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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

DIANE CURRY, C.E. MCADOO
JIM ROSS, DORIS L. PENDLETON PLAINTIFFS

VS. NO. CV-15-654

TONY WOOD, in his official capacity as
COMMISSIONER of the ARKANSAS DEPARTMENT OF EDUCATION;
ARKANSAS DEPARTMENT OF EDUCATION;
SAMUEL LEDBETTER, in his official capacity as
CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION;
TOYCE NEWTON, in her official capacity as
VICE-CHAIRMAN, ARKANSAS STATE BOARD OF EDUCATION;
JOE BLACK, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
ALICE WILLIAMS MAHONY, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
MIREYA REITH, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
VICKI SAVIERS, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
JAY BARTH, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
DIANE ZOOK, in her official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION;
KIM DAVIS, in his official capacity as
MEMBER, ARKANSAS STATE BOARD OF EDUCATION DEFENDANTS

MEMORANDUM ORDER

Plaintiffs filed this action for declaratory judgment, writ of mandamus, writ of prohibition, and injunctive relief on February 20, 2015. Their complaint alleges that on January 28, 2015 the Arkansas State Board of Education (hereafter "ABE") voted to "takeover the Little Rock School District" (Compl. ¶ 74) and "voted to immediately remove the seven-member Little Rock School District Board" (Compl. ¶ 75).

Plaintiffs allege that those actions were arbitrary, capricious, in bad faith, and wanton (Compl. ¶¶ 77 and 95). Plaintiffs separately contend that the challenged actions

by ABE "are ultra vires and outside of its authority" (Compl. ¶¶ 97 and 101). The Complaint seeks extraordinary relief by way of a writ of mandamus or prohibition ordering Defendants to rescind the January 28, 2015 challenged actions (Compl. ¶ 115-119), and also seeks a temporary restraining order or preliminary injunction "directing the Defendants to cease and desist from taking over the Little Rock School District" (Compl. ¶ 120-125).

The litigation was randomly assigned to the undersigned by the office of the Circuit Clerk on February 20, 2015, the date it was filed by Plaintiffs. Summons was issued to Defendants on February 27, 2015, was returned March 2, 2015.

On March 2, 2015, counsel for Defendants wrote a letter to the Court as follows:

> Your Honor:
>
> In light of the Court's January 28, 2015, comments made prior to the Arkansas State Board of Education's decision to assume authority over the Little Rock School District, we respectfully request that Your Honor recuse from the above styled case. Should Your Honor require a formal motion in order to consider this request, we will promptly file the motion for the Court's consideration.

The Court replied to that letter as follows:

> Mr. Lasiter and Ms. Freno:
>
> Please promptly file the Defendants' recusal motion referenced in your letter dated March 2. Counsel for Plaintiffs should file their response to the recusal motion not later than five (5) days after the motion is filed. Defendants' reply should be filed not later than five (five) days after the filing date of the Plaintiffs' response.

Defendants then filed a recusal motion on March 6, 2015 based on the following statement the undersigned issued on January 28, 2015 and that was published in the Arkansas Times, to wit:

I urge you to reject the attempt to disenfranchise the voters who have entrusted the Little Rock School Board with responsibility for governing the Little Rock School District for two reasons.

First, there is no evidence whatsoever that the Little Rock School District is not lawfully governed by the presently composed Little Rock School Board (LRSB). Each LRSB member holds office after having won election by registered voters within the LRSD. The votes have been counted and the election results were duly certified. Any action which divests governance of the Little Rock School District from its democratically elected Board will amount to impeachment of each Board member, without trial and with without [sic] any charge that any Board member, let alone the entire Board, has committed an offense deserving impeachment. And such action would subject the electors of the Little Rock School Board to taxation without representation.

Second, there is no credible evidence that the Little Rock School Board, as presently constituted, has failed to discharge the legal obligations to govern the Little Rock School District in the manner required by the Arkansas statutes, federal statutes, the Constitution of Arkansas, or the Constitution of the United States. The presently constituted LRSB, to its credit, is laboring to overcome the cumulative effect of race discrimination, poverty, and willful actions by many political leaders and private actors bent on noncompliance with the legal and moral obligation to provide free public education to every student in an efficient and fair manner.

Certain problems in LRSD schools that are designated "academically distressed" were not caused by the School Board you are asked to dissolve. None of these Board members should be faulted for those problems.

In 1927 Little Rock Senior High School opened to the claim of being the most beautiful high school in the United States. It was built to accommodate 3000 students. The library had 11,000 books. The principal was paid $500 per month. The school boasted a gymnasium and stadium. The school and its facilities were built with tax funds. All the teachers and students at LRSHS were white.

Meanwhile, M.W. Gibbs High School—the school for Little Rock black students—was in disrepair. When black parents complained about the need for a decent school building, it was discovered that the money for a new black high school had been "diverted" to construct Little Rock Senior High School.

A new high school for black students was finally constructed thanks to funding provided by the Julius Rosenwald Foundation, the John D.

> Rockefeller Foundation, and local fundraising. That new school was Dunbar School for Industrial Arts. Dunbar had no gymnasium and no stadium. The library had less than half the books at LRSHS. The Dunbar principal was paid $335 per month.
>
> Little Rock Senior High School is now known as Little Rock Central High School. I cite this history to show you how previous LRSD School Boards controlled by white politicians and community leaders acted to defraud black children and voters. That fraud was fully known by State leaders. No member of the School Board that authorized condoned, or who was complicit in that colossal fraud was ever removed.
>
> This history reveals the naked hypocrisy at the root of the action you are asked to take. The Little Rock School Board you are asked to dissolve has done nothing that justifies it being dissolved. Instead, you are being urged to commit an act of tyranny by people who must surely know that this School Board is more representative, cohesive, and committed to serving all students than all of its predecessors, without exception.
>
> History will not be kind to the people who seek to have the current Little Rock School Board dissolved. I urge you to not align yourselves with those actors. Allow the duly elected School Board to work to remedy decades of discrimination and hypocrisy so that all children in the LRSD can get the fair, efficient, and decent education they deserve.
>
> Wendell Griffen

Defendants argue that the foregoing January 28, 2015 statement "point[s] to a bias in favor of the plaintiff's position in this case ...[a]nd at the very least, the statements point an appearance of unfairness." (Def's Br. in Supp. of Mot. for Recusal 5). Defendants' base their recusal motion on Canons 1 and 2 of the Arkansas Code of Judicial Conduct. Canon 1 declares that "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Canon 2 states that "A judge shall perform the duties of judicial office impartially, competently, and diligently."

After carefully considering the recusal motion, the authorities cited by Defendants, and the arguments advanced in their supporting briefs as well as the

response, authorities, and brief filed by Plaintiffs, the Court finds the recusal motion to be without basis in fact or law. At footnote 2 of the brief in support of their recusal motion Defendants state: "In citing the Arkansas Code of Judicial Conduct, the defendants do not suggest that the Court's public statements violated ethical standards. Instead, the defendants cite the Arkansas Code of Judicial Conduct to stress the importance the Arkansas Judiciary places upon impartiality and the avoidance of even the appearance of impropriety." Defendants admit there are no facts that impinge upon Cannon 1 or Cannon 2. Thus, Defendants admit there is no factual basis for recusal.

Remarkably, Defendants argue that there is something improper about this Court fulfilling its duty to hear and assign a randomly assigned case involving a controversy simply because Defendants disagree with the public statements made by the undersigned about this controversy even though Defendants admit they know there was nothing unethical about what the undersigned said or did. As such, the recusal motion is a naked ploy by Defendants to have this lawsuit heard and decided by an impartial judge they favor, as opposed to an impartial judge with whom they disagree. Defendants' recusal motion is even more remarkable because it openly disregards generations of case law in Arkansas as well as controlling judicial precedent from the U.S. Supreme Court.

As stated in greater detail below, the fact that a juror or a judge holds or has expressed views about a controversy that later becomes litigation he or she is assigned to hear and decide has never been a basis for disqualification under Arkansas law or any other relevant standard for evaluating the impartiality of a judge or a juror. Furthermore, there is no basis under the Arkansas Code of Judicial Conduct to

disqualify a judge from adjudicating a lawsuit based on extrajudicial public statements a judge has made about a controversy before suit was filed and which do not commit or appear to commit the judge to rule in a particular way in the lawsuit. This memorandum order will address specific provisions of the Arkansas Code of Judicial Conduct pertinent to these questions.

Rule 1.2 of the Arkansas Code of Judicial Conduct

Rule 1.2 of the Arkansas Code of Judicial Conduct states: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Arkansas courts have consistently held that a "judge's decision to recuse is within the trial court's discretion and will not be reversed absent abuse." *Searcy v. Davenport*, 352 Ark. 307, 312, 100 S.W.3d 711, 714 (2003). "There is a presumption of impartiality on the part of judges." *Id.* "The party seeking recusal must demonstrate bias." *Id.* "Unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias." *Id.* at 313, 100 S.W.3d at 714. "Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge." *Id. at* 313, 100 S.W.3d at 715.

The Arkansas Code of Judicial Conduct defines the terms independence, integrity, impropriety, and impartiality.

> "Independence" means a judge's freedom from influence or controls other than those established by law."
>
> "Integrity" means probity, fairness, honesty, uprightness, and soundness of character.

> "Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality."
>
> "Impartiality" means 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.

Ark. Code Jud. Conduct Terminology

Defendants' recusal motion and supporting brief does not cite a single case from Arkansas or elsewhere where a judge or a juror has been held unqualified to hear and decide a controversy because he or she held or expressed preconceived opinions. To the contrary, Arkansas appellate decisions have consistently upheld the decisions of trial judges who refused to strike jurors for cause when those jurors held preconceived opinions about a controversy.

In *Niven v. State*, 190 Ark. 514, 80 S.W.2d 644 (1935), the defendant was convicted of second degree murder and sentenced to 21 years imprisonment. On appeal, he challenged the trial court's seating of three jurors who testified during voir dire that they had formed an opinion concerning the defendant's guilt or innocence which would require evidence to remove. The challenged jurors also testified that they could lay aside any such opinions they held, go into the jury box, and try the case solely on the evidence adduced and the instructions issued by the trial judge. Our supreme court held that the trial judge correctly determined the challenged jurors were competent.

More recently, in *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002), the Arkansas Supreme Court upheld a trial judge's refusal to strike a juror for cause who revealed she had a niece who had sexually assaulted, she worked with several young

women who had been sexually assaulted by family members, and said it would be "very difficult" to put her knowledge of the sexual abuse of her relative aside but that she could "set aside these things and decide the case on the testimony and the exhibits introduced."

In *Beck v. State*, 2002 Ark. App. LEXIS 634, 2002 WL 31518873 (Ark. Ct. App. Nov. 13, 2002), a juror was challenged for cause who told the trial court during voir dire that she had been a victim of rape, but assured the court that she could decide the case fairly. The Arkansas Court of Appeals upheld the trial court's decision denying the defendant's motion to strike the juror for cause, stating that when a juror declares that he or she can lay aside preconceived opinions and give the accused the benefits of all doubts to which he is entitled by law, the trial court may find the juror acceptable.

In *Rowe v. State*, 224 Ark. 671, 275 S.W.2d 887 (1955), jurors were challenged for cause who had formed opinions about a criminal case based on newspaper reports or what others had told them, but the trial court overruled the challenges for cause based on jurors' statements that they could and would be guided solely by the testimony at trial and would give the defendant the benefit of all doubts defined by the law. The Arkansas Supreme Court held that the trial court committed no error in accepting the jurors, adding this observation: "It is no longer practicable in an intelligent society to select jurors from a psychological vacuum or from a stratum where information common to the community as a whole is lacking."

In short, Arkansas lawyers, judges, and courts have long recognized that when a juror states he or she can lay aside preconceived opinions, give all parties a fair hearing, and base a decision on the merits of a controversy on the evidence adduced at

trial and the law, the juror satisfies the requirement of impartiality. Our case law clearly does not stand for the proposition that impartiality, or the appearance of impartiality, requires ignorance, silence, or lack of any opinions concerning a controversy on the part of a trier of fact.

Turning to impartiality and judges, Justice Antonin Scalia of the Supreme Court of the United States expounded on the meaning of impartiality in that Court's majority opinion in *Republican Party of Minn. V. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002), as follows:

> It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case....
>
> ... A judge's lack of predisposition regarding the relevant legal issues in a case *has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.*
>
> *...Avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that kind of impartiality can hardly be a compelling state interest either. ...*
>
> ...A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so.

Id. at 777-78, 122 S. Ct. at 2536 (emphasis added).

Justice Scalia also addressed in the majority opinion in *White* the relationship between impartiality and personal and extrajudicial activities of judges.

> Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues they must later rule upon. See, e.g., *Laird*, supra, at 831-833 (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes' authorship of the opinion overruling *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), a case he had criticized in a book written before his appointment to the Court). *More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of litigation—in classes that they conduct, and in books and speeches.*

Id. at 779, 122 S. Ct. at 2537 (emphasis added).

Justice Scalia also addressed the traditional way the term "impartiality" is used in the judicial context. His analysis is especially relevant to this case.

> One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used....
>
> ...To be sure, when a case arises that turns on a legal issue on which the judge had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

Id. at 775-77, 122 S. Ct. at 2535-36.

The January 28, 2015 statement challenged by Defendants recusal motion did not mention any legal issue alleged in the Complaint that was filed on February 20, 2015, let alone show that the undersigned has signaled unwillingness to apply the law to any party in this case "in the same way he applies it to any other party." As Justice Scalia made clear in *White*, that is the root meaning of "impartiality" in the judicial

context, "the traditional sense in which the term is used." Unsurprisingly, that is precisely how "impartiality" is defined in the Arkansas Code of Judicial Conduct.

It is striking that Defendants have urged the Court to recuse without even a cursory attempt to apply the standards set forth in Arkansas appellate decisions and by the Supreme Court of the United States in *White.* Nevertheless, the Arkansas court decisions and Justice Scalia's exposition about the meaning of "impartiality" in the *White* majority opinion are more than instructive. They are controlling precedent that Defendants have chosen to disregard because they find the holdings in those decisions inconvenient.

Rule 2.10 of the Arkansas Code of Judicial Conduct

Rule 2.10 states:

> (A) A judge shall not make any public statement that *might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.*
>
> (B) *A judge shall not, 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.* (Emphasis added)
>
> (C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).
>
> (D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.
>
> (E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

On January 28, 2015—the date the undersigned issued the public statement under consideration—no litigation involving this controversy was "pending or impending in any court." Thus, subsection (A) of Rule 2.10 is inapplicable on its face.

Rule 2.10(B) prohibits a judge, "in connection with cases, controversies, or issues that are likely to come before the court, [from making] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." The Oxford American Dictionary definition of "pledge" states that a pledge is "a solemn promise" and defines "pledged" and "pledging" as "to promise or cause to promise solemnly."

The Oxford American Dictionary definition of "promise" states:

> Promise n. 1. A declaration that one will do or not do a certain thing. 2. An indication of something that may be expected to come or occur. Promise v. (promised, promising) to make a promise to declare that one will give or do or not do something.

The Oxford American Dictionary defines "commit" and "commitment" as follows:

> Commit v. 3. To pledge, to bind with an obligation.
>
> Commitment n. 1. Committing. 2. The state of being involved in an obligation. 3. An obligation or pledge.

Defendants argue incorrectly that the January 28, 2015 statement by the undersigned "amounted to an opinion on the legality of the very issue at hand in the present case—the State Board's action to assume authority over the Little Rock School District." (Brief for Defendants, p. 7). The January 28, 2015 statement expressing the undersigned's opposition to the takeover of the Little Rock School District did not in any way opine about the legal authority of the Arkansas Board of Education to takeover the Little Rock School District.

The January 28, 2015 public statement contained no pledge, promise, or commitment. It is undeniable that the statement urged the Arkansas State Board of Education not to dissolve the Little Rock School Board. That view was in no way a commitment, pledge, or promise to anyone about how the undersigned would decide any issue if litigation ensued.

The January 28, 2015 statement made no comment, let alone a commitment, pledge or promise, about (a) whether the Defendant Board of Education has legal authority to dissolve a school board, (b) whether dissolving a school board constitutes arbitrary and capricious action, or (c) any other allegation in the Complaint filed on February 20, 2015.

Beyond that, there is a fundamental and distinct difference between stating an opinion about an issue and committing, pledging, or promising to decide controversies involving that issue in a particular way. As will be set forth in greater detail below, judges have opinions about the law and other subjects before they enter office. Some judges prefer to not disclose their views on controversies except within the context of legal rulings on cases assigned to them. Other judges, however, opt to express opinions and openly comment about controversial subjects. Those opinions and comments may be expressed during continuing legal education seminars, speeches to bar association or other groups, and in other settings. The Code of Judicial Conduct does not prohibit judges from expressing their views about controversial issues of the day. Extrajudicial public comments do not require recusal, however strongly they may be held or expressed, unless they amount to commitments, pledges, or promises about how cases and controversies will be decided.

Even opinions expressed by a judge while deciding cases do not amount to commitments, promises, or pledges about how the judge will rule in other cases. No matter whether one has expressed an opinion or not, and regardless of how and when an opinion has been expressed about a disputed legal question, the rulings a judge must make in a case ultimately turn on the facts presented to the judge and the law pertaining to those facts. In other words, a judge's prior opinion about an issue—whether expressed extrajudicially (as in this instance) or in the context of the judge's rulings in other cases—is not an automatic pledge, promise, or commitment from the judge about how the same issue will be decided in a later case.

Beyond that, Defendants' argument implies that when a judge expresses a position about a controversial subject—whether in a case or outside the judicial context—he or she will be less open to viewpoints that differ from what he or she has previously expressed when those different viewpoints are later presented in litigation he or she is assigned to hear and decide. That belief is inaccurate for several reasons.

First, judges change their views about issues. Written and oral arguments during the course of litigation may cause a judge to reconsider a previously held position about a legal issue or controversial subject. One of the benefits that law clerks serve is as sparring partners who challenge what judges may believe about the law or a controversial subject.

Second, judges decide to alter or even abandon previously held views after reading articles written by lawyers, law professors, law students, and other judges that appear in law journals, bar association publications, and judicial opinions authored by other judges. And seasoned lawyers know and counsel their clients that the questions

a judge may pose and the comments he or she may make during an oral argument do not foretell and should not be considered predictive about how the judge will decide.

Third, the undersigned has reversed rulings made one day in a case on the following morning after engaging in additional research, reflection, and discourse with his law clerk (to the surprise of the parties preparing to begin jury trial in that case the day after the ruling change happened). These examples show that judges change their views about legal issues and controversial subjects.

The point is that a judge is not a mindless functionary without views on controversial subjects and issues, whether before he or she assumes office or afterwards. Judges can and often do change their minds about controversial subjects, including changing their minds about rulings previously made in a case. Society is not served by judges who are mindless or by judges who are unwilling to reconsider and change their views based on changing circumstances, different facts, new awareness about issues, and the specific facts and circumstances presented in a given case. In fact, the willingness and ability to ponder, deliberate, reconsider, and revise past views, however strongly one may have held or expressed them, is an essential attribute of the judicial function.

A blanket rule prohibiting judges from expressing extrajudicial views about controversial issues that are not the subject of litigation pending before them violates the freedom of speech guarantee found in the First Amendment to the Constitution of the United States. *See, Republican Party of. Minn. v. White, supra.* Such a prohibition amounts to a prior restraint on political speech and, as such, is subjected to strict scrutiny to determine its validity. To withstand strict scrutiny review, the prohibition must

be narrowly tailored and advance a compelling governmental interest that trumps the cherished right to freedom of expression guaranteed by the First Amendment. *White, supra.*

Some may contend that public interest in the appearance of impartiality and avoiding the appearance of impropriety are compelling state interests that trump the right of a judge to comment publicly about controversial matters he or she might later be required to adjudicate. But as previously addressed in this memorandum order, the Supreme Court of the United States considered, flatly rejected, and settled that notion in 2002 when it decided *Republican Party of Minn. v. White, supra.*

In *White*, the Supreme Court held that a canon of judicial conduct adopted by the Minnesota Supreme Court and which prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues" (hereinafter referred to as the "announce clause") was unconstitutional under the First Amendment, and therefore unenforceable. The Court ruled that the announce clause prohibited speech based on its content and burdened a category of speech—expressions uttered during election campaigns—that is at the core of the First Amendment freedoms. In doing so, the Court observed that the proper test to be applied to determine the constitutionality of such a restriction is strict scrutiny, under which a proponent of the restriction must prove that the restricting provision is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 109 S. Ct. 1013 (1989).

Writing for the majority in *White,* Justice Scalia rejected the argument that maintaining impartiality and the appearance of impartiality was a compelling state interest.

> It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-JUSTICE REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." Ibid. The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. *Minn. Const., Art. VI, § 5* ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.
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> A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of

impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in openmindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. See, *e.g.*, *Laird*, 409 U.S. at 831-833 (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes's authorship of the opinion overruling *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923), a case he had criticized in a book written before his appointment to the Court). More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication -- in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) (HN5 "A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law . . . "); Minn. Code of Judicial Conduct, Canon 4(B), Comment. (2002) ("To the extent that time permits, a judge is encouraged to do so . . . "). That is quite incompatible with the notion that the need for openmindedness (or for the appearance of openmindedness) lies behind the prohibition at issue here.

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 open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. See *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994)

> (noting that underinclusiveness "diminishes the credibility of the government's rationale for restricting speech"); *Florida Star v. B. J. F.*, 491 U.S. 524, 541-542, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989) (SCALIA, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).

White, 536 U.S. at 777-80, 122 S. Ct. 2536-37 (emphasis in the original).

The United States Supreme Court decided in *White* that impartiality—meaning "open-mindedness"—or the appearance of impartiality is not a compelling state interest, which satisfies the strict scrutiny standard of the First Amendment concerning whether a judge can be prohibited from stating his or her extrajudicial views about disputed legal issues before litigation is the law of the land. Despite the fact that Defendants and others disagree with the holding in *White*, this Court is duty bound to abide by it in this and every other instance,

Rule 2.11 of the Arkansas Code of Judicial Conduct

Rule 2.11 states:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> > (1) *The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.*
>
> ...
>
> > (5) *The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.*
>
> ...

(Emphasis added). It is self-evident that the undersigned made a public statement on January 28, 2015. However, recusal is not mandated pursuant to Rule 2.11 for several obvious reasons.

Rule 2.11 applies to conduct within the context of legal proceedings before the judge. "A judge shall disqualify himself or herself *in any proceeding* in which the judge's impartiality might reasonably be questioned, ..." Rule 2.11(A) (emphasis added). Plainly, there was no proceeding before the Court on January 28, 2015—the date of the statement—or at any other time before this lawsuit was filed on February 20, 2015.

Rule 2.11(A)(1) mandates disqualification if "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute *in the proceeding*." (Emphasis added). The challenged statement was made weeks before this litigation was filed.

The undersigned did not know—and could not have known—whether litigation would occur, let alone know who the parties would be or the identities of the lawyers who would represent those parties in what was at that time the yet unfiled litigation. There is no basis for anyone to conclude that the undersigned asserted on January 28, 2015 "personal knowledge of facts that are in dispute in the proceeding" because (a) no personal knowledge was asserted about any facts (disputed or otherwise) in the January 28, 2015 statement, and (b) no proceeding was pending before the undersigned until February 20, 2015.

Rule 2.11(A)(5) requires disqualification of a judge who "while a judge or a judicial candidate, has made a public statement, other than in a court proceeding,

judicial decision, or opinion, that *commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding.*" (Emphasis added). Rule 2.11(A)(5) explicitly applies to extrajudicial statements made by a judge that *commit* or appear to commit the judge to *reach a particular result or rule in a particular way during the course of existing litigation.* (Emphasis added). That this is the correct construction of the Rule is obvious from the relationship between the words "public statement," the phrase "that commits or appears to commit the judge to reach a particular result or rule in a particular way," and the phrase "other than in a court proceeding, judicial decision, or opinion."

Before litigation ensues, judges, like everyone else, are free to express their views about controversies consistent with the freedom of speech guarantee that has been part of the First Amendment since 1791. However, once litigation ensues Rule 2.11(A)(5) prohibits a judge from making statements about results or rulings concerning the litigation "other than in a court proceeding, judicial decision, or opinion."

While, there was considerable speculation about the Little Rock School District when the undersigned issued the statement, no lawsuit was pending or impending, let alone ongoing. Speculation about whether there will be something to litigate is, plainly, not the same thing as a pending lawsuit, and certainly not a commitment about how one will rule in an unknown and unfiled litigation. It is unmistakably clear that the undersigned has not issued a statement during the course of this litigation that "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

As Justice Scalia made clear in the majority opinion in *White*, "judges often state their views on disputed legal issues outside the context of litigation—in classes that they conduct, and in books and speeches." Defendants concede that there is nothing unethical about a judge expressing an opinion about a controversial subject outside the context of litigation. Their recusal motion is not based on the fact that the undersigned expressed an opinion, but on the notion that the January 28, 2015 statements demonstrate that the undersigned has a preconception about the merits of the instant lawsuit which, standing alone, require recusal.

A judge is constantly obligated to perform judicial duties impartially. No party is entitled to favoritism or disfavor by a judge because the judge holds personal views about the subject matter of a controversy involving that party, regardless whether or not those views are expressed publicly. When a judge has commented publicly about a controversy that later is presented in a case to which he or she is assigned, the judge must evaluate whether he or she is biased so as to require recusal. That self-evaluation is confined to the conscience of the judge. *Searcy v. Davenport, supra.*

Defendants admit that the January 28, 2015 public statements did not violate the Arkansas Code of Judicial Conduct. Defendants have not alleged, let alone demonstrated, anything about the January 28, 2015 statements that amounted to a commitment, promise, or pledge to rule in a particular way for or against any party. So the effect of Defendants' recusal argument would, oddly, disqualify any judge in Arkansas for making extrajudicial statements about matters that later are litigated even when no litigation was pending or impending when the statements are made. No one knew whether litigation would ensue. No one could have known who the litigants and

their legal counsel would be and what claims, defenses, and other issues would be presented for adjudication. No one could have known whether the undersigned would be assigned to preside over the litigation that did ensue.

Litigants deserve to have their controversies heard and decided by impartial judges. But judicial impartiality means willingness to hear and decide controversies diligently and by applying the law equally to all parties. Impartiality has never been held to require ignorance about or isolation from the affairs of life. The fact that a judge has expressed views about a subject does not disable him or her from being able to apply the law equally to all parties concerning that subject.

Rule 2.7 of the Arkansas Code of Judicial Conduct

Rule 2.7 states: "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." Although Defendants have not cited it in their recusal motion, their motion does cite Canon 2 which requires judges to perform judicial duties impartially, competently, and dliligently.

This lawsuit was randomly assigned to the undersigned pursuant to the routine practice and procedure established and performed by the Circuit Clerk. The foregoing discussion shows that disqualification is not required by Rule 2.11 of the Code of Judicial Conduct or otherwise and that there is no basis for the undersigned to recuse merely because he issued the January 28, 2015 statement.

Judges should not use recusal or disqualification to avoid controversial, difficult, or unpopular cases and issues. No judge is entitled to only be assigned uncontroversial, routine, or popular cases. Judges are trusted to handle tough cases without concern about whether they will be criticized or commended for their rulings,

including their rulings concerning recusal motions. That trust obligates judges to apply the law to all parties equally no matter how they may personally feel and what they may personally believe (whether the feelings and beliefs are expressed publicly or not) about the controversies assigned to them.

Because there is no basis in fact or law for the undersigned to recuse from hearing and deciding this litigation it would be dereliction of duty for the undersigned to recuse. No person is fit to be a judge who lacks the courage, fortitude, intellectual discipline, and integrity to do the hard work involved in hearing and deciding controversial, unpopular, or novel cases.

Judges volunteer for the work we do. We are not conscripted. The people who entrust us with the judicial office should be able to count on us to do our job. We dishonor that trust if we look for ways to escape and evade doing the work for which we volunteered.

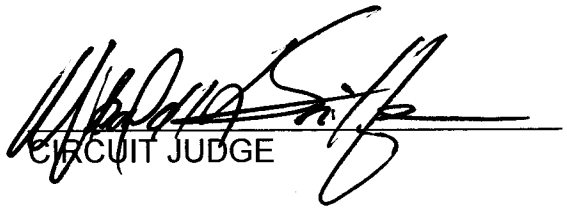
Conclusion

The January 28, 2015 public statement issued by the undersigned did not violate the impartiality requirement protected by Rule 1.2 of the Arkansas Code of Judicial Conduct because the statement does not show that the undersigned has demonstrated, or appeared to demonstrate, unwillingness to apply the law in an even-handed way to the parties in this litigation. There is no reason for the undersigned to recuse based on Rule 2.10 of the Arkansas Code of Judicial Conduct because there was no commitment, pledge, or promise to rule in a particular way, for or against any party, if a lawsuit occurred. Similarly, recusal is not warranted by Rule 2.11 of the Arkansas Code of Judicial Conduct because (a) the undersigned did not make an extrajudicial statement

during the pendency of this litigation and (b) the January 28, 2015 statement did not commit or appear to commit the undersigned to reach a particular result or rule in a particular way, whether on January 28, 2015, February 20, 2015 (the filing date of the lawsuit), or at any other time.

Defendants' recusal motion is DENIED.

ORDERED THIS 12th day of March, 2015



CIRCUIT JUDGE