ENDORSEMENT CLAUSES IN A POST-*WHITE* LEGAL SYSTEM: WHY THESE RESTRICTIONS DO NOT VIOLATE A JUDICIAL CANDIDATE'S FIRST AMENDMENT RIGHT TO FREE SPEECH

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I. INTRODUCTION

John, a prominent and respected lawyer in Georgia, has taken the advice of his colleagues and entered the race for associate justice on the Georgia Supreme Court. Meanwhile, the Georgia gubernatorial election campaign is underway, and David and Rebecca have emerged as the leading candidates for the Democratic Party and Republican Party, respectively. Though each of the three candidates is participating in a Georgia election with the hope of becoming a top official in the state government, certain rules apply to John that do not apply to David and Rebecca.[1] Their campaigns, therefore, share few similarities.

For example, David and Rebecca tour the state. David speaks at numerous events sponsored by the Democratic Party in Atlanta, Athens, Savannah, Macon, and other locations throughout the state. Rebecca does the same at Republican events across Georgia. When David's campaign is the spotlight on the local news, a "D" appears next to his name, and when Rebecca's progress is highlighted, her name appears before an "R." The two candidates give television interviews, press conferences, and public appearances, during which they openly and fervently express their views on issues currently dominating Georgia politics. David promotes the new healthcare plan, calls for more lenient immigration laws, and expresses his intent to raise taxes for the wealthy to stimulate the economy. Rebecca, on the other hand, admonishes universalized health care, wants stricter laws regarding illegal immigrants, and advocates for tax cuts to increase spending and revitalize the economy. The two publicly debate to solidify and provide support for their stances on all major issues for the benefit of the voters. In addition, during his campaign, David whole-heartedly expresses his support for his fellow Democrat, Danielle, a candidate for the Georgia Senate. He fully participates in her campaign, and she fully participates in his. Likewise, Rebecca endorses Robert, a Republican candidate running in the Seventh District of Georgia. She promotes his

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[1] *See* Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1400–01 (2003) (discussing certain provisions regarding judicial elections that are "unique to the judiciary").

campaign in most of her interviews and expresses her belief that he is the most worthy candidate for the office.

By contrast, Georgia law prohibits John—our judicial candidate—from participating in many of the aforementioned activities, which are expected in political races.[2] Like David and Rebecca, John tours the state, makes public appearances and distributes campaign materials. However, despite John being a lifelong member of the Republican Party, he cannot express his disdain for the new healthcare plan, lenient immigration laws, or tax increases because he may encounter these issues as a member of the Georgia Supreme Court.[3] He cannot even hold himself out as a leader of the Republican Party.[4] Moreover, John is prevented from endorsing Rebecca and Robert's candidacies, speaking at party events, or opposing David and Danielle's candidacies.[5] The Georgia Code of Judicial Conduct prohibits all of these activities. If John ran for office in another state, these actions would likely still be precluded because most state codes contain similar provisions.[6]

Since federal judges do not assume office by election, John would engage in different strategies if he wished to sit on the federal bench.[7] In the federal system, the President appoints judicial officials for life, subject to legislative approval.[8] In the state court system, though, the notion of the election as a method of choosing judges has been in place since the early days of the

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[2] *See generally* GA. CODE OF JUDICIAL CONDUCT Canon 7 (2004).

[3] *See id.* Canon 7(B)(1)(b) (precluding a judicial candidate from stating how he would rule regarding "issues likely to come before the court").

[4] *Id.* Canon 7(A)(1)(a) (prohibiting a judicial candidate from "hold[ing] himself or herself out as a leader . . . in a political organization").

[5] *See id.* Canon 7(A)(1)(b) (noting that a judicial candidate cannot "make speeches for a political organization or candidate or publicly endorse a candidate for public office").

[6] *See* Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 181–82 (2004) (explaining that almost all states with judicial elections impose far more restrictions on judicial candidates than executive or legislative candidates).

[7] *See* Jessica Gall, *Living With* Republican Party of Minnesota v. White*: The Birth and Death of Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97, 101 (2008) (noting that federal judges have always been appointed).

[8] *See id.* at 101–02 (discussing the history of the federal appointment system in comparison to the state election system).

United States.[9] By 1860, nineteen of twenty-one states had adopted some form of judicial election.[10] The movement for judicial elections was "led by moderate lawyer-delegates to increase judicial independence and stature" with the goal of establishing "a judiciary 'free from the corrosive effects of politics and able to restrain legislative power.' "[11]

Today, thirty-nine of fifty states employ some form of judicial election,[12] resulting in "[n]ine out of ten American judges stand[ing] for election."[13] In compliance with the original reformers' goal of restraining legislative power, the states that have adopted the election process have done so with "provisions[ ] unique to the judiciary."[14] For example, thirty-seven states subject only members of the judiciary to both "impeachment and special disciplinary process"; thirty-three states require experience or training for judges, but not for those elected to the executive or legislative branch; and twenty-five states provide that judges' salaries cannot be reduced mid-term.[15] These examples provide some insight into the wide spectrum of provisions exclusive to the judiciary the thirty-nine states have adopted. The specific provisions explored in this Note are those that restrict the conduct and speech of judicial candidates.

Restrictive provisions only applicable in state judicial elections are justified based on the idea that an inherent difference exists between the judicial branch and the other branches.[16] The judicial

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[9] Schotland, *supra* note 1, at 1399 (noting that judicial elections were first adopted by Georgia localities in 1789 and ultimately by the State of Georgia in 1812).

[10] *See id.* at 1399–1400 (explaining that most states adopted a judicial election process between 1846 and 1860).

[11] *Id.* at 1400 (quoting Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 44 HISTORIAN 337, 338–39 (1983)).

[12] *Id.*; *see also* Gall, *supra* note 7, at 97 (commenting that thirty-nine states use varying forms of judicial elections).

[13] *My Judge Is a Party Animal*, ECONOMIST, Jan. 1, 2005, at 20.

[14] Schotland, *supra* note 1, at 1401 ("These thirty-nine states have recognized that any effort to treat judicial elections like others would not further their purpose of adopting the popular election of judges, but would undermine the judiciary's independent role").

[15] *See id.* at 1400–01 (providing a number of examples of the provisions many states have adopted that apply only to those elected to the judicial branch).

[16] *See* Briffault, *supra* note 6, at 227–28 (noting that the difference between judicial function and legislative and executive functions is a key factor in considering the extent of restrictions).

branch is rooted in impartiality whereas the other branches are intended to be "political."[17] Public office holders or candidates like David and Rebecca affiliate themselves with a party and make decisions under the influence of their respective party's views. Alternatively, judges are obligated to uphold and interpret the law in a disinterested manner.[18] This distinct judicial duty is a critical and essential check on the political branches.[19] Therefore, in order to ensure that each branch performs its obligations and fulfills its purposes, distinct provisions govern judicial candidates like John that do not apply to political candidates like David and Rebecca.[20]

The United States Supreme Court decision in *Republican Party of Minnesota v. White* challenges this dichotomy. In *White*, the Court held that Minnesota's announce clause—which prohibited a judicial candidate from declaring his stance on political issues—was an unconstitutional violation of the First Amendment.[21] If the Court chooses to broadly interpret *White*'s holding, this case may significantly expand what John can do and say during his campaign in Georgia. To date, *White* has been applied narrowly, only allowing judicial candidates to announce their position on hot political topics as part of their right to free speech. This recent decision raises a number of issues, including whether impartiality in judicial elections still exists. If John can announce how he feels about healthcare, taxes, immigration, or other "big" issues, he might also be announcing, albeit implicitly, his affiliation with the Republican Party. Loyalty to a party would strip his campaign of impartiality and bring it into the political sphere.

Would his campaign be impartial if, instead of attending Republican gatherings and announcing his views on debated legal

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[17] *See* Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) ("There is a critical difference between the work of the judge and the work of other public officials.").

[18] *See id.* at 804, 806 (Ginsburg, J., dissenting) (observing that the role of a judge is to "neutrally apply[ ] legal principles" and that judges "are not political actors").

[19] *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 931 (2003) (discussing how judicial review serves as a check on legislative power).

[20] *See* Schotland, *supra* note 1, at 1400 (commenting on the existence of certain provisions "designed to limit the potentially disruptive consequences of popular election," which apply only to the judiciary).

[21] 536 U.S. at 788.

topics, John expresses his support for Rebecca in the gubernatorial race? In light of the Court's holding in *White*, the constitutionality of provisions prohibiting a judicial candidate from endorsing a candidate for public office is unclear.[22] This Note addresses that issue.

First, this Note discusses the background and effects of *White*'s holding, as well as the haziness of the legal regime governing judicial codes in a post-*White* world. Second, this Note analyzes why the inherent differences between the political branches and the judicial branch warrant separate, more stringent rules for judicial candidates. Because the state judiciary has an obligation to refrain from partisan affiliations, unlike the legislative and executive branches, stricter provisions may apply to keep such biases at bay. Third, this Note discusses the difference between the interests announce clauses and endorsement clauses implicate: namely, announce clauses prohibit speech regarding issues, while endorsement clauses prohibit speech regarding partisan affiliation. Thus, *White* is not binding on the latter category. Finally, this Note applies the strict scrutiny test to endorsement clauses and shows that they are narrowly tailored to further compelling state interests. To put it plainly, endorsement clauses are not violations of judicial candidates' First Amendment rights.

II. BACKGROUND

A. THE HISTORICAL DEVELOPMENT OF STATUTORY RESTRAINTS ON JUDICIAL CANDIDATES' SPEECH AND CONDUCT

Provisions restricting speech and conduct by judicial candidates are an essential, yet controversial, form of judicial restraint.[23] This type of statutory restriction was first introduced in 1924 in the American Bar Association's (ABA) Canons of Judicial Ethics,

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[22] To distinguish announce clauses from these endorsement clauses, announce clauses prohibit a candidate from stating his stance on political issues, whereas endorsement clauses prevent a judicial candidate from endorsing political candidates' campaign.

[23] *See* Bradley S. Clanton, *Suppressing Speech in Judicial Elections: How the Canons of Judicial Ethics Abridge the Freedom of Speech of Judges and Candidates for Judicial Office*, 21 MISS. C. L. REV. 267, 267 (2002) (noting that ethical rules based on the ABA's 1972 Code of Judicial Conduct or the 1990 Model Code of Judicial Conduct prohibit judicial candidates from commenting on their political viewpoints).

setting forth theoretical examples and suggestions to govern judicial ethics.[24] The 1972 Code of Judicial Conduct, which was designed to be enforceable (unlike its 1924 counterpart), further elaborated and effectively expanded these restrictions by incorporating specific provisions governing a judicial candidate's conduct and speech in Canon 7.[25] The ABA included Canon 7 for the purpose of maintaining the "appearance of impartiality" central to the role of the judiciary.[26] Although the committee that promulgated the 1972 Code of Judicial Conduct believed impartiality and elections rarely coexist,[27] the drafters noted that "Canon 7 was included 'not only to set ethical minimums, but also to upgrade the campaigns for elective judicial offices.' "[28]

When the ABA amended the 1972 Code and published the 1990 Model Code of Judicial Conduct, it preserved much of Canon 7 in what became Canon 5.[29] In this updated version, the ABA let the former "pledges and promises clause"[30] stand, but replaced the broad "announce clause" with an attempt at a more specific provision,[31] prohibiting justices and judicial candidates from voicing their views on "cases, controversies, or issues" likely to be encountered during their term.[32] The ABA released yet another

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[24] *See id.* at 268 ("The first attempt to regulate the speech and conduct of judges occurred in 1924 . . . .").

[25] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972) (listing the activities considered inappropriate for a judge or judicial candidate to engage in while campaigning); *see also* Clanton, *supra* note 23, at 269 (discussing the development of Canon 7 of the 1972 Code of Judicial Conduct and contrasting it with the 1924 Canons of Judicial Ethics).

[26] Clanton, *supra* note 23, at 269.

[27] *Id.*

[28] *Id.* (quoting E. Wayne Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 797 (1972)).

[29] *Id.* at 270 ("[T]he pledges and promises clause was left essentially unchanged."); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990) (restricting judges' and judicial candidates' speech and conduct).

[30] "A candidate for judicial office . . . shall not . . . make pledges or promises of conduct in MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1990).

[31] The language of the 1972 Model Code prevents a candidate form "announc[ing] his views on disputed legal or political issues." MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972). The 1990 Model Code reworded this prohibition, barring a candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." MODEL CODE OF JUDICIAL CONDUCT Canon 5(B)(3)(d)(ii) (1990).

[32] Clanton, *supra* note 23, at 270 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990)).

version of the Model Code of Judicial Conduct in 2007.[33] In this version, the restrictions placed on judges and judicial candidates appear in Canon 4 and are much more relaxed, allowing candidates more freedom during their campaign to associate with political parties and participate in other campaigns.[34]

Despite their differences, a prohibition on judicial candidates' involvement in partisan activity is the common thread through each version of the Model Code.[35] Examples of such partisan activity "include holding office in a political party, publicly endorsing or opposing another candidate for public office, making speeches for a political party, or soliciting funds for or making contributions to a political party."[36] Notably, in each version of the Model Code, a judicial candidate is prohibited from publicly endorsing another candidate for public office.[37] For instance, the current edition as amended in 2010 explicitly says: "Except as permitted by law, . . . a judge or a judicial candidate shall not . . . publicly endorse or oppose a candidate for any public office."[38] The intent behind this ban is similar to the intent behind the other restrictive provisions in that its purpose is to ensure the perception of impartiality of judicial elections.[39] Currently, many states accept the ABA's approach and prohibit such endorsements in their respective state laws.[40]

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[33] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4 (amended 2010) (outlining the restrictions on speech and conduct for judges and judicial candidates). The most current edition of the Model Code of Judicial Conduct is substantially the same as the 2007 version. Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 262 (2011).

[34] *See id.* (prohibiting certain categories of speech and conduct for judges and judicial candidates). For examples of the relaxation of the standards as opposed to the 1990 and 1972 versions, see MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.2 (amended 2010).

[35] MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1 (amended 2010); MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990); CODE OF JUDICIAL CONDUCT Canon 7 (1972).

[36] Briffault, *supra* note 6, at 228 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 5(B) (1990)).

[37] MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(b) (1990); CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(b) (1972).

[38] MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(3) (amended 2010).

[39] *See* Clanton, *supra* note 23, at 269 (citing the ABA's stated purpose in drafting the Code, which was to "upgrade" the judicial election process and promote impartiality).

[40] For examples of other state laws prohibiting the endorsement of candidates for public office by a judicial candidate, see, e.g., ARIZ. CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(3) (2009); WYO. CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(3) (2009).

B. THE SUPREME COURT DECIDES *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Despite the long influence the Model Code's restrictions have had on the judiciary, courts have recently called into question the constitutional validity of such provisions. In 2002, the United States Supreme Court addressed the constitutionality of the announce clause in Minnesota's Code of Judicial Conduct.[41] Minnesota's announce clause barred judicial candidates from "announcing their views on disputed legal or political issues," mirroring the 1972 Model Code's announce clause.[42] Although the ABA replaced the 1972 version with a more narrow and specific provision in the 1990 Code,[43] Minnesota retained the broader 1972 version.[44]

The factual background of *White* began when Gregory Wersal ran for associate justice of the Minnesota Supreme Court in 1996.[45] As part of his campaign, "he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare," and abortion.[46] After a complaint was filed alleging that his literature was a violation of Minnesota's announce clause, Wersal withdrew from the election.[47] In 1998, however, he chose to run again for associate justice.[48] Due to the complaint filed during the 1996 election, Wersal suspected the issue of the constitutionality of the announce clause might arise during his new campaign.[49] He therefore filed suit against officers of the Lawyers Board and the Minnesota Board on Judicial Standards,[50] "seeking . . . a declaration that the announce clause

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[41] *See* Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002) (presenting the question of whether the announce clause in the Minnesota Code of Judicial Conduct violates the First Amendment).

[42] *Id.*

[43] *See* Clanton, *supra* note 23, at 270 (discussing the replacement of the announce clause in the 1990 Model Code).

[44] *White*, 536 U.S. at 768 (quoting the Minnesota Code of Judicial Conduct in effect at the time of trial).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 768–69.

[48] *Id.* at 769.

[49] *Id.* at 769–70.

[50] *Id.* at 769 n.3.

violates the First Amendment and an injunction against its enforcement."[51]

The Court granted certiorari and applied the strict scrutiny test, as it usually does in cases evaluating the constitutionality of content-based restrictions that limit fundamental First Amendment rights.[52] The Court explained that "[u]nder the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."[53] The clause would be narrowly tailored if "it does not 'unnecessarily circumscrib[e] protected expression.' "[54] The compelling state interests presented by the respondents, which in their opinion should have rendered the announce clause constitutional, were "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[55] The Court found that the announce clause was not narrowly tailored to preserve either actual impartiality or the appearance of impartiality,[56] concluding that impartiality speaks only to the absence of bias toward particular political parties.[57] The Court reasoned that the announce clause did "not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[58] Consequently, the majority found that Minnesota's announce clause violated the First Amendment.[59]

The dissenters in *White* emphasized the common justifications for restrictions on judicial candidates' speech and conduct.[60] In Justice Stevens's dissent, he stated that "[t]here is a critical difference between the work of the judge and the work of other public officials."[61] In his opinion, this difference justifies applying inconsistent and non-uniform rules to judicial elections as opposed

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[51] *Id.* at 769–70.

[52] *Id.* at 774 (describing the conditions necessary for an application of strict scrutiny).

[53] *Id.* at 774–75.

[54] *Id.* at 775 (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).

[55] *Id.*

[56] *Id.* at 776.

[57] *See id.* at 775 (defining impartiality in reference to political parties).

[58] *Id.* at 776.

[59] *Id.* at 788.

[60] *See* Gall, *supra* note 7, at 111 (observing that the dissenters based their arguments on "the difference between the judicial and the executive and legislative branches").

[61] *White*, 536 U.S. at 798 (Stevens, J., dissenting).

to executive and legislative elections.[62] Similarly, Justice Ginsburg focused on the reality that unlike the executive or legislature, a judiciary "capable of [neutrally applying legal principles], owing fidelity to no *person* or *party*, is a 'longstanding Anglo-American tradition.' "[63] Justice Ginsburg also reasoned that "the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench."[64] Thus, like Justice Stevens, Justice Ginsburg's view that the announce clause did not violate the First Amendment rests primarily on the difference between the roles of the state executive and legislative branches in comparison to the judicial branch.[65]

C. THE ATTITUDE TOWARD JUDICIAL CODES IN A POST-*WHITE* LEGAL SYSTEM

Though the *White* decision is limited to the announce clause, it has influenced many cases dealing with the constitutionality of other restrictive provisions relevant to judicial candidates.[66] Nevertheless, the constitutionality "of the other canons restricting judicial campaign speech," including the restrictions on endorsing or opposing candidates for public office, "is far less clear" because the Supreme Court has not yet heard another similar case.[67] Because the Supreme Court is still silent regarding endorsement provisions, *White* is the only precedent, if it even qualifies as such.

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[62] *See id.* at 803 (concluding that the majority's failure to distinguish judicial elections from political elections "is profoundly misguided").

[63] *Id.* at 804 (Ginsburg, J., dissenting) (emphasis added) (quoting United States v. Will, 449 U.S. 200, 217 (1980)).

[64] *Id.* at 806.

[65] *See id.* at 821 ("Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote.").

[66] *See, e.g.*, Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (adopting much of *White*'s reasoning by holding that Georgia's prohibition on public communication by a judicial candidate violates the First Amendment); *see also* Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840 (9th Cir. 2007); Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005); Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

[67] Briffault, *supra* note 6, at 209.

After all, announce clauses—held unconstitutional in *White*—and endorsement clauses differ in what they prohibit and in the interests they protect. Because no clear answer exists, the circuit courts are split on how to reconcile *White* with endorsement clauses.

For example, the plaintiff in *White* challenged Minnesota's endorsement clause in the recent Eighth Circuit case, *Wersal v. Sexton*.[68] There, the court followed *White*'s reasoning, applied the strict scrutiny test to Minnesota's endorsement clause, and decided that the endorsement clause was not narrowly tailored to further any state interest, compelling or otherwise.[69] The *Wersal* majority determined that the endorsement clause was not narrowly tailored because it was overinclusive by "restricting more speech than is necessary" and underinclusive (as did the *White* court regarding the announce clause) because it only applied to judicial candidates who had officially begun their campaigns.[70] Yet despite the Eighth Circuit's conclusion that the clause was not narrowly tailored, the court commented that unlike the announce clause in *White*, endorsement clauses are "aimed at restricting speech for or against particular *parties*."[71] This logic represents a sharp departure from *White*, where the Court's conclusion depended largely on the fact that Minnesota's announce clause restricted speech on particular *issues*.[72] Notwithstanding this logical deviation, both *White* and *Wersal* ultimately held that each clause failed strict scrutiny, and therefore, violated the First Amendment.[73]

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[68] Wersal v. Sexton, 613 F.3d 821 (8th Cir. 2010). As noted, Wersal, the plaintiff, is the same man who brought *White*. After the Minnesota Supreme Court struck down the announce clause, Wersal brought this case alleging that the new amendments to Minnesota's code "d[id] not cure [the] invasion of his First Amendment rights, and that the endorsement clause improperly restrict[ed] expression protected by the First Amendment." *Id.* at 826.

[69] *Id.* at 833–34.

[70] *Id.* at 835–36.

[71] *Id.* at 835.

[72] *See* Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002) (considering the fact that the announce clause restricted speech regarding particular issues as a major factor in concluding that the provision was not narrowly tailored).

[73] *Id.* at 788; *Wersal*, 613 F.3d at 842.

On the opposite end of the spectrum, the Seventh Circuit recently approached endorsement clauses without even considering *White*.[74] Reasoning that the endorsement clause "addresse[d] a judge's entry into the political arena on behalf of his partisan comrades," rather than on behalf of his own campaign,[75] the majority called for a "balanc[ing] between the state's interest and the judge's."[76] After applying a balancing test and weighing these interests, the Seventh Circuit held that the state's interest in maintaining due process and upholding impartiality outweighed the judge's interest in publicly endorsing a candidate for public office.[77] Therefore, the restriction was not deemed to be in violation of the First Amendment.

Wersal and *Seifert* are two recent examples of the potential disagreement among the circuits regarding if and how *White* serves as precedent for the constitutional analysis of endorsement clauses. While some courts may hold that *White* controls and prohibits such clauses, others will find that *White* has no precedential value. Though this issue has not yet been addressed by a majority of the circuits other courts may adopt novel approaches until the Supreme Court claries whether endorsement clauses are violations of the First Amendment.

III. ANALYSIS

A. DIFFERENCES BETWEEN THE POLITICAL BRANCHES AND THE JUDICIAL BRANCH WARRANT SEPARATE RULES

"Maintain[ing] the actual or perceived integrity, impartiality, independence, and fairness of the judiciary is of the utmost importance,"[78] for these are the fundamental bases of this branch. Judicial independence, which arises out of the U.S. Constitution, has two separate but related components intended by the

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[74] *See* Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) (applying a balancing test rather than the strict scrutiny test to Wisconsin's endorsement clause).

[75] *Id.* at 984.

[76] *Id.* at 985.

[77] *Id.* at 986–87.

[78] Clanton, *supra* note 23, at 268.

Framers.[79] First, the Judicial Branch was created to be "literally independent" of the Executive and Legislative Branches, meaning it was meant to be an utterly "separate . . . distinct . . . [and] autonomous" branch of government.[80] However, judicial independence does not "connote the image of some isolated jurist in the desert completely separated from reality, including . . . the legislature and the executive,"[81] but rather refers to independence in the "administration of justice."[82] In other words, the Judiciary is not physically isolated from the other branches, but its role as "interpreter of the law" is distinct.[83] Second, the Framers intended to insulate the courts' decisionmaking from the influences and politics of the Executive and Legislative Branches.[84] Two examples of these protections are the life tenure and fixed salary provisions in Article III of the Constitution.[85]

By establishing the Judiciary as an autonomous branch of government through the notion of judicial independence, the Framers created a sense of separateness upon the Constitution's ratification. This separateness is deeply rooted in society through the fact that, whether state or federal, the Executive and Legislature are blanketed under the term "political branches," while the Judiciary is referred to separately as the "Judicial Branch." Such is distinct and has always been distinct. At both the federal and state level, because the legislature and executive are often grouped together, it makes perfect sense that the same (or similar) rules apply to members of those branches. Likewise, because the judiciary is often treated separately from the two political branches, it makes sense that unique rules tailored to prevent partisan activity may apply to judges and justices. This is especially true in light of the second component of judicial

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[79] Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL'Y 29, 34 (2008).

[80] *Id.*

[81] Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, 37 GOLDEN GATE U. L. REV. 487, 493 (2007).

[82] Bills, *supra* note 79, at 35 (quoting Bradley v. Fisher, 80 U.S. 335, 347 (1871)).

[83] *Id.*

[84] *Id.*

[85] *Id.* These examples have little relevance here since they apply only to appointed federal judges.

independence, which seeks to protect the judiciary from political influences of the other branches.

Scholars interpret the two components of judicial independence as imposing "at least two reciprocal obligations" that bind judges.[86] First, judges must rid themselves of any loyalties or dedications to entities and individuals.[87] This obligation is entirely opposite to that expected of members of the political branches. Rather than detach themselves from any commitments, politicians avidly emphasize any affiliation they have with a political party or organization. Conversely, judges have an obligation to refrain from such affiliation to avoid partisan activity.[88] Therefore, does it not make sense that some restraints must be placed on members of, or candidates for, the judicial branch to assure that such partisan influence is minimized? If they have an obligation to avoid affiliation with or loyalty to political organizations and individuals, the legislature should limit their behavior by passing codes like the judicial canons. Obviously, these restrictions should not be overly broad, as judges and judicial candidates are still guaranteed constitutional rights that must be protected.[89] They nonetheless should be crafted to prevent the judiciary from overstepping its bounds and destroying its independence.

Second, judges have an obligation to reach their decisions in an unbiased manner, consistent with the fundamental purpose and structure of the law and applicable state constitution.[90] This obligation is reciprocal with respect to the former because in order to make decisions based solely upon administration of constitutional objectives, a judge cannot be tainted by affiliations with politics or political theory. The imperative of the judicial branch is to neutrally interpret, contract, and expand the law in

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[86] Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996).

[87] *Id.* ("[J]udges must free themselves, not only from the crasser forms of obligation or commitment, but also, so far as humanly possible, from the ties of personal and group loyalties and implied commitment.").

[88] *See id.* (expressing the concern that if judges were allowed to declare political affiliations and be influenced by them, they would put "the independence of the courts at risk").

[89] *See infra* Part III.C (discussing why endorsement clauses do not infringe on judicial candidates' free speech rights under the First Amendment).

[90] Cox, *supra* note 86, at 566.

accordance with the central values and ideals of the United States Constitution and the applicable state constitution. This role is incredibly important but impossible to fulfill if outside politics govern or dominate a judge's decisions. As oppositionists of the judicial canons emphasize, every judge inherently has a legal and political background; thus, being entirely impartial is impossible because individual political ideals and experiences already have been established prior to becoming a member of the judiciary.[91] Yet instead of cutting against the existence of the judicial canons, this second obligation makes the first necessary, as a judge is better equipped to hand down unbiased decisions if political affiliations are minimized and not encouraged upon taking the bench. The need for some limitation on the political activities of judges and judicial candidates thereby becomes even more apparent.

Judicial independence and its components illustrate why the judiciary is treated separately from the executive and legislative branches. Especially considering the obligations to avoid political commitments and uphold constitutional values, the separateness of the judiciary not only permits, but mandates, limitations on the judicial branch that would not be applicable (or even relevant) to the political branches. For these reasons, the existence of judicial canons is entirely proper and permissible. In the wake of *White*, however, the constitutional reach of these canons is controversial.[92]

B. *WHITE* DOES NOT DEEM ENDORSEMENT CLAUSES TO BE UNCONSTITUTIONAL

As discussed, the circuits are currently split regarding whether *White* controls the constitutional analysis of endorsement clauses. While the Eighth Circuit has held that *White* renders such clauses

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[91] *See* Republican Party of Minn. v. White, 536 U.S. 765, 779 (2002) ("[T]his object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon.").

[92] *See* discussion *supra* Part II.C (discussing the current circuit split regarding the constitutionality of endorsement clauses in a post-*White* legal system).

unconstitutional—like announce clauses[93]—the Seventh Circuit has taken a novel approach to the question by disregarding *White* and applying a different standard of review.[94] Ultimately, *White*'s holding that announce clauses are a violation of judicial candidates' First Amendment right to free speech[95] should not be binding precedent for the constitutionality of endorsement clauses. The *White* court found that Minnesota's announce clause did not implicate the broad state interest of impartiality in the judiciary.[96] The majority's logic in finding that such clauses violate free speech has little application to the constitutionality of endorsement clauses.

White's justification for concluding that the interest of impartiality is irrelevant to announce clauses can be summed up as follows: "[Announce clauses] do[ ] not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[97] The *White* court was entirely correct in this assessment of the implications of announce clauses. Much of the impartiality concerns regarding judicial elections stem from the fact that judges have an obligation to disassociate from all political loyalties and commitments.[98] This obligation does not speak to issues. Although a judicial candidate may announce views on a certain topic that parallel the views of a political camp, the assumption that impartiality is destroyed by such a statement is unwarranted.

For example, if John, our judicial candidate[99] expresses an opinion favoring broad, nationwide healthcare reform, then voters may infer an alignment with the Democratic Party. Similarly, his opposition to extreme reform may prompt voters to presume

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[93] *See* Wersal v. Sexton, 613 F.3d 821, 837 (8th Cir. 2010) (following *White*, applying strict scrutiny, and holding that endorsement clauses violate the First Amendment).

[94] *See* Seifert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) (adopting a balancing test for judicial review of endorsement clauses).

[95] *White*, 536 U.S. at 788.

[96] *See id.* at 776 (finding that the clause is not "narrowly tailored to serve impartiality (or the appearance of impartiality) . . .").

[97] *Id.*

[98] *See* Cox, *supra* note 86, at 566 (articulating the meaning of judicial independence, which includes the ability to "decide lawsuits free from any outside pressure").

[99] *See supra* notes 1–6 and accompanying text (explaining the hypothetical campaign of this fictional candidate).

alignment with the Republican Party. This effect could be quite strong and forceful if he consistently identifies with the views of one party and not the other. Alternatively, the effect could be weak if his beliefs cross party lines or tend to be more moderate. Therefore, it is inaccurate to make a sweeping presumption that by announcing a stance on an issue, a judicial candidate proclaims a political affiliation.

Unlike announce clauses, which "restrict . . . speech for or against particular *issues*,"[100] endorsement clauses "restrict speech for or against particular *parties*."[101] No matter what definition of "impartial" is used,[102] all courts should agree that for a judge or judicial candidate to maintain neutrality, he or she must avoid party affiliation as a member of the bench—a basic concept of judicial independence.[103] Party affiliation is bias, and bias is not impartiality. By endorsing a public office candidate who openly affiliates with a political party and emphasizes that affiliation often, a judicial candidate indirectly endorses the public office candidate's political affiliation as well. For instance, if John, during his campaign for associate justice of the Georgia Supreme Court, publicly supports Rebecca for governor and Robert for the U.S. House of Representatives, both members of the Republican Party,[104] John would also seem to favor the Republican Party itself. Though he would not directly declare, "I am a Republican," his endorsements of the Republican candidates would indirectly communicate to the voters that he adopts Republican politics.

This analogy is unlike that of a candidate announcing his opinions on several issues. Announcing a stance on an issue is a much more personal and individual action than an endorsement of a candidate for public office. If John is asked where he stands on healthcare, an array of answers could be provided—ranging from advocacy of total reform, opposition to any reform, or falling

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[100] *White*, 536 U.S. at 776.

[101] *Id.*

[102] *See id.* at 775–78 (analyzing the announce clause under three separate definitions of "impartiality").

[103] *See* Bills, *supra* note 79, at 34 (noting that avoidance of political influences is a central element of judicial independence).

[104] *See supra* notes 1–6 and accompanying text (explaining the hypothetical campaigns of these fictional candidates).

somewhere in the middle of the spectrum. By contrast, if he is asked whether he endorses the Republican or Democratic candidate for governor, the choice is black or white—or more aptly, red or blue. John must choose to support the Republican or the Democrat; the choice is absolute.[105]

Restrictions on the judiciary are proper and justifiable based on the entire branch's duty to avoid politics.[106] To avoid undue overreaching, the scope of such restrictions must be tailored to promote that obligation.[107] Analyzing the holding of *White* in this sense again proves that the Court came to the correct conclusion in declaring Minnesota's *announce* clause unconstitutional. Announce clauses do not promote the destruction of party loyalties. Rather, they promote silence on behalf of the judicial candidate's personal, not political, stance on current issues. In the alternative, *endorsement* clauses promote the judicial obligation to avoid party loyalty. That obligation prohibits commitment to an individual, which endorsement clauses clearly further. By endorsing a candidate for public office, a judicial candidate not only solidifies loyalty to and support for that candidate, but also the candidate's party. Judicial independence should prohibit a judicial candidate from making this sort of declaration.[108]

The Court in *White* implied that a restriction on speech "for or against particular *parties*"[109] serves the interest of judicial impartiality. Endorsement clauses seem to fall under this category of speech. Therefore, because announce clauses implicate *issues* and endorsement clauses implicate *parties*, *White*'s determination that announce clauses violate judicial candidates'

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[105] This is the case unless a viable Independent candidate is also running for office. If a judicial candidate were to endorse the Independent, there would clearly be no Republican or Democrat affiliation. However, Independents are rarely forerunners of an election, and independence can, in some sense, be considered a party in itself. *See, e.g.*, ROBERT W. BENNETT, TAMING THE ELECTORAL COLLEGE 122 (2006) ("Over the years, American politics has usually been characterized by two major parties, and it is typically only candidates of those two parties who are able to win votes.").

[106] *See* discussion *supra* Part III.A (justifying separate restrictions on the judiciary in light of its distinct role and obligations).

[107] *See White*, 536 U.S. at 774–75 (explaining that a provision must be "narrowly tailored" in order to pass the strict scrutiny test determining constitutionality).

[108] *See* Cox, *supra* note 86, at 566 (noting the obligations of the judicial branch).

[109] 536 U.S. at 776.

free speech should have no direct bearing on the constitutional analysis of endorsement clauses. The holding should serve only as precedent for other provisions of state judicial canons that implicate *issues*, as opposed to party affiliations.

C. ENDORSEMENT CLAUSES PASS THE STRICT SCRUTINY TEST AND DO NOT VIOLATE JUDICIAL CANDIDATES' FIRST AMENDMENT RIGHTS

In *White*, the Supreme Court applied the strict scrutiny standard to the announce clause.[110] If fundamental rights are involved, courts review the law in question under this standard the most stringent form of constitutional review.[111] Thus, this standard may be applied in the context of endorsement clauses, as well, unless the Court chooses to follow the balancing analysis in *Seifert*.[112]

Assuming that the same state interests set forth in *White* apply—i.e., impartiality and the appearance of impartiality in the judiciary[113]—it follows that endorsement clauses do not "unnecessarily circumscrib[e]" the free speech of judicial candidates and are therefore narrowly tailored.[114] In *White*, the Court reasoned that the announce clause was underinclusive and essentially futile because it only prohibited a judicial candidate from voicing his views between the day he entered the election and the day he was elected.[115] The Court said this was an unnecessary restraint on candidates' speech because they could speak on debated topics to their hearts' desire until the moment of race entry. Moreover, they could then begin again after winning the race. Thus, even after candidates formally joined the election,

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[110] *Id.* at 774; *see also* discussion *supra* Part II.B.

[111] *See* BLACK'S LAW DICTIONARY 1558 (9th ed. 2009) (defining "strict scrutiny" as the "standard applied . . . to fundamental rights").

[112] *See* Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) (applying a balancing test rather than the strict scrutiny test to Wisconsin's endorsement clause).

[113] *White*, 536 U.S. at 776.

[114] *See* Brown v. Hartlage, 456 U.S. 45, 53–54 (1982) (requiring that a compelling state interest support restrictions on a candidate's speech and prohibiting those restrictions from unnecessarily circumscribing protected speech).

[115] *See White*, 536 U.S. at 779–80 (describing the underinclusive nature of the announce clause).

voters could resort to previous statements to see where they stood on the issues.[116]

The underinclusive concern is not quite as strong with endorsement clauses. While political issues last well beyond the election, each individual race for public office does not. The only time a judicial candidate would even have the opportunity to endorse a political candidate would be during the campaign period. Unless the judicial candidate decides to run significantly later than the public office candidate begins campaigning, the former would have little chance to endorse the latter. Though possible, a candidate for public office is unlikely to postpone entering the race to make (or receive) an endorsement. Each candidate is more likely to be concerned with his or her own election and presumably would begin campaigning for votes as early as possible.[117]

Moreover, unlike announce clauses, no underinclusive concern exists for endorsement clauses after the judge has taken office. In many states with endorsement clauses, the provisions apply to both judges and judicial candidates.[118] Therefore, after a judge has taken office, the law still precludes him or her from endorsing political candidates. The restraint during candidacy serves its purpose of promoting judicial independence because it extends its application to elected judges as well. In sum, endorsement clauses are not underinclusive and therefore do not unnecessarily restrain a judicial candidate's speech. The prohibition applies only during the viable times a judicial candidate could possibly endorse a political candidate and after a successful election.

In *Wersal v. Sexton*, the Eighth Circuit suggested that endorsement clauses are overinclusive,[119] an idea the *White* Court

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[116] *See id.* (explaining the short period of time in which the announce clause actually prohibits speech).

[117] *See* Wersal v. Sexton, 613 F.3d 821, 836 (8th Cir. 2010) (arguing that "a judicial candidate may endorse a public official or a potential candidate for office so long as the endorsee has not yet officially filed for office"). Though this is theoretically true, as mentioned above, most candidates presumably would like to get their campaign started early to bolster the chance of winning. As a result, this concern should be considered marginal.

[118] *See* GA. CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(b) (2004) (prohibiting judicial candidates *and* judges from endorsing political candidates).

[119] 613 F.3d at 835 ("[T]he endorsement clause clearly restricts more speech than is necessary to serve an interest in impartiality articulated as a lack of bias for or against

did not address when striking down Minnesota's announce clause. However, the *Wersal* court's reasoning is not entirely cohesive. In the *Wersal* court's opinion, if a judicial candidate cannot endorse a public office candidate, the judicial candidate is also banned from endorsing that individual's "particular subset of issues and policies with which the endorsing candidate may subscribe."[120] As discussed above, the court's conclusion was admittedly true.[121] Nevertheless, the Eighth Circuit failed to recognize that after *White*, announce clauses no longer exist. A judicial candidate is free to independently announce his views on any of the issues that the public office candidate may address without indirectly affiliating with that candidate's party through an official endorsement. Therefore, endorsement clauses are not intended to prevent a judicial candidate from sharing opinions and views with the voters but, rather, are narrowly tailored to prohibit candidates from inadvertently supporting a political party. Courts should find that endorsement clauses are neither underinclusive nor overinclusive and thus do not unnecessarily restrict a judicial candidate's First Amendment speech rights. Such provisions are narrowly tailored to prevent partisan affiliation, which is inherent in a political endorsement.

Additionally, under the strict scrutiny analysis, endorsement clauses attempt to protect the impartiality and the appearance of impartiality of the judiciary.[122] *White* clearly indicates that a provision restricting speech for or against political *parties*, rather than *issues*, would serve to protect impartiality: "Indeed, the [announce] clause is barely tailored to serve that interest [of impartiality] *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[123] As this Note had discussed, endorsement

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parties to a proceeding.").

[120] *Id.*

[121] *See* discussion *supra* notes 100–04 and accompanying text (explaining that by endorsing a political candidate, the endorser is indirectly endorsing that candidate's politics).

[122] *See Wersal*, 613 F.3d at 832–33 (revealing the Eighth Circuit's position that impartiality, in the sense of unbiased judges and in the sense of openmindedness, constitutes a compelling state interest).

[123] Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002).

clauses restrict speech implicating parties rather than issues. Thus, the compelling state interest of judicial impartiality is present here, unlike in *White*. Due to the compelling state interest and the fact that endorsement clauses are narrowly tailored to protect this interest, these provisions withstand strict scrutiny. Because endorsement clauses can survive even strict scrutiny, all of the circuits should recognize their constitutionality.

IV. CONCLUSION

The constitutionality of judicial canon provisions restricting the speech of judicial candidates is under debate in the post-*White* legal world. While the Supreme Court struck down Minnesota's announce clause in *White*, it has been silent on other restrictive provisions, many of which bear little resemblance to announce clauses. Therefore, their constitutionality remains unclear. Endorsement clauses fall into this category of uncertainty, and the circuit courts are split on the issue.

The *White* holding should have no effect on endorsement clauses, which should be upheld as constitutional. Judicial branches were created with the purpose of being distinct and independent from the legislative and executive branches, and this justifies different treatment, including separate restrictions. Furthermore, judges and judicial candidates have an obligation to refrain from affiliation with any political organization or individual. Consequently, certain provisions should be in place to ensure that judges uphold their duty of nonpartisanship and avoid the erosion of judicial independence. The unconstitutionality of announce clauses does not deem all provisions restrictive of judicial candidates' speech and conduct unconstitutional where they are intended to promote judicial impartiality.

After all, the interests implicated by announce clauses and endorsement clauses are different. The *White* court held that because the announce clause prohibited speech regarding issues, it did not promote impartiality. Endorsement clauses, however prohibit speech that would, in effect, promote or oppose parties. When a judicial candidate endorses a public office candidate, he also endorses his political affiliations and organizations.

Therefore, unlike announce clauses, endorsement clauses implicate impartiality.

Finally, unlike announce clauses, endorsement clauses pass the strict scrutiny test and are constitutional. These provisions serve the compelling interest of impartiality because they restrict speech for or against specific parties, not issues. Because they do not restrict more speech than is necessary, they are also narrowly tailored to serve impartiality. Endorsement clauses are not underinclusive because they only apply and have relevance during candidacy and after the judge has been elected. Likewise, such clauses are not overinclusive. In the wake of *White*, a judicial candidate is free to announce his own views independently since announce clauses are no longer effective, but he should not be able to indirectly affiliate with the public office candidate's party by endorsing a political candidate. Thus, while *White* has created controversy regarding the constitutionality of the restrictions on judicial candidates found in a state's judicial canons, endorsement clauses should be upheld.

Endorsement clauses are not nearly as sweeping and prohibitive as their announce clause counterparts, and they are aimed at preventing partisan affiliation. Because a judge has a duty of impartiality, and because endorsement clauses serve to limit affiliation with political parties and individuals, they are narrowly tailored to serve the compelling state interest of judicial independence. Though restrictive, they are constitutional.

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