No. _____

In the Supreme Court of the United States

MARK FRENCH

Applicant,

v.

EDWARD MCLEAN, in his official capacity as Chair of Montana's Judicial Standards Commission; BLAIR JONES, in his official capacity as a member of Montana's Judicial Standards Commission; VICTOR VALGENTI, in his official capacity as a member of Montana's Judicial Standards Commission; JOHN MURPHY, in his official capacity as a member of Montana's Judicial Standards Commission; SUE SCHLEIF, in her official capacity as a member of Montana's Judicial Standards Commission,

Respondents,

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

**Directed to the Honorable Anthony Kennedy,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit**

MATTHEW G. MONFORTON
MONFORTON LAW OFFICES, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949
Facsimile: (406) 551-6919
matthewmonforton@yahoo.com

Counsel for Applicant

October 14, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES

MONTANA CODE ANNOTATED

OTHER AUTHORITIES

To the Honorable Anthony Kennedy, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Applicant Mark French is challenging the incumbent justice of the peace in Sanders County, Montana. He desires to tell voters that the Sanders County Republican Central Committee has endorsed him. He also desires to solicit endorsements from several prominent Republican officeholders. Under Rule 4.1(A)(7) of Montana's Code of Judicial Conduct, however, a judicial candidate shall not "seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate." Dkt. 5-1 at 45.[1]

The First Amendment does not permit states to tell candidates for public office which endorsements are permissible for use in their campaigns and which ones are not. Rather, it "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989). Indeed, "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter…." *Id.* at 340, quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment).

Notably, the Ninth Circuit did not question French's likelihood of success on the merits or the ongoing irreparable harm he is suffering but instead denied relief "because the balance of equities do not tip in appellant's favor and the issuance of

[1] "Dkt." refers to docket entries in the District Court. "9th Cir Dkt." refers to Ninth Circuit docket entries. "App." refers to the appendix to this Application.

an injunction is not in the public interest." App. 1a, citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Though the Ninth Circuit did not elaborate, the District Court held that an injunction allowing French to convey his desired campaign message would result in a "disruption of the whole of the judicial electoral process at this late date in the election calendar," and was therefore not in the public interest. App. at 12a-13a. Likewise, Respondents argued that French's desired injunction would harm the 129 candidates currently running for judicial offices across Montana who have purportedly campaigned in reliance upon the state's gag order regarding political endorsements. 9th Cir. Dkt. 9-1 at 15. In short, the Ninth Circuit has let stand a patently unconstitutional restriction on campaign speech because an election is imminent.

This Court understandably hesitates altering a state's election procedures shortly before an election. See, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5-7 (2006) (holding that the Ninth Circuit erred by enjoining enforcement of Arizona's voter ID law less than five weeks before an election); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (in determining whether to enjoin a state's redistricting plan, courts "should consider the proximity of a forthcoming election and the mechanical complexities of state election laws," as well as whether "a State's election machinery is already in progress"). This rule exists because "court orders affecting elections …can themselves result in voter confusion and consequent incentive to remain away from the polls," and, "[a]s an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

The Court distinguishes laws that "control the mechanics of the electoral process," however, from those involving "regulation of pure speech." *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 345 (1995). It has never withheld relief from plaintiffs challenging restrictions upon pure speech simply because an election is imminent - and for good reason: an "election campaign is a means of disseminating ideas as well as attaining political office." *Eu*, 489 U.S. at 223 (citations omitted). A candidate's right to free speech does not benefit just the candidate but the electorate as well. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates") (citations omitted). Discussions about candidates "are integral to the operation of the system of government established by our Constitution." *Id.*

Indeed, the approach of Election Day demands more, not less, vigilance by the judiciary against political speech prohibitions because "[i]t is well known that the public begins to concentrate on elections only in the weeks immediately before they are held" and, thus, "[t]here are short timeframes in which speech can have influence." *Citizens United*, 558 U.S. at 334. Lost amidst concerns over the reliance (if any) placed by 129 Montana judicial candidates upon a patently unconstitutional speech prohibition are the benefits to 11,000 Sanders County residents and nearly 1 million Montanans of judicial campaigns that are "uninhibited, robust, and wide-open," both at the beginning of election season and at the end. *Citizens United*, 558 U.S. at 471 (citations omitted).

Injunctive relief under the All Writs Act, 28 U.S.C. § 1651, is necessary not only to prevent ongoing, irreparable harm to French's right to convey his campaign message but also to enable the electorate to evaluate that message before Election Day. Montana mailed absentee ballots to voters on October 6, 2014.[2] Each day that passes without relief reduces the number of (1) opportunities French has to communicate his message and (2) voters who have not yet cast ballots and can still be influenced. At a minimum, French requests a temporary injunction to allow him, pending full briefing of this Application, to convey his desired campaign message without fear of discipline by the Montana Standards Commission.

JURISDICTION

The District Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because French's First Amendment claim raises a federal question. The Ninth Circuit has jurisdiction over French's appeal from the District Court's denial of his motion for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). The Ninth Circuit denied French's motion for an injunction pending appeal on Friday, October 10, 2014. App 1a.

This Court has jurisdiction over French's Application under 28 U.S.C. § 1254(1) and has authority under 28 U.S.C. § 1651, to grant the relief French seeks.

---

[2] See http://sos.mt.gov/Elections/documents/Election-Calendar.pdf.

BACKGROUND AND PROCEDURAL HISTORY

I. Montana's Anti-Endorsement Rule Imposed Upon State Judicial Candidates

The Montana Judicial Standards Commission is authorized to investigate complaints by any person alleging violations of Montana Code of Judicial Conduct. Mont. Code Ann. § 3-1-1106(1)(a). If an investigation results in a probable cause determination, the Commission must recommend to the Montana Supreme Court the censure, suspension, removal, or disability retirement of the judicial officer in question. Mont. Code Ann. § 3-1-1106(3). The Montana Supreme Court may either accept or reject the recommendation. Mont. Code Ann. § 3-1-1107.

On December 12, 2008, the Montana Supreme Court enacted Montana's current Code of Judicial Conduct, which is derived from the American Bar Association Model Code of Judicial Conduct. Dkt. 5-1 at 1. In the Comment section of the Code, the Montana Supreme Court expressly warns that "[i]f a judicial candidate who is not a judge violates this Canon and is elected, he or she may be referred to the Judicial Standards Commission for discipline on assuming office." Dkt. 5-1, p. 46.

II. The Republican Party's Endorsement of French

Mark French is a candidate for justice of the peace in Sanders County. Dkt. 1 at ¶ 13. The other candidate is Judge Donald Strine, who currently serves as the county's justice of the peace and is running for reelection. Dkt. 1 at ¶ 14.

French desires to seek and use political endorsements in his campaign literature and discuss them with voters during face-to-face campaigning. Dkt. 1 at

¶ 22. Specifically, French desires to solicit endorsements from two prominent Montana Republicans - Art Wittich, the Majority Leader of the Montana Senate, and Nels Swandal, a prosecutor and former candidate for the Montana Supreme Court, both of whom are willing to consider endorsing French if he asks. Dkt. 1 at ¶¶ 23-24; Dkt. 4-2; Dkt. 4-3. French also desires to use the endorsement he received from the Sanders County Republican Central Committee.[3] Dkt. 1 at ¶ 22. French is self-censoring, however, because he does not want to risk discipline by the Commission for violating Rule 4.1(A)(7). Dkt. 1 at ¶ 20, 24.

III. The Lower Court Proceedings

French filed a verified complaint in the District Court on August 19, 2014, Dkt. 1, and moved for a preliminary injunction on August 26, 2014. Dkt. 3 & 4. The Commission responded to French's motion on September 9, 2014. Dkt. 17. On that same day, six of the seven Justices sitting on the Montana Supreme Court filed an amicus brief opposing French's motion. Dkt. 16. The Montana Justices urged the District Court to, *inter alia*, eschew "a formulaic First Amendment analysis of Rule 4.1(A)(7) standing alone…." Dkt. 16 at 3. French filed a reply brief on September 15, 2014. Dkt. 20.

The District Court held a hearing on October 1, 2014, and, ruling from the

---

[3] French no longer needs to solicit an endorsement from the Sanders County Republican Central Committee because the Committee endorsed him on October 2, 2014, the day after the District Court denied his preliminary injunction motion. Dkt. 35-9. Rule 4.1(A)(7), however, precludes French from accepting or using the Committee's endorsement in his campaign.

bench, denied French's preliminary injunction motion. Dkt. 35-8 at 24-25.[4] French moved on October 6, 2014, for an injunction pending appeal. Dkt. 35. The District Court denied that motion on October 7, 2014. Dkt. 38.

On October 8, 2014, French moved in the Ninth Circuit for an injunction pending appeal. The Ninth Circuit denied the motion on October 10, 2014, "because the balance of equities do not tip in appellant's favor and the issuance of an injunction is not in the public interest." App. 1a, citing *Winter*, 555 U.S. at 7.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent," (2) the legal rights at issue are "indisputably clear," and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. § 1651(a)) (alterations in original). French recognizes that the relief he seeks "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore "demands a significantly higher justification than that described in [ ] stay cases." *Ohio Citizens for Responsible*

[4] The District Court filed a written order on October 6 denying French's preliminary injunction motion. Dkt. 36. A true and correct copy of that order is attached to the Appendix. App. 2a-14a.

Energy, Inc., 479 U.S. at 1313. His case satisfies this heightened standard.

I. French Faces Critical and Exigent Circumstances Because Each Passing Day Costs Him Opportunities to Communicate His Desired Message to Voters Before Election Day

The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S 347, 373. (1976). Such injury "is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and delay of even a day or two may be intolerable." *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012) (citations omitted). Accordingly, this Court has issued injunctions in election-related cases to preserve First Amendment rights that would otherwise be lost forever. See, *e.g.*, *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (ordering the names of third party candidates placed on the ballot pending appeal).

Because of fears of penalties attached to Rule 4.1(A)(7), French cannot discuss his endorsement by the Republican Party with Sanders County voters or solicit endorsements from prominent Montana Republicans. Each day that passes by results in French forever losing opportunities to communicate his desired message to voters because there will never be another election for the 2014 term of Justice of the Peace in Sanders County. And, because Montana's Secretary of State distributed absentee ballots to voters on October 6, 2014, French is not only losing opportunities to communicate, he is also losing actual voters with each passing day as more and more of them mail in their absentee ballots. These losses cannot be

remediated by a favorable ruling issued after Election Day. His circumstances are therefore critical and exigent.

II. French Has an Indisputably Clear Right to Inform Voters of his Endorsement by the Republican Party

The Ninth Circuit denied relief to French "because the balance of equities do not tip in appellant's favor and the issuance of an injunction is not in the public interest." App. 1a. Absent from this order was any hint that French cannot satisfy the other *Winter* factors: likelihood of success on the merits and irreparable harm. The Ninth Circuit undoubtedly concluded, correctly, that French will ultimately prevail on the merits. This is because Rule 4.1(A)(7) is a content-based prohibition upon the use of political endorsements, a category of speech entitled to the highest constitutional protection. *Citizens United,* 558 U.S. at 349 ("[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech").

The Rule is also a speaker-based restriction and thus conflicts with the settled principle that a "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *Citizens United*, 558 U.S. at 340. Strict scrutiny is required because, under state law, the Republican Party, the press, and the general public can all publicize the Committee's endorsement of French, but French himself cannot.

Rule 4.1(A)(7) requires strict scrutiny for a third reason: it completely bans *solicitation* by judicial candidates of certain endorsements. *Cf. Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (solicitations

"involve a variety of speech interests - communication of information, the dissemination and propagation of views and ideas, and the communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes - that are within the protection of the First Amendment").

Strict scrutiny requires the state to show that Rule 4.1(A)(7) is (1) narrowly tailored to serve (2) a compelling state interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) ("*White I*"). This scrutiny is not relaxed simply because a candidate seeks judicial office rather than an executive or legislative position. *Id.* at 788 ("[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles") (citations omitted). The Court in *White I* held that a Minnesota judicial canon prohibiting judicial candidates from announcing their legal and political views could not survive strict scrutiny because it was "woefully underinclusive." *Id.* at 780. After this Court's remand in *White I*, an *en banc* panel of the Eighth Circuit struck down another Minnesota judicial canon -- a canon containing language identical to the one at issue in this case.[5] *Republican Party of Minnesota v. White*, 416 F.3d 738, 749-50 (8th Cir. 2005) ("*White II*").

---

[5] Compare Dkt. 5-1 at 45 (under Rule 4.1(A)(7), Montana judicial candidates shall not "seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate"), to *White II*, 416 F.3d at 745, quoting 52 Minn.Stat. Ann, Code of Judicial Conduct, Canon 5, subd. A(1)(d) (Minnesota judicial candidates shall not "… seek, accept or use endorsements from a political organization").

A. Rule 4.1(A)(7) Violates the First Amendment Because it is Woefully Underinclusive

A law's underinclusivity significantly undermines any claim by the state that the law is needed to advance a compelling interest:

> 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). Rule 4.1(A)(7) is fatally underinclusive in at least three respects.

First, Rule 4.1(A)(7) does not apply to solicitations and uses of endorsements prior to a judicial campaign. A judicial candidate is free to seek and use endorsements from political parties and public officials "up until the very day before he declares himself a candidate," thereby rendering the Rule "so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *White I*, 536 U.S. at 779-80. The Eight Circuit elaborated on this flaw:

> A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial open-mindedness. The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.

White II, 416 F.3d at 758.

Second, Rule 4.1(A)(7) allows judicial candidates to seek and use endorsements from every association except political parties even though parties are indistinguishable from other groups for First Amendment purposes. *Sanders County Rep. Cent. Comm.*, 698 F.3d at 747, n.5 ("we do not see how a political party, in the absence of a role in the nomination balloting process, is materially different from any other interest group that is permitted under Montana law to endorse a judicial candidate"). As explained by the Eighth Circuit:

> There are numerous other organizations whose purpose is to work at advancing any number of similar goals, often in a more determined way than a political party. Minnesota worries that a judicial candidate's consorting with a political party will damage that individual's impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party's policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the constitutional, legislative, public policy and procedural beliefs of organizations such as the National Rifle Association (NRA), the National Organization for Women (NOW), the Christian Coalition, the NAACP, the AFL– CIO, or any number of other political interest groups.

White II, 416 F.3d at 759.

Third, the provision in Rule 4.1(A)(7) prohibiting solicitation of *endorsements* from non-judicial officials does not apply to solicitations of *monetary contributions* from these same persons. Montana's Code of Judicial Conduct does not prohibit, for example, a candidate for a county-level district court from soliciting a $170 contribution from the county sheriff, Dkt. 5-1 at 48, but does prohibit the candidate from soliciting a verbal endorsement from the sheriff. Montana's disparate treatment of monetary contributions and verbal endorsements makes no sense given that both signify support for a judicial candidate and therefore, following the

Respondents' reasoning, both have the potential to undermine judicial independence.

Rule 4.1(A)(7) is even more underinclusive than the "woefully underinclusive" Minnesota canon struck down in *White I*. Respondents therefore cannot meet their burden of demonstrating that Rule 4.1(A)(7) was enacted to reinforce judicial openmindedness or integrity.

B. Rule 4.1(A)(7) Violates the First Amendment Because it is Not Narrowly Tailored

Along with demonstrating that Rule 4.1(A)(7) advances a compelling state interest, Montana officials also have the burden of demonstrating that the rule is narrowly tailored. This requires proof by the state of a causal link between a judicial candidate's seeking and using political endorsements and diminished judicial openmindedness. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) ("we have never accepted mere conjecture as adequate to carry a First Amendment burden"). It also requires proof by the state that content-neutral alternatives are unavailable. *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.")

The Commissioners cannot meet this burden. The Montana Supreme Court had no evidence that political party endorsements diminish the openmindedness of judicial candidates at the time the court adopted Montana's Code of Judicial Conduct in 2008. *Sanders County Rep. Cent. Comm.*, 698 F.3d at 746. Moreover, a

number of other states not only allow but *require* judicial candidates to seek the endorsement of political parties. *Id.* at 746 n.4; *Siefert v. Alexander*, 608 F.3d 974, 983 (7th Cir. 2010) (identifying 12 states requiring judicial candidates to run on partisan ballots). Respondents have presented no evidence suggesting that these states' judiciaries lack independence. Nor is Rule 4.1(A)(7) necessary to achieve judicial integrity or openmindedness because the rule does not "change the circumstances or pressures that cause the candidates to want to make [prohibited] statements," and "[j]udicial campaign speech codes are therefore much more about maintaining appearances by hiding reality than about changing reality." Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech,* 104 Colum. L. Rev. 563, 612 (2004).

Additionally, Montana has content-neutral alternatives to banning judicial speech. One alternative is to eliminate judicial elections:

> If Montana were concerned that party endorsements might undermine elected judges' independence, Montana could appoint its judges, with a bipartisan and expert panel making nominations—a less restrictive alternative currently practiced by several states.

Sanders County Rep. Cent. Comm., 698 F.3d at 747.

Recusal is another content-neutral alternative. This Court has held that recusal, not censorship, is the appropriate response when a judge's bias is substantial enough to deprive litigants of a fair trial. *Citizens United,* 588 U.S. at 360 ("*Caperton's* [*v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009)] holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned"); see also *Carey v. Wolnitzek*, 614 F.3d 189, 193 (6th Cir.

2010) ("[c]oncerns about impartiality and open-mindedness that might result from unfettered judicial campaigning can be handled after the elections, not before, through the application of case-by-case judicial recusal rules that all States require their judges to follow before they agree to hear a case"); *Siefert*, 608 F.3d at 983 ("defendants have failed to show why recusal, which does not restrict speech, is an unworkable alternative to Wisconsin's ban on judges and judicial candidates announcing a party affiliation"); *White II*, 416 F.3d at 755 ("recusal is the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case").

Rule 4.1(A)(7) is not narrowly tailored to achieve judicial independence or openmindedness. This is another reason why the Rule is constitutionally infirm.

C. Depriving Voters of Constitutionally Protected Political Speech is Never in the Public Interest

The Ninth Circuit denied relief to French "because the balance of equities do not tip in appellant's favor and the issuance of an injunction is not in the public interest." App. at 1a, citing *Winter*, 555 U.S. 7. The District Court held that allowing French to convey his desired campaign message would result in a "disruption of the whole of the judicial electoral process at this late date in the election calendar…" and was therefore not in the public interest. App. at 12a-13a.

The public interest, however, is promoted by more speech rather than less, particularly when that speech concerns candidates for public office. *Citizens United*, 558 U.S. at 339 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"),

quoting *Buckley,* 424 U.S. at 14-15. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.,* quoting *Eu,* 489 U.S. at 223.

French's ability to trumpet his endorsement by the Republican Party will give voters a clearer picture of both him and his supporters. Some voters will be impressed by the Republican Party's endorsement. Others will undoubtedly view French's reliance upon partisan endorsements as evidence of unfitness for judicial office. Either way, French's desired speech will provide valuable information to voters. As the Respondents have acknowledged:

> Rule 4.1(A)(7) prevents non-partisan judicial candidates from seeking and using partisan endorsements that signal to the public they lack "open-mindedness" on a wide array of issues likely to come before the court.

9th Cir. Dkt. at 23. Whatever "signal," be it positive or negative, is sent by a judicial candidate's use of partisan endorsements is one voters should be allowed to receive and evaluate. *White I*, 536 U.S. at 794 (Kennedy, J., concurring) ("Deciding the relevance of candidate speech is the right of the voters, not the State").

The lower courts' concerns over French's desired campaign speech somehow "disrupting" Montana judicial elections confuse state *election procedures* with campaign speech. See *McIntyre,* 514 U.S. at 345 (distinguishing laws that "control the mechanics of the electoral process" from those involving "regulation of pure speech"). Montana's nonpartisan judicial elections exist because of statutes French does not challenge. Montana judicial candidates are elected to office according to the non-partisan provisions of Montana's election laws. Mont. Code Ann. § 13-14-111.

This includes omitting from ballots any party designation for judicial candidates. Mont. Code Ann. §§ 13-12-203(2); 13-14-115(1). French's requested injunction will not impact these laws.

The District Court did not explain what "disruption" will occur if French is permitted to inform voters of his endorsement by the Republican Party. French certainly hopes to sway voters by discussing this endorsement – but this is not the kind of "disruption" the government has any authority to stifle. *White I*, 536 U.S. at 781 ("the notion that the special context of electioneering justifies an abridgement of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head"); *id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech"); *Sanders County Rep. Cent. Comm.*, 698 F.3d at 747 ("[T]he prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic process; it *is* the democratic process") (citations omitted).

The Respondents' insistence on prohibiting candidates from sharing this information with voters is misguided. *Eu*, 489 U.S. at 223 (a "highly paternalistic approach limiting what people may hear is generally suspect"). Instead, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361. Accordingly, "voters must be free to obtain information from diverse sources in order to determine how to cast their votes," whether those sources are interest groups or the candidates themselves. *Id.* at 341.

Given the nature of politics, legal issues involving restrictions upon pure speech often do not arise until late in an election cycle:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

Citizens United, 558 U.S. at 334; see also *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 462 (2007) ("WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters. . . ."); *Catholic Leadership Coalition of Texas v. Reisman,* 764 F.3d 409, 431 (5th Cir. 2014) ("October Surprises are not called October Surprises because they happen in June" and in such situations, "it is often necessary to have one's voice heard promptly, if it is to be considered at all") (citations omitted); *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488-89 (2d Cir. 2013) (rejecting defendant's argument that plaintiff created an "artificial urgency" by filing suit 41 days before an election because "the value of political speech is at its zenith at election time" and "[w]e ought not to be determining what speech is pressing and what can suffer the law's delay").

Because a candidate's need for certain types of political speech might not be apparent until late in an election cycle, the need to challenge applicable speech laws might not be, either. The rule in *Purcell* and its progeny disfavoring judicial intervention late in an election cycle should not apply to challenges involving pure campaign speech, such as this one, because an injunction permitting a candidate to engage in constitutionally protected campaign speech is never an improper

"disruption" of a state's election process. *Citizens United*, 558 U.S. at 361 ("it is our law and our tradition that more speech, not less, is the governing rule").

Respondents complain of the supposed harm to other candidates arising from French using political endorsements. 9th Cir. Dkt. 9-1 at 15. They assume, without any evidence, that other candidates are as adamant as they are about scrubbing all traces of political party influences from Montana's judicial elections. The very existence of Rule 4.1(A)(7), however, presupposes a belief by the rule's drafters that, left to their own devices, judicial candidates would use political party endorsements. Many of the judicial candidates currently running in Montana might be more than happy to seek and use partisan endorsements if an injunction in this case removes the risk of subsequent discipline by the Commission.

French's opponent can react to French's publication of the Republican Party's endorsement as he would to French's publication of any other interest-group endorsement. The opponent can seek an endorsement from the Democratic Party, or seek to persuade the Republican Party to withdraw its endorsement of French. Or, if reliance upon political endorsements is as incompatible with judicial integrity as Respondents insist, French's opponent can tell voters that French is unfit for judicial office. What French's opponent and other judicial candidates in Montana may not do is insist on preservation of an unconstitutional gag order stifling the speech of their opponents. *Sanders County Rep. Cent. Comm.*, 698 F.3d at 747 ("Montana…can derive no legally cognizable benefit from being permitted to further enforce an unconstitutional limit on political speech").

Finally, it should be noted that French's First Amendment claim is significantly stronger than the one raised in *Florida Bar v. Williams-Yulee*, 138 So.3d 379 (Fla. 2014), *cert. granted*, ___ S. Ct. ___, 2014 WL 2763710 (Oct. 2, 2014). In *Williams-Yulee,* this Court will decide whether a rule of judicial conduct that prohibits candidates for judicial office from personally soliciting campaign funds violates the First Amendment. The Florida financial solicitation restriction at issue in *Williams-Yulee* does not completely bar solicitation campaign funds, but simply requires that judicial candidates utilize a separate campaign committee to engage in the task of fundraising. Fla. Code of Jud. Cond., Rule 7(C)(1). Nor does the Florida rule ban the use of monies by the judicial candidate once received indirectly through a campaign committee. *Id.* A committee may also solicit "public statements of support for his or her candidacy." *Id.*

French has a stronger First Amendment claim than Williams-Yulee because Montana's Rule 4.1(A)(7), makes no provision for "indirect" solicitation by judicial candidates of political party endorsements and does not allow them to use endorsements issued by parties on their own initiative. And the harm Florida seeks to avoid is arguably greater than the one Montana seeks to combat through Rule 4.1(A)(7). *In re Fadeley*, 802 P.2d 31, 32 (Or. 1990) ("the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary").

The Ninth Circuit did not question French's ability to satisfy *Winter's* likelihood-of-success and irreparable-harm requirements. App. 1a. French also

satisfies the public-interest requirement under *Winter* because Montana voters are entitled to elections that are "uninhibited, robust, and wide-open." *Citizens United*, at 558 U.S. at 471 (citations omitted). The remaining *Winter* requirement, the balance of the equities, necessarily tips in French's favor as well. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (the balance-of-equities and public interest factors merge when the government is a party). French therefore has an indisputably clear right to inform voters of his endorsement by the Republican Party.

D. None of the District Court's Objections to Injunctive Relief Have Merit

The District Court failed to analyze the underinclusiveness and narrow tailoring issues inherent in Rule 4.1(A)(7). Though neither the Ninth Circuit nor the Respondents mentioned the issue, the District Court suggested that French's claims might not be ripe. App. at 6a. French addresses this issue in detail in his brief to the Ninth Circuit. 9th Cir. Dkt. at 9-13.

The District Court also held that French's requested injunction would not benefit him because Mont. Code Ann. § 13-10-602(2)[6] prevents French from informing voters of his endorsement by the Sanders County Republican Central

---

[6] Section 13-10-602 of the Montana Code Annotated states as follows:

> Use of party name. (1) A political party and its regularly nominated candidates, members, and officers have the sole and exclusive right to the use of the party name. A candidate for office may not use any word of the name of any other political party or organization other than that by which the candidate is nominated.
> (2) An independent or nonpartisan candidate may not use any word of the name of any existing political party or organization in the candidacy.

Committee. App. at 12a. The District Court's conclusion is inconsistent with the statute's plain language, which simply prohibits nonpartisan candidates from "us[ing] any word of the name of any existing political party or organization in the[ir] candidacy." Mont. Code Ann. § 13-10-602(2). French has no intention of doing so – *i.e.*, he does not intend to hold himself out as the nominee of the Republican Party or refer to himself as "Republican Mark French." Put another way, French is not seeking to use the Party's *name*. Rather, he seeks to communicate the Party's *endorsement*. The statute's plain language is therefore inapplicable to this case.

Moreover, the District Court ignored Montana's rule requiring courts to "construe [state] statutes narrowly to avoid an unconstitutional interpretation if possible." *Farrier v. Teacher's Retirement Bd.*, 120 P.3d 390, 394 (Mont. 2005).[7] Instead, the District Court's construction of Mont. Code Ann. § 13-10-602(2) collides with the First Amendment. The Sanders County Republican Central Committee endorsed French for justice of the peace, Dkt. 35-9, and it has a First Amendment right to convey that endorsement to the voters. *Sanders County Rep. Cent. Comm.*, 698 F.3d at 749. The District Court does not explain how prohibiting French from conveying this endorsement himself would be even remotely constitutional. Permitting the Republican Party, or the press, or anyone else, to convey to voters the Party's endorsement of French while prohibiting French from doing so himself would render the statute a content-based and speaker-based ban on political speech,

[7] There are no Montana cases interpreting Mont. Code Ann. § 13-10-602.

thereby creating the same constitutional infirmities inherent in Rule 4.1(A)(7). Montana Code Ann. § 13-10-602 therefore does not stand as an obstacle to French's desired speech.

Finally, the District Court expressed concern over French's failure to address the issue of an injunction bond. App. at 4a. A defendant must ask for one, however, as well as articulate the monetary damages arising from a wrongful issuance of an injunction. *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 1999) ("the purpose of such a bond is to cover any costs or damages suffered by the government, arising from a wrongful injunction, and the government did not show that there would be any"). Respondents have never done so.

III. Injunctive Relief Would Aid This Court's Jurisdiction

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. 28 U.S.C. § 1651(a). The Court's authority under the Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC* v*. Dean Foods Co.,* 384 U.S. 597, 603 (1966). Cases involving circuit splits are ones over which this Court traditionally assumes jurisdiction. *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014). Cases raising important questions regarding similar laws in multiple states are also good candidates for review by this Court. See, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371-72 (2000); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957).

As stated previously, the Eighth Circuit invalidated a Minnesota rule of judicial conduct containing language identical to Montana's Rule 4.1(A)(7). *White II*,

416 F.3d at 749-50. A final ruling by the Ninth Circuit in this case upholding Rule 4.1(A)(7) would create a direct circuit split with the Eight Circuit. Review by this Court would be all the more important (and likely) given that numerous other states have adopted the prohibition in the ABA Model Code of Judicial Conduct against judges and judicial candidates "seeking, using, and accepting" political party endorsements.[8] The Court's grant of certiorari two weeks ago in *Florida Bar v. Williams-Yulee*, 138 So.3d 379 (Fla. 2014), further tips the scales in favor of this Court exercising jurisdiction over this matter because, as stated previously, French's claim is significantly stronger than the petitioner's claim in *Williams-Yulee.* The Court thus has jurisdiction to consolidate this matter with *Williams-Yulee* or, alternatively, stay proceedings in the Ninth Circuit pending resolution of *Williams-Yulee*.

Injunctive relief would be "in aid of" this Court's jurisdiction because the subject matter of this suit – French's right to communicate his desired message to voters casting ballots for the 2014 term of Justice of the Peace in Sanders County – is perishable. There will never be another election for the 2014 term of Justice of the Peace in Sanders County. And, because Montana's Secretary of State distributed absentee ballots to voters on October 6, 2014, French is not only losing opportunities to communicate, he is also losing actual voters with each passing day

---

[8] See, *e.g.*, Ark. Code of Jud. Cond. Rule 4.2(B)(5); Kansas Code of Jud. Cond. 4.1(B)(6); N.D. Code of Jud. Cond. 4.2(A)(1)(d); Rev. Nev. CJC., Rule 4.1 (A)(7); Penn. Code of Jud. Cond. Rule 4.2(B)(5); Utah Code of Jud. Cond. 4.1(A)(7); Wash. Code of Jud. Cond., Rule 4.2(B)(3).

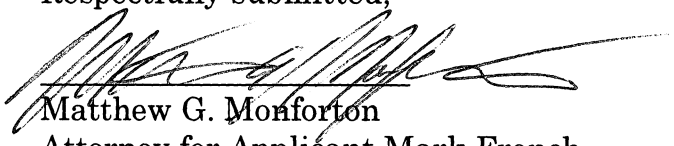
as more and more of them mail in their absentee ballots. These losses cannot remediated by a favorable ruling issued after Election Day.

CONCLUSION

For all of the foregoing reasons, Applicant Mark French requests an injunction pending appellate review prohibiting the members of the Montana Judicial Standards Commission from enforcing Rule 4.1(A)(7) against French for actions taken by him between now and November 4, 2014. Alternatively, French requests a temporary injunction to allow him, pending full briefing of this Application, to convey his desired campaign message without fear of discipline by the Montana Standards Commission.

DATED: October 14, 2014

Respectfully submitted,



Matthew G. Monforton
Attorney for Applicant Mark French

No. _____

In the Supreme Court of the United States

MARK FRENCH

Applicant,

v.

EDWARD MCLEAN, in his official capacity as Chair of Montana's Judicial Standards Commission; BLAIR JONES, in his official capacity as a member of Montana's Judicial Standards Commission; VICTOR VALGENTI, in his official capacity as a member of Montana's Judicial Standards Commission; JOHN MURPHY, in his official capacity as a member of Montana's Judicial Standards Commission; SUE SCHLEIF, in her official capacity as a member of Montana's Judicial Standards Commission,

Respondents,

APPLICANT'S APPENDIX

Directed to the Honorable Anthony Kennedy,
Associate Justice of the United States Supreme Court
And Circuit Justice for the Ninth Circuit

MATTHEW G. MONFORTON
MONFORTON LAW OFFICES, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949
Facsimile: (406) 551-6919
matthewmonforton@yahoo.com

Counsel for Applicant

October 14, 2014

TABLE OF CONTENTS

FILED

OCT 10 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK FRENCH, Plaintiff - Appellant, v. EDWARD McLEAN, in his official capacity as Chair of Montana's Judicial Standards Commission; et al., Defendants - Appellees.	No. 14-35831 D.C. No. 4:14-cv-00057-SEH District of Montana, Great Falls ORDER

Before: O'SCANNLAIN, BERZON, and BYBEE, Circuit Judges.

Appellant's emergency motion for an injunction pending appeal is denied because the balance of equities do not tip in appellant's favor and the issuance of an injunction is not in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

The briefing schedule established previously in this preliminary injunction appeal remains in effect.

LSC/MOATT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

MARK FRENCH,

Plaintiff,

vs.

EDWARD McLEAN, in his official capacity as Chair of Montana's Judicial Standards Commission; BLAIR JONES, in his official capacity as a member of Montana's Judicial Standards Commission; VICTOR VALGENTI, in his official capacity as a member of Montana's Judicial Standards Commission; JOHN MURPHY, in his official capacity as a member of Montana's Judicial Standards Commission; SUE SCHLIEF, in her official capacity as a member of Montana's Judicial Standards Commission,

Defendants.

No. CV 14-57-GF-SEH

ORDER

Background

This case challenges, on First Amendment grounds, Montana Judicial Code of Conduct Rule 4.1(A)(7).[1] Plaintiff Mark French ("French") is a candidate for

[1] (*See* Doc. 5-1at 45 (2008 Montana Code of Judicial Conduct Rule 4.1(A)(7) states: "Except as permitted by law,* or by Rules 4.2, 4.3, and 4.4, a judge or judicial candidate* shall

Sanders County Justice of the Peace in the 2014 general election.[2] He seeks to use endorsements from the Sanders County Republican Central Committee ("SCRCC") and from public officials and other candidates for public office during his judicial campaign.[3] It is Rule 4.1(A)(7)'s prohibition against such conduct by candidates for nonpartisan judicial office French seeks to enjoin.[4]

A Motion for Preliminary Injunction was filed on August 26, 2014.[5] The motion was opposed.[6] Six of seven individually-named Justices of the Montana Supreme Court appeared as amici curiae.[7] A hearing was held on October 1, 2014. The Motion for Preliminary Injunction was DENIED. This Order supplements the Court's statement of reasons for its ruling stated on the record at the time of the hearing.

---

not: . . . (7) seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate."); *see also* 46-51 (Rule 4.1(A)(7) Comments [1]-[15]).) The Montana Supreme Court adopted the 2008 Montana Judicial Code of conduct on December 12, 2008.)

[2] (*See* Doc. 1 at 4.)

[3] (*See* Doc. 1 at 4-5; SCRCC is the Republican Party's county-level organization for Sanders County.)

[4] (*See* Doc. 1.)

[5] (*See* Fed. R. Civ. P. 65; Docs. 3, 4.)

[6] (*See* Doc. 17.)

[7] (*See* Doc. 16; participating are the Honorable Mike McGrath, Honorable Jim Rice, Honorable Michael E. Wheat, Honorable Patricia Cotter, Honorable Beth Baker, and Honorable James Jeremiah Shea; Honorable Laurie McKinnon is not participating.)

Issue

The core question addressed and resolved at the hearing was whether the preliminary injunction requested should be entered.

Discussion

Issuance of a preliminary injunction is governed by Fed. R. Civ. P. 65. Such injunctions may be issued only upon notice to the adverse party. Expedited consideration is expected. In addition, the Court is to issue a preliminary injunction "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined."[8] Although no party even raised the issue of security, the rule is not to be ignored. However, the Court finds it unnecessary to address the deficiency at this point.

The parties disagree as to the type of preliminary injunction sought by the Plaintiff. French asserts he seeks a prohibitory injunction preserving the status quo of "not being disciplined by Defendants."[9] Defendants counter that the injunction sought is, in substance, mandatory, and would "upset[] the status quo and mandate[] a specified course of conduct."[10]

[8] Fed. R. Civ. P. 65(c).
[9] (Doc. 20 at 3.)
[10] (Doc. 17 at 4.)

The 9th Circuit recognizes two different legal standards for preliminary injunctions. The movant must meet one of the two.[11] A Plaintiff seeking a preliminary injunction either must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.[12] Alternatively, the moving party must "demonstrate[] *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor."[13] Under the latter standard, a court should also consider the effect of the preliminary injunction on the status quo.[14]

French argues he is seeking to preserve the status quo by preventing or enjoining the Montana Judicial Standards Commission ("Commission") if he were to violate Rule 4.1(A)(7). He equates status quo with a lack of disciplinary action.[15] However, he has not presently violated the Rule.[16] He is a candidate, not yet an office holder.[17] He has not been charged with any violation and has not been subjected to disciplinary action by the Commission or the Montana Supreme

[11] *See Stanley v. University of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).
[12] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008).
[13] *Stanley*, 13 F.3d at 1319.
[14] *See Stanley*, 13 F.3d at 1319.
[15] (*See* Doc. 20 at 3.)
[16] (*See* Doc. 1 at 5.)
[17] (*See* Doc. 1 at 4.)

Court.[18] This factual scenario strongly suggests there is no existing controversy for the Court to resolve and that no issue is ripe for resolution.[19] If such were the case, any ruling would be, in substance, an inappropriate advisory opinion on a hypothetical issue.[20]

Standing issues aside, it is clear French, notwithstanding his choice of language, seeks to go beyond preserving the status quo. In reality, he seeks to enjoin enforcement of Rule 4.1(A)(7) outright. Such relief, if granted, would require the Commission to act in a particular way to ignore the rule entirely and not apply it to the Plaintiff. Such an outcome clearly disrupts the status quo and would allow the Plaintiff to seek and use partisan endorsements, as well as endorsements from public officials and other candidates for public office. The whole electoral process for judicial elections currently in place would be disrupted.

---

[18] (*See* Docs. 1 at 4-5 (French as a candidate is unwilling to seek the SRCC's endorsement because of Rule 4.1(A)(7)'s prohibition on soliciting political party endorsements); 16 at 2 (Commission can investigate complaints alleging violations and makes recommendations to the Montana Supreme Court if it finds allegations to be true).)

[19] (Doc. 1 at 6 ("The Montana Judicial Commission threatens to discipline any judicial candidate who violates the Code and is subsequently elected.").)

[20] U.S. Const., art. III (federal courts cannot give advisory opinions; a case or controversy must exist wherein the court can provide relief and not just opine what the law would be under hypothetical circumstances); *see also North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (federal courts have "no power to issue advisory opinions"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)("injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical')(citations omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (justiciability requires an actual or imminent injury).

Mandatory injunctions are particularly disfavored.[21] The Court is to act with extreme caution in considering a mandatory injunction request "that goes well beyond maintaining the status quo."[22] To justify such action, the facts and the law must clearly favor the moving party, and the Court must apply the heightened scrutiny standard in deciding the issue.[23]

On the record before the Court, Plaintiff has not made the requisite "clear showing" under *Winter*[24] to justify an upset of the status quo or to mandate implementation of an uncharted course of conduct by the Commission. The facts and the law do not clearly favor the Plaintiff's position. For these reasons alone, a preliminary injunction at this time is not appropriate.

Alternatively, if the Court were to adopt the Plaintiff's position for the applicable standard and construe the requested relief as preserving the status quo, the Plaintiff must still make a "clear showing that [he] is entitled to such relief."[25] All four requirements must be present.[26] A preliminary injunction is "never awarded as of right."[27] Instead, "courts 'must balance the competing claims of

---

[21] *See Stanley*, 13 F.3d at 1320 (citing *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

[22] *Stanley*, 13 F.3d at 1319-20.

[23] *See Stanley*, 13 F.3d at 1320 (citations omitted).

[24] *Winter*, 555 U.S at 22 (citation omitted).

[25] *Winter*, 555 U.S. at 22 (citation omitted).

[26] *Winter*, 555 U.S. at 20.

[27] *Winter*, 555 U.S. at 24 (citation omitted).

injury and must consider the effect on each party of the granting or withholding of the requested relief."[28]

Content-based restrictions on political speech and association are subject to strict scrutiny.[29] A restriction on speech will be upheld if the state can show "a compelling state interest" and the restriction is "narrowly tailored."[30] The United States Supreme Court has left open the question of whether "the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[31]

Judicial integrity is a state interest of the highest order and judicial "codes of conduct serve to maintain the integrity of the judiciary and the rule of law."[32] The Ninth Circuit has acknowledged "that Montana has a compelling interest in maintaining a fair and independent judiciary."[33] The United States Supreme Court has previously "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons . . . based on an interest in allowing governmental

---

[28] *Winter*, 555 U.S. at 24 (citation omitted).

[29] *See Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012).

[30] *See Republican Party of Minnesota v. White*, 416 F.3d 738, 749, 750-52 (8th Cir. 2005); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 312, 340 (2010).

[31] *Republican Party of Minnesota v. White*, 536 U.S. 765, 783 (2002) (neither asserting nor implying such a requirement; but even if the First Amendment does allow greater regulation of judicial election campaigns than legislative campaigns, regulations must still pass strict scrutiny).

[32] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009).

[33] *Sanders County*, 698 F.3d at 746.

entities to perform their functions."[34] "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[35]

"In short, the seriousness with which the regulation of core poltiical speech is viewed under the First Amendment requries such regulation to be as precisely tailored as possible."[36] "A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)."[37] Strict scrutiny, as noted, is required.

Plaintiff relies on *Sanders County Republican Central Committe v. Bullock*, 698 F.3d 741 (9th Cir. 2012). There, the Ninth Circuit struck down a statute making "it a criminal offense for any political party to 'endorse, contribute to, or make an expenditure to support or oppose a judicial candidate.'"[38] The Court found that "Montana lack[ed] a compelling interest in forbidding political parties from endorsing judicial candidates" and that the statute was not narrowly

[34] *Citizens United*, 558 U.S. at 341 (citations omitted).

[35] *Mistretta v. U.S.*, 488 U.S. 361, 407 (1989) (considering whether "the Judiciary's entanglement in the political work of the [Sentencing] Commission undermines public confidence in the disinterestedness of the Judicial Branch.").

[36] *Republican Party of Minnesota*, 416 F.3d at 751.

[37] *Republican Party of Minnesota*, 416 F.3d at 750 (citations omitted).

[38] *Sanders County*, 698 F.3d at 744 (citing Mont. Code Ann. § 13-35-231).

tailored.[39] It pointed out that Montana's error was to suppose that preventing political parties from endorsing judicial candidates was necessary to maintain a fair and independent judiciary without offering evidence in support. Nonetheless, the Court recognized "that Montana has a compelling interest in maintaining" an independent, fair judiciary.[40]

The circumstances in this case vary from those in *Sanders County*. A criminal statutory provision which improperly restricted the speech of political parties cannot be equated with Montana Code of Judicial Conduct Rule 4.1(A)(7), which limits judicial candidates in nonpartisan elections from seeking partisan political party endorsements for use during a campaign. This case concerns the election of judicial officers, not the speech of political parties.

The 2008 Montana Code of Judicial Conduct "establishes standards for the ethical conduct of judges and judicial candidates" in recognition of the fact that "the judiciary plays a central role in preserving the principles of justice and the rule of law."[41] Montana selects its judges through nonpartisan, popular elections.[42] It has done so since 1935.[43]

---

[39] *Sanders County*, 698 F.3d at 747.

[40] *Sanders County*, 698 F.3d at 746.

[41] *See* Doc. 5-1, 2008 Montana Code of Judicial Conduct Preamble [3], [1].

[42] Mont. Code Ann. § 13-14-111; *see also* Mont. Code Ann. 13-14-115(1) (ballots for nonpartisan office ballots are to "be without political designation").

[43] *Sanders County*, 698 F.3d at 744.

The effect of a preliminary injunction on the whole of the judicial election process in Montana and the unintended consequences of such restraint cannot be ignored. Montana's 1889 Constitution required that Montana Supreme Court Justices, District Court Judges, and Justices of the Peace be elected by the people.[44] With the ratification of the 1972 Montana Constitution, the people affirmed that Supreme Court Justices and District Judges shall be elected by the people, as well as Justices of the Peace.[45] "A justice of the peace must be nominated and elected on the nonpartisan judicial ballot in the same manner as judges of the district court."[46] An injunction at this time would dramatically affect the whole judicial election process. This Court would be derelict in its responsibilities if it were to turn a blind eye to those potentialities.

Taking the record as a whole, at most, the Court can say no more than the likelihood of success on the merits for either party is not demonstrated. The Plaintiff has not made a clear showing that he is likely to prevail. Montana's compelling interest in an independent, fair judiciary is firmly recognized.[47] The Court is not prepared to say that the restrictions of Rule 4.1(A)(7) are not narrowly tailored. Likelihood of success on the merits by Plaintiff has not been shown.

---

[44] 1889 Mont. Const., art. VIII, §§ 6, 20.
[45] 1972 Mont. Const., art. VII, §§ 8, 5.
[46] Mont. Code Ann. § 3-10-201(2).
[47] *Sanders County*, 698 F.3d at 746.

Plaintiff's argument in support of irreparable harm is itself facially flawed. The injunction, as sought, would not address that the Plaintiff would still be prohibited from using "the name of any existing political party or organization in the candidacy" under Montana Code Annotated § 13-10-602(2). That statute is not challenged and Plaintiff would not be shielded from its plain language by the preliminary injunction sought. The statute itself would be violated if the Plaintiff were to undertake the course of action that he wishes to take.[48]

As noted previously, the statute is not under attack. Granting the injunction as to Rule 4.1(A)(7) alone would not alleviate the harm Plaintiff claims would accrue. Therefore, I cannot conclude that the irreparable harm requirement has been shown.

Turning next to the requirement that an injunction be in the public interest, disruption of the whole of the judicial electoral process at this late date in the

[48] (Docs. 1 at 5 ("French intends to seek [SCRCC's] endorsement . . . if [the] Court enjoins enforcement of Rule 4.1(A)(7)"); at 4 (if SCRCC were to endorse him, "French intends to accept the [SCRCC's] endorsement and include it in his campaign literature and discuss it during face-to-face campaigning."); 5-1 at 14 (for purposes of Rule 4.1(A)(7), the 2008 Montana Code of Judicial Conduct Terminology defines "political organization" as "a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office."); 17-3 at 1 (Sanders County Republican Central Committee Bylaws, Article II-Purpose)). SCRCC is a political party or organization and falls within the definitional scope of "political organization" found within the Montana Judicial Code of Conduct. SCRCC itself is free to speak to endorse French or any candidate of its choosing at any time under the holding of *Sanders County*, 698 F.3d at 749.

election calendar is problematic. Enjoining Rule 4.1(A)(7) is not justified if the statute remains, as it would, in full force and effect. Issuance of an injunction would result in a contradiction in the laws and rules governing nonpartisan judicial candidate conduct. Amici also have persuasively argued that striking Rule 4.1(A)(7) will have a broader effect upon on the viability of other Judicial Code of Conduct Rules.[49] In particular, other provisions of Rule 4.1(A) would be implicated.[50] Therefore, the public interest leans against granting a preliminary injunction.

It is not necessary to reach the balance of the equities issue as the other conjunctive requirements under *Winter* are not satisfied. Nevertheless, the

---

[49] *See* 2008 Montana Code of Judicial Conduct: Rule 2.3(B) (*Bias, Prejudice and Harassment*) requires that a judge not manifest bias or prejudice with regard to race, sex, gender or political affiliation (emphasis added in Amicus Brief); Rule 2.7 (*Responsibility to Decide*) discourages frequent disqualification (recusal) out of concern for public disfavor and the resulting burden on judicial colleagues; Rule 2.11 (*Judicial Statements on Pending and Impending Cases*) requiring that a judge not make "pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office"; Rule 2.12 (*Disqualification*) requiring a judge to disqualify him or herself when the judge "has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." The politicized judge would be in the position of frequent recusal in contravention of Rule 2.7.

[50] (Doc. 5-1 at 45 (Rule 4.1(A)(12): "a judge or judicial a candidate* shall not: . . . (12) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office."); at 13 ("impartial" "mean[s] absence of bias or prejudice in favor of or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.").)

Plaintiff has not shown that the more lenient scrutiny standard of the *Winter* test applies in the first instance.

Plaintiff has not made the necessary clear showing to justify the conclusion that a preliminary injunction is appropriate. The preliminary injunction request is denied.

ORDERED:

Plaintiff's Motion for Preliminary Injunction[51] is DENIED.

DATED this 6th day of October, 2014.

Sam E. Haddon

SAM E. HADDON
United States District Judge

[51] (Doc. 3.)