03-7250(L)

03-7289(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS J. SPARGO, JANE MCNALLY and PETER KERMANI,

Plaintiffs-Appellees-Cross-Appellants,

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, individually and as Administrator of the State Commission on Judicial Conduct and HENRY T. BERGER, individually and as Chairperson of the New York State Commission on Judicial Conduct,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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PRELIMINARY STATEMENT

Defendants-appellants-cross-appellees New York State Commission on Judicial Conduct, its administrator, Gerald Stern, and its chairperson, Henry T. Berger (collectively, "Commission") appeal the February 20, 2003 judgment of the United States District Court for the Northern District of New York (Hurd, J.) in favor of plaintiffs-appellees-cross-appellants Thomas J. Spargo, Jane McNally, and Peter Kermani (collectively, "plaintiffs") (Special Appendix ["SPA"] 1). The district court declared various provisions of New York's Rules Governing Judicial Conduct ("Rules"), see 22 NYCRR Part 100, facially unconstitutional, and enjoined the Commission from enforcing those provisions. The judgment was based on a Memorandum-Decision and Order published at 244 F. Supp. 2d 72 (SPA 2-37). By order dated May 20, 2003, this Court stayed the judgment pending appeal.

The district court's invalidation of key judicial conduct provisions will significantly weaken public confidence in the judiciary if not reversed. Several of these Rules require that judges observe high standards of conduct and avoid actual and apparent impropriety to protect the integrity and independence of the judiciary and the public's confidence in the judicial branch. Other provisions set aside by the district court – but upheld against an identical constitutional challenge by the New York Court of Appeals, see In re Raab, Slip Op. No. 91, ___ N.Y.2d ___ (N.Y.

June 10, 2003)[1] – restrict partisan political activity by elected judges and judicial candidates that is unrelated to their own campaigns. As the New York Court of Appeals held, these Rules are critical to maintaining the public's belief that judicial decisions will be made on the merits - as the Due Process Clause mandates - rather than on the basis of political alliances. Public perception that judges are governed only by law, not by politics, is an essential cornerstone of our democracy, and the judiciary has only this confidence in the integrity of its decisionmaking process to guarantee its legitimacy.

The district court erred in two key respects. First, it should have abstained from addressing plaintiffs' claims under Younger v. Harris, 401 U.S. 37 (1971). The New York Court of Appeals' recent rulings in Raab and In re Watson, Slip Op. No. 78, ___ N.Y.2d ___ (N.Y. June 10, 2003), leave no room for disputing that the Commission's proceedings and state court review provide an adequate forum for Spargo's federal constitutional claims. Nor can Spargo evade the abstention bar by joining plaintiffs McNally and Kermani, because their interests are closely intertwined with his.

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[1] **Decisions issued by the New York Court of Appeals on June 10, 2003 may be found at www.courts.state.ny.us/ctapps/decisions.**

On the merits, the district court also erred. The contested Rules governing partisan political activity are well within the bounds of the First Amendment. Because those provisions are narrowly tailored to serve the State's compelling interest in an impartial and independent judiciary, they are fully consistent with Republican Party of Minnesota v. White, 536 U.S. 765 (2002). Likewise, the provisions provide sufficient notice of proscribed conduct, especially when viewed in light of interpretive guidance, and thus are not void for vagueness.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, in that the judgment from which the Commission appeals, and from which plaintiffs cross-appeal, is a final judgment that grants permanent injunctive relief (SPA 1). The Commission filed a Notice of Appeal in the district court on or about March 7, 2003 (Joint Appendix ["JA"] 28-29), and plaintiffs cross-appealed on or about March 20, 2003 (JA 30).

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in refusing to apply Younger abstention to Spargo's claims where Spargo may raise any federal

constitutional claims in the Commission's proceedings and obtain mandatory review in the New York Court of Appeals?

2. Did the district court err in refusing to apply Younger abstention to McNally's and Kermani's claims where Spargo has joined in a federal court action individuals who are not parties to the state court proceeding, but whose interests are closely intertwined with his own?

3. Did the district court err (a) in evaluating the challenged Rules under a strict scrutiny standard; and (b) even if strict scrutiny applies, in concluding that the challenged Rules were not narrowly tailored to support the State's compelling interest in an impartial and independent judiciary, where the Rules restrict only activity unrelated to a judicial candidate's own campaign, and fully enable him to inform the electorate about his qualifications for office?

4. Are Sections 100.1 and 100.2(A) unconstitutionally vague where each of the provisions, especially when considered in light of available interpretive guidance, provides sufficient notice of prohibited conduct, and where a judge or judicial candidate may request an advisory opinion concerning the propriety of specific conduct?

STATEMENT OF THE CASE

A. Overview of the Commission and its Proceedings

Article VI, § 22 of the New York State Constitution created the State Commission on Judicial Conduct to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge" (SPA 40 [N.Y. Constit., Art. VI, § 22(a)]; see also SPA 43 [New York Judiciary Law § 44(1)]). To further this mission, the New York Court of Appeals has promulgated, as authorized by the State Constitution (see SPA 41 [N.Y. Constit., Art. VI, § 22(c)]), certain Rules of Judicial Conduct that apply to judges and judicial candidates. Ample interpretive guidance regarding the Rules is readily available, and the statutorily-created Advisory Committee on Judicial Ethics can expeditiously answer questions, should any arise, about the scope of the Rules. Commission proceedings are governed by Section 44 of the Judiciary Law and by Commission Rules, codified at 22 NYCRR Part 7000.

1. Rules Governing Judicial Conduct

At issue in this case are provisions of three of New York's five Rules of judicial conduct. The first two Rules are intended to ensure the integrity and independence of the judiciary. Section 100.1 states that "[a]n independent and honorable

judiciary is indispensable to justice in our society," **and directs judges to observe** "**high standards of conduct**" "**so that the integrity and independence of the judiciary may be preserved**" **(SPA 49). Section 100.2 directs a judge to** "**avoid impropriety and the appearance of impropriety in all of the judge's activities**"**; it requires a judge to** "**respect and comply with the law**" **and to conduct herself at all times** "**in a manner that promotes public confidence in the integrity and impartiality of the judiciary**" **(SPA 50 [22 NYCRR §§ 100.2, 100.2(A)]).**

The third Rule implicated in this matter, Section 100.5(A), governs partisan political activity by judges and judicial candidates. This Rule generally prohibits a judge or judicial candidate from engaging "in any political activity" except "as otherwise authorized by this section or by law" (SPA 58 [22 NYCRR §§ 100.5(A)(1), 100.5(A)(1)(i)]). It directs judicial candidates to "maintain the dignity appropriate to judicial office" and to act "in a manner consistent with the integrity and independence of the judiciary" (SPA 59 [22 NYCRR § 100.5(A)(4)(a)]). Additional provisions challenged by plaintiffs specifically prohibit a judge or judicial candidate from:

> - engaging in any partisan political activity, other than participating in his or her own campaign for elective judicial office (SPA 58 [**22 NYCRR** § **100.5(A)(1)(c)]);**

- permitting his name to be used in connection with any activity of a political organization (SPA 58 [22 NYCRR § 100.5(A)(1)(d)]); - publicly endorsing or publicly opposing (other than by running against) another candidate for public office (SPA 58 [22 NYCRR § 100.5(A)(1)(e)]);
- making speeches on behalf of a political organization or another candidate (SPA 58 [22 NYCRR § 100.5(A)(1)(f)]); and - attending political gatherings (SPA 58 [22 NYCRR § 100.5(A)(1)(g)]).

These prohibitions must be read together with Section 100.5(A)(2), which sets forth the wide range of political activity "otherwise authorized" by Section **100.5(A)(1)(i)**. **While "ancillary political activity" that is in support of "other candidates or general party objectives" is prohibited, the Rules expressly permit "conduct integral to a judicial candidate's own campaign." Raab, Slip Op. No. 91, at 11-12. For example, while the Rules generally prohibit a judge from attending political gatherings, they permit a judge or judicial candidate to attend political gatherings during his own campaign (SPA 58-59 [22 NYCRR §§ 100.5(A)(2)(i), (iii), (v)]).**[2] While the Rules generally prohibit a judge from allowing his name to be used in connection with activities of a political

[2] **The Rules provide that candidates for judicial office may engage in such activities during the "window period" (SPA 58 [22 NYCRR § 100.5(A)(2)]), defined as the period beginning nine months before a primary election or party nominating meeting for the elective judicial office for which the judge or judicial candidate is an announced candidate, and ending six months after the date of the primary or general election (SPA 48 [22 NYCRR § 100.0(Q)]).**

party, they allow a judge or judicial candidate to have his name listed on campaign materials together with the names of other candidates for nonjudicial office, and to appear at gatherings and in media advertisements with those candidates (SPA [22 NYCRR §§ 100.5(A)(2)(iii), (iv)]). And while the Rules generally prohibit a judge from endorsing other candidates or making political contributions, they permit a judge or judicial candidate to purchase two tickets to, and attend, political fundraisers for such candidates during his campaign for elective judicial office (SPA 59 [22 NYCRR § 100.5(A)(2)(v)]).

2. Advisory Opinions

Although the Rules have been applied in a substantial body of accessible precedent, New York has also created a mechanism for resolving any questions that might arise about their scope. Judges and judicial candidates may obtain opinions from the Advisory Committee on Judicial Ethics (see N.Y. Jud. Law § 212(2)(l)). Since 1988, the Committee has published more than 2,000 formal written opinions, and it meets seven times per year to formally answer pending questions (Lippman Aff. 5/14/03 ¶¶ 3, 6, 8). A formal opinion from the Committee provides protection to the requestor "for the purposes of any subsequent investigation" by the Commission (N.Y. Jud. Law § 212(2)(l)(iv)). Moreover, in instances

where a judge or judicial candidate needs an expeditious response, he may seek informal advice from the Committee's counsel or its co-chairs via telephone, and an answer "is almost always provided during the phone call or within a matter of hours thereafter" (Lippman Aff. 5/14/03 ¶¶ 9-10).

3. Commission Proceedings

The State Commission on Judicial Conduct is tasked with enforcing the judicial conduct Rules. Upon receiving a written and signed complaint from a member of the public, the Commission may commence an investigation into the conduct of a judge or judicial candidate (SPA 43 [N.Y. Jud. Law § 44(1)]; see also SPA 69 [22 NYCRR § 7000.3(a)]). If the Commission determines that the complaint lacks merit, it will dismiss the complaint (SPA 43 [N.Y. Jud. Law § 44(1)]), but may issue to the judge a "letter of dismissal and caution containing confidential comments, suggestions and recommendations" with respect to the Commission's investigation of complaint (SPA 69 [22 NYCRR § 7000.3(c)]). The Commission also may initiate an investigation by filing an "administrator's complaint" (SPA 43; 69 [N.Y. Jud. Law § 44(2); 22 NYCRR § 7000.3(a)]).

During the investigatory phase, a Commission member or the administrator may subpoena witnesses and require the production of

books, records, documents or other relevant evidence (SPA 69 [22 NYCRR § 7000.3(d)]; see also SPA 42 [N.Y. Jud. Law § 42(1)]). A judge subject to investigation has the right to be represented by counsel during all stages of the investigation, and to present evidence (SPA 43; 69 [N.Y. Jud. Law § 44(3); 22 NYCRR § 7000.3(f)]). Nonjudicial witnesses, too, have the right to be represented by counsel (SPA 70 [22 NYCRR § 7000.3(g)]). Anytime a judge testifies during an investigation, at least one member of the Commission, or a referee designated by the Commission, must be present (SPA 69 [22 NYCRR § 7000.3(d)]).

If the Commission determines that a hearing is warranted, it serves upon the judge a formal written complaint signed and verified by the administrator (SPA 43 [N.Y. Jud. Law § 44(4)]). This Formal Written Complaint is distinct from the "administrator's complaint" discussed above, which simply authorizes the Commission to conduct an investigation (compare SPA 67 [22 NYCRR § 7000.1(b)] with SPA 67 [22 NYCRR § 7000.1(g)]). The judge must then file an Answer, which may contain affirmative defenses and may "assert that the specified conduct alleged in the formal written complaint is not improper or unethical" (SPA 43; 71 [N.Y. Jud. Law § 44(4); 22 NYCRR § 7000.6(b)]).

At least ten days prior to the hearing – which is not public unless the judge involved so demands (SPA 44 [N.Y. Jud. Law §

44(4)]) – the Commission must make available to the judge any relevant exculpatory evidence (SPA 44; 72 [N.Y. Jud. Law § 44(4); 22 NYCRR § 7000.6(h)(1)]). In addition, at least ten days before the hearing and upon written request of the judge, the Commission must make available, without cost, copies of all documents which it intends to present and any written statements by witnesses the Commission intends to call (SPA 44; 72 [N.Y. Jud. Law § 44(4); 22 NYCRR § 7000.6(h)(1)]).

At the hearing, which adheres to the rules of evidence applicable to nonjury trials (SPA 72 [22 NYCRR § 7000.6(i)(2)]), the Commission may take testimony of witnesses and receive evidence (SPA 44; 72 [N.Y. Jud. Law § 44(4); 22 NYCRR § 7000.6(i)(2)]). The judge has the right to be represented by counsel during all stages of the hearing and may call and cross-examine witnesses, and present evidence of his own (SPA 44; 72 [N.Y. Jud. Law § 44(4); 22 NYCRR § 7000.6(i)(2)]). At all times, the administrator bears the burden of proving, by a preponderance of the evidence, facts justifying a finding of misconduct (SPA 72 [22 NYCRR § 7000.6(i)(1)]). The administrator and the judge may file briefs and proposed findings on issues of law and fact (SPA 72 [22 NYCRR § 7000.6(k)]), and the referee must submit a report to the Commission with proposed findings of fact and conclusions of law (SPA 72 [22 NYCRR § 7000.6(l)]).

The Commission must consider the referee's report and provide the administrator and the judge an opportunity to submit additional briefs and present oral argument with regard to the referee's report and possible sanctions (SPA 74 [22 NYCRR § 7000.7(a)]). The Commission subsequently may determine that a judge be admonished, censured, removed or retired (SPA 44 [N.Y. Jud. Law § 44(7)]; see also SPA 74 [22 NYCRR § 7000.7(c)]). Alternatively, if the Commission determines that some other sanction is appropriate, it may issue a private "letter of caution" containing confidential comments, suggestions and recommendations (SPA 74 [22 NYCRR § 7000.7(d)]). If the Commission determines that the administrator failed to prove his case, the Formal Written Complaint is dismissed (SPA 74 [22 NYCRR § 7000.7(e)]; see also SPA 44 [N.Y. Jud. Law § 44(6)]).

If the Commission determines that a judge should be admonished, censured, removed or retired, it transmits that determination, "together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals" (SPA 44; 74 [N.Y. Jud. Law § 44(7); 22 NYCRR § 7000.7(c)]; see also SPA 40 [N.Y. Constit., Art. VI, § 22(a)]). At that point, the Commission's determination, findings and conclusions, and the record of the proceedings, are made public (SPA 44 [N.Y. Jud. Law §

44(7)]). The judge "may either accept the determination of the commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals" (SPA 44 [N.Y. Jud. Law § 44(7)]; see also SPA 40 [N.Y. Constit., Art. VI, § 22(a)] (same)).

"A written request to the Chief Judge for review by the Court of Appeals, timely made in accordance with Judiciary Law, section 44, subdivision 7, shall commence the proceeding for review of the determination of the State Commission on Judicial Conduct" (SPA 65 [22 NYCRR § 530.1(b)]). To that end, the Court of Appeals "shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based" (SPA 41; 45 [N.Y. Constit., Art. VI, § 22(d); N.Y. Jud. Law § 44(9)]). Ultimately, the State's highest court may accept the Commission's determination and sanction, impose a sanction that is more or less severe, or find that the judge's conduct does not violate the Rules (SPA 41; 45 [N.Y. Constit., Art. VI, § 22(d); N.Y. Jud. Law § 44(9)]).

B. The Commission's Charges Against Spargo

In 1999, plaintiff Thomas J. Spargo ran a successful campaign as a Republican for the position of Town Justice in the town of Berne (JA 33 ¶ 7; 316 ¶¶ 3-6; 318 ¶ 13; 326 ¶ 12). Spargo served

as a part-time Town Justice from January 1, 2000 until December 31, 2001 (JA 35 ¶¶ 21-22; 65 ¶ 3; 74 ¶ 1). In November 2001, running on the Republican, Democratic, and Independence Party lines as a cross-endorsed candidate, Spargo was elected to his current position as Justice of the Supreme Court for the Third Judicial District of the State of New York (JA 34 ¶ 8, 36 ¶¶ 25, 28).

In late 2000 and throughout 2001, the Commission conducted an investigation into Spargo's conduct during his 1999 campaign for Town Justice and after he ascended to the bench (JA 152-153 ¶ 20).[3] In connection with that investigation, Spargo, accompanied by counsel, testified twice and was afforded the opportunity to make opening and closing statements, submit material, respond to questions by his own counsel and submit an additional statement and further material after receipt of a transcript of his testimony (JA 153 ¶ 23).

On November 15, 2001, the Commission commenced a related investigation concerning two $5,000 payments made by Spargo to plaintiff McNally and to another individual, Tom Connolly. In

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[3] It is unclear from the record whether the Commission conducted its investigation pursuant to a complaint as defined by 22 NCYRR § 7000.1(d), or an "administrator's complaint" as defined by 22 NYCRR § 7000.1(b) (see SPA 67).

connection with that investigation, Spargo, accompanied by counsel, again testified twice (JA 153 ¶ 23; 179-236, 240A-286). At his first appearance on January 4, 2002, Spargo refused to answer questions pertaining to the two payments, asserting that such inquiries "constitute[] an impermissible and illegal intrusion on [his] right to freedom of speech and freedom of association as guaranteed" by the First Amendment, and "intrude[] upon [his] right to equal protection of the law" (JA 214-216; see also JA 153 ¶ 24). The full Commission thereafter considered Spargo's constitutional objections, and directed the Commission's administrator to advise Spargo that his "refusal to answer questions pertaining to the Administrator's Complaint is unwarranted" (JA 238-239; see also JA 153-154 ¶ 24). In a letter to Spargo's counsel dated January 10, 2002, the administrator communicated the Commission's view, and warned that Spargo's continued refusal to answer questions could subject him to a charge of misconduct for failure to cooperate (JA 238). When he testified on January 25, 2002, Spargo answered the questions posed to him (JA 154 ¶ 24; 240A-286).

Upon concluding its initial investigation, the administrator served upon Spargo a Formal Written Complaint dated January 25, 2002, with four counts (JA 64-72). Charge I of that instrument alleges that in the course of his campaign for Town Justice, Spargo violated Sections 100.1 (regarding judicial independence), 100.2(A)

(regarding judicial impartiality), and 100.5(A)(4)(a) (prohibiting unauthorized political activity) by offering items of value totaling approximately $2,000 – coupons for free donuts and coffee, coupons redeemable for $5 in gasoline, drinks at the bar of a local restaurant, cider and donuts, and pizza – to induce Berne residents to vote for him (JA 66-67 ¶¶ 5-7).

Charge II alleges that in the fall of 2000, Spargo violated numerous Rules, including 100.1 and 100.2(A),[4] by "accept[ing] Albany County District Attorney-Elect Paul Clyne as a law client in connection with a vote recount in the contested election for District Attorney, notwithstanding that the District Attorney's office regularly appeared in criminal cases before [Spargo] in his capacity as Berne Town Justice" (JA 67 ¶ 8). Charge II further alleges that from the fall of 2000 through August 28, 2001, Spargo presided over criminal cases prosecuted by the Albany County

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[4] The Complaint also alleges that Spargo violated Sections 100.2(C) (a judge "shall not convey or permit others to convey the impression that they are in a special position to influence the judge"); 100.3(E)(1) (a judge must disqualify himself in a proceeding where his "impartiality might reasonably be questioned"); and 100.4(D)(1)(a)-(c) (a judge may not engage in financial or business dealings that may "reasonably be perceived to exploit the judge's judicial position," "involve the judge with any business . . . that ordinarily will come before [her]," or "involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves") (JA 68 ¶ 10; SPA 49-50, 52, 55). Spargo's constitutional challenge to the Rules does not extend to these provisions (SPA 13 n.5).

District Attorney's office "without disclosing to the defense in each criminal case that he had rendered legal services to the Clyne campaign or that the Clyne campaign committee owed him $10,000 for legal services rendered" (JA 68 ¶ 9).

Charges III and IV allege that Spargo engaged in "prohibited political activity." Charge III alleges that he violated Sections 100.1, 100.2(A), and 100.5(A)(1)(c)-(e) by attending, as a Republican Party observer, "governmental sessions for the recount of presidential votes in Miami-Dade County, Broward County, and Palm Beach," and by participating in a "widely publicized" "loud and obstructive demonstration" outside the offices of the Miami-Dade County Board of Elections "with the aim of disrupting the recount process" (JA 69 ¶¶ 11-13). Charge IV alleges that Spargo violated Sections 100.1, 100.2(A), and 100.5(A)(1)(c)-(g) by serving as the keynote speaker at the 39th Annual Monroe County Conservative Party Dinner, a fundraising event for the Conservative Party (JA 70 ¶¶ 14-15).

Upon concluding the investigation concerning Spargo's two $5,000 payments, the administrator served on Spargo a Supplemental Formal Written Complaint dated May 13, 2002 (JA 78-83). The sole charge alleges that Spargo violated Sections 100.1, 100.2(A), and 100.5(A)(4)(a) by authorizing his campaign committee to make those payments (JA 80-81 ¶ 7). Specifically, it alleges that he

authorized the first payment to McNally, "a volunteer in [his] election campaign" with "no expectation of being paid for her services," after she nominated him as the Democratic Party's candidate for Supreme Court Justice (JA 80 ¶ 4). Charge I further alleges that the second payment was made to Empire Strategy Consultants, "the principal of which is Thomas Connolly, the Rensselaer County Independence Party Chairman and a delegate" to the Independence Party convention at which Spargo was nominated on October 8, 2001, "notwithstanding that neither [Spargo] nor [his] campaign was legally obligated to pay any money" to Connolly or Empire Strategy Consultants (JA 80 ¶ 6).

In his first Answer, Spargo asserted as an affirmative defense that his "activities as set forth in Charges I, II, III and IV were protected by the Constitutions of the United States and the State of New York" (JA 75 ¶ 5; see also JA 60 ¶ 19). In his Answer to the Supplemental Formal Written Complaint, Spargo asserted four affirmative defenses, claiming that (1) the "Complaint and charges made therein" violate his rights to free speech, expression, association and equal protection of the laws; and that the specified Rules are (2) "overly broad"; (3) "unduly vague"; and (4) "constitute a prior restraint" (JA 86-87 ¶¶ 6-9; see also JA 60 ¶ 19).

A hearing on the charges was to commence before a referee on October 21, 2002 (JA 60 ¶ 18; 154 ¶¶ 26-27), but on October 10, 2002, Spargo requested an adjournment until December 2002, which the referee denied (JA 60 ¶¶ 20-21; 155 ¶ 30; SPA 4). Spargo renewed his request for an adjournment on October 15, 2002, but after the referee again denied his application, Spargo instituted the present action on October 17, 2002 in the United States District Court for the Northern District of New York (JA 155-156 ¶ 31).

C. The Federal Action

1. The Parties

Four days before the Commission's hearing was to commence, Spargo filed a Summons and Complaint in the district court pursuant to 42 U.S.C. § 1983, alleging that Sections 100.1, 100.2(A), 100.5(A)(4)(a), and 100.5(A)(1)(c)-(g) infringe on his federal constitutional rights to free speech and association and equal protection, and seeking to enjoin the Commission from proceeding against him (JA 31-53). Also named as plaintiffs were McNally, the Democratic consultant who nominated Spargo in his run for Supreme Court, and Peter Kermani, chairperson of the Albany County Republican Party (JA ¶¶ 9-13).

Although McNally subsequently affirmed in motion practice in this Court that she was "an active supporter of [Spargo's] ... candidacy for Supreme Court" (McNally Aff. 5/12/03 ¶ 1), in the complaint she alleged that the Commission's actions "adversely affected" her "because the threat of sanctions against Spargo, and the possibility of like threats against other political candidates supported by McNally in the future, prevents and impedes her freedom of speech, including her ability and desire to nominate and show support for particular candidates" as a Democratic delegate at "future" party nominating conventions (JA 43 ¶ 65, 46 ¶ 80; see also JA 119-120 ¶¶ 7, 9-10).

Although Kermani likewise later affirmed he "was a supporter of [Spargo] during his 2001 campaign" and supported his endorsement by the Republican Party (Kermani Aff. 5/12/03 ¶ 2), he also alleged in the complaint that he was "adversely affected" by the Commission's actions against Spargo, in that "as a member and chairman of the Republican party, he is restrained from associating with Spargo" and other unnamed judicial candidates "out of concern that said association would adversely affect Spargo, and has declined to invite Spargo" and others "to address his organization, despite a desire to do so, out of concern that such activity would result in charges being brought against Spargo" (JA 43 ¶ 66, 46 ¶

81; see also JA 116-117 ¶¶ 4, 6-9; Kermani Aff. 5/12/03 ¶¶ 7-9, 12).

2. Procedural History

On October 17, 2002, the district court (Kahn, J.) temporarily restrained the Commission from taking any action against Spargo with respect to the charges set forth in the Formal Written Complaint and Supplemental Formal Written Complaint (JA 54-56). Plaintiffs moved for a preliminary injunction, and the case was reassigned to the Honorable David N. Hurd, who extended the TRO on consent of the parties until a November 29, 2002 hearing (JA 128-129). On November 7, 2002, the district court, noting that it appeared that "there are no facts in controversy and that the matter for decision" – i.e., the constitutionality of the challenged Rules – "is one strictly of law which may be decided upon the submissions," proposed consolidating the preliminary injunction hearing with a trial on the merits (JA 130-131). The parties did not object.

3. The Decision Below

In accordance with its Memorandum-Decision and Order dated February 20, 2003, the district court entered a judgment declaring Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) facially unconstitutional and permanently enjoined the Commission from enforcing them (SPA 1-37).

The district court first rejected the Commission's argument that Younger v. Harris, 401 U.S. 37 (1971), required it to abstain (SPA 17-23). Under Younger, a federal court must refrain from exercising jurisdiction where: (1) there is an ongoing state administrative proceeding that is judicial in nature; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords an adequate opportunity for judicial review of federal constitutional claims. Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002). Because plaintiffs "make no claim that the Commission proceeding [against Spargo] is not judicial in nature" or "does not implicate an important state interest," the court found that the first two Younger factors were satisfied (SPA 18 & n.6).

However, the court concluded otherwise as to the third factor. With regard to McNally and Kermani, the district court held that because these plaintiffs were not subject to the Commission's authority at the time of the events at issue, the Commission's proceeding against Spargo would not resolve their constitutional challenges to the contested Rules (SPA 18). In addition, while the

court suggested that McNally and Kermani lacked standing "deriv[ed]" from Spargo's claims, it nevertheless found that they had "direct" standing (SPA 18 & n.7).

With regard to Spargo, the court held that the "plain language" of Article VI, § 22(a) of the State Constitution – which vests the Commission with the authority to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications . . . or performance" of State court judges (SPA 40) – constrains the Commission from "entertaining constitutional challenges to the Rules" (SPA 18-19). The court further provided three reasons why, in its view, the Commission's proceeding would not provide an adequate opportunity for judicial review of Spargo's federal constitutional claims.

First, the court ruled that if the Commission were to dismiss the charges against Spargo, his constitutional challenges "would go unheard" (SPA 19). Second, the court found it "debatable" whether Spargo could obtain mandatory review in the New York Court of Appeals (SPA 19), the only body with authority to review a Commission determination (see SPA 40, 44). Finally, believing that the New York Court of Appeals has never considered a constitutional challenge to the Rules in the course of reviewing a Commission determination, the court stated that "[i]t is fallacious to argue that abstention is appropriate" (SPA 23).

On the merits of plaintiffs' First Amendment challenges, the court applied strict scrutiny to the prohibitions on the partisan political activity of judicial candidates (see SPA 26-30). The court accepted that the independence of the judiciary constitutes a compelling state interest (SPA 27), but relying on Republican Party of Minnesota v. White, 536 U.S. 765 (2002) – which found unconstitutional a Minnesota rule that prohibited judicial candidates from "announcing" their views on "disputed legal or political" issues – the court held that Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) were "prior restraints" insufficiently narrowly tailored to further that interest (SPA 28-30).

The district court also invalidated Sections 100.1 and 100.2(A) as void for vagueness, finding that the provisions fail to provide a "reasonable opportunity for a person of any level of intelligence to know what conduct would be prohibited," lack specificity, and "would tend to lead judges" to unduly restrict their conduct (SPA 33-35).

Finally, acknowledging a "critical difference between the work of a judge and the work of other public officials," the court rejected plaintiffs' assertion that the challenged provisions impermissibly distinguish between judicial candidates and candidates for other elective offices in violation of equal protection (SPA 23-24).

The Commission thereafter filed a Notice of Appeal on March 7, 2003, and plaintiffs cross-appealed from that portion of the order rejecting their equal protection claims. **After moving unsuccessfully for a stay pending appeal in the district court, the Commission sought the same relief in this Court and moved to expedite the appeal. On May 20, 2003, this Court granted the Commission's application in its entirety.**

STANDARD OF REVIEW

The district court's entry of a permanent injunction is reviewed for an abuse of discretion. Knox v. Salinas, 193 F.3d 123, 129 (2d Cir. 1999). This Court may overturn the district court's judgment if it finds that the court incorrectly applied the law. Rodriguez v. City of New York, 197 F.3d 611, 614 (2d Cir. 1999). Such questions of law are reviewed de novo. St. Johnsbury Academy v. St. Johnsbury Sch. Dist., 240 F.3d 163, 168 (2d Cir. 2001).

SUMMARY OF ARGUMENT

The district court's judgment declaring Sections 100.1, 100.2, 100.5(A)(4)(a), and 100.5(a)(1)(c)-(g) unconstitutional and enjoining the Commission from enforcing those provisions in unsupportable and should be reversed.

First, the district court should have abstained under Younger from exercising jurisdiction over Spargo's federal constitutional claims. The New York Court of Appeals' decisions in Raab and Watson, issued June 10, 2003, eliminate any doubt that the Commission may entertain constitutional defenses, and that review by the Court of Appeals is mandatory. Because those proceedings afford Spargo an adequate opportunity for review of his constitutional claims, abstention is required. Nor can Spargo evade the abstention bar by joining plaintiffs McNally and Kermani; the federalism and comity concerns at the core of Younger cannot be flouted by such a tactic.

Second, the contested Rules regarding partisan political activity – Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) – are narrowly tailored to further the State's compelling interest in an impartial and independent judiciary. The State may properly limit ancillary partisan activity by judicial candidates that is unrelated to the candidates' own campaigns to ensure that courts decide cases solely on the merits, and perhaps more importantly, that the public views the judiciary as unbiased and openminded.

Finally, Sections 100.1 and 100.2(A) provide sufficient notice to judges and judicial candidates of proscribed conduct. In light of the substantial body of precedent applying these provisions, as

well as the availability of advisory opinions regarding specific conduct, the Rules are not void for vagueness.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FAILING TO ABSTAIN

Based primarily on its belief that the Commission cannot consider constitutional claims and that the New York Court of Appeals is not required to review them, the district court refused to abstain from deciding this dispute. Both of these assumptions, however, are incorrect, and Spargo cannot make the district court's adjudication of his claims permissible by joining McNally and Kermani as plaintiffs. Accordingly, the district court's ruling should be reversed.

A. Younger Abstention Bars Spargo's Claims.

Grounded upon principles of federalism and comity, Younger abstention "rests foursquare on the notion" that a state proceeding constitutes a sufficient forum for the vindication of federal constitutional rights. Diamond "D", 282 F.3d at 198. A federal court must abstain under Younger when: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the federal plaintiff has an adequate

opportunity for review of federal constitutional claims in the state proceeding. Schlager v. Phillips, 166 F.3d 439, 442 (2d Cir. 1999). "[W]hen Younger applies, abstention is mandatory and its application deprives the federal court of jurisdiction in the matter." Diamond "D", 282 F.3d at 197.

All three Younger factors are satisfied here. The district court and plaintiffs agreed (SPA 18 & n.6) that the first two factors are not in dispute: the Commission's proceeding against Spargo is an "ongoing" one, see Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433-34 (1982) (applying Younger to state administrative proceedings); Doe v. Connecticut Dep't of Health Svcs., 75 F.3d 81, 85 (2d Cir. 1996) (same), and it implicates an important state interest – namely, the integrity and impartiality of the judiciary, see Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring) ("There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."); Nicholson v. State Comm'n on Jud. Conduct, 50 N.Y.2d 597, 607 (N.Y. 1980) (same); see also infra Point II.B. The district court's conclusion that the third prong of the Younger inquiry is unsatisfied, however, was erroneous and should be reversed.

1. The Commission's proceeding, coupled with mandatory review by the New York Court of Appeals, affords Spargo an adequate opportunity to present his federal constitutional claims.

a. The Commission considers constitutional defenses to disciplinary charges.

The district court's refusal to abstain was based in large part on its mistaken belief that the provision of the State Constitution governing Commission proceedings does not permit the Commission itself to "entertain [] constitutional challenges to the Rules" (SPA 18-19). Article VI, § 22(a) of the State Constitution provides that the Commission shall "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications" and performance of State judges, and "may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office" (SPA 40; see also SPA 43 [N.Y. Jud. Law § 44(1)]). While neither Art. VI, § 22(a) nor N.Y. Jud. Law 44(1) explicitly authorizes the Commission to address constitutional issues that arise in the context of a proceeding, these provisions do not preclude the Commission from responding to a constitutional defense, nor can they reasonably be read to reach that result. As the Supreme Court held in rejecting a similar argument against abstention, "it would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." Ohio Civ. Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 629 (1986).

In fact, the Commission can and does consider constitutional defenses to disciplinary charges. In two recent matters – In re

Raab (S.C.J.C. Feb. 3, 2003), and In re Watson (S.C.J.C. Dec. 26, 2002)[5] – the Commission squarely considered (and ultimately rejected) First Amendment challenges to specified Rules, including some of the same partisan political activity provisions (Sections 100.5(A)(1)(c)-(g)) at issue here. There is, therefore, no basis for the district court's finding that "[c]onsideration of the validity of the Rules themselves is outside the scope of the Commission's authority despite any constitutional defense brought by the judge" (SPA 20). Indeed, the New York Court of Appeals just acknowledged as much in Raab and Watson. See Raab, Slip Op. No. 91, at 6 ("Petitioner raised his constitutional challenge to the validity of the political activity limitations before the Commission"); Watson, Slip Op. No. 78, at 9 (acknowledging that petitioner raised constitutional challenge to Rules before the Commission).

Because Spargo could have presented his constitutional claims in the Commission proceeding but instead sought an injunction in federal court, this case falls squarely within Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982). There, the Supreme Court held that Younger abstention applied where the

[5] **The Commission's determinations are available online at www.scjc.state.ny.us.**

party charged with violating disciplinary rules (1) "failed to even attempt to raise any federal constitutional challenge" in the substantive state administrative hearing; and (2) "point[ed] to nothing" to indicate that the administrative body, "the majority of whom are lawyers, would have refused to consider a claim that the rules which [it was] enforcing violated federal constitutional guarantees." 457 U.S. at 435 (emphasis in original). Here, Spargo did raise constitutional defenses, both in his Answers and in response to questions asked of him during the Commission's investigation, see supra at 14-15, 17-18, but he refused to allow for their adjudication in the state proceeding, and he can "point to nothing" to indicate that the Commission would have declined to address them.

b. The New York Court of Appeals provides mandatory review of constitutional challenges to the Rules.

Even though the Commission does consider constitutional defenses, review by the New York Court of Appeals alone would be "'sufficient'" to trigger abstention. Doe, 75 F.3d at 86 (abstention required if "'constitutional claims may be raised in state-court judicial review of the administrative proceeding'") (quoting Ohio Civ. Rights Comm'n, 477 U.S. at 629). In New York, a judge or

judicial candidate aggrieved by an adverse Commission determination may obtain mandatory judicial review in the New York Court of Appeals simply by asking for it – a fact that the district court misapprehended (SPA 19-21).

The district court based its conclusion in part on the twin assumptions that the New York Court of Appeals has "never undertaken a constitutional challenge to the Rules on review of a Commission determination" and that the availability of such review is "debatable" (SPA 19, 21). Those assumptions simply cannot stand in light of the Court of Appeals' June 10, 2003 rulings in Raab and Watson. Not only did both cases involve review of constitutional challenges to the Rules, but the Court of Appeals expressly confirmed that a Commission determination is "reviewable as of right." Raab, Slip Op. No. 91, at 5; see also Watson, Slip Op. No. 78, at 7 ("Petitioner appeals to this Court as of right").[6] Of course, the New York Court of Appeals' interpretation in this regard is "authoritative" and binding upon this Court. See Kidney v. Kolmar Labs., 808 F.2d 955, 956 (2d Cir. 1987); see also Tunick v. Safir, 228 F.3d 135, 139 (2d Cir. 2000) (acknowledging "supremacy

[6] **As the district court itself acknowledged in a subsequent ruling, see Spargo v. New York State Comm'n on Jud. Conduct, 2003 U.S. Dist. LEXIS 7073, at *14 n.3 (N.D.N.Y. Apr. 29, 2003), the Court of Appeals never has declined to review a Commission determination.**

of state's highest tribunal in interpreting its own laws") (Calabresi, J., concurring).

The Court of Appeals' characterization in Raab and Watson of review "as of right" is fully supported by relevant constitutional and statutory text, as well as that court's own rules. Article VI, § 22(d) of the State Constitution and N.Y. Judiciary Law § 44(9) each provide that the New York Court of Appeals "shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based" (SPA 41; 45 (emphasis added); see also SPA 65 ([22 NYCRR § 530.1(b] ("[a] written request to the Chief Judge for review by the Court of Appeals, timely made in accordance with Judiciary Law, section 44, subdivision 7, shall commence the proceeding for review of the determination of the State Commission on Judicial Conduct"))). The use of the words "shall review" in Article VI, § 22(d) and N.Y. Judiciary Law § 44(9) leave no room for the exercise of merely discretionary review.

Apart from being able to obtain mandatory review by the New York Court of Appeals of a sanction imposed by the Commission, a judge or judicial candidate under investigation by the Commission for violating the Rules may also obtain review of a federal constitutional claim by commencing a State court proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (see SPA 76-77 [CPLR §§ 7801, 7803]). The availability of such a remedy is well-settled after Nicholson v. State Comm'n on Jud. Conduct, 50 N.Y.2d 597 (N.Y. 1980), in which the New York Court of Appeals held that an individual subpoenaed by the Commission could seek Article 78 review at that stage, but refused to quash the subpoena upon concluding that any infringement on First Amendment rights was "far outweighed by the State's interest in the integrity of its judiciary." 50 N.Y.2d at 608.

Such an avenue of review provides an additional justification for Younger abstention here. This Court has applied Younger upon finding that where an Article 78 proceeding is available, "'a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.'" Diamond "D", 282 F.3d at 202 (quoting Pennzoil v. Texaco, 481 U.S. 1, 15 (1987)). Having failed to avail themselves of that viable remedy, plaintiffs cannot now claim that they are immune from Younger abstention. See Diamond "D", 282 F.3d at 202

(applying Younger where plaintiff was "free to file" Article 78 proceeding but opted not to do so).

2. The district court's other reasons for declining to abstain are unavailing.

The remaining grounds provided by the district court for refusing to abstain under Younger cannot withstand scrutiny. The court noted that if "charges are lodged but are later found to be unsubstantiated," the Commission will dismiss the complaint (see SPA 44; 74 [N.Y. Jud. Law § 44(6); 22 NYCRR § 7000.7(e)]), leaving the "purported offender's constitutional challenge" to go "unheard" (SPA 19). But of course, the "appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief." Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 452 n.1 (1974) (Powell, J., concurring); see also Sui v. INS, 250 F.3d 105, 120 (2d Cir. 2001) (refusing to reach federal constitutional issue in deciding case on statutory grounds). Simply because a judge may prevail in a Commission proceeding on a ground that obviates adjudication of his constitutional challenge does not mean that the proceeding fails to afford him an opportunity for review of federal constitutional claims.

Nor is there any merit to the district court's observation that the New York Court of Appeals might review a "scant" and "spare" administrative record that is "less than ideal for consideration of a constitutional question of import" (SPA 20-21). **That court's precedents establish that it "conducts its own plenary review of the facts and law." In re Mason, 2003 N.Y. LEXIS 899, at *7 (N.Y. May 1, 2003); see also Watson, Slip Op. No. 78, at 7 ("our review is plenary"); Quinn v. State Comm'n on Jud. Conduct, 54 N.Y.2d 386, 391 (N.Y. 1981) (scope of review of Commission determinations is "broader than that traditionally assigned to an appellate court" and "not limited to considering alleged errors of law"). The district court's contrary finding was apparently based upon its misunderstanding that the Commission's investigatory depositions of Spargo constituted the entire hearing record of the Commission proceeding (see SPA 67 [22 NYCRR §§ 7000.1(h), (j) (defining and distinguishing Commission's adjudicative "hearing" from its "investigation")]). Those examinations under oath, however, related only to the Commission's investigation of Spargo's alleged misconduct (see SPA 42; 69 [N.Y. Jud. Law § 42(1); 22 NYCRR § 7000.3(d)]). After the Commission concluded its investigations and its administrator served the Formal Written Complaint and Supplemental Formal Written Complaint on Spargo, a hearing would have ensued before a referee – in which Spargo could have raised**

constitutional challenges to the Rules, and thereby made a record sufficient for review by the New York Court of Appeals – had he not commenced the instant action to enjoin the hearing from going forward.

B. Younger Abstention Bars McNally's and Kermani's Claims.

In addition to precluding adjudication of Spargo's claims, Younger prohibits the exercise of federal jurisdiction over McNally's and Kermani's claims. Spargo cannot evade the Younger bar simply by joining as plaintiffs McNally and Kermani, where their interests are closely intertwined with Spargo's. In any event, the district court should have dismissed McNally's and Kermani's claims for lack of standing.

1. Spargo cannot evade the Younger bar by joining McNally and Kermani as plaintiffs.

Even though McNally and Kermani are not subject to the judicial conduct Rules and are not parties to the Commission's proceeding, their joinder does not provide the court with grounds to exercise jurisdiction. Younger "permit[s] state courts to try state cases free from interference by federal courts, particularly where the party to the federal case may fully litigate his claim before the state court." Hicks v. Miranda, 422 U.S. 332, 349 (1975) (citation and internal quotations omitted).

In Hicks, the Supreme Court abstained from adjudicating the claims of individuals who, while not themselves subject to state court proceedings at the outset of litigation, brought before a federal court an issue that already was under consideration by a state court. Because the interests of the federal and state court litigants "were intertwined," id. at 348, the Court held, "the requirements of Younger v. Harris could not be avoided." Id. at 349. "[T]he same comity considerations [identified in Younger] apply, where the interference is sought by some . . . not party to the state case." Id.; see also Doran v. Salem Inn, Inc., 422 U.S. 922, 928-29 (1975) (multiple parties may be "so closely related" as to be "subject to the Younger considerations which govern any one of them").

Like the Hicks plaintiffs, the interests asserted by McNally and Kermani are so closely intertwined with – indeed identical to – Spargo's as to preclude an exercise of jurisdiction over their claims. McNally and Kermani claim that they have "refrain[ed]" from speaking and associating with Spargo and other unspecified prospective judicial candidates out of a concern that their actions will expose Spargo and others to discipline by the Commission (McNally Aff. 5/12/03 ¶¶ 6-8; Kermani Aff. 5/12/03 ¶¶ 7-10, 22). Spargo, for his part, alleges that he has "refrained" from speaking and associating with members of political organizations, like

McNally and Kermani, out of a fear that doing so will subject him to discipline by the Commission (Spargo Aff. 5/12/03 ¶¶ 4-6). Resolution of Spargo's constitutional claims in state court proceedings will fully address McNally's and Kermani's allegations.

Allowing McNally and Kermani to proceed in a federal forum simply because they were not parties to the Commission proceeding would turn Younger's logic on its head. Spargo, the only plaintiff directly subject to the Rules and the Commission's jurisdiction, would be proscribed under Younger from challenging the Rules, but McNally and Kermani – persons outside the ambit of the Rules and the jurisdictional reach of the Commission – could seek precisely the same relief in federal court despite the pendency of the proceeding against Spargo. It is exactly to prevent such a result that "Younger cannot be avoided simply by joining nonparties to the state court proceeding in order to procure injunctive and declaratory relief [in federal court] against that proceeding." Women's Comm. Health Ctr. v. Texas Health Facilities Comm'n, 685 F.2d 974, 982 (5th Cir. 1982) (citing Hicks, 422 U.S. 332).

2. In any event, McNally and Kermani lack standing.

Even if Younger abstention did not apply to McNally and Kermani – which it does – the district court should have dismissed their claims for lack of standing. Parties invoking federal

jurisdiction bear the burden of showing that they meet the core constitutional requirements of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Free Speech v. Reno, 200 F.3d 63, 65 (2d Cir. 1999). A plaintiff must demonstrate that he suffered an "injury in fact" – i.e., an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal citations and quotations omitted). In addition, a plaintiff must show that his injury is "fairly traceable" to the actions of the defendant, and that a favorable decision will likely redress the harm plaintiff suffered. Id. at 560-61.[7]

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[7] This requirement applies to plaintiffs who seek third-party standing as well. While a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,'" Secretary of State of Maryland v. Munson, 467 U.S. 947, 955 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)), this prudential limitation on standing may be outweighed in First Amendment overbreadth challenges by an interest in unfettered speech, see Munson, 467 U.S. at 956. Such a plaintiff, however,

must still satisfy the Article III "injury in fact" requirement, id. at 958, which McNally and Kermani cannot do.

McNally and Kermani have not satisfied the threshold "injury in fact" requirement. Neither one is a "direct object" of the Rules. Lerman v. Board of Elec., 232 F.3d 135, 142 (2d Cir. 2000) ("In the context of an action challenging the legality of government action," it is "significan[t]" whether or not the plaintiff is "a direct object of the action at issue.") (internal quotations and citations omitted) (emphasis in original). The challenged Rules regulate only the speech and associational rights of judges or judicial candidates from whom McNally or Kermani might wish to hear, but not McNally or Kermani themselves.

Nor were either of them, by their own admissions, foreclosed from engaging in expressive speech or political association with or on behalf of Spargo or any other candidate. In fact, McNally and Kermani concede that they freely exercised their speech and associational rights in supporting Spargo in his 2001 campaign for Supreme Court Justice. McNally repeatedly states that she was "an active supporter of The Hon. Thomas J. Spargo's . . . candidacy for Supreme Court" (McNally Aff. 5/12/03 ¶ 1), and "spoke out publicly in support of Spargo's candidacy, and successfully nominated him for the Democratic Party endorsement" (McNally Aff. 5/12/03 ¶ 2). In fact, she states that over a ten month period, she "spoke to Tom Spargo on nearly a daily basis, if not at least four or five times a day," and "almost on a daily basis [she] performed some function

in helping to move his candidacy along, whether it was talking to people who were key players in the Democratic Party or in making arrangements for some element of the campaign puzzle that had to be put together" (JA 328 ¶ 17). Kermani likewise admits that he "was a supporter of the Hon. Thomas J. Spargo during his 2001 campaign . . . and supported the Albany County Republican Party's decision to endorse him as a candidate for that election" (Kermani Aff. 5/12/03 ¶ 2).

McNally's further assertions that she is constrained to limit her support of Spargo and other judicial candidates in the present or future (McNally Aff. 5/12/03 ¶¶ 4-8) are purely speculative, and thus insufficient to confer standing. See Lujan, 504 U.S. at 564. They are also contradicted by her contemporaneous averments that she "anticipate[s] supporting [Spargo] in his next election for Supreme Court Justice" (McNally Aff. 5/12/03 ¶ 4). And, in any event, the only action involving McNally that led to investigation by the Commission was Spargo's payment to her, not her speech or associational activities on his behalf (JA 118 ¶ 2; 246; 327-328 ¶ 16; 332-333 ¶¶ 34-37).

Like McNally, Kermani conclusorily alleges that he is restrained from inviting Spargo and other candidates to speak to his party about their qualifications for office (Kermani Aff. 5/12/03 ¶¶ 9, 12). The conduct in which Kermani apparently wishes

to engage – having a judicial candidate or sitting judge attend political gatherings – is expressly permitted by the Rules during the "window period" of a campaign (see SPA 58-59 [22 NYCRR § 100.5(A)(2)]; see also Advisory Comm. on Jud. Ethics, Op. 91-44, 1991 WL 757613 (1991) (sitting judge may meet with political chair to discuss possible candidacy, even if not yet an announced candidate))). To the extent Kermani complains of something else, his allegations, like McNally's, are too speculative to confer standing.

POINT II

THE CHALLENGED RULES ARE CONSTITUTIONAL

The challenged Rules are constitutional and the district court's order should be reversed. Because the Rules specifically permit judges and judicial candidates to engage in partisan political activity in support of their own campaigns for judicial office, the restrictions they impose on other unrelated partisan activities are not subject to strict scrutiny; instead, they are constitutional if "closely drawn" to further a "sufficiently important" governmental interest. Even if strict scrutiny applies, the Rules are narrowly tailored. As the New York Court of Appeals just held in Raab, the political activity provisions properly balance the State's interest in electing some of its judges (and the electorate's interest in hearing from these candidates) with the State's compelling interest in an impartial and independent judiciary. Finally, Sections 100.1 and 100.2(A) - which direct that judges should maintain high standards of conduct and promote public confidence in the integrity and independence of the judiciary – are not unconstitutionally vague. They provide ample notice to judges of proscribed conduct, particularly in light of the substantial interpretive guidance available in Commission and New York Court of Appeals' precedent, as well as in opinions from the Advisory Committee on Judicial Ethics.

A. The Challenged Rules Governing Political Activity are Constitutional if Closely Drawn to Further a Sufficiently Important State Interest.

The challenged Rules governing partisan political activity are properly analyzed under a standard of review more flexible than the strict scrutiny analysis applied by the district court (see SPA 26-30). Laws that "implicate, in a limited fashion, a person's rights to participate in politics and to serve as an elected official have survived review under the First Amendment and have not been subjected to strict scrutiny." **Fletcher v. Marino, 882 F.2d 605, 611 (2d Cir. 1989). In upholding a statute that prohibited public officials or those holding party office from also holding membership on a community school board, Fletcher distinguished "restrictions on voters' access to the polls, candidates' access to the ballot, and the internal workings of political parties" from statutes that "do not control political parties or the party process, but ensure fairness in both elections and government service." Id. at 611-612. Strict scrutiny applied to the former category, this Court determined, but not the latter. Id.**

Like the statute at issue in Fletcher, the challenged Rules governing partisan activity by judges are designed to "ensure fairness" in "government service," not to "control political parties or the political process"; they implicate "rights to participate in

politics" only in a "limited" manner. See supra at 6-8; infra at 48-50.

Strict scrutiny is unwarranted not only because of the limited impact of the challenged Rules, but also because the Rules do not interfere with a candidate's ability to communicate with the voters.

Although a candidate's own speech about her qualifications for public office" lies "at the core of our First Amendment freedoms" and is subject to strict scrutiny, White, 536 U.S. at 774, the Supreme Court has applied a more flexible standard of review to speech on behalf of another person's campaign. **Thus, in FEC v. Colorado Repub. Fed. Campaign Comm., 533 U.S. 431 (2001), the Court declined to apply strict scrutiny to expenditures made by political parties in coordination with the parties' candidates – radio and television advertisements in support of a candidate that addressed his qualifications for office – instead asking if the law was "closely drawn" to further a "sufficiently important" governmental interest. Id. at 456. The Court has also applied this standard to restrictions on campaign contribution limits, see** Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387-388 (2000); **Buckley v. Valeo, 424 U.S. 1, 25 (**1976), and is appropriate here.

Like the provisions at issue in Colorado Rep. Fed. Campaign Comm., Buckley, and Shrink Missouri, the challenged Rules restrict association by judges and judicial candidates with the views of

other persons or political parties, not the expression of views by a candidate in the context of her own campaign. Accordingly, the more flexible standard of review set forth in these cases should be applied here. For the same reasons the Rules satisfy strict scrutiny, see infra Points II.B and II.C, they also are "closely drawn" to satisfy a "sufficiently important" government interest, and thus are fully constitutional.

B. Even if Strict Scrutiny Applies, the State Has a Compelling Interest in Preserving the Impartiality and Independence of the Judiciary.

Even if strict scrutiny applies to the plaintiffs' challenges, the State has a compelling interest in preserving both the fact and appearance of its judiciary's impartiality and independence. In White, the Supreme Court identified two concepts of judicial "impartiality" that may justify restrictions on judges and judicial candidates. Impartiality may mean a lack of bias for or against either party to the proceeding, which the Court found to be a compelling State interest. 536 U.S. at 775-76 & n.7. As so defined, impartiality ensures "equal application of the law" and "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." Id. White also defined impartiality as "openmindedness"; in this regard, the state's interest stems from the need for a judge to "be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." 536 U.S. at 778; see also Watson, Slip Op. No. 78, at 13 ("[O]penmindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine – as opposed to illusory – opportunity to be heard.").[8]

[8] White distinguished these two concepts of impartiality from a "lack of predisposition regarding the relevant legal issues in a case," which the Court found neither possible nor desirable to avoid. 536 U.S. at 777-78.

Both of these meanings of impartiality are consonant with the concept of judicial independence, the preservation of which the State has identified as the basis for the promulgation and enforcement of the Rules (see SPA 49 [22 NYCRR § 100.1 ("[a]n independent and honorable judiciary is indispensable to justice in our society," and "[t]he provisions of [the Rules] are to be construed and applied to further that objective")]). The district court properly found that the preservation of judicial independence was a compelling state interest and that petitioners had conceded as much (SPA 27).

The State's interest in judicial impartiality and independence is paramount. Indeed, it has constitutional magnitude. See Watson, Slip Op. No. 78, at 12 ("[T]he Due Process clause guarantees litigants a fair and impartial magistrate, and the State, as steward of the judicial system, has the obligation to create and maintain a system that ensures equal justice and due process."); Raab, Slip Op. No. 91, at 8-9; see also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Ward v. Village of Monroeville, 409 U.S. 57 (1972); In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927); Kamasinski v. Judicial Rev. Council, 44 F.3d 106, 110 (2d Cir. 1994) ("The state's interest in the quality of its judiciary, we conclude, is an interest of the highest order."). Public perception of judicial impartiality is equally

important, because "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." Mistretta v. United States, 488 U.S. 361, 407 (1989); see also Cox v. Louisiana, 379 U.S. 559, 565 (1965) ("A State may . . . properly protect the judicial process from being misjudged in the minds of the public.").

That the State has a compelling interest in preserving both the actual and apparent impartiality and independence of its judiciary cannot reasonably be in dispute. White itself acknowledged as much, noting that it did "not disagree" that the State had an "interest in maintaining both the appearance of . . . impartiality and its actuality." 536 U.S. at 777 & n.7. As shown below, the Rules challenged by plaintiffs are narrowly tailored to serve those important interests, and thus pass constitutional muster.

C. The Challenged Rules Governing Partisan Political Activity are Narrowly Tailored to Advance the State's Compelling Interest.

The district court erred in finding that the contested provisions of the Rules which govern partisan political activity were insufficiently tailored to serve the State's interest in an impartial and independent judiciary. These provisions appropriately balance the two interests at stake here: the First

Amendment right of judicial candidates to communicate their qualifications for public office and of voters to make informed decisions, on the one hand, and the obligation of the State to "ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption," on the other. Raab, Slip Op. No. 91, at 11.

1. The Rules governing partisan political activity are narrowly tailored.

The district court determined that the connection between a judicial candidate's involvement in partisan politics and the potential for creating actual or apparent bias was "attenuated" (SPA 29). The court found that "[t]here is no support for the proposition that one-time participation in political activity impedes the making of independent judgments any less than current participation in some political activity might" (SPA 29-30). This conclusion ignores the irreparable harm that will be done to the public's perception of judicial decisionmaking if judges are permitted to engage, wholly unrestrained, in ancillary partisan political activity.

If the judges whom we ask to decide cases involving political parties, political officers, or party leaders have themselves been

regularly engaging in ancillary political activities unrelated to their own campaigns, inevitably some members of the public will suspect that the decisions in these cases have been made on the basis of political loyalty – bias for or against a political party or one of its standard-bearers – even when that is not the case. "Precisely 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." Raab, Slip Op. No. 91, at 13. And the number of cases in which this risk arises will not be small; after all, political parties routinely litigate matters such as election cases, and political party leaders often are the targets of litigation. "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." Raab, Slip Op. No. 91, at 13.

As described supra at 6-8, the Rules allow a judicial candidate, during the "window period," to "attend and speak to gatherings on his or her own behalf, provided that the candidate

does not personally solicit contributions"; to "appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her own candidacy"; and to "appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part" (SPA 58-59 [22 NYCRR §§ 100.5(A)(2)(i)-(iii)]). The Rules permit "the candidate's name to be listed on election materials along with the names of other candidates for elective public office," and to "purchase two tickets to, and attend, politically sponsored dinners and other functions" (SPA 59 [22 NYCRR §§ 100.5(2)(iv), (v)]). The Rules further permit a judicial candidate "to vote and to identify himself or herself as a member of a political party" (SPA 58 [22 NYCRR § 100.5(A)(1)(ii)]), and to "be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization" (SPA 59 [22 NYCRR § 100.5(A)(3)]). However, the Rules prohibit judges or judicial candidates from "participating in any political campaign for any office" other than his or her own, or "permitting his or her name to be used in connection with any activity of a political organization" (SPA 58 [22 NYCRR § 100.5(A)(1)(d)]); from "publicly endorsing or publicly opposing (other than by running against) another candidate for

public office" (SPA 58 [22 NYCRR § 100.5(A)(1)(e)]); and from "making speeches on behalf of a political organization or another candidate," or "attending political gatherings" (SPA 58 [22 NYCRR §§ 100.5(A)(1)(f), (g)]).

As the New York Court of Appeals held in Raab, Slip Op. No. 91 at 11-14, the line between restricted and permitted activity reflected in the Rules fully addresses the concern animating White: that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms." 536 U.S. at 781 (internal quotations omitted). The Rules thus safeguard "the reputation for impartiality and nonpartisanship" of the judicial branch, upon which its "legitimacy . . . ultimately depends," Mistretta, 488 U.S. at 407, and properly acknowledge that judges are not like other public officials, see Chisom v. Roemer, 501 U.S. 380, 410-11 (1991) (Scalia, J. dissenting), because their fealty lies not with any particular candidate or party, but with "the Law." Id.

2. New York's policy of electing some of its judges does not wholly preclude the State from restricting their ancillary partisan political activities.

The district court also found fault with the challenged political activity Rules because the "prohibition on participating in political activity for fear of influencing a judge ignores the

fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate" (SPA 29). The court concluded that "in light of the political process by which judges are elected" in New York (SPA 30), the state cannot restrict the political activities of such judges in service of its interest in an independent and impartial judiciary.

The district court appears to be suggesting that the challenged Rules are underinclusive since they allow judges to engage in some partisan political activity during their own campaigns, but not at any other time. White, however, refutes the conclusion that simply by choosing some of its judges through an electoral process – a tradition with a long history, see 536 U.S. at 785 – New York must completely forfeit the right to restrict partisan political activity by judges and judicial candidates. The Court, in fact, expressly acknowledged that restrictions on judicial conduct are permissible in order to protect judicial impartiality. See id. at 777 & n. 7.[9]

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[9] In rejecting plaintiffs' equal protection challenge, even the district court appeared to acknowledge the faultiness of this analysis (see SPA 24 ("Judicial candidates and candidates for other public office are not similarly situated.")).

Furthermore, even if such restrictions would not be permitted in other electoral contexts, see Eu v. San Francisco County Dem. Cent. Comm., 489 U.S. 214 (1989); Tashijian v. Republican Party of Connecticut, 479 U.S. 208 (1986), White makes abundantly clear that judicial elections are meaningfully different from elections for other public offices for First Amendment purposes. Id. at 783 ("we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same those for legislative office"). The New York Court of Appeals, upholding these Rules, reached the same conclusion:

> **Unlike other elected officials . . . judges do not serve particular constituencies but are sworn to apply the law impartially to any litigant appearing before the court. Once elected to the bench, a judge's role is significantly different from others who take part in the political process and, for this reason, conduct that would be appropriate in other types of campaigns is inappropriate in judicial elections.**

Raab, Slip Op. No. 91, at 13; see also Buckley v. Illinois Jud. Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993); ACLU v. Florida Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990). Contrary to the district court's holding, the mere fact that New York has chosen to elect some of its judges in no way is dispositive of whether the State may restrict the candidates' partisan political activities, to the extent that such activities are unrelated to a candidate's own campaign for judicial office.

3. The district court's remaining rationales for invalidating provisions of the Rules under the First Amendment are meritless.

The other reasons the district court gave for finding the political activity rules insufficiently narrowly tailored are without merit. The court concluded 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," rather than "a rule prohibiting an elected judge or judicial candidate from participating in politics" (SPA 30). But while "the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality," Mistretta 488 U.S. at 407, that inevitably will result when judges align themselves with the interests of other candidates and political parties beyond relaying their own qualifications for office.

The district court also described Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) as "prior restraints" to which strict scrutiny applied, while offering no explanation for this conclusion (SPA 26). Prior restraints generally "take the form of orders prohibiting the publication or broadcast of specific information," or "systems of administrative preclearance" that give governmental authorities power to bar certain communications. In re G. & A.

Books, Inc., 770 F.2d 288, 296 (2d Cir. 1985); see also Dial Info. Svcs. Corp. v. Thornburgh, 938 F.2d 1535, 1543 (2d Cir. 1991) ("Only where the government imposes a requirement of advance approval or seeks to enjoin speech can there be a prior restraint."). To construe the speech limitations in the Rules and other similar codes of conduct as akin to court-ordered injunctions, licensing schemes, or other classic prior restraints would stretch the boundaries of the doctrine beyond recognition. In any event, even if the Rules are construed as prior restraints on speech, the consequence is merely that they are subject to strict scrutiny, see Perry v. McDonald, 280 F.3d 159, 171 (2d Cir. 2001), which is fully satisfied here.

D. The Challenged Rules Provide Ample Notice of Prohibited Conduct and Thus Are Not Impermissibly Vague.

The challenged Rules give judges and judicial candidates clear notice of prohibited conduct, particularly when considered in light of the substantial interpretive guidance that bears directly on the actions at issue in the Commission's charges against Spargo. Any remaining ambiguities in the Rules – if they exist – may be resolved by requesting an advisory opinion on the propriety of specific conduct. Accordingly, the district court erred in declaring Sections 100.1 and 100.2(A) of the Rules void for vagueness (SPA 33-35).

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In order to be constitutional, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. at 108.

The vagueness doctrine does not, however, require that a statute specify every prohibited act. Because "[t]here are limitations in the English language with respect to being both specific and manageably brief," Arnett v. Kennedy, 416 U.S. 134, 159 (1974) (internal quotations omitted), "[i]t would be impossible to enumerate in any statute all the possible grounds and circumstances justifying the removal of a judicial officer," Sarisohn v. Appellate Div., Second Dep't, 265 F. Supp. 455, 458 (E.D.N.Y. 1967). See also Ex parte Secombe, 60 U.S. 9, 14 (1857) ("it is difficult, if not impossible, to enumerate and define with legal precision every offense for which an attorney or counselor ought to be removed"). The Supreme Court has cautioned that the vagueness doctrine was not designed to create a constitutional dilemma out of "the practical difficulties in drawing . . . statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning

that certain kinds of conduct are prohibited." Arnett, 416 U.S. at 159-160 (internal quotations omitted).

Given the inevitability of statutory imprecision, ambiguity that might otherwise render a statute or regulation impermissibly vague may be remedied by reference to interpretive precedents. For example, in Arnett, the Supreme Court upheld a "for cause" discharge in part because precedent regarding employer-employee relationships helped define that standard. Id.; cf. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048 (1991) (rule restricting attorney speech void for vagueness "absent any clarifying interpretation by the state court"). Similarly, in Sarisohn v. Appellate Div., Second Dep't, 265 F. Supp. 455, 458 (E.D.N.Y. 1967), the district court rejected a vagueness challenge to a provision of the New York State Constitution permitting judges to be removed "for cause,"[10] because that term had been discussed in the ethics canons and "defined in several cases involving the removal of judicial officers [which] provide a reasonable person with a competent definition of this phrase."

As in Sarisohn, there is abundant guidance here about how the Rules apply to the conduct with which Spargo is charged. The

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[10] This provision later was supplemented by the Constitutional provision creating and conferring authority upon the Commission. See supra at 4-5 (discussing Art. VI, § 22).

administrator alleged that Spargo impermissibly delivered the keynote address at a meeting of the Monroe County Conservative Party (JA 70 ¶¶ 14-15). Both the Commission and the Advisory Committee on Judicial Ethics have published opinions indicating that judges may not attend or speak at political events unrelated to their own campaign for judicial office. **See**, **e.g.**, In re Rath, (S.C.J.C. Feb. 21, 1989); Advisory Comm. on Jud. Ethics, Op. 88-136, 1988 WL 546990 (1988); Advisory Comm. on Jud. Ethics, Op. 88-32, 1988 WL 546912 (1988).

The administrator also alleged that Spargo impermissibly participated in partisan political activities during the 2000 Florida recount (JA 69 ¶¶ 11-13). Both the New York Court of Appeals and the Commission have sanctioned judges for endorsements or political activity in support of nonjudicial candidates. See, e.g., In re Maney, 70 N.Y.2d 27 (1987); In re Gloss, 1988 WL 524384 (S.C.J.C. Dec. 21, 1988).

The administrator further alleged that Spargo paid $5,000 to McNally and Connolly, despite the fact that each of them agreed to work on his campaign as an unpaid volunteer (JA 80-81 ¶¶ 4-7). The Advisory Committee on Judicial Ethics has opined that judicial candidates may not make even token gifts to volunteer campaign workers. Advisory Comm. on Jud. Ethics, Op. 98-06, 1998 WL 1109169 (1998).

The administrator also alleged that Spargo distributed items such as coupons for free gasoline or coffee to prospective voters (JA 66-67 ¶¶ 5-7). While no published opinion specifically addresses this issue, opinions regarding similar conduct sound a cautionary note. The Commission has removed a judge from office for making $5 payments in exchange for votes. See In re Therrian, 1986 WL 327092 (S.C.J.C. May 1, 1986); see also Advisory Comm. on Jud. Ethics, Op. 98-97, 1998 WL 1674707 (1998) **(distribution of promotional items such as pens, pencils, and letter openers to prospective voters permissible because the Rules permit judicial candidates to distribute "campaign literature" and because, broadly construed, the phrase "campaign literature" would include promotional items imprinted with campaign slogans).** Alternatively, either the Commission or the New York Court of Appeals might conclude that the distribution of these items was not barred by the Rules. Cf. Connor v. New York State Comm'n on Jud. Conduct, 2003 U.S. Dist. LEXIS 7841, at *12, *13 (N.D.N.Y. May 9, 2003) (fact that "plaintiff believes that the conduct for which he was charged should not be misconduct does not demonstrate that the provision at issue is vague"; "plaintiff's remedy is in defense to the merits of the misconduct charges, not in a vagueness challenge").

Even were such specific guidance unavailable, any ambiguity in the meaning of a statute or regulation could be cured by the

availability of an advisory opinion. In both Arnett, 416 U.S. at 160, and United States Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973) (restriction on "political activity" of federal employees), the Supreme Court relied in part on this factor in rejecting vagueness challenges to provisions less specific than those at issue here. See also Mason v. Florida Bar, 208 F.3d 952, 959 n.4 (11th Cir. 2000) (availability of advisory opinions is ground for rejecting vagueness challenge to attorney disciplinary rule prohibiting self-laudatory statements); Martin Tractor Co. v. Fed. Elec. Comm'n, 627 F.2d 375, 386 (D.C. Cir. 1980) (chill induced by facial vagueness reduced pro tanto by availability of advisory opinions). The opportunity for New York judges to obtain an opinion from the Advisory Committee on Judicial Ethics where any uncertainty about the applicability or meaning of the Rules exists, see N.Y. Jud. Law § 212(2)(l), is dispositive of Spargo's vagueness challenge.

Finally, not only is the district court's invalidation of Sections 100.1 and 100.2(A) on vagueness grounds unsupportable in light of the substantial guidance accessible to any judicial candidate, but the court's ruling on this point would also have extraordinarily broad consequences if affirmed. If the vagueness doctrine barred standards such as those challenged here, no ethical code could survive constitutional scrutiny, including the rules

applicable to federal judges, lawyers, and state officers and employees. See, e.g., 28 U.S.C. § 351(a) (authorizing discipline of judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts"); 2d Cir. R., App., Part E, R. 1(b) (same); N.Y. Jud. Law App. Code Prof. Resp. DR 1-102(a)(5),(7) (Consol. 2003) ("A lawyer shall not ... (5) Engage in conduct that is prejudicial to the administration of justice ... [or] (7) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."); N.Y. Pub. Off. Law § 74(3)(h) ("An officer or employee of a state agency ... should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."). Such a result certainly is not required by the Constitution, and would have gravely detrimental consequences for the public's confidence in the judiciary.

CONCLUSION

For the foregoing reasons, the district court's judgment, which declared Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g), and 100.5(A)(4)(a) of the Rules Governing Judicial Conduct facially unconstitutional and permanently enjoined the State Commission on Judicial Conduct from enforcing those provisions, should be vacated, and this Court should direct that the district court enter judgment in favor of the Commission.

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June 10, 2003

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[11] **The Attorney General's Office acknowledges the valuable contribution of Shaifali Puri in the preparation of this brief.**

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,620 words, excluding the table of contents, the table of authorities, and this certificate of compliance, and complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

Robert H. Easton

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 10th day of June, 2003, caused two true and correct copies of the foregoing Brief of Defendants-Appellants-Cross-Appellees, as well as their Notice of Appearance, to be served by overnight delivery on:

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