

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

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REPUBLICAN PARTY OF MINNESOTA, an association; INDIAN ASIAN AMERICAN REPUBLICANS OF MINNESOTA, an association; REPUBLICAN SENIORS, an association, YOUNG REPUBLICAN LEAGUE OF MINNESOTA, a Minnesota nonprofit corporation, MINNESOTA COLLEGE REPUBLICANS, an association; GREGORY F. WERSAL, individually; CHERYL L. WERSAL, individually; MARK E. WERSAL, individually; CORWIN C. HULBERI, individually; CAMPAIGN FOR JUSTICE, an association; MINNESOTA AFRICAN AMERICAN REPUBLICAN COUNCIL, an association; MUSLIM REPUBLICANS, an association; MICHAEL MAXIM, individually; and KEVIN J. KOLOSKY, individually,

Case No 98-831(MTD)

Plaintiffs,

vs.

***SECOND AMENDED COMPLAINT***

VERNA KELLY, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; CHARLES E. LUNDBERG, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and EDWARD J. CLEARY, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor,

Defendants

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For their Second Amended Complaint, the above-named Plaintiffs state and allege as follows:

## JURISDICTION AND VENUE

1 This action arises under the Constitution of the United States, Amendments I and XIV, and 42 U.S.C. Sec. 1983 and 1988 as hereinafter more fully appears. Jurisdiction is conferred on this court by 28 U.S.C. Sec. 1331, 1343 and 2201. Venue is proper in the District of Minnesota, where the defendants reside.

## INTRODUCTION

2 The purpose of this action is to obtain declaratory and injunctive relief, declaring unconstitutional, as a violation of the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 3 and Article I, Sections 2 and 7 of the Minnesota Constitution, Canon 5 of the Minnesota Code of Judicial Conduct (as amended by the Minnesota Supreme Court on December 23, 1997) which unconstitutionally prohibits or requires the following actions of judicial candidates and others:

- “[A] candidate for election to judicial office shall not . . . attend political gatherings” or “speak to . . . political organization gatherings, on his or her own behalf.” Code, Canon 5 A (1), B (1).
- “A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues.” Code, Canon 5 A (3).
- “A candidate for election to judicial office shall not . . . identify themselves as members of a political organization, except as necessary to vote in an election.” Code, Canon 5 A (1).
- “A candidate for election to judicial office shall not . . . seek, accept or use endorsements from a political organization. A candidate may . . . establish committees to conduct campaigns for the candidate . . . Such committees . . . shall not seek, accept or use political organization endorsements.” Code, Canon 5 A (1), B (2).
- [In reference to the above Code provisions only:] “A candidate for judicial office . . . (a) . . . shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; (b) shall prohibit employees who serve at the pleasure of the candidate, and shall

discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon; (c) . . . shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon " Code, Canon 5 A (3)

- "A judicial candidate shall not personally solicit . . . campaign contributions " Code, Canon 5 B(2)

### PARTIES

- 3 The Plaintiff Republican Party of Minnesota ("RPM") is an association residing in the State of Minnesota. The Preamble to its Constitution states:

The Republican Party of Minnesota welcomes into its party all Minnesotans who are concerned with implementation of honest, efficient, responsive government. The party believes in these principles as stated in the Declaration of Independence: that all men are created equal; that they are endowed by their creator with inalienable rights; that among these rights are life, liberty and the pursuit of happiness. Therefore, it is the party committed to equal representation and opportunity for all and preservation of the rights of each individual. It is the purpose of this constitution to ensure that the party provides equal opportunity for full participation in our civic life for all Minnesota residents who believe in these principles regardless of age, race, sex, religion, or social or economic status.

One of the objectives of the RPM is to organize at all levels to elect Republicans to public office. The office of the RPM is located at 480 Cedar Street, Suite 560, St. Paul MN 55101. The Chairman of the RPM is William A. Cooper. The Executive Director of the RPM is Tony Sutton. The RPM files this Complaint on behalf of the association and each of its members.

- 4 The RPM -- to ensure that it provides an equal opportunity for full participation to all regardless of age, race, sex, religion, or social or economic status -- has affiliated itself with other associations of Republicans. These affiliations were recertified at the State Central Committee meeting of the RPM held in December of 1997. These associations include Plaintiffs Indian Asian American Republicans of Minnesota, Minnesota African

American Republican Council, Muslim Republicans, Republican Seniors, Young Republican League of Minnesota, and Minnesota College Republicans (collectively, "Affiliated Associations").

5 Plaintiff Gregory F. Wersal ("Mr. Wersal") is a 42 year-old lawyer licensed to practice in the State of Minnesota and residing in the State of Minnesota. Mr. Wersal was admitted to practice before Minnesota state courts in 1980. Mr. Wersal was an unsuccessful candidate for the office of Associate Justice of the Minnesota Supreme Court in 1996. Mr. Wersal is a candidate for the office of Associate Justice of the Minnesota Supreme Court in the primary and general elections of 1998. Whether successful or not, Mr. Wersal will be a candidate for judicial office in future elections.

6 Plaintiff Cheryl L. Wersal is the wife of Mr. Wersal and resides in Minnesota. Cheryl Wersal has participated in Mr. Wersal's campaigns for Associate Justice in 1996 and 1998 as a representative and advocate. Cheryl Wersal is a participating member of the RPM.

7 Plaintiff Mark E. Wersal is the brother of Mr. Wersal and resides in Minnesota. Mark Wersal has participated in Mr. Wersal's campaigns for Associate Justice in 1996 and 1998 as a representative and advocate. Mark Wersal is a member of the RPM.

8 Plaintiff Corwin C. Hulbert is not related to Mr. Wersal and does not know Mr. Wersal. Corwin Hulbert is not a representative of Mr. Wersal or his campaign. Corwin Hulbert is not a member of Mr. Wersal's campaign committee Campaign for Justice and does not intend to become a member of such committee. Nonetheless, Corwin Hulbert is a nonagent advocate for Mr. Wersal and his endorsement by the Republican Party and the Affiliated Associations. Corwin Hulbert is a participating member of the RPM.

9. Plaintiff Campaign for Justice ("CFJ") is a campaign committee formed in 1996 to support the election of Mr. Wersal to the office of Associate Justice of the Minnesota Supreme Court. The mailing address of CFJ is P.O. Box 26816, Minneapolis MN 55426. The chairman of CFJ is Mark Wersal. CFJ files this Complaint on behalf of the association and each of its members
10. Plaintiff Michael Maxim, a member of RPM, is not related to Mr. Wersal and does know Mr. Wersal. Michael Maxim is not a representative of Mr. Wersal or his campaign. Michael Maxim is not a member of Mr. Wersal's campaign committee Campaign for Justice and does not intend to become a member of such committee. Nonetheless, Michael Maxim was a nonagent advocate for Mr. Wersal and his endorsement by the Republican Party at the June 18-June 20, 1998 State Convention. Michael Maxim made the motion on June 20, 1998 for the Republican Party to endorse a candidate for Associate Justice of the Minnesota Supreme Court. After much debate, the motion failed narrowly.
11. Plaintiff Kevin J. Kolosky ["Mr. Kolosky"] is a candidate for judicial office in the State of Minnesota for the general elections to be held in November of 1998. He properly filed for office of District Judge, Fourth Judicial District, Hennepin County, with the Secretary of State in July of 1998. Since it is a two-candidate September primary, Mr. Kolosky will be a candidate in the November 1998 general election. Mr. Kolosky was an unsuccessful candidate for judicial office in 1994 and 1996. Whether successful or not in 1998, Mr. Kolosky will be a judicial candidate in future general elections.
12. The Minnesota Board on Judicial Standards ("Board on Judicial Standards") has the jurisdiction and power as a board to receive complaints, investigate, conduct hearings,

and make recommendations to the Minnesota Supreme Court concerning judges who have allegedly violated Canon 5 of the Code. The office of the Board on Judicial Standards is located at 2025 Centre Point Boulevard, Suite 420, Mendota Heights MN 55120. Verna Kelly serves as the current chairperson of the Board on Judicial Standards.

- 13 The Minnesota Lawyers Professional Responsibility Board ("Lawyers Professional Responsibility Board") and Minnesota Office of Lawyers Professional Responsibility ("Office of Lawyers Professional Responsibility") are located at 25 Constitution Avenue, St. Paul MN 55155. The Lawyers Professional Responsibility Board has general supervisory authority over the administration of the Office of Lawyers Professional Responsibility and the implementation of the Rules of Lawyers Professional Responsibility. The Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility have the jurisdiction and power to receive complaints, investigate, conduct hearings, and issue a disposition concerning lawyers who have allegedly violated Canon 5 of the Code. Charles E. Lundberg is the current Chair of the Lawyers Professional Responsibility Board; Edward Cleary is the current Director of the Office of Lawyers Professional Responsibility.

### COUNT I

#### BAN ON ATTENDANCE AND SPEAKING AT POLITICAL PARTY GATHERINGS

- 14 The Code sections banning a candidate for judicial office and others from attending and speaking at political party gatherings violate the Plaintiffs' free speech, associational and equal protection rights provided for in the United States and Minnesota Constitutions:

"[A] candidate for election to judicial office shall not . . . attend political gatherings" or "speak to . . . political organization gatherings, on his or her own behalf." Code, Canon 5 A (1), B (1)

15. Mr. Wersal, CFJ, and his supporters in his 1996 campaign attended gatherings of the RPM and the Affiliated Associations on Mr. Wersal's behalf. He spoke at these gatherings and distributed literature.

16. Mr. Wersal, as a consequence of his 1996 campaign for Associate Justice, was the subject of a Complaint filed with the Office of Lawyers Professional Responsibility. The Complaint stated:

During the course of candidate appearances that evening [at a Republican Party Congressional District Convention], I was surprised when Mr. Wersal appeared on behalf of his candidacy for Supreme Court Justice. He asked for the active involvement of the Republican party in his candidacy but did not seek endorsement of the party that evening. It was very clear to me, however, that he was seeking partisan support for his candidacy . . .

Please note that the [enclosed] document sent to her [complainant's wife] speaks on behalf of Mr. Wersal's campaign committee, seeks endorsement from the upcoming state Republican convention in Duluth, and makes note of the fact that Mr. Wersal personally would be happy to attend district meetings as a speaker.

I believe the comments attributed to Mr. Wersal personally, and his appearance at the District Republican Convention and proposed appearance at the state Republican convention violates Canon 5 A (1)(d)

17. The Office of Lawyers Professional Responsibility on June 13, 1996, determined that sanctions against Mr. Wersal were not warranted. Mr. Wersal was not aware of the Complaint filed against him until his receipt of the Determination from the Office of Lawyers Professional Responsibility

18. The subject of the Complaint against Mr. Wersal was in part his attendance and speech at a Republican Party Congressional District Convention and campaign materials distributed by CFJ. The Office of Lawyers Professional Responsibility held that Mr.

Wersal's speech and attendance at the Republican Party Congressional District Convention and the campaign materials did not violate the version of Canon 5 of the Code effective at the time:

Canon 5B(1)(a) permits judicial candidates to "speak to gatherings on his or her own behalf." Canon 5B(1)(a) refers to "gatherings" as opposed to "political gatherings." While "political organization" is defined in the Comments to Canon 5, there are no definitions or explanations of either "political gatherings" or "gatherings," nor is there any indication whether "gatherings" include "political gatherings." However, "gatherings" has been interpreted elsewhere to include "political gatherings," provided the candidate is there to speak on his or her own behalf. See e.g., McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, American Judicature Society (1990). See also Missouri Commission on Retirement, Removal and Discipline, *Opinion 31* (undated) (in which a judicial candidate was advised that he could attend political gatherings but that his activities should be confined to speaking on his own behalf). Because the Minnesota Judicial Code of Conduct does not address this issue and because others have interpreted gatherings to include "political gatherings," the Director doubts she could establish by clear and convincing evidence that the Canon prohibits respondent's attendance at the conventions and that the Canon provides sufficient notice to respondent that his attendance was prohibited even if the Court's intent in promulgating this Canon was to prohibit candidates from attending and speaking at "political gatherings." [Footnote omitted]

19. After the Office of Lawyers Professional Responsibility issued its opinion on June 13, 1996, Mr. Wersal attended and spoke at numerous gatherings sponsored by the RPM and the Affiliated Associations. Members of CFJ also attended and spoke at numerous gatherings sponsored by the RPM and the Affiliated Associations.
20. Other candidates such as Bruce A. Peterson, a judicial candidate for Hennepin County District Court, spoke to RPM and other political party gatherings during the 1996 campaign. Mr. Peterson commented in a statement about these appearances:

I was a candidate in the November 1996 election for an open seat on the Hennepin County District Court bench. During the campaign, I spoke at several of the monthly Senate district committee meetings held by the political parties. I spoke at approximately an equal number of Republican and DFL gatherings. The audiences ranged in size from about ten to thirty. These meetings were some



of the high points of the campaign. The audiences were knowledgeable and interested, the questions were intelligent, and the people present seemed likely to share their opinions with their friends and neighbors. I never mentioned my party affiliation, nor did I ask for an endorsement. The meetings were purely informational.

In the summer of 1996, Mr. Wersal withdrew as a candidate for Associate Justice as a result of the Complaint filed against him with the Office of Lawyers Professional Responsibility and the risk that further Complaints would be filed against him and thereby jeopardize his ability to practice law.

21. Mr. Wersal in January of 1997 announced his intention to be a candidate for Associate Justice in the primary and general elections of 1998. From January of 1997 until December 23, 1997, Mr. Wersal attended and spoke at numerous gatherings sponsored by the RPM and its Affiliated Associations. He also corresponded with members of the RPM regarding his constitutional rights to attend and speak at gatherings of the RPM.
22. On or about September 2, 1997, the Board on Judicial Standards petitioned the Minnesota Supreme Court to amend Canon 5 of the Code. One of the proposed amendments banned judicial candidates from attending and speaking at political party gatherings. The Board on Judicial Standards petitioned for the change:

Another area of confusion [in the 1996 judicial elections] was whether candidates in attending gatherings on their own behalf, as permitted by Canon 5 B(1), overrode the limitation in Canon 5 A(1)(d) which states a candidate shall not attend political gatherings. The Board has sought to clarify the matter by clearly prohibiting a candidate from attending a political gathering.

(Emphasis added.) The Minnesota Supreme Court issued an Order for a Hearing to Consider Proposed Amendment to the Code of Judicial Conduct. Mr. Wersal subsequently filed an informal motion for all justices who stood for election in 1996 and

those standing for election in 1998 to recuse themselves from the proceedings. The Minnesota Supreme Court issued an Order stating recusal was a matter for each individual justice to decide. In the only other Order in the file on the issue, Justice Esther M. Tomljanovich, a judicial candidate for reelection in 1998, declined to recuse. Mr. Wersal filed his own memorandum with the court noting the unconstitutionality of banning him and others from attending and speaking at political party gatherings. The Minnesota Supreme Court adopted the change by its December 23, 1997 order. The Minnesota Supreme Court made the following revision to Canon 5 B(1) by inserting the highlighted text:

A judge or a candidate for election to judicial office may, except as prohibited by law, (a) speak to gatherings, other than political organization gatherings, on his or her own behalf.

23. The change to Canon 5 B(1) not only bans judicial candidates from attending and speaking at political events, but Canon 5A(3) now also requires judicial candidates to:
- encourage family members to not attend and speak at political party gatherings on behalf of the candidate
  - prohibit employees who serve at the pleasure of the candidate, and discourage other employees and officials subject to the candidate's direction and control from attending and speaking at political party gatherings on behalf of the candidate
  - not authorize or knowingly permit any other person to attend and speak at a political party gathering on behalf of the candidate
24. After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, discontinued attending and speaking at gatherings sponsored by the RPM and the Affiliated Associations due to his concern that the Lawyers Professional Responsibility

Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him for such activities.

25. After the Order was issued on December 23, 1997, the members of CFJ, on the advice of counsel and direction of Mr. Wersal, discontinued attending and speaking at gatherings sponsored by the RPM and the Affiliated Associations, due to their concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction Mr. Wersal for such activities.
26. After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, discouraged family members, prohibited his employees, discouraged officials and employees under his direction and control, and avoided knowingly permitting any other person to attend and speak on his behalf at gatherings sponsored by the RPM and its Affiliated Associations. Mr. Wersal took these steps due to his concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him for such activities.
27. The RPM is adversely impacted by the ban on judicial candidates, their representatives and advocates attending and speaking on behalf of the candidate at its gatherings. A judicial candidate, the candidate's representatives and advocates speaking at an RPM gathering on behalf of the candidate is beneficial to the members of the RPM and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates attend meetings and speak on the candidate's behalf. Such activity may catalyze members of the RPM to become future candidates for judicial office.

- 28 The Affiliated Associations are adversely impacted by the ban on judicial candidates, their representatives and advocates attending and speaking on behalf of the candidate at gatherings of one or more of the Affiliated Associations. A judicial candidate, the candidate's representatives and advocates attending and speaking on behalf of the candidate at a gathering of one or more of the Affiliated Associations is beneficial to the members of the Affiliated Association and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates attend meetings and speak on behalf of the candidate. Such activity may catalyze members of the Affiliated Associations to become future candidates for judicial office. For example, lawyers in certain minority communities -- African American, Lao American, Indian Asian American, Muslim -- may become interested in running for judicial office because they saw and heard a judicial candidate, or a candidate's representative or advocate attend and speak on behalf of the candidate at a gathering of their community's Affiliated Association.
- 29 In light of the December 23, 1997 Order, Cheryl Wersal and Mark Wersal and others, despite their desires, have ceased attending and speaking on Mr. Wersal's behalf at gatherings of the RPM and the Affiliated Associations. Cheryl Wersal, Mark Wersal, and others have taken these actions under threat of sanction against Mr. Wersal by the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards.
- 30 Mr. Wersal sought further clarification of the Code's ban by soliciting an advisory opinion from the Office of Lawyers Professional Responsibility on February 9, 1998. Mr. Wersal requested an advisory opinion on the question:

Does your office intend to enforce the prohibition against judicial candidates speaking on their own behalf to political party organizations gatherings?

Mr. Wersal requested this advisory opinion in order to determine how to proceed with his campaign prior to the precinct caucuses which would be held on March 3, 1998.

31 The Office of Lawyers Professional Responsibility responded with an advisory opinion letter on February 24, 1998. The Office of Lawyers Professional Responsibility stated:

The Court has chosen to specifically proscribe judicial candidates campaigning before political party organizations [only]. Therefore, a licensed Minnesota attorney who speaks to a political party organization gathering in his role as a judge or judicial candidate would be in violation of 5B(1) and could be subject to professional discipline.

32 RPM held precinct caucuses on March 3, 1998, Basic Political Operating Unit ("BPOU") conventions from about March 21 through April 11, 1998, eight Congressional District Conventions from April 25, 1998 through May 16, 1998, and its State Convention from June 18 through June 20, 1998.

33 The Affiliated Associations held meetings and conventions during the same period

34 RPM and the Affiliated Associations desired at their gatherings and conventions to associate with judicial candidates, their supporters and their campaign committees.

35 RPM desired to consider endorsement of judicial candidates at its 1998 State Convention. RPM asserts a constitutional right to endorse nonpartisan judicial candidates.

36 Mr. Wersal and Mr. Kolosky desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations. Due to the bans of Canon 5 of the Code of Judicial Conduct, Mr. Wersal and Mr. Kolosky did not attend and speak at these political party gatherings of RPM and the Affiliated Associations. Due to the bans of

- Canon 5 of the Code of Judicial Conduct, Mr. Wersal also did not attend or speak at the June 18-June 20 RPM State Convention.
37. Plaintiff Cheryl Wersal desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations on her husband Greg Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, Cheryl Wersal did not attend and speak at these political party gatherings of RPM and the Affiliated Associations.
38. Plaintiff Mark Wersal desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations on his brother Greg Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, Mark Wersal did not attend and speak at these political party gatherings of RPM and the Affiliated Associations.
39. Plaintiff Corwin Hulbert desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations on Mr. Wersal's behalf. Despite warnings by Mr. Wersal and his counsel to the contrary, Corwin Hulbert did attend and speak at political party gatherings of RPM and did seek RPM endorsement on behalf of Mr. Wersal at the RPM State Convention.
40. Plaintiff Michael Maxim attended and spoke on Mr. Wersal's behalf at the RPM State Convention and sought endorsement by RPM on Mr. Wersal's behalf.
41. CFJ and its members desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations on Mr. Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, CFJ did not attend and speak at these political party gatherings of RPM and the Affiliated Associations.
42. RPM delegate Mike Maxim on June 20, 1998, at the RPM State Convention moved that the convention delegates endorse a candidate for Associate Justice of the Supreme Court

RPM delegate Ed Lethert seconded the motion. After much debate, the motion failed by a narrow margin.

43 The Code's ban on judicial candidates, their representatives, advocates and others attending and speaking on behalf of the candidate at gatherings of the RPM and the Affiliated Associations is a violation of the Plaintiffs' free speech and associational rights provided for in the U.S. and Minnesota Constitutions.

44 At the same time the Minnesota Supreme Court considered the ban on candidates and others attending and speaking at political party gatherings, the Court also considered a definition of the term "political organization" proposed by the Board on Judicial Standards:

D. Political Organization For purposes of Canon 5 the term political organization denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office

45 The Executive Secretary of the Board of Judicial Standards filed written comments to the Minnesota Supreme Court which included the following remarks regarding the proposed definition of the term "political organization":

One of the Complaints made during the 1996 election challenged the meaning of the term "political organization." The present Code has no definition of political organization. To avoid misunderstanding, the Board recommends the incorporation of the definition of political organization, contained in the present commentary, as part of the Code (proposed Canon 5D). This language is adopted from the terminology section of the 1990 ABA Model Code. The adoption of the new terminology provides a three-part test which clearly defines the prohibited endorsements by political organizations or groups. First is there a political party or group, secondly, is its principle purpose to further the election of a candidate and thirdly, is it for political office? There is a direct parallel in Minnesota law. A "political committee" is defined by Minn Stat 10A.01, subd. 15, as "any association \* \* \* whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question." Neither this definition nor the definition of a political party, as defined by Minn Stat Chap. 200, would include *ad hoc* groups that use a party name. The commentary language does

address *ad hoc* groups. The proposed definition provides flexibility to meet future circumstances and does not prohibit traditional organizations endorsement of a judicial candidate that have been used in the past.

- 46 Minnesota District Court Judge Gary J Meyer, Chief Judge of the Tenth Judicial Circuit, noted the disparate treatment between political parties and other political organizations in his written remarks submitted to the Minnesota Supreme Court in connection with its deliberations on the proposed changes to Canon 5:

It appears that the proposed changes to Canon 5 are an attempt to strip partisan affiliation from judicial elections, while allowing, and perhaps encouraging, candidates to adopt issue affiliation...

To me, the present proposed definition of "Political Organizations" clearly includes only political parties. Judge Bruce Willis, who spent a couple of hours with us on this issue at the Minnesota District Judges Association at Maddens, agrees.

If it is your intention to include such groups within the definition of "Political Organization", I would suggest that the proposed Paragraph D be amended as follows:

D Political Organization. For purposes of Canon 5 the term political organization denotes a political party or other special interest group, one of the purposes of which is to further the election or appointment of candidates to political office.

If Canon 5 must be amended, I encourage you to adopt the above version of Paragraph D. To do otherwise will only create inequity between candidates in judicial elections.

Is it appropriate for a judicial candidate to speak and appear at a MADD function, but not at a political party bean feed?

Why would these special interest endorsements and activity be protected as Constitutionally guaranteed free speech and assembly, but political party endorsements and activity not be so protected?

Perhaps by adopting the Canon 5 amendment we are stirring up unnecessary questions that only have one answer.



I hope you will consider not adopting the amendment, or if you do, that you will consider changing the definition of political organization in Paragraph D.

47. Instead of adopting the proposed language of the Board on Judicial Standards ~~or~~ the proposed language of Judge Gary J. Meyer, the Minnesota Supreme Court limited the definition of the term "political organization" in Canon 5 to "political party organizations" only:
- D. Political Organization For purposes of Canon 5 the term political organization denotes a political party organization.
48. The narrow definition of "political organization" adopted by the Minnesota Supreme Court meant that the prohibition on a judicial candidate's attendance and speaking at events applied *only* to political party organizations such as the RPM and its Affiliated Associations. Judicial candidates under the current Code are now permitted to attend and speak to gatherings of "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association ("MTLA"), National Organization of Women ("NOW"), National Rifle Association ("NRA"), Minnesota Citizens Concerned for Life ("MCCL"), Mothers Against Drunk Driving ("MADD"), or any labor union.
49. The Code's disparate treatment of a judicial candidate and others attending and speaking on the candidate's behalf at gatherings of the RPM and the Affiliated Associations vis-a-vis gatherings of special interest groups, is in itself a violation of the Plaintiffs' equal protection rights provided for in the U.S. and Minnesota Constitutions.

**COUNT II**

**BAN ON JUDICIAL CANDIDATES ANNOUNCING VIEWS  
ON DISPUTED LEGAL OR POLITICAL ISSUES**

50 The Code section banning a candidate for judicial office and others from announcing the candidate's views on disputed legal or political issues violates the Plaintiffs' free speech rights provided for in the United States and Minnesota Constitutions:

A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues" Code, Canon 5 A (3).

51 Mr Wersal, CFJ and Mr Wersal's supporters in his 1996 campaign announced through speech and campaign literature to the RPM and the Affiliated Associations that Mr Wersal believed in strict construction of the Constitution and was critical of a number of decisions of the Minnesota Supreme Court. Still, Mr. Wersal felt constrained from stating many of his views because of the Canon 5 A(3)

52. Mr Wersal, as a consequence of his 1996 campaign for Associate Justice, was the subject of an ethical Complaint alleging a violation of Canon 5 A(3) The Complaint stated:

I have not commented on Mr. Wersal's addressing of issues which may come before the Court to which he seeks election, but I feel those are inappropriate as well

53 The Office of Lawyers Professional Responsibility on June 13, 1996, determined that discipline was not warranted based on the allegations. In fact, the Office of Lawyers Professional Responsibility explicitly expressed its "doubts" that the language of Canon 5 A(3) would survive a constitutional challenge. The Office of Lawyers Professional Responsibility stated in its Determination:

Complainant also raises the issue of respondent's statements made in his "campaign for justice" about three Minnesota Supreme Court decisions. Canon 5A(3)(d)(i) prohibits candidates from announcing their views on disputed legal or political issues

The current prohibition contained in Minnesota Canon 5A(3)(d)(i) is identical to Canon 7B(1)(c) of the prior ABA Code of Judicial Conduct (1972 version). The parallel provision of current ABA Model Code of Judicial Conduct (1990 version) does not contain a blanket prohibition against announcing views on disputed issues. Instead, the current ABA provision prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The ABA adopted the 1990 version out of concern over the constitutionality of the 1972 version. Although adoption of the 1990 version was proposed to the Minnesota Supreme Court in June 1994 by the Minnesota Advisory Committee to review the American Bar Association Model Code of Judicial Conduct, it was not adopted by the Minnesota Supreme Court.

Attached as Exhibit A is a summary and comparison of court decisions concerning cases involving the announcing of personal views on disputed issues. The decisions interpreting the 1972 version have found it to be unconstitutional in four of six cases. Moreover, the *Stretton* decision, the circuit court only found the 1972 version constitutional by reading into the Canon the additional limiting language contained in the 1990 version about *committing or appearing to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court.

The statements in respondent's campaign literature are indeed critical of three Minnesota Supreme Court decisions. However, candidates are not prohibited from criticizing incumbents provided the criticism is truthful and does not bring the impartiality of judiciary into questions. See e.g., *In re Baker*, 542 P.2d 701 (Kan. 1975) (candidate permitted to not incumbent judge's health and the delays and increased costs it had caused to the county); *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979) (candidate could criticize incumbent by pointing out that county's court reporting expenses were higher than in surrounding counties). See also State Bar of Michigan Comm. On Legal Ethics and Professional Conduct, *Formal Opinion C-227* (1982) (ethics committee advised candidate for appellate court that candidate could criticize earlier opinion of the appellate court and the legal philosophy underlying that opinion)

The Director's Office has doubts about the constitutionality of the current Minnesota Canon and its application to respondent's statements. In addition, the Director doubts she would be able to prove by clear and convincing evidence that the statements in respondent's campaign materials constitute an announcement of his views on the issues of crime, welfare or abortion, let alone that they appear

to commit respondent with respect to any of these three issues. For these reasons the Director has determined that discipline is not warranted. [Footnote omitted.]

54. After the Office of Lawyers Professional Responsibility issued its opinion on June 13, 1996, Mr. Wersal and CFJ continued to announce that Mr. Wersal was generally in favor of strict construction of the Constitution. Mr. Wersal and CFJ also criticized decisions of the Minnesota Supreme Court. But, they continued to avoid announcing Mr. Wersal's views on many disputed legal and political issues because Mr. Wersal feared that any decision of the Office of Lawyers Professional Responsibility could be appealed and Mr. Wersal would then be subject to sanctions.
55. In the summer of 1996, Mr. Wersal withdrew as a candidate for Associate Justice as a result of the Complaint filed against him with the Office of Lawyers Professional Responsibility and the risk that further Complaints would be filed against him and thereby jeopardize his ability to practice law.
56. Mr. Wersal in January of 1997 announced his intention to be a candidate for Associate Justice in the primary and general elections of 1998. From January, 1997 until December 23, 1997, Mr. Wersal and CFJ continued to announce that Mr. Wersal was for strict construction of the Constitution. Mr. Wersal and CFJ also criticized decisions of the Minnesota Supreme Court. Mr. Wersal also wrote a letter to members of the RPM mentioning the unconstitutionality of Canon 5 A(3). However, Mr. Wersal and CFJ continued to avoid announcing Mr. Wersal's views on many disputed legal and political issues, hoping that the Minnesota Supreme Court would amend Canon 5 A(3) to conform with the United States and Minnesota Constitutions when presented with the opportunity

57. On or about September 2, 1997, the Board on Judicial Standards petitioned the Minnesota Supreme Court to amend Canon 5 of the Code. The Board on Judicial Standards did not include any proposed amendment to Canon 5 A(3).
58. The Minnesota Supreme Court made no revisions to Canon 5 A(3) in its December 23, 1997 Order, despite the position taken by the Office of Lawyers Professional Responsibility in its June 13, 1996 determination.
59. Canon 5 A(3)(d)(i) not only bans judicial candidates from announcing their views on disputed legal and political issues, but Canon 5 A(3) also requires judicial candidates :
- to encourage their *family members* not to announce the candidate's views on disputed legal and political issues
  - prohibit employees who serve at the pleasure of the candidate, and discourage other employees and officials subject to the candidate's direction and control from announcing the candidate's views on disputed legal and political issues
  - not authorize or knowingly permit any other person to announce the candidate's views on disputed legal and political issues
60. After the Order was issued by the Minnesota Supreme Court on December 23, 1997, and no change was made to Canon 5 A(3)(d)(i), Mr. Wersal, on the advice of counsel, continued to avoid announcing his views on many disputed legal and political issues. Mr. Wersal also discontinued criticizing decisions of the Minnesota Supreme Court.
61. After the Order was issued by the Minnesota Supreme Court on December 23, 1997, and no change was made to Canon 5 A(3)(d)(i), the members of CFJ, on the advice of counsel and direction of Mr. Wersal, continued to avoid announcing Mr. Wersal's views on many disputed legal and political issues. They also discontinued announcing that Mr. Wersal was critical of decisions of the Minnesota Supreme Court.

- 62 After the Order was issued by the Minnesota Supreme Court on December 23, 1997, and no change was made to Canon 5 A(3)(d)(i), Mr. Wersal, on the advice of counsel, encouraged family members, prohibited his employees, discouraged officials and employees under his direction and control, and avoided knowingly permitting any other person to announce Mr. Wersal's views on disputed legal or political issues or to announce that Mr. Wersal was critical of decisions of the Minnesota Supreme Court.
- 63 The RPM is adversely impacted by the ban on judicial candidates, their representatives and advocates announcing the views of candidates on disputed legal and political issues. A judicial candidate, the candidate's representatives and advocates announcing the candidate's views on disputed legal and political issues to the RPM is beneficial to the members of the RPM and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates announcing the candidates' views on disputed legal and political issues. Such activity may catalyze members of the RPM to become future candidates for judicial office.
- 64 The Affiliated Associations are adversely impacted by the ban on judicial candidates, their representatives and advocates announcing the candidate's views on disputed legal and political issues to one or more of the Affiliated Associations. A judicial candidate, the candidate's representatives and advocates announcing the candidate's views on disputed legal or political issues to one or more of the Affiliated Associations is beneficial to the members of the Affiliated Association and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates announce the candidate's views

on disputed legal or political issues. Such activity may catalyze members of the Affiliated Associations to become future candidates for judicial office. For example, lawyers in certain minority communities -- African American, Lao American, Indian Asian American, Muslim -- may become interested in running for judicial office because they saw and heard a judicial candidate, or a candidate's representative or advocate announce the candidate's views on disputed legal or political issues to their community's Affiliated Association.

65 Cheryl Wersal, Mark Wersal, and Corwin Hulbert, despite their desires to the contrary, have continued to avoid announcing Mr. Wersal's views on disputed legal and political issues. Cheryl Wersal, Mark Wersal, and Corwin Hulbert have taken these actions under threat of sanction against Mr. Wersal by the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards.

66 Mr. Wersal sought further clarification on the Code's ban by soliciting an advisory opinion from the Office of Lawyers Professional Responsibility on February 9, 1998.

Mr. Wersal requested an advisory opinion on the question:

Does your office intend to enforce the prohibition against a judicial candidate announcing his or her views on disputed legal or political issues?

Mr. Wersal requested this advisory opinion in order to determine how to proceed with his campaign prior to the precinct caucuses which will be held on March 3, 1998.

67 The Office of Lawyers Professional Responsibility responded with an advisory opinion letter on February 24, 1998. The Office of Lawyers Professional Responsibility stated:

[T]he Director's Office continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution. Therefore, our policy has not changed and unless the speech at issue violates other prohibitions listed in Canon

5 or other portions of the Code of Judicial Conduct, it is our belief that this section is not, as written, constitutionally enforceable.

68. Edward Cleary, Director of the Office of Lawyers Professional Responsibility, stated, according to a Star Tribune article published February 26, 1998, that “the code’s longtime ban on judicial candidates’ stating their views [on disputed legal and political issues] is unconstitutional and unenforceable.”
69. The Code’s ban on judicial candidates Mr. Wersal and Mr. Kolosky, their representatives, their advocates and others from announcing the candidates’ views on disputed legal and political issues is a violation of the Plaintiffs’ free speech and associational rights provided for in the U.S. and Minnesota Constitutions.

### COUNT III

#### BAN ON JUDICIAL CANDIDATES IDENTIFYING THEIR POLITICAL PARTY

70. The Code section banning a candidate and others from identifying the candidate’s political party violates the Plaintiffs’ free speech, associational and equal protection rights provided for in the United States and Minnesota Constitutions:
- A candidate for election to judicial office shall not . . . identify themselves as members of a political organization, except as necessary to vote in an election Code, Canon 5 A (1).
71. The RPM and its Affiliated Associations are not subversive organizations. Unlike the Communist Party and other radical parties in the early 1900’s, the RPM and its Affiliated Associations do not have as an objective the overthrow of the United States government.
72. Mr. Wersal, throughout his 1996 campaign and in his 1998 campaign until December 23, 1997, identified himself as a lifelong member of the RPM who had resigned his position as precinct chairman and state convention delegate upon becoming a judicial candidate.



Mr. Wersal attended and spoke at numerous RPM and Affiliated Association gatherings, including the 1996 RPM State Convention held in Duluth, Minnesota. Members of CFJ and other supporters or Mr. Wersal also attended and spoke at numerous gatherings of the RPM and the Affiliated Associations. They also distributed literature on Mr. Wersal's behalf.

73. On September 2, 1997, the Board on Judicial Standards petitioned the Minnesota Supreme Court to amend Canon 5 (A)(1)(a) of the Code to ban judicial candidates from identifying their memberships in political parties. The Board on Judicial Standards petitioned for the change:

To ensure the maintenance of nonpartisan elections, the Board recommends that judicial candidates not be permitted to identify themselves as past or present members of a political organization (Canon 5A(1)(a)). This limitation would not prohibit a candidate from stating, as part of their background, that they had been elected to the legislature, or had been active in a political party or a precinct captain. The rule would prohibit identifying the political party which the person represented in those particular capacities.

The Executive Secretary of the Board on Judicial Standards also stated in written comments to the Minnesota Supreme Court:

[T]he Board recommends that judicial candidates not be permitted to identify themselves as past or present members of a political organization.

74. The Minnesota Supreme Court issued an Order for a Hearing to Consider Proposed Amendment to the Code of Judicial Conduct. Mr. Wersal filed an informal motion for all justices who stood for election in 1996 and those standing for election in 1998 to recuse themselves from the proceedings. The Minnesota Supreme Court issued an Order stating recusal was a matter for each individual justice to decide. In the only other Order

in the file on the issue, Justice Esther M. Tomljanovich, a judicial candidate for reelection in 1998, declined to recuse.

75 By its December 23, 1997 order, the Minnesota Supreme Court adopted the language proposed by the Board on Judicial Standards and made the following amendment to Canon 5 A(1) by inserting the highlighted text:

a judge or a candidate for election to judicial office shall not (a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election.

76 The change to Canon 5 A(1) not only bans judicial candidates from identifying themselves as members of a political party, but Canon 5A(3) now also requires judicial candidates to:

- encourage family members to not identify the candidate as a member of a political party
- prohibit employees who serve at the pleasure of the candidate, and discourage other employees and officials subject to the candidate's direction and control from identifying the candidate as a member of a political party
- not authorize or knowingly permit any other person to identify the candidate as a member of a political party

77 After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, discontinued identifying himself as a lifelong member of the RPM due to his concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him

78 After the Order was issued on December 23, 1997, the members of CFJ, on the advice of counsel and direction of Mr. Wersal, discontinued identifying Mr. Wersal as a lifelong member of the RPM due to concern that the Lawyers Professional Responsibility Board,

the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction Mr. Wersal.

79. After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, encouraged family members, prohibited employees, discouraged employees and officials under his direction and control, and avoided knowingly permitting any other person to identify Mr. Wersal as a lifelong member of the RPM. Mr. Wersal took these steps due to his concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him.
80. The RPM is adversely impacted by the ban on judicial candidates, their representatives and advocates identifying judicial candidates as members of the RPM. Knowing a candidate's membership in the RPM is beneficial to the members of the RPM and the State of Minnesota. Voters become better informed and more involved in the election process by knowing judicial candidates' memberships in the RPM. Such identification may catalyze some members of the RPM to be future candidates for judicial office.
81. The Affiliated Associations are adversely impacted by the ban on judicial candidates, their representatives and advocates identifying candidates as members of the Affiliated Associations. Judicial candidates, their representatives or advocates identifying candidates as members of one or more of the Affiliated Associations is beneficial to the members of the Affiliated Association and to the State of Minnesota. Voters become better informed and more involved in the election process by knowing judicial candidates are members of the Affiliated Associations. Such identification may catalyze some of the members of the Affiliated Associations into being future candidates for judicial office. For example, lawyers in certain minority communities -- African American, Lao

- American, Indian Asian American, Muslim -- may become interested in running for judicial office after they see a judicial candidate, the candidate's representative or advocate identify the candidate as a member of the community's Affiliated Association.
- 82 Cheryl Wersal, Mark Wersal, and Corwin Hulbert, despite their desires, have discontinued stating that Mr. Wersal is a lifelong member of the RPM. Cheryl Wersal, Mark Wersal, and Corwin Hulbert took these actions due to their concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction Mr. Wersal.
- 83 The Code's ban on judicial candidates Mr. Wersal and Mr. Kolosky, the candidates' representatives, the candidates' advocates and others identifying the candidate as a member of the RPM and the Affiliated Associations is a violation of the Plaintiffs' free speech and associational rights provided for in the U.S. and Minnesota Constitutions.
- 84 At the same time the Minnesota Supreme Court prohibited judicial candidates from identifying themselves as members of "political organizations", the Minnesota Supreme Court limited the definition of the term "political organization" in Canon 5 to "political party organizations" only:
- D Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.
- 85 The narrow definition of "political organization" adopted by the Minnesota Supreme Court meant that the prohibition on a judicial candidates or others identifying candidates as members of political organizations applied only to political party organizations such as the RPM and the Affiliated Associations. Judicial candidates under the current Code are now permitted to identify and associate themselves (as well as be leaders and hold

offices of) "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association, National Organization of Women, National Rifle Association, Minnesota Citizens Concerned for Life, Mothers Against Drunk Driving, or any labor union.

86. The Code's disparate treatment toward a judicial candidate or others identifying the candidate as a member of the RPM or the Affiliated Associations vis-a-vis a member of a special interest group, is in itself a violation of the Plaintiffs' equal protection rights provided for in the U S and Minnesota Constitutions.

#### COUNT IV

#### BAN ON JUDICIAL CANDIDATES AND THEIR COMMITTEES SEEKING, ACCEPTING, OR USING POLITICAL PARTY ENDORSEMENTS

87. The Code sections banning a candidate for judicial office, his campaign committee and others from seeking, accepting or using political party endorsements violate the Plaintiffs' free speech, associational and equal protection rights provided for in the United States and Minnesota Constitutions:

A candidate for election to judicial office shall not seek, accept or use endorsements from a political organization. A candidate may establish committees to conduct campaigns for the candidate. Such committees shall not seek, accept or use political organization endorsements. Code, Canon 5 A (1), B (2).

88. Mr. Wersal, CFJ, and Mr. Wersal's supporters in his 1996 campaign sought endorsements from the RPM and the Affiliated Associations on Mr. Wersal's behalf.
89. Mr. Wersal, as a consequence of his 1996 campaign for Associate Justice, was the subject of a Complaint filed with the Office of Lawyers Professional Responsibility. The Complaint stated:

During the course of candidate appearances that evening [at a Republican Party Congressional District Convention], I was surprised when Mr. Wersal appeared on behalf of his candidacy for Supreme Court Justice. He asked for the active involvement of the Republican party in his candidacy but did not seek endorsement of the party that evening. It was very clear to me, however, that he was seeking partisan support for his candidacy . . .

90 The Office of Lawyers Professional Responsibility on June 13, 1996, determined that sanctions against Mr. Wersal were not warranted. The Office of Lawyers Professional Responsibility held that Mr. Wersal's actions did not violate the version of Canon 5 of the Code effective at the time:

Canon 5B(2) prohibits a candidate from "personally" soliciting publicly stated support. The rule further provides, however, that the candidate may establish Committees to conduct campaigns and to obtain public statements of support for his or her candidacy. According to complainant, respondent did not personally request the endorsement of the republican party when he attended the District Convention. Moreover, the literature sent to complainant's wife was sent by a committee which appears to be entitled "Campaign for Justice." The letter was sent by respondent's brother and law partner who appears to have some relationship to the committee. Although the letter clearly requests that the republican party endorse respondent for Associate Justice to the Minnesota Supreme Court, the Minnesota Judicial Code of Conduct does not prohibit campaign committees from soliciting such support or such endorsements.

Moreover, the Office of Lawyers Professional Responsibility found that the judicial candidate's campaign committee could seek such endorsements.

91 In the summer of 1996, Mr. Wersal withdrew as a candidate for Associate Justice as a result of the Complaint filed against him with the Office of Lawyers Professional Responsibility and the risk that further Complaints would be filed against him and thereby jeopardize his ability to practice law.

92 Mr. Wersal in January of 1997 announced his intention to be a candidate for Associate Justice in the primary and general elections of 1998. From January of 1997 until December 23, 1997, the CFJ sought endorsement of Mr. Wersal by the RPM and its

Affiliated Associations. Mr. Wersal also wrote a letter dated August 15, 1997, explaining to members of the RPM that his campaign committee could seek an endorsement on his behalf.

93. On September 2, 1997, the Board on Judicial Standards petitioned the Minnesota Supreme Court to amend Canon 5 of the Code to expressly ban judicial candidates and their campaign committees from seeking, accepting or using political organization endorsements. The Board on Judicial Standards petitioned for the change:

The proposed change also makes it clear that a candidate may not seek an endorsement from a political organization (Canon 5 A(1)(d)) and prohibits the candidate's committee from seeking, accepting or using political endorsements (Canon 5 B(2)). These recommendations clearly restrict candidates from seeking political organizations' support and make the enforcement of the violation possible.

94. The Minnesota Supreme Court issued an Order for a Hearing to Consider Proposed Amendment to the Code of Judicial Conduct. Mr. Wersal filed an informal motion for all justices who stood for election in 1996 and those standing for election in 1998 to recuse themselves from the proceedings. The Minnesota Supreme Court issued an Order stating recusal was a matter for each individual justice to decide. In the only other Order in the file on the issue, Justice Esther M. Tomljanovich, a judicial candidate for reelection in 1998, declined to recuse.
95. Mr. Wersal filed his own memorandum with the court noting the unconstitutionality of banning a judicial candidate's campaign committee from seeking political party endorsements.
96. The Minnesota Supreme Court adopted the change proposed by the Board on Judicial Standards by its December 23, 1997 order. The Minnesota Supreme Court made the

following revision to Canon 5 A(1)(d) and Canon 5 B(2) by inserting the highlighted text:

A candidate for election to judicial office shall not seek, accept or use endorsements from a political organization. A candidate may establish committees to conduct campaigns for the candidate. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements Code, Canon 5A(1), B(2)

97. Canon 5A(1), B(2) not only bans judicial candidates and their campaign committees and others from seeking political party endorsements, but Canon 5A(3) now also requires judicial candidates to:

- encourage family members to not seek, accept or use endorsements from a political party on behalf of the candidate
- prohibit employees who serve at the pleasure of the candidate, and discourage other employees and officials subject to the candidate's direction and control from seeking, accepting or using endorsements from a political party on behalf of the candidate
- not authorize or knowingly permit any other person to seek, accept or use endorsement from a political party on behalf of the candidate

98 After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, continued not to seek endorsements from the RPM and the Affiliated Associations due to his concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him.

99 After the Order was issued on December 23, 1997, the members of the CFJ, on the advice of counsel and direction of Mr. Wersal, discontinued seeking endorsements from the RPM and the Affiliated Associations, due to their concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction Mr. Wersal.



100. After the Order was issued on December 23, 1997, Mr. Wersal, on the advice of counsel, discouraged family members, prohibited his employees, discouraged officials and employees under his direction and control, and avoided knowingly permitting any other person to seek endorsements from the RPM and the Affiliated Associations. Mr. Wersal took these actions due to his concerns that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction him.
101. The RPM is adversely impacted by the ban on judicial candidates, their representatives and advocates seeking an endorsement from the RPM on behalf of the candidate. Judicial candidates, their representatives and advocates seeking endorsement from the RPM is beneficial to the members of the party and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates seeking the endorsement of a political party. Such activity may also catalyze more party members in being future candidates for judicial office.
102. The Affiliated Associations are adversely impacted by the ban on judicial candidates, their representatives and advocates from seeking the endorsement of one or more of the Affiliated Associations. A judicial candidate, the candidate's representatives or advocates seeking the endorsement of one or more of the Affiliated Associations on behalf of the candidate is beneficial to the members of the Affiliated Association and to the State of Minnesota. Voters become better informed and more involved in the election process by having judicial candidates, their representatives and advocates seeking the endorsement of an Affiliated Association on behalf of the candidate. Such

activity may also catalyze some members of the Affiliated Associations to be future candidates for judicial office. For example, lawyers in certain minority communities -- African American, Lao American, Indian Asian American, Muslim -- may become interested in running for judicial office because they observed a judicial candidate, the candidate's representatives or advocates seeking the endorsement of his or her community's Affiliated Association on behalf of the candidate.

103. Cheryl Wersal, Mark Wersal, and others, despite their desires, have discontinued seeking the endorsement of the RPM and the Affiliated Associations on behalf of Mr. Wersal. Cheryl Wersal, Mark Wersal, and others took these actions due to their concern that the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards may sanction Mr. Wersal.

104. Mr. Wersal sought further clarification on the Code's ban by soliciting an advisory opinion from the Office of Lawyers Professional Responsibility on February 9, 1998. Mr. Wersal requested an advisory opinion on the question:

Does your office intend to enforce the prohibition against a judicial candidate's campaign committee from seeking, accepting or using endorsements from a political party or organization?

Mr. Wersal requested this advisory opinion in order to determine how to proceed with his campaign prior to the precinct caucuses which would be held on March 3, 1998.

105. The Office of Lawyers Professional Responsibility responded with an advisory opinion letter on February 24, 1998. The Office of Lawyers Professional Responsibility stated:

[Canon] 5 B(2) prohibits campaign committees from seeking, accepting or using political organization endorsements (denoting political party organization endorsements)

- 106 RPM held precinct caucuses on March 3, 1998, Basic Political Operating Unit ("BPOU") conventions from about March 21 through April 11, 1998, eight Congressional District Conventions from April 25, 1998 through May 16, 1998, and its State Convention from June 18 through June 20, 1998
- 107 The Affiliated Associations held meetings and conventions during the same period.
- 108 RPM and the Affiliated Associations desired at their gatherings and conventions to associate with judicial candidates, their supporters and their campaign committees
- 109 RPM desired to consider endorsement of judicial candidates at its 1998 State Convention. RPM asserts a constitutional right to endorse nonpartisan judicial candidates
- 110 Mr. Wersal and Mr. Kolosky desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations and to seek, accept and use the endorsement of RPM on their own behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, Mr. Wersal and Mr. Kolosky did not attend and speak at these political party gatherings of RPM and the Affiliated Associations. Due to the bans of Canon 5 of the Code of Judicial Conduct, Mr. Wersal also stated before the June 18-June 20 RPM State Convention that he would not seek the endorsement of RPM and that if endorsed, he would not accept or use the endorsement of RPM.
- 111 Plaintiff Cheryl Wersal desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations and to seek, accept and use the endorsement of RPM on her husband Greg Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, Cheryl Wersal did not attend and speak at these political party gatherings of RPM and the Affiliated Associations

- 112 Plaintiff Mark Wersal desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations and to seek, accept and use the endorsement of RPM on his brother Greg Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, Mark Wersal did not attend and speak at these political party gatherings of RPM and the Affiliated Associations.
- 113 Plaintiff Corwin Hulbert desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations and to seek, accept and use the endorsement of RPM on Mr. Wersal's behalf. Despite warnings by Mr. Wersal and his counsel to the contrary, Corwin Hulbert did attend and speak at political party gatherings of RPM and did seek RPM endorsement on behalf of Greg Wersal at the RPM State Convention.
- 114 Plaintiff Michael Maxim attended and spoke on Mr. Wersal's behalf at the RPM State Convention on June 20, 1998 and sought endorsement by RPM on Mr. Wersal's behalf.
- 115 CFJ and its members desired to attend and speak at these political party gatherings of RPM and the Affiliated Associations and to seek, accept and use the endorsement of RPM on Mr. Wersal's behalf. Due to the bans of Canon 5 of the Code of Judicial Conduct, CFJ did not attend and speak at these political party gatherings of RPM and the Affiliated Associations.
- 116 RPM delegate Mike Maxim on June 20, 1998, at the RPM State Convention moved that the convention delegates endorse a candidate for Associate Justice of the Supreme Court. RPM delegate Ed Lethert seconded the motion. After much debate, the motion failed by a narrow margin.
- 117 The Code's ban on judicial candidates Mr. Wersal and Mr. Kolosky, their campaign committees and others seeking, accepting or using an endorsement from a political party

on behalf of a candidate is a violation of the Plaintiffs' free speech and associational rights provided for in the U.S. and Minnesota Constitutions.

118 On December 23, 1997, at the same time the Minnesota Supreme Court banned candidates and others from seeking, accepting or using political party endorsements, it adopted a narrowed definition for the term "political organization":

D. Political Organization: For purposes of Canon 5 the term political organization denotes a political party organization.

119. The narrow definition of "political organization" adopted by the Minnesota Supreme Court meant that the prohibition on judicial candidates and others seeking endorsements applies only to endorsements by political party organizations such as the RPM and the Affiliated Associations. Judicial candidates and others under the current Code are now permitted to seek endorsements from "special interest" organizations such as political action committees, the Minnesota Trial Lawyers Association, the National Organization of Women, National Rifle Association, Minnesota Citizens Concerned for Life, Mothers Against Drunk Driving, or any labor union

120. The Code's disparate treatment of a judicial candidate or others seeking endorsements from the RPM or the Affiliated Associations vis-a-vis a special interest group, is in itself a violation of the Plaintiffs' equal protection rights provided for in the U.S. and Minnesota Constitutions

COUNT V

BAN ON JUDICIAL CANDIDATES PERSONALLY  
SOLICITING CAMPAIGN CONTRIBUTIONS

121. The Code section banning a candidate for judicial office from personally soliciting campaign contributions violates the Plaintiffs' free speech rights provided for in the United States and Minnesota Constitutions:

A judicial candidate shall not personally solicit campaign contributions.  
Code, Canon 5 B(2)

122. Mr. Wersal, in his 1996 campaign, did not and had not personally solicited campaign contributions. CFJ has solicited campaign contributions on behalf of Mr. Wersal. Mr. Wersal did not personally solicit campaign contributions under threat of sanction by the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards.

123. In May of 1997, Mr. Wersal read the May 1997 Minnesota State Bar Association Judicial Elections Task Force Report & Recommendations. Recommendation number 3 and its commentary state:

The Comment to Canon 5 should be expanded to clarify that general appeals for financial support are a permissible form of candidate speech.

[Commentary:] While the Task Force decided not to recommend any substantive changes to Canon 5 in the area of campaign finance, it does believe that in one respect a clarification of the existing rule is in order.

The Code prohibits candidates from personally soliciting or accepting campaign contributions (Canon 5 B (2)). The Task Force does not object to this prohibition, but it does believe that candidates should be permitted, and in fact are under the existing rule, to make general requests for financial support when meeting with large groups of voters at candidate forums. The Task Force recommends that language be added to the Comment to Canon 5 explicitly authorizing this type of general

appeal under Canon 5B(1)(a), which allows a candidate to “speak to gatherings on his or her own behalf.”

(Emphasis added.)

124. After reading the Report, Mr. Wersal requested an advisory opinion regarding personal solicitations from the Office of Lawyers Professional Responsibility:

The question becomes what type of solicitation for campaign contributions violates this rule. Let me give you three examples. The first example would be where I, as a judicial candidate, would send out a letter to individuals soliciting money and the letter would be signed by me personally. The second would be where I, as a judicial candidate, would be speaking before a large group of people and from the podium would state the need of my campaign for contributions but I would not approach any persons individually to solicit money. The third example would be where I, as a judicial candidate, would directly ask individuals for campaign contributions on a one on one basis either in person or by phone.

125. The Office of Lawyers Professional Responsibility responded to the request for an advisory opinion by indicating that its position during the 1996 elections was that the Code prohibited all forms of judicial candidate solicitation for campaign contributions. The Office of Lawyers Professional Responsibility refused to issue an advisory opinion because there were no pending elections in 1997 and changes to the Canon 5 were pending.

126. The Minnesota State Bar Association (“MSBA”) petitioned the Minnesota Supreme Court to permit judicial candidates to make general appeals for financial support:

The MSBA also recommends that the rules should permit a candidate to make general appeals for financial support when speaking to any permitted group. This change should be implemented as the following amendment to the beginning of Canon 5 . . .

A candidate may, however, make general appeals for financial support when speaking to gatherings as set forth in Section 5 B(1)(a).

127. Mr. Wersal and Mr. Kolosky, in their 1998 campaigns, have not personally solicited campaign contributions. CFJ has solicited campaign contributions on behalf of Mr. Wersal. Neither Mr. Wersal nor Mr. Kolosky will personally solicit campaign contributions under threat of sanction by the Lawyers Professional Responsibility Board, the Office of Lawyers Professional Responsibility, and the Board on Judicial Standards.
128. The Code's ban on judicial candidates Mr. Wersal and Mr. Kolosky personally soliciting funds is a violation of the Plaintiffs' free speech rights provided for in the U.S. and Minnesota Constitutions.

### CONCLUSION

129. The purpose of this action is to obtain declaratory and injunctive relief, declaring unconstitutional, as a violation of the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 3 and Article I, Sections 2 and 7 of the Minnesota Constitution, Canon 5 of the Minnesota Code of Judicial Conduct (as amended by the Minnesota Supreme Court on December 23, 1997) to the extent Canon 5 unconstitutionally prohibits the following actions of judicial candidates and others:
- A judicial candidate or others attending or speaking on behalf of the candidate to gatherings of the Republican Party of Minnesota and the Affiliated Associations
  - A judicial candidate or others announcing the candidate's views on disputed legal or political issues
  - A judicial candidate or others identifying the candidate as a member of the Republican Party of Minnesota and the Affiliated Associations
  - A judicial candidate, his or her campaign committee or others seeking, accepting or using endorsements from the Republican Party of Minnesota and the Affiliated Associations on behalf of the candidate
  - A judicial candidate not personally soliciting campaign contributions.



130. Plaintiffs have no adequate remedy at law

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request the following relief:

1. Declaratory relief as follows:

A The Code sections banning a candidate for judicial office and others from attending and speaking at gatherings of the Republican Party of Minnesota and the Affiliated Associations on the candidate's behalf violate the Plaintiffs' free speech and associational rights provided for in the United States and Minnesota Constitutions.

B The Code's disparate treatment toward a judicial candidate and others attending and speaking on behalf of the candidate at gatherings of the Republican Party of Minnesota and the Affiliated Associations vis-a-vis gatherings of special interest groups, is a violation of the Plaintiffs' equal protection rights provided for in the U.S. and Minnesota Constitutions.

C The Code's ban on a judicial candidate and others announcing the candidate's views on disputed legal and political issues is a violation of the Plaintiffs' free speech rights provided for in the U.S. and Minnesota Constitutions.

D The Code's ban on a judicial candidate and others identifying the candidate as a member of the Republican Party of Minnesota and the Affiliated Associations is a violation of the Plaintiffs' free speech and associational rights provided for in the U.S. and Minnesota Constitutions.

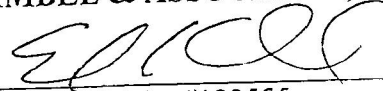
E The Code's disparate treatment toward a judicial candidate and others identifying the candidate as a member of the Republican Party of Minnesota and the Affiliated Associations vis-a-vis a member of a special interest group, is a violation of the Plaintiffs' equal protection rights provided for in the U.S. and Minnesota Constitutions.

F The Code's ban on judicial candidates, the candidate's campaign committee and others seeking, accepting or using an endorsement from the Republican Party of Minnesota and the Affiliated Associations on behalf of the candidate is a violation of the Plaintiffs' free speech and associational rights provided for in the U.S. and Minnesota Constitutions.

G The Code's disparate treatment toward a judicial candidate, the candidate's campaign committee, and others seeking, accepting or using the endorsements of the Republican Party of Minnesota and the Affiliated Associations vis-a-vis endorsements of special interest groups, is a violation of the Plaintiffs' equal protection rights provided for in the U.S. and Minnesota Constitutions.

Dated: September 2, 1998.

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