No. 01-521

In The
Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,
v.
VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief in Support of Respondents for *Amici Curiae* Brennan Center for Justice at NYU School of Law, American Judicature Society, Campaigns for People, Citizen Action/Illinois, Kansas Appleseed Center for Law and Justice, North Carolina Center for Voter Education, Protestants for the Common Good, The Reform Institute, and Wisconsin Citizen Action

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Federal Cases

Case **Page**

State Cases

Rules, Regulations and Statutes

Other Authorities

Authority **Page**

Authority **Page**

INTEREST OF THE *AMICI*[1]

Amici curiae are the Brennan Center for Justice at NYU School of Law and other national and statewide organizations working to promote and preserve judicial fairness and impartiality. *Amici* have an interest in this case because pressures to relax canons of judicial conduct that safeguard important distinctions between judges and other elected officials interact dangerously with the increasing role of money in judicial elections, which is already eroding public confidence in the integrity of state courts. The specific interests of each *Amicus* in state judicial elections and the question presented in this case are set forth in greater detail in the appendix.

SUMMARY OF THE ARGUMENT

Speech by candidates for judicial office puts in tension two constitutional values: the compelling interest in preserving the integrity and impartiality of our courts guaranteed by the Due Process Clause; and the freedom of speech protected by the First Amendment. Striking the proper balance between these interests is critical to maintaining the traditional role of our nation's courts as neutral, independent arbiters that decide cases under a rule of law.

Due process in the context of litigation means that parties have an opportunity to be heard by an impartial judge

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[1] The *Amici* file this brief with the consent of all parties. The parties have separately filed their letters of consent to the participation of an array of *amici* in this matter, including those represented herein. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

who will fairly apply the law to the facts of their case to reach a decision. A judge who has determined in advance how to decide disputed issues effectively denies litigants the impartiality protected by the Due Process Clause. By making campaign statements about contested issues before they are presented in the context of a particular case, a judge may create both the appearance and the reality of bias.

Choosing judges by popular vote does not diminish the importance of judicial impartiality and independence. Those values are seriously threatened, however, by the burgeoning role of money in judicial campaigns. In recent years, candidates and interest groups have spent millions of dollars in fiercely contested judicial races. One deeply troubling consequence is an increased incentive for judicial candidates to attempt to garner support – in the form of votes, contributions, or advertising campaigns by interest groups – by indicating how they will rule on issues likely to come before the courts.

Preserving the impartiality, integrity, and independence of judges necessarily requires some limits on the statements they may make in seeking office. Judges, unlike elected members of the legislative and executive branches, are by the nature of their office expected *not* to commit themselves to take particular positions or to cater to particular constituencies if selected. This fact justifies limits on speech by judicial candidates that would not be tolerated for other elected public officials. The limits imposed on the states' ability to regulate the role of money in campaigns under *Buckley v. Valeo*, 424 U.S. 1 (1976), make other methods – such as limited but direct restrictions on candidate speech – all the more important to protect the states' interests in a fair and impartial judiciary.

Toward this end, most states have adopted some version of Canon 5A(3)(d)(ii) of the ABA Model Code of Judicial Conduct. This canon bars judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Minnesota has adopted a similar canon that prohibits candidates from "announc[ing] their views on disputed legal or political issues" (the "Announce Clause"). The courts below, and now the Minnesota Supreme Court, have construed the Announce Clause as substantively the same as ABA Canon 5A(3)(d)(ii). As construed, the Minnesota rule does not violate the First Amendment.

Prohibiting judicial candidates from making statements that commit or appear to commit them to particular resolutions of cases, controversies, or issues is justified under the First Amendment. The states' constitutional obligation to preserve judicial independence and impartiality outweighs the burden on speech imposed by such a restriction. Regulations like ABA Canon 5A(3)(d)(ii) are also narrowly tailored to serve a compelling public interest because only a provision that targets speech during an election can address the specific risks to impartiality presented by candidates' campaign statements.

The American conception of due process is inconsistent with the notion that prospective judges have a First Amendment right to seek office by indicating how they will resolve particular cases or issues that may come before them. Recognizing such a right would undermine the impartiality of our courts and the public confidence that is the ultimate foundation for the independent role of the judiciary under our federal and state constitutions.

ARGUMENT

I. States Have a Compelling Interest in Courts That Are, and Appear to Be, Fair and Impartial, Regardless of the Method of Judicial Selection.

A. Judicial Neutrality Is an Essential Component of Due Process.

"There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring). That states have a compelling interest in maintaining fair and impartial courts has never been seriously doubted. Chief Justice Rehnquist has described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government today." William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 AM. U. L. REV. 263, 273-74 (1996). Judges "must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or 'the home crowd' wants." Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 HAWAII L. REV. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 PEPPERDINE L. REV. 227, 229-30 (1980)).[2]

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[2] Likewise, impartiality has always been the focus of the Congressionally mandated oath of office for federal judges: "I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge all the duties incumbent on me as [a federal judge] under the Constitution and laws of the United States." 28 U.S.C. § 453; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

Preserving fair and impartial state courts is not merely good government; it is compelled by the Fourteenth Amendment. The ability to present one's case to an impartial tribunal is a fundamental component of due process:

> The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, mental coercion of a defendant, a judicial system which does not provide disinterested judges, and discriminatory selection of jurors.

Bridges v. California, 314 U.S. 252, 282 (1941) (citations omitted); *see also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996).

Judges cannot fulfill this constitutional mandate if they have a personal stake in the outcome of a case. Most obviously, a judge who has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" in a case cannot provide due process. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Less direct interests, too, will interfere with a person's right to an impartial tribunal:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold

> the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (holding that due process required disqualification of state supreme court judge in case that could have affected judge's personal litigation); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding that mayor responsible for village finances could not serve as judge in a court collecting fines that generated village income); *In re Murchison*, 349 U.S. 133 (1955) (concluding that due process does not permit same judge both to act as grand jury and to preside at trial of the accused).

The states' interest in guaranteeing due process includes eliminating not only actual bias but also the appearance of bias. "The Due Process Clause 'may sometimes bar trial by judges who . . . would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Aetna Life Ins.*, 475 U.S. at 825 (quoting *Murchison*, 349 U.S. at 136). Consequently, states may "properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965); *see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("*Letter Carriers*") ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it."); *United States v. Microsoft Corp.*, 253 F.3d 34, 111-17 (D.C. Cir. 2001) (*en banc*) (ordering disqualification of judge for "destroy[ing] the appearance of impartiality," even without evidence of actual bias, and emphasizing the

importance of "public confidence in judicial impartiality"), *cert. denied*, 70 U.S.L.W. 3267 (2001); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("[T]he state's interest in ensuring that judges be *and appear to be* neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." (emphasis added)).

B. Minnesota's Decision to Use an Electoral Selection Process Does Not Lessen Its Compelling Interest in an Impartial Judiciary.

The choice of an elected over an appointed judiciary is simply a decision concerning who selects and removes judges, not a value choice about the role of judges under our constitutional system or the need to maintain an impartial judiciary. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Mode of appointment is only one factor that enables distinctions to be made among different kinds of public officials."). An elected judiciary can and must be as impartial as an appointed judiciary.

As is fitting for a federal system, the states have chosen an array of judicial selection processes. Only eleven rely primarily on appointment. Nineteen utilize retention elections for some or all judges. Sixteen states have at least some partisan elections, while twenty have at least some that are non-partisan. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 1, 45; *see also* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (visited Feb. 18, 2002) http://www.ajs.org/Judicial%Selection%20/Charts3.pdf. In total, fifty-three percent of state appellate judges and seventy-seven percent of state trial judges are selected or retained through contestable elections. Only thirteen percent face no elections

at all. *See* Schotland, *supra*, at 4-5. The Due Process Clause compels all states, however, to provide their citizens with fair and impartial judges, regardless of the method of selection.

Minnesota's own commitment to both an elected and an impartial judiciary confirms that an electoral selection process need not diminish the preeminent goal of independent judges. As the Minnesota Supreme Court has observed:

> The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible to allow judges to decide cases without those influences.

Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992).

As part of that commitment, Minnesota adopted its first canon regulating the speech of judicial candidates in 1950. *See Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 879 (8th Cir. 2001). Most recently, the Minnesota Bar Association, the District Judges Association, and the Conference on Chief Judges have expressed support for Minnesota's strict limits on candidate speech because of concern that reducing the restrictions would further politicize elections. *Id.* at 880.

Minnesota moderates the effect of elections on the judiciary by giving judges a six-year term; requiring judicial elections to be non-partisan; utilizing appointment to fill vacant seats; permitting appointed judges to serve for at least a year before facing an election; designating incumbents on

the ballot; and carefully regulating the conduct of judicial candidates. *See Republican Party*, 247 F.3d at 865-66 (discussing *Peterson* and Minnesota's history of judicial elections); *Peterson*, 490 N.W.2d at 420-25. All of these steps reflect Minnesota's commitment to balancing ultimate democratic oversight with the judicial independence necessary for impartiality.

II. States' Compelling Interests in a Fair and Impartial Judiciary Justify Imposing Speech Restrictions on Judicial Candidates.

A. Judges Differ from Other Elected Officials in Fundamental Respects.

Because of the constitutional obligation of judges to apply the law impartially, states that use an electoral selection or retention process must regulate that process in ways that do not apply to other elected officials. Judges differ from other elected officials both in what they do and in how they do it. These differences justify prohibiting judicial candidates from announcing in advance their positions on issues that are likely to come before them on the bench.

Most elected officials, and particularly legislators, are advocates for their constituents. Their function is to take action on behalf of those constituents through their power to make and change the law. When taken, that action affects the citizenry as a whole, and is intended to reflect the will of the majority.

In contrast, judges are first and foremost the arbiters of individual disputes. They cannot be advocates for either side in a lawsuit but rather must be neutral toward every litigant before them. Moreover, when constitutional rights

are at stake, judges represent a critical anti-majoritarian force that balances the political power of the majority.

Political officials and judges go about performing these different functions in dramatically different ways. Legislators typically act as part of large deliberative bodies. They also routinely contend with elected executive officials, and executives with legislative officers. Political reality forces compromise between representatives with diverse interests in order to take action. Within these limits, however, political officials can take on any topic and debate any point. Indeed, vigorous debate of disputed issues both between and within the legislative and executive branches is intended to promote comprehensive consideration of the public interest and is constitutionally protected. *See, e.g.*, U.S. CONSTITUTION, Art. I, § 6 (the Speech and Debate Clause). Moreover, political officials and their constituents can approach one another at any time to exchange views.

Judges, on the other hand, act individually or in only the smallest of groups. Their reach properly extends only to the issues that parties bring before them in the context of an individual lawsuit. "A trial is not a 'free trade of ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'" *Bridges*, 314 U.S. at 283 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919)). Instead, judges are bound to resolve cases in accordance with the "rule of law." In other words, judges must apply:

> a continuity of reasoned principle found in the words of the Constitution, statute, or other controlling instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding,

> and like sources of law. A legislature may draw arbitrary lines according to practical politics and the pressures of interest groups. A decision "according to law," however, implies a generality of principles binding the judges and applied consistently to all persons of yesterday, today and tomorrow.

Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566-67 (1996); *cf.* Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?* JUDICATURE, Sept.-Oct. 2000, at 1, 3 ("Since vigorous disputes exist over which theory of interpretation is best, a judge is often free to choose among several generally accepted alternatives. A judge is not free, however, to invent an idiosyncratic theory of interpretation with no roots in our judicial traditions or to decide cases according to personal whim.").

Judges are further separated from political officials by their focus on the rights of individuals rather than the will of the majority. State judges, just as much as federal, are sworn to uphold the United States Constitution and the limitations on majority power embodied within it. They must also enforce the additional rights granted by the states to their citizens, regardless of prevailing community sentiments. As Alexander Hamilton explained during the ratification debates:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in

> practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78 at 497 (Robert Scigliano, ed., 2000).

Madison likewise recognized this essential role of independent judges in a constitutional system. When introducing the Bill of Rights to the first Congress, Madison linked the security of those rights to an impartial judiciary:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (Joseph Gales, ed., 1789) (reprinted in THE MIND OF THE FOUNDER 224 (Marvin Meyers, ed., 1973)). Thus, when judges are faced with a decision between the prevailing sentiments of the public and an individual constitutional freedom, they must reject the majority view and uphold the constitutional liberty.

This Court, too, has always upheld the importance of the anti-majoritarian component of the judicial function: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*" *West Virginia State*

Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). The anti-majoritarian role of judges in protecting constitutional freedoms therefore requires them to operate with an independence from their constituencies that the political branches need not always maintain.

B. The Distinctive Purposes and Processes of the Judiciary Require Speech Restrictions in Judicial Campaigns.

Political officials are elected to effectuate the interests of their constituencies. They can and should advocate particular positions during their campaigns because that is also their role in office. But this is emphatically not the role of judges, whose duty is to provide due process and preserve constitutional liberties by applying the law impartially to all litigants. Thus, while the constitutional interest in unrestricted speech is never more vital than in the electoral process for legislators and executives, this principle does not apply with the same force to judges because of their different role.

Consequently, states can properly limit the conduct of judicial campaigns in ways that would be improper for other elections. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d at 228 ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."). For a prospective judge to campaign by announcing positions in advance on disputed issues likely to come before the court is inconsistent with the obligation of a judge, once on the bench, to apply the law impartially to each individual litigant on the specific facts of each individual case.

> Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind. For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office.

Morial, 565 F.2d at 305.

Thus, judges who stake out positions in advance through public announcements on issues likely to come before the bench necessarily risk the impartiality that judging demands. Even if most judges can overcome this risk, due process requires that "justice must satisfy the appearance of justice" as well as the reality. *Aetna Life Ins.*, 475 U.S. at 825. Consequently, states may prohibit judicial candidates from announcing their positions on disputed issues likely to come before them if they win election in order to preserve both the reality and the appearance of judicial impartiality.

III. The Role of Money in Modern Elections Makes Restrictions Such as Minnesota's Announce Clause Essential to Preserve Judicial Impartiality.

A. The Role of Money and Fund-Raising in Judicial Elections Is Increasing.

The biggest threat to judicial independence and impartiality in states with elected judges comes from the increasing role of money in modern judicial elections. Candidate fund-raising increased threefold from 1990 to 2000. *See* Schotland, *supra*, at 2, 13-14. The funds raised by judicial candidates in 1998 and 2000 exceeded the total spending in elections from 1990 to 1996. Candidates for state supreme court seats raised more than $45 million in 2000, a 60% increase over the previous record set in 1998. In just the five states with the most hotly contested seats, outside individuals and organizations poured in at least another $16 million in 2000. *See id.*

A review of the most expensive judicial elections in 2000 shows the pervasive power of money. In Alabama, which had the most costly judicial elections, thirteen candidates for five seats on the state supreme court spent more than $13 million, with at least another $1 million spent by outside groups. *See id.* at 17-19. In Michigan, candidates for the supreme court spent more than $7 million, to which organizations and other supporters added more than $6 million. *See id.* at 24-25. In Ohio, supreme court candidates raised $3 million. Noncandidates spent nearly three times that much, much of it for so-called issue ads. *See id.* at 26-27. Illinois had the most expensive race in the country in terms of dollars per vote: candidates in one supreme court primary spent more than eleven dollars campaigning for each vote cast. *See id.* at 46.

As the amount of money spent in judicial elections has increased, poll after poll has shown that large, private contributions to judges undermine at least the appearance of neutrality, while expensive television attack ads run by interest groups in judicial elections heighten concerns that justice is for sale. A nation-wide poll conducted by Greenberg Quinlan Rosner Research and American Viewpoint for the Justice at Stake Campaign in 2001 found that seventy-six percent of voters believe that campaign contributions influence decisions. *See* National Public Opinion Survey Frequency Questionnaire at 4 (visited Feb. 18, 2002) http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf. Two-thirds of all voters believe that litigants who have made campaign contributions to judges often receive favorable treatment. *See id.* at 7. A similar poll in 1999 found that eighty-one percent of the public thinks that political considerations influence judge's decisions, and seventy-eight percent believe that elected judges are influenced by having to raise campaign funds. *See* National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (visited Feb. 18, 2002) http://www.ncsc.dni.us/ptc/ptc.htm.

B. The Need for Money Provides Incentives for Judicial Candidates to Make Statements that Undermine Neutrality.

With some judicial campaigns now costing millions of dollars, and with costly noncandidate-funded issue ads having increasing impact, elected judges cannot ignore the vital role of fund-raising in attaining and retaining judicial office. Judges do not need to look beyond their courtrooms for the largest contributors to judicial campaigns: the lawyers and litigants who appear before them. *See* Deborah Goldberg, *et al.*, THE NEW POLITICS OF JUDICIAL ELECTIONS

9 (2002) (visited Feb. 18, 2002) http://www.justiceatstake.org/files/jasmoneyreport.pdf (providing results of an analysis of eleven states).

Many judges are acutely aware of the role of money in judicial elections. A 2001 nation-wide survey of state judges found that more than a quarter believe that campaign contributions have at least some influence on judicial decisions. *See* Justice at Stake National Survey of Judges Frequency Questionnaire at 5 (visited Feb. 18, 2002) http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf. Nearly three quarters expressed concern that, in some states, nearly half of all supreme court decisions involve at least one party who has given money to at least one of the justices hearing the case. *See id.* at 9. Forty-six percent of state court judges feel pressure to raise money during election years. *See id.* at 3.

The easiest way for a candidate to raise money is to make herself attractive to the most likely sources of funds. The easiest way for a candidate to make herself attractive to these funding sources is to make statements consistent with their interests. Certainly, prospective supporters can look at a candidate's background or judicial record in an attempt to determine which candidate to support. But potential newcomers to the bench may not have much record available for assessment, and even established judges—bound, as they are, to apply the law neutrally to the facts before them—may not have records that appeal clearly to potential campaign contributors. Consequently, candidates faced with the need to raise funds may feel they have little choice but to confirm their loyalty to particular positions in campaign statements.

Judges quickly learn the importance of tying themselves to the "right" public positions, and the hazards of

being connected with the "wrong" ones. The politics of the death penalty provide striking examples. Former judge Charles F. Baird of the Texas Court of Criminal Appeals, who lost an election in 1998, reports that "the answer to the question whether capital cases make a difference in judicial elections is a clear and resounding Yes." *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?* 31 COLUM. HUMAN RIGHTS L. REV. 123, 134 (1999) (edited transcript of panel discussion at 1999 ABA Annual Meeting). Consequently, "a lot of judges in Texas . . . have just switched parties," because the Republican party "is viewed as being a political safe haven. When a judge leaves the Democratic party and joins the Republican party, he typically does so by asserting, 'I'm tougher on crime than anybody else.'" *Id.*

One member of the Texas Court of Criminal Appeals was elected after using a stump speech in which she declared, "'If you elect me I will never, ever vote to reverse a capital murder case.'" *Id.* By 1999, she had "sat on about 250 capital cases; she ha[d] not voted yet to reverse in a single capital murder case." *Id.* The single issue of the death penalty has had similar impact elsewhere. In Tennessee, former supreme court Justice Penny White became the first Tennessee judge ever to lose a retention race after she voted to reverse a death sentence. *Id.* at 140. On the day of the election, the Tennessee governor commented: "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so." *Id.* The Tennessee Supreme Court now issues press releases when it affirms a death sentence. *Id.*

Of course, if judges announce positions while campaigning, they may also feel compelled to look over their

shoulders to what they said during the last election in considering how to rule on a case. Faced with subsequent elections in order to retain their jobs, candidates can put their jobs at risk if they do not live up to their publicly declared views while on the bench. A candidate who campaigns as "tough on drunk drivers" would be hard pressed to enter a ruling rejecting a state's sobriety tests as unreliable, regardless of the evidence. *See In re Disciplinary Proceeding v. Kaiser*, 759 P.2d 392 (Wash. 1988) (censuring judge who campaigned as "tough on drunk driving"); *compare Mack v. Cruikshank*, 196 Ariz. 541 (Ariz. App. 1999) (holding that state had violated due process rights of defendants by using unreliable breath-testing device).

This is exactly the sort of incentive toward particular positions that has no place in the judiciary. A decision by an arbiter who has a personal interest in the decision is incompatible with due process. Judges plainly have an interest in retaining their jobs. To the extent that a judge feels bound to uphold a position that the judge announced in order to win election, a litigant is denied fair and impartial treatment. Historically, courts recognized that "the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." *Tumey*, 273 U.S. at 524. Nor is the partiality that offends due process limited to pecuniary interests. *See Aetna Life Ins.*, 475 U.S. at 830 (Brennan, J., concurring) ("an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding"); *Murchison*, 349 U.S. 133 (finding due process violation because of likelihood of non-pecuniary bias). Whether or not job security is a pecuniary interest, it is certainly a

personal interest that has no place in judicial decision-making.

Judicial candidates who announce positions in order to raise money to further their campaigns threaten neutrality in more subtle ways, as well. Psychological research establishes that speakers become attached to their positions merely by speaking them. *See* Neil K. Sethi, Comment, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 721-22 (1997) (citing Nicky Hayes, FOUNDATIONS OF PSYCHOLOGY (1994); Jerome Kagan & Julius Segal, PSYCHOLOGY: AN INTRODUCTORY TEXT (6th ed. 1988); B. von Haller Gilmer, PSYCHOLOGY (2d ed. 1973)). Simply taking a position can be enough to change attitudes. *See* Sethi, *supra*, at 722. Moreover, once attached to a position, the human mind tends to reject or rationalize new information so that it conforms to the pre-formed belief. *See id.* at 721. Thus, the judicial candidate who makes a series of speeches establishing a position becomes increasingly unlikely to deviate from that position regardless of the particular laws or facts before her.

In *Murchison*, the Court was mindful of the tendency of the individual to become attached to views previously formed or expressed. There, the Court found that a single judge could not, consistent with due process, act as both "grand jury" and trial judge. Having once taken a position on the state's case, "a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. . . . As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' secret session." *Murchison*, 349 U.S. at 137-38.

The same is true of judicial candidates who announce positions on issues they may have to decide. Having once taken a position on how those issues ought to be handled or resolved, a judge cannot be "wholly disinterested" in the outcome. Nor can judges free themselves from the influence of proclaiming positions to thousands of voters when an individual case presents an opportunity to adhere to, or deviate from, that position. Due process cannot coexist with campaign statements announcing positions on issues likely to come before the court.

C. Because States Are Limited in Their Ability to Regulate Money in Elections, Other Means of Protecting Fair and Impartial Courts Are All the More Important.

Buckley v. Valeo severely limits the ability of states to address the role of money in elections. *See* 424 U.S. 1 (1976). The extent to which *Buckley* does or should apply to judicial elections has not been resolved. As discussed above, judicial elections invoke different state interests than do elections for legislators and executives. That difference compels a different First Amendment analysis of campaign finance restrictions in state judicial elections than the *Buckley* Court developed when analyzing the Federal Election Campaign Act.

Despite these differences, states and lower courts are reluctant to deviate from the standards the Court has established for finance limitations in other elections when considering restrictions on judicial elections. *See, e.g.*, *Suster v. Marshall*, 149 F.3d 523, 529 (6th Cir. 1998) (refusing to differentiate between judicial elections and campaigns for legislative or executive office). As long as states are limited in their ability to regulate campaign

spending directly, they must be free to regulate related aspects of judicial campaigns that are tied to the role of money. First among these should be the ability of states to restrict judges from taking positions that appeal to particular constituents and therefore particular sources of funds, and that appear to tie a judge to a particular position regardless of the law or the facts as they may arise in an actual case.

IV. As Construed, Minnesota's Announce Clause, Like Canon Five of the 1990 ABA Model Code of Judicial Conduct, Is Constitutional.

A. The Courts Below Properly Construed the Minnesota Announce Clause as Consistent with ABA Canon Five.

As written, Minnesota's Canon Five prevents a judicial candidate from "announc[ing] his or her views on disputed legal and political issues." P. App. at 133A-134a. In comparison, Canon Five of the 1990 version of the ABA Model Code of Judicial Conduct states that judges and judicial candidates shall not:

> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
>
> (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

The courts below construed Minnesota's Announce Clause as substantially the same as clause ii of the ABA Model Code. The Minnesota Supreme Court has now expressly adopted the same construction. *See In re the Code of Judicial Conduct*, C4-85-697, 2002 Minn. LEXIS 42 (Minn. Jan. 29, 2002). In doing so, the courts correctly adopted a narrow construction that sustains the Minnesota provision.[3]

All of the parties and *amici* in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner, and that judges should not knowingly misrepresent facts (clauses i and iii of the ABA's Canon Five). Further, all agree that voters require general information from which to make informed choices about judicial candidates.

Controversy exists only as to the ability of judicial candidates to announce positions on controversies or issues that are likely to come before the court. Because such announcements in the context of an electoral campaign inherently carry at least the appearance of a commitment to decide a case or class of cases in a particular manner, the Minnesota Announce Clause is properly construed to be congruent with clause ii of the ABA Model Code. Thus, a candidate may discuss her legal and judicial philosophy generally, as long as she does not commit or appear to be

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[3] Thus, the issue of whether the courts below erred in construing Minnesota's Canon 5 narrowly, *see Republican Party Brief* at 26-29, has now been resolved. This Court is bound by the Minnesota Supreme Court's decision in *In re the Code of Judicial Conduct* "that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001)." *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.").

committing herself to decide a case or class of cases in a particular manner.

Minnesota's Board on Judicial Standards has shed light on the intent behind the Minnesota Announce Clause, in a manner consistent with the ABA Model Code. The Board has opined that judicial candidates may comment on appellate decisions and has provided lists of questions on topics that judicial candidates can address without violating the canon, such as judicial philosophy, issues relating to the administration of different types of cases, and the proper role of a judge in the judicial system. *See Republican Party*, 247 F.3d at 882. Of course, judges can also discuss their experience and qualifications. All of these are meaningful subjects that do not require the judge to present a position on a disputed legal or factual issue likely to come before the court.

B. As Construed, the Announce Clause Is Not Unconstitutionally Vague.

The Announce Clause prohibits judicial candidates from announcing their positions on disputed issues likely to come before a court, but does not prohibit candidates from making general statements on legal and judicial philosophy. This standard is not unconstitutionally vague.

The void-for-vagueness doctrine is aimed at regulations that leave individuals unable to determine what conduct is and is not prohibited, and that permit law enforcement officials to engage in arbitrary enforcement. *See*, *e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Minnesota's Canon Five avoids these concerns. In addition to the plain language of the Minnesota provision and of Canon Five of the ABA's Model Code, the Minnesota Board

of Judicial Standards has issued formal opinions regarding the scope of the canon as well as examples of permissible and impermissible questions and comments that may arise in judicial campaigns. *See Republican Party*, 247 F.3d at 882. All of these interpretive standards lend clarity to the canon and must be considered in the vagueness analysis. *See Letter Carriers*, 413 U.S. at 575 ("It is to these regulations purporting to construe § 7324 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad.").

Moreover, the Minnesota Board provides advisory opinions to judicial candidates who have questions about specific statements. Indeed, this case followed just such an opinion. *Republican Party*, 247 F.3d at 859. The ability of candidates subject to the canon's prohibition to obtain specific guidance from the Board further eliminates any vagueness concerns. *See Letter Carriers*, 413 U.S. at 580 ("It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.").

In any event, vagueness analysis is typically limited to criminal statutes. *See Kolender*, 461 U.S. at 357 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness . . . ."). The danger of vague regulations in the criminal context is particularly severe because a state's failure to provide "'minimal guidelines to govern law enforcement' . . . may permit 'a standardless sweep [that] allows policemen, prosecutors and juries to pursue their

personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974), and describing the need for adequate guidelines for law enforcement as "the most meaningful aspect of the vagueness doctrine").

Here, not only is Canon Five not a criminal statute, but the Minnesota Board of Judicial Standards has applied Canon Five with reserve and precision. There is no evidence in the record of any arbitrary enforcement of Canon Five or that any candidate subject to its limitations has been unable to ascertain what speech is and is not prohibited. Finally, vagueness should be analyzed in light of the class of speakers subject to a regulation. Although drawing the line between permissible and impermissible comments may require fine judgment and an appreciation of the reasons for the rule, these are precisely the qualities that we can properly demand of a judge.

C. The Announce Clause Strikes an Appropriate Balance Between the Role of an Impartial Judiciary in Affording Due Process and the First Amendment Rights of Candidates and Voters.

Because the states' compelling interest in an impartial judiciary itself arises from constitutional interests, the Court should not presume unconstitutionality but rather should balance the two constitutional interests involved. The careful weighing of constitutional concerns is particularly appropriate in the electoral arena. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring). Like *Nixon*,

> this is a case where constitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny." Nor can we expect that mechanical application of the tests associated with "strict scrutiny"—the tests of "compelling interests" and "least restrictive means"—will properly resolve the difficult constitutional problem that campaign finance statutes pose.

Nixon, 528 U.S. at 400 (Breyer, J., concurring).

Consequently, the Court should balance the competing interests rather than simply subject Minnesota's Announce Clause to the categorical rubric of strict scrutiny. On one side of the scale sit the free speech rights of judicial candidates and the corresponding right of access to their views held by the public. On the other sit the due process rights of litigants and the dangers posed by both the reality and the perception of a judiciary tainted by prejudgments and partiality. Thus, the Court should ask "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the other." *Id.* at 402. As part of that inquiry, the Court should defer to bodies with "significantly greater institutional expertise." *Id.*

Here, Minnesota's Canon Five was promulgated and interpreted by the Minnesota Supreme Court as part of Minnesota's commitment to both an elected and an impartial judiciary. The Minnesota Supreme Court has deep institutional experience with the problems posed by an electoral judicial selection process. Minnesota's solution

should be upheld in light of the threat to due process posed by the speech barred by the Announce Clause.

D. The Announce Clause Is Also Narrowly Tailored.

The Announce Clause, properly construed, also passes constitutional muster under the traditional test of strict scrutiny. No less restrictive alternative would serve the states' compelling interests in the impartiality and the appearance of impartiality in their judiciaries.

Statements by judicial candidates that indicate how they will decide issues likely to come before the court create at least the appearance that the candidate is offering rulings in exchange for votes. Judicial candidates who make such statements while trying to attract campaign contributions risk creating the even more damaging appearance that the candidate is offering rulings in exchange for money. Even these appearances are inherently corruptive of the role of the courts in affording due process.

Permitting judges to "announce" their positions also gives judicial candidates an incentive to make such "offers." If one candidate in a judicial race announces a position on a disputed issue, any rival would face the choice of joining in that position, adopting an appealing counterposition, or losing support. Such competing announcements would foster the election of the candidate who most successfully convinces the voters that he or she would rule the way most people want. A system that pressures judges to announce their positions in order to be elected would conflict with the duty of judges to decide each case impartially on its own merits, blur the distinction between the judicial and political branches, and could result in the selection of those

candidates best able to reflect contemporary voter preferences rather than those best qualified to serve as judges.

Announce clauses are essential to limit these dangers. None of the supposedly less restrictive alternatives proposed by petitioners would protect the states' interests. The Republican Party Petitioners propose an appointment system and life tenure as alternatives to a restraint on judicial campaign speech. *Republican Party Brief* at 37-39. The Minnesota Constitution, however, requires an elected judiciary. The "least restrictive alternative" test does not require a state fundamentally to alter its government, particularly as the right of the people of Minnesota to determine the manner of selection of their judiciary is itself an interest of constitutional magnitude under our federal system. *See Gregory v. Ashcroft*, 501 U.S. 452, 457-64 (1991) (construing the Age Discrimination in Employment Act narrowly to avoid a conflict with the constitutional interests of the states in determining the qualifications of their judges).

Moreover, "announce" restrictions would be appropriate even in appointment systems. The predetermination of issues by judges, or the appearance thereof, threatens due process regardless of whether the judge is elected or appointed. Federal nominees recognize the impropriety of such announcements when they decline to answer issue-specific questions during the confirmation process.

The Republican Party Petitioners also suggest a restriction prohibiting judges from making promises or pledges of specific conduct while in office as a less restrictive alternative. *Republican Party Brief* at 37. Such a

restriction, however, would reduce none of the pressures on an impartial judiciary created by position announcements, as discussed above. A definite statement of position ties a judge to that position, both in fact and in the minds of the public, regardless of whether it is followed by a promise to adhere to that position in the future.

Finally, Petitioners suggest that judges can recuse themselves in cases where their impartiality may be at issue. *Republican Party Brief* at 38. However, if recusal were the answer to questions of impartiality, a vigorous campaign could leave a judge ineligible to hear a wide variety of cases. Nor does recusal address the problems of public perception generated by judicial candidates who violate announce clauses. The First Amendment does not require a state to adopt illogical and unworkable rules.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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APPENDIX

The **Brennan Center for Justice at NYU School of Law** unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center recognizes that fair and impartial courts are the ultimate guarantors of liberty in our constitutional system. Through its Judicial Independence Project, the Center works to protect the judiciary from politicizing forces, including the undue influence of money on judicial elections and efforts to relax canons on judicial conduct that help to safeguard crucial differences between judges and officers of the political branches. The Center takes an interest in this case because of its important implications for the ability of states with elected judiciaries to maintain both the reality and appearance of impartiality in their courts.

Founded in 1913, the **American Judicature Society** is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 89 years, the Society has been the foremost national organization speaking with a credible and independent voice on administration of justice issues and has demonstrated a continuing commitment to high ethical standards for judges and judicial candidates. The Society's Center for Judicial Independence promotes a judiciary that is free to issue fair and just rulings without bowing to popular and political pressures. Its Elmo B. Hunter Citizens Center for Judicial Selection promotes judicial selection reform to ensure a bench of the highest quality. Through its Center for Judicial Ethics, the Society provides a forum for the exchange of information and promotes the enforcement of judicial ethics standards designed to promote confidence in the judiciary.

Promoting high standards of conduct in judicial election campaigns has always been one of the focuses of the Center because public confidence in a judge's decisions is based not only on what takes place on the bench but also on how the judge campaigned for the office.[4]

Campaigns for People promotes non-partisan campaign finance and ethics reform in Texas. The organization supports state judicial reforms in Texas that enhance judicial independence, including judicial codes of conduct and public financing of judicial campaigns. It takes an interest in this case because of its implications for Texas' ability to maintain both the reality and appearance of impartiality in its courts.

Citizen Action/Illinois is the largest consumer watchdog group in Illinois. It has been a key player in legislative battles for consumers at the state and national levels. It believes that fair and impartial courts are essential to the preservation of our legal system and our liberty. Citizen Action/Illinois takes an interest in this case because of its important implications for the ability of states with elected judiciaries, like Illinois, to maintain both the reality and appearance of impartiality in their courts.

Kansas Appleseed Center for Law and Justice is a nonpartisan charity that advocates for improvements in the state government and legal system so that all Kansans will have equal access to justice. Kansas Appleseed Center for

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[4] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Judicature Society. No inference should be drawn that any judge-member of the Society's executive committee has participated in the adoption of or endorsement of the positions in this brief, which was not circulated to any judge-member of the executive committee prior to filing.

Law and Justice takes an interest in this case because of its implications for the Kansas Supreme Court Rules, which contain safeguards against promises made by judicial candidates that are similar to those at issue in this case.

The **North Carolina Center for Voter Education** is a non-partisan, not-for-profit organization dedicated to improving the quality and responsiveness of our election system. By examining current systems of campaign finance and election laws, and by promoting research and public discussion about the electoral process, the Center hopes to raise citizen awareness, make the election process more inclusive, and increase participation in elections. The Center takes an interest in this case because of its important implications on how states that elect their judiciaries, such as North Carolina, attempt to reduce the worrisome influence of money and politics over judicial selection.

Protestants for the Common Good is an association of Protestant laity and clergy throughout Illinois that calls people of faith to consider the ways in which their beliefs relate to public life. It believes that citizens must have confidence that decisions made by the judicial branch of government are impartial and independent of any factors not related to the applicable law. Protestants for the Common Good, which has recently focused attention on the increasing sums of money that are being raised and spent by judicial candidates, takes an interest in this case because of its implications for Illinois' ability to maintain both the reality and appearance of impartiality in its courts.

The Reform Institute is a not-for-profit educational organization that focuses on campaign finance and election reform issues. The Reform Institute seeks to protect judicial elections from the abuses that have long plagued our federal

campaign finance system—special interest spending and issue advocacy campaigns. The Reform Institute takes an interest in the *Kelly* case because the canon at issue helps to protect courts from the corrupting influences of large campaign contributions and to distinguish judicial campaign statements from issue advocacy campaigns run against judicial candidates.

Wisconsin Citizen Action is a public-interest organization of 60,000 members committed to economic justice and democracy. Wisconsin Citizen Action believes that the rising tide of special-interest funding of state-level supreme court elections is washing away public trust in the impartiality of justice. Wisconsin Citizen Action takes an interest in this case because, with the ability to raise large amounts of money increasingly becoming a *de facto* qualification for a supreme court candidacy in Wisconsin—as in many other states—it is more vital than ever to retain strong protections in judicial codes of conduct against candidates pandering to partisan or special interests.