

99-4021, 99-4025, 99-4029

---

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

REPUBLICAN PARTY OF MINNESOTA, *ET AL.*,

Plaintiffs/Appellants,

v.

SUZANNE WHITE, *ET AL.*,

Defendants/Appellees.

---

Appeal from the United States District Court for the  
District of Minnesota, District Judge Michael James Davis

---

BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW,  
CAMPAIGNS FOR PEOPLE, AND CITIZEN ACTION/ILLINOIS AS  
*AMICI CURIAE* SUPPORTING JUDGMENT IN FAVOR OF APPELLEES

---

BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW  
Deborah Goldberg  
Wendy Weiser  
161 Avenue of the Americas, 12th Floor  
New York NY 10013  
(212) 998-6730

Attorneys for *Amici Curiae*

## **RULE 26.1 STATEMENT**

The *amici* are organized as not-for-profit corporations. Pursuant to Federal Rule of Appellate Procedure 26.1, these *amici* state that none of them has a parent corporation, and no publicly held corporation owns 10% or more of their stock.

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
IDENTITY AND INTEREST OF AMICI .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    The Canons Should Be Judged by Weighing the Significant Constitutional Interests They Serve Against the Burden on Appellants’ First Amendment Rights.....	3
A.    The Canons Are Essential to Impartiality and Due Process .....	4
B.    Interests in Judicial Independence and Separation of Powers Justify the Canons.....	6
C.    The Canons Protect Public Confidence in the Judiciary.....	9
II.   The Partisan Activity Clauses Serve Compelling State Interests.....	10
III.  Minnesota’s Decision to Elect Its Judges Does Not Vitate Litigants’ Due Process Rights or the State’s Interest in Maintaining an Impartial and Independent Judiciary.....	15
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE.....	20

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986).....	6
<i>Buckley v. Ill. Judicial Inquiry Bd.</i> , 997 F.2d 224 (7th Cir. 1993).....	4
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991) .....	17
<i>Clements v. Fashing</i> , 457 U.S. 957 (1982).....	5
<i>Cox v. Louisiana</i> , 379 U.S. 559 (1965) .....	10
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	8
<i>Griffen v. Ark. Judicial Discipline &amp; Disability Comm’n</i> , 130 S.W.3d 524 (Ark. 2003).....	12
<i>In re Dunleavy</i> , 838 A.2d 338 (Me. 2003).....	12, 13
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	4,5
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978).....	5
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971).....	9
<i>McConnell v. Federal Elections Commission</i> , 124 S.Ct. 619 (2003).....	4, 14
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	9
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988) .....	6
<i>Nixon v. Shrink Missouri Government PAC</i> , 528 U.S. 377 (2000).....	4
<i>Peterson v. Stafford</i> , 490 N.W.2d 418 (Minn. 1992) .....	10, 11, 13, 17
<i>Raab v. State Comm’n on Judicial Conduct</i> , 793 N.E.2d 1287 (N.Y. 2003) ..	5, 9, 10

<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	4, 7, 12, 13, 14, 15, 16
<i>Republican Party of Minn. v. White</i> , 361 F.3d 1035 (8th Cir. 2004), rehearing en banc granted, ___ F.3d ___ (8th Cir. 2004).....	11, 14
<i>Signorelli v. Evans</i> , 637 F.2d 853 (2d Cir. 1980).....	12
<i>State ex rel. Young v. Brill</i> , 111 N.W. 639 (Minn. 1907).....	8
<i>Sylvestre v. State</i> , 214 N.W.2d 658 (Minn. 1973).....	8
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975) .....	6
<i>U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO</i> , 413 U.S. 548 (1973).....	9, 18

**CONSTITUTIONAL PROVISIONS**

Minn. Const. art. III, § 1. ....	7, 8
Minn. Const. art. VI, § 5. ....	8
Minn. Const. art. VI, § 6. ....	8
U.S. Const. art. IV, § 4.....	8

**STATE STATUTES**

Minn. Stat. 204B.06(6). ....	10
------------------------------	----

**OTHER AUTHORITIES**

Deborah Goldberg & Samantha Sanchez, <i>The New Politics of Judicial Elections</i> , (Justice at Stake 2002) .....	15
--	----

Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 Hawaii L. Rev. 603 (1998).....5

Justice at Stake Frequency Questionnaire (2002).....17

Minnesota Constitutional Study Commission, *Judicial Branch Committee Report* (1972) .....17

William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 Pepperdine L. Rev. 227, 229-30 (1980) .....5, 6

William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 273-74 (1996).....6,7

Roy Schotland, *Financing Judicial Elections, 2000: Change And Challenge*, 2001 L. Rev. Mich. St. U. Det. C.L. 849 (2001) .....15

## **IDENTITY AND INTEREST OF AMICI CURIAE**

This brief *amicus curiae* is filed with the permission of this Court, by Order dated July 20, 2004. *Amici Curiae* are the Brennan Center for Justice at NYU School of Law, Campaigns for People (based in Texas), and Citizen Action/Illinois – organizations that have been working to protect and to preserve fair and impartial courts, especially in states with elective judiciaries. *Amici* seek to safeguard the judiciary from politicizing forces, including efforts to relax canons of judicial conduct that help maintain crucial differences between judges and officers of the political branches. *Amici* have an interest in this case because of its important implications for the ability of all states, and particularly those like Minnesota that have judicial elections, to maintain both the reality and appearance of judicial impartiality and independence. To avoid unnecessary duplication, this brief focuses on clauses in Canon 5 of Minnesota’s Canons of Judicial Conduct (the “Canons”) that prohibit candidates for judicial office from engaging in specific partisan activity (the “partisan activity clauses”), while the brief *amicus curiae* of the Missouri Bar focuses on the constitutionality of the ban on personal solicitation of campaign contributions.

## **SUMMARY OF ARGUMENT**

1. The standard for determining the constitutionality of the Canons must take into account not only Appellants’ constitutional rights but also the significant

constitutional rights and interests that the Canons advance. The Canons serve three interests of constitutional magnitude: the right of litigants to impartial courts, the separation of powers, and public confidence in the courts' fairness, which is necessary both to the rights of individual litigants and to the functioning of the judiciary itself. Where interests of constitutional magnitude lie on both sides of the equation, a more deferential approach than strict scrutiny is appropriate.

2. The partisan activity clauses, in particular, serve the three aforementioned constitutional interests, especially Minnesota, which holds nonpartisan elections for judicial office. The clauses serve the interest in impartiality by combating threats to open-mindedness presented when obligations are incurred to political parties committed to specific platforms and by reducing the risk of favoritism when parties or the political branches they dominate appear as litigants. They serve the separation of powers by ensuring that judges avoid unnecessary entanglement with party leadership in the political branches. And they protect public confidence in impartiality and independence by erecting a formal barrier between judges and inappropriate political pressures on their decisionmaking.

3. For those reasons, Minnesota's decision to hold judicial elections does not forfeit the state's right—or its obligation—to provide fair courts. Judicial impartiality is not a mere policy choice; the Fourteenth Amendment requires it.

Direct election of judges has coexisted with independent state judiciaries for nearly two centuries. Many excellent Article III judges in the federal system are elevated to the bench after serving in elective state judiciaries – from both partisan and nonpartisan electoral systems. Those judges show by example that involvement in elections does not leave an indelible “taint” incompatible with the judicial role. Rather, in both elective and appointive systems, the public rightly expects individuals to disentangle themselves from partisanship once they become judges.

## **ARGUMENT**

### **I.**

#### **The Canons Should Be Judged by Weighing the Significant Constitutional Interests They Serve Against the Burden on Appellants’ First Amendment Rights.**

The standard of review applied in this case should reflect the fact that the Canons, and particularly the partisan activity clauses, serve three interests of constitutional magnitude: the right of litigants to unbiased and open-minded courts (the interest in impartiality); the separation of powers (the interest in independence); and public confidence in the courts’ fairness (the interest in the appearance of impartiality and independence). In other words, the First Amendment interests claimed by Appellants are counterbalanced by the equally compelling – indeed, fundamental – rights of litigants and the people of Minnesota. Resolving challenges to the Canons is not a matter of weighing the state’s mere

policy preferences against Appellants’ constitutional rights; instead, “constitutionally protected interests lie on both sides of the legal equation.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). In such circumstances, “there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’” *Id.*; *cf. Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (judicial canon case) (“Two principles are in conflict and must, to the extent possible, be reconciled. . . . The roots of both principles lie deep in our constitutional heritage.”). A more deferential approach recognizes the ability of the Supreme Court of Minnesota “to weigh competing constitutional interests in an area in which it enjoys particular expertise.” *McConnell v. FEC*, 124 S. Ct. 619, 656-57 (2003).<sup>1</sup>

**A. The Canons Are Essential to Impartiality and Due Process.**

The vital interests that the Canons protect are so well established as to be beyond dispute. Most obviously, the Canons protect the right of all persons who come before Minnesota’s courts to be heard by an impartial and independent tribunal. *See In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair

---

<sup>1</sup> In *Republican Party of Minnesota v. White*, the Supreme Court did not analyze whether the Announce Clause must satisfy strict scrutiny but rather adopted this Court’s conclusion and the parties’ assumption to that effect. 536 U.S. 765, 774 (2002). Even if this Court chooses to apply that standard to the partisan activity clauses, they withstand such scrutiny because they are narrowly tailored to serve compelling state interests. *See infra* Point II.

tribunal is a basic requirement of due process.”). That states have a compelling interest in maintaining fair courts has never been seriously doubted. “There could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

In fact, providing fair courts is more than an interest of the state; it is a duty: “[L]itigants have a right guaranteed under the Due Process clause to a fair and impartial magistrate and the State, as steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism.” *Raab v. State Comm’n on Judicial Conduct*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003) (per curiam). Fairness requires not only that judges remain impartial as between the particular persons appearing before them, but also that they not become so entangled in partisan politics that their impartiality can be questioned. *See Clements v. Fashing*, 457 U.S. 957, 968 (1982) (“It is a serious accusation to charge a judicial officer with making a politically motivated decision.”) (plurality opinion). Judges “must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or ‘the home crowd’ wants.” Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 *Hawaii L. Rev.* 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All*

*Honor Lies*, 7 Pepperdine L. Rev. 227, 229-30 (1980)). Thus, Minnesota cannot simply ask litigants to put their faith in judges' striving to do what is legally right; the Constitution guarantees them a judicial system that, to the extent possible, does not tempt judges to do otherwise. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.") (internal quotation omitted); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (discussing circumstances in which "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable") (emphasis added).

**B. Interests in Judicial Independence and Separation of Powers Justify the Canons.**

Litigants' due process rights are not the only interests of constitutional magnitude served by the Canons; the Canons also safeguard the separation of powers that is the essence of our constitutional order. *See Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."). And the separation of powers is the key to judicial independence. Chief Justice Rehnquist has described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government today." William H. Rehnquist, *Keynote Address at the*

*Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 274 (1996).

Contrary to the Supreme Court's suggestion earlier in this case, judicial independence means something more than impartiality. *See Republican Party of Minn. v. White*, 536 U.S. 765, 775 n.6 (2002) (stating that, to the parties, the terms seemed "interchangeable"). Judicial independence means, at least, that the judiciary is neither dominated nor controlled by the political branches and that it is disentangled to the extent possible from the forces that influence those branches' policy choices. If judges answer to political parties and electoral majorities to the same degree as legislators, the courts risk becoming mere shadow legislatures. They would lose the distinct character necessary for the non-legislative and nonpartisan work of judging and for discharging their constitutional duty of judicial review.

The principle of judicial independence as a crucial component of the separation of powers is enshrined in Article III of the federal Constitution and Article III of the Minnesota Constitution. The Minnesota Constitution expressly guarantees the independence of the three branches from one another:

The powers of government shall be divided into three distinct departments: legislative, executive, and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1. It also contains other provisions that are clearly designed to protect the judiciary's independence, including a guarantee that judges' compensation will "not be diminished during their term of office," *id.* art. VI, § 5, and a prohibition on judges' holding other government offices, *id.* art. VI, § 6. While the federal Constitution may not require Minnesota to adopt a system of separated powers, the state is guaranteed a "republican form of government," U.S. Const. art. IV, § 4, and the state's decision as to how to structure its government, including its judiciary, is regarded as "fundamental," *see Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The Minnesota Supreme Court has long and strictly guarded the separation of powers. Almost a century ago, that Court recognized that "the founders of [Minnesota's] system of government intended to confine the courts to their judicial duties, and thus prevent them from becoming involved in the turmoil of political life." *State ex rel. Young v. Brill*, 111 N.W. 639, 650-51 (Minn. 1907). The State's highest court continues to appreciate that the state's interests in judicial independence and separation of powers are intertwined. *See, e.g., Sylvestre v. State*, 214 N.W.2d 658, 666 (Minn. 1973) (interpreting statute so as not to diminish judge's retirement pay because "[a]ny other construction would impair the independence of the judiciary as a separate, coequal branch of government under our concept of a separation of powers among the three branches of government").

Canons that protect judicial independence protect the state's constitutional commitment to the separation of powers.

### **C. The Canons Protect Public Confidence in the Judiciary.**

Finally, the Canons promote not only the reality of judicial impartiality and independence, but also their appearance. Both litigants and the State have a constitutional interest in having the judiciary seen to be impartial and independent. For the individual litigant, “the appearance of evenhanded justice . . . is at the core of due process.” *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). For the effective functioning of the judiciary itself, the appearance of impartiality and the public's confidence in courts' fairness is almost as important as the reality of fairness. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”). Indeed, “without public confidence, the judicial branch could not function.” *Raab*, 793 N.E.2d at 1292.

The government may curtail the political activities of even minor public functionaries to preserve the appearance that laws are not being administered in partisan fashion, which is “critical” to public confidence in our system of government. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973). When individuals seek judicial office – one that carries great responsibility and high esteem – they accept the same critical duty to

maintain both the reality and the perception of impartiality and independence. *See Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (“A State may . . . properly protect the judicial process from being misjudged in the minds of the public.”). Obedience to the Canons gives the public confidence that prospective judges are removing themselves as far as possible from inappropriate political pressures on their decisionmaking.

## II.

### **The Partisan Activity Clauses Serve Compelling State Interests.**

The Canons’ partisan activity clauses are an integral part of a constitutional and statutory system designed to ensure the impartiality and independence of Minnesota’s judiciary. To safeguard “the judicial impartiality required to decide cases free from political maneuvering,” *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992), Minnesota requires elections for judicial office to be nonpartisan. *See* Minn. Stat. 204B.06(6) (“Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office.”). In so doing, the state also protects judges from the political pressures inherent in partisan activity.<sup>2</sup> As the Minnesota Supreme Court explained:

---

<sup>2</sup> In more than a dozen states, partisan elections are used for the selection of trial court or appellate judges, and canons designed to limit partisan activity beyond that essential to the conduct of a candidate’s own campaign have withstood constitutional scrutiny. *See Raab*, 793 N.E.2d at 1292-93 (upholding New York partisan activity clauses). By opting for nonpartisan elections, Minnesota has

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences.... While the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

*Peterson*, 490 N.W.2d at 420.

Against this backdrop, it is apparent that the state's interest in curtailing partisan activity by prospective judges is of paramount importance. When judges are selected in a system of nonpartisan elections, partisan activity by judicial candidates threatens judicial impartiality in several ways. As the panel majority recognized, partisan activity is an "objectively ascertainable threat to open-mindedness that results from having incurred obligations to entities who, while not actually parties to a case, have made known their desire to see certain cases decided in certain ways." *Republican Party of Minn. v. White*, 361 F.3d 1035, 1043 (8th Cir.), *rehearing en banc granted*, \_\_\_ F.3d \_\_\_ (8th Cir. May 25, 2004). Moreover, the political branches are the most frequent parties in litigation. Given the close alignment between political parties and those branches, restrictions on

---

chosen to provide greater protection for the impartiality and independence of its courts, *see Peterson*, 490 N.W.2d at 420, as have an additional 17 states. If partisan activity clauses can be upheld even in a state such as New York with partisan elections, they should surely be sustained to protect the nonpartisan character of Minnesota's judiciary.

partisan activity reduce the risk that a judge may favor, or appear to favor, a particular litigant in legal proceedings and thus guard against “bias for or against either party to the proceeding” – the core conception of impartiality in *White*. 536 U.S. at 775 (original emphasis omitted).

Partisan activity clauses also serve the compelling state interest in safeguarding Minnesota’s separation of powers and the independence of its judiciary. The clauses help to disentangle judges from the influence of party leaders in the executive and legislative branches and to preserve the distinction in the public mind between judicial and political roles. *See, e.g., Signorelli v. Evans*, 637 F.2d 853, 861 (2d Cir. 1980); *see also Griffen v. Ark. Judicial Discipline & Disability Comm’n*, 130 S.W.3d 524, 532 (Ark. 2003) (“Judicial independence is a hallmark of our system of government, and we cannot abide the entanglements between the judicial and other branches of government to which lobbying executive and legislative officials would unquestionably lead. . . . We have no hesitancy in adding that judicial independence is a compelling interest of the State. We cannot and will not countenance a blurring of the judge’s role with that of the executive or legislative branches.”). In fact, Maine’s high court found that the legislature violated a separation of powers clause similar to that in Minnesota’s Constitution by passing legislation intended to override two of the canons’ restrictions on political activity by judges. *In re Dunleavy*, 838 A.2d 338, 347

(Me. 2003) (holding that the legislation “does usurp our judicial authority and is therefore unconstitutional”).

In analyzing the Announce Clause, the Supreme Court in *White* did not address any conception of judicial independence that is distinct from conceptions of impartiality. But judicial independence is a distinct value, and in the context of campaign regulations, independence ensures that future judges remain free to decide cases on the merits and are neither constrained by political agendas nor beholden to members of the political branches. The partisan activity clauses do not, and could not, eliminate all preconceptions candidates may have about legal questions. But they can and do regulate forces that mold and influence those preconceptions and the incentives judges have for acting upon their preconceptions once elected.

In particular, the partisan activity clauses limit the influence of political parties, which exert unparalleled power in elections and dominate the political branches’ agendas. By limiting judicial candidates’ dependence on political parties, Minnesota seeks “to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences.” *Peterson*, 490 N.W.2d at 420. By reducing potential judges’ indebtedness to parties who play such a significant role in the political

branches, the partisan activity clauses further Minnesota's constitutional interest in keeping its judges separate from the political branches.<sup>3</sup>

The separation of powers concern highlights why Minnesota may, consistent with the Constitution, prohibit political activity in association with political parties while permitting association with other issue groups. As the Supreme Court has recognized, “[p]olitical parties have influence and power in the legislature that vastly exceeds that of any interest group.” *McConnell*, 124 S. Ct. at 686. Administrations are referred to as “Republican” or “Democratic,” but never as “NRA” or “NOW.” As a result, Minnesota, like Congress, “is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of” campaign regulation. *Id.* Appellants are incorrect in arguing that the Canons’ failure to restrict judicial candidates’ association with interest groups make the Canons impermissibly underinclusive.

---

<sup>3</sup> In so doing, the Canons also reduce the “possibility that candidates who became indebted to political parties could be or seem to be bound to rule in accord with those parties’ platforms, rather than in accord with the record and the law.” *White*, 361 F.3d at 1043. That possibility is particularly troubling when judges are called upon, as they often are, to rule on the constitutionality of a statute. In performing that function, a judge should be protected to the extent possible from influence by party members in the legislature that enacted the statute. *White*, 361 F.3d at 1044 (“If the judiciary is then expected to review ... 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.”) (internal quotation and citation omitted).

Finally, leaving a party label off the general election ballot, while permitting extensive involvement of political parties in the nomination of judicial candidates for the ballot, does not adequately serve the interests that Minnesota seeks to protect. Judicial elections in Ohio and Michigan, which follow that system, *see* Roy Schotland, *Financing Judicial Elections, 2000: Change And Challenge*, 2001 L. Rev. Mich. St. U. Det. C.L. 849, 868, have acquired the characteristics of partisan elections – including higher costs and high levels of political party and interest group advertising. *See* Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections* 12 n.7 (Justice at Stake 2002), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf>. Minnesota is therefore entitled to conclude that judicial elections that are nonpartisan in name only are not sufficient to further the compelling interests served by the partisan activity clauses.

### III.

#### **Minnesota’s Decision to Elect Its Judges Does Not Vitate Litigants’ Due Process Rights or the State’s Interest in Maintaining an Impartial and Independent Judiciary.**

Relying on Justice O’Connor’s concurrence in *White*, 536 U.S. at 792 (O’Connor, J., concurring) (“If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”). Appellants imply that Minnesota forfeited its right to secure judicial impartiality and independence with its Canons when it instituted the

practice of electing judges. The *White* majority, however, disavowed any implication that by having judicial elections a state must accept the full panoply of constitutional doctrine applying to legislative and executive elections. *See id.* at 783 (“[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”).

There are a number of problems with Appellants’ contention, but the most basic is that the due process rights of individual litigants are not Minnesota’s to forfeit. Indeed, the state is required by the Fourteenth Amendment to *guarantee* litigants an impartial court. While the Canons permit candidates meaningfully to contest judicial elections, those limited allowances for political activity are a far cry from opening the floodgates to every sort of partisan conduct, let alone permitting judges and judicial candidates to flout the constitutional rights of those who may appear before them.

Appellants may believe that the state has an all-or-nothing choice between holding elections and having fair courts, but citizens know better. They value both direct democratic control over judicial selection and courts that are independent. An extensive national survey of public attitudes toward state courts is instructive. Respondents were asked which of the following statements came closer to their own view: (1) Courts are unique institutions of government that should be free of political and public pressure; or (2) Courts are just like other institutions of

government and should not be free of political and public pressure. 78% chose the first statement. Yet 76% said judges in their state should be elected. Justice at Stake Frequency Questionnaire 7 (2002), *available at* <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>. These results are consistent with the findings of Minnesota's 1972 Constitution Study Commission, which reported that "the public finds it distasteful for judges to become embroiled in politics." *Peterson*, 490 N.W.2d at 423 (citing Judicial Branch Committee Report, Minnesota Constitutional Study Commission, at 24-25 (1972)). Nonetheless, Minnesotans still prefer to elect their judges.

The public's values may be in tension, but they are not contradictory. "[T]he word 'representative' connotes one who is not only *elected* by the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People." *Chisom v. Roemer*, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting). Citizens understand that judges must be able to perform their duties without favor toward any political organization and without prejudging any litigant's case. The Canons not only require judges to meet these standards but make it easier for them to do so. The ban on partisan activity means that prospective judges may not curry favor with political parties in order to be elected to the bench. In turn, party leaders cannot as easily use the implied or

actual threat of withholding nomination or support for appointment to a higher court to press prospective judges to use the prestige and power of their judicial offices to benefit the party and its candidates for political office. The Supreme Court has noted the importance of protecting public employees from such pressures. *See Letter Carriers*, 413 U.S. at 566. Such protection is all the more important in the case of judges, who are entrusted with safeguarding the rights of litigants.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to conclude that the Supreme Court's earlier decision in this case is consistent with the constitutionality of Minnesota's partisan activity clauses and to remand the Counts challenging those clauses to the District Court with instructions to enter judgment in favor of Appellees.

Dated:       New York, New York  
              August 9, 2004

Respectfully submitted,

BRENNAN CENTER FOR JUSTICE  
AT NYU SCHOOL OF LAW

---

By:   Deborah Goldberg  
      Wendy Weiser  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013  
212-998-6730

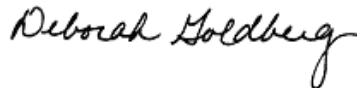
*Attorneys for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,219 words from the IDENTITY AND INTERESTS OF AMICI CURIAE through the CONCLUSION, as determined by the word-counting feature of Microsoft Word for Windows 2000.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the requirements of Eighth Circuit Rule 28A(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 for Windows in 14-point Times New Roman font.

3. This brief complies with the requirements of Eighth Circuit Rule 28A(d) because the diskettes filed with the Court and served on the parties' counsel have been scanned for viruses and are virus-free.



---

Deborah Goldberg  
Attorney for *Amici Curiae*

Dated: August 9, 2004

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of August, 2004, I caused two (2) true and accurate copies of the Brief of the Brennan Center for Justice at NYU School of Law, Campaigns for People, and Citizen Action/Illinois as *Amici Curiae* in Support of Appellees (the “Brief”) and one (1) virus-free diskette with a digital version of the Brief to be served upon the following attorneys of record by depositing the same to a third party commercial carrier for delivery by the next business day, to the following:

James Bopp, Jr.  
Thomas J. Marzen  
Madison Center for Free Speech  
Bopp, Coleson & Bostrom  
1 South Sixth Street  
Terre Haute, IN 47807  
*Counsel for Plaintiffs-Appellants*

William F. Mohrman  
Erik G. Kaardal  
Eric L. Lipman  
Mohrman & Kaardal, P.A.  
4100 Multifoods Tower  
33 South Sixth Street  
Minneapolis, MN 55402  
*Counsel for Gregory F. Wersal, Kevin J. Kolosky, and Campaign for Justice*

Mark Levinger, Esq.  
Thomas Vasaly, Esq.  
Minnesota Attorney General’s Office  
Suite 1100  
445 Minnesota Street  
St. Paul, MN 55101  
*Counsel for Defendants-Appellees*

Joseph C. Blanton, Jr.  
Blanton, Rice, Sidwell, Nickell, Cozean & Collins, L.L.C.  
219 South Kingshighway  
Sikeston, MO 63801-0805  
*Counsel for The Missouri Bar*

John C. Kapsner  
Michael T. Andrews  
Vogel Law Firm  
200 North 3<sup>rd</sup> Street, Suite 201  
Bismarck, ND 58501  
*Counsel for the Conference of Chief Justices*

In addition, I dispatched the original and 30 copies of the Brief, as well as a virus-free diskette with a digital version of the Brief, to a third party commercial carrier for delivery to the Clerk of the Court by the next business day.

/s/ \_\_\_\_\_  
Sarah Samis