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IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE — **PETITIONER**

v. — **No. 2016-JP-01685-SCT**

JUDGE GAY POLK-PAYTON — **RESPONDENT**

AMICUS CURIAE BRIEF OF
THE CENTER FOR COMPETITIVE POLITICS
IN SUPPORT OF RESPONDENT, JUDGE GAY POLK-PAYTON

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. The Hon. Gay Polk-Payton, Respondent.

2. Oliver E. Diaz, Jr., Trial and Appellate Counsel for the Respondent.

3. David Neil McCarty, of the David Neil McCarty Law Firm, PLLC, Appellate Counsel for Respondent.

4. Mississippi Commission on Judicial Performance, Petitioner.

5. Darlene D. Ballard, Rachel W. Michel, and Megan C. Brittain, Counsel for Petitioner.

6. Bonnie H. Menapace, Former Counsel for Petitioner.

7. Roy Campbell, III; Camille H. Evans; Col. Silvanus Johnson; Hon. Kent McDaniel, Members of the Committees which investigated the Complaint.

8. Hon. H. David Clark, II; Hon. Lee J. Howard; H. William E. Andrews, III; Hon. Jimmy Morton; Jeffrey Adcock; Hon. Vicki R. Barnes; Hon. Edwin Woods, Jr.; Hon. Robin A. Midcalf; Hon. James Roberts; Ann Mitchell; Rick J. Coulter; Hon. Cynthia Brewer; Hon. Richelle Lumpkin; Cornelia Gayden; Hon. John Emfinger; Karen Sawyer; Members of the Commission.

9. The Center for Competitive Politics, proposed *amicus curiae*.

10. Graham P. Carner and Eugene Volokh, counsel for proposed *amicus curiae*.

So certified, this the 13th day of March, 2017.

/s/ *Graham P. Carner*
Graham P. Carner

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SUMMARY OF ARGUMENT

The United States Supreme Court has repeatedly held that restrictions on the speech of judicial candidates must satisfy strict scrutiny. Judicial candidates must be able to freely communicate to the public so that voters can determine their qualifications. As this Court recognized in *Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1010 (Miss. 2004), a judge may not be punished for violating a judicial canon when such punishment "would infringe on rights guaranteed under the First Amendment, including the freedom of speech."

The Commission seeks to discipline Judge Polk-Payton for speech that other judges routinely engage in: promoting a book and using social media. These common activities do not threaten the integrity of the judiciary. Rather, they are valuable to voters who can evaluate that speech and use it to make informed decisions.

The Commission believes Judge Polk-Payton's use of the Twitter handle "@JudgeCutie" is "undignified and demeaning" to the judicial office, but the handle conveys the judge's personality to the public, which is essential for an elected judge. The Commission also objects to a photo on the cover of the judge's book, which shows her in ordinary clothes with her robe partially on; it is not clear whether she is putting on her robe or taking it off, but neither action demeans the judicial office. "Undignified" is a subjective judgment, and if anyone should enforce it, it should be the voters: If they find Judge Polk-Payton's speech unbecoming to a judge, they will make that known come election time.

Moreover, social media use by judges is relatively new. States have not provided much guidance on its use, other than to uniformly conclude that it is generally allowed. The Mississippi Judicial Canons, which require "high standards of conduct," make no mention of social media. Neither the Commission nor this Court has offered any clarification. Given the vagueness of the Canons, Judge Polk-Payton had no way of knowing that her speech was impermissible.

ARGUMENT

I. The Commission's Disciplinary Actions Fail Strict Scrutiny

A. Judge Polk-Payton's Speech Provides Valuable Information to Her Constituents, and Is Therefore Fully Protected Under the First Amendment

"Judges do not forfeit the right to freedom of speech when they assume office." *In re Sanders*, 955 P.2d 369, 370 (Wash. 1998). In *Wilkerson*, this Court recognized a judge's right to voice even controversial opinions, holding that disciplining a judge for his comments about gays and lesbians in a letter to a newspaper violated the First Amendment. *Wilkerson*, 876 So. 2d at 1014.

Justice Court judges are elected, and thus differ from the ordinary public employees whose speech can be restricted under the less-demanding *Pickering* balancing test. *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). Elected judges are primarily accountable to their constituents, who need to be able to receive untrammeled information from and about their elected official. The voters, not the state, ultimately supervise elected judges and are thus entitled to decide whether the judges' speech warrants removal. *See Scott v. Flowers*, 910 F.2d 201, 211-12 (5th Cir. 1990).

The Commission's discipline of Judge Polk-Payton is a content-based restriction on "speech about public issues and the qualifications of candidates for elected office"—speech that "commands the highest level of First Amendment protection." *Williams-Yulee v. Florida State Bar*, 135 S. Ct. 1656, 1665 (2015). Restrictions on judicial candidates' speech must pass strict scrutiny, because "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (citations omitted). Attempts to restrict this process impermissibly "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer." *Id.* at 794 (Kennedy, J. concurring).

Since already-elected judges will usually be candidates again, their speech as a sitting judge bears on their qualifications in a future reelection campaign. This is why the Fifth Circuit applied strict scrutiny to punishment imposed on a judge for his speech. *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007). And this fits the Supreme Court's conclusion that speech by elected legislative officials is fully protected by the First Amendment. *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

Judge Polk-Payton's case well illustrates these principles. Judge Polk-Payton is an elected judge whose speech offers valuable information to voters trying to assess her quality as an elected official. Her speech expresses her views on controversial issues including religion and the justice system. Clerk's Papers at 106-07. The Commission objects to a post in which she alludes to the Florida court system's

handling of Trayvon Martin's death.[1] *Id.* But her speech should be lauded, not condemned. Jurors swear to discharge their duties "honestly and faithfully," and Judge Polk-Payton's speech reminds them to uphold that oath—and reminds them that, if citizens shirk their duties as jurors, justice cannot be done. Miss. Code Ann. § 11-27-17 (1972).

Other posts also demonstrate Judge Polk-Payton's commitment to judicial rules. *Id.* at 106 ("PSA: NEVER contact me about a case you have pending . . . I cannot discuss your case with you unless it is in OPEN COURT!!!"). And by sharing photos of her family, Judge Polk-Payton demonstrates her personal values. All of this information is both relevant to voters and fully protected by the First Amendment.

B. The Commission's Restrictions on Judge Polk-Payton's Speech Fail Strict Scrutiny

The Commission has asserted two interests to support disciplining Judge Polk-Payton: (1) protecting the integrity of the judiciary; and (2) upholding the dignity of the judiciary. But the Commission's discipline of Judge Polk-Payton fails to materially advance either interest; and the second interest is in any event not compelling enough to pass strict scrutiny.

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[1] "I became a judge so that I could do my part restore (sic) some integrity to the criminal justice system. I work hard so that by ALWAYS following the law...whether I agree with the law or not. We will never have a fair system of justice until private citizens stand up and honor their duty by serving as jurors for their fellow citizens AND following the law once they are sworn in as part of a petit jury. In Florida, the guilty go free but in Mississippi, those that are not guilty are convicted. Jurors and judges are the gatekeepers to the Constitution. If you can't trust us to follow the law, there can be no justice and where there is no justice, there will be no peace."

1. The Commission's Restrictions Do Not Materially Advance the State Interest in Maintaining the Integrity of the Judiciary

The Commission believes that Judge Polk-Payton's speech damages the integrity of the judiciary merely because she mentions her book alongside her judicial position. Complaint ¶6, 7, 8, 10, 11. But such mention is proper, valuable, and expected.

Judges may use their title and position in a biographical capacity. This purpose does not undermine judicial integrity. In fact, every jurisdiction that has issued an advisory opinion on the subject lets judges use their name and title this way.[2]

Judge Polk-Payton's use of her title and position was biographical. A professional stating her qualifications and professional activities in connection with her professional work is not only appropriate, but expected. Identifying one's job in an interview informs the audience that one is knowledgeable and qualified to speak on certain topics. And identifying oneself as a judge on social media sites, especially on one's personal page, is proper because the sites are designed to convey such personal identification, and "the identity of the speaker is an important component of many attempts to persuade." *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

Indeed, the United States Supreme Court has recognized the value of allowing judges to identify themselves and their opinions publicly, so voters can decide for themselves whether that speech is appropriate for an elected official. *White*, 536

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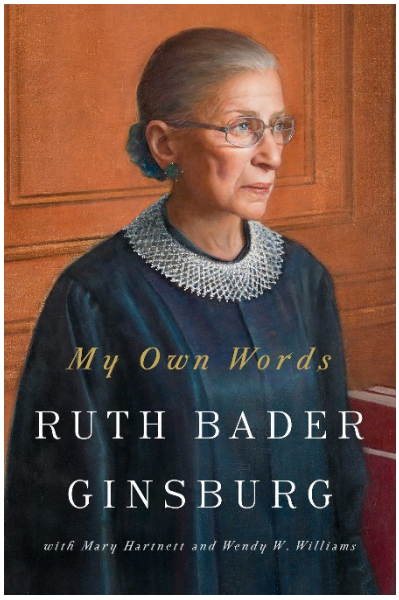
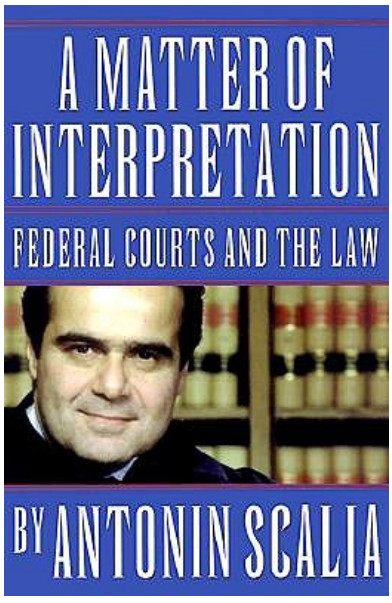
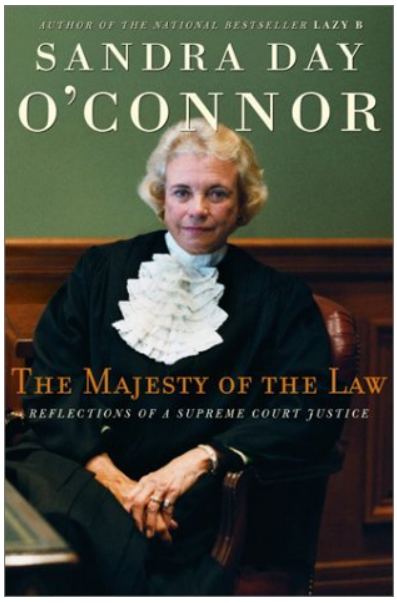
[2] *See* Cal. Jud. Ethics Comm. Op. 65 (2012); Conn. Comm. Jud. Ethics Informal Op. 2012-13; Fla. Jud. Ethics Advisory Comm. Op. 2010-12; Ill. J. Ass'n Op. 1996-08; N.M. Jud. Advisory Op. 12-11; N.M. Jud. Advisory Op. 09-05; N.Y. Comm. Jud. Ethics Op. 06-105; Okla. Jud. Ethics Op. 2002-5; U.S. Comm. Codes Conduct Advisory Op. 114 (2014).

U.S. at 795 (Kennedy, J. concurring). Judge Polk-Payton is an elected judge, and she will stand for reelection in 2019. Voters can evaluate her speech, including her book and her other publications, when deciding whether to re-elect her.

The photograph on the cover of Judge Polk-Payton's book is likewise permissible. In general, judges are allowed to use pictures of themselves in their judicial robes on the covers of their books. *See* N.Y. Comm. Jud. Ethics Op. 98-89 (finding that a judge authoring a book may use "Judge" or "Justice" before his name on the book and may use a picture of a judge wearing a robe on the advertising materials for the book). Prominent judges' practices reflect this: Justice Ruth Bader Ginsburg's book "My Own Words" features a picture of her in her judicial robe on its cover; so does "The Majesty of the Law: Reflections of a Supreme Court Justice" by Justice O'Connor; so does the late Justice Antonin Scalia's book "A Matter of Interpretation."







Nor does this identification risk coercing book buyers, or otherwise depart from the highest standards of judicial integrity. In *Williams-Yulee*, the United States

Supreme Court allowed Florida to restrict judicial candidates' soliciting campaign donations, because people who refused to contribute might fear retaliation if they appeared before that judge. 135 S. Ct. at 1668. By contrast, Judge Polk-Payton's book is sold on several third-party websites including amazon.com and teardropspublishing.net; there is no allegation that she ever personally transacted a sale. Clerk's Papers at 4-5. She thus had no way of knowing who bought her book; no-one buying Judge Polk-Payton's book would reasonably expect special consideration from her.

And unlike with the campaign solicitations in *Williams-Yulee*, which sought contributions of up to $500, Judge Polk-Payton's book costs about $7 (Kindle version) or $15 (paperback). *See* https://www.amazon.com/dp/B00GFEVPWC/. Disciplining Judge Polk-Payton thus does not advance judicial integrity.

2. Judge Polk-Payton's Speech Is Not Undignified and Does Not Demean the Judicial Office

The Commission repeatedly asserts that Judge Polk-Payton's speech was "undignified and demeaning to the judicial office." Complaint ¶¶ 6, 9. But that cannot justify restricting that speech—neither this Court nor the U.S. Supreme Court has recognized a compelling state interest in ensuring "dignified" behavior by judges, and this Court should not do so here.

The reasons that the U.S. Supreme Court gave in recognizing compelling interests in maintaining judicial impartiality or integrity do not apply here. An impartial judiciary "assures equal application of the law" to all. *White*, 536 U.S. at 775-76. Preserving judicial integrity is essential, because the public must have

confidence that a judge will "hold the balance nice, clear and true." *Williams-Yulee*, 135 S. Ct. at 1667 (citation omitted). But the state's interest in judges maintaining "dignified" behavior does not directly bear on the fairness of the trial process.

The "undignified and demeaning" standard is also too subjective to justify content-based speech restrictions. The United States Supreme Court has recognized that subjective matters of "taste and style" are not for the government to determine. *Cohen v. California*, 403 U.S. 15, 25 (1971). Since "one man's vulgarity is another's lyric," and because the government is incapable of making "principled distinctions" between the two, personal style is left "largely to the individual." *Id.* What the Court said regarding outright vulgarisms surely applies with even greater force to mere alleged lapses in dignity, especially when they occur outside the courtroom (as they did here).

To be sure, there is an important constraint on undignified behavior by elected judges: the reaction of the judges' constituents. They, not the Commission, are in the best position to determine whether a judge's speech is "demeaning" under their community's standards. If voters think the Twitter handle "@JudgeCutie" is inappropriate for a judicial officer, they can withhold their votes.

But local voters chose to re-elect Judge Polk-Payton, even given her speech. She started using "@JudgeCutie" on Twitter in 2012, and her book was published in 2013, yet Judge Polk-Payton was re-elected in 2015. Her constituents found her speech acceptable—and there is no need for the Commission to superimpose its own subjective standards on speech between Judge Polk-Payton and the voting public.

Indeed, this Court has already found that even "obnoxious" judicial "public expression" is still protected under the First Amendment. *Wilkerson*, 876 So. 2d at 1008, 1014 (holding that a judge's statement that "homosexuals belong in mental institutions" was protected speech) (citing *In re Hey*, 452 S.E.2d 24, 34 (W. Va. 1994) ("As often proved in this State, judges (like anyone else) have a right to be obnoxious in their public expression.")). Speech that is merely inconsistent with the Commission's subjective standards of dignity merits at least as much protection.

II. Judge Polk-Payton's Speech is Constitutionally Protected Even Under the *Pickering* Test

Even if this Court chooses to apply *Pickering* balancing instead of strict scrutiny, Judge Polk-Payton's speech is still protected. As Part I above demonstrates, it is important to the electoral process that Judge Polk-Payton be permitted to freely share her opinions with the public. For the Commission to discipline her, the government's interest in carrying out its duties must outweigh Judge Polk-Payton's interest in speaking to the public, which it does not. *See Connick v. Myers*, 461 U.S. 138, 156-57 (1983); *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568-69 (1968).

A. Judge Polk-Payton's Speech Is on a Matter of Public Concern

Whether speech is on a matter of public concern is determined by its "content, form, and context." *Connick*, 461 U.S. at 147. Speech said "to a public audience . . . outside the workplace, and involv[ing] content largely unrelated to [the speaker's] government employment" is generally treated as speech on a matter of public concern. *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995).

The content of Judge Polk-Payton's social media posts dealt with wide-ranging public issues. Some of her posts related to her role as a judge, such as the photos of herself in her robe or the comment that she would "ALWAYS follow[] the law . . . whether [she] agree[d] with the law or not." Clerk's Papers at 107. Other posts about her musical performances and motivational speaking were entirely unrelated to her government employment. *See Connick*, 461 U.S. at 146 (stating that speech that can be "fairly considered as relating to any matter of political, social, or other concern to the community" is speech on a matter of public concern).

The form of Judge Polk-Payton's speech indicated her intent to address the public. She often called her posts "public service announcements." The social media platforms on which she made these posts are designed so an individual can build a public following and reach a wide audience. All her social media pages, except her personal Facebook page, were public. Clerk's Papers at 99. *See Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (holding that a protester's signs were matters of public concern since they were made "in a manner designed . . . to reach as broad a public audience as possible" even though they were displayed near a private funeral).

All of Judge Polk-Payton's social media pages identified her as a judge; this is key to understanding the context of her speech. Judge Polk-Payton's social media posts connect her to her constituents. Therefore, all three factors weigh in favor of finding that Judge Polk-Payton's speech addressed a matter of public concern.

B. The Balance of Interests Tips Strongly in Favor of Permitting Judge Polk-Payton's Speech

In *National Treasury Employees Union*, the U.S. Supreme Court struck down a statute that barred federal employees from giving speeches or publishing articles for money. The Court held, applying *Pickering*, that the government's interest in ensuring that public employees not "misuse or appear to misuse" their government authority was not materially undermined by the employees' speech. *Id.* at 472.

As in *National Treasury Employees Union*, Judge Polk-Payton's speech does not materially undermine the state's interests. The speech does not interfere with workplace efficiency because it "d[id] not address audiences of . . . coworkers or supervisors," was not about them, and did not take workplace time. *Id.* at 465. Nor does it interfere with workplace relationships: Judge Polk-Payton does not serve on panels with other judges, and she offered her opinions on her own time, on her own social media pages, to her own constituents.

Most importantly, restricting her speech does not advance the government's interest in maintaining confidence in the integrity of the judiciary. There are no allegations that Judge Polk-Payton has actually been corrupted by her book sales, and when the government restricts speech as an employer, it must "demonstrate that the recited harms are real, not merely conjectural." *Id.* at 475. Indeed, it would damage public confidence in judicial integrity if speech as common and innocuous as Judge Polk-Payton's was found to be a sufficient basis for a suspicion of corruption. "We should not, even by inadvertence, impute to judges a lack of firmness, wisdom or honor." *White,* 536 U.S. at 796.

On the other side of the balance, as Part I demonstrates, Judge Polk-Payton has a strong interest in speaking and her constituents have a strong interest in hearing her speech. The handle under which she chooses to communicate, "@JudgeCutie," provides information to voters about her personality, and encourages greater confidence in the judiciary by making its officers and workings more accessible.

Judge Polk-Payton and her constituents also have a strong interest in permitting her to be paid for her speech. "Publishers compensate authors because compensation provides a significant incentive toward more expression." *National Treasury Employees Union*, 513 U.S. at 469. If judges could not effectively promote their books, they would be much less likely to write them. Thus, as in *National Treasury Employees Union*, the Commission's interests in promoting judicial integrity—which are not materially implicated in this case—are outweighed by Judge Polk-Payton's interest in speaking, and her constituents' interest in receiving her speech.

III. The Mississippi Judicial Canons Are Unconstitutionally Vague as Applied to Judge Polk-Payton

A law is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When a law is applied to speech, the vagueness inquiry "demands a greater degree of specificity." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

In *Gentile v. State Bar of Nevada*, the Supreme Court held that a state bar rule limiting attorney speech was unconstitutionally vague. 501 U.S. 1030 (1991). The

Court held that the rule's safe harbor, which allowed a lawyer to state only "the general nature" of a defense, was vague; the term "general nature" was nowhere defined, and the word "general" was a "classic [term] of degree." *Id.* at 1048-49. The Court emphasized that it would not "defer to professional bodies" when they issued restrictions that "impinge upon First Amendment Freedoms." *Id.* at 1054. And the Court noted that "societal disapproval" and "professional responsibility" were usually "sufficient safeguards" against improper speech by lawyers. *Id.* at 1058.

Like the attorney speech restriction in *Gentile*, the judicial canons that Judge Polk-Payton is accused of violating are vague as applied to her conduct. Canon 1 requires judges to live up to "high standards of conduct" so that the "integrity" of the judiciary will be preserved, and Canon 2A requires promoting "public confidence in the integrity of the judiciary." But "high standards" is no standard at all: "high" gives no details about what is concretely required. The phrase is, like the rule in *Gentile,* a classic term of degree.

The vagueness of Canons 1 and 2A is exacerbated by the fact that "integrity" and "high standards" are never defined. The Commission concedes that there are no advisory or court opinions in Mississippi that deal with the use of social media or sufficiently clarify the meaning of "high standards" and "integrity." Clerk's Papers at 108. Social media norms are rapidly evolving, making general prohibitions especially treacherous for those trying to avoid discipline. *See Goguen*, 415 U.S. at 574 (holding that a statute prohibiting "contemptuous" flag treatment was void for vagueness partly because "attitudes and tastes" for displaying the flag were in flux).

Canon 4A is also vague as applied to Judge Polk-Payton. Subsection (2) requires that judges not "demean the judicial office." But this restriction is unconstitutionally vague as applied to speech, because "demeaning," just like "annoying" and "contemptuous," depends on the subjective and often divergent assessments of others. *See Goguen*, 415 U.S. at 566 (holding that "contemptuous" is vague because it is subjective); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding that "annoying" is vague because it is subjective).

Lastly, Canon 4D(1) requires that judges not "exploit their judicial position," and Canon 2B prohibits judges from lending "the prestige of their office to advance the private interests of the judges or others." But these canons cannot be read literally: If Judge Polk-Payton has exploited her judicial position, then so does every judge who mentions her position when expressing an interest in lecturing at a university, being cleared to work for a charity, or being selected by parents to be a soccer coach. If using her title to sell books is unethical, then so is the behavior of many respected U.S. Supreme Court Justices and Mississippi judges. Clerk's Papers at 25-93.

The scope of conduct that would constitute "exploiting" a judicial position for one's "private interest" would thus be enormous, and the rule would be unconstitutionally overbroad. The Commission must thus have in mind some sort of *improper* exploitation of a judicial position, or *improper* advancement of one's interests. But Canon 4D(1) never defines what distinguishes improper use of one's judicial position from proper use, and is thus unconstitutionally vague. *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 569 (1987) (holding that a speech restriction was so facially broad that it had to have a

limiting construction, and that the city's proposed limiting construction was so vague as to be unconstitutional).

Moreover, the lack of precision in the Canons encourages selective enforcement based on a speaker's viewpoint. *Grayned*, 48 U.S. at 109 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). As Judge Polk-Payton has pointed out, judges across Mississippi have posted photos of themselves in their judicial robes and used their title on social media pages, all without discipline by the Commission. Clerk's Papers at 25-93. The Mississippi Bar Association also promoted sales of books authored by Mississippi judges at its annual convention in 2014. *Id.* at 13-14. The Canons as written give the Commission unduly wide latitude to selectively police the speech of judges, and to punish those with whom they disagree.

CONCLUSION

Judge Polk-Payton is a judge elected by the public, and her speech to the public is fully protected under the First Amendment. Restrictions on her speech must satisfy strict scrutiny, which they do not. Indeed, Judge Polk-Payton should win even under the less demanding *Pickering* test, because her interest in speaking as an elected official outweighs any state interest. And the Canons are unconstitutionally vague as applied to Judge Polk-Payton. This Court should therefore reject the Commission's recommendation to discipline Judge Polk-Payton.

Respectfully submitted, this 13th day of March, 2017.

CENTER FOR COMPETITIVE POLITICS

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CERTIFICATE OF SERVICE

I, Graham Carner, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

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Megan C. Brittain

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And by U.S. Mail to the Trial Court:

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On March 13, 2017.

/s/ *Graham P. Carner*
Graham P. Carner