UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

HON. TOM PARKER, Associate Justice of the Supreme Court of Alabama,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	**CASE NO. 2:16-CV-442-WKW**
JUDICIAL INQUIRY COMMISSION OF THE STATE OF ALABAMA, *et al.*	:	
Defendants.	:	

PLAINTIFF JUSTICE TOM PARKER'S MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiff Hon. Tom Parker, Associate Justice of the Alabama Supreme Court ("Justice Parker" or "Plaintiff"), by and through his undersigned counsel, hereby files this memorandum in support of his Renewed Motion for Preliminary Injunction.

INTRODUCTION

It is black letter law that judges do not lose their First Amendment rights when they campaign for or hold judicial office. Despite this basic principle, Defendants have demonstrated their willingness to improperly interfere with Alabama's judicial elections by investigating a sitting Associate Justice of the Alabama Supreme Court (and candidate for reelection to that office) for alleged judicial ethics violations based upon core political speech protected by the First Amendment. Although it has long been abrogated by the American Bar Association and abandoned by all other states, Canon 3A(6) remains in full force and effect in Alabama, banning judges from commenting publicly on pending or impending litigation in **any** court, even if their comments would have no impact on the outcome or fairness of any litigation. Having already been investigated by the JIC for allegedly violating this breathtakingly broad Canon, Justice Parker's

protected speech – both as a sitting Justice and during his ongoing political campaign to become Chief Justice of the Alabama Supreme Court – will continue to be chilled and censored, unless and until Canon 3A(6) is enjoined by this Court. To stop the irreparable harm to his First Amendment liberties which he suffers each and every day Canon 3A(6) remains in effect, Justice Parker now renews his Motion for a Preliminary Injunction.[1]

FACTUAL BACKGROUND

This Court is already familiar with the detailed and sworn facts alleged in Justice Parker's Verified Complaint ("VC" dkt. 1), and has summarized those facts in its recent Order denying (in large part) Defendants' motions to dismiss. (Dkt. 64, pp. 1-7). For the sake of brevity, Justice Parker will rely upon, but not rehash, those facts in this Memorandum.

To bring those facts current, Justice Parker is submitting a supplemental declaration with this Memorandum. (*See* **Exhibit A**, Declaration of Justice Tom Parker in Support of Renewed Motion for Preliminary Injunction, "Parker Decl."). Of note, on April 27, 2017, Justice Parker announced his candidacy for Chief Justice of the Alabama Supreme Court. ("Parker Decl." at ¶ 3). The general election is scheduled for November 6, 2018, and a primary election will take place on June 5, 2018. (*Id*. at ¶ 6). Justice Parker has a primary opponent, and his campaign is currently in full swing. (*Id*.) As a candidate for judicial office and a sitting Justice on the Alabama Supreme Court, Justice Parker is subject to the challenged canons and threatened by the JIC's demonstrated

[1] Justice Parker's initial Motion for Preliminary Injunction (dkt. 2) was denied by this Court solely on the grounds of *Younger* abstention, after this Court declined to exercise jurisdiction on account of the Judicial Inquiry Commission's ongoing investigation of Justice Parker. (Dkts. 40, 39). Following the JIC's voluntary closure of that investigation, this Court has now denied Defendants' motions to dismiss on abstention and other grounds as to all of Justice Parker's claims, other than the Due Process challenge to Section 159 of the Alabama Constitution. (Dkt. 64). Accordingly, no impediment or obstacles exist to the Court's consideration of Justice Parker's request for preliminary injunctive relief.

willingness to open investigations and consider charges against judicial candidates and judges for their protected speech. (*Id*. at ¶¶ 4-5, 7-10). Accordingly, Justice Parker is forced to self-censor his protected speech to avoid additional investigations or prosecutions. (*Id*.) This is negatively affecting his ability to campaign for office and to speak on matters of public interest. (*Id*.)

Justice Parker is challenging *inter alia* the constitutionality of Canon 3A(6). (VC ¶¶ 84-107). This provision, which is **the only one of its kind still maintained in any state in the country**, imposes substantial restriction upon, and threats to, Justice Parker's protected speech. Canon 3A(6) states that "[a] judge should abstain from public comment about a pending or impending proceeding **in any court**, and should require similar abstention on the part of court personnel subject to his direction." Canon 3A(6), Ala. Canons Jud. Ethics (emphasis added). **Alabama is thus the only state in the nation that purports to ban judicial comments on any lawsuit pending or impending in any court, no matter how far away, and irrespective of whether the comments are likely to adversely impact that litigation**. *Id.* This overbroad provision would sanction even judges who comment on lawsuits as part of a legal education course they might be teaching, or as part of a speech to a group of concerned citizens. *Id*.

This provision was based on the previous model Canon by the American Bar Association. Yet, the American Bar Association has since removed this provision from its model rules because it believed it was grossly violative of the First Amendment. The reporter for the 1990 revision explained the reason for the modification of the public-comment Canon:

> In Section 3B(9), the first sentence of former Section 3A(6) was modified to prohibit only comment, whether public or private, that might affect the outcome or fairness of a trial or hearing. **The language of the 1972 Code's provision prohibiting any public comment about a pending or impending proceeding was believed by the Committee to be overbroad and unenforceable**. For example, judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality.

Lisa L. Milord, *The Development of the ABA Judicial Code* 21 (1992) (emphasis added).

The American Bar Association's 1990 revision to the public-comment rule significantly narrowed its scope to prevent it from being "overbroad and unenforceable." Despite the fact that the American Bar Association revised this unconstitutional provision and the fact that **every other state in the country has also abandoned its excessive reach**, Alabama maintains this provision in its ethical Canons for judges, and Defendants enforce it.

The significant chill that Canon 3A(6) imposes on Justice Parker is magnified given his constant public appearances, discussions with citizen groups and the media, and various events and speeches he gives as part of his campaign for Chief Justice. (*See* Parker Decl. ¶¶ 7-10). Indeed, since the beginning of his elected office as Associate Justice, Justice Parker has actively and consistently participated in numerous discussions with concerned citizens, citizen groups, and local and national media. He continues to participate in such public discussions and wishes to be able to avail himself of his First Amendment right to speak on matters of public concern when called upon to do so. (Dkt. 56-2, Declaration of Justice Parker in Support of Response in Opposition to Motions to Dismiss, "Parker Mootness Decl." ¶ 3). Justice Parker is frequently invited to speak at meetings of citizens and citizen groups, and he accepts such invitations when he is able to do so. (*Id.* ¶ 4). Justice Parker is also frequently invited to speak to various members of the local and national media concerning matters of public importance. (*Id.* ¶ 8). Throughout his elected office, Justice Parker has also discussed topics of public importance to various members of the press, sometimes several times per month. (*Id.*).

Justice Parker's current campaign for Chief Justice of the Alabama Supreme Court magnifies this threat even more. Not only does Justice Parker actively engage in conversations with citizens as a sitting justice, now he must engage in campaign activities and events at which

he would like to discuss his views on matters of importance to Alabama citizens and voters. (Parker Decl. ¶ 7). Justice Parker would like to be able to engage in discussion of the important matters that arise during his appearances and interviews, without fear that he will be punished for offending the sensibilities of the SPLC, or for innocuously commenting on cases pending in other courts. (*Id.* at ¶ 8). However, because of the previous investigation by the JIC into his protected speech and complaints raised by various groups opposed to his position on certain matters, Justice Parker is being chilled in his expression and forced to self-censor. (*Id.*).

ARGUMENT

To obtain a preliminary injunction, Justice Parker must show: (1) that he has a substantial likelihood of success on the merits; (2) that he is suffering or will suffer irreparable injury unless the injunction issues; (3) that the actual or threatened injury to Justice Parker outweighs whatever damage the proposed injunction may cause the Defendants; and (4) the injunction, if issued, would not be adverse to the public interest. *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009). Justice Parker satisfies each of these requirements, and the preliminary injunction should issue.

I. JUSTICE PARKER IS LIKELY TO SUCCEED ON THE MERITS OF HIS FIRST AMENDMENT CHALLENGE TO CANON 3A(6).

A preliminary injunction enjoining the application or enforcement of Canon 3(A)(6) of the Alabama Canons of Judicial Ethics is warranted because Justice Parker is likely to succeed in showing that this canon violates the First Amendment.

A. The First Amendment Unquestionably Extends Its Highest Protection To Justice Parker's Core Political Speech.

Defendants' actions related to application, interpretation, and enforcement of the Alabama Canons of Judicial Ethics are unquestionably constrained by and subject to the dictates of the

United States Constitution. *See Christian Coalition of Alabama v. Cole*, 355 F.3d 1288, 1292 (11th Cir. 2004) ("The JIC's opinions must comply with the U.S. Constitution."). Justice Parker's speech at issue in the previous JIC investigation, and his speech as a current candidate for Chief Justice, is core political speech deserving of the highest constitutional protection. *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) ("A candidate's speech during an election campaign 'occupies the core of the protection afforded by the First Amendment.'") (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)). The Supreme Court has consistently recognized the critical importance of protecting political speech, and has stated unequivocally that political candidates maintain the fundamental protections of the First Amendment during their elections. *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982). Indeed,

> [a]t the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed. . . **Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs**. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. **The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign**. [I]f it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that **the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. The political candidate does not lose the protection of the First Amendment when he declares himself for public office**. Quite to the contrary: **The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues** and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, **it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day**. Mr. Justice Brandeis' observation that in our country public discussion is a political duty, applies with special force to candidates for public office.

Id. (internal citations and quotations omitted) (emphasis added); *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (''[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges.") (citing *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)).

"The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance," *Wood v. Georgia*, 370 U.S. 375, 395 (1962), for "the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Similarly, "the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

That a candidate such as Justice Parker is seeking a judicial office in no way diminishes this entrenched constitutional principle. Quoting the United States Supreme Court at length in a prior case against the JIC, the Alabama Supreme Court has recognized that political speech of judicial candidates is entitled to the highest constitutional protection:

> The people of Alabama have chosen to select their judges in partisan, contested elections. So long as this is the case, it is essential that judicial candidates have 'the unfettered opportunity to make their views known,' so that voters may intelligently evaluate the candidates' positions on issues of vital public importance. Thus, **the political speech of judicial candidates in this state must be guaranteed the fullest application of the First Amendment's protections**.

Butler v. Alabama Judicial Inquiry Comm'n, 802 So.2d 207, 214-15 (Ala. 2001) (quoting *Brown*, 456 U.S. at 52-53) (emphasis added).

Justice Parker's core political speech – previously as a candidate to retain his post of Associate Justice and now as a candidate for Chief Justice – is "of particular importance" and vital to the process "at the heart of the American constitutional democracy—the political campaign."

Brown, 456 U.S. at 52-53. At the outset of the interview that was at the heart of the JIC's previous, year-long investigation, Justice Parker announced that he had qualified to run for reelection to the Alabama Supreme Court. (VC ¶ 43). During the interview, Justice Parker discussed, *inter alia*, political, judicial and constitutional theory, structures of government and its different branches, key public issues such as the role of the judiciary, constitutional interpretation, and marriage, and important American legal history. (*Id.* ¶ 44). During the interview, he cited American political, historical, and legal icons such as Supreme Court Justices Oliver Wendell Holmes, John Roberts, and Antonin Scalia and former Presidents Thomas Jefferson and Andrew Jackson. (*Id.* ¶ 45). He also referred to *The Federalist Papers*, the United States Constitution, and opinions of the United States Supreme Court. (*Id.*).

These same issues arise with great frequency in Justice Parker's current campaign for Chief Justice, and he would like to be able to discuss them freely without fear of reprisal from the JIC's demonstrated willingness to file charges against him for such speech. (Parker Decl. ¶¶ 7-8). Yet, because of the previous investigation by the JIC, Justice Parker is forced to self-censor on such issues. (*Id.*). Who is better able to inform and educate the public about such matters than a justice of the state's highest court who also happens to be running for Chief Justice of the state's highest court? Debate on public issues such as the role of courts, constitutional and judicial theory, and marriage—all key public issues that are hotly disputed and contested in political elections—must "be uninhibited, robust, and wide-open." *Buckley*, 424 U.S. at 14. The function of government—including a state judicial-conduct commission—is not to "select which issues" a sitting judge and judicial candidate may "discuss[] or debate[] in the midst of a political campaign." *Brown*, 456 U.S. at 60.

Restrictions on "core political speech" about candidates and issues—such as Justice Parker and the matters discussed during his previous radio interview and in his current campaign—are subject to strict scrutiny review. *McIntyre*, 514 U.S. at 346-47. The government bears the burden of proving that the speech restriction is "(1) narrowly tailored, to serve (2) a compelling state interest." *White*, 536 U.S. at 774-75; *see also Brown*, 456 U.S. at 53-54 ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."); *Weaver*, 309 F.3d at 1319 ("The proper test to be applied to determine the constitutionality of restrictions on core political speech is strict scrutiny."). As detailed below, Canon 3A(6) cannot satisfy strict scrutiny review.

B. Canon 3A(6) Is Riddled With Constitutional Infirmities And Violates The First Amendment.

Canon 3A(6) is a presumptively unconstitutional content-based restriction on speech and cannot withstand strict scrutiny. Canon 3A(6) is also a presumptively unconstitutional prior restraint on speech. Canon 3A(6) is also unconstitutionally overbroad. Because it violates the First Amendment, Canon 3A(6) should be enjoined.

1. Canon 3A(6) Unconstitutionally Discriminates against the Content of Justice Parker's Core Political Speech and is Thus Presumptively Unconstitutional.

It is axiomatic that content-based restrictions on speech are presumptively unconstitutional and must withstand the most exacting form of constitutional scrutiny. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *R.A.V. v.*

City of St. Paul, 505 U.S. 377, 395 (1992) ("Content-based regulations are presumptively invalid."); *Wollschlaeger v. Florida*, 848 F.3d 1293, 1299 (11th Cir. 2017) (en banc) (same). Canon 3A(6) is unquestionably content-based and therefore must satisfy strict scrutiny. It cannot survive that rigorous test. Indeed, it is a "rare case in which a speech restriction withstands strict scrutiny." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015). This is not one of those rare instances.

a. Canon 3A(6) is content-based.

"Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. In *Reed*, the Supreme Court identified three categories of content-based speech restrictions, each requiring the government to satisfy strict scrutiny: (1) where government "define[s] regulated speech by particular subject matter" even "if it does not discriminate among viewpoints within that subject matter"; (2) where government "define[s] regulated speech by its function or purpose"; and (3) where government cannot justify its facially content-neutral speech restriction "without reference to the content of the regulated speech" or where the restriction was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 2227, 2230 (citation omitted).

On its face, Canon 3A(6) is an unconstitutional content-based speech restriction because it defines the regulated speech by a particular subject matter. By its express terms, this Canon prohibits particular speech by a judge:

> A judge should **abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control**. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Canon 3A(6), Ala. Canons Jud. Ethics (emphasis added). Thus, even though all Alabama judges are elected, they are subject to a possible ethics complaint for publicly commenting on a particular subject matter—in this case, a "**pending or impending proceeding in any court**." *Id.* "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2230.

Constitutional scholars have noted that canons restricting judges from discussing pending cases, such as Canon 3A(6) does here, are content-based. *See, e.g.*, Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 841 (1995). ("The restriction on judges' speech about pending cases is clearly a content-based restriction. Judges are free to speak about almost anything so long as the content of the speech is not about the pending case."); Michael D. Schoepf, *Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases*, 93 MINN. L. REV. 341, 357-58 (2008) (Canon 3A(6) "is content-based because it focuses on the subject matter of the speech, an active case, and prohibits it").

b. Canon 3A(6) is not narrowly tailored and thus cannot satisfy strict scrutiny.

Justice Parker does not dispute that interests such as "preservation of the reputation and integrity of the judiciary," *Butler*, 802 So.2d at 215, or the "operations of the courts and the judicial conduct of judges" are matters "of utmost public concern" and compelling state interests. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *see also Williams-Yulee*, 135 S. Ct. at 1666 (recognizing the "'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges'" and acknowledging that "public perception of judicial

integrity is 'a state interest of the highest order'") (citation omitted).[2] However, the speech restriction of Canon 3A(6) is not narrowly tailored to achieve those interests.

Canon 3A(6) fails narrow tailoring because it is overinclusive. An overinclusive regulation "does not bear a substantial relationship to the Government's objective" and fails the narrow-tailoring requirement. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 n.19 (1984). "[A]n overinclusive statute . . . encompasses more protected conduct than necessary to achieve its goal." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring in the judgment). A speech restriction is overinclusive when its sweep is overly broad. *McDaniel v. Paty*, 435 U.S. 618, 645 (1978) (White, J., concurring in the judgment).

For the same reasons explained in the next section (Section I.B.2 – the unconstitutional overbreadth analysis), Canon 3A(6) is overinclusive and therefore not sufficiently narrowly tailored to survive strict scrutiny.

2. Canon 3(A)(6) is Unconstitutionally Overbroad.

Canon 3A(6) is facially unconstitutional for overbreadth. "An overbreadth challenge is based on a statute's 'possible direct and indirect burdens on speech.'" *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002) (citing *U.S. v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999)). A law is impermissibly overbroad on its face if "a substantial number of its applications are unconstitutional, judged in relation to [any] statute's plainly legitimate sweep." *U.S. v. Stevens*,

[2] Importantly, this interest does not permit suppression of criticism of judges and court decisions. *See Bridges v. State of Cal.*, 314 U.S. 252, 289 (1941) ("Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.") (Frankfurter, J., dissenting). "[S]peech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed.'" *Landmark*, 435 U.S. at 842 (citation omitted).

559 U.S. 460, 473 (2010); *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973). "The doctrine is designed to protect 'the public from the chilling effect such a statute has on protected speech; the court will strike down the statute even though the governmental entity enforced the statute against those engaged in unprotected activities.'" *Weaver*, 309 F.3d at 1318 (citing *Acheson*, 195 F.3d at 650); *see also Broadrick*, 413 U.S. at 612 (overbreadth doctrine permits challenge to a speech regulation whose "very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). The overbreadth doctrine can also be applied to speech that is "presumptively protected by the First Amendment" but remains subject to sanctions. *Stevens*, 559 U.S. at 481.

Overbroad regulations not only deter protected speech, but also, in the case of judicial discipline, may threaten sanctions that can seriously impact the reputation, finances, and professional status of a judge. Alabama is unique among the states in having an immediate and automatic disqualification provision. Art. VI, § 159, Ala. Const. 1901. Canon 3A(6) bans far more speech than is necessary, and a judge could easily be suspended from office for engaging in speech protected by the First Amendment. Thus, the possible punishment resulting from enforcement of Canon 3A(6) swings far too wide against Justice Parker. In particular, **banning judicial comment on legal issues that do not have a reasonable likelihood of affecting the outcome or impairing the fairness of a pending proceeding serves no legitimate purpose**. Because Canon 3A(6) lacks this qualification, it is unconstitutionally broad and thus unenforceable.

The history of this Canon—unchanged from its original adoption—demonstrates that it is out of step with First Amendment jurisprudence regarding the overbreadth doctrine. Effective February 1, 1976, the Alabama Supreme Court adopted the Alabama Canons of Judicial Ethics. The Alabama Canons of Judicial Ethics were modeled on the 1972 Model Code of Judicial

Conduct promulgated by the American Bar Association ("ABA"). Canon 3A(6) is **identical** in wording to the original ABA Model Rule of Judicial Conduct, Canon 3A(6) (1972). The reporter for the Model Rules noted that the ABA drafting committee consulted a draft rule on *Standards Relating to Fair Trial and a Free Press* prepared by the ABA's Project on Minimum Standards for Criminal Justice. That rule recommended that "judges should refrain from any conduct or the making of any statements **that may tend to interfere with the right of the people or of the defendant to a fair trial**." E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 55 (1973) (emphasis added). In drafting Canon 3A(6), however, the ABA Special Committee on Standards of Judicial Conduct ("the Committee") "agreed with the proposition, but felt that it should be broadened to encompass unauthorized public comment by a judge about any pending or impending proceeding." *Id.* Thus, Canon 3A(6), as adopted in 1972 by the ABA and by the Alabama Supreme Court in 1976, was not limited to statements that may tend to interfere with a fair trial. Furthermore, by the addition of the phrase "in any court," Canon 3A(6) also brought within its ban extrajudicial statements a judge might make about cases not on his or her own docket.

In 1990, the ABA saw the error of its ways and adopted a revision of the Model Code of Judicial Conduct that substantially narrowed Canon 3A(6). The revision, renumbered as Canon 3B(9), stated in its first sentence:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment **that might reasonably be expected to affect its outcome or impair its fairness** or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

Rule 3B(9), Model Code Jud. Conduct (2007) (emphasis added). The suggestive "should" was changed to the mandatory "shall," and the phrase "public comment" was limited by the addition of the phrase "that might reasonably be expected to affect its outcome or impair its fairness."

This revision effectively incorporated into Canon 3B(9) the qualification from the Criminal Standards that was before the Committee when it drafted Canon 3A(6) in 1972.[3] The reporter for the 1990 revision explained the reason for the modification of the public-comment canon:

> In Section 3B(9), the first sentence of former Section 3A(6) was modified to prohibit only comment, whether public or private, that might affect the outcome or fairness of a trial or hearing. **The language of the 1972 Code's provision prohibiting any public comment about a pending or impending proceeding was believed by the Committee to be overbroad and unenforceable**. For example, judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality.

Lisa L. Milord, *The Development of the ABA Judicial Code* 21 (1992) (emphasis added). The ABA's 1990 revision to the public-comment rule significantly narrowed its scope to prevent it from being "overbroad and unenforceable."[4] The subsequent 2007 revision of the Model Code of Judicial Conduct by the ABA retained the substance of the 1990 revision in the renumbered Canon 2.10(A).

Alabama has never revised its Canons of Judicial Ethics to incorporate the ABA's 1990 or 2007 revisions to the public-comment rule. Thus, Alabama's Canon 3A(6) continues to suffer from the overbreadth and unenforceability problems that were recognized and changed in the Model Code's two subsequent versions. The Canon "greatly chills" speech by "appl[ying] to all statements, not merely those statements that bear on the impartiality of the judiciary." *Butler*,

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[3] The comparable canon in the 2007 revision of the Model Code is identical in substance, apart from stylistic changes, to the first sentence of Canon 3B(9) from the 1990 revision: "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." Rule 2.10(A), Model Code Jud. Conduct (2007).

[4] "[T]he [1972] Model Code of Judicial Conduct was overbroad because it prohibited judicial speech about pending cases even in situations where the restriction was unnecessary to protect a fair trial." Chemerinsky, *supra*, 28 Loy. L.A. L. Rev. at 844.

802 So.2d at 216 (citation omitted). By not limiting the ban to comments about a proceeding "that might reasonably be expected to affect its outcome or impair its fairness," Canon 3A(6) abridges, on its face and as applied to Justice Parker, the freedom of speech protected by the First Amendment. A ban on speech that does not implicate the State's compelling interest in preserving the integrity of the judiciary is overbroad and lacks narrow tailoring. Indeed, "[t]here is no compelling state interest which justifies limiting a judicial candidate's speech on [issues]" that have no effect on "preserving the impartiality of the judiciary." *Ackerson*, 776 F. Supp. at 314. Canon 3A(6) impermissibly restricts speech on a broad range of issues unrelated to any compelling, or even legitimate, state interest and without any narrow tailoring.

As this Court is by now aware, the JIC previously investigated Justice Parker for an alleged violation of Canon 3A(6) based upon alleged public comments about a case pending before the Alabama Supreme Court. (VC ¶¶ 58-60). In particular, the underlying complaint previously investigated by the JIC took issue with Justice Parker's discussion of several Wisconsin cases collected as *In re Booth*, which begins at page three of the purported transcript. (*Id.* ¶¶ 52-56). This discussion of a judicial reaction to the *Dred Scott* case, knowledge which Justice Parker gained from his participation in a legal seminar at Princeton University during the summer of 2015 presented by Judge Diane Sykes of the Seventh Circuit Court of Appeals (and formerly a Justice on the Wisconsin Supreme Court), occurred before and apart from any mention of an Alabama case. (*Id.* ¶¶ 46, 51). The historical discussion also included political and constitutional theory. (*Id.* ¶ 46).

Beginning on page four of the purported transcript, the discussion turned to a case before the Alabama Supreme Court, but that discussion was entirely (and purely) descriptive. (*Id.* ¶ 47). **Critically, Justice Parker did not predict, promise, pledge, or commit to a certain course of**

action on the merits of the pending case. (*Id.* ¶ 49). The discussion concluded on page ten where the host purportedly stated: "That injunction is still in place, and the issue is whether the Supreme Court there will leave it in place or make it permanent. Is that correct?" (*Id.* ¶ 48). That question stated the alternatives in an either/or format. Justice Parker purportedly responded: "That's one issue before the Alabama Supreme Court." (*Id.*). That response is not only factually true, but is as non-committal a response as is conceivable. There was absolutely nothing in the descriptive discussion of the issues before the Alabama Supreme Court that "might reasonably be expected to affect its outcome or impair its fairness." Indeed, Justice Parker simply identified an issue that was being considered by the court on which he sits. Such identification or description is routine among judges and justices of all courts when engage in teaching, speaking, or media appearances. It was also a permissible description of the judicial process under the second sentence of Canon 3(A)(6): "This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

To reduce the chill on protected speech created by an overbroad regulation, the entire regulation is invalidated. "Overbreadth adjudication, by suspending **all** enforcement of an overinclusive law, reduces [the] social costs caused by the withholding of protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (emphasis added). Because Canon 3A(6) is significantly broader than necessary to protect the State's interest in preserving the integrity of the judiciary, it fails strict scrutiny and is facially unconstitutional under the overbreadth doctrine. Because Canon 3A(6) restricts **all** speech about a pending or impending case, even if such speech cannot reasonably be expected to affect its outcome or impair its fairness, it is facially overbroad and thus unconstitutional.

3. Canon 3A(6) Is An Unconstitutional Prior Restraint.

Prior restraints against constitutionally protected expression, such as public speaking or campaigning, are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Indeed, "**[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity**." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing cases) (emphasis added). "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("[w]hile this freedom from previous restraint . . . cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."); *Carroll v. President & Comm'r Princess Anne, et al.*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect from abridgment.").

"[T]he Supreme Court and [the Eleventh Circuit] consistently have permitted facial challenges to prior restraints without requiring a plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be constitutional." *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000). *See also, Horton v. City of St. Augustine*, 272 F.3d 1318, 1331-32 (11th Cir. 2001) ("the Supreme Court itself in *Salerno* acknowledged [that prior restraints are the] exception to the 'unconstitutional-in-every-conceivable-application' rule") (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The interpretation of judicial canons to restrict the speech of candidates in a judicial election is such an unconstitutional prior restraint. Indeed, JIC interpretations that "prohibit a judicial candidate from engaging in certain speech **is an impermissible prior restraint** on

protected expression." *Weaver v. Bonner*, 309 F.3d 1312, 1323 (11th Cir. 2002) (emphasis added). In *Weaver*, the Georgia equivalent to the JIC, the Georgia JQC ("GJQC"), issued certain "prohibition[s] on speech by a judicial candidate." *Id.* Based on a Georgia canon of judicial conduct, the GJQC received complaints based on a judicial candidate's statements and took action to restrict what speech the candidate could engage in during the campaign. *Id.* at 1323-24. The GJQC's speech-restrictive actions caused the candidate to alter his statements to avoid being subject to an ethical investigation. *Id.* at 1324. The Eleventh Circuit held that such actions "lead to a dramatic chilling effect on speech." *Id.* Thus, the GJQC's interpretation of the challenged canon represented an unconstitutional prior restraint that could not "overcome the heavy presumption" against constitutional invalidity. *Id.*

In its discussion of the challenged canon, the Eleventh Circuit noted that the GJQC's interpretation of the challenged canon was "an unconstitutional prior restraint because it also prohit[ed] *future* statements." *Id.* at 1323 (emphasis original). Here, Canon 3A(6) operates to prohibit future speech (as well as to punish past speech). Canon 3A(6) prohibits a particular kind of judicial speech and causes candidates to alter their speech to avoid ethical investigations. Justice Parker cannot discuss pending or impending proceedings from any court, even if such comments will not affect in fact, or have a reasonable likelihood of affecting, the outcome or fairness of any pending or impending proceedings. To allow the JIC to silence public comments by judges who are also candidates for elected office works the same kind of "dramatic chilling effect on speech" that the Eleventh Circuit invalidated in *Weaver*. *Id.* at 1324.

Additionally, as was true in *Weaver*, the JIC's ability to wield significant power over all of the state's judges only increases the constitutional infirmity of Canon 3A(6). In *Weaver*, the Eleventh Circuit noted that investigations by the GJQC represent "a damaging public statement

which has the imprimatur of the government," and can lead to discipline or even disbarment. *Id.* at 1324. Indeed, "[m]ost candidates would not" engage in speech which the JIC deems to be violative of Canon 3A(6). *Id.* As such, the tremendous power to open an investigation into Justice Parker for his constitutionally protected speech (coupled with the automatic suspension accompanying such investigations) inevitably works an impermissible chill on such speech and represents an unconstitutional prior restraint. Justice Parker is likely to succeed on the merits of his First Amendment challenge.

II. JUSTICE PARKER HAS SUFFERED, IS SUFFERING, AND WILL CONTINUE TO SUFFER IMMEDIATE AND IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

Justice Parker faces substantial and irreparable harm to his free speech rights without entry of the requested preliminary injunctive relief. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983); *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. Unit B June 1981);[5] *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1239 (M.D. Ala. 2000). The Eleventh Circuit has plainly held that ongoing First Amendment violations constitute irreparable harm:

> The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of [F]irst [A]mendment and right of privacy jurisprudence. The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature could not be compensated for by money damages; in other words, plaintiffs could not be made whole.

[5] The Eleventh Circuit has adopted as binding decisions of the Unit B panel of the former Fifth Circuit. *See Harrell*, 608 F.3d at 1254, n.5 (citation omitted).

Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (citations omitted); *see also KH Outdoor*, 458 F.3d at 1272.

The JIC's "charging decisions have substantial and immediate impact on Alabama judges." *Pittman v. Cole*, 267 F.3d 1269, 1284 (11th Cir. 2001). Under Section 159, the mere act of the JIC filing a complaint against a judge triggers immediate disqualification. The JIC's previous investigation and credible threat of prosecution against Justice Parker chills his free speech rights and cause him to engage in self-censorship. (Parker Decl. ¶¶ 7-8). All of the charges previously investigated by the JIC related to a radio interview provided by Justice Parker, wherein he discussed constitutional and political theory, American political and legal history, and the role and institutions of government, all of which constitute protected speech. As this Court noted, the "JIC is willing to initiate investigations that chill protected speech of judges." (Dkt. 64, Opinion and Order at 21). As such, the ongoing and credible threat against Justice Parker imposes an immediate, intolerable, and irreparable injury on Justice Parker's cherished First Amendment liberties.

The actual and threatened injuries being suffered by Justice Parker cannot be remedied by a damage award. *Cate*, 707 F.2d at 1188-89 (noting that "direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury" and that "[o]ne reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future"). Accordingly, Justice Parker has been irreparably harmed, and will continue to be immediately and irreparably harmed each and every day that the unconstitutional Canon 3A(6) is allowed to remain in force. The only means by which this harm can be avoided is through the issuance of an injunction.

III. THE BALANCE OF THE EQUITIES TIPS DECIDEDLY IN JUSTICE PARKER'S FAVOR.

The balance of the equities tips decidedly in Justice Parker's favor. An injunction in this matter will protect the very rights the Supreme Court has characterized as "lying at the foundation of a free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The granting of a preliminary injunction that enjoins enforcement of Canon 3(A)(6) will not harm any of the Defendants. As noted above, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury," and the government "has no legitimate interest in enforcing an unconstitutional [law]." *KH Outdoor*, 458 F.3d at 1272. Neither the JIC (nor its chairman and members) nor the Attorney General (who is responsible for prosecuting the JIC Complaint) will suffer any detriment other than the inability to take enforcement action against Justice Parker or others based upon the application and enforcement of an unconstitutional canon. Indeed, interim protection of Justice Parker's First Amendment rights clearly outweighs any government interest in prosecuting charges based upon the challenged canon. *Cate*, 707 F.2d at 1189. That this is true cannot be gainsaid because "there can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *KH Outdoor*, 458 F.3d at 1272 (same).

As such, there can be no comparison between the irreparable and unconscionable loss of First Amendment freedoms suffered by Justice Parker absent injunctive relief and the non-existent interest the government has in enforcing unconstitutional laws. The balance of the equities tips decidedly in Justice Parker's favor, and the preliminary injunction should issue.

IV. THE PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF.

The protection of First Amendment rights is of the highest public interest. *See Elrod*, 427 U.S. at 373. This protection is *ipso facto* in the interest of the general public because "First

Amendment rights are not private rights [but] rights of the general public [for] the benefits of all of us." *Machesky v. Bizzell*, 414 F.2d 283, 288-90 (5th Cir. 1969) (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)); *see also Bond v. Floyd*, 385 U.S. 116 (1966). Indeed, "[i]njunctions protecting First Amendment freedoms are **always in the public interest**." *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (emphasis added). This is true because "the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *Id.*

Accordingly, the public "has no interest in enforcing an unconstitutional" judicial canon. *See KH Outdoor*, 458 F.3d at 1272; *see also Fla. Businessmen*, 648 F.2d at 959 (noting the lack of public interest in having government expend time, money and effort "in attempting to enforce" a law "that may well be held unconstitutional"). The "public interest is well served when the application of potentially unconstitutional laws is enjoined and when duly elected officials are not hindered from performing their duties by such laws. This is especially true when, as here, the core principles of the First Amendment are at issue." *Butler*, 111 F. Supp. 2d at 1240. Indeed, because there is no interest in enforcing unconstitutional laws, "'it is always in the public interest to protect First Amendment liberties.'" *KH Outdoor*, 458 F.3d at 1272 (quoting *Joelner v. Vill. Of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

CONCLUSION

For the foregoing reasons, Justice Parker requests that this Court grant his Motion for Preliminary Injunction.

Dated: November 29, 2017

Respectfully Submitted,

/s/ Horatio G. Mihet

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2017, I caused a true and correct copy of the foregoing to be filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Justice Tom Parker

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

HON. TOM PARKER, Associate Justice of the Supreme Court of Alabama,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	**CASE NO. 2:16-CV-442-WKW**
JUDICIAL INQUIRY COMMISSION OF THE STATE OF ALABAMA, *et al.*	:	
Defendants.	:	

DECLARATION OF JUSTICE TOM PARKER IN SUPPORT OF
RENEWED MOTION FOR PRELIMINARY INJUNCTION

I, Tom Parker, Associate Justice of the Supreme Court of Alabama, do hereby declare as follows:

1. I am over the age of 18 years, and the Plaintiff in this action. The statements in this Declaration are true and correct, based upon my personal knowledge (unless otherwise indicated). If called upon to testify, I would and could testify competently as follows.

2. I am submitting this Declaration in Support of my Renewed Motion for Preliminary Injunction filed simultaneously herewith.

3. On April 27, 2017, I announced my candidacy for Chief Justice of the Supreme Court of Alabama. A copy of my press release announcing my candidacy was filed with this Court on May 2, 2017. (Dkt. 59-1, Exhibit A to Supplemental Declaration of Justice Tom Parker). *See also* Mike Cason, *Justice Tom Parker announces run for Alabama chief justice* (April 26, 2017), *available at* http://www.al.com/news/index.ssf/2017/04/justice_tom_parker_announces_r.html.

4. As this Court recognized in its Opinion and Order on the supplemental briefing ordered on remand, I have standing to sue Defendants in this matter because I face a credible threat of prosecution under the judicial canons whose constitutionality I am challenging in this lawsuit. (Dkt. 64, Opinion and Order at 10-11). This threatened prosecution for constitutionally protected speech imposes immediate, intolerable, and irreparable injury on my cherished liberties.

5. My candidacy for Chief Justice and the speech I wish to engage in during my campaign is under an immediate and credible threat due to the fact that the "JIC is willing to initiate investigations that chill protected speech of judges." (Dkt. 64, at 21). As this Court recognized, the fact that I was already once subjected to investigation for statements I made during a judicial campaign and as a sitting Associate Justice of the Alabama Supreme Court makes the threat of prosecution for my protected speech credible because "at any moment, [the JIC] may start another investigation" into my political speech. (*Id.* at 11).

6. The election for Chief Justice is scheduled to take place on November 6, 2018. A primary election is scheduled to take place on June 5, 2018. I have a primary opponent, and my campaign is in full swing.

7. The threat of prosecution that I face on a daily basis has undermined my ability to fully engage in speech necessary to succeed in my campaign. I am forced to self-censor in many campaign events, in public statements, and in media appearances based on the continuing threat of prosecution. This has caused, is causing, and will continue to cause irreparable injury to my campaign for Chief Justice and to my cherished First Amendment freedoms until this Court remedies such injury.

8. Given my candidacy for Chief Justice, I am forced to consider the potential for an ethical investigation into my protected speech on issues critical to Alabama voters. The threat from

the JIC's previous investigation has not been diminished in any way because the canons relied upon by the JIC to pursue its investigation into my speech are still operative, and there has been no indication or action taken that would or could diminish the possibility of the JIC pursuing such an investigation into my speech again during this ongoing campaign. Indeed, this Court recognized the importance of "the fact that [I] have already once been subjected to investigation based on the alleged violation of the Judicial Canons [I am challenging]." (*Id.* at 11).

9. Additionally, even if I were not a candidate for Chief Justice, the threat to my constitutionally protected speech as a sitting Justice is also intolerable. As this Court recognized, I have "just as strong an interest in speech in [my] current role as an Associate Justice of the Alabama Supreme Court" as I do as a candidate. (Dkt. 64 at 10 n.5).

10. As I mentioned in my previous Declaration (Dkt. 56-2 at ¶ 14), I frequently discuss matters of public concern in public meetings, speeches, and media interviews, and I would like to be able to engage in the discussion of the important matters related to these issues. However, because of the recent investigation by the JIC into my protected speech and complaints raised by various groups opposed to my position on certain matters, I have been chilled, and continue to be chilled in my expression, and I am forced to self-censor. Such self-censorship is required in both my role as a candidate for Chief Justice and in my current role as Associate Justice. While I would like to be able to discuss these issues openly with citizen groups understandably concerned about the impact of such matters and interested in my positions concerning such fundamental rights, I cannot engage in such free discussion without fear of reprisal from some group(s) that may not agree with my discussion or position on such matters. As such, I am forced to remain silent or avoid the questions altogether in order to prevent my protected speech from being investigated by the JIC based upon various ethical canons previously construed by the JIC to prohibit First

Amendment-protected speech. This threat poses an intolerable burden on my ability to campaign effectively and to engage Alabama voters on issues surrounding my campaign.

I declare under penalty of perjury of the laws of the United States and Alabama that the foregoing statements are true and correct.

Executed this 29th day of November, 2017

/s/ Tom Parker
Justice Tom Parker
Associate Justice, Alabama Supreme Court