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IN THE SUPREME COURT OF THE UNITED STATES

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REPUBLICAN PARTY OF :
MINNESOTA, et al., :
Petitioners, :
v. : No. 01-521
VERNA KELLY, et al. :
- - - - -x

Washington, D.C.
Tuesday, March 26, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:08 a.m.

APPEARANCES:
JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf
of the Petitioners.
ALAN I. GILBERT, ESQ., St. Paul, Minnesota; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 [10:08 a.m.]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on number 01-521, The Republican Party of Minnesota,
5 et al., versus Verna Kelly. Mr. Bopp.

6 ORAL ARGUMENT OF JAMES BOPP, JR.,

7 ON BEHALF OF PETITIONER

8 MR. BOPP: Mr. Chief Justice, and may it please
9 the Court: Like most states, Minnesota selects its judges
10 through periodic popular elections. And when candidates'
11 speech is severely restricted, the people are denied
12 access to the information they need to make an informed
13 choice. While state court judges are different from other
14 elected officials, Minnesota's Announce Clause, as now
15 interpreted by its supreme court, goes too far resulting
16 in elections without campaigns.

17 QUESTION: Could we find out from you just what
18 the Announce Clause prohibits that isn't already
19 prohibited by the Pledges and Promises Clause, as it's
20 been interpreted?

21 MR. BOPP: Yes, Justice O'Connor. The Announce
22 Clause prohibits, according the decision of the Eighth
23 Circuit, any general -- allows general discussions of the
24 law, while it prohibits any implying of how a person would
25 rule -- a candidate would rule, on an issue or case before

1 the Court.

2 QUESTION: How does that differ, then, from the
3 Pledges or Promises Clause?

4 MR. BOPP: The Pledges and Promises Clause
5 prohibits any pledge or promise that -- other than
6 faithful performance of duties in office. The difference
7 between "announce," the plain language of the clause, and
8 "pledge or promise" -- "announce" is simply making known,
9 is one of the formulations of the Eighth Circuit, or
10 implying; while "pledging or promising" is making a
11 commitment on how you would rule in a future case.

12 QUESTION: But you think the Announce Clause,
13 even as interpreted by the Eighth Circuit to be the same
14 as the ABA canon, goes beyond that?

15 MR. BOPP: Well, Your Honor, there is one aspect
16 of the current 1990 ABA canon that has -- was not
17 discussed by the Ninth Circuit or by the ABA brief. And
18 that --

19 QUESTION: And where does that appear in your
20 brief? Where is the ABA canon we're talking about? Where
21 is it? I want to look at it while you're talking about
22 it.

23 MR. BOPP: I do not have a reference to the ABA
24 canon, Your Honor. I apologize. The ABA canon states
25 that a -- the 1990 ABA canon states that a candidate may

1 not make statements to commit, or appears to commit in
2 deciding cases, controversies, or issues likely to come
3 before the Court. While the ABA and the Eighth Circuit
4 seem to imply that the 1990 canon was similar, if not the
5 same, as the 1972 canon, they did not discuss the
6 difference between the words "announce" and "commit."

7 "Commit," if you look in the dictionary, says
8 "pledge." And, thus, the 1990 canon appears to be more
9 narrow under plain --

10 QUESTION: Well, the Eighth Circuit did say that
11 it was -- that Minnesota's provision is the same as the
12 ABA canon, right?

13 MR. BOPP: It did, Your -- it did, Your Honor.

14 QUESTION: And the ABA canon prohibits
15 candidates, judicial candidates, from making statements
16 that commit or appear to commit a candidate.

17 MR. BOPP: Yes.

18 QUESTION: And that looks very much like the
19 Pledge or Promise language. I -- I don't know how we
20 should interpret this.

21 MR. BOPP: Well, one of the problems, Your
22 Honor, is that the January 29th opinion of the Minnesota
23 Supreme Court interpreting the Announce Clause adopted the
24 Eighth Circuit opinion and its interpretations.

25 QUESTION: Right.

1 MR. BOPP: Unfortunately, the Eighth Circuit had
2 conflicting statements about the scope of the
3 interpretation that it was announcing.

4 QUESTION: Well, you were -- you appear to be
5 arguing, in your brief at least, that the Announce Clause
6 is unconstitutionally vague.

7 MR. BOPP: Yes, Your Honor.

8 QUESTION: Is that your argument you're making?

9 MR. BOPP: Yes, we are.

10 QUESTION: But did you make that argument below?

11 MR. BOPP: Yes, we did, as to the interpretation
12 proffered in the district court, adding the words "likely
13 to come before the Court." But where we are now, Your
14 Honor, is that the Eighth Circuit sua sponte added other
15 glosses to this canon, even though it was not advocated by
16 any of the parties.

17 QUESTION: You didn't include a vagueness
18 challenge in your petition for certiorari, did you?

19 MR. BOPP: Yes, we did.

20 QUESTION: Is it in the question on which we
21 granted cert, do you think?

22 MR. BOPP: No, but it is encompassed within the
23 violation of the First Amendment that we allege.

24 QUESTION: But I wouldn't have thought vagueness
25 was a First Amendment issue.

1 MR. BOPP: Well, in the context of First
2 Amendment protected speech, a -- something that chills
3 First Amendment speech, because of -- it is a vague rule,
4 and therefore does not provide a bright line necessary for
5 the exercise of that speech, that it constitutes a First
6 Amendment violation.

7 QUESTION: One of the statements of the Eighth
8 Circuit -- and I don't have the citation to the brief; I
9 have the citation to the Federal Third -- 247 F.3d 881.
10 It says that the Announce Clause applies only to
11 discussion of a candidate's predisposition on issues
12 likely to come before the candidate if elected to office.

13 MR. BOPP: That is one of the three
14 constructions.

15 QUESTION: If we could -- would you agree that
16 that's perhaps the narrowest of the three constructions?
17 I want to find what might be the most likely statement to
18 survive review and then have you discuss that, because I
19 take it that you would not be -- you would not agree that
20 even that is constitutional.

21 MR. BOPP: It is not the narrowest, Your Honor,
22 because it uses the word "issue." There are other
23 formulations --

24 QUESTION: Yes.

25 MR. BOPP: -- in the Eighth Circuit case where

1 they use the word "decide a case," such as on page 45a of
2 the petition -- the petition appendix. It prevents
3 candidates from, quote, "implying how they would decide
4 cases," end of quote. And they also, on page 52a of the
5 appendix to the petition, say that, quote -- that the
6 canon, quote, "applies only to discussions of a
7 candidate's predisposition on issues," as you've quoted,
8 and then finally concludes on page 53 with the statement
9 that it prohibits candidates, quote, "only from publicly
10 making known how they would decide issues." So we have
11 conflicting interpretations of --

12 QUESTION: Well, let's take the -- let's take
13 the last one. I take it, if that were the authoritative
14 narrowing constructing that were before us, you would
15 disagree with its constitutionality.

16 MR. BOPP: Yes, Your Honor.

17 QUESTION: Would you agree that that would be a
18 constitutional standard if it were part of a code of
19 judicial ethics that applied to the judge after the judge
20 was on the bench?

21 MR. BOPP: No, and -- but I believe that this
22 canon does apply to judges once they are elected and on
23 the bench.

24 QUESTION: Well, are judges, after they are on
25 the bench, subject to, all of the same rights that they

1 have before they go on the bench, insofar as making public
2 comments?

3 MR. BOPP: No, they may be limited in a number
4 of different ways, Your Honor, that are necessary to
5 advance compelling interests.

6 QUESTION: Well, why is it that, if an election
7 is in July, the State can, under your view, not prohibit
8 statements in June before he's elected, but they can
9 prohibit the statements in August, after he's elected?

10 MR. BOPP: Well, Your Honor, the First Amendment
11 applies -- has its most urgent application in campaigns
12 for election, and it is -- and while both judges and
13 judicial candidates may be limited in their speech, it has
14 never been held that simply announcing your views on a
15 disputed legal or political issue constitutes an
16 indication of partiality such that would justify, for
17 instance, recusal or disqualification.

18 QUESTION: But I thought you said it would be
19 okay. Then maybe I didn't understand your answer. I
20 thought you said that the kind of limitation that Justice
21 Kennedy referred to would be all right for sitting judges,
22 that you could prohibit sitting judges from letting their
23 views be known on any controversial issues.

24 MR. BOPP: Well, then I misspoke, if that was
25 your understanding.

1 QUESTION: Like the incorporation doctrine or
2 substantive due process and so forth --

3 MR. BOPP: Canon 4 --

4 QUESTION: -- you think you could prohibit
5 judges from discussing those matters.

6 MR. BOPP: No. Canon 4 -- and in fact, Canon
7 4(b) of the Minnesota canons encourages judges to propose
8 changes in the substantive and procedural law, even
9 individually.

10 QUESTION: Sitting judges -- sitting judges run
11 for election. So whatever rights the contender would have
12 in an election, I assume that the sitting judge who was
13 running for reelection would have those same rights, in
14 your view.

15 MR. BOPP: We believe that they should.

16 QUESTION: Because the sitting judge could not
17 be restricted, could he or she, in a way?

18 MR. BOPP: Well, sitting judges are restricted,
19 for instance, from commenting on pending cases that are
20 pending before them, quite properly. But here we are
21 talking about stating general views about the law.

22 QUESTION: So sitting --

23 QUESTION: You wouldn't object to candidates
24 being prohibited from commenting about particular cases
25 either, would you?

1 MR. BOPP: No, I would not.

2 QUESTION: I didn't take your objection to be
3 that you say, you know, that there's a case pending in the
4 courts, if I were appointed, I'll tell you how I would
5 decide that case. You --

6 MR. BOPP: We --

7 QUESTION: -- wouldn't permit that, would you?

8 MR. BOPP: We believe that that can properly
9 be --

10 QUESTION: I thought you gave examples, or your
11 -- one of the briefs gave examples of commenting on
12 specific decisions that had been rendered by the Minnesota
13 Supreme Court, and you said that restraint on that comment
14 was impermissible.

15 MR. BOPP: Yes.

16 QUESTION: Am I not right?

17 MR. BOPP: Yes. That is our position.

18 QUESTION: So you're making --

19 QUESTION: That was a past case. That was a
20 distinction you're making between past cases and pending
21 cases in the court that are likely to come before you if
22 you're elected.

23 MR. BOPP: Yes, I -- the First Amendment
24 protects discussion of past cases. However, the Eighth
25 Circuit opinion only allows discussion of past cases while

1 the enforcement authorities, specifically the Office of
2 Lawyers Professional Responsibility, had previously said
3 that you could criticize those opinions.

4 QUESTION: Well, supposing that -- supposing
5 that Minnesota -- the Minnesota Supreme Court had
6 announced that its Fourth Amendment was more protective
7 than the federal Fourth Amendment and a candidate running
8 for that court saw that several cases, the evidence had
9 been suppressed in Minnesota courts, the defendant was
10 acquitted, so he said, "I think we should go back to the
11 idea that our Fourth Amendment is the same as the federal
12 Fourth Amendment." Would that be permitted under this
13 rule?

14 MR. BOPP: Under the Announce Clause?

15 QUESTION: Under the Announce Clause.

16 MR. BOPP: Not if it's considered implying how
17 you would rule in a future case.

18 QUESTION: But do we know that -- do we -- is
19 there any mechanism for getting a clarification? And the
20 big problem in this case is this is a frontal attack, and
21 so we have no specific examples. And you can say, "I
22 think this would fit, and I think that wouldn't fit." Is
23 there any mechanism in Minnesota for seeking
24 clarification? For example, whether the Minnesota Supreme
25 Court's current rule is, indeed, the ABA's 1990 rule?

1 MR. BOPP: You can seek a private advisory
2 opinion that is not binding on either the office or the
3 board. And petitioner Wersal sought such an opinion after
4 suit was filed regarding other matters, and they declined
5 to provide that advice.

6 QUESTION: Mr. Bopp, I would assume your answer
7 would be that if it's too fuzzy for us to understand what
8 it means in order to rule upon its constitutionality, it's
9 also too fuzzy for a judicial candidate to know what it
10 means in order to conform his conduct to it and,
11 therefore, unconstitutional.

12 MR. BOPP: Yes, sir, Your Honor, not only to
13 candidates, but this canon binds the family members, the
14 supporters of the candidate. If they say anything that is
15 viewed to violate this construction -- this new
16 construction of this rule, then the candidate, him or
17 herself, is subject to discipline or removal from office.

18 QUESTION: Well, I still want to make clear your
19 position. Your position is -- is that the judge can,
20 after the judge's election, be disciplined, sanctioned for
21 certain remarks that he could not be sanctioned for before
22 the election. Is that correct?

23 MR. BOPP: No, Your Honor, and if I gave you
24 that impression, I apologize.

25 QUESTION: In other words, the rule --

1 MR. BOPP: I am not --

2 QUESTION: -- post and pre-election, the

3 rights --

4 MR. BOPP: The rule --

5 QUESTION: -- to speak are the same.

6 MR. BOPP: The rule is the same. But I think

7 the point I was making was that once a judge assumes

8 office, there are restrictions on, for instance, his

9 ability to discuss a pending case that is not imposed upon

10 a lawyer that is not involved in the case in any way.

11 QUESTION: Well, do you claim --

12 MR. BOPP: So then --

13 QUESTION: All right. Then your position is

14 that there is a difference as it applies to pending cases

15 as to which a sitting judge has to -- to which a sitting

16 judge has been assigned.

17 MR. BOPP: Yes, there are specific ethical --

18 QUESTION: And --

19 MR. BOPP: -- canons that apply in that.

20 QUESTION: And that's all.

21 MR. BOPP: And that's appropriate --

22 QUESTION: Now --

23 MR. BOPP: -- an appropriate limit.

24 QUESTION: -- are there limits on what the

25 candidate can say?

1 MR. BOPP: Yes. I --

2 QUESTION: And those are what?

3 MR. BOPP: It's in the realm of Pledges and
4 Promises. It would apply to candidates whether they're
5 sitting judges or not, and that is that a candidate for
6 judicial office shall not pledge or promise certain
7 results in deciding a particular case or issue in a case
8 without regard to the law or facts of the case.

9 QUESTION: Suppose he said, "There are a lot of
10 criminal cases pending," and, to take the Chief Justice's
11 hypothetical, "we've gone too far in interpreting the
12 Fourth Amendment, and I'm going to be more strict." In
13 your view --

14 MR. BOPP: I think that's a --`

15 QUESTION: -- that could be prohibited.

16 MR. BOPP: No, that is allowed, Your Honor,
17 because he's not promising certain results in a particular
18 case. That is, again --

19 QUESTION: He says, "I promise when these cases
20 come before me, this is what I'll do."

21 MR. BOPP: Then that is a pledge or promise of
22 an outcome.

23 QUESTION: And in your view, that can be
24 prohibited.

25 MR. BOPP: Yes, because there is a --

1 QUESTION: Well, I'm surprised you take that
2 view.

3 MR. BOPP: Well, Your Honor, there is a public
4 perception of the impartiality of the judiciary that I
5 think properly can be taken into account.

6 QUESTION: Well --

7 MR. BOPP: And I think this rule announces a
8 rule that is consistent with the judge's obligation to
9 decide cases in accordance with his or her role.

10 QUESTION: Well, that's an extremely fine line
11 you're drawing, it seems to me, because I think a moment
12 ago, in response to my question, you said that a candidate
13 would be prohibited, and wrongly prohibited, under your
14 view -- on your view of it and from saying that Minnesota
15 should adopt the federal Fourth Amendment standard rather
16 than the more liberal Fourth Amendment standard that the
17 Supreme Court of Minnesota hypothetically had it. You say
18 that a candidate ought to be allowed to do that, but he
19 isn't under the Minnesota rule?

20 MR. BOPP: He is not, under the -- well, to the
21 extent that we know what the Announce Clause means --

22 QUESTION: Yeah.

23 MR. BOPP: -- with this conflicting formulations
24 under the Eighth Circuit opinion, talking about cases or
25 issues -- talking about, implying, or making known -- to

1 the extent that we know the rule, it would appear that
2 such a statement would be prohibited --

3 QUESTION: And you --

4 MR. BOPP: -- because it would imply what he
5 would rule in the future.

6 QUESTION: And you say that the First Amendment
7 prohibits that?

8 MR. BOPP: No, I'd say the First Amendment
9 protects talking about prior decisions.

10 QUESTION: What about --

11 MR. BOPP: And one of the problems is we're
12 talking about the rule -- the Minnesota rule versus --

13 QUESTION: Yeah.

14 MR. BOPP: -- other proposed rules.

15 QUESTION: But if --

16 QUESTION: What about comment on a -- by a
17 candidate who is not yet a judge on a case which is then
18 pending before the court? In your view, can the State
19 prohibit the candidate from saying, "I've been reading
20 about this case. I know what the evidence is, and I
21 believe so and so should be convicted, and I think the
22 sentence ought to be the following." Could the State,
23 consistently with the First Amendment, prohibit that kind
24 of a comment?

25 MR. BOPP: Well, there would seem to be, under

1 Gentile, more leeway for a lawyer not in a pending case to
2 discuss a pending case.

3 QUESTION: What's the answer to my question?

4 MR. BOPP: I think -- I think it could not be
5 prohibited.

6 QUESTION: In the question that the Chief
7 Justice asked, suppose the judge said, "I pledge and
8 promise that if you elect me, I will vote in every Fourth
9 Amendment case to restore the law to what it was." That's
10 a pledge and a promise, which I thought your argument
11 started out saying you accept that the pledge or promise
12 is a valid restriction --

13 MR. BOPP: I do, Your Honor.

14 QUESTION: -- that you can't go on that to the
15 Announce. So suppose that instead of -- the Chief Justice
16 suggested, "I think it would be a good idea if the court
17 went back there" -- but if he said, "I pledge and promise
18 that I will vote that way" --

19 MR. BOPP: That is a classic pledge and promise
20 that I think can be appropriated prohibited under the
21 First Amendment.

22 QUESTION: As to issues and not as to particular
23 cases.

24 MR. BOPP: As both to issues and cases.

25 QUESTION: So that you -- you can't disable

1 yourself from being --

2 MR. BOPP: Open minded.

3 QUESTION: -- persuaded by counsel that the
4 views you've held your whole life over the incorporation
5 doctrine, turn out to be wrong.

6 MR. BOPP: Yes. And while judges certainly have
7 views, and they announce these views in numerous different
8 ways, if they are binding themselves not to have an open
9 mind and to decide a case in advance, then that is a
10 violation of the oath, and that type of pledge or promise
11 should be and can be prohibited under the First Amendment.

12 QUESTION: Is this different from that? That
13 is, I read through the Minnesota Bar Association's brief,
14 the ABA's brief, and portions of the Brennan brief. All
15 right? They all suggested to me that this ethical rule,
16 like all ethical rules, is vague, interpreted by
17 interpretive opinions, of which there are many. I mean,
18 there are two pages of them in these briefs.

19 Now, as I understood it, it comes down to an
20 effort to do just what I did in my own Senate confirmation
21 hearing, to say, "I will try to reveal my judicial
22 philosophy. I will try to stay away from anything that is
23 going to commit myself or appear to commit myself about
24 how to decide a future case." All right.

25 MR. BOPP: And I agree.

1 QUESTION: Now, if that's what they're trying to
2 do -- do you agree that is what this is trying to do?
3 And, second, if that is what they're trying to do, why is
4 that unconstitutional?

5 MR. BOPP: If it amounts to a pledge or a
6 promise --

7 QUESTION: No, it doesn't. I used the words
8 that -- of the ABA brief. I've used the words -- I'm
9 referring to the briefs to call those arguments to your
10 mind.

11 What they say this comes down to is you cannot
12 commit yourself or appear to commit yourself as to how you
13 will decide a particular case or issue if it arises. But
14 you can, and there are two pages of this in the Minnesota
15 Bar brief. I'm just trying to call that to your mind --

16 MR. BOPP: Thank you.

17 QUESTION: -- of all the things you can discuss:
18 judicial philosophy, character, this and that. There were
19 two pages of them, and they're all quotes -- in quotes.
20 All right. So, one, am I correct in my interpretation?

21 MR. BOPP: Yes.

22 QUESTION: Two, if I am, why does the
23 Constitution forbid it?

24 MR. BOPP: If the word "commit" means "pledge,"
25 then I think you're correct in --

1 QUESTION: No, I told you what it means.
2 "Commit" means "commit." We can't go more than the words
3 "commit" or "appear to commit," other than to illustrate
4 them by example. And the Bar Association brief contains
5 18 examples that have been given. They're all in quotes.
6 They come from an authoritative source. So that's where I
7 am in what this means. Am I right? And if I am right,
8 what's wrong with it?

9 MR. BOPP: Well, Your Honor, what is wrong with
10 it --

11 QUESTION: But first, am I right, in your
12 opinion?

13 MR. BOPP: you're not right. And what is wrong
14 with it is that the ABA suggested that "commit" means the
15 same thing as "announce." And what I -- my course of my
16 argument is that "commit" means "pledge," and that, to
17 that extent, the ABA canon is different than the current
18 Announce Clause. In fact, it's --

19 QUESTION: All right, so if you're saying the
20 word is "announce," and all these briefs and the bar
21 association are wrong when they say that means commit or
22 appear to commit, on that view, what should I do with this
23 case?

24 MR. BOPP: You should strike down the Announce
25 Clause, because it is impossible -- hopelessly impossible

1 to know what is included within the rule and what is
2 outside the rule. That, and not only did the Eighth
3 Circuit use different formulations of the rule that mean
4 different things, in terms of its scope and application,
5 but it also had exceptions to the rule, discussion -- a
6 general discussion of case law or a candidate's judicial
7 philosophy, but with the proviso that if you imply how you
8 will rule in a particular case, then you have violated the
9 rule.

10 QUESTION: And on an issue on a particular case.

11 MR. BOPP: An issue, including --

12 QUESTION: Can I just follow that up for one
13 second? All right, now take the other assumption. Let's
14 assume that it does mean, as the ABA says, "appear" or
15 "appear to commit." On that view of it -- and assume that
16 I'm right. I know you think I'm wrong on that. Assuming
17 that I'm right --

18 MR. BOPP: With all due respect.

19 QUESTION: -- then is it constitutional, in your
20 opinion?

21 MR. BOPP: No, because of the "appear to commit"
22 language.

23 QUESTION: So you think the ABA can and is,
24 itself, unconstitutional.

25 MR. BOPP: As I interpret it, yes, because the

1 "appear to commit" takes us back away from a bright line
2 of a pledge or a promise into the realm of implying what
3 you are saying. And there --

4 QUESTION: What is the ABA's position on
5 judicial elections?

6 MR. BOPP: They are not in favor of judicial --

7 QUESTION: I didn't think they were.

8 (Laughter.)

9 QUESTION: But you're submitting this case to us
10 on the proposition that, under the First Amendment, a
11 judicial candidate can be subjected to restraints on
12 speech that other -- that are inapplicable to other
13 candidates.

14 MR. BOPP: I believe that they can, Your Honor,
15 because judges have a dual role. One role is to make law,
16 and particularly state court judges making common law, but
17 they also have a duty to decide cases impartially. So
18 while they are running for office, in order to respect
19 judicial impartiality, they should not be pledging to
20 violate the oath. That is promising now how to decide a
21 case in the future when it comes before --

22 QUESTION: Well, how does this play out with
23 sitting judges who write opinions saying, "In my view, for
24 example, I think the death penalty is unconstitutional"?
25 There it is for everybody to see. And presumably in a

1 state like Minnesota, that judge will come up for election
2 again or in another state for retention election. You
3 don't think it's -- can that be prohibited --

4 MR. BOPP: No.

5 QUESTION: -- somehow?

6 MR. BOPP: No. No, it may not.

7 QUESTION: And that judge has expressed a view
8 that presumably the judge will follow in a future case.

9 MR. BOPP: But that is -- but that is different
10 from declaring or announcing that you have a closed mind
11 as to any future --

12 QUESTION: No. I don't know, if it's thoroughly
13 expressed. Now, if the next case comes along involving
14 that very issue, can the judge be changed for bias?

15 MR. BOPP: No. No, you may not be recused, and
16 due process is not violated.

17 QUESTION: But what if a candidate says not, "I
18 pledge that in every case I will say vote against the
19 death penalty," but, "I have real doubts about the death
20 penalty jurisprudence." I mean, I don't think Minnesota
21 has a death penalty, but --

22 MR. BOPP: No, it doesn't.

23 QUESTION: -- let's assume it does. "And I
24 think it probably should change." Is that permissible
25 under this rule? And if the rule says it's not

1 permissible, is that statement protected by the First
2 Amendment?

3 MR. BOPP: I'm sorry. Under the Minnesota rule
4 or my rule?

5 QUESTION: Under the Minnesota rule.

6 MR. BOPP: It -- well, it's very difficult to
7 know, Your Honor.

8 QUESTION: Okay, well, under your rule.

9 MR. BOPP: Under our rule, it would be allowed.
10 And, in fact, judges are encouraged to do -- make
11 proposals just like that under these canons.

12 QUESTION: Now I don't understand what you say
13 the Minnesota rule is. I would have thought your answer
14 would be, "That's probably okay under the Minnesota
15 rules," because he only says probably -- "I think it's
16 probably, you know, unconstitutional."

17 MR. BOPP: Under the Minnesota rule if you
18 simply imply how you might rule --

19 QUESTION: Well, it doesn't. It says, "I have
20 doubts about it," according to the Chief Justice, "I have
21 doubts about it." I think that doesn't necessarily imply
22 -- but I thought --

23 MR. BOPP: Well, it's --

24 QUESTION: I thought --

25 MR. BOPP: It's hard to know.

1 QUESTION: But I thought that your position with
2 regard to judicial opinions is -- is that it is perfectly
3 okay for a sitting judge to make known to the public his
4 view on something like the death penalty when he does it
5 in an opinion and, therefore, that can be out there.

6 MR. BOPP: Yes, it is --

7 QUESTION: Subject to criticism, indeed.

8 MR. BOPP: Yes --

9 QUESTION: But somebody who's running against
10 him in an election cannot let be known what his view is on
11 the death penalty.

12 MR. BOPP: It is perfectly appropriate for a
13 judge to do that in an opinion or in speeches or a law
14 review article.

15 QUESTION: In speeches? You mean the judge
16 could go out and -- a sitting judge can go out and make a
17 speech and say, "In the next death penalty case to come
18 before me, I'm going to vacate. I'm going to vote to
19 vacate the death penalty. I don't care what the argument
20 is."

21 MR. BOPP: Then not that statement. If he made
22 that statement, he'd be subject to recusal and a proper
23 application of --

24 QUESTION: Okay, well --

25 MR. BOPP: -- the pledge rule.

1 QUESTION: Okay. Well, then what he can say in
2 speeches certainly is less than what he can say in a
3 judicial opinion in which he says, "I vote to vacate the
4 death penalty because I believe it's unconstitutional." I
5 mean, there's some line between them.

6 MR. BOPP: Yes, I would think he would. He
7 does, Your Honor. And may I reserve the balance of my
8 time?

9 QUESTION: Very well. Mr. Gilbert, we'll hear
10 from you.

11 ORAL ARGUMENT OF ALAN I. GILBERT

12 ON BEHALF OF THE RESPONDENTS

13 MR. GILBERT: Mr. Chief Justice, and may it
14 please the Court: I would like to take the opportunity to
15 try to clarify some of the questions and answers that have
16 been provided as to what the construed rule in Minnesota
17 means. And I refer the Court to page 53a, of the cert
18 petition appendix, where the Eighth Circuit stated the
19 definitive narrow construction of this rule which says
20 that the rule only prohibits candidates from --

21 QUESTION: Whereabouts on the page?

22 MR. GILBERT: The beginning of the second
23 paragraph, Your Honor. It only restricts judicial
24 candidates from publicly making known how they would
25 decide issues likely to come before them as judges. That

1 is the narrow construction of this Eighth Circuit opinion.
2 That is the construction that's being applied by the two
3 boards that I represent, and that is the construction that
4 has been incorporated in an authoritative order by the
5 Minnesota Supreme Court.

6 QUESTION: What about the example I posed to
7 your opponent? Someone says, "I think the Minnesota
8 Supreme Court's ruling on the Fourth Amendment, the state
9 Fourth Amendment being broader, is wrong, and I -- if you
10 will elect me as a judge, I would try to change that
11 around."

12 MR. GILBERT: Your Honor, this is where the
13 record is very clear as to what Mr. Wersal has done. And
14 in response to your question, the candidate could
15 criticize a prior decision of a judge, but could not say
16 as to a future case how that candidate would decide the
17 case. And that's precisely --

18 QUESTION: So let me put that to the test. If I
19 say, "I think the decision of the Supreme Court of
20 Minnesota two years ago saying that the Fourth Amendment
21 -- state Fourth Amendment protected more than the federal
22 Fourth Amendment is wrong," he could do that, but he
23 couldn't say, "If you elect me to the Supreme Court, I
24 would carry out my view."

25 MR. GILBERT: Well, that would be a future case.

1 And there's other considerations --

2 QUESTION: Well, he told me he couldn't even
3 say, "I think that opinion is wrong. And that is not my
4 position concerning the meaning of the Fourth
5 Amendment" --

6 MR. GILBERT: Your Honor --

7 QUESTION: -- "in Minnesota."

8 MR. GILBERT: That's not correct, Your Honor. I
9 refer you to the record in this case and what Mr. Wersal
10 has said in his literature. If you look at the first
11 volume of the Joint Appendix, pages 34 to 38, as well as
12 pages 86 to 91, they contain the actual statements that
13 Mr. Wersal made as part of his campaign.

14 QUESTION: What pages?

15 MR. GILBERT: 30 -- let's see -- 34 to 38, and
16 86 to 91. And look what he said. First of all, he talked
17 about his judicial philosophy. He has said that he can't
18 talk about his judicial philosophy. He did. He said,
19 "I'm a strict constructionist," and he criticized the
20 Minnesota Supreme Court for being a judicial activist.
21 But more --

22 QUESTION: What does that mean? I mean, that's
23 so fuzzy, that doesn't mean --

24 MR. GILBERT: Well, but --

25 QUESTION: -- that doesn't mean anything. It

1 doesn't say whether you're going adopt the incorporation
2 doctrine, whether you believe in substantive due process.
3 It is totally imprecise. It's just nothing but fluff.

4 MR. GILBERT: And candidates can say that. And
5 that's the point.

6 QUESTION: Can they say anything more than
7 fluff?

8 QUESTION: Can they say anything that has any
9 meaning?

10 MR. GILBERT: Absolutely. And what they can do
11 -- look at what Mr. Wersal --

12 QUESTION: But what about my example?

13 MR. GILBERT: Your example, Your Honor, the
14 candidate can, as Mr. Wersal did, criticize a prior
15 decision of the Court. And that's very clear from what
16 has happened in the Wersal case. What the candidate
17 cannot do is say that, "If I'm elected, I'm going to
18 overturn that decision."

19 QUESTION: Does that dichotomy make any sense at
20 all?

21 MR. GILBERT: Well, it does in the sense, Your
22 Honor, that there's different dynamics involved once a
23 judge is elected and has to overturn a decision that's
24 already precedent in the State of Minnesota.

25 QUESTION: So a candidate says, "This is the

1 worst decision that's come down since Dred Scott, it's a
2 plague on our people, it's an insult to the system, but
3 I'm not telling you how I'll vote."

4 (Laughter.)

5 MR. GILBERT: Your Honor, that's the point.

6 QUESTION: It's more than that. You assert that
7 that does not, within the language that the Supreme Court
8 has adopted, it does not imply how he will vote on that
9 issue at a future date. He says, "It's the worst case
10 we've ever done." That doesn't imply how he's going to
11 vote on it?

12 MR. GILBERT: Well, that might well imply
13 whether he's going to overturn it. But what the candidate
14 can say and what Mr. Wersal said -- if you look at the
15 criticism that he leveled at these decisions of the
16 Minnesota Supreme Court, he said just as you indicated,
17 Justice, that, "These decisions are" --

18 QUESTION: What are you reading? Where are you
19 reading from?

20 MR. GILBERT: If you look at pages -- page 36,
21 for example, of the -- this is of the Joint Appendix -- he
22 says, on abortion, "The Court ordered the State must use
23 welfare funds to pay for abortion despite state law to the
24 contrary. The dissenting judge remarked," et cetera.
25 This is under the topic of "Examples of Judicial

1 Activism." But then he goes into greater detail on page
2 38.

3 QUESTION: But is the statement at page 36 that
4 you read -- is that proscribable under the State's rule?

5 MR. GILBERT: No. And that's the point. What
6 has happened here, Your Honor, is that there was a
7 complaint filed against Mr. Wersal for all of this
8 campaign material. And the then-director of the Lawyers
9 Board, Marcia Johnson, in an opinion, on pages 20 and 21
10 of this appendix, said that the statements made by Mr.
11 Wersal are not proscribable. And that's even before the
12 rule is narrowed.

13 And if you look at page 21, the executive
14 director said specifically that Mr. Wersal can criticize
15 prior decisions of the Court. And that's consistent with
16 what the Board on Judicial Standards did in --

17 QUESTION: What do you say --

18 QUESTION: May he also, at the same time as they
19 criticized the decision, say, "I do not believe in stare
20 decisis"?

21 MR. GILBERT: Yes. He can't, because that
22 is --

23 QUESTION: Well, then isn't he saying how he's
24 going to rule on the case then?

25 MR. GILBERT: Well, Your Honor -- it might be,

1 Your Honor. People might be able to imply from it, but
2 it's still -- the distinction is --

3 QUESTION: Might be able to imply that I don't
4 believe in stare decisis and I think this case is wrong.

5 (Laughter.)

6 QUESTION: Pretty clear, I think.

7 MR. GILBERT: No, and I understand what you're
8 saying, Your Honor. The distinction that's made, if you
9 look at all the cases that have dealt with this issue, is
10 a distinction between past cases on one hand and then
11 pending and future cases on another.

12 QUESTION: As long as you're silent on your
13 views on stare decisis, that's a fine distinction. But if
14 you do reveal your views on stare decisis, that
15 distinction is meaningless.

16 MR. GILBERT: Perhaps. There could be other
17 issues that come up in terms of a case that would be a
18 vehicle to overturn particular decisions -- standing,
19 things of that kind.

20 QUESTION: So now you're saying there's a
21 distinction between issues and cases. And I'm saying
22 you're categorically stating your view about a particular
23 issue, as the Chief Justice's example states, and you also
24 categorically state, "I think stare decisis has no place
25 in constitutional adjudication." Can he do that?

1 MR. GILBERT: Your Honor, again, the -- no,
2 under the State's interpretation of the rule. And I
3 understand your point. It is a fine distinction. But
4 what the State is trying to do is protect the integrity of
5 the judiciary at that point. And to the extent --

6 QUESTION: This protects its integrity?

7 MR. GILBERT: Your Honor, we think so. And the
8 reason for that is that --

9 QUESTION: I mean, it's just a game. It's just
10 a dance, you know --

11 MR. GILBERT: Well, this is --

12 QUESTION: -- I don't say anything about stare
13 decisis and it's okay. If I say something about stare
14 decisis, it's not okay?

15 MR. GILBERT: Well, again, Your Honor, I
16 understand the hypothetical. This is a hypothetical that
17 is kind of on the fringe. I would agree with you. But at
18 the same time, most of the situations are going to be
19 clear, are going to be --

20 QUESTION: Well, it is such a problem to know
21 exactly what the provision covers now. It isn't clear to
22 me. And what we end up with at the end of the day is a
23 system where an incumbent judge can express views in
24 written opinions, and perhaps otherwise, as well, and yet
25 a candidate for that office is somehow restricted from

1 discussing the very same thing in the election campaign.
2 That's kind of an odd system, designed to what? Maintain
3 incumbent judges, or what?

4 MR. GILBERT: No, it's not, Your Honor. In
5 fact, that is not correct in terms of the effect of that
6 situation. Again, if you look at page 20 of the Joint
7 Appendix, what the executive director of the Lawyers Board
8 has said is that an incumbent judge can criticize the
9 prior decision of that sitting judge. So that the
10 challenger actually has greater opportunity than an
11 incumbent judge, because an incumbent judge has a record
12 of decisions.

13 QUESTION: Do you -- you misspoke, I think. You
14 meant the challenger --

15 QUESTION: You did --

16 MR. GILBERT: The challenger. I'm sorry.

17 QUESTION: -- the challenger, who is not a
18 judge, can criticize the specific decision of the judge
19 who wrote it.

20 MR. GILBERT: That's correct, Your Honor.

21 QUESTION: So they're equally free at the least
22 to discuss the specific past cases.

23 MR. GILBERT: At the least. And I would submit
24 that the challenger is in a better situation because of
25 the --

1 QUESTION: All right. Can I ask you this
2 question --

3 MR. GILBERT: Yes.

4 QUESTION: -- because I understand that -- I
5 have two questions, really. One is the line that's being
6 -- that you're trying to draw, everyone would concede is a
7 very difficult one to draw, but it is the line that I
8 tried to draw.

9 MR. GILBERT: Yes.

10 QUESTION: Now, what would happen if, instead of
11 my being in the Senate, I had been in an election
12 campaign, and I was trying to draw this very line between
13 commitments to future cases, specific ones, and general
14 judicial philosophy. And suppose my opponent, after,
15 said, "Breyer made a mistake. He didn't get it right,"
16 but I was in good faith. What could happen, or would
17 likely happen, to me under this rule?

18 MR. GILBERT: As a -- I'm sorry, as a sitting
19 judge, Your Honor?

20 QUESTION: Well, I then -- suppose I won. Fine.
21 I've won the election. My opponent -- what I'm trying to
22 understand is what are the consequences? It is, after
23 all, an ethical rule, and ethical rules are often blurry.

24 MR. GILBERT: Yes.

25 QUESTION: And I want to know what would likely

1 happen to a person who makes a mistake in drawing this
2 very fine line, assuming that it's in good faith.

3 MR. GILBERT: Your Honor, the Board on Judicial
4 Standards or the Lawyers Board would have jurisdiction
5 with respect to a violation which sounds like a technical
6 violation, as you describe it, and could impose some
7 discipline, but I would suspect that discipline would be
8 very minute, if at all --

9 QUESTION: Could a state --

10 MR. GILBERT: -- under those circumstances.

11 QUESTION: -- make a violation of the provisions
12 you described a criminal offense?

13 MR. GILBERT: No, Your Honor. These are not
14 criminal statues.

15 QUESTION: But could a state do it under the
16 First Amendment? Is there any authority you have for the
17 proposition, that can -- a state can impose a civil
18 sanction, but not a criminal sanction?

19 MR. GILBERT: I'm not aware of any authority
20 that would allow a criminal sanction for such a thing.

21 QUESTION: Can I ask you one other question?

22 QUESTION: That's not my question. Is there any
23 authority that a state, under the First Amendment, is free
24 to impose a civil sanction but not a criminal sanction on
25 particular speech?

1 MR. GILBERT: I'm not aware of authority to that
2 effect either, no.

3 QUESTION: This is a technical question, but the
4 sentence you started out reading from the Eighth Circuit's
5 opinion is not identical to the ABA canon. And obviously
6 if this rule differs from the ABA canon and is stricter,
7 one could say there's a less restrictive alternative,
8 namely the ABA canon. And so I'm quite concerned about
9 how to deal with that problem. Do I assume that, in fact,
10 Minnesota does mean it's indistinguishable from ABA canon,
11 which is what the ABA says? Or what your opponent says?
12 How do I deal with that?

13 MR. GILBERT: Your Honor, our position is, just
14 as the ABA indicated, that our rule is the functional
15 equivalent of a commitment clause.

16 QUESTION: The Minnesota Supreme Court turned
17 down the ABA rule, the ABA rule -- we're talking --
18 they're both ABA rules. Minnesota now has on its books
19 the 1972 rule. The 1990 rule is the one that you said is
20 the functional equivalent of the current rule. And yet
21 the Minnesota Supreme Court considered and turned down
22 that rule. So that's one of the aspects of this case that
23 makes it very fuzzy. The court that turned it down now
24 says, "We agree with the Eighth Circuit." And you're
25 telling us that the Eighth Circuit has adopted,

1 essentially, the ABA's current rule.

2 MR. GILBERT: Yes, Your Honor, and that is the
3 case, and you are right. Back in 1995, there was
4 discussion of adoption of the commit clause by the
5 Minnesota Supreme Court. It did not occur at that time.
6 There has been a lot that has evolved over the last seven
7 years, Your Honor, and the Minnesota Supreme Court has
8 made the decision in its January 29th, 2002, order that
9 this construction by the Eighth Circuit is the
10 construction that they are going to place on their clause.

11 QUESTION: Whatever that is.

12 MR. GILBERT: Well, this construction, Your
13 Honor, is, for all practical purposes, identical to the
14 commitment clause. And --

15 QUESTION: Mr. Gilbert, may I ask --

16 MR. GILBERT: Yes.

17 QUESTION: -- a question based on what you said
18 about stare decisis? You say -- have said consistently
19 you can discuss your judicial philosophy. Well, why
20 wouldn't one's position on stare decisis fall under
21 judicial philosophy?

22 MR. GILBERT: I think it would, Your Honor.

23 QUESTION: So that -- so you're changing back
24 then, because you said a while ago that stare decisis --
25 if you said, "I think that decision about the Fourth

1 Amendment was wrong, and I don't believe in stare
2 decisis," you said you couldn't put those two together.

3 MR. GILBERT: Your Honor, you can put them
4 together. I think the question was, could someone then
5 conclude from that what the ramifications would be if that
6 particular candidate came to the Supreme Court, for
7 example, on what the candidate would do with respect to
8 that decision -- whether the candidate would overturn or
9 not.

10 QUESTION: And your answer was it would imply
11 how he's going to vote and, therefore, would not be --

12 MR. GILBERT: Again --

13 QUESTION: -- would not be acceptable, right?

14 MR. GILBERT: Yes, Your Honor, with the
15 distinction being to protect the integrity of the
16 judiciary.

17 QUESTION: Well, let me ask about that. You
18 know, in evaluating whether a state has demonstrated the
19 kind of significant interest necessary to abridge speech,
20 it seems to me we have to look at the entirety of the
21 state law to see what interest it's pursuing.

22 I, frankly, am absolutely befuddled by the fact
23 that Minnesota wants its judges elected -- that's its
24 constitutional provision -- and then enacts statutory
25 provisions that are intended to prevent the electorate

1 from knowing, even by implication, how these candidates
2 are going to behave when they get on the bench. It seems
3 to me a total contradiction. And, indeed, it looks to me
4 like a legislative attempt to simply repeal Minnesota's
5 constitutional provision providing for the election of
6 judges, which is a neat and easy way to get rid of it if
7 you can't do it by plebiscite.

8 Why does it make any sense to vote for a judge
9 in an election, a judge who is not able, even by
10 implication, to tell the electorate what kind of a judge
11 he would be?

12 MR. GILBERT: Well, but, Your Honor, that's the
13 fallacy in that statement, is that a candidate can tell
14 the electorate what kind of candidate they are. The only
15 thing that the candidate cannot say -- it's a very limited
16 restriction -- and that is, how I am going to decide a
17 future case.

18 QUESTION: Not a particular -- well, no, not
19 just a future case, a future issue -- any, not a
20 particular case, but any issue --

21 MR. GILBERT: And --

22 QUESTION: -- how I will vote on the Fourth
23 Amendment situation, how I will vote on the incorporation
24 doctrine. I can understand your saying, he shall not
25 commit himself, "I promise to vote this way." No judge

1 should do that. He should be able to be persuaded that
2 he's been wrong. But to say that my current view is that
3 the Fourth Amendment should be just like the federal
4 Fourth Amendment, and stare decisis in constitutional
5 matters is not a doctrine that I think is very strong --
6 it seems to me you ought to be able to say that.

7 MR. GILBERT: And they can say that. I think
8 the difference of opinion we have here is whether they can
9 go the extra step and just say, "And I would try to
10 overturn the decision if I'm elected."

11 QUESTION: Well, if that --

12 MR. GILBERT: I have to --

13 QUESTION: -- if that indicates a
14 disqualification or a lack of temperament for the bench,
15 the voters can decide that. The bar association and the
16 judges can come out and say, "We have a candidate running
17 who doesn't have the right judicial temperament," and the
18 voters decide. That's the way elections work.

19 MR. GILBERT: They can do that, but I submit to
20 you, what happens if that judge wins? What happens if
21 that judge wins and the litigants come before that judge
22 who has prejudged that case?

23 QUESTION: Well, I suppose the people have said
24 what kind of judges they want.

25 MR. GILBERT: Oh, and it's all of a sudden

1 majority opinion?

2 QUESTION: Why is that any worse than litigants
3 who come before a judge who's already sitting and who has
4 said in a prior opinion that he thinks the Fourth
5 Amendment in Minnesota should be interpreted the same way
6 the federal Fourth Amendment is? Why --

7 MR. GILBERT: Because in --

8 QUESTION: -- is that any different?

9 MR. GILBERT: Because in a prior opinion, due
10 process was accorded, because the judge actually heard the
11 argument of the litigants, heard the facts and the
12 applicable law.

13 QUESTION: You mean a judge can't have an
14 opinion without hearing from all sides and going in briefs
15 and so forth?

16 MR. GILBERT: Absolutely.

17 QUESTION: Well, what if -- even if he gives a
18 speech, does he have to first have this sort of vetting?

19 MR. GILBERT: Not at all, Your Honor. The only
20 -- again, the limited restriction here is that the -- a
21 judge cannot -- I'm sorry -- a judicial candidate cannot
22 prejudge a future case, cannot say, "I think this statute
23 over here is unconstitutional," or, "I think, in consumer
24 fraud cases, that anybody who wins is entitled to punitive
25 damages."

1 QUESTION: So you don't trust the electorate in
2 Minnesota to decide whether a judge has a judicial
3 temperament. You wish us to depart from the usual
4 philosophy --

5 MR. GILBERT: Again --

6 QUESTION: -- that we do not allow the State to
7 presume that the public is better off not having complete
8 information.

9 MR. GILBERT: Well --

10 QUESTION: Maybe we should know about this
11 judge's temperament. And if he spouts off on all sorts of
12 issues, we say, this is not the kind of judge we want.

13 MR. GILBERT: Your Honor, again, this is a
14 balance that's being struck. There's competing interests
15 here. There's the First Amendment interest that we're all
16 familiar with. There's the due process interest of
17 individual litigants. There's the compelling governmental
18 interests that the State has in ensuring the integrity of
19 the judiciary, both in terms of the actual integrity and
20 the perception of it. And that's why this limited
21 restriction is appropriate.

22 QUESTION: Maybe you shouldn't have judicial
23 elections if the last is a significant State interest.

24 MR. GILBERT: Well, Your Honor, that's --

25 QUESTION: To the degree that you're making it a

1 significant State interest here. See, I just question
2 whether it is a significant State interest, because you
3 have a constitution that says, "We're going to have
4 judicial elections." Now, that may be a very bad idea,
5 but as long as that's in your constitution, I find it hard
6 to believe that it is a significant State interest of
7 Minnesota to prevent elections from being informed.

8 MR. GILBERT: Well, again, Your Honor, we're
9 trying to weigh the different interests. I am sure you
10 wouldn't suggest that the State doesn't have a compelling
11 interest in the integrity of the judiciary, and that is a
12 competing interest that is being weighed here, and that
13 results in the commitment clause that the ABA has adopted
14 and the parallel provision that has been construed
15 narrowly by the Eighth Circuit, which, again, only forbids
16 or prohibits a judge saying, "I'm going to decide this
17 particular issue this way in the future."

18 QUESTION: So you're saying the public doesn't
19 know enough in order to determine whether a judge has the
20 requisite qualifications for office.

21 MR. GILBERT: Your Honor, I'm not saying that
22 the public knows or doesn't know. The concern is what
23 happens if that candidate is elected, and then you or any
24 other litigant comes before that candidate, who is now a
25 judge, and tries to litigate the issue that the judge has

1 already prejudged.

2 QUESTION: Well --

3 MR. GILBERT: How fair is that?

4 QUESTION: My goodness, we -- I think we have
5 -- I will say present company excluded -- I know we have
6 had judges on this Court who have answered questions about
7 particular legal issues to the Senate confirmation
8 hearing. Are you saying that those judges were
9 disqualified from sitting in cases in which that issue
10 would later come up?

11 MR. GILBERT: No, Your Honor, I'm not. And
12 actually, I'm surprised to hear that.

13 QUESTION: Is it -- oh. It's --

14 MR. GILBERT: I am surprised to hear that, in
15 light of the testimony that is in our brief and other
16 briefs --

17 QUESTION: You should go before the Senate --
18 (Laughter.)

19 MR. GILBERT: But, Your Honor --

20 QUESTION: I actually found that when they
21 approached a particular case about how you were going to
22 decide in the future, both the senators -- in my
23 experience, since it only concerns me -- would not press
24 the issue of how you would decide a particular case.

25 QUESTION: I'm not talking about --

1 QUESTION: And that's why -- a particular case.

2 QUESTION: I was -- my reference was to a
3 particular issue. A particular issue.

4 MR. GILBERT: Your Honor, cases are made up of
5 issues. And sometimes a case only has one issue. Issues
6 are important in and of themselves.

7 QUESTION: Mr. Gilbert, do you think we should
8 draw any distinction, or whether it would be reasonable
9 for us to draw any distinction, between the application of
10 the rule to the candidates themselves and the application
11 of the rule to all of these ancillary individuals around
12 them -- their associates, their families? Let's assume
13 that we say that the rule passes muster with respect to
14 the candidate. What's the justification for muzzling the
15 candidate's spouse? I mean, I know, in fact, what --

16 MR. GILBERT: Yeah.

17 QUESTION: -- it is, because we figure, you
18 know, that's how you get the message out. But do we have
19 a more difficult First Amendment hurdle?

20 MR. GILBERT: Your Honor, I don't think so, not
21 at all. I think it's really a misnomer to talk about
22 muzzling, which is what the petitioners have indicated.

23 QUESTION: Let's say "limiting."

24 MR. GILBERT: Well, it's not even that. What
25 the rule does is ask the judicial candidate to encourage

1 close family members not to effectively circumvent the
2 rule by announcing views that they might be aware of that
3 the judicial candidate would support.

4 QUESTION: But if the family member says, "Well,
5 I'm going to tell anyway."

6 MR. GILBERT: "I'm going to tell anyway" --
7 there's no penalty.

8 QUESTION: But the --

9 MR. GILBERT: There's no --

10 QUESTION: But there could be. Do I understand
11 that there would be an inquiry in that event as to whether
12 the candidate had, indeed, encouraged the family member to
13 be quiet?

14 MR. GILBERT: Your Honor, the standard is
15 "knowingly permit." So, in other words, some -- the
16 judicial candidate would actually have to be the actor
17 behind those actions.

18 QUESTION: All right, but I want to know, in
19 practical terms, what happens. The spouse makes a
20 statement -- any one of the statements that have been
21 mentioned here, except as suggesting prejudgment of a
22 case. The candidate stays mute. I presume that a
23 complaint would be filed against the candidate, and I
24 presume the candidate would have to answer to the
25 commission as to whether the candidate had, indeed,

1 knowingly encouraged this.

2 MR. GILBERT: Your Honor, I'd assume a complaint
3 would not be filed under those circumstances.

4 QUESTION: Why not? I mean --

5 MR. GILBERT: Well, I don't --

6 QUESTION: Are your opponents forgiving in your
7 state?

8 MR. GILBERT: Pardon me?

9 (Laughter.)

10 QUESTION: I mean, are opponents just forgiving
11 of their opponents in your state?

12 MR. GILBERT: Well, Your Honor, it's a very
13 difficult standard to satisfy, "knowingly permit."

14 QUESTION: Well, maybe it's difficult to
15 satisfy. I'm just trying to get a sense of what the
16 burden on the individuals involved is.

17 MR. GILBERT: Well --

18 QUESTION: And I assume that there could be a
19 complaint, simply based on the emphatic statement of the
20 spouse. And my question is, does the candidate have to
21 show, in that event, that he did not knowingly encourage,
22 or does the State have to show -- or the prosecutor or
23 whoever it is -- that he knowingly did encourage. What's
24 the drill?

25 MR. GILBERT: Yes, of course, the burden's on

1 the State. And not only is it on the State, but the State
2 would have to show by clear and convincing evidence.

3 QUESTION: Okay.

4 MR. GILBERT: And the --

5 QUESTION: But the candidate would have to
6 answer.

7 MR. GILBERT: The -- possibly. The Lawyers
8 Board --

9 QUESTION: Why not?

10 MR. GILBERT: -- sometimes doesn't investigate
11 complaints where they don't have sufficient evidence to
12 think there's even a basis for the complaint.

13 QUESTION: Well, would they have sufficient
14 evidence in the event that a spouse made an emphatic
15 statement saying, "His view is," or "Her view is"?

16 MR. GILBERT: Yeah, it's conceivable, Your
17 Honor, but, again --

18 QUESTION: Counsel, is that -- is that part of
19 the canon part of the question in this case? I know it's
20 part of the canon. I didn't understand that it was
21 presented to us in the petition. What's your view?

22 MR. GILBERT: Your Honor, it's kind of oblique.
23 The focus is on Mr. Wersal's comments. And then there are
24 other comments. And I think one of the justices mentioned
25 a vagueness challenge. To the extent there's any

1 vagueness challenge at all that was discussed at the
2 Eighth Circuit and is part of the petition, it deals with
3 these third parties and the phrase "knowingly permit." And
4 the issue --

5 QUESTION: Because we didn't have the
6 interpretation that was later adopted --

7 MR. GILBERT: Right.

8 QUESTION: -- by the Eighth Circuit. What
9 Counsel says is that the new vagueness issues that he's
10 raising are a consequence of the opinion which your
11 Supreme Court has adopted, the Eighth Circuit's opinion.

12 MR. GILBERT: Well, we -- Your Honor, you're
13 correct. However, the Eighth Circuit opinion is the
14 opinion that's being appealed here. And what the
15 petitioners have done is, they have refused to acknowledge
16 that narrow construction. And the fact of the matter is
17 that the Minnesota Supreme Court has now authoritatively
18 adopted that as a state court construction. But the fact
19 of the matter is, as well, that the Eighth Circuit already
20 opined on what the standard is, and that issue was not
21 raised by them, in terms of vagueness. It simply was not
22 raised.

23 QUESTION: Was not raised where?

24 MR. GILBERT: In the petition.

25 QUESTION: In the petition. The petition is

1 whether it's, it unconstitutionally impinges on the
2 freedom of speech. And one of the principles of freedom
3 of speech is that you cannot -- you cannot chill speech by
4 having a prohibition that is not clear. I don't think
5 that this is a separate issue from the First Amendment
6 issue at all.

7 MR. GILBERT: Well, they have not --

8 QUESTION: We have lots of cases like that,
9 about chilling speech because it's not clear what the
10 coverage of the prohibition is.

11 MR. GILBERT: Your Honor, in their petition,
12 though, they have not made those kinds of arguments
13 specifically as to --

14 QUESTION: They certainly did in the reply
15 brief.

16 MR. GILBERT: They have in the reply brief, but
17 not in the petition, which was the question that was asked
18 previously. And as to vagueness, I should say that this
19 court has been really clear in the *Broadrick v. Oklahoma*
20 case, for example, and the *Colton v. Kentucky* case, that
21 sometimes rules and statutes -- and, frankly, all the
22 time, rules and statutes are not conducive to mathematical
23 precision, that there are going to be, as the Court has
24 said, germs of uncertainty in how these laws are applied.
25 And these laws are going to be applied based upon facts

1 and circumstances. And in this particular case, I think
2 it's really significant that we don't have any facts and
3 circumstances as to what Mr. Wersal wants to say.

4 QUESTION: Well, I think you could set up a
5 system where you get advisory opinions, but I don't know
6 that we've ever allowed that to be done in the First
7 Amendment area.

8 MR. GILBERT: Oh --

9 QUESTION: "Please may I say this?" You know,
10 you submit what you want to say, and somebody tells you,
11 "Yeah, okay. You can say that." That's certainly
12 contrary to our approach to the First Amendment.

13 MR. GILBERT: Well, Your Honor, I don't -- Your
14 Honor, first of all, I'm not a proponent of what -- of
15 that. But in Letter Carriers, that was a critical
16 consideration in upholding the Hatch Act against
17 constitutional attack, because there was the ability of
18 people who had questions about the application of the
19 statute to actually go to an advisory board and get an
20 opinion.

21 Similarly here, both of the boards that are
22 parties to this case do provide advisory opinions, and
23 they provide them on short notice, as well. So there is
24 that mechanism. I'm not suggesting it's a substitute, but
25 it is a consideration in terms of if there is a close

1 question on an issue and someone wants some assurance as
2 to how that particular situation would be interpreted,
3 they can go to the boards and ask that question.

4 QUESTION: Well, how soon can you get something
5 from the board? If somebody wants to give a speech in a
6 political campaign, I assume you can't get a 12-hour
7 ruling from the board.

8 MR. GILBERT: Well, they actually do advisory
9 opinions over the phone, Your Honor, on very short order,
10 and they could do it in a matter of hours or days,
11 depending upon what the needs are.

12 QUESTION: Mr. Gilbert, you brought out that
13 this is not just a question of the candidate informing the
14 voter, that behind all of this is a litigant who's going
15 to be in a future case. How does it work in Minnesota?
16 Suppose, to take an example that Mr. Bopp provided in his
17 brief, the judge -- or the candidate is campaigning "Tough
18 on Drunk Driving." And then I'm a drunk driver, and I
19 come before this judge, now elected, and I say, I want him
20 to recuse, he said he's tough on drunk driving.

21 MR. GILBERT: Are you asking in the --

22 QUESTION: Would there be, under Minnesota law,
23 a grounds to say, "I don't want that judge, because he's
24 announced in the election that he's tough on drunk
25 driving"?

1 MR. GILBERT: No, I don't think so, Your Honor,
2 not under those circumstances.

3 One distinction I would like to make here -- oh,
4 I'm sorry, Your Honor.

5 QUESTION: Thank you, Mr. Gilbert. Mr. Bopp,
6 you have three minutes remaining.

7 REBUTTAL ARGUMENT OF JAMES BOPP, JR.,
8 ON BEHALF OF THE PETITIONERS

9 MR. BOPP: Your Honor, I don't think this is a
10 matter of mathematical precision. The State brief,
11 itself, states two different formulations of the rule.
12 They say, quote, "It is clear that the clause applies to
13 statements about how they would decide, quote, issues, end
14 of quote, on pages 1 and 47. And then they say it is,
15 quote, "clear," end of quote, that the announced clause
16 applies to statements about cases. And that is on pages
17 12 and 37. The rule is not even clear in terms of the
18 State's own formulation of its scope.

19 Secondly, as the Joint Appendix indicates on
20 pages 111 through 123, announcing your views also includes
21 simply answering questions on radio interviews or after
22 speeches. It is hardly a remedy for a candidate to call
23 up the board or the office for an oral opinion which is
24 not binding on them about whether or not they can answer a
25 question on the radio.

1 And, finally, it is undisputed that the people
2 of Minnesota want an impartial judiciary. Governor Arnie
3 Carlson, at Joint Appendix page 247, said -- who's a
4 State's witness -- that people do not want judges who are
5 pre-committed. Thus, candidates who would make excessive
6 statements, who would appear to be partial, risk defeat at
7 the polls in Minnesota. Thus, the people can be trusted
8 to make the decisions that they, themselves, have
9 conferred upon themselves, as long as they have the
10 information they need to make that choice. The First
11 Amendment guarantees that they should receive that
12 information, which the Announce Clause both prohibits and
13 chills. It is, therefore, unconstitutional.

14 QUESTION: Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bopp.
16 The case is submitted.

17 (Whereupon, at 11:07 a.m., the case in the
18 above-entitled matter was submitted.)

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<p>ABA 4:14,16,17,20,23,24,25 5:3,12 5:14 20:8 21:14,17 22:14,23 38:5,6 38:8,10,11,14,17,17,18 45:13 ABA's 12:25 19:14 23:4 39:1 ability 14:9 53:17 able 33:1,3 41:9 42:1,6 abortion 31:22,23 about 4:20,21 6:2 10:21,21,24 16:24 16:25 17:9,10,12,16,20 19:23 24:19 25:20,21 28:6 29:17,18 30:12 33:22 34:12,13 38:8 39:18,25 40:17 44:10 46:6,21,25 47:21 52:9 53:18 55:13 55:16,24 above-entitled 1:12 56:18 abridge 40:19 absolutely 30:10 40:22 43:16 accept 18:11 acceptable 40:13 access 3:12 accordance 16:9 accorded 43:10 according 3:22 25:20 account 16:5 acknowledge 51:15 acquitted 12:10 Act 53:16 actions 48:17 Activism 32:1 activist 29:20 actor 48:16 actual 29:12 44:19 actually 35:10 43:10 46:12,20 48:16 53:19 54:8 added 6:14 adding 6:12 adjudication 33:25 adopt 16:15 30:1 adopted 5:23 31:8 38:25 45:13 51:6 51:11,18 adoption 39:4 advance 9:5 19:9 advice 13:5 advisory 13:1 53:5,19,22 54:8 advocated 6:15 after 8:19,24 9:9 13:3,20 36:14,22 55:21 again 15:18 24:2 34:1,15 35:6 40:12 43:20 44:5,13 45:8,15 50:17 against 24:18 26:9 32:7 48:23 53:16 ago 16:12 28:20 39:24 agree 7:15,19 8:17 19:25 20:2 34:17 38:24 al 1:4,7 3:5 ALAN 1:18 2:6 27:11 allege 6:23</p>	<p>allow 37:20 44:6 allowed 15:16 16:18 25:9 53:6 allows 3:23 11:25 along 24:13 already 3:18 30:24 43:3 46:1 51:19 alternative 38:7 Amendment 6:23,25 7:2,3,6 9:10 11:23 12:6,7,11,12 15:12 16:15,16 17:6,8,23 18:9,21 19:11 23:10 25:2 28:8,9,20,21,22 29:5 37:16,23 40:1 41:23 42:3,4 43:5,6 44:15 47:19 52:5 53:7,12 56:11 amounts 20:5 ancillary 47:11 announce 3:14,18,21 4:7,8,12 5:6,23 6:5 7:10 12:14,15 16:21 18:15 19:7 21:15,18,20,24 56:12 announced 12:6 54:24 55:15 announces 16:7 announcing 6:3 9:14 24:10 48:2 55:20 another 24:2 33:11 answer 9:19 13:6 18:3 25:13 40:10 48:24 50:6 55:24 answered 46:6 answering 55:21 answers 27:15 anybody 43:24 anything 13:14 19:22 29:25 30:6,8 34:12 anyway 48:5,6 apologize 4:24 13:24 appealed 51:14 appear 4:19 5:16 6:4 17:1 19:23 20:12 21:3,22 22:14,15,21 23:1 56:6 APPEARANCES 1:15 appears 5:1,8 appendix 8:2,5 27:18 29:11 31:21 32:10 35:7 55:19 56:3 applicable 43:12 application 9:11 22:4 26:23 47:9,10 53:18 applied 8:19 28:2 52:24,25 applies 7:10 8:6 9:11 14:14 55:12,16 apply 8:22 14:19 15:4 appointed 11:4 approach 53:12 approached 46:21 appropriate 14:21,23 26:12 44:21 appropriated 18:20 area 53:7 arguing 6:5 argument 1:13 2:2,5,8 3:3,6 6:8,10 18:10 21:16 26:19 27:11 43:11 55:7 arguments 20:9 52:12 arises 20:13 Arnie 56:2</p>	<p>around 28:11 47:11 article 26:14 asked 18:7 52:17 asking 54:21 aspect 4:15 aspects 38:22 assert 31:6 assigned 14:16 associates 47:12 association 21:4,21 42:15 Association's 19:13 assume 10:12 13:6 22:14,15 24:23 38:9 47:12 49:2,18 54:6 assumes 14:7 assuming 22:16 37:2 assumption 22:13 assurance 54:1 attack 12:20 53:17 attempt 41:4 August 9:9 authoritative 8:13 21:6 28:4 authoritatively 51:17 authorities 12:1 authority 37:16,19,23 38:1 aware 37:19 38:1 48:2 away 19:22 23:1 a.m 1:14 3:2 56:17</p>
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