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A Judicial Balancing Act: Evaluating the First Amendment Claims of Sitting Judges

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NOTE

A Judicial Balancing Act: Evaluating the First Amendment Claims of Sitting Judges

In re Kemp, 894 F.3d 900 (8th Cir. 2018).

Zeb J. Charlton[*]

I. INTRODUCTION

On April 14, 2017, members of the New Millennium Church in Little Rock, Arkansas, gathered outside of Arkansas's Governor's Mansion to protest capital punishment.[1] The mansion's resident, Governor Asa Hutchinson, had recently scheduled eight executions for the month of April.[2] Two members of the congregation held signs reading, "Other states are trying to abolish the death penalty[,] mine's putting it on express lane."[3] New Millennium Church's lead minister Wendell Griffen lay on a cot in front of his parishioners to symbolize the use of capital punishment on Jesus Christ.[4]

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1. Andrew DeMillo, *Arkansas Judge Who Joined Protest Barred From Execution Case*, ASSOCIATED PRESS NEWS, April 18, 2017, https://apnews.com/908e24606d5a4f31adf3615ffdcb5884/arkansas-judge-who-joined-protest-barred-execution-case [https://perma.cc/U2Q6-A9XK].

2. Shawna Meyers, *Arkansas Governor Releases Execution Dates for Eight Death Row Inmates*, KFSM-TV (Feb. 27, 2017 2:28 PM), https://5newsonline.com/2017/02/27/arkansas-governor-releases-execution-dates-for-eight-death-row-inmates/ [https://perma.cc/G79C-W26W].

3. Assoc. Press, *Outcry After Arkansas Judge Who Stayed Executions Joins Anti-death Penalty Rally*, THE GUARDIAN, Apr. 15, 2017, https://www.theguardian.com/us-news/2017/apr/15/arkansas-executions-judge-wendell-griffen-death-penalty-protest [https://perma.cc/Q7TE-EDEL].

4. Wendell Griffen, *One Year Later*, JUSTICE IS A VERB! (April 18, 2018), http://wendelllgriffen.blogspot.com/2018/04/one-year-later.html [https://perma.cc/F823-8JEN].

In addition to serving as pastor of New Millennium Church, Wendell Griffen serves as an elected judge on Arkansas's Sixth Judicial Circuit.[5] On the same day as the protest, Judge Griffen was assigned to oversee a drug manufacturer's lawsuit involving Arkansas's use of the drug vecuronium bromide in executions.[6] Judge Griffen granted the drug manufacturer's request for a temporary restraining order, preventing the use of vecuronium bromide in Arkansas executions until further notice.[7] Arkansas's Attorney General immediately appealed Judge Griffen's order, arguing that Judge Griffen's participation in the Governor's Mansion protest and subsequent ruling violated Arkansas's Code of Judicial Ethics.[8] The Attorney General requested that Judge Griffen's temporary restraining order be overruled and that Judge Griffen be removed from further proceedings in the instant case.[9]

The Arkansas Supreme Court subsequently overruled Judge Griffen's temporary restraining order and removed Judge Griffen from *all* present and future cases involving capital punishment.[10] Judge Griffen filed suit against the Arkansas Supreme Court, alleging, *inter alia*, that his First Amendment freedom of speech rights had been violated.[11]

The proper constitutional standard for evaluating the First Amendment claims of sitting judges has been an open question since *Republican Party of Minnesota v. White*.[12] This Note argues the balancing test governing the First Amendment rights of public employees created in *Pickering v. Board of Education*[13] should be used to adjudicate the First Amendment suits of active state judges. *Pickering*'s balancing test is then applied to the First Amendment retaliation claims of Judge Wendell Griffen against the Arkansas Supreme Court and its justices to demonstrate the operation of the balancing test in this context.[14] The Note concludes with a short discussion of permanent reassignment, the Arkansas Supreme Court's selected remedy in this case.

II. FACTS AND HOLDING

Unlike the majority of judges in the American judicial system, Judge Wendell Griffen of Arkansas's Sixth Circuit does not shy away from commenting on public issues.[15] The Judge describes himself on Twitter as a "Pastor, judge, social justice advocate, and consultant on cultural competency,

5. DeMillo, *supra* note 1.
6. In re Kemp, 894 F.3d 900, 904 (8th Cir. 2018).
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id.* at 904–905.
11. *Id.* at 905.
12. 536 U.S. 765 (2002).
13. 391 U.S. 563 (1968).
14. *See id.*; *In re Kemp*, 894 F.3d at 905.
15. *See infra* text accompanying notes 16–22.

justice, and relation between faith and public policy."[16] From December 2014 to January 2019, Griffen regularly posted political, religious, and social commentary on his personal blog titled "Justice is a Verb!"[17] Judge Griffen blogged on contemporary political topics such as President Donald Trump,[18] the contentious nomination of Justice Brett Kavanaugh,[19] and white supremacy.[20]

Judge Griffen also frequently disclosed his personal views of the death penalty on "Justice is a Verb!"[21] On April 10, 2017, Judge Griffen's post entitled "Religious Faith and Homicidal Motives During the Holy Week" contained the following statement:

> Premeditated and deliberate killing of defenseless persons—including defenseless persons who have been convicted of murder—is not morally justifiable. Using medications designed for treating illness and preserving life to engage in such premeditated and deliberate killing is not morally justifiable. Any morally unjustified and unjustifiable killing produces moral injury. Beginning a week from today, and three days after Good Friday—on Monday, April 17—the political, religious, commercial, and social captains of empire in Arkansas will commence a series of morally unjustified and unjustifiable killings. Each death will be a new, and permanent, moral injury. These deaths will join the existing long list of atrocities, oppression, and other moral injuries associated with our state to cause people around the world to associate Arkansas with bigotry, hate, and other forms of injustice as long as human memory continues.[22]

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16. Wendell Griffen (@Judggriff) Twitter (last visited Sept. 25, 2020), https://twitter.com/judggriff?lang=en [https://perma.cc/M86C-GRCT].

17. Wendell Griffen, *Trump's Shutdown: A Malicious Spectacle of Moral, Political and Humanitarian Failure*, JUSTICE IS A VERB! (Jan. 16, 2019), https://wendelllgriffen.blogspot.com/ [https://perma.cc/3RC8-N6RN].

18. Wendell Griffen, *Treating Donald Trump like a Psychopath*, JUSTICE IS A VERB! (Dec.26, 2018), https://wendelllgriffen.blogspot.com/2018/12/treating-donald-trump-like-psychopath_26.html [https://perma.cc/669S-QXA3]; Wendell Griffen, *Imbecile in Chief*, JUSTICE IS A VERB! (July 17, 2018), https://wendelllgriffen.blogspot.com/2018/07/imbecile-in-chief.html [https://perma.cc/VY23-24HF].

19. Wendell Griffen, *Lessons to Remember About the Kavanaugh Spectacle*, JUSTICE IS A VERB! (Sept. 28, 2018), https://wendelllgriffen.blogspot.com/2018/09/lessons-to-remember-about-kavanaugh.html [https://perma.cc/4PDC-UYZK].

20. Wendell Griffen, *The Dominant Religion of the United States is White Supremacy*, JUSTICE IS A VERB! (July 11, 2018), https://wendelllgriffen.blogspot.com/2018/07/the-dominant-religion-of-united-states.html [https://perma.cc/JH83-8D5V].

21. Griffen, *supra* note 4.

22. Wendell Griffen, *Religious Faith and Homicidal Motives during Holy Week*, JUSTICE IS A VERB! (Apr. 10, 2017),

Later that week, on April 14, Judge Griffen participated in an anti-death penalty rally at the Governor's Mansion.[23] Judge Griffen subsequently led a prayer vigil with his congregation outside of the Governor's Mansion.[24] After the vigil concluded, Judge Griffen laid on a cot "in solidarity with Jesus."[25]

On the same day, McKesson Medical-Surgical, Inc., a distributor of the drug vecuronium bromide,[26] sued the State of Arkansas, the Arkansas Department of Corrections, Arkansas Governor Asa Hutchinson, and Arkansas Department of Corrections Director Wendy Kelley.[27] The suit was assigned to Judge Griffen.[28] McKesson argued the State had obtained the drug under false pretenses and requested the State return the drug before it was used in any executions.[29] McKesson sought a temporary restraining order ("TRO") in the case.[30] On April 14, Judge Griffen granted McKesson's request for a TRO, preventing the State from "us[ing] the vecuronium bromide obtained from [McKesson] until ordered otherwise by this Court."[31]

The Arkansas Attorney General subsequently filed an emergency petition seeking a writ of mandamus with the Arkansas Supreme Court.[32] The Attorney General requested the Arkansas Supreme Court vacate Judge Griffen's TRO and remove Judge Griffen from further proceedings in the case.[33] The Attorney General's brief stated that Judge Griffen's past conduct, primarily his protest on April 14, violated Arkansas Code of Judicial Conduct Rule 2.11(A)(5).[34] Notably, the Attorney General's emergency petition

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https://wendelllgriffen.blogspot.com/2017/04/religious-faith-and-homicidal-motives.html [https://perma.cc/CJG6-VLRN].

23. In re Kemp, 894 F.3d 900, 904 (8th Cir. 2018).

24. *Id*.

25. *Id*.

26. Vecuronium bromide is a muscle relaxant typically used in conjunction with anesthesia. Mark Ramzy & Russell K. McAllister, *Vecuronium*, NAT'L CTR. FOR BIOTECHNOLOGY INFORMATION, U.S. NAT'L LIBRARY OF MEDICINE (Mar. 27, 2020), https://www.ncbi.nlm.nih.gov/books/NBK493143/ [https://perma.cc/BC4C-7END]. Arkansas uses vecuronium bromide as the second drug in a three-drug execution protocol. Linda Satter, *In Filing, AG Cites 3-Drug Decision; State Urges Look in Execution Case*, ARK. DEMOCRAT-GAZETTE, Sept. 22, 2019, https://www.arkansasonline.com/news/2019/sep/22/in-filing-ag-cites-3-drug-decision-2019/ [https://perma.cc/LXM7-GPM6]; *see also In re Kemp*, 894 F.3d at 904.

27. *In re Kemp*, 894 F.3d at 904 (Governor Hutchinson and Director Kelley were sued in their official capacity).

28. *Id*.

29. *Id*.

30. *Id*.

31. *Id*.

32. *Id*.

33. *Id*.

34.

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,

hinted Judge Griffen would be unfit to hear *any* death penalty case, arguing that "Judge Griffen cannot be considered remotely impartial *on issues related to the death penalty*."[35]

On April 17, the Arkansas Supreme Court granted the Attorney General's mandamus petition.[36] In granting the petition, the court went beyond the stated request of the Attorney General, and "immediately reassigned all cases in the Fifth Division that involve the death penalty or the state's execution protocol, whether civil or criminal."[37] In a lone published dissent, Chief Justice John Dan Kemp would have only removed Judge Griffen from the present case, citing the lack of formal investigation into Judge Griffen's alleged bias in capital punishment cases.[38] The Arkansas Supreme Court also referred Judge Griffen to the "Judicial Discipline and Disability Commission to consider whether he ha[d] violated the Code of Judicial Conduct."[39]

Judge Griffen sued the Arkansas Supreme Court and its justices in the United States District Court for the Eastern District of Arkansas.[40] Judge Griffen brought his claim under several grounds, including: First Amendment freedom of speech retaliation, First Amendment religious exercise retaliation, violation of Arkansas's Religious Freedom Restoration Act, denial of his Fourteenth Amendment procedural due process rights, violation of his Fourteenth Amendment equal protection rights, and civil conspiracy.[41]

The justices of the Arkansas Supreme Court filed a motion to dismiss, arguing that Judge Griffen had stated no plausible grounds for relief.[42] The district judge refused to grant the Arkansas Supreme Court justices' motion to dismiss.[43] On April 13, Judge Griffen sought discovery on the Arkansas Supreme Court's internal deliberations regarding Judge Griffen's temporary restraining order and subsequent litigation.[44] On April 24, the Arkansas Supreme Court justices petitioned the United States Court of Appeals for the

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> including but not limited to the following circumstances: 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.

In re Kemp, 894 F.3d at 904 (quoting Ark. Code Jud. Conduct R. 2.11(A)(5)).

35. *Id.* (emphasis added).

36. In re Pulaski County Circuit Court, No. 17-155, 2017 Ark. LEXIS 154 (2017) at *2 (per curiam).

37. *Id*.

38. *Id.* at *4–5 (Kemp, C.J., concurring in part and dissenting in part).

39. *Id.* at *2.

40. *In re Kemp*, 894 F.3d at 905.

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*.

Eighth Circuit for a writ of mandamus preventing Judge Griffen from engaging in discovery.[45]

In a two-to-one decision, the Eighth Circuit granted the Arkansas Supreme Court justices' mandamus petition and vacated the district court's denial of the justices' motion to dismiss.[46] However, the court refused to discuss the justices' argument that allowing discovery to proceed would interfere with "judicial independence and federalism."[47] The court believed it would be unnecessary to wade into the delicate area of federal-state relations if Judge Griffen failed to state a claim for which relief could be granted.[48]

In the lone dissenting opinion, Judge Kelly would have granted the Arkansas Supreme Court justices' petition for a writ of mandamus, but only regarding Judge Griffen's discovery attempt.[49] In Judge Kelly's view, the petitioners in the case did not adequately exhaust their remedies at the district court level.[50] Judge Kelly reasoned that, without a total exhaustion of remedies at the lower level, the petitioners still had other adequate means to find the relief they desired, and the court should reject the mandamus petition.[51] Judge Kelly would later cast the sole vote in favor of granting Judge Griffen's motion for a rehearing en banc,[52] but did not file an opinion detailing her reasoning.[53]

In June 2019, the Arkansas Judicial Discipline and Disability Commission dismissed the pending ethics action against Judge Griffen.[54] Pursuant to this dismissal, Judge Griffen petitioned the Arkansas Supreme Court to reinstate his ability to hear death penalty cases.[55] The Arkansas Supreme Court denied Judge Griffen's petition in a *per curiam* order, ruling that Judge Griffen had not filed a timely petition for rehearing.[56]

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45. *Id*.

46. *Id.* at 910.

47. *Id.* at 905.

48. *Id.* ("[T]his court express[es] no view on [the Arkansas Supreme Court's federalism argument], because it is clear and indisputable that the discovery sought by Judge Griffen is not relevant to any claim that should survive a motion to dismiss.") (internal quotations omitted).

49. *Id.* at 910–11 (Kelly, J., dissenting).

50. *Id.* at 910.

51. *Id.*

52. In re Kemp, No. 18-1864, 2018 U.S. App. LEXIS 24581, at *1 (Aug. 29, 2018).

53. *Id*.

54. Debra Cassens Weiss, *Ethics Case is Tossed Against Judge Who Protested Death Penalty While Ruling in Execution Drug Dispute*, ABA JOURNAL, June 14, 2019, http://www.abajournal.com/news/article/ethics-case-is-tossed-against-judge-who-protested-death-penalty-while-ruling-in-execution-drug-dispute [https://perma.cc/J698-5J6X].

55. *Id*.

56. In re Griffen, No. CV-19-521, 2019 Ark. 251, at *1 (Sept. 19, 2019).

III. LEGAL BACKGROUND

The proper framework for analyzing the extrajudicial speech of sitting judges has been the subject of disagreement among twenty-first century scholars and courts.[57] The United States Supreme Court's decisions have offered little guidance on the First Amendment protections of sitting judges.[58] This has led to conflicting lines of case law when analyzing the First Amendment claims of the judiciary. The majority of federal and state courts have followed the seminal judicial campaign case *Republican Party of Minnesota v. White*, which invalidated a provision of Minnesota's Code of Judicial Conduct under strict scrutiny.[59] In the alternative, some courts and commentators believe active judges' First Amendment rights should be evaluated under the same public employee balancing test established in *Pickering v. Board Of Education*.[60]

A. The White *Approach*

For the majority of this nation's history, judges freely engaged in overt political activities,[61] such as soliciting funds for partisan candidates,[62] endorsing candidates for elected office,[63] and even seeking the presidency.[64] In 1924, the American Bar Association ("ABA") released the first Canon of Judicial Ethics.[65] Heavily inspired by former President and sitting Chief Justice William H. Taft, the initial Canon "specifically suggested that judges refrain from making political speeches, making or soliciting contributions for political parties, publicly endorsing candidates, and participating in party conventions."[66] However, the ABA only intended the first Canon to be an aspirational model of ideal judicial conduct, and judges continued to actively partake in politics.[67]

The advent of judicial disciplinary commissions, which actively enforced long-ignored codes of judicial ethics, began to curb the political activities of state judges in the late twentieth century.[68] State regulation of

57. *See* Lynne H. Rambo, *When Should the First Amendment Protect Judges from Their Unethical Speech?*, 79 OHIO ST. L.J. 279 (2018).

58. *Id.* at 283.

59. 536 U.S. 765 (2002).

60. 391 U.S. 563 (1968).

61. Raymond J. McKoski, *The Political Activities Of Judges: Historical, Constitutional, And Self-Preservation Perspectives*, 80 U. PITT. L. REV. 245, 249–56 (2018).

62. *Id.* at 256; Am. Bar Ass'n, CANONS OF JUDICIAL ETHICS (1924).

63. McKoski, *supra* note 61, at 256–257.

64. *Id.* at 263.

65. *Id.* at 250.

66. *Id.* at 257–58.

67. *Id.* at 263.

68. *Id.* at 250.

judicial conduct and campaigns remained largely unchallenged until the Supreme Court's decision in *Republican Party of Minnesota v. White*,[69] which cast significant doubt on the constitutionality of judicial campaign restrictions.

In *White*, the Supreme Court held that a state could not prohibit judicial candidates from discussing political or legal issues on the campaign trail.[70] At issue in *White* was Minnesota's "announce clause," which stated that a "'candidate for a judicial office, including an incumbent judge,' shall not 'announce his or her views on disputed legal or political issues.'"[71] Both parties agreed that strict scrutiny[72] should be used in evaluating the announce clause.[73] Writing for a five-to-four majority, Justice Scalia rejected Minnesota's arguments that the announce clause was narrowly tailored to serve the compelling government interest of "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[74] In striking down the announce clause, the *White* majority emphasized the role the provision played in the election context:

> Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. 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. It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.[75]

Justice Scalia's frequent references to judicial elections in the preceding text are noteworthy. In couching his opinion in the language of electoral politics, Justice Scalia casts serious doubt on the impact of *White* outside of judicial campaign restrictions. Further, Justice O'Connor's concurring opinion and Justice Ginsburg's dissenting opinion placed particular importance on the electoral aspect of *White*. Justice O'Connor wrote a separate concurring opinion for the sole purpose of questioning the soundness

69. Republican Party of Minnesota v. White, 536 U.S. 765, 769 (2002).

70. *Id.* at 796.

71. *Id.* at 769 (quoting Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000)).

72. Under strict scrutiny, the state actor must show that a disputed action is narrowly tailored to serve a compelling government interest. *Id.* at 774–75 (citing Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 222, (1989)). In a challenge to a government action on First Amendment grounds, the government must demonstrate the action does not "unnecessarily circumscribe protected expression." Brown v. Hartlage, 456 U.S. 45, 54 (1982).

73. *White*, 536 U.S. at 775.

74. *Id.*

75. *Id.* at 781–82 (internal quotations and citations omitted).

of judicial elections.[76] On the other side, Justice Ginsburg's dissent attacked the *White* majority for what she viewed as a failure to distinguish between legislative and judicial elections[77] – an argument rejected by Justice Scalia in dicta.[78]

Thirteen years later, the Supreme Court officially extended *White*'s use of strict scrutiny to all judicial campaign cases in *Williams-Yulee v. Florida Bar*.[79] Lanell Williams-Yulee, an aspiring judicial candidate, challenged Florida's ban on the personal solicitation of campaign funds.[80] Unlike the parties in *White*, the *Williams-Yulee* litigants disagreed on the proper constitutional standard. The Florida Bar adopted the position that the law should be evaluated under the looser "'closely drawn' to match a 'sufficiently important interest'"[81] test used in campaign contribution cases.[82] Williams-Yulee argued *White*[83] required the Court to apply strict scrutiny.[84]

The Supreme Court agreed with Williams-Yulee and applied strict scrutiny to determine if the ban was constitutional,[85] reasoning that the "closely drawn" standard is only applicable to claims involving the First Amendment's right to free association.[86] Even though the Florida Bar lost the battle over the proper constitutional standard, the Court determined the personal solicitation clause was "one of the rare cases in which a speech restriction withstands strict scrutiny."[87]

Like the "announce clause" at issue in *White*,[88] the *Williams-Yulee* court found that preventing judicial candidates from personally soliciting campaign funds protects the "'vital state interest' in safeguarding 'public confidence in

76. *Id.* at 788 (O'Connor, J., concurring).

77. *Id.* at 805 (Ginsburg, J, dissenting) ("I do not agree with this unilocular, 'an election is an election,' approach.").

78. *Id.* ("[D]espite the number of pages [Justice Ginsburg] dedicates to disproving this proposition…we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

79. 575 U.S. 433 (2015).

80. *Id.* at 439–42 (citing Fla. Fla. Code of Judicial Conduct Canon 7(C)(1) (2012)).

81. *Id.* at 443 (quoting Buckley v. Valeo, 424 U. S. 1, 25 (1976) (per curiam)).

82. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

83. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

84. *Williams-Yulee*, 575 U.S. at 441.

85. *Id.* at 443 ("As we have long recognized, speech about public issues and the qualifications of candidates for elected office [which the fundraising letter included] commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, [*Republican Party of Minnesota v. White*,] this Court and both parties assumed that strict scrutiny applied.").

86. *Id.*

87. *Id.* at 444–45.

88. *Supra* text accompanying notes 71–75.

the fairness and integrity of the nation's elected judges.'"[89] Florida's ban on personal solicitation was found to be narrowly tailored to protect against "a public appearance that undermines confidence in the integrity of the judiciary,"[90] and the regulation was deemed constitutional.[91]

B. The Pickering *Approach*

In *Pickering v. Board of Education*,[92] the Supreme Court firmly established that public employees do not forfeit free speech as a condition of public employment.[93] The *Pickering* plaintiff, a public schoolteacher, was terminated for writing a letter to a local newspaper criticizing the school district's recent method for raising revenue.[94] The local school board determined Pickering's letter was "detrimental to the efficient operation and administration of the schools of the district" and that "[the] interests of the school require[d] [his dismissal]."[95]

The *Pickering* court applied a balancing test that weighed "the interests of [Pickering], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[96] As a statement on "matter of legitimate public concern," the Court afforded great weight to Pickering's First Amendment rights.[97] On the other hand, since the letter had not "impeded the teacher's proper performance of his daily duties in classroom or to have interfered with the regular operation of the schools generally,"[98] the State did not have a legitimate reason for terminating Pickering. Since the balancing test tipped in Pickering's favor, the Court ruled the school board had violated Pickering's First Amendment rights.[99]

In subsequent cases, the Supreme Court has further fleshed out the requirements for *Pickering*'s balancing test. The first inquiry is whether the employee "spoke as a citizen on a matter of public concern."[100] Broadly speaking, an employee cannot satisfy this prong of the balancing test if the speech is closely related to the work the employee is compensated for.[101] If

89. *Williams-Yulee*, 575 U.S. at 445 (quoting Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 889 (2009) (internal quotation marks omitted)).

90. *Id.* at 453–54.

91. *Id.* at 457.

92. 391 U.S. 563 (1968).

93. *Id.* at 574–75.

94. *Id.* at 564.

95. *Id.* at 564-65.

96. *Id.* at 571.

97. *Id.*

98. *Id.*

99. *Id.*

100. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citing Pickering v. Bd. of Education, 391 U.S. 563, 568 (1968)).

101. *Id.* at 420–21.

the government employee cannot demonstrate they spoke on a matter of public concern, they cannot state a viable First Amendment retaliation claim.[102]

If the employee's speech was on a matter of public concern, then the court must determine if "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'"[103] The employee's speech will only be unprotected if the state's interest is greater than the citizen's.[104]

IV. INSTANT DECISION

In a two-to-one decision, the Eighth Circuit held Judge Griffen did not state a plausible claim for relief under Section 1983 for First Amendment retaliation.[105] The Eighth Circuit reasoned that Judge Griffen did not allege he was engaged in a protected activity, and that Judge Griffen suffered no adverse employment action.[106]

The Eighth Circuit ruled that the Arkansas Supreme Court's recusal order exclusively affected Judge Griffen's role as a public employee.[107] The court cited *Bauer v. Shepard*'s[108] finding that a judicial recusal clause only affects the First Amendment rights of a judicial candidate in his or her official capacity, not as a private citizen.[109] Further citing *Bauer*, the Eighth Circuit determined "[t]he state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge's job does)."[110] Like all other public employees, cases may be reassigned to judges who have not made inflammatory public statements about a pending case or an issue in a case.[111]

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102. Connick v. Myers, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

103. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2471 (2018) (quoting Harris v. Quinn, 573 U.S. 616, 653 (2014)).

104. *Id.*

105. *In re Kemp*, 894 F.3d at 906.

106. *Id.*

107. *Id.*

108. 620 F.3d 704 (7th Cir. 2010) (holding that a state's ban on judge's political campaigning activities did not violate the First Amendment's Freedom of Speech clause).

109. Bauer v. Shephard, 620 F.3d 718 (7th Cir. 2010).

110. *Id.* (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)).

111. *In re Kemp*, 894 F.3d at 906 (citing *Bauer*, 620 F.3d at 718); *see also* Ligon v. City of New York, 736 F.3d 166, 169 n.8 (2d Cir. 2013) ("The freedom of speech protected by the First Amendment does not mean that there can be no limitations, such as those contemplated under section 455(a), on what a federal judge may say, much

Judge Griffen also failed to allege that he had suffered an adverse employment action. An adverse employment action "produces a material employment disadvantage."[112] The Eighth Circuit listed a non-exhaustive collection of adverse employment actions, such as termination and a cut in pay or benefits.[113] Additionally, circumstances which effectively create a constructive discharge are an actionable adverse employment action.[114]

In ruling that Judge Griffen did not suffer an adverse employment action, the Eighth Circuit followed *Bauer's* reasoning that a public employee has no right to perform any particular task.[115] The court implicitly argued that states have a compelling interest in assigning judges to hear particular cases as a safeguard of litigants' Due Process rights.[116] The court followed with the conclusory statement that "[r]ecusal from death penalty cases is not an adverse employment action."[117]

V. COMMENT

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[118] The First Amendment's prohibition against Congressional speech restrictions has been incorporated against state government action through the Due Process Clause of the Fourteenth Amendment.[119] The United States Supreme Court also extended First Amendment protection to online speech in *Reno v. American Civil Liberties Union.*[120] Therefore, Judge Griffen's blog posts on "Justice is a Verb!" are entitled to the same First Amendment protections as his in-person protest.[121]

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less on where she can say it, especially as it relates to pending litigation… [N]umerous courts of appeals have reassigned cases due to an appearance of partiality that was traceable to speech by a district judge.").

112. *Id.*

113. *Id.*

114. *Id.* (quoting Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999)).

115. *Id.*

116. *Id.* (quoting *Bauer*, 620 F.3d at 718) ("A state may decide to assign each case to a judge whose impartiality is not in question . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.").

117. *Id.* at 907.

118. U.S. CONST. amend I.

119. Gitlow v. New York, 268 U.S. 652 (1925).

120. 521 U.S. 844 (1996).

121. *Reno*, 521 U.S. at 844.

A. Which Constitutional Standard Should Courts Apply?

While the majority of courts have followed *White* and evaluated judges' free speech claims under strict scrutiny,[122] *Pickering*'s balancing test should be used to evaluate extrajudicial speech that does not occur as part of a judicial campaign. The most faithful application of *White*'s holding requires a careful evaluation of the circumstances surrounding the judicial official's speech. This context-specific approach was applied by the Seventh Circuit in *Siefert v. Alexander*.[123]

In *Siefert*,[124] the Seventh Circuit upheld Wisconsin's Code of Judicial Ethics provisions banning political endorsements and personal solicitation, but struck down the code's prohibition on partisan identification as a violation of the First Amendment.[125] The *Siefert* court evaluated the provisions relating to personal solicitation and partisan identification under strict scrutiny,[126] but argued *Pickering*'s balancing test was well-suited to evaluate the political endorsement restriction.[127] The court reasoned that "offering an endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker."[128] Thus, the *Siefert* court partially chose *Pickering*'s balancing test as a pragmatic solution to permit regulation of some judicial political activity while still operating within the confines of the First Amendment.

While applying the balancing test set forth in *Pickering*, the *Siefert* court also adopted the additional factor of promoting judicial integrity in favor of the state.[129] The *Seifert* court noted the state's power to regulate employees' First Amendment activities – in cases such as *Pickering*,[130] *Connick*,[131] and

122. *See, e.g.*, Wolfson v. Concannon, 811 F.3d 1176 (9th Cir. 2016) (applying strict scrutiny to judge's challenge of Arizona's Judicial Ethics code prohibition on personal solicitation, campaigning, and endorsements); Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010) (applying strict scrutiny to judge's challenge of Michigan's identification, solicitation, and commitment clauses); Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007) (applying strict scrutiny in evaluating judge's First Amendment claim based on disciplinary action).

123. Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

124. 608 F.3d 974 (7th Cir. 2010).

125. *Id.* at 977.

126. *Id.* at 981.

127. *Id.* at 985–86.

128. *Id.* at 984.

129. *Id.* at 985.

130. Pickering v. Bd. of Education, 391 U.S. 563 (1968).

131. Connick v. Myers, 461 U.S. 138 (1983).

Garcetti[132] – is not only based on the government's role as employer, but also on the duty the state possesses to guarantee its citizens due process of law.[133]

The rationale behind the *White* decision also cuts against applying strict scrutiny to extrajudicial speech outside of campaigns. As noted previously, Justice Scalia emphasized the importance of an informed electorate in striking down Minnesota's announce clause.[134] Indeed, Justice Kennedy's concurring opinion in *White* strikes against applying *White* to extrajudicial speech outside of the campaign context:

> This case does not present the question whether a State may restrict the speech of judges because they are judges – for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), could be extended to allow a general speech restriction on sitting judges – regardless of whether they are campaigning – in order to promote the efficient administration of justice, is not an issue raised here.
>
> Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights.[135]

The best analysis of Justice Kennedy's reasoning cabins *White*'s application of strict scrutiny to judicial campaigns. In the most favorable reading for strict scrutiny, Justice Kennedy's opinion leaves the door ajar for courts to choose between *Pickering*'s balancing test and *White*'s stringent approach. But reading Justice Kennedy's opinion as an endorsement of strict scrutiny cannot be reconciled with the majority's reasoning. In light of Justice Scalia's opinion – which deals in the language of electoral politics[136] – the better conclusion is that *White* offers no guidance to the First Amendment rights of sitting judges.

Further, applying a balancing test to sitting judges' First Amendment claims is a more practical solution than applying strict scrutiny. State and local governments have a "legitimate purpose in '[promoting] efficiency and

132. Garcetti v. Ceballos, 547 U.S. 410 (2006).

133. *Siefert*, 608 F.3d at 985 ("We are not concerned merely with the efficiency of those services, but that the work of the judiciary conforms with the due process requirements of the Constitution.").

134. *See* Republican Party of Minnesota v. White, 536 U.S. 765, 782 (2002) ("It is simply not the function of government to select which issues are worth discussing or debating *in the course of a political campaign.* We have never allowed the government to prohibit *candidates* from communicating relevant information to voters *during an election*.") (emphasis added).

135. *Id.* at 796 (Kennedy, J., concurring).

136. *See* text accompanying *supra* notes 75–78.

integrity in the discharge of official duties.'"[137] To require the state to prove that every judicial disciplinary action and rule promulgated is "narrowly tailored to further a compelling government interest" would burden state and federal courts with litigation relating to the constitutionality of judicial speech restrictions,[138] frustrating the government's interest in efficient court services.

Because the underlying rationale of *White* cuts against applying strict scrutiny to Judge Griffen's conduct outside of an active judicial campaign, the *Pickering* balancing test should be applied.

B. Applying Pickering*'s Balancing Test*

Judge Griffen brought a First Amendment retaliation claim under Section 1983.[139] A First Amendment retaliation claim must allege: (1) the plaintiff engaged in a protected activity; (2) a government official's actions against the plaintiff "would chill a person of ordinary firmness from continuing in the activity";[140] and (3) the government official's adverse action was at least partially motivated by the plaintiff's exercise of the protected activity.[141]

To proceed with his First Amendment retaliation claim, Judge Griffen must first allege that his speech was on a matter of public concern.[142] In the Eighth Circuit, courts analyze the "content, form, and context of a given statement, as revealed by the whole record" to determine if the speech in question touched on an issue of public concern.[143]

Judge Griffen's protest at the Governor's Mansion was plainly on a matter of public concern.[144] The imposition of the death penalty in the United States has been the cause of much public debate, with members of the judiciary frequently thrusting themselves into the center of the conflict.[145]

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137. Connick v. Myers, 461 U.S. 138, 150–51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)).

138. Rambo, *supra* note 57 at 307–08 ("Requiring that every ethics rule to which a sitting judge is subject be narrowly tailored to its end would place an extraordinary burden on the State.").

139. 42 U.S.C. § 1983 (2012).

140. Revelz v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004) (quoting Naucke v. City of Park Hills, 284 F.3d 923, 927–28 (8th Cir. 2002)).

141. In re Kemp, 894 F.3d 900, 906 (8th Cir. 2018) (quoting *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004)).

142. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citing Pickering v. Bd. of Education, 391 U.S. 563, 568 (1968)).

143. Connick v. Myers, 461 U.S. 138, 148–149 (1983).

144. Ziccarelli v. Leake, 767 F. Supp. 1450, 1454 (N.D. Ill. 1991) (deciding that character testimony at a death penalty hearing was speech on a matter of public concern).

145. See Gregg v. Georgia, 428 U.S. 153, 231–32 (1976) (Marshall, J., dissenting) ("[T]he death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed as to the

Candidates in contested judicial elections often emphasize their personal views on capital punishment in a calculated move to sway the electorate.[146] Additionally, in determining whether the application of the death penalty violates the Eighth Amendment, the Supreme Court has placed special emphasis on the "evolving standards of decency that mark the progress of a maturing society."[147] The need for robust public debate on the topic of capital punishment is required to determine the "evolving standards of decency," whether that be determined through public polling or legislative action.[148]

Next, it must be determined whether the speech occurred in the course of Judge Griffen's duties as a member of the judiciary. As articulated in *Garcetti v. Ceballos*,[149] the determinative question is whether the expression took place during an activity that the government would compensate the employee for.[150] Judge Griffen was not acting within the scope of his official duties while protesting in front of the Governor's Mansion. Presumably, Judge Griffen's responsibilities as a circuit judge include matters such as reviewing court filings, hearing cases, and meeting with attorneys. Notably, none of these duties involve Judge Griffen holding a protest against the state of Arkansas's use of capital punishment, leading a prayer ritual outside of the Governor's Mansion, or imitating Jesus's three days in the tomb.[151] Judge Griffen's conduct fits comfortably within other instances of government employees acting outside the scope of their employment in protest.[152]

But Judge Griffen was not reprimanded solely for his participation in the Governor's Mansion protest or his blog posts. Instead, Judge Griffen was subject to judicial discipline for failing to recuse himself as required by Arkansas Code of Judicial Conduct Rule 2.11(A)(5),[153] which instructs that

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purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable.") (internal citations omitted).

146. Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L. REV. 760 (1995) (discussing the political consequences of capital punishment cases for elected judges).

147. Trop v. Dulles, 356 U.S. 86, 101 (1958).

148. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 426 (2008) (noting that at the time of decision, only six states permitted the death penalty for child rape of any kind).

149. 547 U.S. 410, 420–21 (2006).

150. Garcetti v. Ceballos, 547 U.S. 410, 420–21 (2006).

151. *Compare Garcetti*, 547 U.S. at 422 ("Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.").

152. Pickering v. Bd. of Education, 391 U.S. 563 (1968) (finding that a schoolteacher's letter to a local newspaper was outside the scope of his employment); Rankin v. McPherson, 483 U.S. 378 (1987) (finding that a government employee's wishful remark to a co-worker that the President was assassinated was outside the scope of the employee's duties).

153. *See* text accompanying *supra* notes 32–39.

"[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[154] A judge's recusal decision may be dependent on the judge's conduct as a private citizen, but the actual recusal action is made as a public employee. Therefore, a judge's recusal decision is wholly within *Garcetti*'s scope of employment standard.[155] As Judge Griffen was not speaking on a matter of public concern as a private citizen, Judge Griffen cannot even trigger *Pickering*'s balancing test.

Even if Judge Griffen did speak as a private citizen on a matter of public concern, he still cannot state a plausible First Amendment retaliation claim. The final step of the *Pickering* analysis, in the judicial context, is the interest of the state in promoting efficient services and ensuring the due process rights of litigants.[156] In addition to ensuring a smooth functioning court system, the judicial system also promotes the effectiveness of its services through the perceived impartiality of its judges.[157]

The final factor of the balancing test weighs in the state's favor. Looking at the context of Judge Griffen's comments and protests, the state had a legitimate interest in removing Judge Griffen from the *McKesson* case. Judge Griffen's blog post on April 10 is a clear reference to the upcoming April 17 execution. Even though Judge Griffen did not directly mention McKesson in the April 10 blog post, his comments necessarily implicated the pending litigation. Further, Judge Griffen's protest in front of the Governor's Mansion took place on the same day McKesson filed its petition for a temporary restraining order. From the standpoint of an impartial and reasonable observer, Judge Griffen's conduct directly impeded the state's interest in promoting the impartial application of the laws and public perception of the judiciary.

As Judge Griffen's interest in free expression is outweighed by the state's interest in promoting an impartial judicial system, Judge Griffen could not successfully allege that he was engaged in a protected activity. Having failed the first part of the First Amendment retaliation test, Judge Griffen cannot make a submissible case, and the Eighth Circuit correctly dismissed Judge Griffen's First Amendment retaliation claim.

C. The Dangers of Permanent Reassignment

While Judge Griffen did not allege a plausible First Amendment retaliation claim, the behavior of the Arkansas Supreme Court should be alarming for those concerned about a restrained judiciary. As Chief Justice

154. *See* text accompanying *supra* notes 32–39.

155. *See* In re Kemp, 894 F.3d 900, 906 (8th Cir. 2018) (quoting Bauer v. Shepard, 620 F.3d 704, 718 (7th Cir. 2010)) ("[A recusal order] specifies how he 'will perform official duties,' or rather, to which duties he is assigned.").

156. Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

157. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (quoting A.T. Massey Co. v. Caperton, 556 U.S. at 889) ("public perception of judicial integrity is 'a state interest of the highest order.'").

Kemp noted in his dissent, the Arkansas Supreme Court has established procedures for investigating the ethical complaints against members of the judiciary.[158] Given the immediate nature of a temporary restraining order, reassigning the *McKesson* case away from Judge Griffen was a prudent move.

But in permanently reassigning all cases involving the death penalty away from Judge Griffen *sua sponte*, the Arkansas Supreme Court determined that Judge Griffen's conduct forever tainted his judgment in capital cases without an investigation into his actions. Judge Griffen should not be permanently barred from hearing cases involving the death penalty without an explicit commitment to rule a certain way in a capital case. Judge Griffen alleged that he has never made such a claim. Indeed, in a blog post on "Justice is a verb!" one year after the events in question, Judge Griffen wrote "I will follow [Arkansas law] whenever my authority to preside over capital cases is restored. I took an oath to follow the law, including laws that I consider objectionable on moral and religious grounds."[159]

Permanent reassignment is a drastic remedy that should rarely, if ever, be used by the judiciary. Temporary reassignment, while uncommon, functions to ensure the due process right to a fair trial in front of an impartial judge.[160] Reassignment plays an important role in maintaining judicial integrity at the state and federal level.[161] Since the judiciary is reliant "on the public's willingness to respect and follow its decisions,"[162] reassignment can be used to insulate the judiciary from questions of improper bias.

On the other hand, permanent reassignment opens up a plethora of options to the judiciary. Hyper-partisan judges from a state's highest court may attempt to weaponize permanent reassignment for quick political gain. In a judicial system that is rooted in the concept of an independent and impartial judiciary, allowing permanent reassignment to stand is a dangerous game.

When the opportunity arises, courts should decide to seal off the possibility of permanent reassignment. Indeed, in a First Amendment retaliation case, it is plausible that permanent reassignment could amount to a constructive discharge. Perhaps armed with a better First Amendment case, a future judge may be able to successfully argue that permanent reassignment is an infringement on the judiciary's First Amendment rights.

158. In re Pulaski County Circuit Court, No. 17-155, 2017 Ark. LEXIS 154 (2017) at *3 (Kemp, C.J., dissenting).

159. Griffen, *supra* note 4.

160. Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1 (2014).

161. *Id.* As of 2014, 668 cases had been reassigned to different judges at the federal level. *Id.*

162. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 446 (2015) (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)).

VI. CONCLUSION

Judge Griffen's case provides an interesting look into the difficulties of preserving the constitutional protections of those who comprise our judiciary. With the advent of judicial participation in social media[163] and a political climate that encourages judges to enter the political arena,[164] courts will likely see an increase in litigation relating to judicial speech. Courts would be wise to announce a clear standard for analyzing these claims, as continued litigation over extrajudicial speech would prove harmful to the judiciary's image.

Adopting *Pickering*'s balancing test would protect the due process rights of litigants and ensure the efficient running of our judicial system, while still allowing judges to exercise First Amendment rights as private citizens. While Judge Griffen should follow the call to come into the courthouse with an open mind, Wendell Griffen, the private citizen, should continue to blog, tweet, and protest. Of course, a judge who is active in the arena of public debate will be subject to challenges regarding the judge's prior statements in a pending case, but this is the cost of allowing every citizen, regardless of position in our judicial system, to exercise First Amendment rights.

163. Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 SMU L. REV. 249 (2018).

164. *See* Rambo, *supra* note 57, at 279–81 (discussing Justice Ginsburg's comments on then-candidate Donald Trump in 2016).