SUPREME COURT OF THE UNITED STATES

No. 01–521

REPUBLICAN PARTY OF MINNESOTA, ET AL., PETITIONERS *v.* SUZANNE WHITE, CHAIRPERSON, MINNESOTA BOARD OF JUDICIAL STANDARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 27, 2002]

JUSTICE KENNEDY, concurring.

I agree with the Court that Minnesota's prohibition on judicial candidates' announcing their legal views is an unconstitutional abridgment of the freedom of speech. There is authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases, see, *e.g.*, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105 (1991), and the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test. So I join its opinion.

I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argu-

ment that the statute should be upheld." *Id.*, at 124 (KENNEDY, J., concurring in judgment). The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Here, Minnesota has sought to justify its speech restriction as one necessary to maintain the integrity of its judiciary. Nothing in the Court's opinion should be read to cast doubt on the vital importance of this state interest. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Articulated standards of judicial conduct may advance this interest. See Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059 (1996). To comprehend, then to codify, the essence of judicial integrity is a hard task, however. "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921). Much the same can be said of explicit standards to ensure judicial integrity. To strive for judicial integrity is the work of a lifetime. That should not dissuade the profession. The difficulty of the undertaking does not mean we should refrain from the attempt. 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. See, *e.g.*, Administrative Office of U. S. Courts, Code of Judicial Conduct for United States Judges (1999). Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.

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. Deciding the relevance of candidate speech is the right of the voters, not the State. See *Brown* v. *Hartlage,* 456 U. S. 45, 60 (1982). The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech. See Sedition Act of 1798, ch. 74, 1 Stat. 596. Cooler heads have always recognized, however, that these measures abridge the freedom of speech—not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are " 'expressly and positively forbidden by' " the First Amendment. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 274 (1964) (quoting the Virginia Resolutions of 1798). The State cannot opt for an elected judiciary and then assert that its democracy, in order to

work as desired, compels the abridgment of speech.

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the federal judiciary. In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor." *Bridges* v. *California,* 314 U. S. 252, 273 (1941).

These considerations serve but to reinforce the conclusion that Minnesota's regulatory scheme is flawed. By abridging

speech based on its content, Minnesota impeaches its own system of free and open elections. The State may not regulate the content of candidate speech merely because the speakers are candidates. This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563, 568 (1968), and *Connick* v. *Myers,* 461 U. S. 138 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.

Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights. His speech may not be controlled or abridged in this manner. Even the undoubted interest of the State in the excellence of its judiciary does not allow it to restrain candidate speech by reason of its content. Minnesota's attempt to regulate campaign speech is impermissible.