

No. 05-566

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 *AMICUS CURIAE* OF THE
AMERICAN BAR ASSOCIATION**

Of Counsel:

RICHARD P. HOGAN, JR.
JENNIFER BRUCH HOGAN
MATTHEW E. COVELER

MICHAEL S. GRECO *
President
AMERICAN BAR ASSOCIATION
312 N. Clark Street
Chicago, IL 60610
(312) 988-5295

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	3
I. The Petition Raises Issues Of Nationwide Import	3
A. The Eighth Circuit’s Ruling Calls into Question Portions of the Judicial Canons of 31 States Across the Nation	4
B. Unsettled Questions in the Lower Courts Will Cloud the Conduct of Judicial Elections	6
II. The Petition Presents The Opportunity For This Court To Address The Constitutionally Permissible Bounds Of Judicial Campaign Restrictions	9
A. Judicial Independence, Integrity, and Impartiality are Critical Both to the Role of the Judiciary in American Government and the Public’s Respect for the Courts	10
B. The ABA Seeks This Court’s Guidance in Crafting a Judicial Ethics Code That Promotes Judicial Independence, Integrity, and Impartiality.....	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
<i>Ackerson v. Ky. Jud. Retirement & Removal Comm'n</i> , 776 F. Supp. 309 (W.D. Ky. 1991).....	7
<i>Am. Civil Liberties Union of Fla., Inc. v. Fla. Bar</i> , 744 F. Supp. 1094 (N.D. Fla. 1990).....	12
<i>Buckley v. Illinois Jud. Inquiry Bd.</i> , 997 F.2d 224 (7th Cir. 1993)	11
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	11
<i>Clark v. Burleigh</i> , 841 P.2d 975 (Cal. 1992).....	7
<i>In re Broadbelt</i> , 683 A.2d 543 (N.J. 1996).....	7
<i>In re Buckson</i> , 610 A.2d 203 (Del. 1992).....	7
<i>In re Chmura</i> , 608 N.W.2d 31 (Mich. 2000).....	7
<i>In re Dunleavy</i> , 838 A.2d 338 (Me. 2003)	8
<i>In re Fadeley</i> , 802 P.2d 31 (Or. 1990).....	7
<i>In re Raab</i> , 793 N.E.2d 1287 (N.Y. 2003)	8
<i>Katz v. United States</i> , 389 U.S. 347 (1967).....	12
<i>Morial v. Judiciary Comm'n</i> , 565 F.2d 295 (5th Cir. 1977).....	6
<i>New York v. Ferber</i> , 458 U.S. 747 (1982).....	6
<i>New York v. O'Neill</i> , 359 U.S. 1 (1959).....	6
<i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000).....	6
<i>North Dakota Family Alliance v. Bader</i> , 361 F. Supp. 2d 1021 (D.N.D. 2005).....	9
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	<i>passim</i>
<i>Summe v. Jud. Retirement & Removal Comm'n</i> , 947 S.W.2d 42 (Ky. 1997).....	7
<i>Weaver v. Bonner</i> , 114 F. Supp. 2d 1337 (N.D. Ga. 2000), <i>aff'd in part, rev'd in part</i> , 309 F.3d 1312 (11th Cir. 2002).....	7
<i>Weaver v. Bonner</i> , 309 F. 3d 1312 (11th Cir. 2002).....	8, 10

TABLE OF AUTHORITIES—Continued

	Page
<i>West Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	11
<i>Zeller v. Fla. Bar</i> , 909 F. Supp. 1518 (N.D. Fla. 1995).....	7
 STATUTES AND CODES	
ALASKA COURT RULES, CODE OF JUD. CONDUCT, Canon 5C(3) (West 2006).....	4
17A ARIZ. REV. STAT. ANN., S. CT. R. 81, CODE OF JUD. CONDUCT, Canon 5B(3) (West 2005)...	4
ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5A(1)(d) (Lexis Nexis 2005).....	6
ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5A(1)(f) (Lexis Nexis 2005)	5
ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(1) (Lexis Nexis 2005).....	6
ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(1)(a)(iii) (Lexis Nexis 2005)	5
ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005).....	4
COLO. CT. RULES ANN., Ch. 24, COLO. RULES OF JUD. DISCIPLINE, CODE OF JUD. CONDUCT, Canon 7B(2)(d) (West 2005).....	4
FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(1) (West 2005).....	5
FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(3) (West 2005).....	5, 6
IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5A(1)(d) (West 2001).....	6
IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001).....	5
ILL. COMP. STAT. ANN., CODE OF JUD. CONDUCT, S. CT. R. 67, Canon 7B(2) (West 2005)	5

TABLE OF AUTHORITIES—Continued

	Page
IND. CODE ANN. tit. 34, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2002).....	5
KAN. S. CT. R. 601A, Canon 5C(2) (West 2002) ..	5
KY. REV. STAT. ANN., S. CT. R. 4.300, KY. CODE OF JUD. CONDUCT, Canon 5A(2) (West 2005)...	5
KY. REV. STAT. ANN., S. CT. R. 4.300, KY. CODE OF JUD. CONDUCT, Canon 5B(2) (West 2005)...	5
LA. REV. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7D(1) (West 2005)	5
MICH. COMP. LAWS ANN., CODE OF JUD. CONDUCT, Canon 7B(2)(a) (West 2005)	5
52 MINN. STAT. ANN., MINN. CODE OF JUD. CONDUCT, Canon 5A(1) (2005).....	5, 14
52 MINN. STAT. ANN., MINN. CODE OF JUD. CONDUCT, Canon 5B(2) (2005).....	14
MISS. CODE ANN. § 23-15-973 (West 2005)	5, 6
MISS. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005).....	5
MO. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5B(2) (West 2005).....	5
N.D. COURT RULES, CODE OF CONDUCT, Canon 5C(2) (West 2005)	5
N.Y. JUDICIARY LAW, APP., N.Y. CODE OF JUD. CONDUCT, Canon 5A(5) (McKinney 2003).....	5
NEB. COURT RULES & PROC., CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005).....	5
NEV. REV. STAT. ANN., S. CT. RULES, Part VI, NEV. CODE OF JUD. CONDUCT, Canon 5C(1)(ii) (West 2000 & Supp. 2005)	5
OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 7(c)(2)(a) (West 2005)	5

TABLE OF AUTHORITIES—Continued

	Page
OKLA. STAT. ANN., tit. 5, ch. 1, app. 4, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001 & Supp. 2005).....	5
OR. RULES OF COURT, CODE OF JUD. CONDUCT, R. 4-102(C) (2005)	5
OR. RULES OF COURT, CODE OF JUD. CONDUCT, R. 4-102(D) (2005).....	5
PA. CONS. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7B(2) (West Supp. 2005)	5
S.D. CODIFIED LAWS, CH. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(1)(a)(ii) (Lexis Nexis 2005).....	5, 6
S.D. CODIFIED LAWS, ch. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005).....	5
TENN. RULES OF COURT, S. CT. R. 10, CODE OF JUD. CONDUCT, Canon 5C(2)(a) (West 2005) ...	5
UTAH CODE OF JUD. ADMIN., ch. 12, CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2001).....	5
W. VA. CODE ANN., STATE COURT RULES, CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2004).....	5
WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7(A)(1)(e) (West 2000)	6
WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7B(2) (West 2000).....	5
WIS. CODE ANN., ch. 60, S. CT. R. 60.06(2)(b) (West 2005)	6
WIS. CODE ANN., ch. 60, S. Ct. R. 60.06(4) (West 2005).....	5

TABLE OF AUTHORITIES—Continued

	Page
WYO. COURT RULES ANN., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005).....	5
OTHER AUTHORITIES	
ABA CANONS OF JUD. ETHICS (1924)	4, 14
ABA CODE OF JUD. CONDUCT (1972)	4
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, <i>Final Draft Report</i> , http://www.abanet.org/judicialethics/finaldraftreport.html	2
ABA MODEL CODE OF JUD. CONDUCT (1990).....	4, 13, 14
ABA POLICY AND PROCEDURES HANDBOOK 2005-2006.....	2
<i>ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct</i> (Dec. 21, 2005).....	2, 15
48 ABA REPORTS 74 (1923).....	14
1 ANNALS OF CONG. 457 (Joseph Gales, ed., 1789) (reprinted in THE MIND OF THE FOUNDER 224 (Marvin Meyers, ed., 1973))	11
<i>FrontLine: Justice for Sale</i> (PBS television broadcast Nov. 23, 1999) (transcript avail. at http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html)	12
E. Gallagher, <i>Judicial Ethics and the First Amendment</i> , JUDGES' J. 26 (Spring 2003).....	15
C. Gray, <i>The States' Response to Republican Party of Minnesota v. White</i> , 86 JUDICATURE 163 (2002).....	8
ALEXANDER HAMILTON, THE FEDERALIST NO. 78 ...	11

TABLE OF AUTHORITIES—Continued

	Page
JUDICIAL CODE SUBCOMM. OF THE ABA STAND- ING COMM. ON ETHICS & PROF. RESPONS- IBILITY, DRAFT REVISIONS TO THE ABA CODE OF JUDICIAL CONDUCT (May 1, 1989)	15
L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992)	3, 4
M. Peter Moser, <i>The 1990 ABA Code of Judicial Conduct; A Model for the Future</i> , 4 GEO. J. LEGAL ETHICS 731 (1991)	3, 4
<i>Scheduled Supreme Court Elections 2006-2008</i> <a href="http://www.justiceatstake.org/files/SCElection
s06to08.pdf">http://www.justiceatstake.org/files/SCElection s06to08.pdf	9

IN THE
Supreme Court of the United States

No. 05-566

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 *AMICUS CURIAE* OF THE
AMERICAN BAR ASSOCIATION**

INTEREST OF THE *AMICUS CURIAE* ¹

With more than 400,000 members, the American Bar Association is the nation's leading representative of the legal profession.² Members of the ABA come from all 50 states, the

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

² Neither this brief nor the decision to file this brief should be interpreted to reflect the views of any judicial member of the ABA. No mem-

District of Columbia, and the United States' territories. Its members include attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as law professors, legislators, law students, and non-lawyer associates in related fields.

The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society. Its mission is to serve the public and the profession by promoting justice, professional excellence and respect for the law. Stated goals of the ABA include "preserv[ing] the independence of the legal profession and the judiciary as fundamental to a free society." ABA POLICY AND PROCEDURES HANDBOOK 2005-2006 (Goal XI).

The ABA is currently evaluating its judicial canons. On December 14, 2005, the ABA Commission to Evaluate the Model Code of Judicial Conduct released a final, complete draft of its proposed new canons and rules, including those addressing political activity. *See* ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *Final Draft Report*, <http://www.abanet.org/judicialethics/finaldraftreport.html>. The chair of the ABA Commission, inviting public comment to the draft, noted that "[t]he code must provide the guidance judges need, while also assuring a regulatory structure that reinforces the rectitude we expect from our judiciary." News Release, ABA, *ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct* (Dec. 21, 2005).

ber of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division prior to filing.

The most substantial revisions to the Model Code involve Canon 5's provisions governing political activity of judges and judicial candidates. The ABA strives to ensure that the judiciary's integrity, independence, and impartiality are not undermined by inappropriate political activity. Particularly now, when the ABA's House of Delegates will consider the Commission's proposed, revised canons, this case interests the Association.

SUMMARY OF THE ARGUMENT

This Court should review the Eighth Circuit's *en banc* decision for two reasons:

First, the impact of *White* is uncertain. Judicial elections and the state codes modeled on the ABA canons will be in limbo without guidance from this Court. Issues concerning fundraising and political activities in judicial campaigns are likely to recur unless the Court intervenes.

Second, the proper scope of campaign regulations affecting judicial candidates and judges is important to the ABA and the public. The ABA's Model Code must both advance the goals of judicial independence, integrity, and impartiality and comport with this Court's guidance.

ARGUMENT

I. The Petition Raises Issues Of Nationwide Import.

Every state, and the federal judiciary, has adopted some set of judicial canons predicated on the ABA's model. *See generally* L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 7 (1992); M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO. J. LEGAL ETHICS 731, 731 n.3 (1991). Moreover, the preferred merit selection method for choosing judges notwithstanding, the ABA committee drafting the Model Code has for some time been "aware that the public election method was deeply

rooted in many jurisdictions and unlikely to change significantly in the near future.” MILORD, *supra*, at 46. Accordingly, the ABA must confront the dual reality that (1) judicial-ethics codes modeled on ABA standards are in force everywhere there are judges in this country, and (2) many of those judges will be chosen in elections, where they must campaign for office.

In the face of *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), no state that follows the ABA model can be sure how to conduct an election, and no judicial candidate can know the boundaries of permissible campaign behavior. This Court’s guidance is critical for the proper operation of judicial elections.

A. The Eighth Circuit’s Ruling Calls into Question Portions of the Judicial Canons of 31 States Across the Nation.

The ABA’s Canons of Judicial Ethics (1924), Code of Judicial Conduct (1972), and Model Code of Judicial Conduct (1990) serve as the basis for the states’ and federal judiciary’s codification of “basic standards which should govern the conduct of all judges.” ABA MODEL CODE OF JUD. CONDUCT (1990) (Preamble). Since the ABA began its work on the creation of standards for ethical conduct of judges in 1922, every state in the union, along with the federal judiciary, has adopted some iteration (albeit with a variety of modifications) of the ABA’s judicial ethics guidelines. *See generally* MILORD, *supra*, at 7; Moser, *supra*, at 731 n.3.

Specific to this case, 29 states have crafted a ban on judicial candidates’ personal solicitation of campaign contributions like that reflected in Minnesota’s Canon 5B(2).³

³ *See* ALASKA COURT RULES, CODE OF JUD. CONDUCT, Canon 5C(3) (West 2006); 17A ARIZ. REV. STAT. ANN., S. CT. R. 81, CODE OF JUD. CONDUCT, Canon 5B(3) (West 2005); ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005); COLO. CT. RULES ANN., Ch.

Nine states with nonpartisan judicial elections include some limitation, like Minnesota Canon 5A(1), on political party activities.⁴ In all, a total of 31 states have adopted one or both provisions similar to those at issue in the case below.

24, COLO. RULES OF JUD. DISCIPLINE, CODE OF JUD. CONDUCT, Canon 7B(2)(d) (West 2005); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(1) (West 2005); IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001); ILL. COMP. STAT. ANN., CODE OF JUD. CONDUCT, S. Ct. R. 67, Canon 7B(2) (West 2005); IND. CODE ANN. tit. 34, CODE OF JUD. CONDUCT, 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. CONDUCT, Canon 5B(2) (West 2005); LA. REV. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7D(1) (West 2005); MICH. COMP. LAWS ANN., CODE OF JUD. CONDUCT, Canon 7B(2)(a) (West 2005); MISS. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005); MO. RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5B(2) (West 2005); NEB. COURT RULES & PROC., CODE OF JUD. CONDUCT, Canon 5C(2) (West 2005); N.Y. JUDICIARY LAW, APP., N.Y. CODE OF JUD. CONDUCT, Canon 5A(5) (McKinney 2003); N.D. COURT RULES, CODE OF CONDUCT, Canon 5C(2) (West 2005); OHIO REV. CODE ANN., CODE OF JUD. CONDUCT, Canon 7(c)(2)(a) (West 2005); OKLA. STAT. ANN., tit. 5, ch. 1, app. 4, CODE OF JUD. CONDUCT, Canon 5C(2) (West 2001 & Supp. 2005); OR. RULES OF COURT, CODE OF JUD. CONDUCT, R. 4-102(D) (2005); PA. CONS. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7B(2) (West Supp. 2005); S.D. CODIFIED LAWS, ch. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2005); TENN. RULES OF COURT, S. CT. R. 10, CODE OF JUD. CONDUCT, Canon 5C(2)(a) (West 2005); UTAH CODE OF JUD. ADMIN., ch. 12, CODE OF JUD. CONDUCT, Canon 5C(2) (Lexis Nexis 2001); WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7B(2) (West 2000); W. VA. CODE ANN., STATE COURT RULES, CODE OF JUD. CONDUCT, 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. CONDUCT, Canon 5C(2) (Lexis Nexis 2005).

⁴ Nine states limit statements of party affiliation. ARK. CODE ANN., CODE OF JUD. CONDUCT, 5A(1)(f) and 5C(1)(a)(iii) (Lexis Nexis 2005); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(3) (West 2005); KY. REV. STAT. ANN., S. CT. R. 4.300, KY. CODE OF JUD. CONDUCT, Canon 5A(2) (West 2005); MISS. CODE ANN. § 23-15-973 (West 2005); NEV. REV. STAT. ANN., S. CT. RULES, Part VI, NEV. CODE OF JUD. CONDUCT, Canon 5C(1)(ii) (West 2000 & Supp. 2005); OR. RULES OF

Because many other states have adopted provisions like those of Minnesota, the Eighth Circuit’s ruling impacts not only Minnesota’s judiciary and judicial candidates, but 30 other states across the nation as well. This far-reaching effect justifies this Court’s review of the issues raised. *See, e.g., New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (noting that the provisions of New York’s child pornography statute before the Court had identical or similar analogs in federal statutes and the statutes of 46 other states); *New York v. O’Neill*, 359 U.S. 1, 3 (1959) (“We granted certiorari [citation omitted] inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico.”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 385 (2000) (“Given the large number of States that limit political contributions [citation omitted], we granted certiorari . . .”). Without this Court’s review, provisions of the judicial canons of 31 states will be called into question.

B. Unsettled Questions in the Lower Courts Will Cloud the Conduct of Judicial Elections.

At the time of the Court’s opinion in *White*, a significant number of cases in the lower courts had attempted to address limits on conduct by candidates for judicial office.⁵ These

COURT, CODE OF JUD. CONDUCT, R. 4-102(C) (2005); S.D. CODIFIED LAWS, ch. 12-16, APP., CODE OF JUD. CONDUCT, Canon 5C(1)(a)(ii) (Lexis Nexis 2005); WASH. CT. RULES, CODE OF JUD. CONDUCT, Canon 7(A)(1)(e) (West 2000); WIS. CODE ANN., ch. 60, S. CT. R. 60.06(2)(b) (West 2005). Two states allow speaking at party gatherings if the candidate’s opponent is also invited to speak. ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5C(1); FLA. STAT. ANN., CODE OF JUD. CONDUCT, Canon 7C(3). Three States prohibit seeking party endorsement. ARK. CODE ANN., CODE OF JUD. CONDUCT, Canon 5A(1)(d); IDAHO RULES OF COURT, CODE OF JUD. CONDUCT, Canon 5A(1)(d) (West 2001); MISS. CODE ANN. § 23-15-973.

⁵ *See, e.g., Morial v. Judiciary Comm’n*, 565 F.2d 295, 306-07 (5th Cir. 1977) (upholding constitutionality of provisions of Louisiana statute and

inconsistent rulings failed to provide a framework for evaluating the constitutionality of the states' judicial canons.

Following on the heels of *White*, lower courts have continued their struggle to strike a balance between First Amend-

Code of Judicial Ethics requiring judges to resign from bench prior to running for elective non-judicial offices); *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1341-43 (N.D. Ga. 2000), *aff'd in part, rev'd in part*, 309 F.3d 1312 (11th Cir. 2002) (declaring provision of Georgia Code of Judicial Conduct prohibiting false statements to be unconstitutional); *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1529 (N.D. Fla. 1995) (granting preliminary injunction enjoining enforcement of provisions of Florida Code of Judicial Conduct regulating expenditure and solicitation of judicial campaign funds and solicitation of public support for judicial candidates); *Ackerson v. Ky. Jud. Retirement & Removal Comm'n*, 776 F. Supp. 309, 313-16 (W.D. Ky. 1991) (granting preliminary injunction enjoining enforcement of provision of Kentucky Code of Judicial Conduct prohibiting promises of conduct and statements regarding court administrative issues but upholding constitutionality of same provision regarding issues likely to come before court); *Clark v. Burleigh*, 841 P.2d 975, 988 (Cal. 1992) (upholding constitutionality of California statute limiting judicial candidate's statement for inclusion in voter's pamphlet to recitation of candidate's name, age, occupation, and brief description of background and qualifications and prohibiting reference to other judicial candidates); *In re Buckson*, 610 A.2d 203, 222-25 (Del. 1992) (upholding constitutionality of provisions of Delaware Code of Judicial Conduct requiring judges to resign from bench prior to running for elective non-judicial offices and prohibiting judges from attending political gatherings); *Summe v. Jud. Retirement & Removal Comm'n*, 947 S.W.2d 42, 47-48 (Ky. 1997) (upholding constitutionality of provision of Kentucky Code of Judicial Conduct prohibiting false statements); *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000) (declaring provision of Michigan Code of Judicial Conduct prohibiting false statements to be unconstitutional but upholding constitutionality of narrower construction of provision); *In re Broadbelt*, 683 A.2d 543, 552 (N.J. 1996) (per curiam) (upholding constitutionality of provisions of New Jersey Code of Judicial Conduct prohibiting judges from commenting on pending proceedings and from lending prestige of their office to advance private interests of others); *In re Fadeley*, 802 P.2d 31, 38-40 (Or. 1990) (per curiam) (upholding constitutionality of Oregon Code of Judicial Conduct prohibiting judges from personally soliciting campaign contributions).

ment protections and the right of states to regulate the behavior of their judicial officers and candidates. But no clear consensus has developed.

For instance, in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit Court overturned Georgia’s ban on personal campaign fund solicitations. “[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. But *White* itself said no such thing: “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” *White*, 536 U.S. at 783. Indeed, the high courts of Maine and New York have upheld restrictions on judicial campaign conduct even in light of *White*.⁶ See *In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding ban on sitting judges from soliciting support for political candidates and political organizations, and from purchasing tickets to political dinners or functions); *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003) (upholding limitations on judicial candidates’ participation in other candidates campaigns and contributions to political organizations that support other candidates or general party objectives; “the State’s interest in ensuring that judgeships are not—and do not appear to be—‘for sale’ is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.”).

⁶ Disciplinary bodies and judicial ethics advisory committees in a number of jurisdictions have stated that campaign speech restrictions not explicitly addressed by the *White* decision should continue to be enforced. See Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (2002).

These conflicting opinions are to be expected. As one district court has noted:

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 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.

North Dakota Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1041-42 (D.N.D. 2005). This confusion will permeate judicial elections across the nation.

No fewer than 30 states are set to hold elections of their high court judges in 2006. Justice at Stake, *Scheduled Supreme Court Elections 2006-2008*, <http://www.justiceatstake.org/files/SCElections06to08.pdf>. Absent guidance from this Court, judicial candidates are left in an untenable situation—either comply with potentially suspect rules, or worse, violate statutes that are ultimately deemed constitutional and suffer prosecution and punishment. *See, e.g., White*, 536 U.S. at 769 (“[F]earing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election.”). To alleviate this state of confusion, the Court should provide guidance.

II. The Petition Presents The Opportunity For This Court To Address The Constitutionally Permissible Bounds Of Judicial Campaign Restrictions.

This case concerns both the role of the judiciary and public's trust in the courts. It is therefore important to the ABA, which promulgates judicial-ethics standards:

Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The

legislative bodies, judicial committees, and professional associations that promulgate those standards perform a vital public service.

White, 536 U.S. at 793 (Kennedy, J., concurring).

As the drafter of the Model Code of Judicial Conduct adopted in a majority of the states, the ABA must consider this Court's direct influence on the shape of judicial governance. The Model Code is being evaluated at the very time that this Court will consider granting certiorari in this case. How that Code is interpreted—and whether the Partisan Activities Clause and the Solicitations Clause will survive—is of great moment.

A. Judicial Independence, Integrity, and Impartiality are Critical Both to the Role of the Judiciary in American Government and the Public's Respect for the Courts.

“The citizen's respect for judgments depends . . . upon the issuing court's absolute probity.” *White*, 536 U.S. at 793 (Kennedy, J., concurring). After all, “[j]udicial integrity is, in consequence [of public trust in a court's judgments], a state interest of the highest order.” *Id.*

Following *White*, many lower courts have reviewed the judicial canons only in the context of the First Amendment. See, e.g., *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down Georgia's ban on personal campaign fund solicitations). They do so with no apparent consideration of the important distinctions between judicial campaigns and those of the political branches. But one of the primary purposes of judicial canons, and therefore of the ABA's model-code drafters, is the protection of judicial independence, integrity, and impartiality.

In American government, the judiciary serves as a counterbalance to the majoritarian executive and legislative

branches. While introducing the Bill of Rights to the first Congress, James Madison articulated the link between security of fundamental, personal rights and an independent judiciary:

Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (Joseph Gales, ed., 1789) (reprinted in THE MIND OF THE FOUNDER 224 (Marvin Meyers, ed., 1973)). See also ALEXANDER HAMILTON, THE FEDERALIST NO. 78 (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”).

As this Court has noted, “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.” *White*, 536 U.S. at 772-73 (quoting *Buckley*, 997 F.2d at 229). In handling this virtually infinite variety of matters, judges must resolve disputed cases and issues; they are not elected to represent geographic constituencies, or to further the interests and values of certain constituencies. See *id.* at 805-07 (Ginsburg, J., dissenting). “[T]he judge represents the Law—which often requires him to rule against the People.” *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting).

Because of a judge’s unique position in the government, the judicial branch has a need to create and maintain independence from “outside” influences. See *Buckley v. Illinois Jud. Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (“Judges

remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech.”⁷ Put another way, judges are different from other governmental officials—and should be regulated differently too. “[S]tates need not treat candidates for judicial office the same as candidates for other elective offices” because “the judicial office is different in key respects from other offices.” *Am. Civil Liberties Union of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990).

The *White* case produced five separate opinions. But it also produced agreement on two key points. The Court was unanimous in its beliefs that (1) an independent and impartial judiciary is central to American democracy,⁸ and (2) judicial campaigns can present the possibility of undermining the public's confidence in the judiciary.⁹

⁷ Compare *Katz v. United States*, 389 U.S. 347, 364 (1967) (Douglas, J., concurring) (“Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested.”), with *FrontLine: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (transcript avail. at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html>) (quoting Justice Kennedy, “[T]he law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral.”).

⁸ “It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary” *White*, 536 U.S. at 778 (Scalia, J., joined by Rehnquist, C.J., O’Connor, J., Kennedy, J., and Thomas, J.); “We of course want judges to be impartial” *Id.* at 788 (O’Connor, J., concurring); “Judicial integrity is, in consequence, a state interest of the highest order” *Id.* at 793 (Kennedy, J., concurring); “[T]he State [has an] interest in maintaining both the appearance in this form of impartiality and its actuality.” (Stevens, J., dissenting, joined by Souter, J., Ginsberg J., and Breyer, J.); “[P]reserving the public’s confidence in the integrity and impartiality of its judiciary [is a compelling state interest].” *Id.* at 817 (Ginsberg, J., joined by Stevens, J., Souter, J., and Breyer, J., dissenting).

⁹ “[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative

Given American democracy's need for judicial independence, integrity, and impartiality, the ABA has fostered standards that recognize the importance of these ideas. "Intrinsic to all sections of th[e] Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." ABA MODEL CODE OF JUD. CONDUCT (1990) (Preamble).

The ABA favors "an election process geared to the judicial office." *White*, 536 U.S. at 805 (Ginsburg, J., dissenting). In light of the Court's unanimity in endorsing the goal of preserving judicial integrity, the question left open by *White* is the constitutionally-permissible means of upholding this goal. This case provides an excellent opportunity to consider this important question.

B. The ABA Seeks This Court's Guidance in Crafting a Judicial Ethics Code That Promotes Judicial Independence, Integrity, and Impartiality.

This Court has noted the ABA's role in stating standards of judicial ethics. *See White*, 536 U.S. at 786 ("The first code

office." *White*, 536 U.S. at 783 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., Kennedy, J., and Thomas, J.); "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 790 (O'Connor, J., concurring); "[J]udicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system." *Id.* at 794 (Kennedy, J., concurring); "Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials There is a critical difference between the work of the judge and the work of other public officials" *Id.* at 797-98, 801 (Stevens, J., dissenting, joined by Souter, J., Ginsberg J., and Breyer, J.); "Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . ." *Id.* at 817 (Ginsberg, J., dissenting).

regulating judicial conduct was adopted by the ABA in 1924.”); 48 ABA Reports 74 (1923) (report of Chief Justice Taft). Since its first involvement in promulgating the model codes, the ABA’s interest has been the same:

[T]he American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

ABA CANONS OF JUD. ETHICS (1924) (Preamble).

The ABA’s interest in judicial ethics extends to those cases discussing its Model Code. This case involves two provisions of the Minnesota Code of Judicial Conduct, which in turn are derived in part from the ABA Model Code of Judicial Conduct. *Compare* 52 MINN. STAT., CODE OF JUD. CONDUCT 5B(2) (the “Solicitation Clause”) *and* 52 MINN. STAT., CODE OF JUD. CONDUCT 5A(1) (the “Partisan Activities Clause”) *with* ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5 (1990).

The ABA expends tremendous effort in the formulation of its judicial ethics code. The ABA seeks input from groups spanning the entire legal community, including representatives of the ABA Judicial Administration Division Coordinating Committee, the Committee on Codes of Conduct of the Judicial Conference of the United States, the Center for Judicial Conduct Organizations, the American Judicature Society, the Josephson Institute for the Advancement of Ethics, and the Conference of Chief Justices. Additionally, federal and state judges in every jurisdiction provide feedback and in-

sights into working drafts. *See, e.g.*, JUDICIAL CODE SUBCOMM. OF THE ABA STANDING COMM. ON ETHICS & PROF. RESPONSIBILITY, DRAFT REVISIONS TO THE ABA CODE OF JUDICIAL CONDUCT (May 1, 1989).

Following this Court's decision in *White*, the ABA Standing Committee on Federal Judicial Improvements formed a working group on the First Amendment and Judicial Campaigns. *See* Eileen Gallagher, *Judicial Ethics and the First Amendment*, JUDGES' J. 26, 26 (Spring 2003). The purpose of the group was to "evaluate Canon 5 of the Model Code of Judicial Conduct in light of First Amendment concerns." *Id.* at 27.

Building upon the working group's deliberative efforts, the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct recently issued a new draft of Canon 5. *See* News Release, ABA, *ABA Releases Complete Final Draft of Revisions to Model Code of Judicial Conduct* (Dec. 21, 2005). This new version reflects the ABA's intensive iterative process to set reasoned restrictions on the political activities of judges and judicial candidates. *See id.* For instance, the final, complete draft differentiates ethical rules governing candidates in partisan elections from rules governing candidates in non-partisan elections (like those in Minnesota). *See id.*

Inasmuch as the provisions of the ABA's Canon 5 are now under study and redrafting, the ABA has an interest in learning this Court's reasoning about standards that relate to a judicial candidate's or judge's behavior on the campaign trail. The ABA respectfully requests this Court's review of the questions presented.

CONCLUSION

The Petition for a Writ of Certiorari to the Eighth Circuit should be granted.

Respectfully submitted,

Of Counsel:

RICHARD P. HOGAN, JR.
JENNIFER BRUCH HOGAN
MATTHEW E. COVELER

MICHAEL S. GRECO *
President
AMERICAN BAR ASSOCIATION
312 N. Clark Street
Chicago, IL 60610
(312) 988-5295

* Counsel of Record