

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**

—◆—
**BRIEF OF *AMICUS CURIAE* THE AMERICAN
JUDICATURE SOCIETY IN SUPPORT OF THE
PETITION FOR A WRIT OF *CERTIORARI***

—◆—
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**BRIEF OF THE AMERICAN JUDICATURE
SOCIETY AS *AMICUS CURIAE* IN SUPPORT
OF THE PETITION FOR *CERTIORARI***

This *amicus curiae* brief is submitted on behalf of the American Judicature Society.¹ Petitioners and Respondents have consented to the filing of this brief. The correspondence regarding the American Judicature Society's requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICUS CURIAE* THE AMERICAN JUDICATURE SOCIETY

Founded in 1913, the American Judicature Society ("AJS") is a national, nonpartisan organization with members from every state who are judges, lawyers, and lay people dedicated to improving the administration of justice. A nonprofit corporation, it is funded through members' dues, contributions, and grant funds for special projects. For 92 years, AJS has spoken with a credible and independent voice on administration of justice issues and has demonstrated a continuing commitment to high ethical standards for judges and judicial candidates.

AJS's interest as *amicus curiae* in this case arises from its involvement and expertise in judicial selection, ethics, and independence. AJS's work in all three areas

¹ None of the parties to this case had any role in writing this brief and no one other than AJS counsel made a monetary contribution to the preparation or submission of this brief. As a matter of policy and procedure, no judicial member of AJS participated in the decision to file this brief or in its preparation. No inference should be drawn that any judge member of AJS's board of directors has participated in the adoption or endorsement of the positions of this brief.

provides a unique, national perspective on the impact of the decision below.

From its founding, AJS has been a consistent voice in favor of reform of the process of judicial selection to ensure a bench of the highest quality. Since 1991, AJS has conducted its programs and activities in this area through the Elmo B. Hunter Citizens Center for Judicial Selection. For much of its existence, AJS has been a proponent of merit selection of judges, that is, selecting judges through a bi-partisan appointment process followed by a nonpartisan retention election,² rather than in political contests.

While continuing to favor merit selection, AJS has sought improvements of elective systems in recent years. Because some voters are reluctant to give up the accountability of elective systems, AJS realized that it should no longer ignore opportunities to promote intermediate reforms that could immediately benefit the majority of citizens and judges. Moreover, “attack politics” have been imported into retention elections, making issues of campaign speech and fund-raising relevant even in merit selection states.

² Although systems vary in particulars, in general, merit selection is a system in which a state establishes a bi-partisan nominating commission that includes members of the legal community as well as citizens. When a vacancy occurs on a court, interested individuals submit their applications to this nominating commission. After conducting interviews and assessing the qualifications of the applicants, the commission submits the names of the three to eight most qualified to the governor, who appoints one to the judgeship. Subsequently, the judge is periodically placed on the ballot without an opponent, and voters decide whether to retain the judge in office. Currently, 14 states use this method to appoint some or all of their judges.

Therefore, AJS is currently addressing both nonpartisan merit selection reforms and improving the process of elective systems, giving AJS a helpful perspective on the issues of campaign speech and fund-raising implicated by the decision below. For instance, the Hunter Center has compiled comprehensive information on judicial selection processes in each of the 50 states and the District of Columbia and made it available on-line.³ This website is the leading resource for information about the methods of selecting, retaining, and removing judges from the bench in each state and includes information about successful and failed reform efforts, the roles of political parties, interest groups, and professional organizations in judicial selection, and the diversity of the state courts. It is regularly cited by reference works, scholars, legal professionals, reform organizations, and the media.

AJS also brings together relevant stakeholders to discuss current, critical problems in judicial selection. AJS regularly collaborates with state and national organizations, including the National Center for State Courts, the American Bar Association, and state bar associations. Moreover, AJS's mid-year meeting, in February 2006, titled "Re-thinking Strategies for Judicial Selection Reform," will be a major national summit to discuss theoretical and practical issues relating to all types of judicial selection.

In 1997, AJS established the Center for Judicial Independence in response to an increase in unfair criticism of, and efforts to remove from the bench, judges who have issued unpopular rulings. Subsequently, in 2004, AJS

³ URL: <http://www.ajs.org/js/>

established the Task Force on Judicial Independence and Accountability. The Task Force has three goals: (1) to monitor developments bearing on judicial independence and accountability at the federal and state levels; (2) to respond to unwarranted attacks on the judiciary and to highly visible situations demonstrating a failure of judicial accountability; and (3) to sponsor programs and educate the public on the relevant issues.

AJS's involvement in judicial ethics also gives it an important perspective on the ramifications of the decision below. Through its Center for Judicial Ethics, AJS provides a forum for the exchange of information on judicial discipline and promotes the enforcement of judicial ethics standards. Advancing high standards of conduct in judicial election campaigns has always been one of the focuses of the Center because public confidence in a judge's decisions is based not only on what takes place on the bench but also on how the judge campaigned for the office. In 1990, AJS published two monographs on judicial election campaigns, and in 2000, it published a judicial ethics curriculum on communicating with voters.

Because of its historical and continuing commitment to high ethical standards for judges and judicial candidates, AJS has closely followed and been actively involved in developments across the country since this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The Center for Judicial Ethics has tracked First Amendment challenges to canon restrictions based on *White*, followed cases in which judges have been disciplined for campaign violations, and surveyed changes to codes of judicial conduct prompted by *White*. The Center

has posted a document describing the developments following the decision on its web-site,⁴ with new developments added as they occur. In addition, the implications of both this Court's decision and the decision below will be discussed at AJS's mid-year meeting in February 2006.

Because of its national perspective on judicial selection, ethics, and independence and on the importance of the *White* decision, AJS respectfully requests that this Court consider the following arguments in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit in *Dimick v. Republican Party of Minnesota*, No. 05-506.⁵

II. SUMMARY OF ARGUMENT

Federal and state courts throughout the country are analyzing the extent and effect of this Court's decision in *White*. Though that decision was limited to the constitutionality of Minnesota's "announce clause," many other types of restrictions on judicial conduct are being examined (including "partisan activity" and "solicitation" clauses similar to those under consideration here), often with widely varying results. The writ of *certiorari* should be granted so that this Court can provide necessary guidance to lower courts by more fully defining the constitutional boundaries of judicial campaign regulation.

⁴ URL: <http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf>

⁵ If this Court grants the petition for a writ of *certiorari*, AJS anticipates seeking to file a longer brief on the merits, elaborating the reasons why the decision below was not required by this Court's decision in *White* and the respects in which the Eighth Circuit's decision subordinates compelling state interests.

III. ARGUMENT

The Petition for a Writ of *Certiorari* Should Be Granted to Address the Uncertainty That Exists in State and Federal Courts Regarding Regulation of Judicial Elections.

If left standing, the decision below would have repercussions beyond Minnesota. The Eighth Circuit held unconstitutional clauses in the Minnesota code of judicial conduct (1) prohibiting judges or judicial candidates from identifying themselves as members of a political organization, attending political gatherings, and seeking, accepting, or using endorsements from a political organization and (2) prohibiting judicial candidates from personally soliciting campaign contributions from large groups and transmitting solicitations above their personal signatures (the extent of the plaintiffs' challenge). *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005). At least 17 states (including Minnesota) have chosen to select their judges through nonpartisan elections, and the decision raises doubts about the constitutionality of that choice and any efforts states may make to reflect that choice in the code of judicial conduct. Of the 41 states that have some type of election for judges, 30 (including Minnesota) prohibit personal solicitation of contributions by the candidate. Most states, regardless of how they choose their judges, restrict judges, if not candidates, from attending political gatherings.

The effects of the decision below are already being felt. On December 1, 2005, based on the decision, the South Dakota Supreme Court amended that state's code of judicial conduct to allow a judge or candidate to identify himself or herself as a member of a political party at any time despite a statutory requirement that judicial elections be nonpartisan.

Moreover, the South Dakota code now expressly allows a candidate to personally solicit campaign contributions and does not even include any of the limitations on solicitation contained in the decision below. Further, the amendments lifted the prohibitions on acting as a leader in a political organization, attending political gatherings, paying an assessment to or making a contribution to a political organization or candidate, and purchasing tickets for political party dinners or other functions. *In the Matter of the Amendment of SDCL Chapter 16-2 Appendix; SDCL Chapter 16-1A Appendix; and Repeal of SDCL Chapter 12-9, Rule 05-3* (S.D. December 1, 2005).⁶

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court held that states cannot, consistently with the First Amendment, prohibit judicial candidates from announcing their views on disputed legal and political issues. That holding directly affected only the nine states that had the “announce clause” in their codes of judicial conduct on the date the decision was issued.

United States Supreme Court decisions on judicial ethics are very rare, however, and the Court’s analysis included extensive discussions of the principle of judicial impartiality and the role of the judge. Therefore, in the three and a half years since the decision, state supreme courts, judges, lawyers, and others in all 50 states have carefully parsed the Court’s majority opinion, two concurring opinions, and two dissenting opinions to try to forecast what the Court would do if presented with a host of other challenges to the code of judicial conduct. The decision below is only one example of lower courts’ application of

⁶ URL: <http://www.sdjudicial.com/downloads/sc/rules/y2005/r0513.pdf>.

this Court's reasoning in *White* to a variety of issues arising in judicial codes of conduct.

Notably, state supreme courts (which are responsible for adopting the codes of conduct for judges and judicial candidates) have adopted conflicting interpretations of this Court's decision. Relying on this Court's statements in *White* that it was not addressing the constitutionality of the "pledges and promises clause" or the "commit clause" adopted in many states,⁷ the Supreme Court of Florida and the New York Court of Appeals have upheld the constitutionality of those provisions and disciplined candidates for violating them by using pro-prosecution rhetoric during a campaign. *Inquiry Concerning Kinsey*, 842 So.2d 77 (Fla.), cert. denied, 540 U.S. 825 (2003); *In the Matter of Watson*, 794 N.E.2d 1 (N.Y. 2003). The court in *Kinsey*, for example, held that "it is beyond dispute" that the clauses serve a compelling state interest in preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary.

⁷ The American Bar Association Model Code of Judicial Conduct contains provisions that prohibit judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Model Code of Judicial Conduct Canon 5A(3)(d)(i) and (ii) (1990). Those provisions, particularly the pledges and promises clause, have been adopted in many states. In its decision, this Court noted the pledges and promises clause was not challenged in the case and that it was not expressing a view on its constitutionality. *White*, 536 U.S. at 770. With respect to the commit clause, this Court stated, "no aspect of our constitutional analysis turns on" the question whether the announce clause and commit clause are the same. *Id.* at 773 n.5.

A judicial candidate should not be encouraged to believe that the candidate can be elected to office by promising to act in a partisan manner by favoring a discrete group or class of citizens. Likewise, it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner in a case which was heading to court.

842 So.2d at 87. The court also held that the restraints were narrowly tailored to protect the state's compelling interests without unnecessarily prohibiting protected speech, noting that "a candidate may state his or her personal views, even on disputed issues" but that "to ensure that the voters understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law." *Id.*

In contrast, the North Carolina Supreme Court apparently considered the pledges and promises clause suspect and, without awaiting a constitutional challenge, eliminated it from the state's code (which never had the commit clause), leaving intentional misrepresentations as the only restriction on judicial campaign speech in the state. *See N.C. Rules of Court, Code of Judicial Conduct, Canon 7C(3)*. Federal courts have declared the pledges and promises clause and commit clause unconstitutional at least insofar as they might be construed to prohibit a judicial candidate from answering questions about the candidate's views of legal or political issues. *See Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *appeal filed; Family*

Trust Found. of Kentucky v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005).

In addition, the North Carolina Supreme Court, presumably acting from similar apprehension about the reach of *White*, has not only eliminated the canon that prohibited judicial candidates from personally soliciting campaign funds, but now expressly allows a judicial candidate to “personally solicit campaign funds and request public support from anyone for his own campaign.” See *N.C. Rules of Court, Code of Judicial Conduct*, Canon 7B(4). Relying on this change, a trial court judge in North Carolina construed the court’s permission to personally solicit funds as permission to campaign in the courthouse. During a recess of a session of court over which he was presiding, he called the assistant district attorney who was prosecuting the docket on behalf of the state into his chambers and requested that the attorney support and endorse him in the 2004 election in which the judge was a candidate for re-election. Although it strongly disapproved of the judge’s action, the North Carolina Judicial Standards Commission felt constrained to dismiss the charges against him. *In re Graham*, Order (N.C. Judicial Standards Comm’n October 2005).

North Carolina’s decision to eliminate the personal solicitation clause is consistent with the decision below and with *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002). Despite this Court’s explicit statement that it was “neither assert[ing] nor imply[ing] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” (*White*, 536 U.S. at 783), in *Weaver*, the Eleventh Circuit stated 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.” 309 F.3d at 1321. The court held unconstitutional the Georgia code of judicial conduct’s prohibition on judicial candidates using:

“any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.”

Id. at 1319.

The court also held that the solicitation clause fails strict scrutiny because it completely chills a candidate from speaking to potential contributors and endorsers about their potential contributions and endorsements “while hardly advancing the state’s interest in judicial impartiality at all.” *Id.* at 1322.

By contrast, the New York Court of Appeals has upheld code restrictions on activities such as participating in other candidates’ campaigns, publicly endorsing other candidates or publicly opposing any candidate other than an opponent for judicial office, making speeches on behalf of political organizations or other candidates, or making contributions to political organizations. *In the Matter of Raab*, 793 N.E.2d 1287 (N.Y. 2003). Distinguishing this Court’s decision in *White*, the court concluded:

The political activity rules are carefully designed to alleviate [the concern that the public, including litigants and the bar, might perceive judges

as beholden to a particular political leader or party] . . . by limiting the degree of involvement of judicial candidates in political activities during the critical time frame when the public's attention is focused on their activities, without unduly burdening the candidates' ability to participate in their own campaigns.

793 N.E.2d at 1293. *See also In re Dunleavy*, 838 A.2d 338 (Me. 2003), *cert. denied*, 541 U.S. 960 (2004) (upholding prohibitions on sitting judges soliciting support for political candidates and political organizations and purchasing tickets to political dinners or functions).

A federal judge in New York, however, accepted an argument that, under the decision in *White*, a state judicial conduct commission could not, consistently with the First Amendment, apply the canons to sanction a judge for participating in a demonstration at a Florida board of elections during the 2000 presidential election recount, engaging in fundraising for the county conservative party, and making payments to politicians whose party endorsements he sought. *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003). This decision was vacated on abstention grounds. *Spargo v. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2nd Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). In subsequent state court proceedings, the New York Supreme Court Appellate Division upheld the dismissal of the judge's application to prohibit the State Commission on Judicial Conduct from enforcing provisions of the code of judicial conduct restricting campaign and political conduct. *Spargo v. New York State Comm'n on Judicial Conduct*, 803 N.Y.S.2d 742 (N.Y. App. Div. 2005).

Furthermore, the *White* decision has prompted challenges and speculation beyond the canons related to campaign and political conduct. The attorney for some of the plaintiffs in *White*, for example, has argued that the rule requiring disqualification when a judge's impartiality might reasonably be questioned is unconstitutional if applied to statements made during a campaign despite Justice Kennedy's statement in his concurring opinion in *White* that adopting strict standards of disqualification is one of the less restrictive alternatives to the announce clause that states may adopt. 536 U.S. at 783 (Kennedy, J. concurring). So far, federal courts have rejected this argument. See *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *appeal filed*; *Family Trust Found. of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005).

Some judges and experts (and news reporters) have even argued that the *White* decision should be a catalyst for relaxing the prohibition on commenting on pending cases, which has been adopted in every state and the *Code of Conduct for U.S. Judges*. See, e.g., Thomas Penfield Jackson, "Beyond Republican Party v. White: A Plea for Rule of Reason for Extrajudicial Speech," 32 HOFSTRA L. REV. 1163 (2004). A California judge recently invoked this Court's holding in *White* to defend himself in a discipline case based on his comments about a juvenile case pending before him on a public television program. (The Commission on Judicial Performance rejected the argument.

Inquiry Concerning Ross, Decision and Order (Cal. Com-m'n on Judicial Performance November 16, 2005)).⁸

Relying on this Court's decision, a judicial ethics advisory committee in Vermont, a state in which all judges are appointed, issued an opinion allowing judges to participate in a peace march, hold an anti-war sign, and sign a petition to the congressional delegation or the town board on issues such as energy independence and funding for a local anti-poverty agency. *Vermont Advisory Opinion 2827-6* (2003).⁹ The committee stated it "must . . . apply strict scrutiny to an application of the Code which would restrict the free speech rights of a Vermont judge." *Id.*

Finally, interest groups and commentators have used the decision in *White* to pressure nominees to this Court to answer questions during the Senate confirmation process that have traditionally been considered inappropriate and irrelevant, arguing that the logic of the decision applies, not just to election campaigns, but also to the appointive process.

Some of the confusion about the logical reach of the holding in *White* is evident in the decision below. For example, the majority's statement that "[t]his case . . . is not about what happens after an election" (416 F.3d at 753) is clearly inconsistent with this Court's decision in *White*. Although this Court did not accept the argument that the announce clause was necessary to protect the state's interest in judicial impartiality, its analysis clearly

⁸ URL: <http://cjp.ca.gov/pressrel.htm>

⁹ URL: <http://www.vermontjudiciary.org/Committees/boards/vtjudethic sadcomm.htm>

accepted “what happens after an election” as the relevant focus.

The independence, impartiality, and integrity of state judges is being assailed from many directions. Articulation and implementation of high ethical standards is one of the few safeguards against such attacks available to state supreme courts. The confusion that has arisen since this Court’s decision in *White* undermines the judiciary’s ability to maintain public confidence in the courts in the face of unfair criticism. Therefore, the American Judicature Society respectfully requests that this Court grant the writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit in *Dimick v. Republican Party of Minnesota*, No. 05-506.

IV. CONCLUSION

As argued by the Petitioners, and supported by the foregoing additional reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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