a reasonable person might

question whether the judge is biased in favor of or against a party, as this standard is routinely interpreted and applied.

The second situation in which Canon 3E(1) requires a judge's disqualification is when an objectively reasonable person might question whether the judge can "maintain[] an open mind in considering issues that may come before the judge." Florida Code of Judicial Conduct, Definitions. As an example of a situation requiring disqualification under this standard, Canon 3E(1)(f) lists the making of a public statement that commits, or appears to commit, the judge with respect to an issue or the controversy in the proceeding. Plaintiff asserts that bias with respect to *issues*, as opposed to bias with respect to *parties*, is not a basis for a judge's disqualification, and that by chilling a candidate's free speech, the canon contravenes the First Amendment.

It is true, as plaintiff asserts, that judges often have opinions, including on issues that come before them, and that the fact that a judge has opinions is not alone a basis for disqualification. As the United States Supreme Court has said,

> A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one

> another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion). Indeed, 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. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid*.

Republican Party v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

Based in part on this reasoning, the Court in *White* struck down a prohibition on statements by judicial candidates expressing their opinions on issues that might come before them. The Court said the state's interest in maintaining "impartiality" in the sense of not having opinions, or maintaining the "appearance" of impartiality in this sense, was not a compelling state interest sufficient to justify the suppression of candidates' free speech.

But Florida does not prohibit judicial candidates from having or even expressing opinions, including on issues that might come before them. All the canon at issue requires is the disqualification of a judge if a reasonable person might question the judge's ability to keep an open mind. Addressing a specific application of this principle, the canon requires disqualification if the judge in a proceeding, while a candidate or judge, made a public statement that commits or appears to commit the judge on an issue or the controversy in the proceeding.

Merely announcing a position is not the same as making a commitment, as all parties to this proceeding seem to agree.

Plaintiff makes no assertion that judicial candidates have a right to commit themselves, that is, to pledge or promise rulings they will make on specific issues. And whether or not candidates have any such right, they clearly have no right to sit on cases in which they have made such commitments. Canon 3(E)(1), including subpart (f), prohibits speech not at all, and burdens speech only a trifle, allowing a judge to keep the same job at the same pay and to perform the same type of work with the same perquisites while giving up only the right to preside over cases (presumably few if any) in which the judge reasonably appears not to have an open mind. A judge has no First Amendment right to sit in such cases, and any right plaintiff has to hear speech of this type clearly does not encompass a right to have judges sit on cases in which they have made commitments. There is no right to a biased judge, nor to a judge with a closed mind.

To the contrary, a state has a compelling interest in providing suitably impartial, open minded judges who will rule based on the evidence and governing law, not based on commitments made in advance. Florida's disqualification provision thus survives strict scrutiny.

Nothing in *White* is inconsistent with this conclusion in any way. To the contrary, Justice Kennedy, whose vote was critical to the outcome, made clear that

the Court was *not* addressing the possible disqualification of a judge based on comments made during a campaign. Thus, he said, a state "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." *Republican Party v. White*, 536 U.S. at 794 (Kennedy, J., concurring). That is all Florida has done.

The Florida disqualification provision thus is constitutional. And this conclusion accords with the weight of lower court authority. Most courts have upheld disqualification provisions against constitutional attacks of the kind advanced by plaintiff in the case at bar. *See, e.g., Ind. Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879, 886-87 (N.D. Ind. 2006); Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); *Alaska Right to Life Political Action Comm. v. Feldman,* 380 F. Supp. 2d 1080, 1083-84 (D. Alaska 2005); *N.D. Family Alliance, Inc. v. Bader,* 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005); *Family Trust Found., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 705-11(E.D. Ky. 2004).[3]

[3] To be sure, one court has concluded that although a state can require disqualification of a judge who "commits" on an issue or controversy, a state cannot require disqualification of a judge who merely "appears to commit." *See Duwe v. Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007). This latter provision, the court said, is unconstitutionally vague. *Id.* But disqualification standards long have turned on appearances. Thus, for example, federal judges must disqualify themselves not only when they are partial, but when their impartiality "might reasonably be questioned." Code of Conduct for United States Judges Canon 3C(1). The suggestion that a state cannot tie disqualification to

III

A cornerstone of due process is a judge with a mind sufficiently open to base his or her decision on the evidence and governing law. A judge who makes an advance commitment with respect to an issue or controversy—or who reasonably appears to commit in advance—has no business deciding the issue or controversy. The provision of the Florida Code of Judicial Conduct requiring disqualification in these circumstances is constitutional. Accordingly,

IT IS ORDERED:

Defendants' motion to dismiss (document 25) is GRANTED. The clerk shall enter judgment stating, "This action is dismissed with prejudice." The clerk shall close the file.

SO ORDERED this 11th day of September, 2007.

s/Robert L. Hinkle
Chief United States District Judge

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reasonable appearances is simply wrong.