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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

ROBERT MYERS, Plaintiff, v. SHAUN R. THOMPSON, in his official capacity as Chief Disciplinary Counsel for the State of Montana, Defendant.	Case No. CV-16-45-H-DWM-JCL **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** *** ***Hearing Requested at the Court's Earliest Convenience***

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

INTRODUCTION

Plaintiff Robert Myers is an attorney residing in Ravalli County, Montana, and a candidate for district judge. Montana's Office of Disciplinary Counsel (ODC) - the state agency charged with prosecuting attorneys accused of ethical violations - is investigating Plaintiff Myers because he broadcast a campaign advertisement on a local radio station criticizing his opponent, Judge Jeffrey Langton. Even though the assertions in the advertisement were true, fear of discipline, including possible suspension or disbarment, is causing Plaintiff Myers to refrain from rebroadcasting it.

The regulations underlying the State's investigation prohibit attorneys from making statements about judges the State deems to be false. The United States Supreme Court has made clear, however, that false statements, particularly false statements made during a campaign, are protected by the First Amendment in situations where counterspeech is a likely response. *United States v. Alvarez,* 132 S.Ct. 2537 (2012). These regulations violate the First Amendment both on their face and as applied to Plaintiff Myers.

Judicial candidates should not be forced to choose between exercising their fundamental right to criticize their opponents or keeping their law licenses. Plaintiff Myers is entitled to immediate injunctive relief from this Court.

STATEMENT OF FACTS

I. Montana's Attorney Discipline System

The Montana Supreme Court has established the Office of Disciplinary Counsel (ODC) as well as a Commission on Practice to regulate professional conduct by Montana-licensed attorneys. Verif Comp., ¶9.[1] ODC processes, investigates, and prosecutes complaints filed against Montana attorneys. *Id.* at ¶ 9. The Montana Supreme Court appoints a Chief Disciplinary Counsel who has supervisory authority over ODC. *Id.* at ¶ 12. Defendant Thompson currently serves as Chief Disciplinary Counsel. *Id.* at ¶ 16.

The Commission on Practice has authority to hear and decide complaints filed by ODC and make recommendations to the Montana Supreme Court for disciplining attorneys. *Id.* at ¶ 13. The Montana Supreme Court considers such recommendations, issues written decisions, and imposes whatever discipline (if any) it deems appropriate. *Id.* at ¶ 14. Disciplinary options include private reprimands up to suspension or disbarment of lawyers. *Id.* at ¶ 15.

II. Judge Langton's Misconduct In The Cox Matter

On June 29, 2012, Sara Cox filed a "Motion and Brief to Amend Parenting

[1] The assertions in the Verified Complaint concerning ODC procedures are derived from its "Rules For Lawyer Disciplinary Enforcement" which is posted at: http://www.montanaodc.org/Portals/ODC/Rules%20for%20Lawyer%20Disciplinary%20Enforcement%20(Revised,%202016).pdf

Plan" involving children with whom she and Dan Cox, Plaintiff Myers' client, held joint custody, but failed to include with the motion a proposed amended parenting plan as expressly required by Mont. Code Ann. § 40-4-219(7). *Id.* at ¶ 45. On or about July 17, 2012, Judge Langton's administrative assistant contacted Sara Cox's attorney *ex parte* and informed him to file a proposed amended parenting plan as required by Mont. Code Ann. § 40-4-219(7). *Id.* at ¶ 46.

Dan Cox filed a response to Sara Cox's motion on July 27, 2012, and also filed on August 3, 2012, a petition for contempt against Sara Cox based on her alleged violation of the parenting plan. *Id.* at ¶ 47. Dan Cox's filing did not refer to Sara Cox's proposed amended parenting plan because she had not filed it and he was unaware of the *ex parte* communication between Judge Langton's staff and Sara Cox's attorney that had occurred on July 17. *Id.* at ¶ 48.

On August 8, 2012, Sara Cox filed a response to Dan Cox's petition for contempt. She attached to that pleading a proposed amended parenting plan – the one that should have been filed on June 29 as required by Mont. Code Ann. § 40-4-219. *Id.* at ¶¶ 49-50. Judge Langton refused to grant leave to Dan Cox to file a supplemental response addressing Sara Cox' untimely proposed amended parenting plan. *Id.* at ¶¶ 51-52. Judge Langton granted Sara Cox' motion on December 4, 2012. *Id.* at ¶ 53.

Plaintiff Myers and Dan Cox learned a year later of Judge Langton's *ex*

parte communication when Cox was reviewing the trial court file. Cox discovered the following handwritten notation in the court file:

> July 17, 2012 - "Need Prop. Amend. Parent Plan per JHL. Call & let Cuffe's asst. know. O.C. 2 weeks. O.C. 08-06-12."

(Verif Comp., Ex. 7). Plaintiff Myers and Cox interpreted this document as a memorialization of Judge Langton (whose initials are "JHL") authorizing an *ex parte* contact with Sara Cox's attorney, Matthew Cuffe, in order to alert him to his violation of Mont. Code Ann. § 40-4-219(7). *Id.* ¶56.

On December 5, 2013, Dan Cox filed a motion for relief under M.R.Civ.P. 60 and also moved to disqualify Judge Langton based upon the *ex parte* communication. *Id.* ¶69. Judge Langton did not disqualify himself. *Id.* ¶70.

Dan Cox filed a subpoena on February 25, 2014, to depose Judge Langton regarding the court file notation. *Id.* ¶72. Judge Langton quashed the subpoena without giving Dan Cox an opportunity to respond and did not permit any live witness testimony in support of Cox's Rule 60 motion. *Id.* ¶73.

On June 17, 2013, Cox filed a complaint with the Montana Judicial Standards Commission against Judge Langton.[2] *Id.* ¶75. Plaintiff Myers also sent an email to the Commission expressing his concerns about Judge Langton's *ex parte* communication with Sara Cox's attorneys. *Id.* ¶76.

[2] The Commission threatened to hold Cox in contempt if he publicly disclosed the complaint. Cox responded by obtaining injunctive relief from this Court. See *Cox v. McLean*, 49 F.Supp.3d 765 (D. Mont. 2014).

On March 5, 2014, Judge Langton denied the Rule 60 motion and *sua sponte* set a hearing to determine whether Cox's Rule 60 motion violated M.R.Civ.P. 11. *Id.* ¶78-79. Judge Langton later found Plaintiff Myers violated Rule 11 and ordered him to pay $10,000. *Id.* ¶80. In doing so, Judge Langton considered the income of Plaintiff Myers' wife, who is a physician: "for a lawyer living on a lawyer's and doctor's combined incomes, the court determines that a sanction of $1,000, or $5,000 or even $7,500 would constitute no more than a sting, or a nuisance penalty. A sanction of $10,000, however, would constitute a bite, which the Court believes Mr. Myers would be more likely to take seriously." *Id.* ¶81-82.

II. Plaintiff Myers' Campaign to Publicize Judge Langton's Misconduct

Both Judge Langton and Plaintiff Myers are candidates for District Judge for the Twenty-First Judicial District of Montana, Department 1, and both of their names will appear on the general election ballot in November 2016. *Id.* ¶17-19. Plaintiff Myers is campaigning on the positive changes he would like to bring to the judicial system in Ravalli County, but also intends to inform voters that Judge Langton is unfit for office by describing instances in which he abused his power. *Id.* ¶20-21. To that end, Plaintiff Myers caused to be broadcast a campaign advertisement critical of Judge Langton's handling of the Cox matter. *Id.* ¶28. The advertisement was narrated by Cox and stated as follows:

> This is Dan Cox and I have a warning for you. I caught Judge Jeff Langton committing fraud on the court. He was secretly communicating with attorneys for the other party. He denied me a chance to respond and prevented me from fully presenting my case. Robert Myers was the only attorney who helped me to stand up to this corruption. All I was asking for was a new judge to determine how his conduct affected my ability to have a fair hearing. Not only did Jeff Langton not allow a neutral judge to look at his conduct, but he stopped all witnesses including himself from being questioned. He of course found himself innocent without a hearing. No judge should judge his own conduct. Shame on Jeff Langton for retaliating against my lawyer, and shame on Jeff Langton for not giving me and my children a fair hearing. Paid for by Myers for Judge.

Id. ¶29. This advertisement was broadcast several times from late April 2016 through late May 2016 on KGVO, a radio station in Missoula. *Id.* ¶30.

III. ODC's Investigation of Plaintiff Myers

On May 27, 2016, ODC Deputy Disciplinary Counsel Jon Moog transmitted an email to Plaintiff Myers with an investigative letter attached to it. Verif. Comp., Ex 1. The letter stated that ODC "has initiated an investigation into your advertising campaign for election to District Court Judge for Ravalli County, for potential violations of Rule 8.2, MRPC,[3] and Canon 4 of the Montana Code of

[3] Rule 8.2 of the Montana Rules of Professional Conduct states as follows:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
> (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

Judicial Conduct." *Id.* The ODC letter also stated that Plaintiff Myers was "directed to provide ODC with digital copies of all published campaign materials, whether written, video, or audio, including all television or radio advertisements, with written transcripts, aired by your campaign. ODC also requires the invoices and publishing contracts related to all advertising materials, including the publishing dates and frequency of all materials." *Id*. ODC also directed Plaintiff Myers to produce "any internet/social network posting by yourself, your campaign, or affiliated campaign committees/groups." *Id*. The letter did not specify which provisions of Canon 4 (the provisions of which take up almost two single-spaced pages) ODC suspected Plaintiff Myers had violated. *Id.* ¶35.

Plaintiff Myers' counsel faxed a letter to ODC later that day requesting a copy of the complaint filed against Myers as well as a list of the regulations that ODC suspected Plaintiff Myers of violating. Verif. Comp., Ex 3. Deputy Disciplinary Counsel Moog responded later on May 27 and stated that ODC had not received a written complaint but instead "just a transcript of your client's radio advertisement narrated by Mr. Cox and sent by Judge Langton's law clerk." *Id*., Ex 4. Plaintiff Myers' counsel responded a few hours later and again asked ODC to identify the provision(s) of Canon 4 that Plaintiff Myers supposedly violated. *Id*., Ex 5. Deputy Disciplinary Counsel Moog responded via email on May 31 and stated that "the investigation just began, so I'm not sure what rules might be

implicated, but Rules 4.1(A)(10)[4] and 4.2(A)(3)[5] look applicable." *Id.,* Ex. 6.

Plaintiff Myers desires to again broadcast the radio advertisement. *Id.* ¶40. He will not do so, however, so long as he faces a threat of prosecution by ODC and subsequent discipline, including possible suspension or disbarment. *Id.* ¶41. Plaintiff Myers intends to run again for election to the position of district judge in 2022 whether or not he is successful in November 2016. *Id.* ¶43.

ARGUMENT

Plaintiff Myers' campaign speech is entitled to the greatest degree of protection by the United States Constitution. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."). This principle applies with particular force to speech about candidate qualifications, including those of judicial candidates. *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1665

[4] Canon 4.1(A)(10) states that "a judge or a judicial candidate shall not …knowingly, or with reckless disregard for the truth, make any false or misleading statement."

[5] Canon 4.2(A)(3) states that "a judicial candidate shall…review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee…." Plaintiff Myers does not challenge this particular canon and asserts that he reviewed and approved the radio advertisement and stands by it.

(2015) ("speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection.")

Restrictions on candidate speech are subject to strict scrutiny, which means Montana officials "may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S.Ct. at 1665. The burden is on the State to make this showing, *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S 449, 464 (2007), a burden that is particularly heavy. *Williams-Yulee*, 135 S.Ct. at 1665-66 ("It is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest.") (citations omitted).

Promoting judicial integrity and the appearance of judicial integrity are compelling state interests. *Williams-Yulee*, 135 S.Ct. at 1666. Canon 4.1(A)(10) and Rule 8.2, however, are not narrowly tailored to advance these interests. Moreover, they are substantially overbroad as well as underinclusive. Both are therefore unconstitutional on their face and as applied to Plaintiff Myers' radio advertisement.

I. CANON 4.1(A)(10) IS UNCONSTITUTIONAL ON ITS FACE

A. Counterspeech is Less Restrictive Than Canon 4.1(A)(10) And Effectively Exposes False Campaign Statements

For Canon 4.1(A)(10) to be deemed narrowly tailored, it "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (2014); *Wolfson v. Concannon*, 811 F.3d 1176, 1186 (9th Cir. 2016) (en banc) ("government may only regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.") Allowing false speech to be rebutted by counterspeech is certainly less restrictive than enforcing regulations to suppress false speech.

The principle that counterspeech remedies false speech is also deeply rooted in First Amendment jurisprudence. The United States Supreme Court's recent decision in *Alvarez* underscores this point. *Alvarez* involved a First Amendment challenge to the Stolen Valor Act, which criminalized a person's false claim of being awarded the Congressional Medal of Honor. A four-Justice plurality applied exacting scrutiny to the Act and held that, while the "Government's interest in protecting the integrity of the Medal of Honor is beyond question," the Government failed to demonstrate that the Act was "actually necessary to achieve its interests." *Alvarez*, 132 S.Ct. at 2549 (plurality opinion). A concurring opinion

authored by Justice Breyer and joined by Justice Kagan reached many of the same conclusions as the plurality opinion, but did so by applying intermediate scrutiny. *Alvarez*, 132 S.Ct. at 2552 (Breyer, J., concurring). And although the three dissenting Justices described false statements concerning the Medal of Honor as unworthy of constitutional protection, they recognized that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech," including speech involving "matters of public concern." *Alvarez*, 132 S.Ct. at 2549 (Alito, J., dissenting).[6]

Both the plurality and concurring opinions in *Alvarez* emphasized the American tradition of refuting false speech with more speech. *Alvarez*, 132 S.Ct. at 2550 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth"); *id.* at 2556 (concurring opinion) ("in this area more accurate information will normally counteract the lie."). This approach has held sway on the Court, to one degree or another, for almost a century. See, *e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)

[6] Although *Alvarez* lacked a majority opinion, the Ninth Circuit has recently relied upon *Alvarez* as persuasive authority in reviewing other statutes regulating false speech. See, *e.g.*, *United States v. Swisher*, 811 F.3d 299, 307-309 (9th Cir. 2016); *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014).

("The preferred First Amendment remedy of more speech, not enforced silence…has special force"); *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

The principle that more speech is the appropriate remedy for false speech applies with particular force to campaigns for public office, *281 Care Committee v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) (in striking down Ohio' prohibition on false campaign speech, court held that "*especially as to political speech*, counterspeech is the tried and true buffer and elixir," emphasis added), particularly in the age of the internet. Judicial candidates themselves have always had a keen interest in refuting false allegations made against them. *Butler v. Alabama Judicial Inquiry Comm*., 111 F.Supp.2d 1224, 1235 (M.D. Ala. 2000) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent"). Now, a myriad of media outlets, outside interest groups, political party groups, activists and, increasingly, bloggers and other "alternative media" weigh in on campaigns. More than ever,

campaign speech by or about any candidate for public office is put through its paces in an online arena that gives no quarter to falsity. Thus, as with the federal government in *Alvarez*, Montana "has not shown, and cannot show, why counter-speech would not suffice to achieve its interest." *Alvarez,* 132 S.Ct. at 2549 (plurality opinion).

The alternative to counterspeech is the choice Montana has made: promulgation of Rule 4.1(A)(10), which prohibits purportedly false campaign speech by judicial candidates. Montana's decision has a number of problems.

First, prohibitions on false campaign speech invariably chill debates over candidate qualifications because "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, 132 S.Ct. at 2544 (plurality opinion). Put another way, the "erroneous statement is inevitable in free debate." *Id.*; quoting *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964). Requiring the State to prove knowledge does not eliminate the chilling effect of a ban on false statements because a "speaker might still be worried about being prosecuted for a careless, false statement even if he does not have the intent required to render him liable." *Alvarez*, 132 S.Ct. at 2555 (concurring opinion). This is especially true in campaigns for public office. *Id.* (a false speech prohibition "may be applied where it should not be applied," such as "in the

political arena, subtly but selectively to speakers that the Government does not like.").

Defending against a disciplinary complaint takes time and money, no matter how innocent the respondent might be. And the stakes are high for attorney-candidates. While lay candidates face monetary sanctions for violating most campaign laws, attorney candidates such as Plaintiff Myers face potentially ruinous reputational and career consequences if found to have violated Canon 4.1(A)(10) or Rule 8.2. The safe strategy for them is to avoid criticizing their opponents entirely. The resulting polite, staid campaigns deprive the voter of information and the candidate of his or her "First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Brown,* 456 U.S. at 53 (citations omitted).

Allowing false speech by judicial candidates to be rebutted by counterspeech is obviously a less restrictive alternative than government punishing false speech. It is also the most effective. *Id.*, quoting *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting) ("the theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). Because free speech is less restrictive and more effective than Canon 4.1(A)(10), the Canon is not narrowly tailored and must be struck down.

B. Canon 4.1(A)(10) is Substantially Overbroad Because It Applies to Private Settings and Non-Material Subjects

Besides not being narrowly tailored, Canon 4.1(A)(10) is substantially overbroad. Overbroad statutes may be invalidated if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc), quoting *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010). Canon 4.1(A) is substantially overbroad for at least three reasons.

First, Rule 4.1(A)(10) applies without regard to subject matter. Thus, "influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue…." *Susan B. Anthony List v. Driehaus,* 814 F.3d 466, 475 (6th Cir. 2016). This overbreath encompasses vast swaths of speech that could not possibly impact the public's perception of the integrity of the judiciary.

Second, Canon 4.1(A)(10) applies to any setting, including private conversations. *Cf. Alvarez*, 132 S.Ct. at 2547 (plurality opinion) (criticizing the "sweeping, quite unprecedented reach" of the Stolen Valor Act because it "appl[ied] with equal force to personal, whispered conversations within a home."); *id.* at 2555 (Breyer, J., concurring) (Stolen Valor Act's "breadth means that it

creates a significant risk of First Amendment harm" by "appl[ing] in family, social, or other private contexts, where lies will often cause little harm"). This can be particularly problematic for Montana lawyers because they have an affirmative duty to report ethical violations committed by other attorneys. See Rule 8.3. If a judicial candidate in a private, informal conversation with a fellow attorney criticizes a judge in a way that the attorney thinks might be false, that attorney is put in a very difficult position.

As a result of the overbreadth of Rule 4.1(A)(10), attorney-candidates are likely to self-censor in private, informal contexts where criticisms of judges, even false ones, are not likely to harm the public's perception of judicial integrity. ODC's demands upon Plaintiff Myers illustrate how the substantial overbreadth of Rule 4.1(A)(10) exposes attorneys to investigation by State authorities. The State is demanding Plaintiff Myers produce "digital copies of all published campaign materials, whether written, video, or audio, including all television or radio advertisements, with written transcripts, aired by your campaign. ODC also requires the invoices and publishing contracts related to all advertising materials, including the publishing dates and frequency of all materials." Verif. Comp., Ex 1. ODC is also demanding Plaintiff Myers produce "any internet/social network posting by yourself, your campaign, or affiliated campaign committees/groups."

Id. ODC has yet to explain how the airing of a truthful campaign advertisement justifies rummaging through Plaintiff Myers' campaign files.

Rule 4.1(A)(10) is substantially overbroad because it applies to any subject in which an attorney-candidate is alleged to have made a false statement, and applies in any setting, no matter how private. This is a separate and distinct reason for striking it down.

C. Canon 4.1(A)(10) is Underinclusive Because It Does Not Apply To False Statements Made Prior to Attorneys Announcing Their Candidacies

The Supreme Court has long held that a speech prohibition violates the First Amendment if it is substantially underinclusive:

> While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth.

City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citations omitted). The Supreme Court has invalidated numerous statutes based solely upon underinclusiveness. See, *e.g., Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231-32 (2015) (ordinance that was purportedly enacted to enhance aesthetics and safety by restricting signs

providing directions to churches was "hopelessly underinclusive" because it exempted signs conveying ideological messages); *Brown v. Entertainment Merchants Assn*., 131 S.Ct. 2729, 2740 (2011) (statute prohibiting sale of violent video games to minors in order to protect them from harm was unconstitutionally underinclusive because it did not apply to books, cartoons, and movies depicting violence); accord, *Williams-Yulee,* 135 S.Ct. at 1670 ("underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.") (emphasis in original).

In an analogous case, the Supreme Court struck down a Minnesota judicial canon prohibiting judicial candidates from announcing their legal and political views. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002). The canon "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is at the core of our First Amendment's freedoms – speech about the qualifications of candidates for political office." *Id.* at 774. The Court noted that it had "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Id.* at 782. The canon's underinclusiveness was particularly problematic:

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully under inclusive as to render belief in that purpose a challenge to the credulous.

Id. at 779-80 (emphasis added). Thus, Minnesota's prohibition on judicial candidates announcing legal or policy positions "fail[ed] strict scrutiny because it is woefully under inclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." *Id.* at 783.

Montana's ban on false statements by judicial candidates suffers the same flaw as the Minnesota ban prohibiting judicial candidates from announcing their political or legal views. Under Rule 4.1(A)(10), a judicial candidate in Montana can make any false statement "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected." *White*, 536 U.S. at 779-80. Thus, as a means of pursuing the objective of judicial integrity, or the appearance thereof, Rule 4.1(A)(10) "is so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Id.* This is another reason the Rule must be struck down.

II RULE 8.2 IS UNCONSTITUTIONAL AS APPLIED TO CAMPAIGN SPEECH

A. Free Speech is a Less Restrictive Alternative That Effectively Exposes False Campaign Statements

Rule 8.2 is not narrowly tailored. As stated previously, free speech in campaigns is an effective alternative for overcoming falsity.[7] Rule 8.2 should therefore be struck down as applied to campaign speech by attorneys.

B. Rule 8.2 is Underinclusive Because It Leaves Non-Attorneys Free to Make False Statements Without Fear of Penalties

Rule 8.2 is grossly underinclusive because it prohibits only attorneys from making false statements about the qualifications or integrity of judicial candidates. Montana does not impose any penalties upon non-attorneys for the same speech. If false statements about the qualifications or integrity of judicial candidates eroded judicial integrity to any substantial degree, Montana would have prohibited anyone from making them. Allowing the 99% of persons who are not attorneys to make false statements about judges significantly undermines the contention that the appearance of judicial integrity depends on suppressing such statements. Rule 8.2 should therefore be struck down on this basis as well.

[7] For the sake of brevity, Plaintiff Myers incorporates by reference the narrow tailoring argument made with regard to Rule 4.1(A)(10). See pages 10-14, *supra.*

III BOTH CANON 4.1(A)(10) AND RULE 8.2 ARE UNCONSTITUTIONAL AS APPLIED TO PLAINTIFF MYERS' RADIO ADVERTISEMENT BECAUSE IT CONTAINS NO FALSE STATEMENT

Plaintiff Myers is entitled to injunctive relief not only because regulations prohibiting false campaign speech are inherently unconstitutional, but also because the statements in his advertisement are not false. The Ninth Circuit has established a number of protections based upon the First Amendment for attorneys threatened with discipline because of their statements about judges. First, "attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense." *Standing Committee on Discipline v. Yagman,* 55 F.3d 1430, 1438 (9th Cir. 1995). Second, ODC "bears the burden of proving falsity." *Id.* Third, ODC must demonstrate that the attorney knew or should have known of the falsity. *Id.* at 1437.

Additionally, an attorney who publishes a derogatory opinion about a judge is not subject to discipline if the opinion is based upon disclosed facts that are accurate. *Id.* at 1439. Expressing such opinions inflicts no harm on the judiciary because "an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea." *Id*. Thus, "readers are free to accept or reject the author's opinion based upon their own independent evaluation of the facts." *Id*. An opinion "of this sort doesn't imply a false assertion of fact and is thus entitled to full constitutional protection." *Id.*

Applying these First Amendment principles to Plaintiff Myers' radio advertisement makes clear he cannot be disciplined because of it. The advertisement refers to Judge Langton as "committing a fraud on the court," and also refers to "corruption." Verif. Comp., ¶29. Though hard hitting, these opinions are based upon factual assertions in the advertisement that Judge Langton "secretly communicat[ed] with attorneys for the other party" and denied Dan Cox "a chance to respond and prevented me from fully presenting my case." *Id.*

These factual assertions have evidentiary support. When Sara Cox filed her motion to amend the parenting plan in June 2012 but failed to include with the motion a proposed amended parenting plan, Judge Langton's administrative assistant contacted Sara Cox's attorney *ex parte* and instructed him to file one. Verif. Comp., ¶46. When Sara filed her proposed amended plan, Dan Cox unsuccessfully sought leave from Judge Langton to file a supplemental response to it, but he refused to grant leave. *Id.* ¶¶51-52.

Voters who heard the radio advertisement asserting (1) Judge Langton communicated *ex parte* with an opposing lawyer and (2) refused to allow Dan Cox to respond to the *ex parte* communication were free to accept or reject Plaintiff Myers' opinion that these facts demonstrated "a fraud on the court" or "corruption." The opinions are therefore not actionable.

None of the other statements in the radio advertisement are actionable, either. The radio advertisement correctly asserts that Judge Langton refused to "allow a neutral judge to look at [Judge Langton's] conduct" and "stopped all witnesses including himself from being questioned." Verif. Comp., ¶29. On December 5, 2013, Dan Cox filed a motion for relief under M.R.Civ.P. 60. *Id.* ¶69. During the briefing on the motion, Dan Cox unsuccessfully moved to disqualify Judge Langton based upon his *ex parte* communication with Sara Cox. *Id.* He later filed a subpoena to depose Judge Langton for the purpose of verifying the court file notation. *Id.* ¶72. Judge Langton quashed the subpoena without giving Dan Cox an opportunity to respond and did not permit any live witness testimony in support of Cox's Rule 60 motion. *Id.* ¶73.

The campaign advertisement's allegation of "retaliation" against Plaintiff Myers is accurate, too. The term "retaliate" means "to hurt someone or do something harmful to someone because that person has done or said something harmful to you."[8] Judge Langton sanctioned Plaintiff Myers in the amount of $10,000 based upon Plaintiff Myers' litigation of the Rule 60 motion. Even assuming Plaintiff Myers committed sanctionable conduct in litigating the Rule 60 motion, Judge Langton's actions were properly characterized as retaliatory. Judge Langton did something harmful to Plaintiff Myers by

[8] See <http://dictionary.cambridge.org/us/dictionary/english/retaliate>

sanctioning him because Plaintiff Myers allegedly did something harmful to the court in the way he litigated the motion. That Judge Langton imposed a draconian sanction based upon the salary of Plaintiff Myers' *spouse* provides additional support for the advertisement's use of the term "retaliating."

None of the statements contained in Plaintiff Myers' radio advertisement are actionable. Canon 4.1(A)(10) and Rule 8.2 are therefore unconstitutional as applied to that advertisement.

IV MYERS IS ENTITLED TO A PRELIMINARY INJUNCTION

To obtain injunctive relief, a plaintiff must show (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm if injunctive relief is not granted, (3) the balance of equities tips in his or her favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 129 S.Ct. 365, 374 (2008). As shown below, Plaintiff Myers can satisfy each of these requirements.

A Myers is Likely to Succeed on the Merits

Plaintiff Myers has previously demonstrated that Canon 4.1(A)(10) and Rule 8.2 violate the First Amendment both as applied and on their face.[9] He is therefore likely to succeed on the merits.

[9] See pages 10-24 *supra*.

At the very least, Plaintiff Myers has satisfied the alternate "sliding scale" approach applied by the Ninth Circuit to preliminary injunction motions. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this rule, Plaintiff Myers is entitled to injunctive relief because he has raised "serious questions going to the merits" along with showing (as described below) that the balance of the hardships tips sharply in his favor and that the other two *Winter* factors favor him. *Id.* at 1135.

B. Myers Will Suffer Irreparable Harm if Relief is not Granted

Ongoing or future constitutional violations by a defendant satisfy the irreparable harm requirement because "unlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009); *Monterey Mechanical Co v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("an alleged constitutional infringement will often alone constitute irreparable harm"). Moreover, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Such "harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and [a] delay of even a day or two may be intolerable." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011).

As stated previously, Canon 4.1(A)(10) and Rule 8.2 violate Plaintiff Myers' rights under the First Amendment.[10] This deprivation will continue until this Court grants relief, relief that cannot be achieved with monetary damages. This factor thus weighs in favor of granting injunctive relief.

C The Balance of Equities Tips Sharply in Myers' Favor

In the Ninth Circuit, "the fact that a case raises serious First Amendment questions compels a finding that . . . the balance of hardships tips sharply in [the plaintiffs' favor." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). If Plaintiff Myers' is denied injunctive relief, his First Amendment rights will continue being violated. On the other hand, there is no detriment to the State from enjoining an unconstitutional law. *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012). This factor sharply tips in Plaintiff Myers' favor.

D. Enjoining the Statute is in the Public Interest

Plaintiff Myers' First Amendment rights are ones that, if protected, will unquestionably advance the public interest. *Thalheimer*, 645 F.3d at 1129 ("Courts considering requests for preliminary injunctions have consistently recognized the

[10] See pages 10-24, *supra*.

significant public interest in upholding First Amendment principles."); *Joelner v. Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("it is always in the public interest to protect First Amendment liberties"). This factor therefore favors granting injunctive relief as well.

CONCLUSION

For all of the foregoing reasons, Plaintiff Myers requests that this Court immediately enjoin Defendant from enforcing Canon 4.1(A)(10) and Rule 8.2.

DATED: June 10, 2016

Respectfully submitted,

/s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE PURSUANT TO L. R. 7.1(d)(2)(E)

I hereby certify that this document, excluding caption and certificate of compliance, contains 6051 words, as determined by the word count of the word processing software used to prepare this document, specifically Microsoft Word 2007.

DATED: June 10, 2016

Respectfully submitted,

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