

referee. As he was doing this, Judge Day produced his business card which identified him as a circuit court judge.

Deny paragraph 3 as alleged, but admit that after the soccer game, Judge Day approached the referees' table to obtain information about the center referee because Judge Day had a player safety concern regarding how the game was controlled and intended file a complaint with the officiating organization. Admit that Judge Day advised the referee that he had seen him officiate before and had the same player safety concerns. Admit that Judge Day asked the referee for his business card which showed the organization he worked for. Admit that Judge Day produced a business card after the referee asked if Judge Day had a card.

4.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): "A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Rule 2.2: "A judge shall not use the judicial position to gain personal advantage of any kind for the judge or any other person. However, a judge may provide a character or ability reference for a person about whom the judge has personal knowledge."

Denies that Judge Day's actual conduct in relation to paragraph 3, forms the basis for a violation of the Oregon Code of Judicial Conduct.

5.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 2

6.

On November 7, 2012, Judge Day attended another soccer game in which his son was playing. Judge Day approached the soccer referees' table after the game, which was on the opposite side of the field from the spectators. As Judge Day was walking towards the table, a soccer official signaled him to stop. In a January 31, 2013, letter to the Oregon Commission on Judicial Fitness and Disability (the "Commission"), Judge Day wrote the following about that event:

Before I could finish the sentence I was grabbed by my shoulders from behind without warning, whirled around, and nearly picked [up] off my feet and forcefully thrown forwards. I nearly went down on my hands and knees, but was able to right myself.

This statement written by Judge Day to the Commission was false. There was no physical contact between the soccer official and Judge Day.

Denies paragraph 6 as alleged, but admits that he attended another college soccer game in 2012 in which his son was playing. Admits that he approached the soccer referees' table, which was on the opposite side of the field from spectators, after the game to thank the officials for officiating the game. Admits that he accurately recounted the events of that evening in his January 31, 2013 letter to the Commission. Denies that the specific statement alleged by the Commission to be false, is false. Admits that the soccer official initiated physical contact before signaling Judge Day to stop.

7.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Rule 2.1 (D) "A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Denies that Judge Day's actual conduct in relation to paragraph 6 forms the basis for a violation of the Oregon Code of Judicial Conduct.

8.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct in relation to paragraph 6, was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

(Relating to Complaint No. 14-86)

Count 3

9.

Denies paragraph 9 as alleged, but admits that he presided over the Marion County Veteran's Treatment Court ("VTC") in which "BAS", a decorated former member of the elite Navy SEAL Team Six, was enrolled due to a felony DUII. Admits that Judge Day knew that BAS, having a felony conviction, was prohibited from possessing weapons.

10.

In November, 2013, Judge Day took BAS to do some work at Judge Day's daughter's home. At his daughter's house, Judge Day asked BAS if he could find a gun hidden in a secret compartment in a cabinet. BAS searched and found the compartment and a loaded gun within that compartment.

Denies paragraph 10 as alleged, but admits that in November, 2013, Judge Day took BAS to do some work at Judge Day's daughter's home. Admits that BAS searched and found a secret compartment in a cabinet in which a gun was located.

11.

When he found the compartment and gun, BAS asked Judge Day if he was permitted to handle the gun. Judge Day gave him permission. In fact, Judge Day lacked the authority to waive the statutory firearm prohibitions against a felon having or handling firearms.

Denies paragraph 11 as alleged, but admits that Judge Day lacked the authority to waive the statutory firearm prohibitions for a felon.

12.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

Rule 2.1 (C) “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

Denies that Judge Day's actual conduct in relation to paragraphs 9, 10 and 11 form the basis for a violation of the Oregon Code of Judicial Conduct.

13.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 4

14.

On January 12, 2014, Judge Day and his son, Justin Day, drove to BAS's home. Justin Day brought a gun along and took it out while at BAS's home. BAS asked Judge Day if he could handle the gun, and again, Judge Day gave him permission.

Denies paragraph 14 as alleged, but admits that on or about January 5, 2014, Judge Day and his son Justin Day drove to BAS's home. Admits that there was a hand gun in

the back of Justin Day's truck that was unknown to Judge Day. Admits that Justin Day brought the gun into BAS' house while Judge Day was attempting to repair BAS' only source of heat.

15.

Judge Day told BAS that, because he was BAS' probation judge, he could waive the firearm prohibition. BAS relied on Judge Day's representations and handled the guns on these occasions. In fact, Judge Day lacked the authority to waive the statutory firearms prohibitions against a felon having or handling firearms.

Denies paragraph 15 as alleged, but admits that a circuit court judge does not have the authority to waive the statutory firearm prohibitions for a felon.

16.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): "A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Denies that Judge Day's actual conduct in relation to paragraphs 14 and 15 form the basis for a violation of the Oregon Code of Judicial Conduct.

17.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 5

18.

Judge Day was asked about the gun handling incidents described above by the Commission. In his response, Judge Day denied that his son brought a gun to BAS's house, and Judge Day denied that he told BAS that he "waived" the statutory prohibition against felons having or handling firearms.

Denies paragraph 18 as alleged, but admits that Judge Day was asked about the gun handling incidents described above by the Commission's investigator. Denies that Judge Day denied to the Commission's investigator that his son brought a gun to BAS's house. Admits that Judge Day denied to the Commission's investigator that he told BAS that he "waived" the statutory prohibition against felons having or handling firearms.

19.

When asked about the events, Judge Day told Marion County judges the Hon. James Rhoades and the Hon. Dale Penn that he did not know that BAS was convicted of a felony. This was untrue, as Judge Day was BAS's probation judge through the VTC and he knew that BAS was convicted of a felony DUII.

Denies paragraph 19 as alleged, but admits that Judge Day, when asked about the events by Hon. James Rhoades, used a phrase to the effect "I did not know he was a felon" when answering the question from Hon. James Rhoades. Admits that his explanation was inartful. Admits that he was not thinking of BAS' felony conviction when he noticed his son showing BAS a handgun. Denies that he purposely intended to mislead or misrepresent any fact to Hon. James Rhoades or Hon. Dale Penn. Admits that he presides over the VTC, took a plea from BAS, and signed various judgments relating to BAS.

20.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (D): "A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Denies that Judge Day's actual conduct in relation to paragraphs 18 and 19 form the basis for a violation of the Oregon Code of Judicial Conduct.

21.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 6

22.

Judge Day singled BAS out for attention and improperly imposed himself onto BAS. Judge Day's conduct put BAS in the position of being subject to Judge Day's attentions, while being aware of Judge Day's control over his probation status.

Denies paragraph 22 as alleged, but admits that the VTC team was concerned about BAS becoming depressed and making comments indicating potential plans to harm himself. Admits that the VTC team was concerned that BAS was isolated in East Marion County in a dilapidated home and had no means of transportation. Admits that the VTC team purposely sought to provide BAS with pro-social contact so that isolation would not occur.

23.

In one such example of Judge Day's impositions, in November, 2013, while driving BAS to Judge Day's daughter's home to do some cabinetry work, Judge Day stopped to perform a wedding ceremony. Judge Day made BAS stand next to him at the wedding, at Judge Day's left shoulder. Judge Day introduced BAS to the wedding attendees as a Navy SEAL.

Denies paragraph 23 as alleged, but admits that Judge Day, while driving BAS to Judge Day's daughter's home to do some work for hire, stopped to perform a wedding ceremony. Admits that Judge Day asked BAS if he wanted to wait in the car or watch the brief wedding ceremony. Admits that BAS chose to watch the ceremony. Admits that the wedding

took place near the state capitol under a small covered area that required people in attendance to stand in close proximity to each other. Denies that Judge Day made BAS stand next to him at the wedding, at Judge Day's left shoulder. Admits that after the groom told Judge Day that he had served in the Navy, that Judge Day then introduced BAS to the groom as a Navy SEAL.

24.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

Rule 2.1 (C) “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

Rule 3.7 (B) “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.”

Denies that Judge Day's actual conduct in relation to paragraphs 22 and 23 form the basis for a violation of the Oregon Code of Judicial Conduct.

25.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 7

26.

On July 26, 2013, BAS appeared telephonically before Judge Day as part of the VTC. During that VTC session, Judge Day ordered BAS to read the book Fearless. That book is about Navy SEAL Team Six member Adam Brown who was killed in action in Afghanistan. BAS personally knew Mr. Brown and told that to Judge Day. BAS was emotionally distraught when he talked about Mr. Brown.

Denies paragraph 26 as alleged, but admits that BAS appeared before Judge Day telephonically as part of the VTC hearing on July 26, 2013. Admits that Judge Day and BAS discussed the book *Fearless* and that BAS knew Adam Brown. Admits that the Order entered following the appearance required BAS to read the book *Fearless*. Admits BAS became emotional during his telephonic appearance, the full extent of which was unknown to Judge Day.

27.

At that July 26, 2013, VTC session, Judge Day knew that BAS was a member of SEAL Team Six and was aware of his service record and his medical conditions.

Denies paragraph 27 as alleged, but admits that Judge Day was aware of BAS' service record and that he was a member of SEAL Team Six through 2004. Denies that Judge Day knew the full extent of BAS' medical conditions on July 26, 2013.

28.

Judge Day ordered BAS to read Fearless even though BAS expressed that reading the book exacerbated his PTSD symptoms and threatened his sobriety.

Denies paragraph 28 as alleged, but admits that the Order signed by Judge Day says "read fearless."

29.

On another occasion, Judge Day forced other veterans appearing in the VTC to remain in the room and watch a video that exacerbated PTSD symptoms in some of them.

Denies paragraph 29.

30.

Judge Day sometimes called the veterans in VTC "Raggedy Asses." He said numerous times to VTC staff, "I'm the judge- I can do whatever I want."

Denies paragraph 30 as alleged, but admits that Judge Day has used language appropriate for veterans when addressing VTC participants which is consistent with building camaraderie and a therapeutic relationship within the context of a military culture.

31.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

Rule 2.1 (C) “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

Denies that Judge Day’s actual conduct in relation to paragraphs 26, 27, 28, 29 and 30 form the basis for a violation of the Oregon Code of Judicial Conduct.

32.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

Denies that Judge Day’s actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day’s actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 8

33.

Judge Day stated in a letter dated August 23, 2014, to the Commission that he had reassigned BAS's case to the Hon. Tracy Prall. This was an untrue statement, as Judge Rhoades had reassigned BAS's case to Judge Prall.

Denies paragraph 33 as alleged, but admits that Judge Day's letter to the Commission dated August 23, 2014 states "I have requested that this case be formally transferred to Judge Tracy Prall, who serves as the backup judge for the veterans' court." Admit that Judge Day's letter dated August 23, 2014 also states "(I)t is my understanding that Judge Prall will handle the case through completion." Denies that Judge Day's letter to the Commission dated August 23, 2014, states that Judge Day reassigned BAS's case to the Hon. Tracy Prall. Denies that the substance of Judge Day's August 23, 2014 letter contains any false statements. Admits that Hon. James Rhoades reassigned BAS' case to Hon. Tracy Prall.

34.

Judge Day also falsely claimed that he volunteered to report himself to the Commission relating to BAS's allegations, when instead Judge Rhoades had told him that he had to report himself.

Denies paragraph 34 as alleged, but admits that Judge Day told Hon. Dale Penn and Hon. James Rhoades that he would self-report to the Commission. Denies that Hon. James Rhoades required Judge Day to report himself to the Commission. Admits that Hon. James Rhoades' letter to BAS dated August 28, 2014, states that Judge Day "has self-reported" to the Commission and her letter is fully consistent with Judge Day's letter to the Commission dated August 23, 2014.

35.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (D): "A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Denies that Judge Day's actual conduct in relation to paragraphs 33 and 34 form the basis for a violation of the Oregon Code of Judicial Conduct.

36.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

Denies that Judge Day’s actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day’s actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 9

37.

Judge Day collected money from lawyers, including those appearing before him in court, to sponsor veteran-related wall hangings in the Marion County courthouse hallways. Donation checks were delivered to Judge Day at the courthouse.

Denies paragraph 37 as alleged, but admits he collected, on behalf of Partnership for Veterans at Risk (PVR), a local 501C(3) charitable organization, money donations that were offered by local lawyers, some of whom appeared before Judge Day as well as the other Marion County Circuit Court judges, to pay for matting and framing of war memorabilia, photographs, and other documents, to be displayed at the Marion County Courthouse, for the purpose of honoring the military service of local residents, attorneys, and judges. Judge Day further admits he did this for the benefit of veterans who were participants in the VTC.

38.

Judge Day said that he had permission to hang pictures and other wall hangings in the courthouse, when he did not.

Denies paragraph 38 as alleged, but admits that he said he had permission to hang pictures and other wall hangings in the courthouse because he did have permission.

39.

Some of the wall hangings had wall signs next to them, identifying by name the donor that "sponsored" the wall hanging. These names included practicing attorneys appearing in the courthouse before Judge Day.

Denies paragraph 39 as alleged, but admits that some of the wall hangings had signs next to them describing the history of the individual or the event and further admits that

some of the signs identified the names of the individuals who made money donations. Judge Day further admits that several of the individuals have appeared before Judge Day.

40.

Judge Day hung a wall hanging that included a picture of Adolf Hitler. He displayed this without permission in a public area of the Marion County courthouse.

Denies paragraph 40 as alleged, but admits that three wall hangings were created and hung in July of 2014 to honor the service of a local medical doctor, Kenneth Vollmar. Judge Day further admits that one of the wall hangings emphasized how a liberal democracy overcame the scourge of fascism and, as part of the background behind Dr. Vollmar's memorabilia, the wall hanging did contain an old painting from that period of Adolf Hitler. Admits that Judge Day was never informed that wall hangings to be displayed in the Marion County Courthouse had to be pre-approved for display by anyone.

41.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): "A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Denies that Judge Day's actual conduct in relation to paragraphs 37, 38, 39 and 40 form the basis for a violation of the Oregon Code of Judicial Conduct.

42.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 10

43.

Judge Day hung pictures and wall hangings in his judicial assistant's work area at the courthouse, despite being advised by her that she did not want those items in her work area.

Denies paragraph 43 as alleged, but admits that he hung pictures in the waiting area adjacent to his private chambers.

44.

When his judicial assistant removed the items while Judge Day was on vacation, Judge Day told her that he is a "benevolent dictator" and that she "works at his pleasure." Judge Day also asked her whether she became a circuit court judge while he was away on vacation.

Denies paragraph 44 as alleged, but admits that Judge Day jokingly said in the past that he can be a "benevolent dictator". Judge Day further admits that after his judicial assistant removed the wall hangings in the waiting area adjacent to his private chambers and that he had a discussion with his judicial assistant about removing the wall hangings. Judge Day further admits that he jokingly made a comment to his assistant about whether she had become a judge while he was on vacation.

45.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): "A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Rule 3.7 (B) "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

Denies that Judge Day's actual conduct in relation to paragraphs 43 and 44 form the basis for a violation of the Oregon Code of Judicial Conduct.

46.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 11

47.

Court staff was fearful of Judge Day's treatment. At times, Judge Day failed to provide his court staff required breaks for lunch or in the morning and afternoon. Judge Day regularly expected staff to stay late after normal work hours. Judge Day expressed exasperation when his judicial assistant took her work vacation.

Denies paragraph 47.

48.

Judge Day promised Elan Lambert, the Court Coordinator for the VTC, a contract of employment, which he never presented to her. Judge Day led Ms. Lambert to believe that her VTC position included payment for work as an evaluator, when in fact no payment was initially available and it was approximately five months before funds were made available to pay Ms. Lambert for her evaluator work.

Denies paragraph 48 as alleged, but admits that a "Personal/Professional Services Agreement" was drafted by Marion County and signed by Elan Lambert on March 5, 2013. Admits that a US Department of Justice grant was awarded to the VTC which included funding for an evaluator to work under contract. Admits that the federal grant was a reimbursement grant and that Elan Lambert was aware of the need to find an agency to self fund

the contract and then wait for reimbursement. Admits that the funding process was outside of Judge Day's control and took approximately five months before payment could be made to Elan Lambert.

49.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 2.1 (A): "A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

Rule 2.1 (C) "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge."

Rule 3.7 (B) "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

Denies that Judge Day's actual conduct in relation to paragraphs 47 and 48 form the basis for a violation of the Oregon Code of Judicial Conduct.

50.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 12

51.

Judge Day inappropriately screened and ordered his court staff to screen wedding applicants to ensure that they were not same-sex applicants, because Judge Day refused to marry same-sex partners even though they could lawfully marry under Oregon law.

Denies paragraph 51 as alleged, but admits that Judge Day has firmly held religious beliefs rooted in the Judeo-Christian tradition that defines marriage as between a female and a male. Admits that Judge Day requested his assistant to not schedule him to perform same sex marriages, but to find an alternate judge who would do so because it conflicted with his firmly held religious beliefs.

52.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 3.3 (B) “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”

Denies that Judge Day’s actual conduct in relation to paragraph 51 forms the basis for a violation of the Oregon Code of Judicial Conduct.

53.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(c) Willful or persistent failure to perform judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

Denies that Judge Day’s actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

Count 13

(No paragraph number is stated for this first paragraph of Count 13)

Disregarding the importance of partisan neutrality in the courthouse, Judge Day inappropriately hung pictures of select past U.S. presidents in his courtroom's jury room.

Denies the non-numerated paragraph under Count 13.

54.

The above alleged conduct is a violation of the Oregon Code of Judicial Conduct as follows:

Rule 3.3 (B) "A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

Rule 3.7 (B) "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

Denies that Judge Day's actual conduct in relation to the non-numerated paragraph above forms the basis for a violation of the Oregon Code of Judicial Conduct.

55.

The above alleged conduct is in violation of the Oregon Constitution Article VII (Amended) Section 8(1) as follows: "In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court."

Denies that Judge Day's actual conduct was willful misconduct under the Oregon Constitution Article VII (Amended) Section 8(1).

Denies that Judge Day's actual conduct was a willful violation of the Oregon Constitution Article VII (Amended) Section 8(1).

First Affirmative Defense

56.

Judge Day re-alleges and incorporates by reference the matters admitted in his Answer above.

57.

The Commission's Complaint fails to state ultimate facts sufficient to constitute claims on which relief may be granted as a matter of law.

Second Affirmative Defense

58.

Judge Day re-alleges and incorporates by reference the matters admitted in his Answer above.

59.

Case No. 12-139 was dismissed by the Commission at its meeting on February 15, 2013. By reviving Case No. 12-139 more than two years after the formal dismissal of the case, the Commission has violated Rule of Procedure 2(j), 7(e) and 20(a). The Commission's actions violate Judge Day's Due Process rights under the Oregon and the United States Constitution.

Third Affirmative Defense

60.

Judge Day re-alleges and incorporates by reference the matters admitted in his Answer above.

61.

The Commission did not perform its investigative, prosecutorial, or deliberative duties in good faith, but instead charged Judge Day with some violations even after clear and convincing evidence of his innocence was provided to the Commission.

Fourth Affirmative Defense and Counterclaim

62.

Judge Day re-alleges and incorporates by reference the matters admitted in his Answer above.

Affirmative Defense

63.

Rule 2.1(A), Rule 2.1(C), Rule 2.1(D), Rule 3.3(B), Rule 3.7(B), and Article VII (Amended), section 8(1) are unconstitutional, either on their face and/or as applied to Judge Day.

Counterclaim

64.

This is a counterclaim seeking declaratory and injunctive relief under Article VI and the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of Rule 2.1(A), Rule 2.1(C), Rule 2.1(D), Rule 3.3(B), and Rule 3.7(B) of Oregon’s Code of Judicial Conduct, and Article VII, section 8(1) of the Oregon Constitution, facially and/or as applied to Judge Day’s alleged conduct.

65.

Rule 2.1 (A) states that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

66.

Rule 2.1 (C) states that “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

67.

Rule 2.1 (D) states that “A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

68.

Rule 3.3 (B) states that “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”⁰

69.

Rule 3.7 (B) states that “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.”

70.

Oregon Constitution Article VII (Amended), section 8(1) states that:

In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties; . . .

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.

71.

Judge Day complains that Rule 2.1(A), Rule 2.1(C), Rule 2.1(D), Rule 3.3(B), Rule 3.7(B), and Article VII (Amended), section 8(1) either on their face or as applied to Judge Day, are unconstitutional in that they infringe on constitutionally protected free speech. Specifically, they are vague, overbroad, and/or fail strict scrutiny. Article VII (Amended), section 8(1) also is unconstitutional as applied to Judge Day because it serves as a religious test for qualification for office.

(Jurisdiction and Venue)

72.

Judge Day's counterclaim arises under Section 1 of the Civil Rights Act of 1871, 17. Stat. 13, 42 U.S.C. § 1983, Article VI and the First and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 8 of the Oregon Constitution.

73.

The Commission has jurisdiction to adjudicate Judge Day's claims under the United States Constitution, Article VI, and Oregon Revised Statute Section 1.415.

(Facts)

74.

Judge Day is a judge of the Marion County Circuit Court in Salem, Oregon. He was appointed to office in 2011 and successfully ran for office in 2012.

75.

The Oregon Commission on Judicial Fitness and Disability ("the Commission") is charged with investigating complaints of misconduct filed against a judge, including violations of Oregon's Code of Judicial Conduct. ORS § 1.420.

76.

While attending his son's soccer game, Judge Day produced a government authorized, printed, and provided business card, which identifies him as a Circuit Court Judge, to a soccer official when a request was made for the business card.

77.

Judge Day presides over the Marion County Veterans Treatment Court. The treatment court is a non-adversarial program where veteran defendants are responsible to complete an eighteen month judicially supervised treatment program. This non-traditional treatment court allows the judge and other veterans court team members to have out of court interactions that are not normally not allowed in traditional court settings. Judges and team members are expected to encourage, guide and teach veteran participants and associate with them outside the traditional courtroom setting, because such interactions can be beneficial to the participant's success.

78.

During the development and maintenance of this court Judge Day has attended several trainings which emphasize the importance of positive judicial interaction with veteran participants. Depending on the circumstances, Judge Day may encourage a veteran to read a book, address the veterans using military terms, or have those in attendance watch an educational or inspirational video. A judge's freedom to encourage and discuss their progress is critical to the success of the individual veteran and the program.

79.

During the months of May and June of 2014, Judge Day worked with the family of a local veteran to create several wall hangings which the family wished to donate to the Marion County Veterans Treatment Court (VTC). The purpose of some the wall art was honor Dr. Ken Vollmar's military and community service in hopes of encouraging current VTC

participants that there is life after combat. One of the wall hangings was designed to emphasize how a liberal democracy overcame the scourge of fascism and as part of the background behind Dr. Vollmar's memorabilia the piece of art did contain a poorly preserved original painting of Adolf Hitler. The wall art was not intended to honor fascism, but to honor the Americans that defeated the dreadful ideology. The wall art was first displayed on July 18, 2014, at the inaugural graduation ceremony of four VTC participants. Several weeks later Judge Day was requested to remove the wall art because a fellow judge felt that the art may offend someone. Judge Day complied with the request in August of 2014.

80.

In late 2011 and early 2012, Judge Day inquired if it would be permissible to hang various historical photos and other framed artifacts in Courtroom 4D and the hallways of the fourth floor of the Marion County Courthouse. Permission was given and the wall hangings, along with several descriptive placards were placed on the walls. In mid-July of 2014, a number of wall hangings were added to the fourth floor public areas by Judge Day in order to encourage member of the VTC that other local citizens had served in the military and went on to create successful lives after their service. The wall hangings are still located on the fourth floor and are being enjoyed by the public.

81.

Judge Day also owns several wall hangings containing the picture of, and artifacts relating to, past Presidents of United States. Judge Day temporarily stored the wall hangings in his assigned jury room when it was not in use by a jury. The wall hangings were never hung on the walls of the jury room. On or about July 30, 2014, Judge Day hung several of the presidential wall hangings in the waiting area of his chambers.

82.

As a Circuit Court Judge in Marion County, Judge Day is assigned a court clerk and a judicial assistant to assist him in his judicial duties. Judge Day supervises a Court Coordinator due to a federal grant for the Veterans Treatment Court. The liberty to discuss issues important to the proper functioning of a judicial office and courtroom decorum is critical to serving the public.

83.

In late 2011, Judge Day made himself available to the public to perform wedding ceremonies under ORS 106.20. Judge Day accepted and performed weddings requested by the public from late 2011 to early September of 2014. On May 19, 2014, Judge Michael J. McShane of The United States District Court for the District of Oregon issued an opinion that Article 15, § 5A of the Oregon Constitution was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Judge Day has a sincerely held religious belief that same-sex marriage violates the tenants of his faith. Due to his religious convictions, Judge Day sought to recuse himself by requested that his judicial staff direct same-sex couples to another available judge who was available to perform same-sex ceremonies.

84.

The Commission initiated an investigation of Judge Day for expressing his religious and political views in the fall of 2014, and in June 2015, the Commission filed a complaint in this action against Judge Day, asserting 13 Counts against Judge Day for violating Rule 2.1(A), Rule 2.1(C), Rule 2.1(D), Rule 3.3(B), and Rule 3.7(B) of Oregon's Code of Judicial Conduct and seeking his removal pursuant to Article VII (Amended), section 8(1) of the Oregon Constitution.

85.

Because of the Commission’s unconstitutional enforcement of Rule 2.1(A), Rule 2.1(C), Rule 2.1(D), Rule 3.3(B), and Rule 3.7(B), Judge Day has suffered and will continue to suffer irreparable injury, loss, and damage.

86.

Judge Day has no adequate remedy at law.

Count I

(Rule 2.1(A) Is Unconstitutionally Vague)

87.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

88.

Rule 2.1(A) states that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

89.

“Vague statutes are objectionable for three primary reasons. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of those freedoms. . . . these vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent. “ *California Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

90.

Rule 2.1(A) fails to define “public confidence in the judiciary and the judicial system.” *See Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015). It fails to provide fair warning to judges like Judge Day that their protected political speech implicates Rule 2.1(A) and allows arbitrary, ad hoc application. So it is unconstitutionally vague under the First and Fourteenth Amendments of the United States Constitution.

Count II

(Rule 2.1(A) Does Not Satisfy Strict Scrutiny)

91.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

92.

Rule 2.1(A) states that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

93.

Rule 2.1(A) restricts core political speech. Because Rule 2.1(A) is not narrowly tailored to serve a compelling interest, it is unconstitutional.

Count III

(Rule 2.1(A) Is Unconstitutional As Applied to Judge Day)

94.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

95.

Rule 2.1(A) states that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

96.

Judge Day distributed his business card when requested, interacted with veterans through his work with VTC, interacted with his staff, and hung wall hangings on fourth floor and outside his chambers. Such conduct amounts to core political speech and association. Because Rule 2.1(A) is not narrowly tailored to serve a compelling interest as applied to Judge Day, it is unconstitutional.

Count IV

(Rule 2.1(A) is Unconstitutional under the Oregon Constitution)

97.

Judge Day realleges and incorporates by reference the preceding paragraphs in this counterclaim.

98.

Rule 2.1(A) states that “A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”

99.

Article I, section 8 of the Oregon Constitution states that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” As

interpreted by the Oregon Supreme Court, Article I, Section 8 “prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.” *State v. Ciancanelli*, 339 Or. 282, 296, 121 P.3d 613, 621 (2005) (*quoting State v. Robertson*, 293 Or. 402, 416-17, 649 P.2d 569 (1982)). But “there is an exception to that rule—specifically, that laws that are directed at restraining expression are permissible when the ‘scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.’” *Ciancanelli*, 121 P.3d at 621 (*quoting Robertson*, 293 Or. at 412, 649 P.2d 569).

100.

Rule 2.1(A) on its face is directed at conduct, including speech and association, and the Commission seeks to apply it to Judge Day’s speech and association of distributing his business card when requested, interacting with veterans through his work with VTC, interacting with his staff, and hanging wall hangings on fourth floor and outside his chambers. No historical exception applies to justify Rule 2.1(A) either on its face or as applied to Judge Day. It violates the Oregon Constitution.

Count V

(Rule 2.1(C) Is Unconstitutionally Vague)

101.

Judge Day realleges and incorporates by reference the preceding paragraphs in this counterclaim.

102.

Rule 2.1 (C) states that “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

103.

“Vague statutes are objectionable for three primary reasons. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of those freedoms. . . . these vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent.” *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

104.

Rule 2.1(C) fails to define “reflect adversely.” It fails to provide fair warning to judges like Judge Day that their protected political speech implicates Rule 2.1(C) and allows arbitrary, ad hoc application. So it is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Count VI

(Rule 2.1(C) Does Not Satisfy Strict Scrutiny)

105.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

106.

Rule 2.1 (C) states that “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

107.

Rule 2.1(C) restricts core political speech. It is a content-based restriction and subject to strict scrutiny. Because Rule 2.1(C) is not narrowly tailored to serve a compelling interest, it is unconstitutional.

Count VII

(Rule 2.1(C) Is Unconstitutional As Applied to Judge Day)

108.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

109.

Rule 2.1 (C) states that “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

110.

Judge Day distributed his business card when requested, interacted with veterans through his work with VTC, interacted with his staff, and hung wall hangings on fourth floor and outside his chambers. Such conduct amounts to core political speech and association. Because Rule 2.1(C) is not narrowly tailored to serve a compelling interest as applied to Judge Day, it is unconstitutional.

Count VIII

(Rule 2.1(C) is Unconstitutional under the Oregon Constitution)

111.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

112.

Rule 2.1 (C) states that “A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.”

113.

Article I, section 8 of the Oregon Constitution states that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” As interpreted by the Oregon Supreme Court, Article I, Section 8 “prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.” *State v. Ciancanelli*, 339 Or. 282, 296, 121 P.3d 613, 621 (2005) (*quoting State v. Robertson*, 293 Or. 402, 416-17, 649 P.2d 569 (1982)). But “there is an exception to that rule—specifically, that laws that are directed at restraining expression are permissible when the “scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Ciancanelli*, 121 P.3d at 621 (*quoting Robertson*, 293 Or. at 412, 649 P.2d 569).

114.

Rule 2.1(C) on its face is directed at conduct, including speech and association, and the Commission seeks to apply it to Judge Day’s speech and associations of distributing his business card when requested, interacting with soccer referees, interacting with veterans through his work with VTC, interacting with his staff, and hanging wall hangings on fourth floor and outside his chambers for the purpose of educating the public on local history, particularly the rich history of service by local citizens. No historical exception applies to justify Rule 2.1(C) either on its face or as applied to Judge Day. It violates the Oregon Constitution.

Count IX

(Rule 2.1(D) Is Unconstitutionally Overbroad)

115.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

116.

Rule 2.1 (D) states that “A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

117.

A law is overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.’ ” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (quoting *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1587 (2010)).

118.

Rule 2.1(D) reaches protected speech. It substantially prohibits protected speech and is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Count X

(Rule 2.1(D) Is Unconstitutionally Vague)

119.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

120.

Rule 2.1 (D) states that “A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

121.

“Vague statutes are objectionable for three primary reasons. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of those freedoms. . . . these vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent. “ *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

122.

Rule 2.1(D) fails to define “involving.” It fails to provide fair warning to judges like Judge Day that their protected political speech implicates Rule 2.1(D) and allows arbitrary, ad hoc application. So it is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

Count XI

(Rule 2.1(D) Does Not Satisfy Strict Scrutiny)

123.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

124.

Rule 2.1 (D) states that “A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

125.

Rule 2.1(D) restricts core political speech. It is a content-based restriction and subject to strict scrutiny. Because Rule 2.1(D) is not narrowly tailored to serve a compelling interest, it is unconstitutional.

Count XII

(Rule 3.3(B) Is Unconstitutionally Vague As Applied to Judge Day)

126.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

127.

Rule 3.3 (B) states that “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”

128.

“Vague statutes are objectionable for three primary reasons. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of those freedoms. . . . these vagueness concerns are more acute when a law implicates First Amendment rights and, therefore, vagueness scrutiny is more stringent.” *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

129.

Rule 3.3(B) is being applied to Judge Day because he recused himself from performing same-sex marriage ceremonies. It fails to provide fair warning to judges like Judge Day that their unwillingness to perform non-mandatory, non-judicial duties because of sincerely-held religious beliefs implicates Rule 3.3(B) and allows arbitrary, ad hoc application. So it is unconstitutionally vague under the First and Fourteenth Amendments of the United States Constitution.

Count XIII

(Rule 3.3(B) Does Not Satisfy Strict Scrutiny)

130.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

131.

Rule 3.3 (B) states that “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”

132.

Rule 3.3(B) restricts core political speech. It is a content-based restriction and subject to strict scrutiny. Because Rule 3.3(B) is not narrowly tailored to serve a compelling interest, it is unconstitutional.

Count XIV

(Rule 3.3(B) Is Unconstitutional As Applied to Judge Day)

133.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

134.

Rule 3.3 (B) states that “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”

135.

Judge Day chose not to marry same-sex couples and stored paintings of U.S. presidents in his jury room until he hung them outside his chambers. Such conduct amounts to core political and religious speech and association. Because Rule 3.3(B), as applied to Judge Day, does not narrowly serve a compelling interest and compels speech, it is unconstitutional.

Count XV

(Rule 3.3(B) is Unconstitutional under the Oregon Constitution)

136.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

137.

Rule 3.3 (B) states that “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties,

witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.”

138.

Article I, section 8 of the Oregon Constitution states that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” As interpreted by the Oregon Supreme Court, Article I, Section 8 “prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.” *State v. Ciancanelli*, 339 Or. 282, 296, 121 P.3d 613, 621 (2005) (*quoting State v. Robertson*, 293 Or. 402, 416-17, 649 P.2d 569 (1982)). But “there is an exception to that rule—specifically, that laws that are directed at restraining expression are permissible when the “scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Ciancanelli*, 121 P.3d at 621 (*quoting Robertson*, 293 Or. at 412, 649 P.2d 569).

139.

Rule 3.3(B) on its face is directed at conduct, including speech and association, and the Commission seeks to apply it to Judge Day’s speech and association of storing paintings of U.S. presidents in a jury room until he hung them outside his chambers, and recusing from same-sex marriage ceremonies. No historical exception applies to justify Rule 3.3(B) either on its face or as applied to Judge Day. It violates the Oregon Constitution.

Count XVI

(Rule 3.7(B) Fails Strict Scrutiny As Applied to Judge Day)

140.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

141.

Rule 3.7 (B) states that “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.”

142.

Judge Day hung pictures outside his chambers and temporarily stored paintings of U.S. presidents in his jury room. Such conduct amounts to core political and religious speech. Because Rule 3.3(B) is not narrowly tailored to serve a compelling interest as applied to Judge Day, it is unconstitutional.

Count XVII

(Rule 3.7(B) is Unconstitutional under the Oregon Constitution)

143.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

144.

Rule 3.7 (B) states that “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.”

145.

Article I, section 8 of the Oregon Constitution states that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” As interpreted by the Oregon Supreme Court, Article I, Section 8 “prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences.” *State v. Ciancanelli*, 339 Or. 282, 296, 121 P.3d 613, 621 (2005) (*quoting State v. Robertson*, 293 Or. 402, 416-17, 649 P.2d 569 (1982)). But “there is an exception to that rule—specifically, that laws that are directed at restraining expression are permissible when the “scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Ciancanelli*, 121 P.3d at 621 (*quoting Robertson*, 293 Or. at 412, 649 P.2d 569).

146.

Rule 3.7(B) on its face is directed at conduct, including speech, and the Commission seeks to apply it to Judge Day’s conduct and speech of hanging paintings and artwork outside his chambers. No historical exception applies to justify Rule 3.7(B) either on its face or as applied to Judge Day. It violates the Oregon Constitution.

Count XVIII

(Article VII (Amended), section 8(1)(e) Is Unconstitutionally Overbroad)

147.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

148.

Oregon Constitution Article VII (Amended), section 8(1) states that: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

...

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

149.

A law is overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.’ ” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (quoting *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1587 (2010)).

150.

Article VII (Amended), section 8(1)(e) permits removal from office for *any* willful violation of Oregon’s Code of Judicial Conduct. “The purposes of a judicial code of ethics are broader, serving aspirational and precautionary purposes.” *State v. Pierce*, 263 Or. App. 515, 523, 333 P.3d 1069, 1075 (2014). To remove a judge from office for subjectively failing to satisfy an aspirational goal more generally, or for engaging in protected political and religious speech more specifically, gives Article VII (Amended), section 8(1)(e) a substantial number of unconstitutional applications and renders it unconstitutionally overbroad under the First and Fourteenth Amendments of the United States Constitution.

Count XIX

(Article VII (Amended), section 8(1)(e) Does Not Satisfy Strict Scrutiny)

151.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

152.

Oregon Constitution Article VII (Amended), section 8(1) states that: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

...

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

153.

Article VII (Amended), section 8(1)(e) punishes and chills core political speech. Because Article VII (Amended), section 8(1)(e) is not narrowly tailored to serve a compelling interest, it is unconstitutional.

Count XX

(Article VII (Amended), section 8(1) Is Unconstitutional As Applied to Judge Day)

154.

Judge Day re-alleges and incorporates by reference the preceding paragraphs in this counterclaim.

155.

Oregon Constitution Article VII (Amended), section 8(1) states that: “In the matter provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(b) Willful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties; . . .

(e) Willful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

156.

Judge Day distributed his business card when requested; interacted with soccer referees, veterans through his work with VTC, and his staff; hung pictures outside his chambers and on the fourth floor; stored paintings of U.S. presidents in his jury room; and recused himself from performing same sex marriages. Such conduct amounts to core political and religious speech and association. Because Article VII (Amended), section 8(1) is not narrowly tailored to serve a compelling interest as applied to Judge Day, it is unconstitutional.

157.

The Constitution of the United States, Article VI, provides: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

158.

Article VII (Amended), section 8(1) violates the religious qualifications prohibition of Article VI of the United States Constitution as applied to Judge Day. *See Feminist Women’s Health Center v. Codis*, 69 F.3d 339 (9th Cir. 1995).