No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondent*s.

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

Reply Brief for Petitioners
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March 14, 2002

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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ARGUMENT

I. The Announce Clause Has Injured Wersal, His Family and Supporters, and Minnesota Voters.

The State now claims for the first time (Brief and Appendix for Respondents ("R. B.") 35 n.7) that Petitioner judicial candidate Wersal lacks standing to challenge the Announce Clause based on the following excerpt from an August, 1997 letter Wersal wrote to the Republican Party of Minnesota ("RPM"):

> As a practical matter, the Code allows judicial candidates to discuss their judicial philosophy, such as whether they believe in the strict interpretation of the Constitution, and to criticize prior Court decisions. I believe that I am able to effectively get out *a* message without violating even the most restrictive interpretation of the Code.

Joint Appendix ("J. App.") 1:44 (emphasis added). When Wersal wrote this letter, Canon 5 did not prohibit judicial candidates from speaking at political party gatherings as is now prohibited by Canon 5(B)(1)(b), Appendix to Petition for Writ of Certiorari ("P. App.") 134a. But the RPM nevertheless expressed concern that, on account of the Announce Clause, it would become involved in litigation if Wersal spoke to any of its gatherings. Wersal's letter addressed this concern stating that, despite the Announce Clause, he could still effectively communicate "a" message to the Party – even if not "the" specific messages he wanted to communicate.

Wersal's August 15, 1997 correspondence does not show that Wersal lacks injury as the result of the Announce Clause or could campaign freely within it. To the contrary, the very

fact that such a letter was deemed necessary at all demonstrates how the Announce Clause severely chilled and hamstrung Wersal's campaign.[1]

In fact, Wersal specifically testified in his deposition that the Announce Clause impinged the delivery of his campaign message by preventing him from "stat[ing] in detail [his] opinion about the various cases" described in his campaign flier, limiting his "ability to discuss legal issues under the rules other than perhaps to state the facts and the existence of the case and what the Court held or a dissent held . . ." J. App. 1:162-163.[2]

Although the Minnesota Supreme Court left the Announce Clause untouched in its December 1997 amendments to Minnesota's Code of Judicial Conduct, Wersal further testified the 1997 amendments banning judicial candidate

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[1]Exhibit 1 to Wersal's deposition, J. App. 1:235-236, and his testimony regarding it reveal how the Announce Clause forced him to emasculate his campaign message to the point of voter confusion. Exhibit 1, his campaign piece, cites three Minnesota Supreme Court opinions and discusses their facts, holdings, and dissents. The flyers never stated Wersal's opinion on the cases. Wersal testified in deposition that the Announce Clause prevented him from stating his views on the rulings to the voters, although the Justices he was running against openly stated their views in their decisions. J.A. 1:162-63, 167.

[2] The Director of the [Minnesota] Office of Lawyers Professional Responsibility ("OLPR") stated that if Wersal's statements in campaign literature went beyond mere description of cases to the point that they "constitute a statement of his views on crime, welfare or abortion," then these statements would violate the Announce Clause. J. App. 1:21. In contrast, Wersal testified that without the Announce Clause he could have stated whether he agreed with opinions authored by the Justice against whom he ran. J. App. 1:217.

speech to political party gatherings and the candidate's use or acceptance of endorsements reflected increased court hostility to judicial speech:

> [W]hen the Minnesota Supreme Court made the decision they made to change the rules on January 1, 1998, (sic) it became very obvious to me that they were hostile . . . to candidates' First Amendment rights and that I had to be far more circumspect in what I said or didn't say in 1998 as opposed to what I think I did in 1996 or even '97.

J. App. 1:181-82. Thus, even if Wersal believed in 1997 that he could deliver some message, however inadequate, under the Announce Clause, this was no longer true after the Minnesota Supreme Court revised the Minnesota judicial canons and Wersal filed this action.

Finally, the State ignores the Announce Clause's application to Wersal's family, supporters, and voters through Canons 5(A)(3)(a) and (c). P. App. 133a. Even assuming that the Announce Clause causes no constitutionally cognizable injury to candidates, Wersal's family members and others who know him are plainly injured: They are not candidates, but the canons coerce them into silence regarding the candidate's views as the price of saving their friend and relative her judicial job or her license to practice law. Likewise, voters suffer injury in the inability to learn the candidate's views on relevant issues directly from the candidate and his supporters.

II. Minnesota's Judicial Selection Process Supports the Right of Candidates to Express, and Voters to Receive, Candidates' General Views

on Political and Legal Matters.

Citizens of Minnesota and the majority of States adopted judicial elections because they recognized that many judicial decisions create law through judge's power to make common law, to interpret laws, and to exercise discretion and that judicial elections provide a mechanism for citizens to hold judges accountable for the exercise of their powers. Brief for Petitioners Gregory F. Wersal, et al. ("Wersal Br.") 17-28. The State's argument turns this analysis on its head. Despite the fact that Minnesota citizens want periodic judicial elections, the State argues they do not want to receive information about judicial candidates' general views on legal or political issues for fear they might conclude that the judge has "prejudged" future cases. R.B. 2-5. In short, the State argues that Minnesota citizens want or need to be protected from themselves.

The State cites neither constitutional debates nor legislative history of constitutional amendments actually adopted in support of its argument. Rather, the State relies almost exclusively on dicta in *Peterson v. Stafford,* 490 N.W.2d 418 (Minn. 1992). In particular, the State quotes *Peterson,* R.B. 2, in support of the proposition that "the explicit and implicit goal of the [federal and Minnesota] constitutional provisions [for selecting and retaining judges] is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible." 490 N.W.2d at 420.

On the contrary, the Minnesota and United States judicial articles seek to achieve diametrically opposite goals. The goal of life tenure in the federal system is to insulate federal

judges from popular political pressure. But the goal of Minnesota's election system, as specifically expressed and recorded in Minnesota's Constitutional debates, is to subject judges to a degree of electoral accountability by requiring them to periodically stand before the voters for election. Wersal Br. at 18-26.

The State again quotes from *Peterson*, R.B. 3: "The 1857 [Minnesota] Constitution restricted the judicial office to persons 'learned in the law.' Implicit in this restriction is the recognition that judges be subject to the ethical canons of the legal profession." 490 N.W.2d at 420 (citation omitted). However, there were no acknowledged "ethical canons of the legal profession" in 1857. In fact, Minnesota did not adopt ethical canons for attorneys until 1955 – 98 years after the adoption of the Minnesota Constitution. W. Foster & M. Anderson, eds., *For The Record, 150 years of Law & Lawyering in Minnesota,* p. 135 (Minn. Stat. Bar. Ass'n. 1999). Judicial ethical canons were first introduced by the American Bar Association ("ABA") in 1924. Charles Wolfram, *Modern Legal Ethic*s, 53-54 (Practitioner ed., 1986). Minnesota's Constitutional debates reveal that judges must be "learned in the law" to ensure judges have the legal competence to perform their duties. It had nothing to do with ethics and is certainly not that judicial candidates should be mute on disputed legal or political issues. *Proceedings and Debates of the Minnesota Constitutional Convention,* (Democratic)(1857) p. 513.

The State also cites *Peterson's* rendition of failed efforts to amend Minnesota's judicial article to eliminate judicial elections, R.B. 3, which are said to reflect "the public's [distaste] for judges to become embroiled in politics." 490

N.W.2d at 420. History reflects precisely the opposite: Minnesota voters have rejected each and every attempt to abolish judicial elections.

Finally, the State argues that gubernatorial appointment for judicial vacancies and the Commission on Judicial Selection (to recommend such appointments) evidences Minnesota's commitment to judicial independence. R.B. 4. However, the fact that such appointees must stand for election within two years reflects Minnesota's overriding commitment to judicial accountability. Wersal Brief at 17-18.

III. ABA Removal of the Announce Clause Was Due to Constitutional Concerns.

The ABA claims that Minnesota's Announce Clause and the 1990 ABA "commitments clause" have the same effect, despite (1) the ABA repealed the Announce Clause in its 1990 model canon on constitutional grounds, (2) the Minnesota Supreme Court rejected 1990 ABA Canon in 1995 in preference to the Announce Clause, and (3) the ABA concedes that the Announce Clause "contains somewhat different language than the 1990 ABA Canon" that the ABA adopted to replace the language of Announce Clause.[3] *Brief of*

[3]As the Minnesota Office of Lawyers Professional Responsibility explained to Petitioner Wersal, "The current prohibition contained in Minnesota Canon 5(A)(3)(d)(i)is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.'" J. App. 1:19.

the ABA as Amicus Curiae *in Support of Respondents* ("ABA Brief") 4-5.

The ABA argues that the new "commitments clause" is simply a "revision" of the Announce Clause and fully "corresponds" to Minnesota's Announce Clause. ABA Brief 8-9. However, amendments to existing language are intended to have a "real and substantial effect." *Stone v. INS,* 514 U.S. 386, 397 (1995). Moreover, the ABA's committee reports confirm that the ABA discarded the Announce Clause due to concerns it impinged free speech:

> The committee believed the revised rule [striking the announce clause in favor of the commitments clause] to be more in line with constitutional guarantees of free speech, while preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality. It also believed that the broad language of the 1972 code's version of the rule cannot be practically applied in its literal terms.

Lisa L. Milord, *The Development of the ABA Judicial Code* 50 (ABA Center for Professional Responsibility).[4]

The ABA's position is contrary to its own committee reports and is based exclusively on the "gloss" the Eighth

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[4]The ABA first adopted a version of the announce clause in 1924 as Canon 30, which provided "[the judicial candidate] should not announce in advance his conclusions of law on disputed issues to secure class support." Unlike the 1972 version of the clause at issue here, the 1924 version only prohibited judicial candidates from announcing their "conclusions of law" (i.e., a judge's legal determinations on particular issues in specific cases involving specific facts) "in advance" – not the open ended "views on disputed legal or political issues" as contained in the Announce Clause.

Circuit and Minnesota Supreme Court have placed on the Announce Clause. Pet. App. 54a; R.A. 1. However, as explained below, what that "gloss" is simply unknown and therefore constitutionally vague.

IV. The New Announce Clause Enforcement Policy Is Void for Vagueness.

The Minnesota Supreme Court now proclaims, for the first time, that it will enforce the Announce Clause as if it does not mean what it says, i.e., that candidates cannot "announce [their] views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i). *See* Appendix to R.B. ("R.A.") 1. But what it *does* mean is vague.

The vagueness test for core First Amendment political speech was established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). This Court held that where a regulation borders on the protected territory of issue advocacy there must be a bright-line express advocacy test. *Id.* at 44. Even the formula "advocating the election or defeat of a clearly identified candidate" was unconstitutionally vague without the preceding modifier "expressly." *Id.* Otherwise, the speaker would be "at the mercy of the varied understanding of his hearers." *Id.* at 43.[5] Thus, the issue is what is the new rule governing judicial candidates' speech and does it establish a bright-line.

Minnesota judicial candidates have followed the An-

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[5] *See Brief Amici Curiae of the American Civil Liberties Union and the Minnesota Civil Liberties Union Supporting Petitioners* 11-17 (discussing *Buckley* standard in relation to the Announce Clause as construed) ("ACLU Brief").

nounce Clause because the Minnesota Supreme Court specifically refused to adopt the 1990 ABA's "commitments clause." In 1992, that court specifically stated that "[t]he task of the voter in considering candidates for judicial office is a difficult one, made more difficult by the nature of the office itself: a position that requires its holder studiously to avoid partisan politics [and] refrain from *all* discussions of public issues." *Peterson*, 490 N.W.2d at 425 (emphasis added). The Minnesota Supreme Court did not list the public issues on which the candidate may comment, as the Eighth Circuit speculated, *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 883 (8th Cir. 2001) ("general discussion of case law or a candidates's judicial philosophy" permissible), because candidates must *"refrain"* from *"all* " such discussion. The message to Minnesota judicial candidates, as reflected in the court's refusal to adopt the 1990 commitments clause, *Peterson's* dicta and the DeMoss prosecution[6], is clear - "Refrain from *all* discussions of public issues" or face sanctions.[7]

Now, for the first time in three decades – and while this case is in the U.S. Supreme Court – Minnesota judicial candi-

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[6]*See* Wersal Br. at n. 2 describing an ethical complaint against judicial candidate Michael DeMoss for simply declaring that "the unborn child is a human being, has constitutional rights, and the State of Minnesota needs to protect those rights." J. App. 2:254.

[7]The enforcement threat is real. While the OLPR ultimately decided not to prosecute DeMoss, the defendant in *Deters v. Judicial Retirement & Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994), was less fortunate. Jed Deters approved print advertisements stating he was "a Pro-Life Candidate" and was publicly censured for violating a canon banning "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id*. at 202.

dates are told that the Announce Clause will not be enforced as meaning what it says and what everyone thought it meant. The Minnesota Supreme Court has "performed a remarkable job of plastic surgery upon the face of the [court rule]" for enforcement purposes. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).[8] However, this plastic surgery suffers from two defects: It is a changeable enforcement policy and it is unconstitutionally vague.

The Minnesota Supreme Court's *Order* is an enforcement policy, not a statutory construction. The *Order* nowhere says what *is* the "construction" of the Announce Clause, referring instead to "adopting the interpretation of the federal court of appeals." R.A. 1. However, the "adoption" was solely for the purposes of enforcement. The court declared plainly that "the announce clause . . . shall be enforced in accordance with the interpretation . . . by the . . . Eighth Circuit." It did not set forth the construction of the challenged provision as this Court did carefully and fully in *Buckley*, 424 U.S. at 39-44.

Because the Minnesota Supreme Court's *Order* is an

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[8]In *Shuttlesworth*, 394 U.S. at 156, this Court declared that "[i]t would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later." Even greater clairvoyance would be necessary in the present case in light of the Minnesota Supreme Court's express refusal in 1995 to adopt the language of an ABA canon that the Minnesota Supreme Court now attempts to approximate with its present enforcement policy for the Announce Clause. The Eighth Circuit's construction – whatever it is – that has been adopted as an enforcement policy by the Minnesota Supreme Court has the character of a "disingenuous evasion." *Cf. Salinas v. United States* 522 U.S. 52, 60 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 n.9 (1996).

enforcement policy, not a decision in a case, it lacks even the persuasive protection of *stare decisis*. The Court was acting as an administrative agency for the Minnesota courts, and such an agency enforcement policy can be as easily changed tomorrow as it was announced today. *Cf. Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) ("Nothing . . . prevents the Commission from enforcing its rule at any time with . . . another change of mind of one of the Commissioners.").[9] Given the Minnesota Supreme Court's earlier refusal to adopt the 1990 ABA revisions to the Announce Clause, it is plain that it has a clear preference (absent pending litigation threatening its canon) for the unconstrued language of the Announce Clause – arguably making a reversion of enforcement policy possible or even likely.

But even if this plastic-surgery enforcement policy were a real construction, it is still unconstitutionally vague. Rather than providing the text of the new Announce Clause policy, the Minnesota Supreme Court merely cites to the Eighth Circuit's opinion. But the Eighth Circuit and the district court said different things at different places in their opinions.

The district court "[found] that the Minnesota Supreme Court would interpret the announce clause narrowly, *consistent with* the construction urged upon the Court by the Judicial Board." P. App. 128a (emphasis added). The construc-

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[9] *Cf. Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (Courts are not "compelled to leave '[t]he defendant . . . free to return to his old ways.'" (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

tion the BOJS urged was "to prohibit a candidate's public statements of opinion on disputed legal or political issues *that may come before the courts*." Dist. Ct. Docket #84 at 26 (Def. Flinn's summary judgment brief) (emphasis added). The proffered construction merely added the phrase "that may come before the courts."

But the district court's construction was not "consistent with" its finding because it held the announce clause constitutional by "interpreting [it] as only prohibiting *discussion of a judicial candidate's predisposition* to issues likely to come before the court." P. App. 129a (emphasis added). The trial court, and later the Eighth Circuit, completely excised both (1) the phrase "disputed legal or political," which modified and narrowed "issues," and (2) the "announce an opinion" language of the Announce Clause, although they vacillated on what they had substituted. While the district court spoke of "prohibiting *discussion of a . . . predisposition* to issues," it justified its construction on the basis of a state interest in "preventing a candidate from *committing* himself/herself as to certain issues prior to being faced with a particular case or controversy." P. App. 124a (emphasis added).

The Eighth Circuit described the Announce Clause as "prevent[ing] candidates from *implying* how they would *decide cases* that might come before them as judges." P. App. 45a (emphasis added). It cited the district court as "constru[ing] the Announce Clause to apply only to *discussion of a candidate's predisposition* on *issues* likely to come before the candidate if elected into office." P. App. 52a (emphasis added). It said the trial court construction "prohibits candidates only from publicly *making known how they would*

decide issues likely to come before them as judges," P. App. 53a (emphasis added), which "announcements," the Eighth Circuit declared, are "calculated to show that the candidate will decide *cases* in a certain way if elected." P. App. 53a (emphasis added).

So what is the Minnesota Supreme Court's new enforcement policy? Is it announcing an *opinion*? *Discussing a predisposition*? *Committing* to decide a certain way? *Implying* how one would decide? Publicly *making known* how one would decide? On *all disputed legal and political* issues? On *all issues* likely to come before the court? On *cases* . . . ?

The lower courts didn't simply tack "that may come before the courts" onto "disputed legal or political issues," as the BOJS suggested. Dist. Ct. Docket #84 at 26. The lower courts excised "disputed legal and political" and converted "announce an opinion" into something . . . but they're not sure what.

Finally, the text of the new enforcement policy remains unknown to both the State[10] and its amici curiae.[11]

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[10] First the State says "the Announce Clause precludes judicial 'candidates only from *publicly making known how they would decide issues* likely to come before them as judges.'" R.B. 1 (quoting Eighth Circuit, P. App. 53a) (emphasis added). Then they surreptitiously slip from "issues" to " cases," declaring that "[t]he import and meaning of the Announce Clause is clear: judicial candidates cannot publicly make known how they will decide *cases* likely to come before them as judges." R.B. 12 (emphasis added). The State reemphasizes this, declaring, "[i]n short, the *only* type of campaign speech that the announce clause restricts is public statements regarding how candidates would decide cases likely to come before them." R.B. 37 (emphasis in original). They conclude that "[t]he meaning of the announce clause is clear: judicial candidates cannot publicly make known how they

would decide issues likely to come before them as judges." R.B. 47.

[11]The *Brief of Amicus Curiae Pennsylvanians for Modern Courts in Support of Affirmance* insists the rule proscribes only "statements of predisposition." *Id.* at 19, 21, 23, 24.

The *Brief of Ad Hoc Committee of Former Justices and Friends Dedicated to an Independent Judiciary as Amicus Curiae in Support of Respondents Supporting Affirmance* declares "that a judicial candidate may not announce his or her views on disputed legal issues that may come before the court." *Id.* at 20.

The *Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondents* insists "the speech at issue in this case are statements by judicial candidates indicating or promising how they would rule in cases likely to come before them – in essence, committing themselves to an outcome before hearing the merits of a case," *id.* at 11, but might really mean "campaign promises," *id.* at 12, "announc[ing] a predisposition on an issue," *id.* at 17, or "promis[ing] to rule in a particular way or mak[ing] sweeping policy proclamations." *Id.* at 20.

The *Brief of Amicus Curiae the Missouri Bar Association in Support of Respondents* argues the rule prohibits "judicial candidates mak[ing] comments about matters on which they must later rule as judges." *Id.* at 4. *Cf. id.* at 13 (same).

The *Brief in Support of Respondents for* Amici Curiae *Brennan Center et al.* argues that "a candidate may discuss her legal and judicial philosophy generally, as long as she does not commit or appear to be committing herself to decide a case or class of cases in a particular manner." *Id.* at 23-24.

The *Brief of Amicus Curiae Minnesota State Bar Association in Support of Respondents* ("Minnesota Bar Ass'n Brief") tells us whether potentially affected lawyers can understand the new enforcement policy and declares that the "construed" and "affirmed" announce clause is neither overbroad nor vague because it "extends only to "'issues likely to come before the court'" – completely ignoring the debate about the meaning of "announce an opinion." *Id.* at 8, 24.

The *Brief of Amicus Curiae Conferences of Chief Justices in Support of Respondents* declares "the Eighth Circuit . . . construed the announce clause . . . to apply only to statements displaying a pre-disposition on issues likely

If the lower courts, the State and their amici curiae cannot agree on what is the text of the new enforcement policy, the policy is void for vagueness simply because no one knows what it is. [12]

The enforcement policy is also void for vagueness because the various efforts to describe it employ words with differing meanings and interchange words that are not synonyms. For example, there are important differences between *cases* and *issues* in legal use, although the State wants to use them interchangeably in their theories of what is the enforcement policy. "Case" has a strong body of legal meaning, e.g., in the Article III context of "cases and controversies," and is "[a] general term for an action, cause, suit, or controversy, at law or in equity." *Black's Law Dictionary* 195 (5th ed. 1979). In contrast, an "issue," as used in pleading and practice, is "[a] single, certain, and material point, deduced by the allegations and pleadings of the parties, which is affirmed on the one side and denied on the other." *Id.* at 745. Similarly, there are important distinctions between other key terms used by the Eighth Circuit. "Implying" is radically different from either "announcing" or "declaring" how one will decide either cases or issues. And "declaring" is quite different from "making known" a position. Because the new enforcement policy is whatever the Eighth Circuit said and that court said conflicting things, the policy is unconstitutionally vague.

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to come before the elected judge." *Id.* at 15.

[12] If the Announce Clause could be construed as identical to the 1990 ABA Canon, it would still be the unconstitutionally vague commitments clause as explained in the ACLU Brief at note 5.

The new Announce Clause enforcement policy is also unconstitutionally vague because of the Eighth Circuit's reliance on the vague terms "implying" and "making known." P. App. 45a, 53a. The critical question is whether a proper First Amendment bright line has been established to identify what is beyond the pale – or whether the new policy risks impaling hapless candidates? "Implying" is precisely the sort of nebulous standard that this Court has eschewed in the heightened-protection First Amendment area. *Buckley*, 424 U.S. at 44 and n. 52. "Making known" is similarly vague potentially encompassing such obscure things as publishing a resume showing membership in organizations that take positions on social issues, e.g., NRA, NARAL, NRLC.[13]

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[13]This point is made well in the ACLU Brief at 14-15, which states that the phrase "*making known*" is vague and that "[t]o avoid unconstitutional vagueness, any such regulation must be limited to speech by judicial candidates that 'expressly commits them to a particular result in a particular case likely to come before them.'"

The Minnesota State Bar Association argues that the ACLU Brief declared the phrase "likely to come before the court" is vague, but then used the phrase (thereby allegedly admitting that it is not vague) in the ACLU's own formulation that an acceptable provision "must be limited to speech by a judicial candidate that expressly commits them to a particular result in a *particular* case likely come before them." Minnesota Bar Ass'n Brief at 25 n. 5 (quoting ACLU Brief at 3) (emphasis added). However, the ACLU's focus on a "particular case" eliminates the inherent vagueness of "likely to come before a court." At the other extreme, coupling "likely to come before a court" with "issues," as in the unconstrued Announce Clause, must either be a limitation without real limit, or vague because it is unclear where is the limiting line. Moreover, in the ACLU Brief at 3, the real focus of vagueness analysis is on the phrase "*making known* a candidate's view" (emphasis added), which is unconstitutionally vague for the reasons given there and the ACLU Brief at 9-18.

The State and the Eighth Circuit both claim that within the pale are "'general discussions of case law or a candidate's judicial philosophy.'" R.B. 7 (quoting *Republican Party of Minnesota v. Kelly*, P. App. 54a), 11.[14] But does this establish a bright line? Because the Eighth Circuit said that the Announce Clause encompassed "implying how [candidates] would decide cases," P. App. 45a, 53a, where is the line between talking about prior decisions and implying how that candidate would decide differently if confronted with a similar case? And where is the line between discussing judicial philosophy, e.g., history-and-tradition versus living-constitution models, and implying that a candidate would vote differently than a candidate of the opposite philosophy in a particular case? There is no line, let alone a bright line.

Petitioners have already explained how this new "general discussion" gloss by the Eighth Circuit is itself unconstitutionally vague, Wersal Br. 41-42, and the State's response is woefully inadequate. First, the State ignores the heightened requirement for clarity with regard to core First Amendment political expression. Second, it declares that "a judicial candidate who is familiar with the role of a judge should be able to comprehend the Announce Clause as construed." Third, it ignores application of the enforcement policy to non-judges. R.B. 47.

Do judicial candidates know the text of the new enforcement policy? The district judge and the Eighth Circuit judges couldn't settle on a single statement of their construction and

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[14]The "general" language is vague because it is a "classic term[] of degree" without "settled usage or tradition of interpretation in law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991).

their statements are contradictory; different federal courts of appeal have interpreted similar announce clauses differently. ACLU Brief at 13 n8. Moreover, as set forth in ft. nt. 11 above, the State and its amici, who are judges and lawyers, can't agree on the language of the construed Announce Clause; the judges of the Minnesota Supreme Court didn't even try to articulate their new enforcement policy, adopting instead a whatever-*they*-said approach. The candidates-will-know response rings hollow.

Finally, the State completely ignores Canon 5's mandate that judicial candidates "encourage family members to adhere to the same standards" and "prohibit" and "discourage" "employees and officials" "from doing on the candidate's behalf what the candidate is prohibited from doing." P. App. 133a. These people are not judges or even attorneys. By its reliance on a candidates-will-know response, the State has conceded vagueness with respect to all the other people affected by the new Announce Clause enforcement policy.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the Announce Clause unconstitutional.

Respectfully submitted,

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