

IN THE
Supreme Court of the United States

LAURA HENDRIX, *et al.*,

Petitioners,

v.

HON. DONNA GREENWELL DUTTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Conduct Commission

QUESTION PRESENTED

This Court has long recognized that Article III permits pre-enforcement constitutional challenges only where a plaintiff faces a sufficiently credible threat that a law will be enforced against her. That requirement preserves the constitutional limits on federal jurisdiction while allowing challenges to genuinely imminent enforcement actions before constitutional rights are violated.

State judicial-conduct commissions, however, ordinarily begin with confidential, preliminary investigations in response to citizen complaints. At that stage, the Commission makes no determination regarding the complaint's validity or the accuracy of its allegations. Under Kentucky's Rules, the Commission merely notifies the judge of the complaint, requests a response, and conducts a preliminary inquiry to determine whether formal disciplinary proceedings are warranted. No discipline may be imposed unless the Commission later authorizes formal charges.

The Sixth Circuit held that these preliminary, nonfinal investigative steps created a sufficiently credible threat of enforcement to confer Article III standing for a pre-enforcement First Amendment challenge, effectively permitting federal intervention before the Commission completed its investigation or decided whether to pursue formal charges.

The question presented is: Whether a state judicial-conduct commission's confidential, preliminary investigative actions preceding the initiation of formal disciplinary proceedings create a sufficiently credible threat of enforcement to confer Article III standing for a pre-enforcement First Amendment challenge.

PARTIES TO THE PROCEEDING

Petitioners are Laura Hendrix; Hon. Carroll M. “Trip” Redford III; Hon. Glenn E. Acree; Hon. Amy S. Anderson; Hon. Eddy Coleman; Dr. Joe Ellis; and Janet Lively McCauley, in their respective official capacities with the Kentucky Judicial Conduct Commission. The Respondent is Hon. Donna Greenwell Dutton. Pursuant to Supreme Court Rule 35(3), the official-capacity respondents have been updated to reflect the automatic substitution of the current officeholders for their predecessors.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Dutton v. Shaffer*, Nos. 25-5352/25-5391, United States Court of Appeals for the Sixth Circuit. Judgment entered April 1, 2026; petition for rehearing *en banc* denied May 5, 2026.
- *Dutton v. Shaffer*, No. 3:23-cv-00039-GFVT-EBA, United States District Court for the Eastern District of Kentucky. Opinion and Order entered March 27, 2025; judgment entered April 3, 2025.
- *Dutton v. Shaffer*, No. 23-5850, United States Court of Appeals for the Sixth Circuit. Order vacating denial of preliminary injunction entered August 15, 2024.
- *Dutton v. Shaffer*, No. 3:23-cv-00039-GFVT-EBA, United States District Court for the Eastern District of Kentucky, Opinion and Order entered September 15, 2023.

There are no additional proceedings in any court that are directly related to these cases within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Laura Hendrix; Hon. Carroll M. “Trip” Redford III; Hon. Glenn E. Acree; Hon. Amy S. Anderson; Hon. Eddy Coleman, Dr. Joe Ellis, and Janet Lively McCauley, in their respective official capacities with the Kentucky Judicial Conduct Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a) is reported at *Dutton v. Shaffer*, 171 F.4th 858, 864 (6th Cir. 2026). The Sixth Circuit’s May 5, 2026, order denying *en banc* review (Pet. App. 85a) is unreported but available at *Dutton v. Shaffer*, No. 25-5352/5391, 2026 LX 273856, at *1 (6th Cir. May 5, 2026). The Eastern District of Kentucky’s order granting summary judgment in part to plaintiff and in part to defendants, and issuing a permanent injunction, (Pet. App. 38a) is reported at *Dutton v. Shaffer*, 779 F. Supp. 3d 924, 929 (E.D. Ky. 2025).

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Sixth Circuit entered its judgment on April 1, 2026, and denied a timely petition for *en banc* review on May 5, 2026. This Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The following provisions are involved in this case:

Article III, Section 2, Clause 1 of the United States Constitution provides, in relevant part:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ”

Section 121 of the Kentucky Constitution provides, in relevant part:

Subject to rules of procedure to be established by the Supreme Court, and after notice and hearing, any justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court may be retired for disability or suspended without pay or removed for good cause by a commission. . . . Its actions shall be subject to judicial review by the Supreme Court.

Kentucky Supreme Court Rule 4.170 provides, in relevant part:

(1) Upon its own motion or upon receiving a written complaint indicating that there is a basis for investigation of a matter within the jurisdiction of the Commission under SCR

4.020, the Commission shall make a preliminary investigation to determine whether formal proceedings should be initiated.

(2) Notice of the investigation shall be given to the judge, and the judge shall be given an opportunity to appear informally before the Commission. The name of the complainant shall not be included in the notice.

(3) If the Commission concludes after its preliminary investigation that formal proceedings should not be initiated, it shall so inform the judge.

(4) After the preliminary investigation is completed and before formal proceedings are initiated under Rule 4.180, the Commission shall afford the judge under investigation an opportunity to examine all factual information, including the name of the complainant if relevant, and shall afford the judge an opportunity to furnish to the Commission any information the judge may desire bearing on the investigation.

Kentucky Supreme Court Rule 4.300, Rule 4.1(A)(11) provides:

A judge or judicial candidate shall not knowingly, or with reckless disregard for the truth, make any false statement of material fact.

INTRODUCTION

Every State entrusts a judicial-conduct commission with the responsibility of investigating complaints against judges while protecting both judicial independence and public confidence in the judiciary. To accomplish that task, state disciplinary systems uniformly begin with confidential preliminary inquiries—not enforcement proceedings. A complaint is received, the judge is notified, a response is requested, and the commission determines whether the allegations warrant formal disciplinary proceedings. Until that determination is made, no findings have been reached, no charges have been authorized, and no discipline may be imposed.

The decision below fundamentally undermines that longstanding process. The Sixth Circuit held that a citizen complaint, coupled with the Commission’s confidential preliminary investigation and an unaccepted proposed resolution exchanged before formal proceedings were ever authorized, created a sufficiently credible threat of enforcement to confer Article III standing for a pre-enforcement First Amendment challenge. In doing so, the court permitted a federal lawsuit to halt the Commission’s investigation before the Commission had completed its inquiry, determined whether the complaint had merit, or voted to initiate formal disciplinary proceedings. In other words, the Sixth Circuit found a “credible threat” of enforcement before the Commission possessed enough information to know whether there was anything to enforce.

That holding expands Article III standing well beyond this Court’s precedents. The Judicial Conduct Commission

did not determine that Judge Dutton violated the Kentucky Code of Judicial Conduct. It did not authorize formal charges. It did not impose discipline. Indeed, Kentucky law prohibited the Commission from reaching any of those questions until it completed the preliminary investigative process established by the Kentucky Supreme Court. Yet the decision below treats the Commission's threshold inquiry itself as the constitutional injury.

The consequences extend far beyond Kentucky. Every State employs preliminary investigative procedures to separate unsupported complaints from those warranting formal proceedings. Licensing boards, attorney-disciplinary authorities, ethics commissions, and countless other state agencies likewise rely upon confidential investigations before deciding whether enforcement is appropriate. Under the Sixth Circuit's rule, the mere commencement of those preliminary inquiries may now invite immediate federal constitutional litigation before the responsible state authority has made any enforcement decision.

This case presents an ideal vehicle to restore the constitutional limits on federal jurisdiction. The standing question was squarely presented, fully litigated, and dispositive below. Because the Commission never completed its investigation or determined whether formal proceedings should commence, this case cleanly presents whether Article III permits federal courts to intervene in an ongoing state disciplinary investigation before the State has taken any final or even preliminary enforcement action. This Court should grant the Commission's Petition.

STATEMENT OF THE CASE

A. Kentucky's Judicial Disciplinary Process

Section 121 of the Kentucky Constitution vests the Commonwealth with authority to discipline judges for misconduct in office. Pursuant to that constitutional authority, the Kentucky Supreme Court established the Judicial Conduct Commission ("Commission") and charged it with enforcing the Kentucky Code of Judicial Conduct. Ky. Const. § 121; Ky. Supreme Court Rule ("SCR") 4.020(1)(b)(i)(v). The Commission's disciplinary decisions are subject to review by the Kentucky Supreme Court. SCR 4.290.

The Commission's disciplinary process begins when it receives a written complaint alleging conduct within its jurisdiction. At that point, the Commission conducts a confidential preliminary investigation "to determine whether formal proceedings should be initiated." SCR 4.170(1). During that preliminary stage, the judge shall be provided notice of the complaint, shall be afforded the opportunity to submit a written response, and shall be afforded the opportunity to appear informally before the Commission. SCR 4.170(2). After completing its preliminary investigation, the Commission determines whether formal proceedings should be initiated. SCR 4.170(3)-(4). Only if the Commission authorizes formal proceedings does the matter proceed to an evidentiary hearing, where the judge is afforded full procedural protections, including the right to counsel, to present evidence, to subpoena witnesses, and to cross-examine witnesses. SCR 4.170(5); SCRS 4.180—4.290.

Thus, under the Kentucky Supreme Court's Rules, a preliminary investigation serves a limited gatekeeping function. Its purpose is to determine whether formal proceedings are warranted—not whether a complaint is meritorious, whether its allegations are true, or whether a judge has violated the Code of Judicial Conduct. Until the Commission authorizes formal proceedings, it has reached none of those determinations.

The preliminary investigation serves an especially important function in cases arising under Rule 4.1(A)(11), such as the situation here. That Rule prohibits only knowingly or recklessly made false statements of material fact. Accordingly, before the Commission could determine whether formal proceedings were warranted, it first had to investigate the factual allegations underlying the complaint, including an assessment of whether evidence existed to demonstrate that the challenged statement was demonstrably false and whether said falsehood was material. If the available evidence did not establish a potentially actionable falsehood, the preliminary investigation would end without the initiation of formal proceedings. Thus, until the Commission completed the factual inquiry required by Kentucky Supreme Court Rule 4.170, it had not determined whether Rule 4.1(A)(11) had been implicated at all.

B. The Commission's Preliminary Investigation of Judge Dutton

Judge Donna Dutton has served as a Kentucky District Judge since 2006. In October 2022, she gave a newspaper interview discussing discipline previously imposed by the Commission. After a citizen filed a complaint concerning

statements made during that interview, the Commission commenced the confidential preliminary investigation required by Kentucky Supreme Court Rule 4.170.

Consistent with the Commission's ordinary procedures, the Executive Secretary notified Judge Dutton that a complaint had been received, requested a written response, and invited her to participate in an informal conference. The notice did not identify any Rule of Judicial Conduct that had been violated, nor did it reflect any determination regarding the merits of the complaint. Judge Dutton submitted a written response.

While the preliminary investigation remained pending, and before any additional investigation could occur, counsel discussed the possibility of resolving the matter without consideration of formal proceedings. To facilitate those discussions, Commission counsel prepared a draft agreed public reprimand for Judge Dutton's consideration. The draft represented only a proposed resolution prepared by counsel; although approved by the Commission as an acceptable resolution if accepted, it remained subject to further negotiation and revision. Judge Dutton never responded with proposed changes. Instead, she retained new counsel and filed this action before the Commission completed its preliminary investigation or undertook the question of whether formal disciplinary proceedings should be initiated.

As a result, the Commission never completed its investigation, never determined whether Judge Dutton had violated the Code of Judicial Conduct, never voted to institute (or even considered) formal proceedings, and never imposed discipline.

C. District Court and Interlocutory Appeal Proceedings

Judge Dutton filed this action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief prohibiting the Commission from continuing its preliminary investigation and enforcing several provisions of the Kentucky Code of Judicial Conduct. (Pet. App. 71a) She asserted both facial and as-applied First Amendment challenges to Rules 1.2, 2.4(B), and 4.1(A)(11). Before the Commission completed its preliminary investigation, determined whether the allegations of the citizen complaint had merit, or voted whether to initiate formal disciplinary proceedings, Judge Dutton moved for a temporary restraining order and preliminary injunction to halt the Commission's investigation and prevent any further disciplinary process.

The district court denied preliminary injunctive relief, concluding that Judge Dutton had failed to demonstrate imminent, irreparable harm. (Pet. App. 83a—84a) The court reasoned that Judge Dutton had already prevailed in her judicial election and had failed to establish any actual or imminent injury to her reputation or goodwill arising from the Commission's ongoing confidential preliminary investigation. *Id.* At that time, the Commission had neither authorized formal proceedings nor made any determination that Judge Dutton had violated the Code of Judicial Conduct.

On interlocutory appeal, the Sixth Circuit vacated that decision, not because it concluded Judge Dutton had demonstrated irreparable harm or was likely to succeed on the merits, but because it held that the district court should have first analyzed her likelihood of success on the merits before addressing irreparable injury. (Pet. App. 69a—70a)

The court remanded for further proceedings without resolving the merits of Judge Dutton’s constitutional claims or whether the Commission’s ongoing preliminary investigation constituted a sufficiently concrete injury to support prospective relief. *Id.*

On remand, the parties filed cross-motions for summary judgment. The Commission argued that Judge Dutton lacked Article III standing because she sought to challenge only a confidential preliminary investigation that had not resulted in any enforcement action. Specifically, the Commission had not completed its investigation, had not determined whether the allegations in the citizen complaint were meritorious, had not determined whether Judge Dutton violated Rule 4.1(A)(11) or any other provision of the Code, had not voted to institute formal disciplinary proceedings, and had not imposed or authorized any discipline. The district court rejected the Commission’s standing arguments. It also rejected Judge Dutton’s facial challenges to all three Rules and her as-applied challenges to Rules 1.2 and 2.4(B). It nevertheless concluded that Rule 4.1(A)(11) had been unconstitutionally applied to Judge Dutton because the statements at issue were “readily capable of true interpretation,” and permanently enjoined the Commission from enforcing that Rule against her. Both parties appealed.

D. The Recent Sixth Circuit Proceedings

The Sixth Circuit affirmed the district court’s judgment insofar as it held that Judge Dutton possessed Article III standing to pursue her pre-enforcement challenge and that Rule 4.1(A)(11) had been unconstitutionally applied to her. (Pet. App. 36a)

Addressing standing as a threshold matter, the court concluded that Judge Dutton had alleged a sufficiently credible threat of enforcement notwithstanding that the Commission had not completed its confidential preliminary investigation or authorized formal disciplinary proceedings. (Pet. App. 21a) The court reasoned that the Commission’s ongoing investigation, coupled with a proposed agreed public reprimand exchanged during confidential settlement discussions, constituted sufficient evidence that Rule 4.1(A)(11) would be enforced against Judge Dutton. *Id.*

The Sixth Circuit rejected the Commission’s argument that no injury sufficient to satisfy Article III existed because the Commission had not completed the preliminary process prescribed by the Kentucky Supreme Court Rules. Specifically, the court held that the Commission’s failure to determine whether the citizen complaint had merit, whether Judge Dutton violated Rule 4.1(A)(11), or whether formal disciplinary proceedings should be initiated did not preclude a finding that Judge Dutton faced a sufficiently credible threat of enforcement. (Pet. App. 31a)

Having concluded that Judge Dutton possessed standing, the court proceeded to the merits of her as-applied challenge. It agreed with the district court that Rule 4.1(A)(11) had been unconstitutionally applied because the challenged campaign statements were “readily capable of true interpretation” and therefore could not constitutionally serve as the basis for discipline. (Pet. App. 31a) The court otherwise affirmed the district court’s rejection of Judge Dutton’s remaining constitutional challenges.

The Commission timely petitioned for rehearing and rehearing en banc, arguing that the panel's standing analysis conflicts with this Court's Article III jurisprudence by permitting a federal court to adjudicate a pre-enforcement challenge before the Commission completed its preliminary investigation or made any enforcement determination. The Sixth Circuit denied rehearing. (Pet. App. 85a) This petition followed.

REASONS FOR GRANTING THE PETITION

This petition presents an important and recurring question concerning the constitutional boundary between a State's preliminary investigation of alleged judicial misconduct and an Article III injury from threatened enforcement. The court of appeals held that Respondent had standing to obtain a permanent federal injunction even though the Commission never initiated formal charges, never held an adjudicative hearing, and never imposed discipline. That conclusion rests principally on a Commission-approved proposed agreed order that Respondent never accepted and that, by its own terms, would have waived formal proceedings only if accepted.

The decision warrants review under Rule 10(c). It resolves an important federal question that this Court has not settled: whether a preliminary disciplinary investigation and an unaccepted proposed consent disposition establish a sufficiently imminent threat of enforcement where the State has not commenced formal proceedings or imposed any presently binding sanction. It also extends this Court's pre-enforcement precedents beyond their limits by treating a contingent, nonfinal step

in a confidential disciplinary process as the equivalent of an actual enforcement action.

I. THIS CASE PRESENTS AN IMPORTANT, RECURRING ARTICLE III QUESTION THAT THIS COURT HAS EXPRESSLY LEFT UNRESOLVED

Article III permits a pre-enforcement challenge only when the plaintiff establishes a concrete and particularized injury that is actual or imminent. A plaintiff challenging a threatened enforcement action ordinarily must show an intention to engage in constitutionally protected conduct that is arguably proscribed and a credible threat that the law will be enforced against that conduct. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–60 (2014); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297–98 (1979).

This case presents the question left open in *Susan B. Anthony List*. There, the Court considered an Ohio regime under which a commission panel had made a probable-cause finding, a full administrative hearing had been set, discovery had begun, and the proceedings were backed by possible criminal prosecution. The Court held that the combined threats were sufficient, but expressly declined to decide whether the burdens of the administrative proceedings standing alone would establish Article III injury. *Susan B. Anthony List*, 573 U.S. at 165–66.

The decision below answers that reserved question in a materially different setting. Kentucky’s preliminary process is confidential and serves to determine whether formal proceedings should be initiated. The Commission

did not institute formal charges; authorize an adversarial hearing; make a final finding of a violation; or impose a sanction—the Commission solely asked the judge for preliminary information it was required by Supreme Court Rule to seek. The proposed agreed order did not alter that posture. It offered a consensual disposition that Respondent could accept or reject; she rejected it. Yet the court of appeals held that these nonfinal steps, coupled with Respondent’s asserted subjective chill and intended future speech, were enough to establish an imminent enforcement injury.

That question recurs across state judicial-discipline systems and other professional-regulatory regimes. States commonly use preliminary inquiries, warning communications, informal conferences, and voluntary consent resolutions to screen complaints without immediately commencing formal adjudicative proceedings. If those preliminary measures themselves establish Article III injury, any target of an inquiry may seek to enjoin the process before the responsible authority decides whether to bring charges. The resulting federal intervention is especially consequential where, as here, a state supreme court has prescribed the investigative process for the discipline of its own judges.

II. THE SIXTH CIRCUIT’S EXPANSION OF *SUSAN B. ANTHONY LIST* UNDERMINES KENTUCKY’S CONSTITUTIONALLY AUTHORIZED SYSTEM FOR DISCIPLINING ITS JUDICIARY

Kentucky has assigned judicial discipline to a system established under its Constitution and administered under rules of its highest court. Section 121 vests the

Commonwealth with authority to discipline judges for misconduct; pursuant to that authority, the Kentucky Supreme Court created the Judicial Conduct Commission, prescribed a confidential preliminary investigation, and retained review of the Commission's disciplinary decisions. Under SCR 4.170, the preliminary investigation is not a discretionary preliminary gesture. It is the mandatory threshold process by which the Commission determines whether formal proceedings should be initiated. Only after that determination may the matter proceed to a formal evidentiary hearing.

That sequencing reflects a state judicial judgment of institutional design. It protects judges from public and formal discipline based on untested allegations while preserving the Commission's ability to investigate complaints, gather information, and decide whether charges are warranted. The Sixth Circuit's rule defeats both features. It permits a federal court to halt the required state-court-created process before the Commission completes the investigation that Kentucky law makes the prerequisite to a charging decision—and before the Kentucky Supreme Court's review structure can operate.

This case illustrates why that preliminary inquiry is indispensable. Unlike many pre-enforcement challenges, the existence of any potential disciplinary violation depended upon the resolution of a factual question the Commission had not yet answered: whether Judge Dutton's statement was actually false. The Commission expressly disavowed any intention to discipline truthful—or even merely misleading—statements. If the investigation established that Judge Dutton's statement was true, or

that the available evidence was insufficient to establish falsity, the matter would have ended without formal proceedings. The Commission therefore had not yet formed a view regarding whether Rule 4.1(A)(11) had been violated, much less whether discipline should be pursued. By treating the Commission's effort to answer that threshold factual question as a sufficiently credible threat of enforcement, the Sixth Circuit treated the Commission's mandatory effort to determine whether any violation existed as the constitutional injury.

The Commission's preliminary process also serves interests that this Court has held uniquely weighty in the judicial-election context. *Williams-Yulee v. Florida Bar* recognizes that States may regulate judicial-candidate speech to protect public confidence in the integrity and impartiality of the judiciary, an interest of the highest order; *Caperton v. A.T. Massey Coal Co.* likewise recognizes the constitutional significance of public confidence in judicial integrity. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444–46, 460–61 (2015); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009). Those authorities do not dilute First Amendment protections or create standing where Article III is absent. They do, however, confirm why the standing threshold must preserve Kentucky's ability to conduct the fact-gathering that is indispensable to distinguishing protected speech from sanctionable knowing falsehoods.

This Court has recognized the special federalism interests implicated when a State's highest court supervises professional discipline through a constitutionally authorized system. In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, the Court held that

the State’s interest in maintaining professional discipline was “extremely important” and that the relationship between the state supreme court and its disciplinary bodies warrants federal-court deference. 457 U.S. 423, 434–35 (1982). *Middlesex* arose under *Younger* and therefore does not itself decide standing here. But its federalism principle confirms why Article III must not be expanded to authorize federal intervention at an earlier, nonfinal investigative stage that the State’s highest court has deliberately required.

The decision below reverses the constitutional order of Kentucky’s process. It allows a federal court to decide whether the Commission may investigate and enforce its judicial-conduct rules before the Commission has decided whether enforcement will even occur, and before the Kentucky Supreme Court’s state-law procedures for considering discipline can run their course. That is not merely an erroneous application of a properly stated standing rule—it is a structural alteration of the division of responsibility between federal courts and a State’s highest court in the governance of that State’s judiciary.

The Court should grant review to confirm that *Susan B. Anthony List* does not require—or permit—federal courts to treat a State’s mandatory preliminary disciplinary inquiry as a completed enforcement action. Otherwise, the decision below will invite federal challenges at the very stage state supreme courts have chosen to conduct confidential fact-gathering and screen complaints, thereby disabling the state systems before they can determine whether formal discipline is justified.

III. THE DECISION BELOW EXTENDS THIS COURT'S PRE-ENFORCEMENT-STANDING CASES BEYOND THE ENFORCEMENT THREATS THOSE CASES REQUIRED

This Court's precedents permit a party to challenge a law without first subjecting herself to prosecution, but they do not dispense with the requirement of an imminent, objectively grounded injury. In *Babbitt*, the plaintiffs alleged planned conduct arguably proscribed by law and a credible threat of prosecution under a statute that facially reached that conduct; the State had not disavowed criminal enforcement. *Babbitt*, 442 U.S. at 297–303. In *Susan B. Anthony List*, the plaintiff had already faced a probable-cause determination, scheduled proceedings with discovery, and the additional prospect of criminal prosecution. 573 U.S. at 162–66.

Those precedents do not establish that a nonfinal investigatory step or an unaccepted settlement proposal is itself enforcement. To the contrary, *Susan B. Anthony List* reserved that precise issue. The Sixth Circuit's contrary approach strips the distinction of practical force: after receiving a complaint and conducting the preliminary inquiry required by Kentucky law, the Commission may now face federal litigation before it decides whether any formal enforcement is appropriate.

The decision also relaxes the requirement that an alleged future injury rest on more than a chain of contingent events. This Court has emphasized that a claimed future injury cannot depend on speculation about how government officials and independent decisionmakers will exercise their discretion. *Clapper v. Amnesty*

International USA, 568 U.S. 398, 409–14 (2013). Here, formal discipline would have depended on completion of the preliminary inquiry, identification of the specific rules believed to be implicated, a decision voted on by a majority of the Commission members to authorize charges, an adjudicative process, and a final disposition. *None* of these events occurred. The court of appeals nevertheless treated a proposed consensual resolution as enough to bridge those contingencies. But the proposed resolution is not dispositive of what violations would or could have even been pursued in formal proceedings.

But most importantly, the Commission first had to determine whether Judge Dutton’s statement was false at all. That factual predicate had never been established. Indeed, the investigation existed precisely so the Commission could determine whether the evidence—both that in its possession and that which was yet to be obtained—established falsity. If the Commission concluded the statement was true—or that the available evidence failed to establish falsity—the disciplinary process would have ended immediately. The Sixth Circuit nevertheless assumed the existence of a credible enforcement threat before the Commission completed the inquiry necessary to determine whether any violation existed.

This Court has recognized, in multiple contexts, that judicial review ordinarily awaits a sufficiently definitive governmental position. *See First Choice Women’s Res. Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1128 (2026); *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 478–79 (2021); *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986). Although those cases arose in different constitutional settings, they reflect the same

practical reality: until the government commits itself to a position regarding how it intends to apply the challenged law, a court cannot reliably determine whether a concrete controversy exists.

That principle has particular force here. Throughout this litigation, the Commission consistently maintained that it had not completed the factual investigation required by Kentucky Supreme Court Rule 4.170 and therefore had not determined whether Respondent's statements were false, whether Rule 4.1(A)(11) had been implicated, or whether formal proceedings were warranted. To be sure, Respondent alleged an intention to make similar statements during a future campaign, and the court of appeals relied on that allegation. But the relevant Article III question is whether the Commission's nonfinal investigative conduct created a sufficiently imminent threat that the Code would be enforced against that future speech. It did not. A proposed agreed resolution concerning past speech was not a final enforcement decision and neither compelled nor prohibited Respondent's future speech. Treating that preliminary settlement proposal as conclusive evidence of imminent future enforcement enlarges Article III jurisdiction beyond the concrete enforcement threats recognized in this Court's precedents.

Treating that preliminary settlement proposal as conclusive evidence of imminent future enforcement allowed the Sixth Circuit to find a "credible threat" before the Commission had even committed itself to a position on whether Rule 4.1(A)(11) had been implicated at all. That decision below extends this Court's pre-enforcement-standing precedents beyond the concrete enforcement threats those cases required.

**IV. THE QUESTION IS OUTCOME-DETERMINATIVE,
CLEANLY PRESENTED, AND SUITABLE FOR
THIS COURT'S REVIEW NOW**

The standing issue was raised by the Commission, decided by the Sixth Circuit, and preserved through the petition for rehearing. It is antecedent to every merits issue. A ruling that Respondent lacked Article III standing would require vacatur of the merits judgment and permanent injunction, without any need to resolve the underlying First Amendment questions.

This case also presents the issue on a developed record. The material facts concerning the procedural posture are undisputed: the Commission received a complaint, opened a preliminary inquiry pursuant to SCR 4.170(2), sent Respondent notice of the complaint, proposed an agreed resolution, and did not commence formal proceedings or impose discipline. The Commission did not make any probable cause determination or in any way indicate intent to pursue charges. The only question is the legal consequence of those facts under Article III.

Nor is this petition a request for routine error correction. Rule 10 recognizes that certiorari may be warranted when a court of appeals decides an important federal question that should be settled by this Court or decides an important federal question in tension with relevant decisions of this Court. Supreme Court Rule 10. This case satisfies that standard because the decision below answers an important question expressly reserved in *Susan B. Anthony List* and redraws the line between preliminary investigation and threatened enforcement in a manner that affects state disciplinary systems nationwide.

**V. THIS COURT SHOULD GRANT THE PETITION
TO AFFIRM THAT ARTICLE III DOES NOT
CONVERT EVERY PRELIMINARY INQUIRY
INTO A JUSTICIABLE ENFORCEMENT
CONTROVERSY**

The Federal Judiciary may not adjudicate constitutional disputes based on a plaintiff's subjective apprehension of possible future governmental action. *Clapper*, 568 U.S. at 416–18. Yet that is the practical consequence of the judgment below: a confidential preliminary investigation and a declined consent proposal now suffice to halt a State's disciplinary process before the State decides whether to file charges.

The Court should grant review to clarify the line left open in *Susan B. Anthony List*: whether a nonfinal disciplinary inquiry and an unaccepted proposed consent disposition, absent formal charges, an adjudicative finding, a presently binding sanction, or an independently imminent coercive consequence, establish the concrete and imminent injury Article III requires. The answer will determine when federal courts may intervene in state disciplinary investigations and will restore the constitutional distinction between investigating a complaint and enforcing a rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT,
FILED APRIL 1, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 25-5352/5391

HON. DONNA GREENWELL DUTTON,

Plaintiff-Appellant/Cross-Appellee,

v.

JIMMY SHAFFER, IN HER OFFICIAL
CAPACITY AS THE EXECUTIVE SECRETARY
OF THE JUDICIAL CONDUCT COMMISSION;
HON. R. MICHAEL SULLIVAN, HON. JEFF S.
TAYLOR, HON. ELIZABETH CHANDLER, HON.
EDDY COLEMAN, HON. JOE E. ELLIS, AND
HON. JANET LIVELY MCCAULEY, IN THEIR
OFFICIAL CAPACITIES AS MEMBERS OF THE
JUDICIAL CONDUCT COMMISSION,

Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court for the
Eastern District of Kentucky at Frankfort. No. 3:23-cv-
00039—Gregory F. Van Tatenhove, District Judge.

Argued: March 5, 2026
Decided and Filed: April 1, 2026

Appendix A

Before: GIBBONS, WHITE, and MURPHY, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. This appeal arises from Donna Greenwell Dutton’s lawsuit against the Kentucky Judicial Conduct Commission (JCC) for attempting to enforce state judicial ethics rules against her. The JCC suspected that Dutton’s statement to a newspaper during her campaign for reelection ran afoul of three rules in the Kentucky Code of Judicial Conduct (KCJC). After the JCC sent Dutton a Proposed Agreed Order to discipline her, Dutton sued Jimmy Shaffer, in her official capacity as Executive Secretary of the JCC, as well as R. Michael Sullivan, Jeff S. Taylor, Elizabeth Chandler, Eddy Coleman, Joe E. Ellis, and Janet Lively McCauley, in their official capacities as Members of the JCC.

Alleging that the JCC’s attempt to enforce the KCJC violated her free speech rights under the First Amendment, Dutton pled one facial challenge and one as-applied challenge to each of the three rules. The district court granted summary judgment and ordered permanent injunctive relief in favor of Dutton based on her as-applied challenge to Rule 4.1(A)(11), which prohibits judicial candidates from making false statements of material fact. Yet the court rejected Dutton’s as-applied challenges to Rule 1.2, which requires judicial candidates to uphold judicial independence, integrity, and impartiality, and Rule 2.4(B), which prohibits them from allowing personal relationships to influence judicial conduct or judgment.

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The court also denied Dutton relief based on her facial challenges to all three Rules.

We affirm in part and reverse in part the district court's order. While the district court properly granted Dutton's motion for summary judgment and a permanent injunction based on her as-applied challenge to Rule 4.1(A)(11), it erred in denying her motion based on her as-applied challenges to Rules 1.2 and 2.4(B).

I.

Dutton is a sitting Kentucky district court judge in and for the 53rd Judicial Circuit, which includes Anderson, Shelby, and Spencer Counties. She was a judge when she sought reelection in 2022. On October 24, 2022, Dutton made a statement to *The Sentinel-News*. The newspaper published her statement in an article titled *Hot-Button Issues Keeping Races Lively*, which discussed Dutton's disciplinary history. The article explained that the JCC had suspended her in 2020 for accusing defense counsel of stealing from her husband and engaging in other misconduct during a bench conference.

The article referred to Dutton's conduct in 2020 while presiding over a bench conference in *Commonwealth v. Carter*, a state court case. According to the JCC, Dutton "falsely accused a local attorney of stealing money from her husband's law firm," did not recuse herself from the case, and interfered with the attorney's right to obtain a video copy of the bench conference. DE 1-7, JCC Proposed Agreed Order, Page ID 47. Dutton has emphasized that

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the JCC disciplined her because she made inappropriate comments—not because she made false statements.

This suit concerns the JCC’s enforcement against Dutton for the statement she made to *The Sentinel-News* about this prior issue. Dutton stated, “‘That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent.’ . . . ‘I let my personal feelings about the theft interfere with my courtroom conduct and for that I apologize. No litigants were affected by my actions, and the only person hurt was me.’” DE 1-4, Newspaper Article, Page ID 24.

On January 23, 2023, Jimmy Shaffer sent Dutton a letter on behalf of the JCC to inform her that a disciplinary complaint had been filed against her regarding the “alleged statements [she] made to *The Sentinel-News* in response to questions about [her] previous suspension by the Commission[.]” DE 1-5, JCC 2023 Letter, Page ID 25. The JCC’s letter recounted the complaint’s allegations that Dutton made false statements in the newspaper article regarding her previous suspension. In the article, as described above, Dutton stated the following: “That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent. . . . No litigants were affected by my actions, and the only person hurt was me.” *Id.* The complaint alleged that Dutton’s statements were false because no theft occurred, no theft was undertaken by an attorney who practiced law with Dutton’s opponent, and the litigant in *Carter* was indeed harmed because Dutton’s failure to recuse herself caused him to “live and work under bond conditions longer than

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necessary.” *Id.* In its letter, the JCC requested that Dutton provide a “written response to the allegations” by February 27, 2023. *Id.*

Dutton responded on February 24, 2023. She asserted that her statement to the newspaper was “fair and accurate” in “addressing both the events precipitating her suspension and the suspension itself.” DE 1-6, Response to JCC Letter, Page ID 26. Although the JCC’s letter did not identify specific rules that Dutton had violated, Dutton anticipated potential enforcement based on “Supreme Court Rule 4.300, [KCJC], Canon 4, or any other provision of the Code.” *Id.* Dutton also specifically noted that her “statement . . . did not violate Rule 4.1(A)(11),” which prohibits a judge or judicial candidate from “knowingly, or with reckless disregard for the truth, mak[ing] any false statement of material fact.” *Id.* Dutton explained why each statement was not false.

We recount Dutton’s responses and other evidence pertinent to each statement’s veracity in the summary-judgment record. Dutton first stated that her prior disciplinary issue “involved the theft of a large sum of money by an attorney. . . .” DE 1-4, Newspaper Article, Page ID 24. Some background is in order. Dutton’s husband, C. Gilmore Dutton III, is an attorney in Kentucky who employed Cole Tomlinson—the defense counsel in *Carter*. Mr. Dutton discovered that Tomlinson over several months had “diverted to himself funds from clients that should have been paid to Mr. Dutton’s firm[.]” DE 31, Verified Am. Compl., Page ID 323; DE 1-6, Response to JCC Letter, Page ID 27; DE 34-1, Aff. Decl.

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C. Gilmore Dutton III, Page ID 370. According to Mr. Dutton, he learned of the theft when his firm received an IRS Form indicating that the firm had “been paid money from various clients, which were never received in [the firm’s] office.” DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 370. The fees Tomlinson stole were “substantial,” but no audit was conducted. DE 1-6, Response to JCC Letter, Page ID 27-29; DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 371.

After discovering the theft, Mr. Dutton terminated Tomlinson’s employment, reported his conduct to the Kentucky Bar Counsel, and demanded repayment. Tomlinson tendered Mr. Dutton a check dated January 30, 2019. The check reflects a payment of \$2,150.00 to the “Dutton Law Office.” DE 1-2, Check Repaying Trust Funds, Page ID 19. Mr. Dutton chose “not to pursue the complaint” or civil or criminal remedies against Tomlinson, and “it is believed that the complaint” was “dismissed by the [Kentucky Bar Association].” DE 1-6, Response to JCC Letter, Page ID 27; DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 371. Dutton alleged that this theft was a “fact,” and emphasized that her ethical violations in 2020 were based on the impropriety of her remarks rather than their veracity. DE 31, Verified Am. Compl., Page ID 324, 324 n.1.

Next, the JCC flagged Dutton’s statement concerning Tomlinson’s practice of law with Dutton’s opponent in the Kentucky judicial election. The JCC first implied and later proposed a finding that the statement was false because Tomlinson did not “*practice law*” with Dutton’s opponent.

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See DE 1-5, JCC 2023 Letter, Page ID 25 (emphasis added); DE 1-7, JCC Proposed Agreed Order, Page ID 48.

Dutton responded that Tomlinson practiced law or “shared office space with” her opponent. DE 1-6, Response to JCC Letter, Page ID 27, 29; *see* DE 31, Verified Am. Compl., Page ID 326. Specifically, she alleged that Tomlinson and her opponent, Amanda Wills Cypert, not only “shared office space” and “secretarial staff,” but also “covered hearings for each other from time to time.” DE 31, Verified Am. Compl., Page ID 326. Mr. Dutton confirmed that Tomlinson, at the time of his termination, was in an office-sharing arrangement or casual attorney association with Dutton’s opponent in an office located at 301 Washington Street, Shelbyville, KY 40065. Further, Mr. Dutton believed that Tomlinson had worked there since he was fired. Mr. Dutton also confirmed that “Cypert . . . shares office space, works with, or is associated with Mr. Tomlinson” at that address. DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 371-72.

The JCC then cited as false Dutton’s remark that “[n]o litigants were affected by [her] actions, and the only person hurt was” Dutton. DE 1-5, JCC 2023 Letter, Page ID 25. According to the complaint, Dutton’s “actions delayed resolution of Mr. Carter’s case and caused him to live and work under bond conditions longer than necessary,” and Dutton “sought to harm litigants when [she] failed to recuse from the attorney’s cases.” *Id.*

Dutton responded that any concern regarding delay in Carter’s case was “speculative” and unsupported by the

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record. DE 1-6, Response to JCC Letter, Page ID 31. She noted that her statement was an expression of subjective opinion. When Carter appeared without counsel for his arraignment before Dutton on July 2, 2019, Dutton set his next appearance for July 18, 2019. Carter appeared with counsel for the first time then and requested that Dutton recuse herself. During a bench conference to discuss the recusal motion, Dutton accused Tomlinson of theft. Dutton recused herself later that same day. “[O]nly a couple of hours had lapsed between” Dutton’s comment and her recusal. DE 41, Depo. Tr. Donna Dutton, Page ID 479.

After Dutton’s recusal, Carter’s case was re-docketed for July 25, 2019; and on that date, the new judge imposed a sentence of six months deferred and scheduled a review for January 23, 2020. Dutton claimed that it was not clear that Carter’s “case would have been resolved—or [his] bond conditions modified—earlier but for [her] conduct,” so the JCC’s assertion of falsity was “speculative[.]” DE 1-6, Response to JCC Letter, Page ID 32. She stated that Carter’s case was not delayed because of her recusal and that Carter would agree that no litigants were affected and only she was hurt. Dutton further asserted that it is a stretch to suggest that, even if her conduct played a role in creating a delay, Carter was harmed by a “one-week delay in the resolution of his case[.]” *Id.*

On May 17, 2023, Jeff Mando, the JCC’s outside counsel, sent Dutton’s counsel, Guthrie True, an email with a “proposed Public Reprimand” attached. DE 39-6, Email Correspondence, Page ID 563. This proposed reprimand was the JCC’s Proposed Agreed Order, which

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directly led to Dutton’s suit. The Proposed Agreed Order, titled “In Re the Matter of: Donna G. Dutton, District Court Judge 53rd Judicial Circuit,” would have Dutton “waive[] formal proceedings and . . . agree[] to” its disposition. DE 1-7, JCC Proposed Agreed Order, Page ID 47. In the document, the JCC concluded the following: (1) Dutton’s remark about the theft was “inaccurate, and inappropriately attempt[ed] to undermine the severity of her prior judicial misconduct,” (2) Dutton’s remark about the attorney who committed the theft practicing law with her opponent was an attempt to “inappropriately fabricate a conspiracy in furtherance of her election objectives,” and (3) Dutton’s remark that no litigants were harmed was false and “downplay[ed] the severity of her prior misconduct.” *Id.* at 47-48.

On these bases, the JCC proposed “that Judge Dutton’s conduct violated” Kentucky Supreme Court Rule (SCR) 4.020(1)(b)(i), SCR 4.300, and Kentucky Rules of Judicial Conduct (Rules) 4.1(A)(11), 1.2, and 2.4(B). *Id.* at 48-49. Rule 4.1(A)(11) bars judges and judicial candidates from “knowingly,[] or with reckless disregard for the truth, mak[ing] any false statement of material fact[.]” DE 42-7, Rule 4.1, Page ID 718. Rule 1.2 requires them to uphold the independence, integrity, and impartiality of the judiciary and Rule 2.4(B) prohibits them from allowing “family, social, political, financial, or other relationships” to influence their judicial conduct or judgment. DE 42-14, JCC Proposed Agreed Order, Page ID 754-55. The Order purported to “publicly reprimand[]” Dutton. DE 1-7, JCC Proposed Agreed Order, Page ID 49.

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In response to Mando's email including the Order, True replied, "Before I send this to [Dutton], how wedded are you to the language used? I need to know whether there can be revisions." DE 39-6, Email Correspondence, Page ID 562. Mando responded that the JCC "approved the document," and "[i]f [True has] proposed changes, send them to me and I will discuss with the Commission." *Id.* Dutton believed True could not make any revisions and that there would be no "negotiations regarding the fact" that the Order would be a public reprimand and "no negotiation of [its] content." DE 41, Depo. Tr. Donna Dutton, Page ID 523-25, 527-28. True has also stated that "Mr. Mando [had] indicated that the [JCC] was wed[ded] to a public reprimand[.]" DE 43-1, Aff. Decl. J. Guthrie True, Page ID 781. Because she "was not going to agree to a lie," Dutton declined to agree to the Order. DE 41, Depo. Tr. Donna Dutton, Page ID 527. And given the JCC's enforcement activity, Dutton felt "too scared to say anything" publicly. *Id.*

II.

On May 24, 2023, Dutton filed her original complaint, which pled as-applied and facial challenges to the three Rules, and concurrently moved for emergency injunctive relief. Specifically, Dutton requested a preliminary injunction or temporary restraining order prohibiting the defendants from instituting formal proceedings against her. On September 15, 2023, the district court denied Dutton's motion for a preliminary injunction because Dutton had won her election, so she no longer "face[d] a threat of imminent, irreparable harm." DE 17, Order, Page ID 208. Dutton timely appealed.

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On January 22, 2024, Dutton filed a verified amended complaint, now operative, in which she pled both facial and as-applied challenges to Rules 4.1(A)(11), 1.2, and 2.4(B). Part I of Count I includes Dutton’s as-applied challenges to the Rules, and Part II includes her facial challenges to the Rules. Each part contains a request for permanent injunctive and declarative relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202. The defendants promptly answered Dutton’s verified amended complaint.

On April 1, 2024, Dutton moved for summary judgment and a permanent injunction against the defendants, and, in response, the defendants made a cross-motion for summary judgment on Dutton’s claims. Before the district court ruled on the parties’ motions for summary judgment, we vacated its decision denying Dutton’s request for a preliminary injunction. *Dutton v. Shaffer*, No. 23-5850, 2024 WL 3831884, at *5 (6th Cir. Aug. 15, 2024). We remanded with instructions for the court to conduct the preliminary injunction analysis “in its entirety,” as it had analyzed only the irreparable harm factor and not Dutton’s likelihood of success on the merits. *Id.*

Following our order, the district court granted in part and denied in part Dutton’s request for a preliminary injunction. And just over two months later, the court granted in part and denied in part Dutton’s and the defendants’ motions for summary judgment. The court denied Dutton a permanent injunction based on her facial challenges to all three Rules and her as-applied challenges to Rules 1.2 and 2.4(B). The court, however, sustained Dutton’s as-applied challenge to Rule 4.1(A)(11)

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because the JCC’s enforcement “r[an] afoul of the First Amendment.” DE 52, Op. & Order, Page ID 857. On April 3, 2025, the district court entered its judgment granting Dutton a permanent injunction limited to the defendants’ enforcement of Rule 4.1(A)(11) against Dutton for her statement to *The Sentinel-News*. Dutton filed her notice of appeal on April 15, 2025, and the defendants filed their notice of cross-appeal on April 25, 2025.

III.

We may assess whether a plaintiff has standing to sue because standing is vital to our exercise of subject matter jurisdiction. *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607 (6th Cir. 2007). In determining standing at summary judgment, we accept as true the plaintiff’s evidence-backed allegations. *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1022 (6th Cir. 2024).

We review de novo a district court’s grant of summary judgment. *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016). Summary judgment is appropriate where a party establishes that there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it could affect the suit’s outcome under the governing law, and an issue about a material fact is genuine if the evidence would allow a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We believe the non-moving party’s evidence and draw all justifiable inferences in that party’s favor. *Morales v. Am. Honda Motor Co.*,

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71 F.3d 531, 535 (6th Cir. 1995). These standards do not change when parties advance cross-motions for summary judgment. *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 387 (6th Cir. 2016). We consider each motion on its own. *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991).

Regarding a permanent injunction, we review its grant or denial for an abuse of discretion. *United States v. Miami Univ.*, 294 F.3d 797, 806, 820 (6th Cir. 2002); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). A district court abuses its discretion when it relies on “clearly erroneous findings of fact or when it improperly applies the law.” *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 317 (6th Cir. 2001). To reverse, we must have a “definite and firm conviction that the trial court committed an error of judgment.” *Pouillon v. City of Owosso*, 206 F.3d 711, 714 (6th Cir. 2000) (quoting *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991)).

IV.

The district court granted summary judgment and entered a permanent injunction in favor of Dutton based on her as-applied challenge to Rule 4.1(A)(11), and it granted summary judgment in favor of the defendants and denied Dutton relief based on her other challenges. Dutton appeals the court’s denial of her as-applied challenges to Rules 1.2 and 2.4(B) and her facial challenges. On cross-appeal, the defendants contest the district court’s grant of summary judgment and entry of a permanent injunction

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based on Dutton’s as-applied challenge to Rule 4.1(A)(11). The defendants also raise on appeal Dutton’s standing to sue and the Proposed Agreed Order’s admissibility. We consider in turn Dutton’s standing to sue, the Order’s admissibility, and Dutton’s as-applied challenges to Rules 4.1(A)(11), 1.2, and 2.4(B).

A.

Dutton has standing to bring her pre-enforcement challenge because she has established injury in fact. She expressed an intent to engage in campaign speech in a manner arguably proscribed by the Rules. Moreover, she established a credible threat that the JCC will enforce the Rules against her. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). We have also found standing in similar cases. *See Fischer v. Thomas*, 52 F.4th 303, 307-09 (6th Cir. 2022) (per curiam); *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016).

Although the district court did not assess whether Dutton had standing to bring her First Amendment claims, the defendants contend that she did not. The defendants contest only the injury in fact element, which depends in this case on whether the “threatened enforcement of a law creates an Article III injury.” *See Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334. Specifically, they assert that Dutton failed to establish a “sufficiently concrete and imminent” injury because she showed no credible threat that the JCC would enforce the KCJC generally or these Rules specifically. CA6 R. 22, Defs.’ Br., Page ID 23-24. They

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reason that the JCC never “actually applied” the Rules to Dutton, as Dutton’s claims relied on a “*draft* Agreed Order of Public Reprimand” written amid “settlement discussions,” and the JCC did not guarantee that it would enforce the exact Rules identified in its Order if it pursued formal charges. *Id.* at 22-24 (emphasis in original).

It is well-established that a litigant subject to a threat of enforcement need not await “actual arrest, prosecution, or other enforcement action” to establish injury in fact. *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334; accord *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007). But the litigant must still show that enforcement is “sufficiently imminent.” *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334; *Crawford v. U.S. Dep’t of Treasury*, 868 F.3d 438, 454-55 (6th Cir. 2017).

Threatened enforcement is sufficiently imminent where a party “has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Driehaus*, 573 U.S. at 160, 134 S.Ct. 2334 (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). In *Driehaus*, a congressman filed a complaint with the Ohio Elections Commission, urging it to enforce a false statement statute against a pro-life group. *Id.* at 153-54, 134 S.Ct. 2334. The petitioner group, Susan B. Anthony List (SBA), filed a pre-enforcement suit based on the First Amendment because its speech had been “chilled,” it intended to engage in “substantially

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similar activity in the future,” and it faced the possibility of future action based on this speech. *Id.* at 154-55, 134 S.Ct. 2334.

First, the Court concluded that SBA intended to engage in a course of conduct affected with a constitutional interest because it had made statements that it sought to make in future election cycles and those statements were political speech in a campaign for political office. *Id.* at 161-62, 134 S.Ct. 2334. Second, the Court reasoned that SBA’s speech was “arguably proscribed” by the Ohio false statement statute given its broad sweep and the fact that the Commission panel had “already found probable cause to believe that SBA violated the statute[.]” *Id.* at 162, 134 S.Ct. 2334; *see also Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301 (requiring that a party show that the statute “arguably” proscribes the plaintiff’s conduct). Third, the Court proceeded to find that the threat of the statute’s enforcement was “substantial” based on the following factors: a history of past enforcement, the Commission’s findings, the ease with which a person could lodge a complaint with the Commission, the frequency of Commission proceedings, and the fact that the respondents did not disavow enforcement. *Driehaus*, 573 U.S. at 164-65, 134 S.Ct. 2334.

In accordance with the third part of the *Driehaus* Court’s analysis, we have determined that a credible threat exists where a plaintiff alleges a subjective chill and some combination of these factors, which we refer to as the *McKay* factors. *See McKay*, 823 F.3d at 869. No credible threat of enforcement exists where the record is “silent as

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to whether the [defendants] threatened to punish or would have punished” the plaintiff for conduct that might violate the challenged law. *Id.* (quoting *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008)); *Kareem*, 95 F.4th at 1023, 1025-26; *Fischer*, 52 F.4th at 307-08.

Driehaus compels us to conclude that Dutton has standing. As a preliminary matter, Dutton alleged and stated under oath that she filed suit because the JCC’s measures chilled her speech; that she intends to run for a judgeship in 2026, make public appearances, and respond to media inquiries as she did in *The Sentinel-News*; and that she faces the threat of the JCC’s enforcement for her speech. *See Driehaus*, 573 U.S. at 154-55, 134 S.Ct. 2334. First, Dutton has expressed an intent to engage in constitutionally protected speech in support of her judicial campaign. *See id.* at 161-62, 134 S.Ct. 2334. She intends to speak about her qualifications and earlier disciplinary controversy. And her speech is protected political speech in a campaign for office. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 436, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (“Judicial candidates have a First Amendment right to speak in support of their campaigns.”); *Winter*, 834 F.3d at 695-96 (“If the Commission wishes to impose mandatory sanctions on the speech of judicial candidates for office, . . . it must satisfy the rigors of the First Amendment in doing so.”); *see also Kiser v. Reitz*, 765 F.3d 601, 608 (6th Cir. 2014); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

Second, the Rules arguably proscribe Dutton’s speech. *See Driehaus*, 573 U.S. at 160, 162, 134 S.Ct. 2334; *see*

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also DE 31, Verified Am. Compl., Page ID 327-30. Rule 4.1(A)(11) bars judicial candidates from “knowingly,[] or with reckless disregard for the truth, mak[ing] any false statement of material fact[.]” DE 42-7, Rule 4.1, Page ID 718. Rule 1.2 requires them to uphold the independence, integrity, and impartiality of the judiciary, and Rule 2.4(B) forbids them from allowing “family, social, political, financial, or other relationships” to influence their conduct or judgment. DE 42-14, JCC Proposed Agreed Order, Page ID 754-55. Dutton’s speech regarding the “theft of a large sum of money” could be deemed a knowingly false statement of material fact. *See, e.g.*, DE 1-4, Newspaper Article, Page ID 24 (“That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent [.] . . . No litigants were affected by my actions, and the only person hurt was me.”). As the defendants suggest, false statements of material fact regarding prior discipline could be deemed an “affront” to the judiciary’s integrity. *See* DE 39, Defs.’ Mot. for Summ. Judgment, Page ID 425. And making a false “comment about a certain attorney stealing money from [her] husband” could reflect a personal relationship’s interference with judicial judgment. *See* DE 41, Depo. Tr. Donna Dutton, Page ID 477. These are “*plausible* interpretation[s]” of the Rules, so the Rules arguably proscribe Dutton’s conduct. *See Kentucky v. Yellen*, 54 F.4th 325, 337 (6th Cir. 2022).

The JCC, of course, also believed that the Rules barred Dutton’s speech. In its January 2023 letter, the JCC stated that a complaint had been lodged against Dutton based on her remarks. And in its Proposed Agreed Order, the

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JCC “conclude[d]” that Dutton’s conduct violated the three Rules. DE 1-7, JCC Proposed Agreed Order, Page ID 48-49; *see Driehaus*, 573 U.S. at 162, 134 S.Ct. 2334 (“[A] Commission panel here already found probable cause to believe that SBA violated the statute” when it made a statement similar to those it plans to make). Under these circumstances, “we have no difficulty concluding that [Dutton’s] intended speech is ‘arguably proscribed’ by the law.” *See Driehaus*, 573 U.S. at 162, 134 S.Ct. 2334; *Winter*, 834 F.3d at 687; *Boone Cnty. Republican Party Exec. Comm. v. Wallace*, 132 F.4th 406, 415-18 (6th Cir. 2025).

Third, Dutton has established a credible threat of enforcement because she alleged a subjective chill based on the JCC’s conduct and showed the applicability of at least four of the *McKay* factors. *See McKay*, 823 F.3d at 869. She alleged a subjective chill when she stated that the “continued threats of enforcement” were preventing her from responding to media inquiries in the way she responded to *The Sentinel-News*. DE 31, Verified Am. Compl., Page ID 329-30; *see McKay*, 823 F.3d at 869. And she emphasized that she was “too scared to say anything” publicly after receiving the JCC’s Proposed Agreed Order for a public reprimand. DE 41, Depo. Tr. Donna Dutton, Page ID 527.

With respect to the first factor, Dutton has shown a history of the JCC’s enforcement against her, but that past enforcement did not target the “same conduct” at issue here. *Cf. Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334; *Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 848-49 (6th Cir. 2024). The JCC’s earlier enforcement

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addressed Dutton's conduct when she presided over a bench conference and accused a local attorney of stealing from her husband's law firm. The enforcement activity at issue here, however, concerns her statement to *The Sentinel-News* regarding that earlier controversy. A prior instance of enforcement based on separate conduct does not necessarily portend a threat of later enforcement. *See Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334; *but see Fischer*, 52 F.4th at 308 (finding it relevant that the JCC had previously enforced rules against *other* candidates). Yet even assuming this factor cuts against finding a credible threat of enforcement, the remaining factors do not.

Because the JCC sent Dutton a warning letter regarding her statement and the Proposed Agreed Order, Dutton established the second factor. *See Driehaus*, 573 U.S. at 165, 134 S.Ct. 2334; *Kiser*, 765 F.3d at 609-10; *Berry v. Schmitt*, 688 F.3d 290, 296-98 (6th Cir. 2012). Dutton has also shown that the KCJC encourages enforcement, as anyone can file a complaint with the JCC about a judge's or judicial candidate's conduct. *See Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334; *Platt v. Board of Com'rs on Grievances and Discipline of Ohio Supreme Court*, 769 F.3d 447, 452 (6th Cir. 2014). Shaffer noted in sworn testimony on behalf of the JCC that complaints number in the "hundreds . . . each year," the JCC sent nineteen warning letters in one year, and four of those resulted in action, so enforcement proceedings are frequent. DE 42-5, Aff. Decl. Shaffer, Page ID 712-14; *see Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334 (finding that proceedings were "not a rare occurrence" because the Commission handled twenty to eighty complaints per year).

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And the defendants did not disavow enforcement against Dutton. *See Driehaus*, 573 U.S. at 165, 134 S.Ct. 2334; *McKay*, 823 F.3d at 869. In fact, informal conferences like the one JCC intended to have necessarily precede enforcement actions. We do not expect plaintiffs to satisfy each *McKay* factor. *See Fischer*, 52 F.4th at 307-08 (“This isn’t a laundry list; the candidates don’t have to satisfy all the factors.”). Because Dutton alleged a subjective chill and produced evidence to support these factors, she established a credible threat of enforcement. *See McKay*, 823 F.3d at 869.

While the *Driehaus* Court did not base its finding of imminence solely on the Commission’s proceedings, as SBA’s allegations were backed by the “additional threat” of criminal prosecution, it did not imply that the “burdensome . . . proceedings” could not have sufficed. *Driehaus*, 573 U.S. at 166, 134 S.Ct. 2334. We have decided that the threat of administrative enforcement confers standing based on records much like the one here. *See Kiser*, 765 F.3d at 609-10; *Winter*, 834 F.3d at 687; *Berry*, 688 F.3d at 296-98; *Fischer*, 52 F.4th at 308-09; *Platt*, 769 F.3d at 452; *see also Ohio C.R. Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625-26 n.1, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986). Dutton thus has standing to challenge the JCC’s enforcement of Rules 4.1(A)(11), 1.2, and 2.4(B).

B.

The defendants argue that the district court improperly considered the JCC’s Proposed Agreed Order

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because the Order is inadmissible pursuant to Federal Rule of Evidence 408. We disagree because Rule 408 does not exclude the Order.

Rule 408 states that a party cannot introduce evidence of an offer of “valuable consideration in compromising or attempting to compromise” a claim to “prove or disprove the validity or amount of a disputed claim[.]” Fed. R. Evid. 408(a)(1). The Rule “excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity *of the claim under negotiation.*” *Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B.*, 718 F.2d 269, 277 (8th Cir. 1983) (emphasis added).

Rule 408 does not exclude the Order because the claims in the Order are not the claims in Dutton’s suit. The Order discusses the JCC’s claims that Dutton violated the KCJC, but it does not discuss Dutton’s constitutional claims against the JCC. *See id.* Stated differently, the “claim[s] under negotiation” in the Order are not the claims at issue in this litigation. *See id.*; *Broadcort Cap. Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992) (“Rule 408 did not bar [the] evidence because it related to settlement discussions that involved a different claim than the one at issue in the current trial.”). In addition, Dutton does not seek to use the Order to “prove or disprove” the “validity” of her claims or the Commission’s findings. *See* Fed. R. Evid. 408(a)(1). She seeks to show the Commission’s “state of mind” about whether she violated the KCJC. *See Croskey v. BMW of N. Am., Inc.*, 532 F.3d 511, 519 (6th Cir. 2008); *Coakley & Williams Const., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349, 353-54

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(4th Cir. 1992). Therefore, the district court did not err in considering the Proposed Agreed Order.

C.

The district court properly sustained Dutton’s as-applied challenge to the JCC’s enforcement of Rule 4.1(A)(11) against her speech. We uphold the court’s decision because the JCC attempted to apply the Rule to statements that were “readily capable of a true interpretation” on the summary-judgment record, so its enforcement of Rule 4.1(A)(11) fails strict scrutiny review. *See Winter*, 834 F.3d at 693.

Specifically, the district court concluded that it could “conceive of a world” in which Dutton’s three statements to *The Sentinel-News* were “readily capable of a true interpretation,” or “at the very least . . . not made ‘knowingly, or with reckless disregard for truth.’” DE 52, Op. & Order, Page ID 851-52 (quoting Rule 4.1(A)(11)). The court determined that Dutton’s remark that the issue involved the theft of a large sum by an attorney who happened to practice law with her opponent could be deemed either an “opinion” or a “misleading statement on her prior disciplinary action,” both of which are protected under the First Amendment. *Id.* at 853-54. And it decided that Dutton’s statement that no litigants were affected by her actions and she was the only person hurt was a “matter of opinion and not subject to Rule 4.1(A)(11).” *Id.* at 854-55. The defendants stress that the record “contains sufficient evidence” that Dutton’s statement was “actually and materially false,” not a protected opinion or negligent misstatement. CA6 R. 22, Defs.’ Br., Page ID 30, 32.

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First, strict scrutiny applies to Rules 4.1(A)(11), 1.2, and 2.4(B). Each Rule is a content-based restriction on judicial candidates' speech, preventing speech "about some subjects . . . but not others," and referring to and being "justified with reference to" the contents of candidates' speech. *See Carey v. Wolnitzek*, 614 F.3d 189, 199 (6th Cir. 2010) (citation modified) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Indeed, strict scrutiny "applies to any State's efforts to regulate the campaign speech of sitting or aspiring judges." *Winter*, 834 F.3d at 688; *see Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). Rules facing strict scrutiny are "presumptively invalid" unless the restriction discriminates based on certain classes of unprotected speech, none of which is relevant here. *See Carey*, 614 F.3d at 199 (listing the "categorical carve-outs," including fighting words or incitement, defamation, obscenity, and child pornography). And these Rules target a "core area of free-speech protection: elections." *Id.*

Because strict scrutiny applies to Rule 4.1(A)(11), the JCC may enforce the Rule against Dutton's speech only in a manner "narrowly tailored to serve a compelling interest." *See O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015) (quoting *Williams-Yulee*, 575 U.S. at 442, 135 S.Ct. 1656). We have already decided that a constitutional prohibition on false statements—one nearly identical to Rule 4.1(A)(11)—cannot survive strict scrutiny as applied to a statement that is "readily capable of a true interpretation[.]" *Winter*, 834 F.3d at 693. Such an application is not narrowly tailored because it "outstrips" a state's interest in "ensuring candidates don't tell knowing

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lies and thus fails to give candidates the ‘breathing space’ necessary to free debate.” *Id.* (quoting *Brown v. Hartlage*, 456 U.S. 45, 60-61, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982)). And an application of Rule 4.1(A)(11) to speech that is not false would not further Kentucky’s compelling interest in preventing candidates from lying. *See id.*; *see also Berry*, 688 F.3d at 303 (statements of opinion that do not “imply a false assertion of fact” and seemingly factual statements that “‘cannot reasonably be interpreted as stating actual facts about their target’” are protected (quoting *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995))).

We agree that the Rule’s application to Dutton’s speech fails strict scrutiny review because it is not narrowly tailored to serve a compelling interest. The defendants stretched the Rule’s reach beyond materially false statements of fact to regulate speech that was either opinion-based or “readily capable of a true interpretation,” and they lacked a compelling interest in doing so. *See Winter*, 834 F.3d at 693.

First, the JCC’s attempt to enforce Rule 4.1(A)(11) against Dutton based on her statement about the theft cannot survive strict scrutiny because it is an attempt to enforce a prohibition on false statements to speech that is “readily capable of a true interpretation[.]” *See Winter*, 834 F.3d at 693. Dutton’s statement that the issue “involved the theft of a large sum of money by an attorney” is largely uncontroverted. *See* DE 1-4, Newspaper Article, Page ID 24. Mr. Dutton stated that he discovered Tomlinson’s diversion of client funds that should have been paid to

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Mr. Dutton's law firm; he discovered the theft after his firm received an IRS Form indicating it had been paid money that was never received; and Tomlinson stole "between \$25,000 and \$50,000" in fees. DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 370-71. The check that Tomlinson provided Mr. Dutton for part of the stolen funds reflected a payment of \$2,150.00 to the Dutton Law Office on January 30, 2019. And Dutton stated that the theft occurred, even if her comment about it during the bench conference was inappropriate.

While the defendants attempted to enforce Rule 4.1(A)(11) against Dutton by labeling this statement "inaccurate," they do not explain how it was false. DE 1-7, JCC Proposed Agreed Order, Page ID 47; *accord* DE 1-5, JCC 2023 Letter, Page ID 25; DE 39, Defs.' Mot. for Summ. Judgment, Page ID 421. As the district court reasoned, one cannot conclude that Tomlinson did not engage in the conduct Dutton described just because the Kentucky Bar Association (KBA) declined to discipline him and he was not criminally charged. Shaffer acknowledged on behalf of the JCC that Tomlinson's conduct would qualify as theft if he was not entitled to the money, that Shaffer had seen the documents indicating that Tomlinson diverted or kept for himself client fees or escrow funds, and that the absence of an investigation or of criminal charges does not mean that no theft occurred. The JCC's attempt to enforce Rule 4.1(A)(11) against Dutton was unconstitutional. *See Winter*, 834 F.3d at 693; *Brown*, 456 U.S. at 60-61, 102 S.Ct. 1523; *O'Toole*, 802 F.3d at 789.

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Moreover, the JCC could not constitutionally enforce Rule 4.1(A)(11) against Dutton for stating that Tomlinson “also happens to practice law with [her] opponent” in the election because this statement was also “readily capable of a true interpretation[.]” *See* DE 1-4, Newspaper Article, Page ID 24; *Winter*, 834 F.3d at 693. The JCC has stated that it sought to enforce the Rule against Dutton because Tomlinson did not “*practice law*” with Cypert. *See* DE 1-5, JCC 2023 Letter, Page ID 25 (emphasis added); *accord* DE 1-7, JCC Proposed Agreed Order, Page ID 48; DE 42, Depo. Tr. Shaffer, Page ID 678-80, 689-90.

Dutton alleged that Tomlinson “practiced law with” Cypert, as they shared office space, shared secretarial staff, and covered hearings for each other from “time to time.” *See* DE 31, Verified Am. Compl., Page ID 326. And Mr. Dutton stated that he believed Tomlinson was in an office-sharing arrangement or a casual attorney association with Cypert at the time that Mr. Dutton fired him, Tomlinson had worked there since he was fired, and Tomlinson and Cypert shared office space, worked together, or were associated together in one office. DE 34-1, Aff. Decl. C. Gilmore Dutton III, Page ID 371-72.

The JCC’s basis for claiming that Tomlinson and Cypert did not practice law together is unclear. Its Proposed Agreed Order indicated that the two attorneys “operated separate practices and kept separate office spaces,” and that Dutton misrepresented their relationship in a “transparent effort to inappropriately fabricate a conspiracy in furtherance of her election objectives . . . to downplay the severity of her prior misconduct.” DE

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1-7, JCC Proposed Agreed Order, Page ID 48. Shaffer acknowledged that the two attorneys shared office space but asserted that sharing office space cannot reasonably be understood as practicing law because some attorneys share a space without practicing together. Shaffer also acknowledged that there are no grounds to dispute that Tomlinson shared office space and support staff with Cypert, and that she did not know whether there was any reason to dispute that Tomlinson and Cypert occasionally covered cases for each other. The JCC labeled Dutton's statement as a false statement of material fact because it disagreed with the term that Dutton used to describe two attorneys sharing office space and covering the same cases—not because Dutton's factual bases were incorrect.

Yet the JCC's disagreement with Dutton's choice of words cannot remove her speech from the First Amendment's range of protection because disagreement is not evidence of falsity. Shaffer and the JCC adduced no facts besides their own Order's language that the two attorneys were *not* practicing law together. Shaffer did not dispute that the attorneys shared space and resources and that she did not know whether they covered cases for each other. In our view, Dutton's claim that two lawyers who share office space, support staff, *and* case-related duties are practicing law together is "readily capable of a true interpretation[.]" *See Winter*, 834 F.3d at 693. What qualifies as "practicing law" depends on the relevant definition but Shaffer noted that the JCC has no such definition. DE 42, Depo. Tr. Shaffer, Page ID 680. And while Shaffer noted that such an inquiry would be "fact specific," she marshaled no facts to support the JCC's

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position. *Id.* The JCC cannot enforce Rule 4.1(A)(11) against Dutton for stating that the lawyers practiced law together because the record reflects that the statement was “readily capable of a true interpretation,” as the JCC has advanced insufficient evidence of falsity. *See Winter*, 834 F.3d at 693.

The JCC also impermissibly attempted to enforce Rule 4.1(A)(11) against Dutton for stating that no litigants were affected by her actions and only she was hurt. Her assertions were not statements of fact subject to Rule 4.1(A)(11)—they were opinions and thus outside the Rule’s reach. *See* DE 1-4, Newspaper Article, Page ID 24; DE 42-7, Rule 4.1, Page ID 718; *see also Winter*, 834 F.3d at 694 (“But only a ban on *conscious falsehoods* satisfies strict scrutiny.” (emphasis added)). And to the extent that Dutton’s statement implied assertions of fact regarding the people affected and hurt by her disciplinary misconduct, those assertions were capable of a “true interpretation” and not false on this record. *See Winter*, 834 F.3d at 693; *Berry*, 688 F.3d at 303 (“An opinion can ‘be the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false.’” (quoting *Yagman*, 55 F.3d at 1438-39)).

When Carter appeared with counsel for the first time on July 18, 2019, he had already requested that Dutton recuse herself. Dutton recused herself that same day—only a “couple of hours” later. DE 41, Depo. Tr. Donna Dutton, Page ID 479. After Dutton’s recusal, Carter’s case was re-docketed for a week later; and on that date,

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the new judge imposed a sentence of six months deferred and scheduled a review in the case for January 23, 2020. Dutton asserted that it was not clear that Carter’s “case would have been resolved—or [his] bond conditions modified—earlier but for Judge Dutton’s conduct,” and that his case was not delayed because of her recusal. DE 1-6, Response to JCC Letter, Page ID 32.

Shaffer stated that the “only litigant” who could have been affected by a delay in recusal was Carter. DE 42, Depo. Tr. Shaffer, Page ID 686-87. The JCC thus labeled as false Dutton’s statement that no litigants were “affected” and only she was “hurt,” DE 1-4, Newspaper Article, Page ID 24, because Dutton’s actions “delayed resolution” of Carter’s case and “caused him to live and work under bond conditions longer than necessary.” DE 1-5, JCC 2023 Letter, Page ID 25; *see* DE 39, Defs.’ Mot. for Summ. Judgment, Page ID 421-22.

The record does not support the JCC’s claim because there is no evidence that Dutton’s actions delayed the resolution of Carter’s case. First, the JCC specifically stated that Dutton failed to recuse herself. But Shaffer conceded that Dutton “recused [herself] the same day” Carter requested that she do so. DE 42, Depo. Tr. Shaffer, Page ID 696. So there is no evidence that Dutton’s failure to recuse herself affected or hurt Carter. And although Shaffer noted that Dutton failed to “immediately” recuse herself, Shaffer stated that the outcome in Carter’s case would not have changed whether Dutton “recused [herself] at the hearing or several hours later[.]” *Id.* at 667, 683. The JCC defendants presented no evidence that the few

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hours that Dutton took to recuse herself affected or hurt Mr. Carter. And the JCC advanced no evidence that Carter’s case would have been resolved earlier or his bond conditions would have been shorter had Dutton recused herself sooner. To the extent that Dutton’s assertions implied statements of fact, they implied statements “readily capable of a true interpretation[.]” *See Winter*, 834 F.3d at 693; *Berry*, 688 F.3d at 303.

Therefore, we agree with the district court’s conclusion that the JCC’s enforcement of Rule 4.1(A)(11) against Dutton’s speech failed to give Dutton the requisite “breathing space” to exercise her First Amendment rights. *See* DE 52, Op. & Order, Page ID 851 (internal quotation marks omitted) (quoting *Brown*, 456 U.S. at 61, 102 S.Ct. 1523).

D.

We disagree with the district court’s conclusion that Dutton failed to carry her burden on her as-applied challenges to the JCC’s enforcement of Rules 1.2 and 2.4(B). Dutton carried her burden at summary judgment of showing that the JCC sought to enforce Rules 1.2 and 2.4(B) against statements that were “readily capable of a true interpretation[.]” *See Winter*, 834 F.3d at 693. And we conclude that the defendants, as cross-movants for summary judgment, failed to carry their burden of showing that their enforcement withstands strict scrutiny review under the First Amendment.

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The JCC's Proposed Agreed Order concluded that Dutton violated Rules 1.2 and 2.4(B). And at summary judgment, the defendants likewise maintained that Dutton violated Rules 1.2 and 2.4(B) because she made materially false statements. The district court stated that Dutton did not explain how the enforcement of Rules 1.2 and 2.4(B) burdened her free speech rights. It noted that it was required to draw "all reasonable inferences against the party whose motion is under consideration," Dutton bore the burden at summary judgment, and she did not address why those Rules were unconstitutionally applied to her speech. DE 52, Op. & Order, Page ID 848-49. Yet the court failed to evaluate Dutton's arguments and to apply summary-judgment standards to the defendants as cross-movants. *See Taft Broad. Co.*, 929 F.2d at 248. And in concluding that the defendants "passed strict scrutiny under both rules," the court failed to ask whether their *application* of the Rules passed strict scrutiny—it asked only whether their *text* did. DE 52, Op. & Order, Page ID 843, 849; *see N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988) (stating that *facial* overbreadth challenges require a showing from the law's "text" that the law cannot be applied constitutionally in a substantial number of instances).

The defendants claimed that they were entitled to summary judgment because Dutton's "statements were materially false," so Dutton violated her obligation to the judiciary's values under Rule 1.2 and her obligation to refrain from allowing personal relationships to interfere with her role under Rule 2.4(B). DE 39, Defs.' Mot. for Summ. Judgment, Page ID 423-25. Notably, the

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defendants staked their enforcement’s constitutionality on the theory that Dutton made “statements that are consciously false with the intention of deceiving the public” and those “materially false statements” were “an affront” to the judiciary. *See id.* at 424-25. Yet they did not articulate in their warning letter, Proposed Agreed Order, or motion papers a single alternative basis why Dutton’s statements ran afoul of Rules 1.2 and 2.4(B). At its core, their justification for enforcement was that both “Rules 1.2 and 2.4(B) *essentially rise and fall with these materially false statements.*” *Id.* at 425 (emphasis added); *accord* CA6 R. 22, Defs.’ Br., Page ID 26-27 (“Rules 1.2 and 2.4(B) have cascading application. . . . Both Rules 1.2 and 2.4(B) essentially rise and fall contingently with underlying misconduct—if misconduct occurred, these Rules are implicated.”).

The defendants’ lone justification for enforcing Rules 1.2 and 2.4(B) lacked any evidentiary support. As we explained in our analysis of Dutton’s as-applied challenge to Rule 4.1(A)(11), the record does not support the defendants’ claims that Dutton’s statements were false. Because no evidence sustains the defendants’ sole predicate for enforcing Rules 1.2 and 2.4(B) against Dutton, the defendants failed to establish the absence of a genuine issue of material fact regarding the constitutionality of Rules 1.2 and 2.4(B) as applied to Dutton and they were not entitled to judgment as a matter of law.

We hold that the JCC’s application of Rules 1.2 and 2.4(B) to Dutton’s speech fails strict scrutiny review. The JCC sought to enforce the Rules against speech that was

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“readily capable of a true interpretation” without evidence of falsity and the JCC provided no alternative, factually supported basis on which to enforce the Rules against Dutton. *See Winter*, 834 F.3d at 693. The defendants cannot sidestep the First Amendment’s limits on enforcing a false statements prohibition against statements that are “readily capable of a true interpretation” by applying other rules to that same speech without an independent basis for enforcement. *See id.*

Dutton, on the other hand, carried her burden at summary judgment. She explained that the defendants applied Rules 1.2 and 2.4(B) to her statements on the basis that they were false, but her statements were not false, and the defendants could not constitutionally enforce these prohibitions against statements “readily capable of a true interpretation.” DE 34, Pl.’s Mot. for Summ. Judgment, Page ID 359-64 (quoting *Winter*, 834 F.3d at 693). Because she showed that the defendants attempted to enforce Rules 1.2 and 2.4(B) against statements protected under *Winter* without an alternative basis for those Rules’ application, Dutton established that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law on her as-applied challenges to Rules 1.2 and 2.4(B).

We need not reach Dutton’s facial challenges to Rules 4.1(A)(11), 1.2, and 2.4(B) because she is entitled to summary judgment on her three as-applied challenges. *See Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 570-71 (6th Cir. 2012); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

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The standard for a permanent injunction is “essentially the same” as for a preliminary injunction, but a plaintiff must show “actual success”—not a mere “likelihood of success on the merits[.]” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *see Am. C.L. Union of Ky. v. McCreary County*, 607 F.3d 439, 445 (6th Cir. 2010). The movant must also show that the absence of an injunction will likely “result in irreparable harm.” *Kallstrom*, 136 F.3d at 1068. We presume irreparable injury when “constitutional rights are threatened or impaired[.]” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *accord Am. C.L. Union of Ky. v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). The injunction must also not cause “substantial harm to others” and it must serve the public interest. *City of Pontiac Retired Emps. Ass’n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (per curiam) (en banc).

The district court properly granted Dutton a permanent injunction based on her as-applied challenge to Rule 4.1(A)(11), but it abused its discretion because it improperly applied the law in denying her the same relief based on her as-applied challenges to Rules 1.2 and 2.4(B). *See Herman Miller, Inc.*, 270 F.3d at 317. Dutton showed that the JCC’s enforcement of all three Rules as applied to her speech violated her constitutional rights, so she established actual success. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). And it is “well-settled” that even short deprivations of First Amendment freedoms “unquestionably constitute[] irreparable injury,”

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so Dutton has established irreparable harm because the defendants violated her free speech rights. *See id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)).

Moreover, the entry of a permanent injunction enjoining the application of the Rules to Dutton's speech poses no harm to the public. And while the JCC has an interest in constitutionally enforcing the KCJC, it suffers no harm from our preventing its unconstitutional enforcement of the Rules. *See Connection Distrib. Co.*, 154 F.3d at 288. Finally, it is "always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); accord *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995). Dutton is entitled to a permanent injunction enjoining the enforcement of Rules 4.1(A)(11), 1.2, and 2.4(B) as applied to her speech.

V.

For the foregoing reasons, we affirm the district court's grant of partial summary judgment to Dutton based on her as-applied challenge to Rule 4.1(A)(11) and affirm its entry of a permanent injunction enjoining the JCC's enforcement of Rule 4.1(A)(11) against Dutton. We reverse the district court's grant of partial summary judgment to the JCC with respect to its enforcement of Rules 1.2 and 2.4(B) against Dutton and reverse its denial of a permanent injunction enjoining the JCC's enforcement of Rules 1.2 and 2.4(B). On remand, the district court is

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ordered to grant summary judgment to Dutton based on her as-applied challenges to Rules 1.2 and 2.4(B) and enter a permanent injunction enjoining the JCC's enforcement of those Rules against Dutton.

**APPENDIX B — OPINION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY,
CENTRAL DIVISION AT FRANKFORT,
FILED MARCH 27, 2025**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

Case No. 3:23-cv-00039-GFVT-EBA

DONNA DUTTON,

Plaintiffs,

v.

HON. JIMMY SHAFFER, *et al.*,

Defendants.

OPINION & ORDER

Having elected judicial officers breeds a unique set of problems. Judicial officers and judicial candidates are bound to a certain code of ethics, aimed at ensuring the integrity of the judiciary. However, because they are elected, they are also incorporated into the folds of the political process, which encourages candidates to espouse their positions on a variety of matters. These two processes, seemingly at odds with one another, have come to head in this case. Judge Dutton, during a reelection

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campaign, made a statement to a local newspaper about her prior disciplinary history that the Judicial Conduct Commission took issue with. Both parties have filed Motions for Summary Judgment, and Judge Dutton is seeking to permanently enjoin the Commission from enforcing Rule 1.2, Rule 2.4(B), and Rule 4.1(A)(11). For the reasons that follow, the Plaintiff's Motion for a Summary Judgment and Permanent Injunction [R. 34] is **GRANTED IN PART AND DENIED IN PART** and the Defendant's Motion for Summary Judgment [R. 39] is **GRANTED IN PART AND DENIED IN PART**.

I

Judge Donna Dutton is a sitting Kentucky District Court judge for the 53rd Judicial Circuit since 2006.¹ In 2020, Judge Dutton was disciplined by the Judicial Conduct Commission as a result of her handling of *Commonwealth v. Carter*, specifically a motion for recusal. [R. 31 at 4.] During the motion hearing, Judge Dutton made remarks about the defense counsel stealing money from her husband and attempted to keep a copy of the video of the court proceedings from being released. *Id.* at 6. Judge Dutton ultimately recused from the case later that same day but faced disciplinary action from the Commission. *Id.* Judge Dutton agreed that she violated Rules 1.1, 1.2, 1.3, 2.2, 2.4, 2.8, 2.9, and 2.11 of the Code, and was punished with a 14-day suspension. *Id.*

1. These facts were taken from the Court's prior Memorandum Opinion and Order at [R. 51].

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In 2022, Judge Dutton ran for reelection. [R. 31 at 3.] Days before the election, a local Kentucky newspaper published an article focused on a previous suspension that Judge Dutton received. *Id.* at 6. The article included the below response that Judge Dutton provided to the newspaper, where she attempted to explain the suspension:

That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent. I let my personal feelings about the theft interfere with my courtroom conduct and for that I apologize. No litigants were affected by my actions, and the only person hurt was me.

Id. She then won her election. *Id.*

Months later, the Defendants sent Judge Dutton a letter informing her that a complaint had been filed against her with the Commission. [R. 1-5.] The complaint alleged that Judge Dutton's response to the newspaper was false, and the letter invited her to respond to the complaint. *Id.* She did. [R. 1-6.] Attorneys for Judge Dutton and the Commission then began a discussion about the potential for settlement. [R. 10-5.] The Commission sent Judge Dutton a proposed agreed order that would settle the matter and welcomed proposed changes from Judge Dutton. *Id.* at 1. If agreed upon, the proposed agreed order would publicly reprimand Judge Dutton and state that she violated several portions of the Code of Judicial Conduct by responding to the newspaper article. [R. 10-4.]

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Rather than proposing changes, Judge Dutton brought this action against the Defendants. [R. 1; R. 31.] She now moves for an order enjoining the Defendants from initiating formal enforcement proceedings against her for her comments. [R. 4.] In September 2023, this Court denied her request for a preliminary injunction, finding that Dutton has not sustained an irreparable injury. [R. 17.] Dutton appealed to the Sixth Circuit. [R. 18.]

On August 15, 2024, the Sixth Circuit vacated and remanded this Court's prior denial for preliminary injunction "for a fresh appraisal of Dutton's request." [R. 48-1 at 1.] The Sixth Circuit said that this Court "should have assessed Dutton's likelihood of success on the merits before reaching the irreparable injury question" because Dutton is alleging a continuing violation. [R. 48-1 at 9.] Ultimately, the Sixth Circuit ordered for this Court to "conduct the preliminary injunction analysis in its entirety," keeping in mind that where a constitutional right is at issue, the likelihood of success on the merits is the determinative factor. [R. 48-1 at 9-10.] On January 17, 2025, the Court entered an Order granting in part and denying in part the Plaintiff's request for a Preliminary Injunction. [R. 51.] The Court granted the Plaintiff's injunction request and enjoined the Commission from enforcing Rule 4.1(A)(11) against Plaintiff Dutton. *Id.* The remainder of the Plaintiff's request was denied. *Id.* Now, there are two cross-motions for Summary Judgment [R. 34; R. 39], as well as a request for a Permanent Injunction [R. 34], all of which are now ripe for review.

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II

Under Rule 56, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.² See Fed. R. Civ. P. 56(c). A fact's materiality is determined by the substantive law, and a dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "[T]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). "Instead, 'the non-moving party has an affirmative duty to direct the Court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.'" *J.B-K.-1 v. Sec'y of Ky. Cabinet for Health & Fam. Servs.*, 462 F. Supp. 3d 724, 731 (E.D. Ky. 2020), *aff'd sub nom. J. B-K. by E.B. v. Sec'y of Ky. Cabinet for Health & Fam. Servs.*, 48 F.4th 721 (6th Cir. 2022) (quoting *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001)).

Summary judgment is inappropriate where there is a genuine conflict "in the evidence, with affirmative support on both sides, and where the question is which witness to

2. The Court's analysis adheres very closely to the analysis in the prior Memorandum Opinion and Order granting in part and denying in part the Plaintiff's request for a preliminary injunction. [R. 51.]

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believe.” *Dawson v. Dorman*, 528 F. App’x 450, 452 (6th Cir. 2013). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Morales v. Am. Honda Motor Co.*, 71 F.3d 531, 535 (6th Cir. 1995) (quoting *Liberty Lobby*, 477 U.S. at 255).

The standards upon which we evaluate motions for summary judgment do not change when, as here, “both parties seek to resolve [the] case through the vehicle of cross-motions for summary judgment.” *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir.1991).

The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.

Id. (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir.1987)).

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A

The Plaintiff disputes the constitutionality of Rule 1.2, Rule 2.4(B), and Rule 4.1(A)(11). [R. 4 at 11.] Rule 1.2 provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Rule 2.4(B) provides: “A judge shall not permit family, social, political, financial, or other relationships to influence the judge’s judicial conduct or judgment.” Rule 4.1(A)(11) provides: “Except as permitted by law, or by Rules 4.2, 4.3, or 4.4, a judge or judicial candidate shall not knowingly or with reckless disregard for the truth, make any false statements of material fact.” The Plaintiff argues that Rules 1.2, 2.4(B), and 4.1(A)(11) are all both facially and as-applied unconstitutional. [R. 31 at 11-14.]

1

Where a plaintiff makes a facial challenge under the First Amendment to a statute’s constitutionality, the “facial challenge” is an “overbreadth challenge.” *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (en banc). To succeed on a facial attack, the plaintiff must establish that a “substantial number of instances exist in which the law cannot be applied constitutionally.” *Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012) (quoting *Richland Bookmart, Inc. v. Knox Cnty.*, 555 F.3d 512, 532 (6th Cir. 2009)).

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The Plaintiff alleges that the Defendants have construed Rules 1.2, 2.4(B), and 4.1(A)(11) so overbroadly as to be facially invalid. [R. 34 at 10.] However, Courts typically “do not apply the ‘strong medicine’ of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.” *Wash. State Grange v. Washington State Republican Party*, 552 U.S. 442, 471 n.6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). The burden of showing a “substantial number of instances” rests squarely with the Plaintiff. *Connection Distrib. Co.*, 557 F.3d at 336; *see also N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 14, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (“To succeed in its [facial overbreadth] challenge, [the plaintiff] must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.”). Ultimately, “the record is utterly barren about whether some, many, indeed any” individuals, other than Judge Dutton, are adversely affected by these rules. *Id.* at 338.

2

Having determined that the Plaintiff fails to allege a proper facial challenge on any of the rules, we turn to the as-applied challenge. As-applied challenges have a seemingly lower threshold to meet. *See Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (“raising a narrow as-applied challenge is easier, not harder, than raising a facial challenge”). The Court finds that Dutton has provided enough facts to allege a plausible as-applied First Amendment challenge to Rule 4.1(A)(11) but fails as to Rules 1.4 and 2.4(B).

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With respect to Rule 1.4 and Rule 2.4(B), Dutton does not discuss in sufficient detail, either in her Complaint or her preliminary injunction briefings, how her First Amendment rights are burdened by these rules. At the Motion for Summary Judgment phase, the Court draws all reasonable inferences against the party whose motion is under consideration. In a seeming attempt to shift the burden to the Defendants, the Plaintiff fails to address completely the rules that she is arguing are unconstitutional. The Court reminds the Plaintiff that the burden rests with her to justify that summary judgment is proper. *See Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010) (“The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact”).

Further, the Defendants have passed strict scrutiny under both rules.³ The first Rule in question is Rule 1.2, which directs that a “Judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Under strict scrutiny, the first question is whether the Defendants have a compelling interest. The Commission argues they have an interest in “promoting an unbiased and impartial judiciary and in maintaining the integrity of

3. When a law restricts speech on the basis of content, as these rules do, the law is unconstitutional unless it passes strict scrutiny. *See Republican Party of Minn. v. White*, 536 U.S. 765, 774, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

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the judiciary.” [R. 39 at 10.] The Supreme Court has held that such an interest is a compelling one. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447-48, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015). Having determined there is a compelling interest, the Court must now determine whether Rule 1.2 is narrowly tailored to achieve said interest. Judicial candidates and officers do not have an unfettered right to say whatever they want. Otherwise, the Code of Conduct for the United States Judges, which requires judges to “uphold the integrity and independence of the judiciary” and “avoid impropriety,” would be unconstitutional, which the Sixth Circuit has quipped “would come as a surprise.” *See Winter*, 834 F.3d 681, 690; *see also* Canon 1 and Canon 2.

Being a member of the judiciary is much like being a doctor. The public places great trust in doctors, and upon entry into the coveted profession, doctors are bound by a code of ethics, which provides the confines in which they operate. Likewise, the judiciary is uniquely positioned within the community to undertake the role of decisionmaker. More than any other branch of the government, the judiciary is entrusted with remaining fair and impartial.

As the adage goes, with great power comes great responsibility. A part of that responsibility is being bound by a set of ethical codes, which are not meant to restrict more than necessary; rather, their purpose is to ensure the longevity and vitality of the judiciary. When deciding to become a member of the judiciary, one forfeits some autonomy in exchange to fulfill their role as

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an impartial decisionmaker. Without such constraints, the trust and confidence so necessary to the integrity of the judicial function, could be jeopardized. Thus, the Court finds that Rule 1.2 is narrowly tailored to achieve the Defendant's interest in "promoting an unbiased and impartial judiciary."

The second rule is Rule 2.4(B), which provides "[a] judge shall not permit family, social, political, financial, or other relationships to influence the judge's judicial conduct or judgment." Similar to the above analysis, the Court finds that this rule suffices to meet strict scrutiny. The Commission has a compelling interest in maintaining a fair tribunal. With respect to narrow tailoring, Rule 2.4(B) tracks very closely with Canon 2B of the Code of Conduct for the United States Judges, which states that "[a] judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment." So, again, it "would come as a surprise," if this Rule was so overbroad as to be unconstitutional.

b

With respect to Rule 4.1(A)(11), Dutton argues that the Rule is unconstitutional as applied to her because it prohibits her from telling her side of the story the way that she wants to without offending the Commission. Further, Dutton alleges that she intends to respond to media inquiries regarding the 2020 reprimand in the same way that the Commission finds objectionable under the Code, meaning the threat of enforcement is ongoing. [R. 31 at 11.] Case law dictates that any impermissible

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burden on the First Amendment, however small, is unconstitutional. *See Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998). There undoubtedly is a burden on Dutton's First Amendment right, which begs the question of whether Rule 4.1(A)(11) can pass strict scrutiny when applied to the facts. The statement at the center of this case was given in response to questions about Dutton's prior disciplinary history. In her response, Judge Dutton said:

That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent. . . . I let my personal feelings about the theft interfere with my courtroom conduct and for that I apologize. No litigants were affected by my action, and the only person hurt was me.

[R. 31 at 6.]

The Commission is characterizing Dutton's statement as patently false, while Dutton is characterizing her statement as "ambiguously truthful." [R. 34 at 7.] Under Rule 4.1(A)(11), the former is prohibited, while the latter is allowed. With how the Commission is presently interpreting Dutton's remarks, she stands in violation of Rule 4.1(A)(11) and risks disciplinary action, despite Dutton believing her statement to be true. As a result, her ability to speak is burdened. At bottom, the Court can conceive of a world in which Dutton's statement is readily capable of a true interpretation, or, at the very least, that the statement was not made "knowingly, or with reckless disregard for truth."

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In the Court’s prior Order granting the Plaintiff’s preliminary injunction with respect to Rule 4.1(A)(11), the Court noted that “it appears the practical effect of Rule 4.1(A)(11) has the potential to eclipse said interest, thereby failing to give Judge Dutton the requisite ‘breathing space’ to exercise her First Amendment right. *See generally Brown v. Hartlage*, 456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (U.S. 1982).” [R. 51 at 9.] The Court finds this conclusion holds true at the Summary Judgment phase.

There is an inherent tension between judicial elections and judicial independence. If a state chooses to have judges elected by voters, as is the case in Kentucky, the electorate should have the necessary information to make an informed choice. States should not be able to keep judges and judicial candidates from giving their opinions on issues that matter to voters. With this in mind, the Court finds that Dutton’s statements are privy to First Amendment protections.

As an initial matter, Judge Dutton argues that Rule 4.1(A)(11) is unconstitutionally vague by failing to give “the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The Court finds Rule 4.1(A)(11) gives the requisite guidance. “Don’t want to violate the [Rule]? Don’t tell a lie on purpose or recklessly.” *Winter v. Wolnitzek*, 186 F.Supp.3d 673, 697 (E.D. Ky. 2016) (overruled on other grounds). Thus, Rule 4.1(A)(11) is not a problem because it is vague. Rather, the problem lies in how the Commission is applying Rule 4.1(A)(11) to Judge Dutton.

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Taking Judge Dutton’s statement phrase-by-phrase, the first phrase the Commission takes issue with is: “[t]hat issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent.” [R. 31 at 6.] At best, the Court thinks this phrase is likely Judge Dutton’s opinion on her prior disciplinary record and therefore outside the scope of Rule 4.1(A)(11). *Winter v. Wolnitzek*, 482 S.W.3d 768, 779 (Ky. 2016) (noting Canon 5(B)(1)(c) does not “cover expressions of opinion because expressions of an opinion do not implicate a statement that is not factually true”).⁴ At worst, the Court finds that Judge Dutton’s statement is misleading, which is still considered constitutionally protected speech. *See Winter*, 834 F.3d 681, 694 (noting the misleading statement clause “adds little to the permissible ban on false statements, and what it adds cannot be

4. Throughout the Court’s analysis, it will draw comparisons between Rule 4.1(A)(11) and Canon 5(B)(1)(c), primarily because they use the same language. Likewise, the language of Canon 5(B)(1)(c) has been scrutinized by both the Sixth Circuit and the Kentucky Supreme Court. Thus, the Canon provides helpful guidance to the Court as it analyzes Rule 4.1(A)(11).

Canon 5(B)(1)(c) provided, in relevant part, that a judge or judicial candidate “shall not . . . knowingly, or with reckless disregard for the truth . . . make any . . . false or misleading statements.” *Winter v. Wolnitzek*, 186 F.Supp.3d 673, 681 (E.D. Ky. 2016). Rule 4.1(A)(11) provides, in relevant part, “a judge or a judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false statement of material fact.” Rule 4.1(A)(11), Kentucky Code of Judicial Conduct, SCR 4.300.

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squared with the First Amendment.”). As this Court has previously stated, “[o]ne man’s soundbite is another man’s misleading statement.” *Winter*, 186 F. Supp. at 697. In *Winter*, the Court concluded that Canon 5(B)(1)(c), which prohibited judges and judicial candidates from making any “misleading statement” “knowingly, or with reckless disregard for the truth,” as unconstitutionally vague. *Id.* at 778. It is up to the public, not the government, to determine whether political speech is true or misleading. *Id.* Here, as in *Winter*, the Court finds that the best way to combat misleading speech is with more speech. *Id.*

The Commission argues that this matter was investigated by the Kentucky Bar Association, and no further action was taken against the individual accused of theft. [R. 39-5 at 1.] While the Court acknowledges this matter was investigated, the fact that no further action was taken can be attributed to a variety of reasons. Because the Commission does not provide details as to why no action was taken, it is entirely possible that no action was taken for an entirely different reason than the fact there was no theft.

Further, an “erroneous statement is inevitable in free debate,” and “[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with [an] atmosphere of free discussion.” *Brown v. Hartlage*, 456 U.S. 45, 60-61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (quotation omitted). It seems to the Court that this statement could be taken as either an opinion or a misleading statement on her prior disciplinary action, either of which are privy to First Amendment protections.

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ii

The next statement the Commission takes issue with is: “[n]o litigants were affected by my actions, and the only person hurt was me.” Again, the Commission argues that this statement is false because Judge Dutton’s actions delayed the resolution of the case. [R. 39-3 at 1.] Further, the Commission asserted that Judge Dutton “sought to harm litigants when [she] failed to recuse” herself from the case. *Id.* Interestingly, much of the case law surrounding First Amendment protections given to opinions is in the defamation context. Although not completely on all fours with the facts of this case, the aim behind Rule 4.1(A) (11) and defamation laws are the same—to prevent harm caused by false statements. The Court again finds *Winter v. Wolnitzek* instructive.

In *Winter*, the District Court certified a question to the Supreme Court of Kentucky to answer “[w]hat constitutes a false statement?” In their opinion, the Kentucky Supreme Court made clear that the “false statement” section of Canon 5(B)(1)(c) prohibited only statements of fact, rather than of opinion. *Winter*, 482 S.W.3d at 779. In their certification opinion, the Supreme Court of Kentucky concluded that Canon 5(B)(1)(c), does not “cover expressions of opinion because expressions of an opinion do not implicate a statement that is not factually true.” *Id.* The Kentucky Supreme Court went on to conclude that Canon 5(B)(1)(c) does not “extend to expressions of subjective opinions or innocuous campaign-trail ‘puffing.’” *Id.*

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Albeit a different rule, because the same language is used, the Court finds the certification opinion instructive on the state's intent behind Rule 4.1(A)(11). Ultimately, the Court finds that Judge Dutton's statement is a matter of opinion and not subject to Rule 4.1(A)(11). From her perspective, the matter has been fully resolved, and she is the one still dealing with repercussions. The Commission has a different perspective. However, difference in perspectives does not make Judge Dutton's statement recklessly or knowingly false.

B

In addition to Summary Judgment, the Plaintiff also asks for a Permanent Injunction.⁵ [R. 34 at 21.] The standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that the plaintiff must show actual success on the merits rather than a mere likelihood of success. *Herrell v. Benson*, 261 F. Supp. 3d 772, 776 (E.D. Ky. 2017) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). A plaintiff seeking a permanent injunction also must demonstrate that (1) it has suffered an irreparable injury; (2) there is no adequate remedy at law; (3) considering the balance of

5. In the usual course, a district court should conduct an evidentiary hearing before issuing a permanent injunction. *See Wedgewood Ltd. Partnership I v. Township Of Liberty, Ohio*, 610 F.3d 340, 349 (6th Cir. 2010). However, where no factual issues remain for trial, a district court's decision to grant a permanent injunction without a hearing will be upheld if summary judgment was properly granted. *Id.*

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hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) it is in the public's interest to issue an injunction. *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641 (2006)).

Inasmuch as the Court has determined that summary judgment should be entered into in Judge Dutton's favor with respect to Rule 4.1(A)(11), the first requirement of success on the merits is satisfied. Additionally, Judge Dutton has established that she has suffered an irreparable injury. An injury is irreparable when it cannot be fully compensated by money damages. *Overstreet v. Lexington-Fayette Urban Cnty. Government*, 305 F.3d 566, 578 (6th Cir. 2002). And, where there is a constitutional violation established, a finding of irreparable injury is mandated. *See ACLU v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."). The balance of hardships, likewise, militates in favor of an injunction. While an injunction would presumably harm the Commission by preventing them from administering the constitutional application of the Rule, because the Court has found their application of Rule 4.1(A)(11) as-applied to Judge Dutton is unconstitutional, the Court finds the Commission is not harmed. Last, it is in the public's interest to prevent the unconstitutional application of Rule 4.1(A)(11). *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) ("It is in the public interest not to perpetuate the unconstitutional application of a statute.").

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Accordingly, the Court will grant the requested permanent injunction as it relates to Rule 4.1(A)(11). However, the injunction will be limited in scope to the parties before this Court *in this case*. See *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392, 2425, 201 L.Ed.2d 775 (2018) (Thomas, J., concurring) (opining that universal injunctions “prevent[] legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency for the courts and for the Executive Branch.”). Here is why—the Commission’s current application of Rule 4.1(A)(11) as-applied to this set of facts is unconstitutionally chilling Judge Dutton’s speech; however, on a set of different facts with the same parties, it could be case that the Commission is applying Rule 4.1(A)(11) in an entirely constitutional way as to Judge Dutton. The Court does not have a crystal ball to predict other situations in which this rule may be applied against Judge Dutton. Permanently enjoining the Commission from using Rule 4.1(A)(11) against Judge Dutton effectively makes her immune to speak falsely with no repercussions. While the Court agrees that the current application of the Rule to Judge Dutton on these facts is unconstitutional, Rule 4.1(A)(11) still plays a narrowly-tailored role in maintaining the honesty and integrity of the judiciary.

III

In light of the above analysis, the Court finds that Rule 4.1(A)(11), as it applies to Judge Dutton, runs afoul of the First Amendment. Accordingly, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** as follows:

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1. The Plaintiff's Motion for Summary Judgment [R. 34] is **GRANTED IN PART AND DENIED IN PART**;
2. The Defendant's Motion for Summary Judgment [R. 39] is **GRANTED IN PART AND DENIED IN PART**;
3. The Plaintiff's Motion for Permanent Injunction [R. 34] is **GRANTED IN PART AND DENIED IN PART**;
4. The Plaintiff's request for permanent injunction for her as-applied challenge of Rule 4.1(A)(11) is **GRANTED**; and
5. The Judicial Conduct Commission is **ENJOINED** from enforcing Rule 4.1(A)(11) as it applies to Plaintiff Dutton's statement in *The Sentinel-News* article published on October 24, 2022.

This the 27th day March 2025.

/s/ Gregory F. Van Tatenhove
Gregory F. Van Tatenhove
United States District Judge

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**APPENDIX C — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT,
FILED AUGUST 15, 2024**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 23-5850

DONNA DUTTON,

Plaintiff-Appellant,

v.

JIMMY SHAFFER, *et al.*,

Defendants-Appellees.

Filed August 15, 2024

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY

OPINION

Before: GIBBONS, WHITE, and MURPHY, Circuit
Judges.

JULIA SMITH GIBBONS, Circuit Judge. Donna
Dutton, a judge, moves to preliminarily enjoin Kentucky's
Judicial Conduct Commission from enforcing the state's

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Judicial Code of Conduct, arguing that certain provisions of the Code are unconstitutional. Because the district court abused its discretion in its assessment of whether Judge Dutton would suffer irreparable harm, we vacate its decision and remand the case for a fresh appraisal of Dutton's request.

I.**A.**

Donna Dutton serves as a district court judge in Kentucky's 53rd Judicial Circuit, a position she has held since 2006. Her husband is also an attorney.

In 2019, Dutton's husband accused an attorney at his law firm of theft. After Dutton's husband confronted him, the attorney repaid the allegedly stolen funds. Dutton's husband then complained to the Kentucky Bar Association, but the KBA dismissed his complaint, and Dutton's husband pursued no further civil or criminal remedies.

Several months later, the accused attorney—now practicing law elsewhere—appeared as defense counsel in a case assigned to Judge Dutton. The attorney moved for Dutton's recusal, but she refused. From the bench, Dutton accused the attorney of stealing from her husband, and she warned the attorney's co-counsel that the attorney would not "be conflicted out forever." DE 10-1, Agreed Order of Suspension, Page ID 140. The attorney interpreted this statement as a threat, and he sought courtroom video

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of Dutton’s remarks. Dutton attempted to suppress the video by pressuring the county clerk and a fellow judge to withhold access. That effort failed, and Dutton ultimately recused herself from the case.

The foregoing episode led to a complaint against Dutton with Kentucky’s Judicial Conduct Commission (the “Commission” or “JCC”), the body tasked with enforcing Kentucky’s Judicial Code of Conduct (the “Code”). After an investigation, the Commission found that Dutton’s actions violated Rules 1.1, 1.2, 1.3, 2.2, 2.4, 2.8, 2.9, and 2.11 of the Code. The JCC publicly reprimanded Dutton, and it suspended her from her duties for two weeks without pay. Dutton consented to the Commission’s punishment in lieu of formal proceedings.

B.

In 2022, Dutton ran for reelection. Her opponent shared an office and some administrative resources, like secretarial staff, with the attorney her husband had accused of theft.

Less than a month before election day, a local newspaper ran an article discussing Dutton’s discipline by the JCC. Given an opportunity to comment, Dutton made the following statement:

That issue involved the theft of a large sum of money by an attorney who also happens to practice law with my opponent. . . . I let my personal feelings about the theft interfere with

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my courtroom conduct and for that I apologize. No litigants were affected by my actions, and the only person hurt was me.

I'm proud of the job I've done in my 16 years on the bench and have worked every day to ensure the court system protects our families and community.

DE 10-3, *The Sentinel-News* Article, Page ID 158.

Dutton's statement generated yet another complaint to the JCC. In a notice letter, the Commission informed Dutton of the complaint and offered her an opportunity to respond. Dutton's response refuted the charges. To settle the matter, the Commission proposed a public reprimand, asserting that Dutton's conduct violated Rules 1.2,¹ 2.4(B),² and 4.1(11)³ of the Code. When Dutton's counsel asked the Commission if the draft reprimand was final,

1. Rule 1.2 provides that, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Ky. R. Sup. Ct. 1.2.

2. Rule 2.4(B) provides that, "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Ky. R. Sup. Ct. 2.4(B).

3. Rule 4.1 provides that, "a judge or a judicial candidate shall not: . . . (11) knowingly, or with reckless disregard for the truth, make any false statement of material fact[.]" Ky. R. Sup. Ct. 4.1(11).

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the Commission's attorney responded that, "[i]f you have proposed changes, send them to me and I will discuss with the Commission." DE 10-5, Mando Email, Page ID 168.

Rather than negotiate with the Commission, Dutton filed suit in the United States District Court for Eastern District of Kentucky, alleging that Rules 1.2, 2.4(B), and 4.1(11) of Kentucky's Judicial Code of Conduct violate the First Amendment, both facially and as applied to Dutton's conduct. Dutton then moved the district court for a preliminary injunction preventing the JCC from formally disciplining her for the duration of the proceedings. The district court denied Dutton's motion, and Dutton timely appealed. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

II.

Faced with a request for a preliminary injunction, the district court considers four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (quoting *PACCAR Inc. v. TeleScan Techs., LLC*, 319 F.3d 243, 249 (6th Cir. 2003)). Typically, the court conducts this inquiry "as a balancing test," weighing "the strength of the four factors against one another." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019). Yet that

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best practice comes with two relevant caveats. First, the presence of irreparable injury is an “indispensable” factor. *Id.* And second, “[w]hen a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits will often be the determinative factor.” *Jones v. Caruso*, 569 F.3d 258, 265–66 (6th Cir. 2009) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). This is “because the question[] of harm to the parties . . . generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation.” *Connection Distrib.*, 154 F.3d at 288. We review the district court’s denial of a preliminary injunction for abuse of discretion. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019).

III.

The district court denied Dutton’s motion based on its analysis of only one of the four preliminary injunction factors: irreparable injury. Relying on our decision in *Fischer v. Thomas*, 78 F.4th 864 (6th Cir. 2023) (*Fischer II*), the district court eschewed analysis of Dutton’s likelihood of success on the merits, of the risk of substantial harm to others, and of the public interest, and it instead found that Dutton was not entitled to injunctive relief strictly because she could not show that she faced a threat of imminent, irreparable harm. But *Fischer* is distinguishable because it did not involve a continuing violation. Because its analysis does not apply here, and because the district court should have analyzed Dutton’s likelihood of success on the merits as logically antecedent

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to a finding of irreparable injury, we vacate the district court's order and remand for consideration of all four preliminary injunction factors together.

In *Fischer*, two Kentucky judicial candidates sued the JCC after they learned that the Commission planned to investigate their campaign speech. *Id.* at 866. The candidates had identified as “conservative[s]” and “Republican[s]” in their campaign literature, and both had received and accepted endorsements from pro-life organizations. *Id.* at 867. In a notice letter, the Commission informed the candidates of allegations that their speech violated Rules 4.1(A)(6), (A)(7), and (A)(13) of the Code, which maintain the non-partisan nature of Kentucky's judicial elections. *Fischer v. Thomas*, 52 F.4th 303, 306 (6th Cir. 2022) (per curiam) (*Fischer I*). The Commission did not identify the specific statements at issue or the complaining party. The letter simply asked the candidates to formally respond in writing and invited them to attend an informal conference to discuss the allegations in greater detail. *Id.*

Rather than wait for the conference, which was set to occur only two weeks before the upcoming election, the candidates sued, arguing that the First Amendment protected their allegedly infringing speech. *Fischer II*, 864 F.4th at 867. The candidates moved for a preliminary injunction that would both allow their continued campaign speech and block the Commission from initiating formal disciplinary proceedings for the duration of their suit. *Id.* The district court denied the candidates' request, and the candidates appealed. *Id.*

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We addressed the candidates' appeal in two stages. First, in *Fischer I*, we addressed the candidates' motion for emergency injunctive relief under Federal Rule of Appellate Procedure 8(a)(2), which asked us to enjoin the Commission from initiating formal proceedings while the candidates' appeal of the preliminary injunction was pending. *Fischer I*, 52 F.4th at 307–13; see FED. R. APP. P. 8(a)(2). Analyzing the candidates' likelihood of success on the merits, we found that “[w]hen a judicial commission sends vague and threatening letters to candidates on the eve of election, it puts the candidates to a choice between self-censorship and uncertain sanctions.” *Fischer I*, 52 F.4th at 313. Because “the First Amendment protect[ed] the candidates from having to make such a choice,” we found that the candidates were likely to succeed on the merits. *Id.* And eleven days before the election, we ordered the Commission to hold off on initiating formal or informal proceedings. *Id.*

Election day came and went, and both candidates lost their respective races. *Fischer II*, 78 F.4th at 867. With the election over, and with the emergency injunction's rationale reaching its expiration date, we took up the candidates' original request for a preliminary injunction in *Fischer II*. But rather than begin with the candidates' likelihood of success on the merits, we began by analyzing irreparable injury, an indispensable showing for those seeking a preliminary injunction. *Id.* at 868. Although the former candidates alleged irreparable harm in four ways, we found that none sufficed to warrant injunctive relief.

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As relevant to this suit, we rejected two of the candidates' four theories of irreparable harm due to the nature of their speech (campaign-related) and the timing of our consideration of their request (after the campaign). *Id.* at 868–69. The former candidates claimed that the Commission's formal proceedings would irreparably harm them first by “chill[ing] their and other candidates' speech in future campaigns,” and second by “punish[ing] them for their past protected speech.” *Id.* at 868. We rejected the former theory of harm because there was no ongoing election, and the former candidates had not indicated that there would be another election before the case reached final judgment. *Id.* Thus, the alleged “chill” over the former candidates' speech rights was not “immediate,” and the candidates were free to “renew their request for preliminary relief” when an election “loom[ed].” *Id.* We rejected the second theory of harm because “the only speech threatened by the Commission's proceedings had already occurred.” *Id.* at 869. Thus, neither formal proceedings nor sanction by the Commission would “affect the former candidates' ability to speak” moving forward, making the alleged harm non-irreparable (i.e., compensable by damages). *Id.* (“[I]f a court finds that the past speech was protected, then the appropriate remedy is damages, not an injunction.”).

Here, the district court found a lack of irreparable injury—and denied Dutton a preliminary injunction—by following our *Fischer II* analysis to a fault. The court rejected Dutton's contention that the Commission's formal proceedings would chill her speech by quoting from *Fischer II* itself, concluding that “because ‘there's no ongoing election’ and [Dutton] has not ‘indicated that

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there will be before the case reaches final judgment . . . the risk of chill isn't immediate.” DE 17, Op. & Order, Page ID 213–14 (quoting *Fischer II*, 78 F.4th at 868). Similarly, the court rejected Dutton’s contention that formal proceedings would unconstitutionally punish her for protected speech based on its finding that “the only speech threatened by the Commission’s proceedings has already occurred.” *Id.* at 213 (quoting *Fischer II*, 78 F.4th at 869). Because “Dutton does not allege that she intends to engage in similar speech anytime soon,” the court concluded, “the appropriate remedy” for any abridgment of Dutton’s protected speech “is damages, not an injunction.” *Id.* (quoting *Fischer II*, 78 F.4th at 869).

But the district court’s analysis fails to recognize that Dutton’s situation differs from that of the former candidates in *Fischer II*. Unlike the plaintiffs in *Fischer*, who wanted to self-identify as Republicans and accept the endorsement of pro-life groups only insofar as they were running for judicial office, Dutton wants to express her threatened speech outside the election season. Further, Dutton is a sitting judge, so her speech—unlike that of the former candidates—is subject to the Code on a go-forward basis. The district court’s observation that there is no looming election is therefore irrelevant to deciding whether Dutton’s speech is currently chilled. Moreover, Dutton explicitly alleges in her complaint that absent a Commission enforcement action, “[s]he will respond to media inquiries” regarding her 2020 reprimand “in the same way.” DE 1, Compl., Page ID 10 ¶ 35. Thus, the district court’s conclusion that Dutton “does not allege that she intends to engage in similar speech anytime soon” is incorrect. DE 17, Op. & Order, Page ID 213. So too

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with the district court's conclusion that "the only speech threatened by the Commission's proceedings has already occurred." *Id.*

What is clear from the record and from the parties' briefing is that Dutton wants to continue telling her side of the story in a way that the Commission finds objectionable under the Code. Equally clear from the record is the fact that the Commission stands at the ready to discipline Dutton under its view of the Code, chilling Dutton's speech. *See Schlissel*, 939 F.3d at 764. Whether the Commission's application of the Code to Dutton's speech in fact violates the First Amendment is a question we reserve for a later juncture. For now, it is sufficient to say, as we have many times before, that "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003)); *see also Connection Distrib.*, 154 F.3d at 288 ("With regard to the factor of irreparable injury . . . it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Thus, "insofar as a successful showing on the first [preliminary injunction] factor mandates a successful showing on the second factor," the district court should have assessed Dutton's likelihood of success on the merits before reaching the irreparable injury question.⁴ *ACLU of*

4. Because Dutton alleges a continuing constitutional violation, the district court should have first considered her likelihood of success on the merits. *See Connection Distrib.*, 154

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Ky., 354 F.3d at 445. By failing to do so, the district court abused its discretion. *Appalachian Reg'l Healthcare, Inc. v. U.S. Nursing Corp.*, 68 F.4th 324, 331 (6th Cir. 2023) (district court abuses its discretion by “misapplying the correct legal standard” (quoting *King v. Harwood*, 852 F.3d 568, 579 (6th Cir. 2017))).

IV.

That leaves the question of remedy. Dutton asks us to reverse the district court and remand with instructions to enter the requested preliminary injunction, a course that would require us to “resolve the ultimate question” of Dutton’s likelihood of success on the merits. *Schlissel*, 939 F.3d at 770. Yet while we review the district court’s assessment of likelihood of success on the merits de novo, perhaps counseling in favor of Dutton’s suggested approach, “we grant the district court substantial deference in its weighing of the preliminary injunction factors.” *Id.* Accordingly, the proper course in this case is to vacate the district court’s decision and remand with instructions to conduct the preliminary injunction analysis in its entirety, keeping in mind that “when a party

F.3d at 244. However, assessing the first prong of the preliminary injunction analysis is not always essential where there is no allegation of a continuing violation. In *Fischer II*, for example, the plaintiffs were no longer subject to the Code of Judicial Conduct. 78 F.4th at 868–69. As a result, the panel concluded that there was no risk of irreparable injury, regardless of whether the plaintiffs were likely to succeed on the merits. *Id.* Accordingly, first assessing the “likelihood of success” prong may be unnecessary in other cases where there is no ongoing risk of irreparable harm.

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seeks a preliminary injunction on the basis of a potential constitutional violation, likelihood of success on the merits will often be the determinative factor.” *Obama for Am.*, 697 F.3d at 436 (quoting *Jones*, 569 F.3d at 265).

For the foregoing reasons, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

**APPENDIX D — OPINION AND ORDER OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY,
CENTRAL DIVISION AT FRANKFORT,
FILED SEPTEMBER 15, 2023**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

DONNA DUTTON,

Plaintiff,

v.

HON. JIMMY SHAFFER, *et al.*,

Defendants.

Civil No. 3:23-cv-00039-GFVT

OPINION & ORDER

This matter is before the Court on Plaintiff Donna Dutton's Motion for Preliminary Injunction. [R. 4.] While running for election, Judge Dutton gave a statement to a local newspaper. [R. 1 at 6.] The Kentucky Judicial Conduct Commission informed Judge Dutton that her statement may have violated the Code of Judicial Conduct. [R. 1-5.] Judge Dutton now asks the Court to prevent the Commission from bringing an enforcement action under

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the First Amendment. [R. 1.] But Judge Dutton won her election. Thus, she does not face a threat of imminent, irreparable harm. Her request for a preliminary injunction is **DENIED**.

I

Judge Dutton was a candidate for the 53rd Judicial Circuit in the 2022 election cycle. [R. 1 at 4.] Days before the election, a local Kentucky newspaper published an article focused on a previous suspension that Judge Dutton received. *Id.* at 6. The article included a response that Judge Dutton provided to the newspaper, where she attempted to explain the suspension. *Id.* She then won her election. *Id.*

Months later, the Defendants sent Judge Dutton a letter informing her that a complaint had been filed against her with the Commission. [R. 1-5.] The complaint alleged that Judge Dutton's response to the newspaper was false, and the letter invited her to respond to the complaint. *Id.* She did. [R. 1-6.] Attorneys for Judge Dutton and the Commission then began a discussion about the potential for settlement. [R. 10-5.] The Commission sent Judge Dutton a proposed agreed order that would settle the matter and welcomed proposed changes from Judge Dutton. *Id.* at 1. If agreed upon, the proposed agreed order would publicly reprimand Judge Dutton and state that she violated several portions of the Code of Judicial Conduct by responding to the newspaper article. [R. 10-4.]

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Rather than proposing changes, Judge Dutton brought this action against the Defendants. [R. 1.] She now moves for an order enjoining the Defendants from initiating formal enforcement proceedings against her for her comments. [R. 4.] She argues that such formal proceedings would violate the First Amendment and cause her irreparable harm. *Id.* On the other hand, the Defendants argue that this Court must abstain from exercising jurisdiction over Judge Dutton’s claims and allow the state process to continue. [R. 10.]

II

A preliminary injunction is an extraordinary remedy that should be granted only if the movant carries his or her burden of proving that the circumstances “clearly demand it.” *Overstreet v. Lexington—Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). The purpose of a preliminary injunction is to “preserve the relative positions of the parties until a trial on the merits can be held.” *Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 761 (6th Cir. 2016) (internal quotations omitted).

To obtain a preliminary injunction, the movant must show that (1) they have a strong likelihood of success on the merits, (2) they are likely to suffer irreparable harm if the injunction is not issued, (3) the balance of equities favors an injunction, and (4) an injunction furthers the public interest. *See Overstreet*, 305 F.3d at 573. Yet when a party asserts that the Court should apply the *Younger* abstention doctrine, a court “must first address the

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Younger issue prior to engaging in any analysis on the merits of the case.” *Kalniz v. Ohio State Dental Bd.*, 699 F. Supp. 2d 966, 970 (S.D. Ohio 2010) (citing *Tenet v. Doe*, 544 U.S. 1, 6, n. 4, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005) and *Steel Co. v. Citizens for Better Env’t.*, 523 U.S. 83, 100, n.3, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). If *Younger* applies, a court “may not retain jurisdiction over the case.” See *O’Neill v. Coughlan*, 490 F. App’x 733, 737 (6th Cir. 2012) (citing *Juidice v. Vail*, 430 U.S. 327, 348, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977) (Stewart, J., dissenting)). The Defendants argue that *Younger* abstention applies here.

A

Abstention doctrines “promote harmony between the state and federal courts” and reflect the belief that “the state courts should be left to decide matters of unique importance to them.” *Summit Cty. Crisis Pregnancy Ctr., Inc. v. Fisher*, 830 F. Supp. 1029, 1032 (N.D. Ohio 1993). One abstention doctrine, *Younger*, “cautions federal courts against exercising jurisdiction in cases where they are asked to enjoin pending state proceedings.” *Fowler v. Benson*, 924 F.3d 247, 255 (6th Cir. 2019) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)).

Younger applies in only “three exceptional categories” of cases: (1) parallel, pending state criminal proceedings, (2) state civil proceedings that are akin to criminal prosecutions, and (3) state civil proceedings that implicate a state’s interest in enforcing court orders and judgments. *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73, 134 S.

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Ct. 584, 187 L. Ed. 2d 505 (2013). In all cases, there must be a state proceeding that was pending at the time that the action was filed in federal court. *See Kelm v. Hyatt*, 44 F.3d 415, 422 (6th Cir. 1995); *Fed. Express Corp. v. Tenn. Pub. Serv. Com.*, 925 F.2d 962, 969 (6th Cir. 1991).

With nearly identical facts, the Sixth Circuit has held that no pending state proceeding existed. *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016). In *Winter*, an individual running for a judicial election made various statements while campaigning that concerned the Judicial Conduct Commission. *Id.* at 686. The Commission sent her a letter informing her that a complaint had been filed against her and requesting that she respond to the allegations in writing. *Id.* at 687. The letter listed particular statements and alleged that they violated the Code of Judicial Conduct. *Winter v. Wolnitzek*, 186 F. Supp. 3d 673, 679 (E.D. Ky. 2016). The Commission issued the letter after deciding that there was “probable cause for action.” *Winter*, 834 F.3d at 686. The plaintiff contacted the Commission and asked for additional details, but the Commission refused. *Winter*, 186 F. Supp. 3d at 679. The Sixth Circuit held that “a finding of probable cause does not necessarily mean a formal proceeding exists,” and in the “absence of an ongoing enforcement action, *Younger* has no role to play.” *Winter*, 834 F.3d at 688.

Like in *Winter*, Judge Dutton made a statement that the Commission found concerning. [R. 1 at 6.] The Commission sent Judge Dutton a letter informing her that “a complaint has been filed against [her]” and “requested [she] file a written response to the allegations.” [R.

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1-5.] The letter listed the particular statements Judge Dutton made and alleged that they violated the Code of Judicial Conduct. *Id.* The Commission issued the letter after determining that the complaint showed “a basis for investigation of a matter within the jurisdiction of the Commission.” Ky. R. Sup. Ct. 4.170(1). These are the same procedures as those in *Winter*. Thus, *Winter* dictates that no ongoing enforcement action existed at this point. *Winter*, 834 F.3d at 688.

Only, here, Judge Dutton responded to the allegations and the Commission proposed an agreed order to settle the matter. [R. 1 at 7-8; R. 1-7.] The proposed agreed order would have Judge Dutton stipulate to the violations and receive a public reprimand. [R. 1-7.] But Judge Dutton’s response and the Commission’s proposed agreed order are not sufficient to create an ongoing state proceeding. Neither a response nor a settlement offer moves the Commission’s investigation out of the preliminary stage. *See* Ky. R. Sup. Ct. 4.170. Indeed, the Commission never initiated formal proceedings. *See* Ky. R. Sup. Ct. 4.180. Moreover, the Commission admits that “all parties understood” that the draft agreed order “was just that—a draft.” [R. 10 at 3.] It represented a starting point for negotiations before the Commission considered formal charges. *See id.* Therefore, like in *Winter*, no ongoing state proceedings exist. And in the “absence of an ongoing enforcement action, *Younger* has no role to play.” *Winter*, 834 F.3d at 688.

The Commission contends that if Judge Dutton faces a credible threat of enforcement sufficient to confer

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standing, then the Commission’s “disciplinary process” is necessarily ongoing and *Younger* applies. [R. 10 at 14-15.] The Commission raised this argument in *Winter* as well. 834 F.3d at 688 (“If the plaintiffs have standing to raise these challenges and if they are ripe for resolution, the Commission maintains, that must be because the Commission has initiated formal proceedings against them.”). The Sixth Circuit rejected this argument. *Id.* (“But a finding of probable cause does not necessarily mean a formal proceeding exists.”). Accordingly, *Younger* does not prevent this Court from exercising jurisdiction over Judge Dutton’s challenge. *See Fowler*, 924 F.3d at 255.

B

Judge Dutton requests an order preliminarily enjoining the Defendants from instituting formal proceedings while this action proceeds. [R. 4 at 20.] While the components of a preliminary injunction are generally “factors to be balanced,” it is “indispensable” that the movant show they are likely to suffer an irreparable harm without an injunction. *Six Clinics Holding Corp., II*, 119 F.3d at 400; *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019).

To constitute an irreparable harm, the movant must show a harm that is actual and immediate, not “speculative or theoretical.” *D.T.*, 942 F.3d at 327 (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)). The harm must also be such that there is no adequate remedy at law. *See United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002).

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The movant must also show that she will suffer the injury before a final judgment. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”). Judge Dutton claims that she will suffer four types of irreparable harm. [R. 4 at 16-20.] Yet because she fails to show that she would suffer any irreparable harm, the inquiry ends there.

First, Judge Dutton alleges that bringing an enforcement action for her prior speech constitutes an irreparable harm because the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* at 18 (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). Surely, Judge Dutton would suffer an irreparable injury if the Commission were threatening to impair her ability to speak now. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). But “the only speech threatened by the Commission’s proceedings has already occurred.” *Fischer v. Thomas*, No. 22-5938, 78 F.4th 864, 2023 U.S. App. LEXIS 21409, at *7 (6th Cir. Aug. 16, 2023). Judge Dutton does not allege that she intends to engage in similar speech anytime soon. Therefore, “if a court finds that the past speech was protected, then the appropriate remedy is damages, not an injunction.” 2023 U.S. App. LEXIS 21409, [WL] at *8.

Second, Judge Dutton contends that formal proceedings will chill her and other candidates’ speech in future elections. [R. 4 at 18.] But because “there’s no

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ongoing election” and she has not “indicated that there will be before the case reaches final judgment . . . the risk of chill isn’t ‘immediate.’” *Fischer*, No. 22-5938, 78 F.4th 864, 2023 U.S. App. LEXIS 21409, at *7 (citing *D.T.*, 942 F.3d at 327). Judge Dutton may renew her request for an injunction if an election looms. *See id.*

Third, Judge Dutton argues that being subjected to formal proceedings will necessarily hurt her reputation and goodwill. [R. 4 at 18-19.] Though reputational harm can be irreparable, she fails to support this claim. A movant claiming reputational harm must provide proof in support. *See, e.g., Tri-County Wholesale Distribs. v. Wine Grp., Inc.*, 565 F. App’x 477, 486 (6th Cir. 2012) (affirming a finding of no harm where “the motions and the affidavits left the district court without any facts upon which it could plausibly find anything but a speculative threat of irreparable harm”); *Reliant Capital Sols., LLC v. Ram Payment, LLC*, No. 2:22-cv-3047, 2022 U.S. Dist. LEXIS 210242, at *32-33 (S.D. Ohio Nov. 18, 2022) (finding no irreparable harm where the plaintiff provided no “market studies of name recognition, any figures of lost sales, or any evidence of actual confusion”).

Judge Dutton provides only one sentence claiming that formal proceedings will harm her reputation and goodwill. [R. 4 at 18-19.] Finding an irreparable harm without supporting evidence here would mean that administrative enforcement actions always cause irreparable harm. They do not. *See, e.g., Dobson Indus. v. Iron Workers Local Union No. 25*, 237 F. App’x 39, 49 (6th Cir. 2007); *Fischer*, 78 F.4th 864, 2023 U.S. App. LEXIS 21409, at *9. Because

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Judge Dutton supports her claim with no facts showing that this harm will actually occur, the threat of harm is speculative. *Tri-County Wholesale Distribs.*, 565 F. App'x at 486.

Finally, Judge Dutton argues that, if the Commission institutes formal proceedings, there will now be a pending state proceeding and *Younger* will prevent her from seeking a remedy in federal court. [R. 4 at 17-18.] She contends that this inability to seek federal relief would constitute an irreparable harm. *Id.* However, Judge Dutton fails to show that *Younger* would apply. And even if it did, utilizing an abstention doctrine—designed to promote harmony between the state and federal courts—does not constitute a harm.

Younger abstention is required only when state court proceedings are initiated “before any proceedings of substance on the merits have taken place in the federal court.” *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). In other words, *Younger* applies only when state proceedings began when “the federal litigation was in an embryonic stage and no contested matter had been decided.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975).

Proceedings are not yet of substance on the merits where the “sole issue” addressed by the court is whether to abstain. See *Tokyo Gwinnett, LLC v. Gwinnett Cnty.*, 940 F.3d 1254, 1271 (11th Cir. 2019) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 437, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)). Likewise,

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federal proceedings are not yet on the merits where the court only denied a request for a temporary restraining order. *See Hicks*, 422 U.S. at 337, 349. But an action where a court granted a preliminary injunction has “certainly” proceeded “well beyond” the embryonic stage. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984).

The Sixth Circuit has not reviewed the issue in depth. *See Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd.*, 542 F.2d 652, 654 (6th Cir. 1976) (no proceedings on the merits where a complaint has been filed). However, the Ninth Circuit has found that an “extended evidentiary hearing on the question of a preliminary injunction constituted a substantive proceeding on the merits,” even though the court did not ultimately grant the motion. *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348, 1350-51 (9th Cir. 1985). Some courts have gone further, holding that proceedings on the merits have begun where a motion for preliminary injunction was briefed but still pending before the court. *See, e.g., Cremeans v. Taczak*, No. 2:19-CV-2703, 2019 U.S. Dist. LEXIS 183158, at *24 (S.D. Ohio Oct. 23, 2019) (finding proceedings on the merits where the court held a preliminary injunction hearing for which “the parties and the Court had already spent significant time and resources preparing”); *Merck Sharp & Dohme Corp. v. Conway*, 909 F. Supp. 2d 781, 789 (E.D. Ky. 2012) (finding proceedings on the merits where the action was pending for over seven months, the parties briefed two “important” motions, and the court held a scheduling conference).

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This action has been pending for nearly four months. [See R. 1.] The Defendants answered the complaint and agreed not to initiate formal proceedings until the Court resolves the request for a preliminary injunction. [R. 8; R. 9; R. 13.] The parties fully briefed the motion for preliminary injunction, and the Court conducted a hearing during which the parties argued at length Judge Dutton's First Amendment claims. [R. 14.] Although this order does not discuss the merits of these claims, the parties and the Court nonetheless spent significant time analyzing them. [R. 4; R. 10; R. 12.] Therefore, this action has progressed past the embryonic stage with contested matters decided. *See Doran*, 422 U.S. at 929.

Moreover, because no state proceedings exist, this action continues to progress. The Court expects the parties to soon meet and confer under Federal Rule of Civil Procedure 26(f), create a discovery plan, and begin discovery. Judge Dutton provides no evidence that the "Defendants are prepared to immediately file formal charges against her." [R. 1 at 9.] Rather, when sending Judge Dutton the proposed agreed order, the Defendants' counsel represented that they "are not faced with any impending deadlines" and invited Judge Dutton to negotiate changes to the proposed order. [R. 10-5.] Thus, Judge Dutton fails to show that state proceedings would soon begin and bar this Court's jurisdiction even if these are not yet of substance on the merits.

Regardless, Judge Dutton fails to show that the threat of *Younger* abstention constitutes a harm. In our system, federal and state courts share the stage. Neither

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is a mere understudy to the other. In fact, the state and federal governments are separate sovereigns, and state power derives from a source independent of the federal government. *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 72, 136 S. Ct. 1863, 195 L. Ed. 2d 179 n.5 (2016). Federal courts designed *Younger* “to promote equity and comity and allow state officials to proceed with cases uninterrupted by the federal courts.” *Doe v. Univ. of Ky.*, 860 F.3d 365, 372 (6th Cir. 2017).

Judge Dutton argues that simply directing her “to a state process” is irreparable harm. [R. 4 at 17.] Yet she does not specify how the state process would prejudice her rights. Indeed, she does not argue that the state process disables her from bringing federal claims. *See id.* This would consider the Court’s own abstention doctrine inherently harmful. The Court will not hold that relegating an individual to a state process to promote equity and comity between separate sovereigns constitutes irreparable harm. *See Univ. of Ky.*, 860 F.3d at 372.

In fact, *Younger* has its own exception in cases of irreparable harm. If a plaintiff can show that the pending state proceeding would cause irreparable injury, then *Younger* does not bar the court from hearing the case. *See Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 564 (6th Cir. 1982). But if a state proceeding itself is an irreparable harm, the exception would always apply and *Younger* would turn into a nullity. Therefore, Judge Dutton fails to show that the threat of *Younger* abstention constitutes an irreparable harm. And because Judge Dutton does not show that she is likely to suffer any other

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irreparable harm, she is not entitled to a preliminary injunction. *See Six Clinics Holding Corp., II*, 119 F.3d at 400.

III

Accordingly, and the Court being sufficiently advised, Judge Dutton's Motion for Preliminary Injunction [**R. 4**] is hereby **DENIED**.

This the 15th day of September, 2023.

/s/ Gregory F. Van Tatenhove
Gregory F. Van Tatenhove
United States District Judge

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**APPENDIX E — ORDER DENYING REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, FILED MAY 5, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 25-5352/5391

HON. DONNA GREENWELL DUTTON,

Plaintiff-Appellant/Cross-Appellee,

v.

JIMMY SHAFFER, IN HER OFFICIAL
CAPACITY AS THE EXECUTIVE SECRETARY
OF THE JUDICIAL CONDUCT COMMISSION;
HON. R. MICHAEL SULLIVAN, HON. JEFF S.
TAYLOR, HON. ELIZABETH CHANDLER,
HON. EDDY COLEMAN, HON. JOE E. ELLIS,
AND HON. JANET LIVELY MCCAULEY,
IN THEIR OFFICIAL CAPACITIES AS MEMBERS
OF THE JUDICIAL CONDUCT COMMISSION,

Defendants-Appellees/Cross-Appellants.

Filed May 5, 2026

ORDER

BEFORE: GIBBONS, WHITE, and MURPHY,
Circuit Judges.

Appendix E

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE
COURT**

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk