

No.

IN THE

Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA
BOARD ON JUDICIAL STANDARDS, *et al.*,
Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Minnesota selects its judges through a system of non-partisan elections. Canon 5 of the Minnesota Code of Judicial Conduct, promulgated by the Minnesota Supreme Court, regulates the campaign finance and political activities of judges and candidates for election to judicial office. Canon 5 prohibits judges and judicial candidates from “personally solicit[ing] or accept[ing] campaign contributions.” Instead, judges and judicial candidates must establish committees to handle all campaign finance matters, including the solicitation of contributions. Canon 5 also prohibits judges and judicial candidates from identifying themselves as members of, from seeking or accepting the endorsement of, and from attending and speaking at gatherings of, partisan political organizations. The questions presented are:

1. Whether Minnesota’s rule precluding judges and judicial candidates from personally soliciting campaign contributions is inconsistent with the First Amendment to the United States Constitution or otherwise invalid insofar as it bars them from (1) signing letters requesting campaign contributions; and (2) making personal appeals for campaign contributions to “large groups” of individuals.

2. Whether Minnesota’s restrictions on the partisan political activities of judges and judicial candidates violate the First Amendment to the United States Constitution or are otherwise invalid to the extent that they bar judges and judicial candidates from (1) attending and speaking at political party gatherings; (2) identifying themselves as members of a political party; and (3) seeking, accepting, or using political party endorsements.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Martha Holton Dimick, in her capacity as Chairperson of the Minnesota Board on Judicial Standards, is the successor to Suzanne White, who was defendant-appellee in the court of appeals and previously respondent in this Court. Ms. White was successor to Verna Kelly, who was also defendant-appellee in the court of appeals. Petitioner Kenneth L. Jorgensen, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, was defendant-appellee in the court of appeals. Mr. Jorgensen succeeded Edward C. Cleary, who was defendant-appellee in the court of appeals and previously respondent in this Court. Kent A. Gernander, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, is the successor to Charles E. Lundberg, who was defendant-appellee in the court of appeals and previously respondent in this Court.

Respondents Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Gregory F. Wersal, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Campaign for Justice, Minnesota African American Republican Council, Muslim Republicans, Michael Maxim, and Kevin J. Kolosky, were plaintiffs-appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Martha Holton Dimick, Chairperson of the Minnesota Board on Judicial Standards, Kent A. Gernander, Chair of the Minnesota Lawyers Professional Responsibility Board, and Kenneth L. Jorgensen, Director of the Minnesota Office of Lawyers Professional Responsibility, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App., *infra*, 1a-86a) is reported at 416 F.3d 738 (8th Cir. 2005). The panel opinion (App., *infra*, 88a-122a) is reported at 361 F.3d 1035 (2004). This Court's earlier decision (App., *infra*, 123a-180a) is reported at 536 U.S. 765 (2002). The court of appeals' first decision (App., *infra*, 183a-272a) is reported at 247 F.3d 854 (2001). The district court's opinion (App., *infra*, 273a-307a) is reported at 63 F. Supp. 2d 967 (1999).

JURISDICTION

The court of appeals sitting *en banc* entered its judgment on August 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and Minnesota's Code of Judicial Conduct are set forth in the Appendix at App., *infra*, 323a-327a.

STATEMENT OF THE CASE

I. Background

For more than 150 years, most States have selected some or all of their judges by popular election. For a brief period early in this Nation's history, most state judges were appointed by the governor or the legislature. L. Berkson, *Judicial Selection in the United States*, in *Guide to Political Campaigns in America* 398-399 & n.1 (P. Herrnson, ed.

2005); C. Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 190 (1993). But the public rapidly came to believe that “governors and legislatures had distributed judgeships on the basis of ‘service to the party’ rather than on the ‘legal skills or judicial temperament’ of appointees,” and reformers concluded that popular election provided the best opportunity to secure judges who served the law, rather than a patron. K. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 *Historian* 337, 347 (1983); Nelson, *supra*, at 194. At state constitutional conventions, “[d]elegate after delegate argued that the appointive system left far more room for the play of partisan politics than the elective system.” K. Hall, *Progressive Reform and the Decline of Democratic Accountability: Popular Election of State Supreme Court Justices, 1850-1920*, 1984 *Am. Bar Found. Research J.* 345, 346-47. As a result, by the eve of the Civil War, most States had embraced popular elections as the best means of selecting their judges. Nelson, *supra*, at 190.

Concerns about political influence—and the corresponding need to preserve both the fact and appearance of an impartial judiciary—resurfaced again by the 1870s. Even in States with elected judiciaries, the public became concerned that “judges were almost invariably selected by political machines and controlled by them.” Berkson, *supra*, at 398. Since then, States have implemented reforms to combat those problems. Chief among them is the adoption of nonpartisan elections for judicial positions, often coupled with regulation of judicial candidates’ partisan activities. *Ibid.* In addition, to redress the potentially corrupting influence of money, many States have barred judicial candidates from personally soliciting campaign contributions. See p. 13-14 n.5, *infra*. This case concerns Minnesota’s efforts to protect the impartiality of, and ensure public faith in, its elected judiciary through such measures.

II. Proceedings In This Case

Minnesota has provided for the election of judges since it joined the Union in 1858. Minn. Const. art. VI, § 7. In 1912, the Minnesota legislature joined other States in “decree[ing] that elections for judicial office be nonpartisan.” *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992). Like the highest courts of other States, Minnesota’s Supreme Court has adopted a Code of Judicial Conduct (based on the ABA’s Model Code) that seeks to redress the impact of partisan politics and campaign contributions on judicial impartiality. App., *infra*, 275a-276a.

A. The Lawsuit

Respondent Gregory Wersal—twice an unsuccessful candidate for the Minnesota Supreme Court—filed this suit in 1998 challenging three provisions of Minnesota’s Code of Judicial Conduct.¹ Two of those provisions remain at issue.

The “solicitation clause,” bars judicial candidates from personally soliciting campaign contributions from potential donors. It provides in relevant part:

A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept cam-

¹ Wersal was joined by members of his family, his campaign committee, the Minnesota Republican Party, and the other respondents. Petitioners are the Chairs of the Minnesota Lawyers Professional Responsibility Board and the Minnesota Board on Judicial Standards, as well as the Director of the Minnesota Office of Lawyers Professional Responsibility. By statute and rule, the Minnesota Lawyers Professional Responsibility Board and the Minnesota Board on Judicial Standards are responsible for enforcing Minnesota’s Code on Judicial Conduct against lawyers and sitting judges, respectively. See 52 Minn. Stat. Ann., Rules on Lawyers Prof’l Responsibility, Rule 4; 52 Minn. Stat. Ann., Board on Jud. Standards, Rule 2; Minn. Stat. Ann. §§ 490.15, 490.16 & 490.18 (West 2002).

campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. * * * Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.

52 Minn. Stat., Code of Jud. Cond., Canon 5B(2) (West 2005). Respondents challenged that clause to the extent it prohibited judicial candidates from personally soliciting contributions from "large" groups or from signing letters seeking contributions. App., *infra*, 235a.

Respondents also challenged the "partisan activities" provisions, which state that "judge[s]" and "candidate[s] for election to judicial office shall not":

(a) * * * identify themselves as members of a political organization, except as necessary to vote in an election. * * *

(d) attend political gatherings; or seek, accept or use endorsements from a political organization.

52 Minn. Stat., Code of Jud. Cond., Canon 5A(1). The partisan activities restrictions further declare that candidates' campaign "committees * * * shall not seek, accept or use political organization endorsements." *Id.*, Canon B(2). Respondents challenged those restrictions insofar as they bar judicial candidates from attending or speaking at political party gatherings, identifying themselves as members of political parties, or seeking, accepting, or using political party endorsements.

Respondents further challenged a third provision, the so-called "announce clause" of the Code of Judicial Conduct, which, as explained below, has been invalidated by this Court, was repealed by the Minnesota Supreme Court, and is no longer at issue in this case.

B. The Initial District Court And Court Of Appeals Decisions And This Court's Decision In *White*

The district court upheld all three clauses, App., *infra*, 306a-307a, and the Eighth Circuit affirmed, *id.* at 239a. This Court granted respondents' petition for a writ of certiorari, but limited its review to the announce clause. App., *infra*, 181a; *Republican Party v. Kelly*, 534 U.S. 1054 (2001). The Court then reversed. App., *infra*, 144a; *Republican Party v. White*, 536 U.S. 765 (2002).

The Court began by noting the announce clause's extremely broad scope. That clause, as the Court described it, prohibited "a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running." App., *infra*, 129a. Candidates were even barred from criticizing precedents if the candidate also stated that he or she was not required to follow them. *Id.* at 129a-130a. That broad clause, the Court held, did not survive strict scrutiny. *Id.* at 140a.

The Court then addressed whether that clause "serves the State's interest in maintaining both the appearance of * * * impartiality and its actuality." App., *infra*, 132a-133a n.7. But the Court distinguished among three different aspects of impartiality—(a) avoiding bias or the appearance of bias against particular *parties*; (b) avoiding preconceived notions about *the law*; and (c) ensuring *open-mindedness* on *legal issues*. *Id.* at 131a-140a. The Court agreed that avoiding bias for or against particular *parties* was essential to due process. *Id.* at 131a-132a. But it held that the announce clause was not narrowly tailored to serve that purpose. By its terms, the clause regulated speech on *legal issues*; it did not purport to regulate associational activities that might raise concerns about attitudes toward particular *parties*. *Id.* at 132a. Turning to whether States have a compelling interest in preventing judicial candidates from having preconceived notions about the law, the Court held that States do not. Anyone qualified to be a judge, the Court stated, would necessarily have *some* preconceptions

about legal issues. *Id.* at 133a-134a. Finally, the Court dismissed Minnesota’s interest in ensuring that judges remain open-minded. The Court concluded that regulation of campaign speech alone was so underinclusive that preserving open-mindedness could not have been the announce clause’s actual purpose. *Id.* at 134a-141a.

Justices Ginsberg, Stevens, Souter, and Breyer dissented. The dissenters observed that, because judges “perform a function fundamentally different from that of the people’s elected representatives,” there should be a distinction between “elections for political office, in which the First Amendment holds sway, [and] elections designed to select those whose office it is to administer justice,” where it does not. App., *infra*, 161a, 163a (Ginsburg, J., dissenting). Judges’ First Amendment rights, the dissenters observed, are not the only constitutional concern at stake: “[The] judicial obligation to avoid prejudgment corresponds to the litigant’s right * * * to ‘an impartial and disinterested tribunal * * * .’” *Id.* at 171a (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

C. The Decisions Below

On remand, a panel of the Eighth Circuit initially upheld the solicitation clause and remanded the partisan-activities regulations. App., *infra*, 88a-122a.² The Eighth Circuit granted rehearing *en banc*. *Id.* at 87a. Applying strict scrutiny, the Eighth Circuit then struck down the challenged portions of the partisan-activities prohibition and the solicitation clause. *Id.* at 1a-86a.

1. At the outset, the Eighth Circuit rejected Minnesota’s interest in preserving judicial “independence” from political influences. App., *infra*, 18a n.7. The Eighth Circuit

² The remand required the district court to take evidence concerning the need for the partisan-activities clause, the justification for the distinction between political parties and other organizations, and whether banning certain partisan activities by candidates solely during elections “is arbitrary.” App., *infra*, 107a.

acknowledged the State’s interest in preserving public confidence in its judiciary by insulating judges and judicial candidates from partisan entanglement. Insofar as that represented an effort to maintain separation of powers—*i.e.*, a government with a political executive and legislature but a non-political judiciary—the Eighth Circuit held the interest insufficiently compelling. *Ibid.* No court, the Eighth Circuit declared, has ever determined that a State’s “interest in maintaining separation of powers is sufficiently compelling to abridge core First Amendment freedoms.” *Ibid.*

The Eighth Circuit then accused the Minnesota Supreme Court of “compromis[ing] any separation of powers framework [in] Minnesota’s constitution.” App., *infra*, 20a n.7. Minnesota’s highest court, the Eighth Circuit asserted, had acted “without apparent constitutional or statutory authority” in creating Canon 5, invading the authority “to regulate the political climate of statewide elections * * * seemingly granted only to the Minnesota legislature * * *.” *Ibid.*

2. The Eighth Circuit then turned to the State’s interest in “impartiality.” The court of appeals acknowledged that States have a compelling interest in guaranteeing that judges are not biased for or against a *particular party* to a proceeding. App., *infra*, 22a. The court of appeals also acknowledged that States may have an interest in ensuring that judges remain open-minded on legal issues, and do not by their campaign statements become incapable of considering issues anew in the specific cases before them. *Id.* at 31a-32a. But the court of appeals struck down the challenged portions of the partisan-activities prohibition and solicitation clause nonetheless.

a. With respect to the partisan-activities prohibition, the Eighth Circuit asserted that it is directed toward associational activities that are “part-and-parcel of a candidate’s speech for or against particular *issues* embraced by the political party.” App., *infra*, 25a. The court of appeals therefore held that the partisan-activities prohibitions were indistinguishable from the speech restrictions invalidated

by this Court in *White* because neither “serve[s] the due-process rights of *parties*” to litigation. *Ibid.* While the court of appeals conceded that political parties are often litigants or otherwise interested in particular cases, it concluded that such conflicts could be addressed through recusal. *Id.* at 26a.

The Eighth Circuit then addressed Minnesota’s interest in ensuring that its judiciary remains open-minded, rather than pre-committed, on issues of law. After this Court’s decision in *White*, the Minnesota Supreme Court amended its Code of Judicial Conduct to emphasize that interest: “Impartiality,” the amended canons now declare, “denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintaining an open mind in considering issues that may come before the judge.*” App., *infra*, 49a (quoting 52 Minn. Stat., Code of Jud. Cond., Canon 5E (as amended Sept. 14, 2004)) (emphasis added).

The Eighth Circuit dismissed that interest, holding that preserving open-mindedness could not be the restrictions’ true purpose because they were “woefully underinclusive.” App., *infra*, 31a. Limits on a candidate’s partisan activities during a judicial campaign, the court of appeals reasoned, cannot counteract “a lifetime of commitment” to a political party and its positions. *Ibid.* Further, that court of appeals held, the partisan-activities prohibition is too limited in scope, because it does not prohibit a judicial candidate from associating with “interest groups.” *Id.* at 33a-35a. The court of appeals rejected the notion that there is any significant difference between powerful, well-organized political parties and special interest groups. *Id.* at 38a. And it likewise rejected the idea that Minnesota can “take one step at a time, addressing itself to the phase of the problem which seems most acute * * * .” *Id.* at 39a (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)).

b. Finally, as respondents urged, the Eighth Circuit invalidated the solicitation clause insofar as it barred candi-

dates from personally soliciting contributions from “large groups” (an undefined phrase) and proscribed them from personally signing solicitation letters. App., *infra*, 41a-42a.

The court of appeals first rejected the dissenting judges’ conclusion that intermediate scrutiny should apply to fundraising activities. Personal solicitation of funds, the Eighth Circuit stated, is core political speech because the requested “funds [are] to be used in promoting a political message.” App., *infra*, 42a.

The court of appeals then rejected Minnesota’s contention that the solicitation clause advanced the State’s compelling interest in an independent and impartial judiciary. App., *infra*, 44a-45a. Contributions still must be made to a campaign committee, which cannot disclose to the candidate who has and has not contributed. That mechanism, the Eighth Circuit held, was sufficient to protect the State’s interest in preventing bias for or against particular parties. *Ibid.* The court did not explain how having the judge’s signature (rather than that of the campaign committee chair) on letters soliciting funds would contribute to political discourse. It did not address the appearance of impropriety that arises when a sitting judge or a candidate personally asks, by letter or before a “large” audience, for money from individuals or lawyers who may have financial or other interests in the outcome of cases he or she may be asked to decide. *Id.* at 44a-46a. Nor did it explain how candidates could sign personal letters without noticing to whom they are addressed, saying only that “[a]n actual * * * candidate’s signature on a contribution letter will not magically endow him or her with a power to divine * * * to whom that letter was sent.” *Id.* at 44a.

3. Three judges dissented, and four others joined only portions of the majority opinion. The dissenters pointed out that the court had adopted “an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat.” App., *infra*, 47a. Unlike the announce clause at issue in *White*,

“[t]he partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate’s *relations with people, and organizations of people*, not the candidate’s relations *with issues*.” *Id.* at 50a (emphasis added). “[T]he participation of judges who have been allowed or forced to make themselves dependent on party largesse for their continued tenure,” the dissenters explained, “affects the state’s ability to provide neutral judges and [to protect] the public perception of such neutrality.” *Id.* at 56a.

The dissenters faulted the majority for ignoring the risk of corruption and the perception of corruption. App., *infra*, 52a. They observed that Congress, “to serve the great end” of “impartial execution of the laws,” had barred *executive branch* employees from having “substantial roles in partisan political campaigns,” and from “run[ning] for office on partisan political tickets.” *Id.* at 53a (quoting *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 567 (1973)). If the need for “impartial[ity]” is a compelling interest for the executive branch, the dissenters observed, it is even “more important for the judicial branch.” *Id.* at 54a. “The State has a compelling interest in keeping its judges free from the odor of self-interest or partisanship.” *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit’s decision in this case strikes down as unconstitutional two provisions of Minnesota’s Code of Judicial Conduct critical to ensuring that the State’s judiciary is—and is seen to be—above party politics and the corrupting influences of money. The decision has profound consequences not only for the States in the Eighth Circuit, but also for every State with judicial elections. Dozens of States with elected judiciaries have restrictions virtually indistinguishable from one or more of those invalidated by the Eighth Circuit here, and similar provisions appear in the ABA’s Model Code. As a consequence of the Eighth Circuit’s decision and a similar decision of the Eleventh

Circuit, *Weaver v. Bonner*, 309 F.3d 1312 (2002), eight States in those Circuits now confront binding precedent invalidating portions of their ethics codes regulating judicial campaigns.³ Candidates and judges in the many other States with similar rules are uncertain about what conduct is proper, and those charged with overseeing compliance are unsure which prohibitions they may lawfully enforce. With 30 States holding supreme court elections in 2006,⁴ this Court's immediate review is needed to resolve growing uncertainty in this important area of law.

The Eighth Circuit's decision intrudes severely on the States' ability to preserve the integrity and credibility of their judiciaries. Under it, judicial candidates are constitutionally entitled to seek money through signed letters sent to, and through in-person appeals before "large" groups of, current and potential litigants and their lawyers. This Court has repeatedly recognized the government's powerful interest in redressing money's corrosive effect on public confidence in the integrity of the political branches. See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136-137 (2002). The Eighth Circuit's decision undermines the States' even more powerful interest in preventing the fact or appearance of corruption that arises when judges and judicial candidates seek money from those who may have interests in the cases before them. In addition, the decision allows judicial candidates to engage in partisan activities, declaring allegiance to a political party and its platform. That is anathema to the States' compelling interest in having judicial branches that are and are seen to be non-political, nonpartisan, and impartial.

³ These States are Arkansas, Florida, Georgia, Minnesota, Missouri, North Dakota, Nebraska, and South Dakota. See p. 13-15 n.5, *infra*; App., *infra*, 323a-398a (collecting state codes).

⁴ Justice at Stake, Scheduled Supreme Court Elections 2006-2008, avail. <http://www.justiceatstake.org/files/SCElections06to08.pdf>.

Regulations addressing the speech of judges and judicial candidates are, of course, subject to First Amendment scrutiny, as *Republican Party v. White*, 536 U.S. 765 (2002), shows. But the Eighth Circuit misread *White* to preclude virtually any regulation of judicial elections, without regard to judges' unique status in our system of government or the highly attenuated nature of the First Amendment interests. The provisions at issue here are wholly different from the obsolete "announce clause" struck down in *White*. The solicitation clause does not restrict judicial candidates' speech about legal issues; it addresses only their requests for *money*. And the partisan-activities prohibition, far from restricting the *expression of viewpoints* important to judicial selection, regulates the *relationship* of judicial candidates to political parties. States have a compelling interest in preventing the judiciary from being or being seen as a political branch that behaves like the policy-making branches.

"The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). Consequently, the States' "interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978). Yet far from according respect to this most fundamental of State concerns, the Eighth Circuit adopted an interpretation of strict scrutiny that renders *any* judgment the State makes in this area either too sweeping to be narrowly tailored or too underinclusive to serve the stated rationale. App., *infra*, 47a, 79a. That deprives the States of a critical tool in their efforts to prevent their judicial systems from being transformed into "super-legislatures" for advancing partisan goals that could not be achieved through the political process—a result that should not be imposed absent review by this Court.

I. The Decision Below Resolves Overwhelmingly Important First Amendment Issues With Profound Consequences For State Judiciaries

A. The Decision Below Invalidates Restrictions On Personal Solicitation That Are Critical To Preserving Impartiality And Public Confidence In The Judiciary In Dozens Of States

Even in the context of the political branches, this Court consistently has recognized the potentially corrupting effect of money on the faithful discharge of official function and the corresponding erosion of public confidence. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 37 (1976); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143-144 (2002). “Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns.” *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm’n*, 470 U.S. 480, 497 (1985). “Of almost equal concern as the danger of *actual* quid pro quo arrangements is the impact of the *appearance of corruption* * * * .” *Buckley*, 424 U.S. at 27 (emphasis added). The interest in combating corruption and the appearance of infidelity to duty in the *judicial* branch—where due process guarantees both the appearance and the reality of an impartial proceeding—is more compelling still. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

For that reason, Minnesota and 28 other States have banned candidates for judicial office from personally soliciting money.⁵ Under the Eighth Circuit’s decision, however,

⁵ See Alaska Court Rules, Code of Jud. Cond., Canon 5C(3) (West 2006); 17A Ariz. Rev. Stat. Ann., S. Ct. R. 81, Code of Jud. Cond., Canon 5B(3) (West 2005); Ark. Code Ann., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005); Colo. Ct. Rules Ann., Ch. 24, Colo. Rules of Jud. Discipline, Code of Jud. Cond., Canon 7B(2)(d) (West 2005); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(1) (West 2005); Idaho Rules of Court, Code of Jud. Cond., Canon 5C(2) (West 2001); Ill. Comp. Stat. Ann., Code of Jud. Cond., S. Ct. R. 67, Canon 7B(2) (West 2005); Ind. Code Ann. tit. 34,

letters asking for money, personally signed by judges or judicial candidates, may now be sent to the very persons who are likely to appear before them. App., *infra*, 46a. Likewise, judges may now personally ask for money before “large” groups—without regard to the interests that some persons in the group might have in the decisions of the court to which the candidate seeks election. *Ibid.* The Eleventh Circuit, in *Weaver v. Bonner*, 309 F.3d 1312, 1315 (2002), went further, striking down Georgia’s bar on direct solicitation across the board, opening the door for judicial candidates to make in-person requests for money to anyone, including those who may appear before them. Those decisions intrude gravely on the States’ ability to ensure their judicial systems both remain and appear above reproach.

Tellingly, the Eighth Circuit’s decision fails to address the *appearance* of partiality and corruption that results when judges and candidates solicit money from those who

Code of Jud. Cond., Canon 5C(2) (West 2002); Kan. S. Ct. R. 601A, Canon 5C(2) (West 2002); Ky. Rev. Stat. Ann., S. Ct. R. 4.300, Ky. Code of Jud. Cond., Canon 5B(2) (West 2005); La. Rev. Stat. Ann., Code of Jud. Cond., Canon 7D(1) (West 2005); Mich. Comp. Laws Ann., Code of Jud. Cond., Canon 7B(2)(a) (West 2005); Miss. Rules of Court, Code of Jud. Cond., Canon 5C(2) (West 2005); Mo. Rules of Court, Code of Jud. Cond., Canon 5B(2) (West 2005); Neb. Court Rules & Procedure, Code of Jud. Cond., Canon 5C(2) (West 2005); N.Y. Judiciary Law, app., N.Y. Code of Jud. Cond., Canon 5A(5) (McKinney 2003); N.D. Court Rules, Code of Jud. Cond., Canon 5C(2) (West 2005); Ohio Rev. Code Ann., Code of Jud. Cond., Canon 7(C)(2)(a) (West 2005); Okla. Stat. Ann., tit. 5, ch. 1, app. 4, Code of Jud. Cond., Canon 5C(2) (West 2001 & Supp. 2005); Or. Rules of Court, Code of Jud. Cond., R. 4-102(D) (2005); Pa. Cons. Stat. Ann., Code of Jud. Cond., Canon 7B(2) (West Supp. 2005); S.D. Codified Laws, ch. 12-16, app., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005); Tenn. Rules of Court, S. Ct. R. 10, Code of Jud. Cond., Canon 5C(2)(a) (West 2005); Utah Code of Jud. Admin., ch. 12, Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2001); Wash. Ct. Rules, Code of Jud. Cond., Canon 7B(2) (West 2000); W. Va. Code Ann., State Court Rules, Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2004); Wis. Code Ann. ch. 60, S. Ct. R. 60.06(4) (West 2005); Wyo. Court Rules Ann., Code of Jud. Cond., Canon 5C(2) (Lexis Nexis 2005).

may appear before them. The Eighth Circuit ruled that Minnesota must tolerate such solicitation because, under an unchallenged portion of Canon 5, campaign committees provide a buffer between donors and candidates. Invoking the due process standard, the Eighth Circuit declared it “unlikely” that a judicial candidate would, once elected, have “a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against” a particular litigant because the campaign committee would shield the judge from learning who contributed and who did not. App., *infra*, 44a (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). But that myopic focus ignores the perspective of the individuals solicited, who may feel pressured to give, then feel entitled to a quid pro quo when they do. It ignores the perspective of those who are unsuccessful in court, who may never accept that their case was adjudicated on the merits, rather than on the money. And it ignores the perspective of the general public, whose confidence in the judicial system is bound to be compromised by the sight of judges with their hands out.⁶ Ignoring those consequences does not make them go away.⁷

⁶ See, e.g., Nat’l Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, 8 (1999), avail. at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (finding that 78% of respondents agree that “Elected judges are influenced by having to raise campaign funds”); Memorandum from S. Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, Inc. & L. DiVall, President, American Viewpoint, to G. Palast, Executive Director, Justice at Stake Campaign 1 (Feb. 14, 2002), avail. at <http://www.greenbergresearch.com/publications/reports/rJASsummary.pdf> (“Seventy-six percent of voters * * * believe that campaign contributions made to judges have at least some influence on their decisions.”).

⁷ The Eighth Circuit’s decision also improperly deems the State’s interest in impartiality insufficiently compelling *unless necessary* to avoid a due process violation. But the State’s interest in preserving the integrity of and public confidence in its judiciary is not limited to protecting the bare rudiments of fairness mandated by due process. See, e.g., *Mills v. Rogers*, 457 U.S. 291, 303 (1982) (recognizing that States may “require

As Justice Kennedy has stated, “the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral.” *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (transcript avail. <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>). The prohibition on personal solicitation adopted by Minnesota and more than two dozen other States is intended to preserve neutrality and public respect. It should not be cast aside without the benefit of this Court’s considered review.

B. The Decision Below Eliminates Protections Essential To The Preservation Of Truly Nonpartisan Judicial Elections In Numerous States

The Eighth Circuit’s decision also eviscerates the States’ ability to keep their judiciaries free from the specter of partisan political influence. Most States and the United States have adopted codes of conduct that bar sitting judges from involving themselves in politics. See, *e.g.*, Code of Cond. for United States Judges, Canon 7 (a federal judge should not “make speeches for a political organization or candidate,” “attend political gatherings,” or “engage in *any other political activity*,” except activities to improve the administration of justice described in Canon 4) (emphasis added); Fed. Code of Cond. for Jud. Employees, Canon 5; App., *infra*, 328a-393a (collecting state codes).

Minnesota’s Canon 5A(1) applies similar rules to judges and judicial candidates alike, declaring that they shall not “identify themselves as members of a political organization, except as necessary to vote in an election” or “attend po-

greater protection of relevant liberty interests than the minimum adequate to survive scrutiny under the Due Process Clause”); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding prohibition on picketing near courthouse with intent to influence the judge even though such picketing would not violate due process). Due process is a floor, not a ceiling. The Eighth Circuit’s decision inverts that relationship, hobbling the States’ ability to provide anything beyond minimum constitutional protections.

litical gatherings.” Minnesota’s Canon 5B(2) reinforces that, barring candidates and campaign committees from “seek[ing], accept[ing] or us[ing] political organization endorsements.” Nine other States with nonpartisan judicial elections impose similar restrictions on judicial candidates.⁸

Those restrictions are critical to preserving “the freedom of [judicial] officials from the control of partisan politics.” *In re Amendment of the Code of Judicial Conduct*, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004). As the ABA explained when adopting similar rules in its first canons 80 years ago, “it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes an active promoter of the interests of one political party as against another.” App., *infra*, 273a (quoting ABA Canon 28 (1924)). The Eighth Circuit’s decision sweeps those considered judgments aside—potentially as to judges and judicial candidates alike. See pp. 26-30, *infra*. Moreover, it thwarts the possibility of reform in other nonpartisan States, where the creeping influence of party politics has

⁸ Of the 19 States with some nonpartisan judicial elections, nine limit statements of party affiliation. Ark. Code Ann., Code of Jud. Cond., Canon 5A(1)(f) and 5C(1)(a)(iii) (Lexis Nexis 2005); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(3) (West 2005); Ky. Rev. Stat. Ann., S. Ct. R. 4.300, Ky. Code of Jud. Cond., Canon 5A(2) (West 2005); 52 Minn. Stat. Ann., Minn. Code of Jud. Cond., Canon 5A(1)(a); Miss. Code Ann. § 23-15-973 (West 2005); Nev. Rev. Stat. Ann., S. Ct. Rules, Part VI, Nev. Code of Jud. Cond., Canon 5C(1)(ii); Or. Rules of Court, Code of Jud. Cond., R. 4-102(C); S.D. Codified Laws, ch. 12-16, App., Code of Jud. Cond., Canon 5C(1)(a)(ii) (Lexis Nexis 2005); Wash. Ct. Rules, Code of Jud. Cond., Canon 7(A)(1)(e) (West 2000); Wis. Code Ann., ch. 60, S. Ct. R. 60.06(2)(b) (West 2005). Arkansas and Florida allow speaking at party gatherings if the candidate’s opponent is also invited to speak. Ark. Code Ann., Code of Jud. Cond., Canon 5C(1); Fla. Stat. Ann., Code of Jud. Cond., Canon 7C(3). Three States prohibit seeking party endorsement. Ark. Code Ann., Code of Jud. Cond., Canon 5A(1)(d); Idaho Rules of Court, Code of Jud. Cond., Canon 5A(1)(d); Miss. Code Ann. § 23-15-973.

the potential to render (or in some cases has already rendered) the elections nonpartisan in name only.

As the dissenting opinion below observed, partisan activities threaten to establish a system in which “candidates [must] plac[e] themselves in debt to powerful and wide-reaching political organizations that can make them or break them in each election.” App., *infra*, 49a. The effects are easily envisioned: decisions split along party lines, opinions or votes that appear directed to obtaining party support in the face of future elections, and favoritism and patronage toward the party faithful. See CA Br. of Amicus Curiae Conf. of Chief Justices 13-15 (Aug. 10, 2004). The effect of permitting political party entanglement in nominally nonpartisan judicial elections is readily apparent in States like Michigan and Ohio.⁹ It is no surprise that lawyers in Indiana—the one State that has partisan, nonpartisan and merit-retention elections—ranked partisan elections last when polled on their views of judicial selection systems. C. Solida, *The Two Sides of Merit Selection*, Ind. Lawyer, Sept. 16, 1998, at 1.

There is “a fundamental tension between the ideal character of the judicial office and the real world of electoral politics.” *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). Minnesota has an interest of the highest order in mitigating that tension to preserve the integrity of its judicial system. It, like many other States, legitimately chose to do so by separating the judicial process, and the judicial selection process, from partisan competition for political control. If that judgment is to be set aside, it should be set aside only by this Court.

⁹ Although party labels appear nowhere on either State’s judicial ballot, the parties in fact choose and help bankroll the “independent” candidates, who without that support have essentially no hope of victory. See, e.g., D. Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, (2004) avail. <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>. Minnesota has a compelling interest in choosing a different course.

C. The Decision Below Tramples The States' Authority To Structure Their Own Governments

It is “[t]hrough the structure of its government” that “a state defines itself as a sovereign.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The Eighth Circuit’s ruling cuts deeply into the States’ ability, as sovereigns in our federal system, to craft their governments to include elected but nonetheless independent judiciaries.

1. Most States have structured their governments—like the federal government—so that the judicial branch is explicitly non-political, setting it apart from the legislative and executive branches. As the Minnesota Supreme Court explained in connection with the partisan-activities clause:

[T]he separation of powers inherent in the creation of three distinct branches of government, * * * provides the constitutional underpinning for the independence of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics.

In re Amendment of the Code of Jud. Cond., *supra*, at 4-5.

Because judges represent “the Law,” they—unlike their “counterparts in the political branches”—“are expected to refrain from catering to particular constituencies * * * . Their mission is to decide ‘individual cases and controversies’ * * *, neutrally applying legal principles, and, when necessary, ‘stand[ing] up to what is generally supreme in a democracy: the popular will,’ Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).” App., *infra*, 159a-160a (Ginsburg, J., dissenting). Rewarding supporters, building coalitions, and supporting the “party line” may be salutary, even necessary, for those elected officials whose role is to reflect the people’s will. But that is not and should not be seen as the nature of the judicial process.

Most courts have a Chief Judge or Chief Justice. None has, nor should have, a majority whip.

The Eighth Circuit, however, belittled the State's interest in having two political branches and a distinct, nonpolitical judicial branch. However basic "separation of powers" may be to "Minnesota's constitution," that court stated, "the right to free political speech and association guaranteed by the First Amendment is no less basic a concept. Indeed, First Amendment rights are even more fundamental," because the "right to free and open elections undergirds the framework of government established by any constitution." App., *infra*, 20a n.7. But the question is not whether the First Amendment or the independence of the judiciary (which must protect First Amendment rights) is more important. It is whether the balance Minnesota struck is permissible. Nowhere did the Eighth Circuit explain how the purpose of judicial elections is advanced by partisan affiliations that conflict with the judicial function by rendering judges and candidates beholden—in appearance if not actuality—to powerful political parties rather than to the rule of law.

2. The Eighth Circuit's decision also intrudes on more than a century and a half of State efforts to make their judicial systems fairer, more impartial, and free from partisan influence or control. As discussed above, the move to judicial elections early in this Nation's history was a response to "[c]oncerns about the penetration of partisanship into the appointive judicial selection process." Hall, 45 *Historian* at 346; see pp. 1-2, *supra*. Reformers believed that, under an elective system, "parti[s]an influences never could wholly prevail, nor popular opinion be moulded and controlled by demagogues." Nelson, *supra*, at 195 (quoting Report of the Debates & Proceedings in the New York State Convention, for the Revision of the Constitution 484 (Albany 1846) (remarks of Conrad Swackhamer)). When the influence of partisan politics threatened judicial independence by making judges reliant on parties for

election and re-election, States adopted the further reform of nonpartisan elections.¹⁰

The restrictions struck down by the Eighth Circuit in this case represent Minnesota’s considered effort to protect the unique function of judges in its system of government. Unlike legislators, judges decide only the cases before them, as framed by the litigants, not any issues on which they might wish to opine. Unlike legislators, judges are bound by the doctrine of stare decisis (whether interpreting positive law or developing common law). And unlike legislators, judges may not decide issues based on party loyalties or their personal views of wise social policy. The political branches “represent[] ‘the People’; the judge represents the Law—which often requires him to rule against the People.” *Chisom*, 501 U.S. at 411 (Scalia, J., dissenting). The Eighth Circuit’s refusal to recognize any distinction between electing judges and electing lawmakers blinks reality and disrupts the States’ efforts to select a judiciary that is both apolitical and truly independent.

3. Finally, the Eighth Circuit’s decision reflects an unfortunate disregard for the important role of the States in defining their own institutions. Indeed, the decision goes

¹⁰ In the 1960s and 1970s, several States adopted new constitutions or amendments that provided for judges to be appointed in the first instance, to be followed by retention elections. See W. Hall & L. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *Judicature* 340, 340 (1987). More recent history has shown, however, that voters are increasingly “unlikely to disenfranchise themselves and amend their state constitutions” by eliminating popular ballot as a means of judicial selection. E. Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 *Chi.-Kent L. Rev.* 133, 149 (1998). Consequently, many States in the last 25 years have adopted nonpartisan elections as a means of reform. See Ga. Const. art. 6, § 7, ¶ I (amend. July 1, 1983); Miss. Code Ann. § 23-15-976 (West 1999); Miss. Laws, ch. 301, § 16 (Jan. 15, 1999); Ark. Const. Amend. 80, § 18 (approved Nov. 7, 2000, eff. July 1, 2001); Gen. Assembly Of North Carolina Session 2001, Session Law 2002-158, Senate Bill 1054 (2001).

so far as to accuse the *Minnesota Supreme Court* of violating *state* separation of powers principles by issuing Canon 5 “without apparent constitutional or statutory authority” under state law. App., *infra*, 20a n.7. But the federal courts have no role in determining a state court’s authority under state law. Even where plaintiffs challenge executive conduct on state-law grounds, federal courts must stay their hands. *Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). The Eighth Circuit’s unwarranted attack on court-promulgated judicial codes cannot stand.¹¹

Ultimately, rather than respect the States’ continuing efforts as “laboratories” to enhance judicial competence and independence, see *New State Ice Co. v. Liebmann*, 285 U.S. 371, 386-387 (1932) (Brandeis, J., dissenting), the decision below disdains any system of judicial selection that differs from the federal model. The Eighth Circuit did not merely confess “bias in favor of a system for the appointment of judges.” App., *infra*, 9a. Rather, the author of the Court’s *en banc* opinion previously opined that the goal of neutrality “could be most efficiently and effectively achieved by amending the Minnesota Constitution to allow for the appointment rather than the election of judges.” *Id.* at 270a (Beam, J., dissenting). But it was the *failure* of the appointment system in many States that led to the popular ballot as a re-

¹¹ Most state supreme courts have grants of authority similar to Minnesota’s, or promulgate rules under their inherent authority. See, e.g., Ala. Const. art. IV, § 147(c); Ga. Const. art. 6, § 7, ¶ VII; Fla. Const. art. V (see also *Chandler v. State*, 366 So. 2d 64 (Fla. App. 1978)); Ill. Const. 1970, art. VI, § 136(a); Ky. Const. §121; Mo. Const. art. 5, §§ 5 & 24; Nev. Const. art. 6, § 21; N.Y. Const. art. 6, § 20; N.C.G.S.A. § 7A-10.1; N.D. Stat. § 27-23-03; Ohio Const. art. IV, § 5; Okla. Stat. Ann. § 1404; Or. Const. art. VII, § 8; 42 Pa. Code Stat. Ann. § 1722(a)(2); Pa. Const. art. 5, § 18; R.I. Const. art. 3, § 8; Tex. Const. art. 5, § 1-a; 4 Vt. Stat. Ann. § 3; Va. Stat. § 54.1-3909; Wash. Const. art. IV, § 31; W. Va. Const. art. 8, § 18; Wyo. Const. art. 5, § 6; *In re Petition of Judicial Conduct Committee*, 855 A.2d 535 (N.H. 2004) (inherent power); *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (same); *In re Promulgation of a Code of Judicial Ethics*, 153 N.W.2d 873, 155 N.W.2d 665 (Wis. 1967) (same).

form, and the entanglement between candidates and political parties that led to nonpartisan ballots as a further reform. Besides, simply prescribing the federal model—a “solution” that would require the legislatures and voters of numerous States to amend state constitutions to set aside longstanding methods of judicial selection—is no solution at all.

D. Confusion Reigns In State And Federal Courts

The law concerning State regulation of judicial elections is in disarray. The candidates, the courts, and the officials who must enforce the law desperately require guidance. As one trial court observed:

To say there is considerable uncertainty regarding the scope of the Supreme Court’s decision in *White* is an understatement. Whether the decision in *White* left *any* room for the regulation of the speech of judicial candidates is a question yet to be resolved. * * *

It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates.

N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1041-1042 (D.N.D. 2005); see R. Salokar, *After White: An Insider’s Thoughts on Judicial Campaign Speech*, 26 Just. Sys. J. 149 (2005) (detailing difficulty in applying *White* in Florida).

Some federal courts have read *White* broadly to imply that judicial speech is no different from speech in other elections, so that the challenged restrictions invariably fail strict scrutiny review. For example, striking down Georgia’s ban on personal solicitation *sua sponte*, the Eleventh Circuit declared: “[W]e believe that the Supreme Court’s decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.” *Weaver*, 309 F.3d at 1321; see also *Bader*, 361 F. Supp. 2d at 1042; *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004);

Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 88 (N.D.N.Y. 2003), vacated on other grounds, 351 F.3d 65 (2003), cert. denied, 541 U.S. 1085 (2004).

White itself, however, disavows any such suggestion: “[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” App., *infra*, 139a. Accordingly, many courts refused to extend *White* beyond the obsolete “announce” clause at issue in that case. See, e.g., *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (upholding prohibition on judges contributing to political campaigns as essential to preventing political bias and corruption); *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (upholding New York’s “pledges and promises” clause as essential to impartiality in the state judiciary); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (“pledges or promises clause” distinguishable from the announce clause at issue in *White*, because judges may state their opinions, so long as they ensure that voters understand a judge’s duty to uphold the constitution and laws of the state); *In re Angel*, 31 Fla. Bar News, No. 13 (July 1, 2004) (while “[e]very judicial election presents * * * a great opportunity * * * to educate our citizens about the proper role and responsibility of the Third Branch, * * * absolute impartiality and freedom from partisan influences are the most important of these responsibilities. * * * [J]udicial elections present a * * * risk that * * * confidence * * * will be undermined * * * if the public perception is that judges may act in a partisan manner—rather than strictly adhere to the Rule of Law.”); *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding provision barring judges from soliciting “funds for, pay[ing] an assessment to, or mak[ing] a contribution to a political organization or candidate * * *,” because “[i]t is exactly this activity that potentially creates a bias, or at least the appearance of a bias, for or against a party to a proceeding”).

II. The Eighth Circuit Erred in Striking Down Minnesota’s Rules

Far from supporting the Eighth Circuit’s decision, this Court’s decision in *White* underscores the legitimacy of the solicitation and the partisan-activities restrictions at issue here. *White* acknowledged the State’s interest in “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary,” particularly “the lack of bias for or against either *party* to the proceeding.” App., *infra*, 130a-131a. It merely faulted the regulation at issue there because, rather than regulate the judicial candidate’s relationship to *parties* with potential interests in litigation, it regulated the candidate’s expression of *ideas* relevant to his performance of the judicial function. Here, in contrast, neither canon restricts the ability of judicial candidates to address *issues* relevant to their performance as judges, and neither forestalls vigorous public debate. The provisions here merely address *relationships* with interested persons and parties—relationships that can create actual or apparent party bias, and interfere with judicial independence, by rendering the candidate seemingly beholden to political parties.

A. The Solicitation Clause Is Constitutional

Minnesota’s restriction on direct solicitation serves precisely the interest this Court recognized in *White*. Surveys show that most people believe that “elected judges are influenced by having to raise campaign funds.” Nat’l Ctr. for State Courts, *How the Public Views the State Courts*, *supra*, at 8. That impression is compounded when judges and candidates solicit money from those who have or may have cases in their courts. The clause is also narrowly tailored. It does not proscribe fundraising altogether. It simply requires that solicitations come from a campaign committee—not from the person who is expected to rule impartially on all matters coming before the court.

Unlike the restriction at issue in *White*, moreover, the solicitation clause has virtually no effect on speech. It regu-

lates only particularly problematic proposals with little expressive content—requests for money—not by barring them but by separating the solicitation from the judicial candidate.¹² For that reason, the Eighth Circuit erred in applying strict scrutiny. Regulations that deal not with speech but with the potentially corrosive effect of money should be subject to the “less demanding” standard of intermediate scrutiny. *McConnell*, 540 U.S. at 136.

Even under strict scrutiny, however, the solicitation clause is constitutional. The Eighth Circuit’s primary rationale in reaching the contrary conclusion was its view that *actual corruption* is a relatively minor risk. App., *infra*, 43a-44a. But that fails to address the States’ equally compelling interest in preventing the *appearance* of impropriety. Whether from the viewpoint of the donor, the losing litigant, or the public as a whole, States have a compelling interest in addressing even the “appearance of corruption stemming from public awareness of the opportunities for abuse.” *Buckley*, 424 U.S. at 27; see *McConnell*, 540 U.S. 93, 134-152 (repeatedly upholding the compelling interest in avoiding the appearance of corruption); p. 15, *supra*. Particularly given the minimal impact on speech, Minnesota’s effort to keep its courts above such suspicions should be respected.

B. The Partisan-Activities Prohibition Is Constitutional

Contrary to the Eighth Circuit’s decision, the partisan-activities clause likewise survives constitutional scrutiny consistent with *White*. The court of appeals viewed partisan

¹² As Justice Stevens stated in his concurring opinion in *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000), “Speech has the power to inspire volunteers * * *. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.” *Id.* at 398.

activities and associations as essentially equivalent to the “announce” restrictions in *White*. According to the Eighth Circuit, such associations serve as a convenient short-hand for the candidate’s agreement with a party on significant issues. App., *infra*, 24a-25a. Even setting aside the questionable value of such short-hands in the judicial context—particularly given a candidate’s ability to speak on the issues directly—a candidate’s partisan activities do much more than signal potential agreement on issues. They also establish a *relationship* between the judicial candidate and powerful political parties, as well as their leaders and adherents, who are keenly interested in the candidate’s resolution of a wide range of cases. The goal of the partisan-activities clause is to “prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their independence, while allowing them alternative means of communicating subjects of valid interests to voters.” App., *infra*, 213a. As explained above, pp. 17-18, *supra*, such indebtedness erodes judicial independence. It gives political parties the ability to demand fealty not to the law, but to the party agenda. And it raises the specter of litigant-specific bias, since judicial candidates identified as partisan may, at the very least, *appear* partial toward particular litigants in certain cases. Citizens should not have to consider whether the judge is Republican or Democrat, or what the Republican or Democratic Party might think about their case, when they approach a court for evenhanded justice.

For similar reasons, Congress has restricted the political activities of federal employees. See 5 U.S.C. § 7323; 15 U.S.C. §§ 1501, 1502. As this Court explained when upholding the Hatch Act in *United States Civil Service Commission v. National Ass’n of Letter Carriers*, 413 U.S. 548, 564-565 (1973):

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should admini-

ster the law in accordance with the will of Congress, rather than in accordance with their own will or the will of a political party. They are expected to enforce the law and execute the programs of government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—*impartial execution of the laws*—it is essential that federal employees, for example, not take formal positions in political parties, not undertake substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.

No less than executive branch officers, judges “should administer the law in accordance with the will of [the legislature], rather than in accordance with their own will or the will of a political party,” and “without bias or favoritism for or against any political party or group or the members thereof.” *Id.* at 564-565.

The Eighth Circuit’s rationale cannot be reconciled with *Letter Carriers* or ordinary First Amendment principles. That court first reasoned that the prohibition on partisan political activities was fatally underinclusive because it addresses only associations with political parties and not other groups. App., *infra*, 33a-35a. But the Hatch Act provisions at issue in *Letter Carriers* do precisely the same thing—a fact the Eighth Circuit fails to address. Political parties are singularly powerful forces in government, with a unique ability to command allegiance from members on a wide range of issues, regardless of the members’ own viewpoints. See *McConnell*, 540 U.S. at 188 (“Political parties have influence and power in the Legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that * * * parties in turn have special access to and relationships with federal officeholders.”). No less than the Hatch Act, the partisan-activities restrictions at issue here

“reduce the hazards to fair and effective government,” and further the compelling interest of maintaining both the fact and appearance of impartial application of the law.¹³

The Eighth Circuit also deemed those restrictions underinclusive because—although they always apply to judges—they bar “a judicial candidate from associative activities with a political party” only “during a campaign, though he may have been a life-long, active member of a political party.” App., *infra*, 31a. But that analysis would invalidate *all* restrictions on the political activities of judges and executive branch employees. See pp. 16-17, 27-28, *supra*. Those prohibitions likewise do nothing to address the fact that an individual, before becoming a judge or employee, “may have been a life-long, active member of a political party.” But they are hardly underinclusive as a result. They still serve the compelling interest of preserving both the fact and appearance of impartiality by enforcing the rule that, at some point, partisan activities must end. If those rules, which ban partisan activities only once the individual becomes a judge, are not fatally underinclusive, then *a fortiori* Minnesota’s broader rule—which bans partisan activities both while candidates campaign for

¹³ The Eighth Circuit also opined that recusal poses a less-restrictive means of ensuring that judges do not preside over cases in which they may harbor bias. App., *infra*, 26a. But recusal is not a viable solution where partisan affiliation is at issue, because virtually every judge would have to recuse in redistricting disputes, for example, which pit the parties against each other. Virtually every judge would also have to recuse whenever a high-ranking party member or the party itself has an interest in the matter. In any event, even if recusals eventually secure the litigants an unbiased judge, they do nothing to address the erosion of public faith that results when parties must wander from chambers to chambers, like Diogenes, searching for an unbiased, nonpartisan judge to decide their case. There is no reason Minnesota should be precluded from proscribing judicial candidates from engaging in conduct that would disqualify them from performing their job in important cases.

judicial office and later when they become judges—is not underinclusive either.¹⁴

Minnesota has made the sensible determination that those campaigning to be judges must comport themselves just as they would once they become judges. To require Minnesota to extend its rules further and ban partisan activities before an individual even seeks judicial office, disqualifying those who have engaged in such conduct, is absurd. The fact that a judicial candidate may have supported or been supported by a party in some other past endeavor is hardly problematic; any other rule would reduce the available talent pool to a puddle. It is not until the individual becomes a candidate for judicial office that partisan affiliations raise serious concerns: Once candidates for judicial posts may seek party endorsements and run as party candidates for judicial positions, “the party becomes empowered to play the role of judge-maker”—and, in the case of re-election, a judge defeater. App., *infra*, 50a (dissenting opinion). By focusing its restriction on judicial candidates and judges, Minnesota has addressed the threat to judicial independence—and the perception that judges are indebted and beholden to powerful political interests for their tenure—that “is most overt.” *Ibid.* Given the ability of judicial candidates to speak their mind on the issues, there is no compelling reason Minnesota should be constitutionally foreclosed from preventing partisan entanglement that threatens judicial independence and impartiality.

CONCLUSION

The petition for a writ of certiorari should be granted.

¹⁴ To the extent the Eighth Circuit read Canon 5 to permit judges to engage in partisan activities when not campaigning, it misread that rule, which applies to “judge[s]” and “candidate[s] for judicial office.”

Respectfully submitted.

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