Nos. 01-521

IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Petitioners,

v.

KELLY, *et al.*,

Respondents.

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

BRIEF OF AMICI CURIAE STATE SUPREME COURT JUSTICES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Honorable Clifford Taylor is an Associate Justice on the Michigan Supreme Court. He was appointed to that court in 1997, and that appointment was confirmed by election in 1998. He was reelected to an eight-year term in 2000. As a past and potential future candidate for elective judicial office, and as a current state supreme court jurist, Justice Taylor brings to this Court a valuable perspective on the interests of both candidates and the judiciary.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

The Honorable Richard B. Sanders is a Justice on the Washington Supreme Court. He took his seat on that court after winning a special election in 1995 and was reelected to a six-year term in 1998. Between his two elections Justice Sanders encountered political criticism and faced legal challenges for a speech regarding a controversial issue. He ultimately prevailed in defending his speech, both at the polls and in the courts. He thus brings to this Court a unique perspective on the interaction between judicial speech and judicial ethics in an elective system.

STATEMENT

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct states, in part, that a candidate for judicial office shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his or her views on disputed legal or political issues." Only the latter "announce" clause is challenged before this Court. Canon 5(A)(3)(a) and (c) further require the candidate to encourage family members to adhere to the same standards of political conduct as the candidate and forbid the candidate from authorizing or knowingly permitting any other person "to do for the candidate what the candidate is prohibited from doing" for him or herself.

The conduct at issue on certiorari involves petitioner Wersal's announcement, during the course of a campaign for a seat on the Minnesota Supreme Court, that he was in favor of strict judicial construction and his criticism of certain Minnesota Supreme Court decisions. Pet. 4. His wife, his brother, and associates and members of his campaign committee also spoke in favor of his candidacy and announced his views in favor of strict construction and against some Minnesota Supreme Court decisions. *Id*. 4-5.

Out of concern that those statements and certain other conduct violated Canon 5, petitioners brought a challenge to Canon 5's announce clause and its separate provisions – no

longer at issue before this Court – concerning activities involving political parties. Regarding the challenge to the announce clause, the district court construed the clause to apply only to matters likely to come before the candidate if elected as judge and held that Canon 5 advanced Minnesota's compelling interest in the independence and integrity of its judiciary. *Republican Party of Minnesota* v. *Kelly*, 63 F. Supp.2d 967, 985-86 (D. Minn. 1998).

The Eighth Circuit affirmed in a split decision, accepting the district court's narrowing construction of the announce clause and finding that, so construed, it was narrowly tailored to serve the Minnesota Supreme Court's compelling interest "to guarantee the independence of the Minnesota judiciary" from "'political, economic and social pressure.'" *Republican Party of Minnesota* v. *Kelly*, 247 F.3d 854, 864-65 (CA8 2001) (citation omitted).

Because thirty-four states select their judiciaries in whole or in part through popular election, the issue in this case is of national interest. The jurists appearing as *amici* on this brief both come from states that elect members of their judiciary, and thus have a particular interest in the reconciliation between the Canons and the First Amendment.

SUMMARY OF ARGUMENT

Two central facts about the judiciaries in Minnesota and in thirty-three other states must necessarily dominate the First Amendment analysis in this case. First, jurists in Minnesota and other states are subject to recurring elections and thus are dependent on the electorate for their continued tenure in office. Second, state courts, unlike their federal counterparts, play a central role in making, not merely interpreting, the law. While those facts may seem obvious, they have far-reaching and frequently ignored implications regarding the nature of state judiciaries.

The fact of recurring judicial elections introduces political accountability into a branch of government that, at the federal

level, is thought of mostly in terms of isolation and independence from such matters. Such a dramatic departure from the federal model necessarily rejects, at least in part, the notion of a fully independent judiciary and suggests that a certain degree of political responsiveness is not only permissible, but is an intrinsic and expected element of the elective judicial role.

The fact that state courts play a greater role than federal courts in the creation of substantive law explains, in part, why many states have opted for a more responsive, rather than isolated, judiciary. The authority, responsibility, and discretion inherent in developing the common law are perhaps the most significant law-making functions of state courts, and add a distinctly legislative character to state judiciaries. While state courts also have the simultaneous task of faithfully interpreting and applying authoritative law – constitutions, statutes, and regulations – made by others, their common-law-making function necessarily imposes upon them a degree of discretion in making policy choices that are political in a very basic sense of the word. It should hardly be surprising, therefore, that with such a mixed role for state courts, many states have rejected the federal model of a politically insulated judiciary and instead have opened their judiciaries up to periodic public input and influence through recurring elections.

The central facts of recurring elections and state judicial law making both increase the propriety and importance of judicial speech regarding issues on which courts exercise discretion and decrease the significance of judicial independence from public influence regarding such issues. While it remains true even in elected judiciaries that judges must be independent and impartial as to the facts and the litigants in individual cases, and ought not, therefore, make promises of how they will decide particular cases, that aspect of independence is not implicated by a ban on candidates announcing their views on legal *issues*. And although a jurist ought not *commit* to deciding even a legal issue a certain way – because it suggests im-

proper refusal to consider contrary arguments – expressing views on legal issues is a far cry from such a commitment.

While judicial candidates should not be allowed to promise to violate their oaths – either by disobeying binding law or by refusing to consider the arguments of the parties – they should be protected by the First Amendment when expressing their views regarding issues on which jurists might differ in the exercise of their lawful discretion and judgment. For if reasonable jurists might differ over matters ultimately within their discretion, then the voters might likewise differ over who they want exercising discretion over such issues. The electorate thus has a vital constitutional interest in knowing the views of judicial candidates on issues over which they will have discretion, and the candidates have a vital constitutional interest in seeing that their views are conveyed to the public accurately and as the candidates think best.

ARGUMENT

I. STRICT SCRUTINY IS APPROPRIATE.

The Eighth Circuit recognized that Canon 5's announce clause is a content-based restriction on political speech at the heart of an election campaign, and is thus subject to strict scrutiny. 247 F.3d at 864. *Amici* agree that full and rigorous strict scrutiny is appropriate in this case. There is no question that forbidding a candidate for judicial office from announcing his or her views on disputed issues (especially those likely to come before the court, and hence uniquely relevant to any election) is a severe burden on the First Amendment rights both of the candidate and the public.

Amici do take issue, however, with the Eighth Circuit's seeming attempt to dilute the rigor with which strict scrutiny was applied, and in particular with the court of appeals' suggestion that a strong government interest in judicial impartiality and integrity somehow lowers the standard of scrutiny it-

self. 247 F.3d at 862. Although the court of appeals may well be correct that certain differences between the judiciary and the legislative and executive branches "bear on the strength of the state's interest" in restricting certain types of judicial speech, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (CA7 1993); *In re Chmura*, 608 N.W.2d 31, 40 (Mich.), *cert. denied*, 531 U.S. 828 (2000), that difference in state interest is fully taken into account in the balancing process of strict scrutiny itself, and is no excuse for peremptorily diluting the standard of review.

II. RECURRING ELECTIONS AND THE COMMON LAW FUNDAMENTALLY ALTER THE TRADITIONAL FEDERAL CONCEPTION OF THE JUDICIAL FUNCTION.

When evaluating both the burden on First Amendment rights and the state interests in this case, it is important to bear in mind the inevitable implications of recurring popular election as a means of selecting or retaining members of a state judiciary. The recurring election of jurists is such a fundamental departure from the federal model that it is often a mistake to adopt federal norms as the standard for jurists in an elective system. Instead, elections create their own baseline norms about the proper role of elected jurists, the nature and scope of judicial independence, and the requirements of judicial integrity. While in some instances such norms may be similar to those in the federal system, in many instances they are quite different. The federal model of isolation and reticence makes far less sense in the context of a judiciary that is intentionally subject to the public check of elections and thus, by definition, must be responsive to public views regarding the proper direction of the law and the judicial process.

The unique role of state courts in creating the common law likewise has a profound impact on the First Amendment analysis in this case. Unlike the federal courts, which primarily focus on interpreting rules created by the Constitution, statutes, and regulations, state courts have the added power

and responsibility to *create* substantive rules governing behavior across a wide spectrum of daily life. *Cf. Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal common law. * * * And no clause in the Constitution purports to confer such a power upon the federal courts."). Common-law rules on topics such as negligence, product liability, contracts, business organization, and damages necessarily reflect an exercise of discretion regarding values and policy choices that can only be described as political. The inevitable and proper role of such values and policy choices in the common law and in other aspects of state judicial decision making explains, in part, why many states have rejected a model of extreme judicial independence and instead chosen recurring elections as a means of ensuring significant public influence over the make-up of their courts and the inclinations of their jurists. For where decisions reflect, not merely the application of external rules to individualized disputes, but also the discretionary formulation of new rules of widespread precedential force, the public has a valid interest in knowing the values and inclinations of those jurists who will be making the law, and in selecting their judicial lawmakers according to the values and inclinations they bring to their jobs.

A. Electoral Accountability Restricts the Concept of Judicial Independence.

Whatever the merit of the federal ideal of a wholly independent judiciary, elected state courts, by design, are *not* independent of the electorate. The very point of elections is to make jurists accountable for their decisions by subjecting them to repeated tests at the ballot box. As the Michigan Supreme Court has observed, one "rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction." *In re Chmura*, 608 N.W.2d at 42. A necessary corollary to that rationale is that the public has a legitimate interest in hearing the views of candidates on such issues and may take account

of those views when they vote. Accountability in state judicial systems is thus a significant departure from the federal model of initial political appointment followed by near impenetrable independence from further political influence.

By choosing to elect their judiciaries, the majority of states have eschewed the independence ideal and instead made jurists directly dependent upon the public for their future tenure. Although such dependence does not mean that elected jurists are expected to respond to public opinion in all matters,[2] it necessarily does mean that they are expected to at least take into account public sentiment on matters that involve policy- or value-based discretion, construction, or common-law creation.

While such accountability may seem jarring to lawyers and judges accustomed to the federal system, the significant law-making authority of state courts is a difference from the federal system that elevates the importance of accountability to the public and substantially alters the notion of judicial "independence" in state courts. This Court thus should resist relying on familiar norms of judicial independence from the federal courts and give thorough consideration to the struc-

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[2] It remains true, of course, that jurists must *apply* legal rules – whether legislative or court-made – impartially in each case and independent of public sentiment regarding the parties or the facts. And the very existence of elections seems to create pressure that threatens or appears to threaten impartiality and independence regarding those aspects of judging. It is precisely that concern that led the Framers of the federal Constitution to reject popular election of the judiciary. *See The Federalist No. 78*, at 471 (Hamilton) (Rossiter ed. 1961) (periodic election of judges creates "too great a disposition to consult popularity" when rendering decisions). Minnesota has made a different choice. States opting for an elected judiciary have, by definition, subordinated such intrinsic concerns raised by elections to the competing interest in accountability as to other aspects of the judicial function. The choice suggests considerable confidence both in jurists and in the public to distinguish between the elements of judging legitimately subject to public influence and accountability and the elements that must remain independent of external influence.

tural and conceptual limits on judicial independence that flow from the existence of recurring elections and enhanced law-making authority.

B. Impartiality as to Persons, Groups, and Facts.

There is no doubt that an essential characteristic of the judicial function, in both elective and appointive systems, is the impartial *application* of the law to individual cases. But impartiality in that context means deciding cases on the evidence presented without improper bias for or against the particular litigants. Personal favor or animus towards particular person or groups, or prejudgment of the facts of the case apart from the evidence presented, are the types of bias that are incompatible with judicial impartiality.

Notwithstanding the need for jurists to approach cases with an open and unbiased mind, judicial impartiality does not require a lack of knowledge or opinions about disputed legal questions or jurisprudential models that might arise in future cases. Judges are not expected to come to every case with a *totally* empty mind, and there is no expectation that judges must be impartial to ideas and legal issues. In fact, the near universal expectation of jurists is precisely the opposite – judges are expected to be knowledgeable and experienced in the law, which generally equates with having formed at least *some* opinions about the law and about various disputed legal issues. *See Laird* v. *Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., Memorandum regarding motion to disqualify) ("It would be not merely unusual, but extraordinary, if [most Justices] had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.").

Judges also are expected to interpret the law correctly regardless of whether the particular parties succeed in identifying such a correct interpretation. *See United States Nat'l Bank*

of Or. v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("'When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'") (citation omitted). It would be difficult to correctly explicate the law without reliance on a pre-existing background of knowledge and opinion regarding various legal issues and the judicial process in general.

In the creation of common law, in particular, it is both necessary and proper for jurists to have a pre-existing substantive and jurisprudential framework. While the creation of common-law rules certainly takes place in the context of individualized cases, it undeniably is done with an eye toward the larger class of cases that will be controlled by the rules being announced. Taking into account basic values, policy concerns, and opinions when formulating such rules does not reflect partiality or improper bias towards the litigants. Rather, it reflects judgment, experience, and a recognition that judges are more than mere arbitrators of private disputes – they are often the makers of public law. Impartiality comes not from the absence of opinions on legal issues, but rather from the even-handed application of the rules jurists develop based on their opinions as sharpened and challenged, though not defined, by the adversary process in individual cases and across a body of cases.

C. Judicial Integrity Can Co-Exist with a Functioning System of Judicial Elections.

As the preceding discussion illustrates, jurists can have *both* integrity and opinions. And they can express their opinions on legal issues to the electorate without compromising that integrity. Indeed, where disputed legal issues involve discretion, policy choice, and values, it is entirely proper for jurists to take into account public debate on such issues and, if they are so inclined, to participate in that debate.

The longstanding debate over the role of judges and over jurisprudential models such as strict construction or an evolving-law approach serves as a particularly apt example. The process by which courts interpret potentially ambiguous law or handle cases in the interstices of statutory provisions is one about which reasonable jurists and the public may disagree. And the different approaches taken by jurists can have profound impacts on the outcome of particular cases. But it surely does not reflect any lack of integrity for a jurist, prior to hearing argument in a case, to have an opinion regarding the jurisprudential model he will use. And it poses no threat to judicial integrity for a judge to announce – as did petitioner Wersal in this case – that he favors strict construction over more fluid jurisprudential models. Indeed, judges' discussion of their views on jurisprudence occurs regularly in scholarly and professional publications, typically invoking praise for its educational and professional value. *See, e.g.*, *Judicial Review of Legislation*, 77 Mich. Bar J. 32 (Jan. 1998) (debate between Michigan State Supreme Court Justice Clifford Taylor and Federal District Court (E.D. Mich.) Judge Avern Cohn over the role of judges). The general public – bearing ultimate responsibility for judicial selection – can benefit as much or more than members of the legal profession from the discussion of such views during judicial campaigns.

Insofar as the public is concerned with such differences in jurisprudence, the discussion of the issue and the announcement of a candidate's views thereon only serve to facilitate the democratic process and to give the public genuine choice based on matters of substance and consequence. The notion that it threatens judicial integrity to provide the public the information it needs to make its choice gets it entirely backwards. Integrity in an elective environment is only enhanced

by honest discussion of a candidate's views on matters important to the election.[3]

Judicial integrity ultimately means remaining true and faithful to your role and to the unique elements – including elections and the authority to create common law – that define your role. Where a state has chosen to make jurists accountable through recurring elections, responding to and facilitating such accountability is part and parcel of elective judicial office and can be accomplished with no loss of judicial integrity, properly understood.

III. PREVENTING CANDIDATES FROM ANNOUNCING VIEWS RELEVANT TO AN ELECTION DOES NOT ADVANCE ANY COMPELLING STATE INTERESTS.

In considering whether the announce clause serves a compelling state interest, the Eighth Circuit began by simply incorporating its earlier determination that a compelling interest in judicial independence supported the restrictions on partisan campaign activities, which are no longer at issue in this Court. 247 F.3d at 876. The court of appeals held in that earlier discussion that "guarantee[ing] the independence of the Minnesota judiciary * * * is crucial to preserve[ing] the justice of its courts of law and its citizens' faith in those courts," and that there "is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order." 247 F.3d at 864. The claimed strength of the State's interest in judicial independence was bolstered by reliance on the Minnesota case of *Peterson v. Stafford*, 490

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[3] Indeed, recognizing that judicial elections are intended to create a degree of accountability means that jurists not only may wish to explain their views on disputed issues such as jurisprudence, but they also may choose to remain open to adjusting their jurisprudential approach based on public input during the campaign and through the ballot box. Remaining open to such public influence on matters involving discretion – rather than being rigidly "independent" – reflects the integrity and purposes of the election process itself.

N.W.2d 418 (Minn.1992), for the proposition, offered in a quite different context, that the goal of the Minnesota Constitution, like the Federal Constitution, is to

> "create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences"[]

247 F.3d at 865 (quoting *Peterson*, 490 N.W.2d at 420) (footnote omitted).

The asserted threat to that generalized state interest is that a jurist who has made announcements regarding issues that later arise in a case "risks appearing as though he or she prejudged the case rather than gave it due consideration in light of the law, arguments, and facts" if his vote is consistent with his announced views and "risks being assailed as a dissembler" if it is not. 247 F.3d at 878. The "apparent rigidity" in the first instance is claimed potentially to "undermine the faith of the litigants and public in the judge's decision and in the State's judicial system generally," and the fear in the second instance is that "the judge may hesitate to decide the case in a way that might lose votes at the next election." *Id*.

The Eighth Circuit's analysis of the state interest in this case, and the manner in which the announce clause supposedly advances that interest, is problematic in several respects.

The particularized interests behind the announce clause are not compelling. The determination that the interest in judicial independence is compelling was made at too high a level of generality to be meaningful. Any interest can be described at a sufficiently high level to make it seem compelling. For example, maintaining a sound economy and avoiding a depression is certainly compelling in the abstract, but not every economic measure satisfies the compelling-interest standard.[4] This Court should look to the more specific inter-

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[4] This Court should distinguish between valid, substantial, and compelling interests. If the various levels of scrutiny have any meaning at all, then

ests in preventing direct communication of a candidate's views to determine whether *those* interests are compelling.

The more specific interests advanced in support of the announce clause are twofold. The first is the supposed impact on public faith in the judicial system if a judge acts consistently with his announced views and thus appears "rigid[]" in his views and unwilling to consider the particulars of a specific case. The second is the alternative possibility that concern for electoral consequences might cause a judge to decide cases consistent with prior announced views even when the judge has since reconsidered those views.

A central problem with these two asserted interests is that they are primarily a function of conduct within the scope of the "pledges or promises" clause of Canon 5, *see supra* at 2, and are implicated only indirectly and tangentially by the distinct category of speech prohibited by the announce clause. The concerns over apparent rigidity or an unwillingness to apply new views different from those previously announced is more evident in connection with statements regarding the *outcome* of future cases. Indeed, the Eighth Circuit seemed to recognize that connection when it argued that during an election campaign "the candidate simply cannot predict what the facts or arguments *in a particular case* may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision." 247 F.3d at 877 (emphasis added). But the court also acknowledged that "the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office – pledges by candidates to make specific decisions on the bench." *Id*.

With actual commitments as to future cases, as well as litigant- or fact-based bias, being addressed by provisions not

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those different levels of interest necessary for rational-basis, intermediate, and strict scrutiny must be given identifiable boundaries.

challenged here, the remaining concern seems to be that the announcement of views on disputed issues will function as "implied commitments" to decide cases in accordance with such views. *Buckley*, 997 F.2d at 227; *see also Kelly*. 247 F.3d at 877 (the announce clause "prevents candidates from *implying* how they would decide cases that might come before them as a judge") (emphasis added). But it is far from clear that the statements covered by the announce clause, rather than by the narrower pledges clause, actually do imply a commitment to a specific outcome in future cases. Instead, the announce clause bars speech on the broader category of *issues*, and while such speech may imply a jurist's anticipated approach to such issues in general, it is quite a stretch to the further implication that the jurist will ignore individualized factors relevant to how the jurist's announced approach would apply in specific future cases. Absent the implication of precommitment to specific outcomes in cases, the announcement of views on legal issues raises only very attenuated concerns that do not rise to the level of *compelling* interests.

The examples given by the court of appeals actually tend to disprove the stated concern over the broad category of announcements as opposed to more specific commitments regarding future cases. For example, the court cited "declarations by candidates that legislation relating to hot-button social issues is or is not constitutional" and "opinions about how unsettled legal issues should be resolved" as raising the threat of prejudgment. 247 F.3d at 877. The first example seems more an instance of a commitment, or at least a prediction, of the outcome of a future case regarding a specific piece of legislation. As such it falls more into the realm of the pledges and promises clause regarding future *decisions* than into the realm of views regarding *issues*.

The second example is more nebulous in that it depends on the particular issue and the nature of the resolution suggested. If the disputed "issue" involves the application of the law to prospective facts or circumstances, then once again

announcing the resolution of such an issue trenches upon the area of commitments regarding future decisions and would fall under the separate clause of Canon 5. If, on the other hand, the issue is the hotly disputed question of what jurisprudential framework to use when judging, the suggestion that announcements will appear to prejudge future cases seems fanciful. Similarly, where the disputed issues involve matters such as the nature or existence of substantive due process, the role of punitive damages, or the weight to be accorded the interests of victims in discretionary multi-factor balancing tests, announcing views on those issues creates no implied prejudgment of a future case; it merely recognizes that judging is conducted within a framework of values and views that pre-exist and may impact future cases, but that do not prejudge the specifics of those cases. *Cf. Tatum*, 409 U.S. at 834 ("Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities."); *id.* at 838-39 ("neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.").

Because the concerns raised by the mere *implications* of announcements regarding issues, as opposed to pledges regarding cases, are only attenuated manifestations of the State's more generalized interests, the particularized interests that exist in this case are not compelling. Just as a marginal economic program cannot claim the protection of a compelling state interest in averting economic collapse, neither can the marginal effort to reduce the attenuated effects of otherwise wholly proper statements. While states may well have *legitimate* interests in both limited economic stimuli and attenuated perceptions and political pressures impacting the ju-

diciary, it requires far more for a legitimate interest to be transformed into a *compelling* interest.[5]

Inconsistent pursuit of state interests diminishes their weight. The court of appeals further erred in its analysis by misapprehending both the facts and the relevance of Minnesota's inconsistent and contradictory pursuit of judicial independence.

As to the facts, the Eighth Circuit's holding that Minnesota continues to pursue "the ideal of an independent judiciary," 247 F.3d at 865, is belied by the mere existence of judicial elections. As discussed above, the very point of such elections – and their inevitable consequence regardless of intent – is to make jurists accountable to the public. Accountability and independence are the antitheses of each other and Minnesota is plainly pursuing a balance between the two "ideals" of full independence and full accountability.

Were Minnesota in fact pursuing the "ideal of an independent judiciary," there are numerous actions it could have, but has not, taken that would more effectively achieve its goal without restricting speech. For example, the terms of elected judges could be lengthened, thus minimizing the impact of any single case and reducing the frequency of campaigns. Or judicial pensions could be made to vest faster and be more

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[5] The court of appeals' citation, 247 F.3d at 877-78, to then-Justice Rehnquist's memorandum regarding disqualification in *Laird v. Tatum*, 409 U.S. 824 (1972), actually confirms that the interests in this case, while valid, are not compelling. The vast majority of that memorandum flatly rejected the notion that a prior expression of views on a legal issue impaired a jurist in subsequently ruling on such an issue. And while the opinion in a footnote did draw a distinction between statements made before and after nomination to the bench, that distinction was "[i]n terms of propriety, rather than disqualification." *Id*. at 836 n. 5. While reasonable jurists may differ about the "propriety" of particular statements on issues, the fact that the memorandum seems to treat even post-nomination statements as insufficient to force disqualification suggests that concern over such statements does not rise to the level of a compelling interest.

generous, thus reducing any financial concerns related to the possible loss of an election from an unpopular but correct decision. Or judges could be elected only once and serve either for life or for a fixed term of years with no reelection. Or, of course, elections could be eliminated entirely and judges could be appointed with life tenure and protected salaries according to the federal model. Any one of those options would have a greater impact on increasing judicial independence than does the announce clause, yet Minnesota has adopted none of them. That is the State's prerogative, and there are no doubt competing considerations for each of those suggestions, but it nonetheless repudiates the notion that Minnesota is in fact pursuing an independence "ideal" for its judicial system.

Minnesota's pursuit of its asserted interests is inconsistent and incomplete in other ways as well. With regard to the particularized interests of avoiding the appearance of rigidity from following, or the fear of electoral consequences from abandoning, previously announced views, Minnesota – by necessity – leaves unregulated the single biggest threat to both of those interests: Judicial opinions. Published opinions involving disputed legal issues are likely to be much more definitive and detailed regarding a jurist's future inclinations than campaign announcements would be. *See Tatum*, 409 U.S. at 835 ("Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason.") Deviation from such opinions in future cases is far more likely to generate public backlash on grounds of inconsistency and dissembling. The authorship of extensive concurrences, dissents, and *dicta* to express views

on numerous disputed legal issues compounds the effect of such unregulated "announcements" from the bench.

Even the Eighth Circuit itself inadvertently imputes inconsistency to Minnesota's pursuit of its interests, suggesting that the Minnesota Supreme Court would exempt numerous disputed issues from the facially broad language of the announce clause. For example, the court of appeals believed that the announce clause would not be found to cover "general discussions of case law or a candidate's judicial philosophy" or the expression of views on "issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system." 247 F.3d at 882. All of those potentially disputed issues are likely to come before a court, and hence fall within even the narrowed construction of the announce clause ratified by the Eighth Circuit.[6] And they implicate the State's proffered interests no less than the conduct that led to this case. Indeed, petitioner Wersal's announcements during his campaign involved two of the very issues that the court of appeals imagines might be exempt – a statement of judicial philosophy and criticism of past cases – yet the court still rejected his challenge. While the hypothesized exceptions thus offer little certainty or security to a judicial candidate, their mere suggestion calls into doubt the coherence of the State's pursuit of the alleged interests in this case.

The relevance of such inconsistency in the pursuit of an interest is that it will reduce the constitutional weight accorded the asserted interest. *See Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 186-87 (1999) (questioning assumption that a government interest in

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[6] The limitation of the announce clause to issues likely to come before the court is essentially meaningless in this case, both because almost any issue is likely to come before a court in one fashion or another and because issues likely to come before the court are the only ones *relevant* to a judicial election campaign and hence most acutely implicate the First Amendment.

reducing gambling is "substantial" where government has determined that "the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations" and some gambling is sanctioned despite "awareness of the potential social costs"; policy was "decidedly equivocal," and Court "cannot ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General"); *Carey* v. *Brown*, 447 U.S. 455, 465 (1980) (classification scheme "suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.").

The pursuit of the "ideal" of judicial independence is not compelling in a system that specifically sacrifices independence for accountability through elections. Generic statements about independence beg the question of independence from what? Surely not independence from popular opinion; that is the very point, and surely the inevitable consequence, of elections – particularly recurring elections.

The Eighth Circuit's claim that various other courts have found that "the decision to elect judges cannot be regarded as abandonment of a State's interest in an independent judiciary," 247 F.3d at 866-67, largely misses the point. Nobody doubts that, even in an elected judiciary, independence remains *an* interest – particularly in connection with impartial treatment of individual litigants, adherence to controlling law, and other non-discretionary aspects of judging. But with regard to other aspects of judging that involve discretion, policy

judgment, or jurisprudential differences, the interest in accountability inherent in elections waxes and the interest in independence correspondingly wanes. Judicial independence on such discretionary matters still remains an interest – it is not "abandoned" – but it surely ceases to be the "ideal" and cannot be deemed a *compelling* interest. It is simply one among several conflicting interests at stake, and a state's valid interest in marginal adjustments to the balance between accountability and independence is subordinate to the structural role of the First Amendment in the context of democratic elections.

Minnesota case law does not establish a compelling interest relevant to this case. The Eighth Circuit's reliance on Minnesota's *Peterson* case for evidence of a compelling state interest is misplaced. That case involved an equal protection challenge to a rule that placed the designation "incumbent" on the ballot next to the names of judicial candidates seeking reelection. The claimed interest behind that rule was to increase the information available to the voters:

> "In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. * * * The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for."

490 N.W.2d at 423-24 (*quoting Gustafson v. Holm*, 44 N.W.2d 443, 477 (Minn. 1950)). The court then applied rational-basis scrutiny and concluded that "the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while, at the same time, requiring incumbent judges to submit to voter appraisal in an open election," and that those were "legitimate considerations which satisfy the equal protection clause." 490 N.W.2d at 424. *Peterson's* treatment of the competing interests of independence for the judiciary and voter appraisal of judges as "legitimate" under rational-basis scrutiny is not at all ade-

quate to demonstrate that judicial independence alone is a "compelling" interest under strict scrutiny.

The background discussion in *Peterson* regarding the nature of the Minnesota judiciary deals not with any interest in the judiciary being independent from public opinion regarding disputed issues, but rather with a judge's independence from direct partisan relationships with political parties. *See id*. at 422 (noting the "inherent tension in the judicial election process" and the legislature's effort to counter conflicts "between the demands of an election process and the judicial impartiality required to decide cases free from political maneuvering" by requiring that judicial elections be nonpartisan). But the court repeatedly recognized that responsiveness to the voters is a competing interest that weighs against notions of perfect independence. *Id*. at 422-23. The court ultimately characterized Minnesota's choice as a "middle-of-the-road approach to judicial selection." *Id*. at 425.

Regardless of whether *Peterson* might be read to support a compelling interest in judicial independence from political parties and partisan politics, the issue of speaking to and seeking endorsements from political parties is no longer part of this case and may present somewhat different considerations in the context of Minnesota's nonpartisan judicial election process. But the "middle-of-the-road" treatment of the competing interests of judicial independence and accountability to the public suggests that the ideal of a judiciary independent from all (nonpartisan) political influence simply does not exist and is not sought in Minnesota.[7] Judicial independence is merely one interest among several competing interests. And while it is certainly a legitimate interest, it is not a compelling

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[7] Even assuming that *Peterson* should be read more broadly to state an interest in independence from the electorate as well as from political parties, merely having the State or its courts pronounce such an interest does not make it so and does not answer the federal constitutional question of whether such an interest is compelling.

interest sufficient to overcome the supervening weight of the First Amendment in the context of core political speech.

The claimed interest in independence does not account for judicial law-making and discretionary functions. The conception of judges underlying the asserted interests in this case also ignores the role of state courts in *making* the law, not merely applying settled law to facts determined at trial. For example, the court of appeals repeatedly refers to the "judges' obligation to render impartial decisions based on the law and facts." 247 F.3d at 877. Similarly, the Third Circuit in *Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 142 (CA3 1991), offers a narrow conception of the judicial system as "based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government." But it is incorrect to view the judicial function in state courts as merely interpretive. State-court authority over the common law fully repudiates such a federal-centric notion of the judicial function. And even as to interpretation, jurisprudential policy and values play a significant role in the decision-making process and are not dictated by external law.[8]

A judicial candidate's announcement of his views on such discretionary issues is fully compatible with the judicial role and is often essential to understanding how a candidate will implement that role. Jurisprudential views, discussed *supra* at 11, are the easiest example. Similarly, a greater or lesser regard for victim and societal interests in criminal sentencing, or a concern with inequality in sentencing for different drug offenses, are perfectly valid points of discussion for jurists

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[8] Interestingly, the notion that courts merely interpret law created by others does little do distinguish the executive branch, which has the primary function of executing the laws enacted by the legislature. While it is true that executive officials have substantial discretion in numerous areas that can be influenced by policies and politics, such discretion likewise does not distinguish executive officials from judges when the latter are exercising their authority to create common law.

who will be called upon to exercise discretion when sentencing within broad ranges based on a multitude of legislatively prescribed factors. Class action and punitive damages rules are further examples of topics that can raise both legal and political controversy and that are subject to significant judicial "legislation" in many circumstances. Finally, state supreme courts also act in a distinctly legislative capacity with regard to ethical canons and procedural rules that, as this case itself demonstrates, can become the focus of legal and political debate.

Tangential effect on public confidence is not a compelling interest. In addition to finding a compelling interest in the independence and impartiality of jurists, the Eighth Circuit posited a further "equally important interest in preserving public confidence in that independence and impartiality." 247 F.3d at 867 (citations omitted). The concern over public confidence, however, assumes that Minnesota citizens share the same misperception as the Eighth Circuit regarding the nature of the Minnesota judiciary. That assumption seems unlikely given that Minnesotans have rejected efforts to abolish the judicial election process and hence seem to have ample confidence in an accountable judiciary. There is simply no reason to think that the citizenry fails to understand the competing interests in accountability and independence or cannot be educated, through more speech rather than suppression, to understand those divergent elements in their judiciary.

Furthermore, insofar as the interest in public confidence turns on maintaining the mere "appearance" of platonic independence from all influence and the absence of opinions on disputed issues, such an interest is especially suspect. If the point of the announce clause is simply to hide from public sight the views of candidates on disputed issues, then it is at best pointless and at worst *per se* invalid. If we start with the premise that judicial candidates in fact have views on the various issues covered by the announce clause, then Canon 5 does nothing more than attempt to deprive the public of accu-

rate information about those candidates. But it is singularly ineffective if the goal is to persuade the public that judges are in fact *tabula rasa* – the public is not so naive and third-party speakers during election campaigns will surely impute various views to the candidates. One would expect the public to have *less* confidence, not more, as a result of such a blatant attempt at hiding the ball, and, indeed, there are frequent accusations that judges are "hiding behind the robe" when they refuse to answer questions during a campaign. A more likely expectation – consistent with First Amendment principles – is that the public would gain more confidence in the system if the candidates themselves gave accurate descriptions of their views and were allowed to explain the valid role of such views in the judicial process. And insofar as Canon 5 were successful in leading the public to believe that jurists lacked any views on relevant disputed issues, then an interest in such misdirection should be *per se* invalid under the First Amendment. Suppressing information in order to deceive the public cannot be a compelling interest in and of itself, and in the context of deception intended to influence election campaigns such suppression strikes at the very heart of democracy.

IV. RESTRICTING CANDIDATE SPEECH IN JUDICIAL ELECTIONS SEVERELY BURDENS FIRST AMENDMENT RIGHTS AND DISTORTS THE ELECTION PROCESS.

Aside from being justified through alleged interests in tension with the public accountability established through use of the election process, the announce clause also has a number of consequences at odds with core First Amendment principles and with the democratic process.

First, barring candidates themselves from announcing their views on matters relevant to their job performance deprives the public of the most accurate source of such information. The rule effectively empties the marketplace of those speakers with the most pertinent information and instead leaves it to third parties to characterize – and mischaracterize

– a jurist's views on significant issues. Even in the face of third-party distortion, candidates are restricted from correcting any error by offering an accurate statement of their views.

Second, the rule creates incentives for peculiar evasions that only further distort the campaign process and the judicial function in general. In the case of challengers, there would be great incentive to announce or publish one's views just prior to announcing a judicial candidacy, and then to let those previous statements do the work. In the case of incumbents, there is a perverse incentive to write separate opinions and *dicta* made for public consumption in an eventual election.

Third, to the extent there may be no other sources of information regarding a candidate's views on particular matters, the rule completely deprives the electorate of information relevant to their vote. A candidate's jurisprudential model can be a central and hotly disputed point in a judicial election, yet voters may be deprived of such information or forced to speculate when exercising their franchise. Likewise, it is difficult to imagine deciding how to vote in states where tort-reform is a major issue without knowing a judicial candidate's views on the role of punitive damages, on the relative importance of compensation versus deterrence in tort law, and on the scope of legislative authority to intrude upon the common law. Even criticism of past cases – as attempted by petitioner Wersal – is forbidden by the announce clause, yet such discussion might well provide the most direct and meaningful comparison between two candidates.[9]

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[9] Consider a challenger discussing a past decision authored by the incumbent and stating that he agreed with the dissent or even would have taken yet a third path in resolving the case. Such discussion is of self-evident value, deals with matters wholly in the past, and concerns an issue on which the incumbent has already "announced" his views in a written opinion. To deprive the public of any discussion of such opinions seems absurd – how else would one evaluate a jurist's performance in office but through examination of his or her opinions.

While information regarding a candidate's general experience, education, and professional qualifications would remain available to the public, it can hardly be doubted that a candidate's views will often be of critical importance in an election. For example, if voters were asked to choose between Justice Felix Frankfurter and Justice Hugo Black in a judicial election, it would be impossible for them to make an informed decision without access to the very different views of those candidates on the Fourteenth Amendment incorporation doctrine and the role of the courts implicit in their divergent approaches. *Compare Adamson* v. *California*, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) ("'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth") *with id*. at 71-72, 75 (Black, J., dissenting) ("one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states"; "the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.").

Similarly, in an example particularly appropriate to the historical origins of Minnesota's elective judicial system, voters asked to choose between Chief Justice Roger Taney and Justice Samuel Miller would be thwarted in the exercise of their rights to influence the direction of the state judiciary if they were deprived of the views of those jurists regarding due process. *Compare Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 292, 450 (1856) ("[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particu-

lar Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."), *with Davidson* v. *City of New Orleans*, 96 U.S. (6 Otto) 97, 104-05 (1877) (when property is taken for public use, and provides judicial review of the lawfulness of the action, the "judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections").

Fourth, inhibiting the candidates' and the public's ability to focus on substantive and jurisprudential issues can only increase the relative importance of non-substantive factors such as name and physical appearance – read ethnicity, race, and gender. The First Amendment assumes that through full and free discussion of ideas the democratic process will be strengthened and voter decision making will be improved. Suppressing such discussion merely opens the field for assumptions and prejudice to gain a more prominent role in decision making.

V. ANNOUNCING JUDICIAL VIEWS SHOULD BE PROTECTED SO LONG AS A CANDIDATE DOES NOT MAKE A PROMISE OR COMMITMENT THAT WOULD VIOLATE JUDICIAL OBLIGATIONS IF ACTED UPON.

Taking into account the competing concerns of judicial accountability and independence, and the First Amendment constraints on restricting political speech, the proper rule for announcing views in judicial campaigns should focus on whether the views discussed concern matters over which the jurist will eventually have discretion to act according to those views. Such a focus on discretion, or the lack thereof, means that express promises or commitments of a specific result in future cases can be seen as beyond a jurist's discretion because they essentially violate the judicial obligation to consider each case and listen to the arguments of the parties. Precommitment says that the jurist will not consider the argu-

ments of the parties because his or her mind is already closed to any alternative outcome. Such promises of improper behavior can be prohibited.

That limitation on speech can be reflected in a constitutional rule distinguishing between the announcement of views on how particular law should be applied to hypothesized or undeveloped facts in some future case and announcements of views regarding only the principles of the law or elements of discretion that would frame the consideration of such future cases. The distinction between discussing outcomes in future cases and issues that might simply affect the outcome of cases draws its strength from the unique aspects of an elected judiciary and addresses both the need for independent and impartial justice for individual litigants and the right of the public to exert control over the direction of the courts and the make-up of the judiciary.

Similarly, promises to ignore the law (statutory or constitutional) likewise violate the judicial duty to apply the law, and hence are not within the prospective discretion of a judicial candidate. Such candidates thus can be prohibited from campaigning on a platform that, for example, promises never to let certain categories of persons out on bail notwithstanding laws that establish criteria for allowing bail.

But aside from promises not to follow various non-discretionary judicial duties, judicial candidates should be free to announce their views on any matter relevant to issues where judicial discretion validly comes into play. Thus, a candidate should be free to opine on the weight, or lack thereof, given to victims' interests in sentencing where such sentencing involves a multi-factor balancing test that leaves the weight of the different factors to the discretion of the judge. Likewise, candidates should be free to discuss their policy views regarding business climate, consumer injuries, or any of the myriad of factors bearing upon areas such as tort law, punitive damages, class actions, and other topics where the court acts to create, rather than merely interpret, the law.

And, of course, candidates should be free to discuss their jurisprudence and the approach they will take to the role of jurist when interpreting laws created by others as well as in potentially creating common-law rules of their own.

Finally, candidates should be free to discuss past cases that are no longer pending. Such decisions are the ultimate work-product of the judicial office, and all candidates should be free to discuss that work product in the course of seeking judicial office. Because such cases are fixed in both their facts and their results, and because at least some jurists have, by definition, already publicly opined on the issues contained in decided cases, they provide a particularly valuable point of comparison for citizens seeking to understand potential differences between the candidates for whom they are being asked to vote.

Under the standards just described, this Court should find that Canon 5's announce clause violates the First Amendment. The conduct of petitioner Wersal that placed him in jeopardy and triggered his challenge to the announce clause was his discussion of his judicial philosophy of strict construction and his criticism of certain past decisions of the Minnesota Supreme Court. Such speech is fully protected and does not pose a threat to any compelling state interest.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully Submitted,

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