No. 10-405

In the

Supreme Court of the United States

JOHN SIEFERT, Judge,
Circuit Court of Wisconsin, Milwaukee County,
First Judicial Administrative District,
Petitioner,

JAMES C. ALEXANDER, et al.,
Respondents.

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

Motion for Leave to File Brief Amicus Curiae and Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amicus Center for Constitutional Jurisprudence has received consent to file this amicus brief from Petitioner. Respondent, however, declined consent stating that it was the policy of the Wisconsin Department of Justice "neither to oppose nor to consent to amicus requests, but rather leave it up to the Court to decide for itself whether to hear from amici."

The Center believes the issue presented in this petition goes to the heart of the First Amendment. At issue is the attempted suppression of election-related speech. If permitted, amicus will argue that the protection of this speech is at the core of the First Amendment. It does not matter that the election is for judicial rather than executive or legislative office. The majority of the states have chosen to select and/or retain judicial officers via election. This decision makes sense in light of the work of the state courts. While states are not required to use elections for the selection of judges, once they have chosen to do so they may not suppress election-related speech without a narrowly tailored regulation that advances compelling interest.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae.

DATED: October, 2010.

Respectfully submitted,

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QUESTION PRESENTED

In the absence of a compelling interest, may a state restrict the election-related speech of candidates for judicial office.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is dedicated to upholding the principles of the American Founding, including the proposition that the Founders intended to encourage election-related speech. The fact that the election at issue is for judicial office does not alter the core value protected by the First Amendment. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases concerning election related speech, including *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010) and *Doe v. Reed*, 130 S.Ct. 2811 (2010).

REASONS FOR GRANTING REVIEW

Notwithstanding this Court's ruling in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), state courts continue to put restrictions on the election speech of judges and judicial candidates. Elections have been the dominant method of selecting and/or retaining state judges for more than a century of our history. Nonetheless, the subject of judicial elections continues to generate controversy – especially among state judicial incumbents that write the rules for judicial candidates.

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[1] Pursuant to Rule 37.2, all parties were given notice of this brief at least 10 days prior to filing. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

There are few subjects that display the legal profession's federal-centric view of the law more than the election of state court judges. Judges (especially federal judges), lawyers, and academics immediately frame the notion of judging in terms of the federal judiciary. We train our students in law schools to think primarily about the federal courts. The few classes taught that do not involve resort to federal law are often taught with reference to a 50-state norm, and the policies of any particular state – and more importantly, who developed those policies and how – are rarely discussed.

This narrow consideration, however, invariably leads to erroneous conclusions – or at least conclusions based on an erroneous premise. There are good policy reasons for judicial elections at the state level. These reasons are grounded in the differences between state and federal courts.

Federal courts are courts of limited jurisdiction. They only have that power granted under Article III of the Constitution. *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1148-49 (2009), *Flast v. Cohen*, 392 U.S. 83, 94 (1968). As such, federal courts are not empowered to create a general "common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This arrangement allows the argument that federal judges are like umpires calling balls and strikes. THEODORE MCKEE, *JUDGES AS UMPIRES*, 35 HOFSTRA L.REV. 1709 (2006-2007) (quoting testimony of Chief Justice Roberts to Senate Judiciary Committee). To be sure, federal judges exercise their individual judgment in making those calls, but they are not engaged in the task of writing the rules of the game. *Id.*

State court judges, by contrast, make law. As participants in a "common law" judicial process, state judges are not merely enforcing and interpreting laws. Instead, these judges are actively writing laws and legal norms for their jurisdictions. ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW 12 (1997).

An example can be found in the California decision of *Li v. Yellow Cab Co.*, 13 Cal. 3d 804 (1975). In that case, the California Supreme Court decided that henceforth California would no longer adhere to the doctrine of contributory negligence, but would instead apply the rule of comparative fault in tort cases. *Id.* at 814. This decision overturned "the long-standing principle that one should not recover from another for damages brought upon oneself" a rule that had "been the law of this state from its beginning." *Id.* at 804. Not only did the court overturn more than a century of California precedent in order to reach this ruling, but also a statute enacted by the state legislature codifying that precedent. *Id.*

This is not to say that the California decision was wrong or that the new policy it adopted is not more socially beneficial. It is only to highlight the fact that state courts are engaged in law making and not simply case resolution. *See also Katzberg v. Regents of University of California*, 29 Cal. 4th 300, 331-32 (2002) (Brown, J. dissenting)(arguing that the court's constitutional interpretation was based more on notions of common law than the text), JAMES GARDNER, *THE FAILED DISCOURSE OF STATE CONSTITUTIONALISM*, 90 Mich. L. Rev. 761, 765-66

(1992), HANS LINDE, *ARE STATE CONSTITUTIONS COMMON LAW*, 34 Ariz. L. Rev. 215 (1992).

While state courts generally exercise the lawmaking powers only in the context of deciding cases (*but see*, *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973) (upholding power of the court to issue rules authorizing prejudgment interest in tort actions)), it must be remembered that state courts are not bound by the same standing and jurisdiction doctrines that limit the actions of Article III courts. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Most states recognize doctrines such as taxpayer and citizen standing, allowing virtually any person to invoke the court's lawmaking jurisdiction. *See*, *e.g.*, *Van Atta v. Scott*, 27 Cal. 3d 424, 449 (1980) (permitting taxpayer standing in a suit for declaratory relief), HANS LINDE, *THE STATE AND FEDERAL COURTS: VIVE LA DIFFERENCE!*, 46 Wm. & Mary L. Rev. 1273, 1275 (2005) ("state courts routinely allow individual taxpayers to challenge official acts with trivial fiscal impacts.").

Indeed, the lawmaking power of a court is in some ways superior to that of the Legislature. While legislators are free to rewrite laws of the previous terms, judicial actors invoke stare decisis to limit (or at least slow) reconsideration of past judicial lawmaking. SCALIA, *supra* at 7.

It is no surprise, therefore, that state constitutional conventions would decide that judicial officers ought to be selected and or retained by popular election. Indeed, every state admitted to the union since 1846 included a provision for judicial election in its Constitution. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 371 (1973).

There is some debate in the legal literature about the purpose behind the elections of state judicial officers. One school of thought argues that the elections were chosen as a vehicle to increase judicial independence – to take the decision out of the hands of politicians. *See* ROY A. SCHOTLAND, *MYTH, REALITY PAST AND PRESENT, AND JUDICIAL ELECTIONS*, 35 Ind. L. Rev. 659, 660 (2002).

There is also evidence, however, that citizens wanted to exercise some control of their own. This point of view was evidence by a complaint from a delegate to the Kentucky constitutional convention of 1849-1850, referring to appointed judges as "'the last dying kick of aristocracy.'" THOMAS PHILLIPS, *ELECTORAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE*, 64 Ohio State L. J. 137 (2003). This view of judges as aristocrats was inadvertently seconded by the Albany Law Journal two decades later when the journal published an editorial complaining that "a herd of dissatisfied farmers have an ignorant demagogue in the seat of an able and upright judge." 8 Albany L.J. 18 (1873), quoted in FRIEDMAN, *supra* at 372. The editorial went on to opine that "[t]he people are the worst possible judges of those qualifications essential to a good judge." *Id.*

Notwithstanding such complaints, however, state voters in judicial elections generally elect the most qualified candidates. CHRIS BONNEAU, *VACANCIES ON THE BENCH: OPEN-SEAT ELECTIONS FOR STATE SUPREME COURTS*, 27 Just. Sys. J. 143, 146 (2006). Indeed, the argument can easily be made that the outcome of state judicial elections reflect "smart political choices by voters." MELINDA HALL, *THE CONTROVERSY OVER ELECTING JUDGES AND*

ADVOCACY IN POLITICAL SCIENCE, 30 Just. Sys. J. 284, 285 (2009).

Far from discouraging voter involvement in the selection of judges, hard-fought, contested elections generate more voter interest and participation. *Id.* Professors Hall and Bonneau have addressed this in a book-length study, demonstrating that more campaign information generates more voter participation. CHRIS BONNEAU & MELINDA HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2009. If this is the case, what type of government interest would the First Amendment permit to suppress election speech? Given that suppression of election speech will result in the suppression of voter participation, amicus suggests that nothing short of a compelling interest would support such a regulation.

This Court has already rejected the notion that the values of the First Amendment and judicial impartiality are advanced by state policies that require candidates for judicial office to keep secret their views on matters of controversy. *Republican Party*, 536 U.S. at 775-76. After all, the *reality* of an impartial judiciary cannot be affected by whether a candidate keeps her views to herself or announces those views during an election campaign. To say that requiring candidates to keep their views concealed from voters advances the goal of the *perception* of fairness is to deprive the value from any semblance of meaning. If we only care about what the public might think is happening rather than what is really at play in judicial law making, we advance cynicism as the constitutional value rather than impartiality.

Judicial actors and candidates are not blank slates. Nor are they required to live out their terms in cloistered silence. Even aside from the judicial officer's own First Amendment rights of political speech and participation, voters have a genuine need for information about judicial candidates. The more time and money those candidates spend on providing that information, the more voters participate in the process and the more informed those voters will be. HALL at 288. Conversely, the greater the restriction on judicial campaign speech, the lower the voter participation and the less informed the electorate. Any state regulation that has the effect of suppressing voter participation in an election by reducing information for the electorate strikes at the core of the First Amendment.

Nonetheless, state courts continue to apply some or all of the restrictions suggested by the American Bar Association in Model Rule 4.1 of the 2007 Model Code of Judicial Conduct. Wisconsin is not alone in this restriction of election speech. Amicus is familiar with California judicial elections and notes that California also imposes some of these same restrictions, including the prohibition on endorsing other candidates. California Code of Judicial Conduct, Cannon 5. Under the California Code, judicial candidates are prohibited from holding a position in a political organization or endorsing candidates for office.

Unlike the ABA Model Code, however, the California Code contains an exception permitting the endorsement of other *judicial* candidates. *Id.* California explains this rule by asserting that "judicial officers [and presumably judicial

candidates] ... are in a unique position to know the qualifications necessary to serve as a competent judicial officer." Comment to Canon 5, Cal. Code Jud. Conduct. This is an echo of the 1873 complaint in the Albany Law Journal that voters do not know enough to make wise decisions. However, any lack of voter knowledge is due to state restrictions on election speech by judicial candidates.

By restricting some types of information and permitting others, state judiciaries are attempting to dictate the information that will be available to voters. State officials may not, however, dictate the issues to be discussed in an election campaign. *Republican Party*, 536 U.S. at 782.

These rules deprive judicial candidates and officers of their rights to engage in political discourse and deprive voters of the information necessary to make electoral decisions. The natural result of the restriction of information is lack of voter participation in judicial elections. Whether or not suppression of voter interest is a purpose of these restrictions it is clear that that is the effect of the regulation. This Court should grant review to ensure that any state regulation that has the effect of suppressing voter participation is narrowly tailored and is supported by a compelling interest.

CONCLUSION

In his concurring opinion in *Republican Party*, Justice Kennedy noted:

> Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its

> definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.

536 U.S. at 794 (Kennedy, J., concurring). Yet in the eight years since this Court decided *Republican Party*, states continue to restrict what voters may hear and what candidates may say. At the core of the First Amendment is the right to participate in the political process. This Court ought to grant review to ensure that no state regulation that has

the effect of suppressing voter participation is permitted unless narrowly tailored to advance a compelling governmental interest.

DATED: October, 2010.

Respectfully submitted,

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