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 Amicus Curiae of the American Center for Law and Justice Supporting Petitioners

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*. This brief is filed with the consent of the parties. Letters indicating such consent have been filed separately by the parties with the Office of the Clerk of the Supreme Court.

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STATEMENT OF INTEREST OF AMICI**

The American Center for Law and Justice (ACLJ) is a nonprofit public interest law firm and education organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have briefed and argued, or presented the views of amici curiae, in numerous cases before this Court on these issues.[1]

**. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

1. Counsel for amicus curiae have participated in the presentation of numerous cases in this Court, including: *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (42 U.S.C. § 1985(3)); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Free Speech Clause); *Lee v. ISKCON*, 505 U.S. 672 (1992) (Free Speech Clause); *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994) (18 U.S.C. §§ 1961-68); *United States v. Kokinda*, 497 U.S. 720 (1990) (Free Speech Clause and 39 C.F.R. § 232.1(h)(1)); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (Free Speech Clause); *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000) (Establishment Clause); *Hill v. Colorado*, 530 U.S. 703 (2000) (Free Speech Clause).

In addition, counsel for amicus curiae have represented groups and individuals as amici curiae in numerous cases before this Court, including: *Board of Educ. v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (First Amendment Freedom of Association); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Free Speech

Nothing in the challenged provision of the Minnesota Code of Judicial Conduct bars the residents of Minnesota from *asking* judicial candidates in Minnesota about their views on important matters of public policy and law. Nor is there anything obviously underhanded or unseemly about making such inquiries. Rather, the examination of candidates for any elective office is the hallmark of an informed exercise of the elective franchise. But no declared candidate for judicial office in Minnesota is free to answer such inquiries. Even willing candidates are barred from stating their views when asked for them.

If the purpose of Minnesota Code of Judicial Conduct is to insure that voters engage in *uninformed*, *ignorant* democracy, then it is well-crafted to that purpose. If the intention of the Code is to insure judicial independence by successful judicial candidates, other provisions of the Code serve that purpose more directly and efficiently. In any event, the challenged Code

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and Establishment Clauses); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (Fourteenth Amendment); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (Cable Television Consumer Protection and Competition Act of 1992); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (Free Speech Clause); *Lee v. Weisman*, 505 U.S. 577 (1992); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Fourteenth Amendment); *Reno v. ACLU*, 520 U.S. 1113 (1997) (Communications Decency Act); *Romer v. Evans*, 517 U.S. 620 (1996) (Equal Protection Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Free Speech and Establishment Clauses); *Rust v. Sullivan*, 500 U.S. 173 (1991) (42 U.S.C. §§ 300-300a-6 and 42 C.F.R. §§ 59.8-59.10); *Troxel v. Granville*, 530 U.S. 57 (2000) (Fourteenth Amendment); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (Fourteenth Amendment).

provision cannot fairly be described as advancing *any* democratic values. For these reasons, the outcome of this dispute, and particularly the principles on which it will be decided, are of grave concern to the American Center for Law and Justice.

SUMMARY OF ARGUMENT

Thomas Jefferson, responding to a letter from Wilson Nicholas on the power of the United States to expand its territory by the admission of new States, expressed his doubt regarding a construction of the Constitution given by Mr. Nicholas.[2] While acknowledging the occasional need for the practice of construing written constitutions, he expressed best the rule that should guide this Court's consideration of the present controversy:

> Our security is in the possession of written Constitution. Let us not make it a blank paper by construction.[3]

The First Amendment bars Congress from making laws that abridge the freedom of speech. U.S. Const. amend. I. This Court has construed the Due Process Clause of the Fourteenth Amendment as incorporating the requirements of the free speech clause of the First Amendment, *see*, *e.g.*, *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 831 (1983) ("The First Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to state governments and their officials, prohibits either Congress or a State from making any 'law . . . abridging the freedom of

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2. JEFFERSON: POLITICAL WRITINGS at 373-74 (Appleby and Ball ed. 1999).

3. JEFFERSON, *supra* n.2, at 374.

speech, . . . or the right of the people peaceably to assemble'").[4] The effect of that incorporation is that the same restrictions that bar the Congress from abridging the freedom of speech bar the States, including Minnesota, from doing so, *see id*. In the present case, it is pressed by the Petitioners, and correctly in the view of this Amicus, that the right to freedom of speech incorporated into the Fourteenth Amendment bars the State of Minnesota from threatening judicial candidates with discipline and disbarment for the entirely appropriate political act of expressing their views on disputed legal or political issues. A result under which judicial candidates continue to be barred from announcing their views on disputed legal and political questions will have made, by construction of them, blank pages of the First and Fourteenth Amendments.

This amicus is particularly concerned that the right of the electorate to inquire about the legal and political views of judicial candidates be considered in the resolution of this dispute. This Court has often described the right to freedom of speech in terms sensitive to the right of auditors to hear, to read, and to learn. *See*, *e.g.*, *Board of Education v. Pico*, 457 U.S. 853 (1982); *cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (freedom of inquiry protected under the Due Process Clause). In the present case, although the voters of Minnesota are not prohibited by law from inquiring about the political and legal opinions of judicial candidates, their questions can never be answered. As a result,

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4. *See also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[w]e hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment").

voters are left to exercise their precious franchise in a dark that is deeper than the night.

Nor can it be surprising when such an uncommonly silly law is inflicted on the rights of the people of a republic that anomalous consequences demonstrate the foolhardiness and inconstancy of the law. In the present case, as we demonstrate, the *effect* of the challenged provision of the Code is not to silence all candidates for judicial office. Instead, as we will show, incumbent judges remain free to express their opinions on disputed legal and political issues, but challenging candidates for office are forced to stand mute.

ARGUMENT

I. AGAINST EVERY PRINCIPLE OF SOUND, REPUBLICAN GOVERNMENT, THE "ANNOUNCE" RULE PREVENTS THE ELECTORATE FROM LEARNING FROM CANDIDATES FOR JUDICIAL OFFICE THEIR VIEWS ON MATTERS OF GREAT PUBLIC IMPORTANCE

In their genius, the Framers of the United States Constitution embedded in that great document a guarantee that every State would continually exist under a republican form of government. U.S. Const. art. IV, § 4. "Republican" indicates a form of government "having the characteristics of a republic"[5] In turn, "republic" describes "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and

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5. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1928 ("WEBSTER'S").

governing according to law . . . ."[6] Thus, at heart, that guarantee means that those who vote will have the means to determine whether the candidates of their choosing do, in fact, represent their views and opinions.

In prior cases considering constitutional challenges to restrictions on campaign speech this Court has demonstrated the appropriate sensitivity to the important rights of the electorate. In *Eu vs. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989), for example, this court discounted the interest of the state of California in suppressing campaign related speech of political parties. There, the ban on party endorsements of primary candidates, "directly affect[ed] speech which 'is at the core of our electoral process and of the First Amendment freedoms.'" *Eu*, 489 U.S. at 222-23 (citing case). Because, as this Court has said, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office[,]" *id*. at 223 (citing cases), the California restriction was subject to the most severe scrutiny. In like vein, the Minnesota Code of Judicial Conduct, which not only affects, but directly targets, speech at the core of the electoral process and of the First Amendment, must be so scrutinized.

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6. WEBSTER'S, *supra* n.5, at 1928. *See also* JEFFERSON, *supra* n.2, at 207 (defining a "republic" as "a government by its citizens in mass, acting directly and personally, according to rules established by the Majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens"). *Cf. United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances").

Minnesota's "highly paternalistic approach," *Eu*, 489 U.S. at 223 (internal quotation marks omitted), prohibiting candidates from announcing their views on disputed legal or political issues, "is generally suspect," 489 U.S. at 223-24 (citing cases), and patently anti-democratic. Minnesota acts as a censor, deciding what information is appropriate for a voter to consider in selecting judicial candidates. There is one fact, however, that the State of Minnesota treats as essential information for every voter in a judicial election, namely the status of *incumbent* candidates as such.[7] The identification of incumbent status is, purportedly, provided only in judicial elections, *id*. Perhaps the State of Minnesota has discovered a fact about incumbency and voters that can be made to speak volumes with that one word. It seems more likely that, while silencing the discussion of views and opinions on disputed legal and political issues, the State is commending experience on the job as the important consideration for voters.

Still more disturbing, the State of Minnesota has concluded that it is appropriate to restrict the flow of information to voters by silencing candidates for judicial office. The day has long since passed when a State might claim to this Court that such a restriction on the flow of information "enhanc[es]the ability of its citizenry to make wise decisions . . . ." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 221 (1986). Clearly, the challenged provision of the Minnesota Code of Judicial Conduct is incapable of being described as anything other than an anti-democratic cloak designed to draw an impenetrable darkness down over judicial candidates with the

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7. *See* D.J. Tice, "What's In a Name," St. Paul Pioneer Press, Aug. 3, 2000, at 20A.

result that Minnesota's voters cast ballots with all the effectiveness of shots in the dark.

II. IN PRACTICE, THE "ANNOUNCE" RULE INEQUITABLY SILENCES CHALLENGERS FOR JUDICIAL OFFICE BUT DOES NOT SILENCE INCUMBENT CANDIDATES.

Under the Minnesota Code of Judicial Conduct,

> A candidate for a judicial office, including an incumbent judge . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent . . . .

Canon 5A(3)(d)(i), Minnesota Code of Judicial Conduct. In the present litigation, challenges to the "announce" clause are founded on the First and Fourteenth Amendment. Modestly complicating this matter, below, federal courts were put in the position to forecast the likely construction of the Canon if it were to be taken up for consideration by the Minnesota courts. *See Republican Party of Minnesota v. Kelly*, 63 F. Supp.2d 967, 983-86 (D. Minn. 1999); *Republican Party v. Kelly*, 247 F.3d 854, 881-83 (8th Cir. 2001). The trial court acknowledged the difficulties presented by the announce clause; in fact, that court concluded that it would be necessary to narrowly construe the announce clause in order to prevent its invalidation. 63 F. Supp.2d at 983-86. The narrow construction that the trial court gave to the announce clause limited its application so that it barred only the expression of views on issues of law and politics likely to come before the court to which the candidate seeks election. *Id*.

In doing so, the trial court may have identified a construction of the statute more closely related to its purported purposes than is found by a facial reading of the statute. But the constitutional defects remain. An important consideration is the disparate impact that the announce clause causes. The Code purports to treat challengers and incumbents identically. But, in fact, the Canon silences challengers while leaving incumbents free to announce their views on disputed legal or political issues.

While it is true that voters are free to ask judicial candidates their views on disputed legal and political questions, no candidate is permitted to respond to such inquiries in a way that "announces" his view on disputed matters of law and politics. But *incumbent* candidates in Minnesota flagrantly violate the ban on "announcing" their views on disputed matters of law and policy. Their violations take the form of written orders and opinions published in decisions of Minnesota's courts, published during the period of time in which such incumbents are announced candidates for reelection.[8]

That the Canon in fact puts incumbents and challengers in quite different positions from each other is readily demonstrated by examining the actual circumstances of the November 2000

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8. So that no doubt can be left on this point, this amicus does not seek to suggest that the judges and justices of Minnesota's courts should be barred, while standing for reelection, from carrying out their constitutional and statutory duties. Instead, the point to be drawn from the circumstances identified in this argument is that Minnesota's uncommonly silly law does not treat all qualified candidates the same and, to avoid its application in fact to announcements made by *incumbent* judges, Minnesota must ignore the patent application of the statute.

general election in Minnesota. During that election, four sitting justices of the Minnesota Supreme Court declared themselves candidates for reelection: Chief Justice Blatz, and Justices Gilbert, Lancaster, and Russell Anderson.[9] While declared candidates for judicial reelection, Canon 5A(3)(d)(i) barred these judges from announcing their views on disputed matters of law and politics. In fact, as these amici will demonstrate below, each of the incumbents announced their views on disputed matters of law and politics. Worse than those violations, the bare existence of the announce clause and the threat of enforcement forced each challenging candidate to maintain a severe silence while the views of their opponents were not only announced, they were published by the agencies of the State.

Despite the provisions of the Minnesota Code of Judicial Conduct, Minnesota voters were free to select judicial candidates based upon the positions of those candidates on important questions of law and politics, even ones in serious dispute. It could hardly be surprising to learn that voters cared about the positions candidates hold on crime, the economy, privacy, and other important issues. To the extent that a candidate expressed his view on disputed issues of law or politics, however, he risked the imposition of legal sanctions. The sole exception to the Code is one *in fact* by which sitting judges who are declared candidates announce their views on disputed legal and political questions by deciding cases but are not investigated or disciplined for doing so.

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9. *See* "Judges are elected to six-year terms in nonpartisan races," Minneapolis Star Tribune, Voter's Guide (insert) at 31 (Nov. 3, 2000) (identifying candidates for judicial posts).

During the campaign season, while he is a candidate for a trial court bench, a challenger might announce that there is too great laxity in the practice of judges when sentencing violent criminals; or the challenger might express the view that a tax or an assessment should, or should not, have been imposed on a special district. These views, and countless others, from mundane questions of court management questions to questions of life and death, expressed in terms of law and politics, might be announced. But if those views are announced, then the challenger is in apparent violation of Canon 5A(3)(d)(i), and may be subject to investigation and discipline.

But during the election cycle leading to the general elections of November 2000, Chief Justice Blatz, and Justices Anderson, Gilbert and Ferguson announced their views on such questions without any consequent discipline. They announced these views by authoring opinions for the Minnesota Supreme Court, or in concurrence with the Court, or in dissent from it. And even when all they did was join the opinions of others, the act of joining the opinion of another gives rise to a presumption that the view expressed in the opinion is shared by those that join.

Justice Anderson, a declared candidate for reelection, for example, did not stand on a speaker's platform at the convention of a political party and announce his support for a no-nonsense, get-tough-on-crime policy. But he did author the opinion for the Minnesota Supreme Court in *Minnesota v. Wasson*, 615 N.W.2d 316 (Minn. 2000). In that case, in an opinion by Justice Anderson, the Minnesota Supreme Court upheld an unannounced, no-knock search which produced the evidence (drugs and weapons) which formed the basis of appellant's conviction. *Id*. To the reasonable mind, Justice Anderson's opinion for the Court "announces" his preference for a lighter burden of proof on police for their reliance on the reasonable

suspicion exception to the knock and announce requirement of the Fourth Amendment. Such an announced view might, perhaps, stand a candidate in quite good stead with an electorate haunted by concerns about crime.

Of course, not everyone shares the view that criminals are being molly-coddled. For the voter who is concerned that judges are being overly harsh to criminals or being overly generous to prosecutors in their rulings on disputes in criminal matters, it is matter of some moment what views a judicial candidate hold regarding these questions. While his challenger was silenced by law, Justice Gilbert, dissenting in *Wasson*, "announced" that he would have required a higher showing of reasonable suspicion for a no-knock search and that, in his opinion, the circumstances of the case were insufficient to outweigh the constitutional guarantee of the expectation of privacy and sanctity of the home in the Fourth Amendment. *Id.* at 323. And although Justice Gilbert was free to announce this view in an obviously disputed matter of law, his election opponent was unable to announce his view regarding Justice Gilbert's position in an appeal to those Minnesotans whose concerns did not include insuring that criminals had a cakewalk in court.

In a similar vein, Justice Anderson again was able to announce his views on a disputed legal matter, and also to prove his no-nonsense approach to crime in *Ademodi v. Minnesota*, 616 N.W.2d 716 (Minn. 2000). In *Ademodi*, in an opinion by Justice Anderson, the Minnesota Supreme Court rejected a fundamental fairness claim raised on appeal by a foreign national and refused to exercise its discretion to consider the case on the merits. Ademodi had failed to raise a claim under the Vienna Convention on direct appeal and sought to raise it before the Minnesota Supreme Court. Under the Vienna Convention, a state must inform a consulate that its national has been arrested

or is in custody. The Minnesota Supreme Court had held previously that it could consider a claim not raised on direct appeal "in limited situations when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue." *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). But Justice Anderson declined to do so, and instead, the Court remanded a separate claim of ineffective counsel as the appropriate resolution of the appeal. 616 N.W.2d at 719.

During the 2000 election season, a declared challenger for the position of Justice on the Minnesota Supreme Court might also have wanted to announce a like view regarding the question of fundamental fairness. Explaining to potential supporters his views on disputed legal and political questions might well be viewed by such a challenging candidate as the best and appropriate way to demonstrate his fitness and qualification for judicial office. Unlike Justice Anderson, however, such a challenger would be in violation of Canon 5A(3)(d)(i) and risking legal sanctions by doing so.

In *Minnesota v. Schmidt*, 612 N.W.2d 871 (Minn. 2000), Justice Anderson again announced his views on a disputed legal issue, and in doing so was able to demonstrate to the electorate his law and order mien. Schmidt appealed from his conviction on the basis that the prosecution presented an instance of double jeopardy. After Schmidt was convicted of stalking, the statute under which Schmidt was charged was declared unconstitutional; the state then retried him under a separate statutory subsection. Justice Anderson rejected the double jeopardy claim, concluding, "where a conviction is overturned on appeal due to the unconstitutionality of the charging statute, prosecuting the defendant under a different statute is not the sort of governmental oppression against which double jeopardy was intended to protect criminal defendants." 612 N.W.2d at 876

(citation omitted).

Again, an election challenger might see the value in announcing his view that retrial in such cases should not be considered a form of double jeopardy – or he might conclude that it was double jeopardy and want voters to know that view. If a challenger published a letter to the editor of a local newspaper expressing either view, however, he would be in patent violation of the Minnesota Code of Judicial Conduct.

Nor was Justice Anderson the sole incumbent candidate to have the benefit of his position on the bench in making "protected" announcements of his views on disputed legal and political matters. The question of race and considerations of race in the exercise of peremptory strikes is one that has presented great controversy and has even been the source of dispute and contention in this Court. *See*, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986). And, unsurprisingly, this fertile source of dispute over law politics has come before the Minnesota Supreme Court.

While he was a declared *incumbent* candidate during the 2000 election cycle, Justice Gilbert authored the majority opinion in *Minnesota v. Martin*, 614 N.W.2d 214 (Minn. 2000). In Martin, appellant challenged his murder conviction on the ground that the State exercised its peremptory strikes in a racially discriminatory manner when it struck the lone African-American from the jury pool. 614 N.W.2d at 221. Based on race-neutral justifications offered by the prosecutor (members of the juror's family had been or were currently in prison) and the considerable deference given to the trial court's credibility determinations, Justice Gilbert, for the Court, announced the view that the appellant failed to show that the prosecutor acted with discriminatory intent. Specifically, Justice Gilbert rejected appellant's argument that such exclusions disparately impact

African Americans "because African Americans are more frequently arrested and more often have criminal records because of the scrutiny they face from the predominantly white police force." 614 N.W.2d at 223. Despite announcing his view on this contentious and controversial legal and political issue (one that must certainly be of the kind likely to come before the courts), Justice Gilbert was not investigated or disciplined for violating the Minnesota Code of Judicial Conduct.

Of course, questions of criminal law and procedure are not the only disputed legal and political matters that judges on Minnesota's courts face. Nor are they the only matters about which *incumbents* announce their views despite the restrictions of Canon 5A(3)(d)(i).

Domestic relations law provides another fertile field for contention and dispute. As was demonstrated when this Court considered and decided *Troxel v. Granville*, 530 U.S. 57 (2000), questions of custody, visitation, and support, stir the people of this Nation as deeply as any issue. While she was standing for reelection during the 2000 election cycle, Chief Justice Blatz announced her view on a disputed legal matter regarding the termination of parental rights. In *In the Matter of the Welfare of: G.L.H., G.E.H., Jr.*, 614 N.W.2d 718 (Minn. 2000), Chief Justice Blatz rejected an appeal by a mother whose rights had been terminated. In that case, in the trial court, on the day of her termination of parental rights trial, the respondent fired the public defender who had represented her for over a year. The disputed issue on appeal was whether the statutory right to counsel in termination proceedings was analogous to the constitutional right to counsel possessed by criminal defendants. If so, the mother argued, a formal waiver procedure was required to ensure that the waiver of counsel is voluntary and intelligent. 614 N.W.2d at 720. Chief Justice Blatz rejected the analogy,

explaining that a statutory right is not equivalent to a constitutional right and that the right to appointed counsel only exists when the litigant may be deprived of physical liberty. 614 N.W.2d at 722.

Of course, reasonable minds might disagree on the question answered by Chief Justice Blatz. But whether a challenger shared Chief Justice's Blatz's view, or rejected it, he could not announce his view on the question while a declared candidate for judicial office. Chief Justice Blatz did.

Just as certain as death, taxes nonetheless present moments of high controversy and heated dispute, both as political questions and legal ones. And Chief Justice Blatz took the opportunity presented by the Minnesota Supreme Court's decision in *In re Improvement of Murray County Ditch No. 34*, 615 N.W.2d 40 (Minn. 2000), to announce her views on a disputed legal and political question *in an opinion dissenting from the views of the majority of the Court*. There, the Court upheld an administrative decision to assess benefitted property owners only for improvements done to a deteriorating drainage ditch in need of repair. The majority announced the view that the drainage authority correctly applied Minn. Stat. §§ 103E.215 (6), as the improvement was to a separable portion of the ditch. In dissent, Chief Justice Blatz announced her view that the record before the court did not support the conclusion that the improvement project was separable from the remainder of the drainage system.

Few candidates for elective office miss the value of easing the burden of taxes, or at least, the value of expressing the view that such burdens should be eased. The majority in *In re Improvement of Murray County Ditch No. 34*, might have preferred to abstain, or to have held its decision until after the election cycle. But, by doing its duty, the Minnesota Supreme

Court created the opportunity for Chief Justice Blatz to announce her views *in dissent* on this disputed matter. Of course, had the challenger for her position on the court announced a like view, or disagreed with her conclusions, as part of his campaign for office, he would have been in patent violation of the Minnesota Code of Judicial Conduct.

* * * *

In each of the foregoing cases, *incumbents* announced their views on disputed legal and political questions. None of the incumbent candidates on the Minnesota Supreme Court was investigated or disciplined as a consequence of doing so. Because of the opportunity to announce their views in writing by deciding cases, *incumbent* candidates receive a special benefit from the operation of Canon 5A(3)(d)(i). But Canon 5A(3)(d)(i) hangs precipitously over *challengers*, virtually insuring that voters will be deprived of the opportunity to have their questions about the views of such candidates on disputed questions of law and politics answered.[10]

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10. The foregoing discussion does not bring to account the four sitting judges of the Minnesota Court of Appeals who were declared candidates for reelection during the 2000 election cycle: Judges Harten, Anderson, Shumaker, and Halbrooks. Each of these *incumbent* judicial candidates on Minnesota's intermediate appellate court announced their views on disputed legal and political questions in areas of high controversy and public contention. *See*, *e.g.*, *State v. Reece*, 615 N.W.2d 852 (Minn. Ct. App. 2000) (departures from state sentencing guidelines); *State v. Baumann*, 616 N.W.2d 771 (Minn. Ct. App. 2000) (vehicle stops for DWI); *Halverson v. Taflin*, 617 N.W.2d 448 (Minn. Ct. App. 2000) (child custody); *In re Welfare of C.P.K.*, 615 N.W.2d 832 (Minn. Ct. App. 2000) (cross burning and the right to freedom of speech); *Roquemore v. State Farm Mut. Auto. Ins. Co.*,

CONCLUSION

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

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610 N.W.2d 694 (Minn. Ct. App. 2000) (economic injury and tort law); *Brown v. State*, 617 N.W.2d 421 (Minn. Ct. App. 2000) (distribution of Minnesota's settlement with tobacco companies).

Respectfully submitted,

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January 17, 2002.