NO. 01-521

IN THE
Supreme Court of the United States

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

v.

VERNA KELLY, *et al.*,
Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit advocacy group with more than 150,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues, including campaign finance reform and preservation of the state-law civil justice system. Of particular relevance to this case, Public Citizen attorneys represented plaintiffs in a case challenging the Texas system for financing campaigns for judicial elections. The case was premised on the theory that the Texas system—which allows large campaign contributions by lawyers and others with interests before the courts but does not require recusal of judges when contributors appear before them—creates an appearance that judges are not impartial, in violation of litigants' due process rights. The Fifth Circuit recently held that the plaintiffs in that case lacked standing. *See Public Citizen v. Bomer*, No. 00-51009 (5th Cir. Nov. 26, 2001). Public Citizen also filed an amicus curiae brief in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). Moreover, Public Citizen lobbyists are active on issues involving campaign finance reform. Thus, Public Citizen has a long-standing interest in the issue presented in this case.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Canon 5A(3)(d)(i) of the Minnesota Code of Judicial Conduct provides, among other things, that no judge or candidate for judicial office shall "announce his or her views on

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with the consent of the parties, as documented in a letter filed by Petitioner's counsel and signed by counsel for both parties.

disputed legal or political issues." This Canon, as revised by the Supreme Court of Minnesota in 1996, is intended to further the State's interests "in an independent and impartial judiciary" and "in preserving the public's confidence in that independence and impartiality." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 867 (8th Cir. 2001). Public Citizen agrees with the lower court's finding that these interests are compelling. Public Citizen disagrees, however, that the speech restriction imposed by Canon 5's "announce" clause is narrowly tailored to serve that interest.

The wisdom of choosing a judiciary by election is often questioned. *See*, *e.g.*, Texas Supreme Court Chief Justice Thomas Phillips, State of the Judiciary (Address to the 76th Legislature March 1999); Citizens for Independent Courts, Choosing Justice: Reforming the Selection of State Judges 1 (1999); ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 3 (1998). Public Citizen is sympathetic to the criticism of judicial elections. Requiring judges to campaign for their posts—and in particular to seek and accept campaign contributions—while at the same time calling upon them to perform their judicial function impartially creates a conflict that is difficult to reconcile. Moreover, the public certainly has cause to question whether judges who solicit contributions from lawyers appearing before them and parties with interests before the courts can in fact serve as neutral arbiters. *See* National Center for State Courts, How The Public Views The State Courts, A 1999 National Survey 42 (May 1999) (78% of public surveyed agreed that having to raise campaign funds influences elected judges).

The Minnesota Supreme Court, in issuing Canon 5, correctly recognized that the State's system for choosing its judges threatens litigants' due process right to judges who are

and appear to be impartial. Nonetheless, in attempting to protect the legitimate interest in an impartial judiciary, the Court has fashioned a rule that runs roughshod over candidates' First Amendment rights. Canon 5 unnecessarily pits two constitu-tional imperatives—due process and free speech—against one another. The proper resolution of the conflict between an elected judiciary and an impartial judiciary, however, is not a blanket rule forbidding candidates from speaking about substantive matters. Rather, the State should use other available means to ensure that judicial decisionmaking is impartial and that the public perceives it to be so. Although Minnesota has some such protections in place, it has thus far neglected to address one of the most significant threats to the fact and appearance of impartiality: unrestricted contributions by lawyers and parties with actions or interests before the judges to whom they are contributing.

If Minnesota's electorate believed that the only relevant criteria for selecting judges were the candidates' resumes and photographs, it would be hard to justify the time and expense of electing judges. The decision to elect judges, however, derives from a recognition that any selection process will involve political concerns and a desire to keep the political choice in the hands of the electorate. *See Republican Party of Minn. v. Kelly*, 247 F.2d at 888-89 (Beam, J., dissenting). If Minnesota had chosen a gubernatorial appointment system, the First Amendment would surely not permit the State to prohibit a potential judge from discussing his or her judicial philosophy, controversial legal issues, and political views with the governor or his staff. The choice to select state judges by election, whether or not wise, does not justify infringing the right of judicial candidates to discuss their views with those who will make the selection.

At the same time, not all speech restrictions run afoul of the First Amendment. As this Court has recognized, a state may lawfully prohibit candidates for judicial office from making promises that represent quid pro quo arrangements and may limit campaign contributions. In comparison to Canon 5's "announce clause," these restrictions are better tailored to protect the fact and appearance of judicial impartiality.

Indeed, Canon 5's "announce" clause is particularly ill-suited to serve the interest for which it was intended. Although it forbids candidates from speaking about "disputed legal and political issues," the "announce" clause cannot practically restrain incumbent judicial candidates from addressing such topics in the course of issuing opinions and performing other judicial duties. This inequity further illustrates the unconstitutionality of the "announce" clause.

ARGUMENT

Canon 5's "announce" clause is intended to serve the compelling interests of neutral application of the law and ensuring the public's faith in the impartiality of the judiciary. *See Republican Party of Minn. v. Kelly*, 247 F.3d at 864, 867. "Trial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (citation omitted). As this Court has observed:

> The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking

> process. *See Carey v. Piphus*, 435 U.S. 247 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frank-furter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). "[T]his stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Concrete Pipe & Prods.*, 508 U.S. at 618 (citing *Marshall v. Jerrico*, 446 U.S. at 243). The Due Process Clause forbids even the "possible temptation to the average man as judge" not to be neutral and detached. *Concrete Pipe & Prods.*, 508 U.S. at 617 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).

Canon 5, however, is a poor means of serving the interest in a judiciary that is and appears to be impartial. The "announce" clause imposes a restriction on political speech that, as the Eighth Circuit recognized, lies at the core of First Amendment freedoms. *Republican Party of Minn. v. Kelly*, 247

F.3d at 861 (citing *Eu v. San Francisco County Democratic Cent. Comm*., 489 U.S. 214, 222-23 (1989)). States have many other means at their disposal to protect the independence of the judiciary. Particularly in light of Minnesota's failure to use one of the tools best calibrated to achieving the State's purpose—campaign contribution limits—the availability of other means of serving the State's objective renders the "announce" clause impermissible under the First Amendment. Moreover, Canon 5's "announce" clause imposes inequitable restrictions on the challenger as opposed to the incumbent and, in that way, fails to serve its intended purpose.

1. The numerous means—short of restricting protected speech—available to protect against judicial partiality demonstrate that Canon 5's "announce" clause violates the First Amendment. *See United States v. Playboy Entertainment Group*, 529 U.S. 803, 815 (2000) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.").

In Minnesota, for instance, protections against the fact or appearance of partiality are provided by procedural rules and by statute. Minnesota Rule of Civil Procedure 63.02 provides: "No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." In addition, parties may move for disqualification of a judge as a matter of right by serving a notice to remove on the opposing party and filing the notice with the court administrator. Minn. R. Civ. P. 63.03. Thus, if a judicial candidate's "announcement" of his or her views goes so far as to suggest that he or she cannot preside impartially over a given case ("I think Company X has been violating our State's antitrust laws for 10 years."), the Rules of Civil Procedure provide a precisely tailored mechanism for protecting the due process right, without infringing protected

speech. In contrast, because not every "announcement" on a "disputed legal or political issue" threatens a judge's impartiality, *see Laird v. Tatum*, 409 U.S. 824 (1972), the proscription of Canon 5's "announce" clause is overly broad.

Furthermore, the doctrine of stare decisis, the right to appeal, and the lower courts' duty to obey the pronouncements of the higher courts offer powerful protection against biased decisionmaking at the lower court levels. The use of multiple-judge panels on appeal also helps to ensure that one judge's preconceived views, as opposed to the advocates' presentations, do not control the outcome of a case.

In addition to the "announce" clause, Canon 5A(3)(d)(i) contains prohibitions on a candidate "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; . . . or misrepresent[ing] his or her identity, qualifications, present position or other fact, or those of the opponent." If the "pledge" clause were interpreted to prohibit general "pledges" —"I promise to be tough on drug dealers"—it too would be overbroad, as such pledges do not meaningfully differ from "announcements." ("I believe judges should be tough on drug dealers.") However, to the extent that it prohibits pledges or promises that offer or represent quid pro quo arrangements, the "pledge" clause serves the State's interest better than the "announce" clause, as it is more narrowly tailored to serve the State's interest in decisionmaking that both is and appears to be neutral. *See FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). A state statute provides further protection against such conduct. *See* Minn. Stat. § 211B.13 (promise made to induce voter to vote in particular way constitutes felony).

Along the same lines, restrictions on judicial candidates' ability to make promises in exchange for campaign contributions protect the independence of the judiciary. Thus, most states, attempting to insulate judges from knowledge of their contributors, do not allow judicial candidates personally to solicit campaign contributions. ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 40-41 n.73 (1998). Minnesota goes further than most states, as Canon 5B(2) prohibits a judicial candidate's campaign committee from disclosing to the candidate either the names of those who contribute or the names of those solicited. The First Amendment permits this sort of restriction, which removes the specter of bribery from judicial decisionmaking.

The First Amendment also permits limits on campaign contributions. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976); *see id.* at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."). Campaign contributions pose a far greater threat to judicial independence than do candidates' announcements of their views on legal and political issues. *See* Minn. Supreme Court, 1999-2000 Public Opinion of the Courts Study, Executive Summary at 5, available at www.courts.state.mn.us (68% of respondents think elected judges are influenced by having to raise campaign funds); *see also* Call To Action, Statement of the National Summit on Improving Judicial Selection (Jan. 25, 2001) (recommending campaign finance reform and other ways of improving judicial elections as formulated at national summit convened by Texas Supreme

Court Chief Justice Thomas Phillips and Texas Senator Rodney Ellis).

In Texas, for example, the parties and lawyers involved in the 12 cases heard by the state supreme court in November 2001 had contributed $1,603,409 to the nine justices. The parties and lawyers involved in the nine cases heard in September 2001 had contributed $1,449,329 to the justices. Texans for Public Justice, Dollar Docket (Dec. 12, 2001; Oct. 3, 2001), available at www.tpj.org/payola/docket.html. Law firms and lawyers accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. Texans For Public Justice, Checks & Imbalances: How the Texas Supreme Court Raised $11 Million, Part VI at I-2 (April 11, 2000). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by those four candidates. *Id*. Such facts have a clear negative effect on the public's perception of the judiciary. A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents believed that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. Supreme Court of Texas, Judicial Campaign Finance Study Committee, Report and Recommendations 4 (Feb. 23, 1999). A study sponsored by the Supreme Court of Texas showed that a majority of judges, lawyers, and court personnel perceive the same unseemly influence. *See* Supreme Court of Texas, The Courts and The Legal Profession in Texas—The Insider's Perspective 19, 36, 54 (May 1999).[2]

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[2] Although in 1995 Texas sought to eliminate the appearance of "justice for sale" by enacting limits on judicial campaign contributions, its $5,000 limit on an individual's (continued...)

Perversely, Minnesota's "announce" clause may increase the dependence of the judiciary on campaign contributions. For without the ability to distinguish themselves through substantive discussion, candidates are forced to rely more heavily on name recognition and other non-substantive campaign tools. *Cf. Geary v. Renne*, 911 F.2d 280, 292 (9th Cir. 1990) (Reinhardt, J., concurring) ("In actuality, the prohibition of endorsements appears to be counterproductive, for it *increases* the dependence of the judiciary on campaign contributions."), *vacated on other grounds*, 501 U.S. 312 (1991).

In contrast to restrictions on permissible topics of speech, limits on campaign contributions can be fashioned without "undermin[ing] to any material degree the potential for robust and effective discussion of candidates and campaign issues. . . ." *Buckley,* 424 U.S. at 29. Accordingly, the First Amendment provides less protection to campaign contributions than to the core First Amendment speech restricted by Canon 5's "announce" clause. *See id.* at 23, 29. Minnesota, however, does not limit individuals' contributions to judicial election campaigns. *But cf.* Minn. Stat. § 211B.15, subd. 2 (prohibition on corporate contributions); Minn Stat. § 10A.27 (contribution limits for certain executive and legislative offices); Minn. Stat. § 10A.25 (expenditure limits for certain executive and legislative offices). Having chosen to forgo limits on campaign contributions—a lesser form of speech and a more direct threat to judicial independence—Minnesota cannot permissibly

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[2](...continued)
contribution to each candidate for statewide judicial election, 15 Tex. Elec. Code Ann. § 253.155—which is 5 times higher than the limit on contributions to candidates for president, *see* 2 U.S.C. § 441a(a)(1)(A)—did little to alleviate the problem.

restrict the core speech at issue here. *See Playboy Entertainment Group*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

2. The "announce" clause restriction also works inequitably. Whereas the incumbent judicial candidates regularly "announce" their views through orders, opinions, and other statements made in the course of their work, challengers are forbidden from sharing their views on those same issues. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (law cannot "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). For example, Canon 5 bars candidates from stating their views on a facial challenge to the constitutionality of a state law, on the death penalty, or on other disputed legal matters as to which one would likely have a view apart from the facts of a particular case. Thus, although Canon 5 nominally applies to incumbent candidates, in fact incumbents are permitted, through their decisions, to make otherwise prohibited "announcements," and may even add dicta to go beyond what they must say to decide a particular matter or issue. Canon 5 thus tilts the playing field in favor of incumbents, the only candidates with the means to speak substantively. In fact, by barring the challenger from both raising issues and responding to the incumbent's pronounce-ments, Canon 5 creates a situation in which the electorate knows the views only of the incumbent. In this way, the sitting judges responsible for the Code of Judicial Conduct have in effect thwarted the will of the people of Minnesota by converting a system of contested elections into a system of retention elections.

For this reason, among others, Canon 5 does not serve even its intended purpose of protecting the independence and impartiality of the judiciary. If a judge has a preconceived view

on some legal or political issue, it strains logic to suggest that the judiciary is more independent or impartial simply because the judge, as candidate, is compelled to remain silent. The public's right to a judiciary that both is and appears to be impartial does not warrant elevating illusion over reality. One cannot reasonably argue that a litigant is better off before a judge who is predisposed against his or her position if the individual does not know the judge's predisposition than if he or she does know it. Indeed, the litigant is surely better off knowing, either because he or she can use that knowledge to help frame his or her case most effectively to address the judge's concerns or because, if the judge's "announcement" suggests that the judge cannot consider the case impartially, the litigant can invoke the recusal rules.

The Eighth Circuit expressed concern that, if a candidate announced a view, the candidate would then feel more tightly bound to that position than if he or she had not stated it aloud. *Republican Party of Minn. v. Kelly*, 247 F.2d at 878. Amicus is not aware of any evidence on this point. On the other hand, common experience teaches that candidates for other elective offices frequently reverse themselves on campaign pledges once they are elected. (*E.g.*, "Read my lips. No new taxes.") We know of no reason to believe that judges, who are generally in the public spotlight less than are many other elected officials, will feel any more constrained by their campaign statements regarding legal and political issues. In fact, history offers examples of judges who staked out views on issues and later, when considering cases presenting the issues, authored opinions at odds with their previously stated views. *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from the denial of certiorari); *McGrath v. Kristensen*, 340 U.S. 162, 176-78 (1950) (Jackson, J., concurring, and citing cases) ("The matter does not appear to

me now as it appears to have appeared to me then.") (citation omitted).

In any event, as an effort to prevent judges and prospective judges from feeling bound to a particular position, the "announce" clause is ineffective and discriminatory. It does not prevent judges or prospective judges from staking out positions via judicial opinions, legal briefs or arguments, law review articles, op-ed pieces, books, or speeches that predate the declaration of candidacy. Rather, Canon 5 targets only speech during the term of an individual's candidacy—in other words, pure political speech. Ironically, this form of speech is the one subject to the highest degree of First Amendment protection.

CONCLUSION

For the foregoing reasons, the Eighth Circuit's holding that Canon 5's "announce" clause is constitutional should be reversed.

Respectfully submitted,

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