No. 01-521

IN THE
SUPREME COURT OF THE UNITED STATES

Republican Party of Minnesota, et al.,

Petitioners,

v.

Kelly, et al.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MIKE HATCH Attorney General State of Minnesota MIKE HATCH Attorney General State of Minnesota MARK B. LEVINGER Assistant Attorney General Atty. Reg. No. 62686 *Counsel of Record*	THOMAS C. VASALY Assistant Attorney General Atty. Reg. No. 112501 445 Minnesota Street, Suite 1100 St. Paul, Minnesota 55101-2128 (651) 282-5718 (Voice) (651) 296-1410 (TTY) ATTORNEYS FOR RESPONDENTS.

QUESTIONS PRESENTED

I. Whether the provision of Canon 5 of the Minnesota Code of Judicial Conduct that prohibits candidates for elective judicial office from announcing their views on disputed legal and political issues, as construed by the district court to apply only to statements displaying a pre-disposition on issues likely to come before the court, violates those candidates' First Amendment rights?

II. Whether the provision of Canon 5 of the Minnesota Code of Judicial Conduct that prohibits partisan political activity by incumbent and non-incumbent candidates for elective judicial office violates those candidates' rights, or the rights of political parties, under the First and Fourteenth Amendments?

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STATEMENT OF THE CASE

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS.

The court of appeals concluded that the governmental interests underlying the restrictions on partisan political activities in Canon 5 are "undeniably compelling." App. 21a. Those interests include the creation and maintenance of an independent judiciary free from partisan political pressures; preserving public confidence in the independence and impartiality of the judiciary; and ensuring a high caliber of judges by protecting judges from pressure to engage in partisan activities. App. 23a-26a.

The court rejected the contention that Canon 5 is fatally underinclusive. Citing this Court's decision in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973), the court concluded that it was not arbitrary for Respondents to conclude that political parties pose a greater threat to the integrity and reputation of the judiciary than do non-partisan groups. App. 41a-43a.

The court concluded that the partisan political restrictions were narrowly drawn. Candidates for judicial office have ample means to publicize and disseminate information about their candidacies. App. 36a-37a.

The court concluded that the prohibition in Canon 5 against making statements that "announce . . . views on disputed legal or political issues" ("announce clause"), as construed by the district court, was narrowly tailored to meet compelling government interests. The state's interests are compelling because making certain statements about future judicial decisions is "fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts." App. 44a-45a. The court held that Petitioners, by failing to raise the appropriateness

of the district court's narrowing construction of the announce clause in their opening briefs to the court, waived that issue, and thus the court analyzed the announce clause as construed by the district court. App. 52a. The announce clause is narrowly tailored because it permits judicial office candidates to discuss a wide range of issues. App. 55a.

II. STATEMENT OF FACTS.

Petitioners' statement of the case gives the impression that petitioner Wersal had his First Amendment rights chilled by his reasonable fear that he would be subject to discipline by the Minnesota Office of Lawyer Professional Responsibility ("Lawyers Board") for violation of the announce clause in Canon 5.[1] In fact, at no time was Wersal under any actual or implied threat of prosecution by the Lawyers Board, which consistently stated its intention not to enforce that provision.

First, Wersal maintains that he withdrew his candidacy for Associate Justice of the Minnesota Supreme Court in 1996 after an ethics complaint was filed with the Lawyers Board because the threat of such ethics complaints "placed his livelihood as a lawyer and the well-being of his family in jeopardy." Pet. at 4. Wersal asserts that the Lawyers Board "eventually" exonerated him, stating its doubts regarding the constitutionality of the announce clause. *Id.* These assertions imply that Wersal, being under the threat of investigation, withdrew his

[1] Wersal is not subject to regulation by the Minnesota Board on Judicial Standards ("Judicial Board"), which regulates the conduct of judges in Minnesota. The Lawyers Board regulates the conduct of non-incumbent judicial candidates in judicial elections. Both Boards enforce Canon 5 in judicial elections. At the district court level in this action, the Lawyers Board did not take a position on the constitutionality of the "announce clause." However, at the court of appeals the Lawyers Board joined with the Judicial Board in defending the constitutionality of that clause, as narrowed by the district court. Nevertheless, the Lawyers Board indicated it would continue not to enforce that clause "unless and until it is ultimately held constitutional in this proceeding." *See* Lawyers Board Statement at page x in the Brief of Appellees Edward J. Cleary and Charles E. Lundberg to the court of appeals.

candidacy. In fact, three weeks after the ethics complaint was received, the Lawyers Board summarily dismissed it. Appendix to Brief of Appellants in Eighth Circuit ("AA __") at 1643-1646. Wersal was notified of the ethics complaint at the same time he was notified that it had been dismissed. Wersal Aff., ¶ 7, at AA 1614.[2] Thereafter, during the summer of 1996, Wersal withdrew as a candidate. Wersal Aff., ¶ 8, at AA 1614. Just a few months later, in January 1997, with no further action by the Lawyers Board, Wersal announced his intention to be a candidate in the 1998 election. *Id.*, ¶ 10, at AA 1615.

Second, Petitioners contend that, in response to a request from Wersal for an advisory opinion in February 1998, the Lawyers Board "was not willing to state whether it would enforce the [announce clause], but instead stated only that it 'continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution.'" Pet. at 6. In fact, this quotation from the Lawyers Board letter is immediately followed with another sentence that states:

> Therefore, our policy has not changed and unless the speech at issue violates other prohibitions listed in Canon 5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable.

AA 1760-61. In addition, the Director of the Lawyers Board told Wersal that the Board could not advise him as to his announce clause question because he had not provided the Board with information about any particular statements he wished to make that might have constituted a view on a disputed legal or political issue. App. 12a.

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[2] Ethics complaints to the Lawyers Board and dismissals of those complaints are not public. Rule 20, Minnesota Rules on Lawyers Professional Responsibility. Thus, unless Wersal or the complainant released the ethics complaint, no one would have known that a complaint had been filed.

The Lawyers Board has never threatened any investigation or action against Wersal for violations of Canon 5. In fact, there is no evidence that either the Lawyers Board, the Judicial Board, or the Minnesota courts have ever enforced the announce clause.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT.

Petitioners have not established that any of the criteria contained in Rule 10 of this Court's rules exist such that this Court should grant the Petition. In particular, the decision below does not conflict with any decision of this Court or with the decision of any other court of appeals.

A. The Announce Clause.

The district court upheld the constitutionality of the announce clause, but only after interpreting it to apply only to announcements of the candidate's position that display a predisposition on those issues likely to come before the court. App. 128a. Petitioners did not properly raise before the court of appeals their argument that the district court acted improperly in narrowing the scope of the clause. Thus, they cannot claim that the decision below conflicts with *Buckley v. Illinois*, 997 F.2d 224 (7th Cir. 1993), in which the court declined to adopt a narrowing interpretation of the same clause. Even if that issue had been properly raised and appropriate for this Court to consider, *Buckley* is distinguishable and the district court acted correctly. Both this Court and the Minnesota Supreme Court adhere to the long-standing principle that courts should construe laws to sustain their constitutionality.

The announce clause is supported by compelling state interests. Litigants have a right and an expectation that a judge will decide cases based upon the law and facts of the case rather than based upon statements made during a campaign. The state has the right to ensure that the

judge not be concerned that if he rules a certain way, voters or a political party will feel betrayed and will punish him at the next election. Preserving the appearance of independence and impartiality is equally important. Even if a judge's decision is not affected by the positions he took during the last campaign, the litigants and the public will not know that and may well believe that the decision was based upon statements made during the campaign.

The announce clause is narrowly tailored. Candidates for judicial office may discuss a wide variety of topics.

B. Restrictions On Partisan Political Activities.

The restrictions in Canon 5 on partisan political activity by incumbent and non-incumbent judicial candidates are supported by compelling governmental interests and are narrowly tailored to meet those goals. The decision below is neither inconsistent with any decision of this Court nor with the decision of any other court of appeals.

Specifically, the decision below is not in conflict with *Eu v. San Francisco Co. Democratic Central Comm.*, 489 U.S. 214 (1989). In *Eu,* this Court struck down a statute directly prohibiting political parties from making endorsements for any offices in partisan primary elections. However, Canon 5 does not prohibit a political party from endorsing candidates for elective judicial office, and the Republican Party endorsed Gregory Wersal for Associate Justice of the Supreme Court in 2000. Pet. at 7. No decision of this Court has extended the rationale of *Eu* to non-partisan elections, let alone to non-partisan judicial elections.

The decision is also not in conflict with *Geary v. Renne,* 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub. nom., Renne v. Geary,* 501 U.S. 312 (1991) (lack of justiciability).[3]

[3] Both the Petition and the amicus brief create confusion regarding the citation of this ninth Circuit case. The amicus cites the case as *Renne v. Geary,* 880 F.2d 1062 (9th Cir. 1990). (Footnote Continued on Next Page)

Geary, as a vacated decision, has no effect and does not state the law in the Ninth Circuit. Even if *Geary* were the law of the Ninth Circuit, it is not in conflict with the decision below. The Ninth Circuit in *Geary* specifically noted that a less drastic means of accomplishing the state's goals would be to provide for "controls on partisan activities of the candidates" (as opposed to controls on the partisan activities of parties). 911 F.2d at 285 (footnote omitted).

The decision below is also not in conflict with any other decisions of this Court involving the underinclusiveness doctrine of the First Amendment or the Equal Protection Clause. There are ample legitimate reasons to treat partisan political parties differently from other organizations.

Petitioners have cited no cases striking down restrictions on the partisan political activities of judges or judicial branch employees. Numerous courts have upheld such restrictions.

II. ARGUMENT.

A. Canon 5 Is Supported By Compelling Government Interests.

The state's interests are compelling regarding the announce clause because making certain statements about future judicial decisions is "fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts." App. 44a-45a. The court quoted Chief Justice Rehnquist:

> In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the

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Amicus brief at 7. However, the citation "880 F.2d 1062" is to *Geary v. Renne,* a panel decision holding that the challenged statute was constitutional. The quotations on pages 7-8 of the amicus brief are actually from *Geary v. Renne,* 911 F.2d 280 (9th Cir. 1990), an *en banc* decision reversing the panel's decision. Petitioners correctly cite to the *en banc* decision, but also mistakenly name the case as *Renne v. Geary.* Petition at 11, 24.

> one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without the benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

Laird v. Tatum, 409 U.S. 824, 836 n.5 (1972) (Mem. on Motion for Recusal). The court concluded the state offered sufficient evidence of widespread and long-standing consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way. App. 49a.[4]

With respect to Canon 5's restrictions on partisan political activities, the court noted that, "[w]hereas, affiliation with a partisan program is thus at the heart of executive and legislative campaigns, a State may conclude that [such affiliation] has no role in judicial campaigns because of the neutral, decision-making nature of the judicial function." App. 17a. In recognition of this difference, the State of Minnesota has provided that its judicial offices are nonpartisan. App. 18a, citing Minn. Stat. § 204B.06, subd. 6 (1998) and *Peterson v. Stafford,* 490 N.W.2d 418 (Minn. 1992).

Thus, the court of appeals concluded that the governmental interests underlying Canon 5 are "undeniably compelling." App. 21a. The court deferred to the Minnesota Supreme Court's view that the ideal for the judiciary in Minnesota is "to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide

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[4] The court followed this Court's statement in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 391, (2000) that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." The court, noting that this Court, lower federal courts, the Minnesota Supreme Court, and others have long seen partisanship as posing a threat to judicial integrity, found the evidence presented by the state to be sufficient, particularly in light of Plaintiffs producing no evidence tending to disprove the threat to the integrity or reputation of the judiciary from involvement with partisan politics. App. 28a-33a.

those cases without those influences . . ." App. 23a, quoting *Peterson v. Stafford,* 490 N.W.2d at 420 (footnote omitted).

The court found as an equally important governmental interest that of preserving public confidence in the independence and impartiality of the judiciary. App. 26a. The court relied in part upon this Court's statement in *Cox v. Louisiana,* 379 U.S. 559, 565 (1965) that "[a] State may also properly protect the judicial process from being misjudged in the minds of the public." Finally, the court found that the state had a very important governmental interest in protecting judges from pressure to participate in partisan activities to ensure a high caliber of judges. App. 26a.

The court of appeals held that the state produced sufficient evidence that the impartiality and appearance of impartiality of the judiciary are threatened by judicial candidates being involved in partisan political activities. App. 30a-33a.

B. Petitioners Did Not Properly Raise At The Court of Appeals Level Their Challenge To The Announce Clause, As Narrowed By The District court, And, In Any Event, The Decision Below Is Not In Conflict With Any Decision Of This Court Or Of Any Other Circuit Court Decision.

The district court interpreted the announce clause as "only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, . . ." App. 129a. In so doing, the district court concluded that the Minnesota Supreme Court would interpret the announce clause narrowly if there were an appropriate case before it, "consistent with the construction urged upon the Court by the Judicial Board." App. 128a.

Petitioner's primary argument in support of its Petition is a claimed conflict between the decision below and the Seventh Circuit decision in *Buckley v. Illinois*, 997 F.2nd 224 (7th Cir. 1993). Pet. at 16. In *Buckley*, the court struck down an identical Illinois rule as the announce clause in Canon 5. The *Buckley* court specifically rejected a request to narrowly interpret the

rule on the grounds that it was not the proper role of the court to "patch up the rules." 997 F.2d at 229-30. However, contrary to Petitioners' suggestion (Pet. at 18), *Buckley* questioned but did not state definitively that a narrowed construction would not cure the asserted constitutional defect. *Id.*

There cannot be even an arguable conflict between *Buckley*'s refusal to adopt a narrow interpretation and the district court and the Eighth Circuit's willingness to do so if Petitioners failed to raise the narrowing issue below so that it was before the court of appeals. Petitioners did fail to raise the issue.

Petitioners, in their opening briefs on appeal to the court of appeals, challenged the announce clause as if the district court had not narrowed it. *See* App. 52a. They neither claimed that the district court erred by interpreting the clause narrowly or that the narrowed language was still unconstitutional. Wersal attempted to challenge the propriety of narrowing in his reply brief. The court of appeals properly held that issues not argued in an opening brief could not be raised for the first time in the reply brief, and the court therefore analyzed the announce clause as narrowly construed by the district court. App. 52a. In their Petition Petitioners do not challenge the Eighth Circuit's determination that Petitioners did not properly raise this issue on appeal.

Despite holding that the appropriateness of the narrowing construction was not before the court, the court of appeals briefly disposed of the substance of Petitioners' challenge by holding that the district court acted properly in narrowing the clause. App. 53a. This Court has long held that federal courts should construe laws to sustain their constitutionality. *See*, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Minnesota Supreme Court, as the Eighth Circuit noted, also adheres to this principle

of statutory interpretation. App. 53a, citing *In re R.A.V.*, 464 N.W.2d 507, 509 (Minn. 1991), *rev'd on other grounds by R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).[5]

Finally, the court below found *Buckley* to be distinguishable in any case. App. 53a, n. 24. In contrast to this case or the situation in *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania,* 944 F.2d 137 (3rd Cir. 1991), in which the Third Circuit narrowly interpreted an identical announce clause in the same manner as did the court below, the *Buckley* court had indications that the clause before it would not be interpreted narrowly by the Illinois Supreme Court. A state disciplinary board had determined that a judge had violated the clause when he commented truthfully on his past record. *Buckley*, 997 F.2d at 229.

In contrast, the Judicial Board has long interpreted the announce clause as permitting discussion of a broad range of issues. A 1990 advisory opinion by the Board, since made known to judicial candidates by letter, states that Canon Five does not prohibit candidates from discussing appellate court decisions. *See* App. 55a. The court of appeals also noted that the Judicial Board has approved extensive lists of sample questions that interested voters could pose to judicial candidates, consistent with Canon 5. *Id.*

The Judicial Board endorsed the narrowed construction before the court of appeals. *See* App. 53a. The Lawyers Board's determinations and opinions have consistently reflected apprehensions concerning the constitutionality of the announce clause, and that Board adopted a

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[5] The Minnesota Supreme Court has shown both a sensitivity to First Amendment Rights and a willingness to construe statutes narrowly to protect their constitutionality. *See*, e.g., *In Re: Welfare of S.L.J.,* 263 N.W.2d 412 (Minn. 1978) (although disorderly conduct statute clearly contemplated punishment for speech protected under the First Amendment, Court would uphold its constitutionality by construing it narrowly to refer only to fighting words); *see also State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (on remand from U.S. Supreme Court holding statute requiring display of slow-moving vehicle emblem did not violate Amish defendants' First
(Footnote Continued on Next Page)

policy of not enforcing the clause until it was determined to be constitutional. The Lawyers Board's view of the announce clause further distinguishes this case from *Buckley*. The Lawyers Board and Judicial Board's longstanding policies are consistent with the Minnesota courts' concerns for First Amendment rights and support the narrowed construction of the announce clause.

The four district court or state court cases cited by Petitioners purporting to be in conflict with the decision below are readily distinguishable. *See* Pet. at 18. The three cases involving announce clause language all involve language identical to Canon 5 before narrowing, not as narrowed. *See Beshear v. Butt,* 863 F. Supp. 913, 916 (E.D. Ark. 1994); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1096 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 955 (Ky. 1990). These cases proceed generally on the assumption that judicial candidates are left with little to discuss and put before the voters other than their "name, rank, and serial number," *Buckley*, 997 F.2nd at 227, "biographical data" *ACLU v. Florida*, 744 F. Supp. at 1098, or "professional history," *J.C.J.D.*, 803 S.W.2d at 956, and are thus also distinguishable on these grounds. App. 56a.[6]

(Footnote Continued From Previous Page)
Amendment rights, Minnesota Supreme Court held statute violated freedom of conscience rights protected by Minnesota Constitution).

[6] The final case cited by Petitioners is *Pittman v. Cole*, 117 F. Supp. 2d 1285 (S.D. Ala. 2000). They claim that the holding of this case is that a "ban on answering questions relating to political and legal issues [is] unconstitutional." Pet. at 18. In fact, this is not the holding of the case. The district court in *Pittman* specifically declined to even address the likelihood of plaintiffs' success on the merits in the context of a preliminary injunction motion. 117 F. Supp. at 1311. Recently, the Eleventh Circuit Court of Appeals vacated the district court's decision, also without addressing the merits of plaintiffs' claims. *Pittman v. Cole*, 2001 WL 1167749 (11th Cir. 2001).

Petitioners have not cited, nor are Respondents aware of, any reported decision holding that the announce clause as narrowed herein is unconstitutional. Thus, there are no reasons for this Court to review the decision below relating to the announce clause.

C. The Decision Below Upholding Canon 5's Restrictions On Partisan Political Activities By Incumbent Judges And Candidates For Judicial Elective Office Does Not Conflict With Any Decision Of This Court Or With Any Other Decision Of A Circuit Court of Appeals.

The court of appeals concluded that the partisan political restrictions were narrowly drawn to address the State's compelling interests. Minnesota permits candidates for judicial office to speak to gatherings other than political ones; appear in newspaper, television, or other media advertisements supporting their candidacy; and distribute pamphlets and other promotional literature. The candidates may also obtain public statements of support from individuals or other organizations. App. 36a-37a.

Petitioners maintain that the decision below conflicts with the decision of this Court in *Eu vs. San Francisco Co. Dem. Central Comm.*, 489 U.S. 214 (1989), other decisions of this Court addressing the underinclusiveness doctrine in First Amendment cases or the Equal Protection Clause, and with the decision of Ninth Circuit Court of Appeals in *Geary v Renne*, 911 F.2d. 280 (9th Cir. 1990) (en banc) *vac. on other grounds sub. nom., Geary v. Renne,* 501 U.S. 312 (1991) (lack of justiciability). Pet. at 24-25. In fact, the decision below does not conflict with any of these decisions.

1. The Eighth Circuit's decision is not in conflict with *Eu*.

The decision below is not in conflict with this Court's decision in *Eu*. *Eu* is readily distinguishable on three grounds. In *Eu* the Court struck down state laws prohibiting (1) *political parties* from endorsing candidates for (2) *any office* in (3) *partisan primary* elections. In contrast, Canon 5 operates only on (1) *candidates* for (2) *judicial office* in (3) *non-partisan*

elections. Petitioners do not contest that these distinctions exist between this case and *Eu.*[7] Instead, they argue that the distinctions make little or no difference. Specifically, they argue, with respect to the first distinction, that Canon 5's restrictions on candidates "impose a severe burden on political party endorsements and, therefore, are in conflict with *Eu.*" Pet. at 20. With respect to the second and third distinctions, Petitioners rely upon the Ninth Circuit's decision in *Geary* to argue that the logic of *Eu* should be extended to all non-partisan elective offices, including judicial offices.

Both Petitioners and amicus contend that the decision below is in conflict with *Eu* because Canon 5's prohibitions on candidates seeking, accepting, or using endorsements from political parties is in practical effect a ban on effective party endorsements because political parties cannot get information directly from the candidates themselves or from their families and associates, "the most relevant and credible source." Pet. at 20. They further argue that voters learn about the endorsement most effectively from the candidates themselves. *Id.;* amicus brief at 10.

These arguments are misplaced. As the Eighth Circuit decision recognizes, Canon 5's restrictions on partisan political activities are a narrowly tailored means of regulating the conduct of candidates, while still permitting third parties such as political parties to endorse such

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[7] In the lower courts, Petitioners disagreed with the first distinction, arguing that in *Eu* the Court also struck down a statute prohibiting *candidates* from "using" a political party endorsement during a primary election, thereby making *Eu* directly on point. However, in *Eu* the statute actually at issue, Cal. Elec. Code Ann. § 11702, banned Party endorsements in primaries, while a companion election code statute, section 29430, made it a misdemeanor for any primary candidate to claim to be the endorsed candidate. *See Eu,* 489 U.S. at 217. None of the plaintiffs in *Eu* were candidates for office, and their complaint challenged section 11702, not section 29430. *See San Francisco Co. Democratic Cent. Comm. v. Eu,* 826 F.2d 814, 817 (9th Cir. 1987). Furthermore, all the discussion in *Eu* relates to section 11702's effect on political parties, not to any effect of section 29430 on candidates. 489 U.S. at 222-29.

candidates. There is only an indirect impact upon political parties, and the extent of such impact is not established in the record. Contrary to Petitioners' assertion, there is nothing in Canon 5 that prohibits Republican Party members from getting information directly from candidate Wersal or from his campaign. Wersal and his campaign can respond by sending Republican Party members information about his candidacy in the same manner that they can send information to any other interested citizens.

Second, the complaint in this matter does not contend that endorsements made by the Republican Party of Minnesota are worthless and ineffectual. In fact, the complaint alleges that such endorsements cannot be made under Canon 5. Throughout this case, the centerpiece of Plaintiffs' argument that Canon 5 affected the Republican Party's rights was the claim that the Canon effectively prohibited the Party from endorsing Wersal in 1998. *See* Second Amended Complaint ¶¶ 101, 116, 117; district court decision at 9, App. 104a; Republican Party of Minnesota Brief to 8th Circuit at 31-32; Republican Party of Minnesota Reply Brief to 8th Circuit at 21-22. In 2000, following the oral argument in the Eighth Circuit, the Party showed that this claim was without merit by proceeding to endorse Wersal. Pet. at 7. This by necessity led to a major change in Petitioners' arguments.

Petitioners must now point to other, less direct ways in which Canon 5 allegedly affects political parties. In particular, Petitioners and amicus argue for the first time in this case that the Party's endorsement must be communicated by the candidate himself to be meaningful. Pet. at 20; amicus brief at 10. That argument must be rejected for two reasons. First, parties have the ability to choose someone other than the candidate to announce the endorsement. Second, the very reason advanced by amicus for choosing the candidate as a spokesperson--the "practical identity of interests between parties and their candidates during an election"--means that the

candidate's use of the endorsement would communicate the identity of interests to the voters. Amicus Brief at 10 (quoting *California Democratic Party v. Jones,* 530 U.S. 567, 589 (2000)). Such a communication would be antithetical to a nonpartisan election.

To show that the impact of Canon 5 on political parties is at all similar to the ban struck down in *Eu*, Petitioners must show at a minimum that voters will not learn of an endorsement unless it is communicated by the candidate rather than another spokesperson for the party. It is not enough to allege that the candidate could do a better job of communicating the endorsement than another spokesperson. For example, in *Renne v. Geary,* this Court said that it did "not believe deferring adjudication will impose a substantial hardship on these respondents" [voters and party members], because they probably could learn of the endorsements through other means than the candidates' statements in the government voting guide. 501 U.S. at 323. *See also* the *Renne* concurrence by Justice Stevens ("[T]o prove injury to *their* interest as informed voters, respondents would perhaps also have to allege they would not otherwise know about the endorsements if the endorsements are not included in mailed candidates' statements.") (emphasis in original). 501 U.S. at 326. Since Petitioners are arguing for the first time that the endorsement can only be communicated by the candidate, the record below is devoid of evidence to support it. In fact, the argument is directly refuted by Petitioners' own statement that the Republican Party's endorsement of Mr. Wersal in 2000 was "widely reported in the newspapers." Pet. at 7.

Eu is further distinguishable in that the severe restrictions upon parties imposed by the statutes under challenge were barely supported by any state interests, let alone compelling ones. The ban on party endorsement in party primaries was a direct interference with the associational rights of political parties and directly hampered the ability of the party to spread its message by

stating whether a candidate in the party's own primary adhered to the tenets of the party or whether party officials believed the candidate to be qualified. *See* 489 U.S. at 223.[8] The State claimed this ban helped avoid voter confusion, but the Court found it actually resulted in the opposite. Voters were likely to be misled by the growing number of endorsements by political organizations using the word "Democratic" in their name (e.g., the Berkeley Democratic Club) in an effort to persuade voters they were the "official" Democratic Party. *See* 489 U.S. at 228 n.18.

2. The Eighth Circuit's decision is not in conflict with the Ninth Circuit's decision in *Geary v. Renne.*

Petitioners assert the decision below is in direct conflict with *Geary v. Renne,* 911 F.2d 280 (9th Cir. 1990), *vac. on other grounds sub. nom., Renne v. Geary,* 501 U.S. 312 (1991) and with *California Democratic Party v. Lungren,* 919 F. Supp. 1397 (N.D. Cal. 1996), the only cases extending *Eu* to nonpartisan races. Pet. at 24. These cases provide no support for Petitioners. First, *Geary*, as a vacated decision, has no precedential effect and does not state the law of the Ninth Circuit. *Los Angeles County v. Davis,* 440 U.S. 625, 635 (1979). Thus, there can be no conflict with the court of appeals decision below. Second, neither *Geary* nor *Lundgren* addressed restrictions on the conduct of candidates in elections, but addressed laws that prohibited political parties from endorsing candidates in nonpartisan elections. *See* 911 F.2d at 282; 919 F. Supp. at 1398.

Both courts recognized this key distinction. The *Geary* court noted that a less drastic means of accomplishing the state's goals would be to provide for "controls on partisan activities

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[8] The ban had the perverse result of preventing the Democratic Party from publishing its opposition to the ultimate winner of a Democratic primary for Congress, even though, as a Grand Dragon of the Ku Klux Klan, the candidate held views antithetical to those of the Party. *See* 489 U.S. at 217 n.4.

of the candidates" (as opposed to controls on the partisan activities of political parties). 911 F.2d at 285. Similarly, the *Lungren* court noted that the State of California improperly relied upon the Hatch Act *Letter Carriers* case because *Lungren* involved a ban on *political party* speech about candidates for office, rather than "a ban on the *partisan political conduct of the officeholders themselves.*" 919 F. Supp. at 1402 (italics in original). The court found this distinction to be critical, in that the government did not have a legitimate interest in silencing the speech of third parties about the qualifications and political views of candidates. The court noted that the state could "of course prohibit judges from engaging in partisan political activity once they are in office." *Id.* at 1405.

3. The Eighth Circuit's decision is not in conflict with other First Amendment or Equal Protection decisions of this Court.

Petitioners claim that the decision below is in conflict with decisions of this Court holding that "to single out for punitive measures certain types of speech from certain speakers violates the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Carey vs. Brown*, 477 U.S. 455 (1980)." Pet. at 21-22. Petitioners also contend that Canon 5's restrictions are unconstitutional under equal protection analysis for substantially the same reason, the allegedly irrational distinctions between partisan political party activities and nonpartisan activities. Pet. at 23. Petitioners rely upon Judge Beam's dissent, in which he states that Canon 5's prohibitions on partisan political activity are fatally underinclusive because candidates may seek and use the endorsement of any individuals or organizations other than political parties. Pet. at 21.

The court of appeals correctly held that only *arbitrary* underinclusiveness poses constitutional problems. App. 35a. Canon 5's restrictions on only partisan activities are not arbitrary. This Court and other courts have held that states may legitimately treat partisan political activity as more of a threat than nonpartisan political activity. *See* App. 42a, citing

Letter Carriers, 413 U.S. at 562 (Court approved wide-spread restrictions on political activities of federal employees even though prohibitions did not extend to non-partisan political activities) and *Bauers v. Cornett*, 865 F.2d 1517, 1525 (8th Cir. 1989) (Court approved constitutional restrictions on state employees soliciting money for a "political purpose", but only by interpreting that term narrowly to apply only to elections "where political parties play a substantial enough role that the integrity of the civil service would be compromised absent restriction on employee participation" and not apply to elections in which political parties did not play such a role). [9]

The court of appeals also properly rejected Petitioners' equal protection claim. The equal protection clause does not require a state to make an all-or-nothing choice in regulating to avoid a perceived evil. As one court explained: "We. . . reject the implied premise of the Plaintiffs' argument, i.e., that unless the state exercises the full extent of its power to prevent some evil, the state's interest in preventing that evil cannot be considered constitutionally weighty." *Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 305 (5th Cir. 1977) (*en banc*). Even in the context of regulation of First Amendment activity, underinclusiveness is not fatal where the regulation, like Canon 5, is viewpoint neutral.[10] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992) ("a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection . . . is in its view greater there.") As pointed out

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[9] Petitioners have cited no cases striking down restrictions on the partisan political activities of judges or judicial branch employees. Numerous courts have upheld such restrictions. App. 30a.

[10] Canon 5 is viewpoint-neutral because it applies equally to all partisan activities. *See Letter Carriers*, 413 U.S. at 564 (Hatch Act partisan political activity restrictions "are not aimed at (Footnote Continued on Next Page)

in *Morial*, this Court in *Buckley v. Valeo* acknowledged the government's compelling interest in preventing undue influence on public officials even though Congress had not attempted to eliminate every possible source of such influence. *See* 565 F.2d at 302-03 n.6, citing 424 U.S. 1, 29 (1976). Canon 5 represents a realistic attempt to prevent the practices that are most likely to harm judicial independence.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court easily disposed of plaintiffs' equal protection claim. Plaintiffs, classified employees, claimed violation of their equal protection rights because they had their political activities prohibited, while unclassified employees were not so restricted. The Court held:

> The legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. *See McGowan v. Maryland*, 366 U.S. 420 (1961). And a State can hardly be faulted for attempted to limit the positions upon which such restrictions are placed.

413 U.S. at 607 n.5 . *Accord Perry v. St. Pierre,* 518 F.2d 184, 186 (2nd Cir. 1975).

The court of appeals set forth ample factual reasons to justify differentiating between political parties and other organizations or individuals, under either a First Amendment underinclusiveness analysis or an Equal Protection Clause analysis. App. 42a. Political parties, having large membership and fund-raising organizations, are in the business of electing candidates and are in a better position than other organizations "to hold a candidate in thrall." *Id* In addition, because political parties have comprehensive platforms, "obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues." *Id* (See, e.g., the RPM Platform, AA 871-74). Furthermore, political party activity is far more ubiquitous

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particular parties, groups, or points of view, but apply equally to all partisan activities of the type described.")

in elections than is non-partisan group activity, thereby making it more likely the public will identify the judicial candidates with the political parties. Political parties have caucuses, conventions, primaries, lawn signs, slates of candidates, advertising, and sample ballots. Finally, the court noted that legislators owe allegiance to a political party for financial support and endorsement and for political support within the legislative process itself, and the sharing of a common partisan affiliation plays an integral role in enactment of legislation. "If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it." App. 43a.[11]

Furthermore, contrary to the dissent's assertions, App. 90a, the record in this case does not indicate that quasi-political organizations have increasing influence over judicial election politics in Minnesota. The fact that there may have been a few isolated instances of endorsements by such organizations does not mean there is a problem requiring a response from the Minnesota Supreme Court at this time.[12] The record indicates that judicial candidates have been deterred from seeking special interest group endorsements because such activities could violate the announce clause and/or "manifest bias or prejudice inappropriate to judicial office." Canon 5.A.3(d)(ii); *Amendment of Canon 5 of the Code of Judicial Conduct Hearing before the*

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[11] Amicus Republican National Committee alluded to the unique nature of political parties by quoting from this Court's decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986), that party labels "provide a shorthand designation of the views of candidates on matters of public concern". Amicus brief at 11. Indeed, if judicial candidates were free to seek and use party endorsements, the public would naturally assume that the candidates' views coincided with those of the party and its platform.

[12] The Director of the Lawyers Board testified: "I am not aware that there has been any significant problem in Minnesota with judicial candidates seeking endorsement of special interest groups." Supplemental Affidavit of Edward J. Cleary, ¶ 7, Joint Appendix of Defendants/Appellees to Court of Appeals at DA 51.

Minnesota Supreme Court, No. C7-81-300, at 12-13 and 87-88, AA 307.[13] The fact that Minnesota has chosen not to address problems that are theoretical rather than actual does not render Canon 5 underinclusive. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986) ("We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other types of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.").

Petitioners cannot rely upon *R.A.V. v. St. Paul,* 505 U.S. 377 (1992), in which this Court invalidated an ordinance criminalizing "hate speech" on the grounds it imposed special prohibitions on those speakers expressing views on disfavored subjects. *R.A.V.* is inapplicable for two reasons. First, the Court specifically noted that its decision left room for exceptions such as reasonable and viewpoint-neutral content-based discrimination with respect to certain speech by government employees, citing *Broadrick* and *Letter Carriers. See* 505 U.S. at 390 n.6. In those cases, of course, the Court approved the banning of a wide range of political speech. Thus, *R.A.V.* does not limit the effect of these Hatch Act cases. Second, the Court noted that a state could prohibit obscenity only in certain media or markets and not others because it would not involve discrimination on the basis of content, or could prohibit only that obscenity which is the most patently offensive, again because the discrimination would not be based upon content. *Id.* at 387-88. Similarly, the partisan political restrictions in Canon 5 prohibit Wersal from speaking in certain places (political party gatherings), but do not regulate the contents of speeches he gives elsewhere.

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[13] As an example of "the increasing role in and influence over judicial election politics exerted" by special interest groups, the dissent below points to Lavender Magazine. App. 90a. What the record shows is that the organization merely solicited candidates to advertise in its magazine. (Footnote Continued on Next Page)

Petitioners contend that this case is closely analogous to *Carey v. Brown,* 447 U.S. 455 (1980) in which this Court held that a ban on all residential picketing with the exception of peaceful picketing of a place of employment involved in a labor dispute violated equal protection rights. Pet. at 22. In fact, the state lost in *Carey* because the statute gave preferential treatment to the expression of views on one particular subject, and the avowed purpose of the statute, protecting residential privacy, had nothing to do with the content-based labor/non-labor distinction. *See* 447 U.S. at 471. In contrast, Canon 5 does not accord preferential treatment to the expression of views on a particular subject; candidates are prohibited from speaking on *any* issue to partisan political gatherings, while at other gatherings candidates may speak on any issue as long as they do not violate the announce clause.

Here, the Minnesota Supreme Court chose to limit only what it perceived as the most problematic type of political conduct by judicial candidates -- that linking candidates with partisan political parties. The effect of partisan groups on judicial elections differs significantly from the effect of non-partisan groups on those elections.

The court of appeals correctly held that Canon 5 does not violate Petitioners' rights under the First Amendment or the Equal Protection Clause.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

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AA 1258-61. The dissent also points to the Minnesota Family Council. What the record contains is a flyer from the Council that does not even refer to judicial elections. AA 1241.

MARK B. LEVINGER
Assistant Attorney General
Counsel of Record

THOMAS C. VASALY
Assistant Attorney General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5718 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENTS

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