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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Mark French, Plaintiff, v. Edward McLean, in his official capacity as Chair of Montana's Judicial Standards Commission; Blair Jones, in his official capacity as a member of Montana's Judicial Standards Commission; Victor Valgenti, in his official capacity as a member of Montana's Judicial Standards Commission; John Murphy, in his official capacity as a member of Montana's Judicial Standards Commission; Sue Schleif, in her official capacity as a member of Montana's Judicial Standards Commission, Defendants.	Case No. CV-~~00057-SEH~~ 14-57-GF-SEH AMICUS BRIEF OF AMICI

The Hon. Chief Justice Mike McGrath, Hon. Jim Rice, Hon. Michael E Wheat, Hon. Patricia Cotter, Hon. Beth Baker, and Hon. James Jeremiah Shea hereby submit the following amicus brief on the question of whether Rule 4.1(A)(7) of the Montana Code of Judicial Conduct is unconstitutional.

STATEMENT OF INTEREST

Under Article VII, Section 2(3) of the Montana Constitution, the Montana Supreme Court is charged with adopting and enforcing a code of judicial conduct. Pursuant to its constitutional duty, the Court in 2008 adopted a Code of Judicial Conduct. By statute, the Judicial Standards Commission can investigate complaints alleging violations of the Code of Judicial Conduct. Section 3-1-1106(1)(a), MCA. If the Commission finds the allegations to be true, it recommends to the Montana Supreme Court the censure, suspension, removal, or disability retirement of the judicial officer. Section 3-1-1106(3), MCA. The Court may then either accept or reject the recommendation. Section 3-1-1107, MCA.

Because the Montana Supreme Court crafted the Code of Judicial Conduct that governs the conduct of judicial candidates, the participating Justices can present the policy perspectives underlying the rule of conduct presently under challenge—a role that the named defendants, as the body charged with the enforcement of those rules, cannot fill.

AMICUS BRIEF

Plaintiff Mark French has filed a verified complaint for declaratory and injunctive relief. French seeks a declaration that Rule 4.1(A)(7) of the Montana Code of Judicial Conduct is unconstitutional. He contends that the Rule violates the Free Speech Clause of the First Amendment to the United States Constitution

in preventing him from seeking, accepting, or using endorsements from political parties and non-judicial elected officials or candidates.

The Ninth Circuit Court of Appeals has addressed First Amendment freedom of speech issues in judicial campaigns in two recent decisions: *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012), and *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014). These decisions establish a number of broad principles that have application to this matter: (1) Montana has a compelling interest in maintaining a fair and independent judiciary; (2) Montana has a compelling interest in maintaining public confidence in the judiciary; (3) restrictions of campaign speech are subject to a strict scrutiny analysis; and (4) in order to survive strict scrutiny analysis, the State must show that the Rule in question is narrowly tailored and not under-inclusive.

Amici submit that, rather than applying a formulaic First Amendment analysis of Rule 4.1(A)(7) standing alone, this Court should review the Rule in the context of the entire Code of Judicial Conduct and ask whether the alternative remedies suggested by French (appointment and recusal) adequately address the State's compelling interest in maintaining public confidence in the judiciary.

In advocating for appointment of judges and dismissing Montana's concern with the corrupting influence of political endorsements on judicial elections, the Ninth Circuit, in *Sanders*, citing J. Marshall's dissent in the U.S. Supreme Court

decision in *Renne v. Geary*, 501 U.S. 312, 349, 111 S. Ct. 2331, 2353 (1991), stated: "The prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic process; it *is* the democratic process." *Sanders*, 698 F.3d at 747 (emphasis in original).

Not surprisingly, none of the 39 states that elect their judges has, since the U.S. Supreme Court decision in *Republican Party of Minn. v. White,* 536 U.S. 765, 122 S. Ct. 2528 (2002), chosen to switch to an appointive system. *See* American Judicature Society, Chronology of Successful and Unsuccessful Merit Selection Ballot Measures (cited in *Sanders*, 698 F.3d at 751 (Schroeder, J., dissenting)). Rather, the Montana citizenry has stayed with its decision that the "democratic process" is best served by having its judiciary popularly elected rather than appointed by the executive branch. Given that the judiciary, unlike the "political" executive and legislative branches, interprets the law rather than representing a constituency, Montana has chosen to structure its judicial elections as nonpartisan. In keeping with that policy decision, the Code of Judicial Conduct seeks to ensure that the judiciary is independent, impartial, nonpartisan, and apolitical.

The U.S. Supreme Court in *White* stated, "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *White*, 536 U.S. at 783. However, given the numerous challenges across the country to codes of conduct that were crafted to

differentiate a judicial election from a political election, it is evident that partisan forces are pressing to invalidate any judicial code of conduct that seeks to maintain non-partisan judicial elections.

Out of concern for the First Amendment rights of either the candidate or political organizations, the U.S. Supreme Court in *White* invalidated the prohibition on candidates "announcing" their views on issues. That decision spawned the invalidation of the statutory prohibition on a political party endorsing or contributing to a judicial candidate. *Sanders*, 698 F.3d at 749. Subsequently, in *Wolfson*, 750 F.3d at 1160, the Ninth Circuit invalidated Arizona's Judicial Code provisions prohibiting solicitation and political activities, finding the provisions were not sufficiently narrowly tailored and were thus unconstitutional restrictions on the political speech of non-judge candidates.

In light of these precedents, a question arises as to which, if any, of the numerous Code of Judicial Conduct provisions designed to assure nonpartisan judicial elections has any further meaning.

For example, given that political parties can now endorse judicial candidates, Amici are concerned as to whether the prohibition in Rule 4(A)(12) on judicial candidates making "pledges" or "promises" has any further viability. Making a pledge or promise is, of course, the time-honored manner of garnering party endorsements. The candidate gains the party's endorsement by, in turn,

endorsing the party's platform on a very broad spectrum of issues ranging from capital punishment to abortion, minimum wage, or health care. Even without an express statement, a candidate's solicitation, use, or acceptance of a political party's endorsement reasonably will be perceived as adoption of the party's platform or ideology. Saddled with having adopted the party's platform, the successful candidate dons the judicial robe and is then expected to shed the "political" persona and be independent, impartial, and unbiased.

Wolfson suggests, and French argues, that in the event a subsequent litigant notes the candidate's political endorsements, pledges, promises, and announcements and perceives that the elected judge is not impartial or independent, the litigant's due process rights will be protected when the judge recuses him- or herself. *Wolfson*, 750 F.3d at 1159.

Although case by case recusal may serve to alleviate due process concerns of a particular litigant, it is of very limited value in serving the larger goal of maintaining public confidence in the judiciary—an interest which the Ninth Circuit has recognized as a compelling interest. *Wolfson*, 750 F.3d at 1156. Amici submit that public confidence in the judiciary is rooted in the electoral process, and not in whether a judge, months or years after election, is recused in a specific case—an event normally receiving little or no publicity. This is particularly true when the recusal is not voluntary but rather mandated by rule or statute, or is at the behest of

one of the parties. The public's confidence arises from the election campaign process, with the public watching and asking, "Given her campaign statements and endorsements, is this judge a party-line politician, or is she a candidate who will judiciously reserve judgment on issues which may come before the Court to which she seeks election?"

Amici submit that it is counter-intuitive and detrimental to the efficient operation of the judiciary to elect judges who, due to their pledges, promises, endorsements, and announcements during candidacy, have compromised their ability to function optimally in the role as judge. The question of whether allowing judges to use partisan endorsements enables the judiciary to function optimally is an issue not yet addressed by the Ninth Circuit. *See Wolfson*, 750 F.3d at 1152.

A judge who is elected after having endorsed the Democratic or Republican platform is in a real quandary under the Code. The platform of a political party is, by design, filled with positions on difficult, controversial, and both popular and unpopular issues. On the one hand, Rule 2.7 imposes a "responsibility to decide" issues. The comment to this Rule states: "The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues." On the other hand, the rule on disqualification provides that a judge shall

disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including instances in which the judge, "while a judge or a judicial candidate has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Rule 2.12(4). It goes without saying that a judge who has endorsed a party platform on, for example, pro-life or pro-choice issues, has at a minimum, "appeared" to commit him- or herself to reach a particular result.

If the judge does not disqualify himself, arguably he is denying the litigants their due process right to an independent and impartial jurist. If he repeatedly and consistently disqualifies on such political issues, he is not able to function optimally as a judge and becomes a burden on his fellow jurists. Further, and ironically, he has frustrated the goals of the very partisans who have been encouraged to endorse him so that he could vote the party line. It is a no-win situation which undermines the public's confidence in the judiciary.

We submit that seeking and accepting an endorsement from a political party compromises a judge's ability to be "objective and open-minded." Comment [1] to Rule 2.2. Comment [2] of that Rule recognizes that "each judge comes to the bench with a unique background and personal philosophy." What the Rule assumes is that, despite the reality of personal predilections, the judge will have the ability to set aside his or her personal philosophy and keep an open mind. In most

instances, that is a valid aspiration. However, the other reality is that once a judge has made a public statement, or publicly endorsed a political platform, it is much more difficult for that judge to rethink, set aside, or back away from his or her commitment. Human nature is such that even persons of integrity shy away from reversing course on publicly stated positions—be they announcements, endorsements, pledges, or promises. In resolving legal issues, a judge should not have one eye on the platform of a political party whose endorsement the judge expressly sought, used, or accepted.

In concluding that Montana's statute prohibiting political parties from endorsing judicial candidates was not narrowly tailored, the Ninth Circuit noted the existence of a "content-neutral alternative"—that is, Montana could appoint its judges. *Sanders*, 698 F.3d at 747. Similarly, in the Arizona challenge, the Court held: "To the extent states wish to avoid a politicized judiciary, they can choose to do so by not electing judges." *Wolfson*, 750 F.3d at 1156. It is curious that, given concerns for the First Amendment rights of political parties and judicial candidates to have a robust involvement in the democratic process, the Ninth Circuit's preferred alternative—appointment by the executive—is no less political and yet much less "democratic." In an appointive system, individual citizens are denied any right to vote and political parties and other organizations or corporations are

denied their right to make expenditures on behalf of individual candidates. *Citizens United v. FEC,* 558 U.S. 310, 130 S. Ct. 876 (2010).

Rule 4.1(A)(7) of the Code of Judicial Conduct is, of course, not the only Code provision that is potentially implicated by this challenge.

Rule 2.3(B) (Bias, Prejudice and Harassment) requires that a judge not manifest bias or prejudice with regard to race, sex, gender or *political affiliation.*

Rule 2.7 (Responsibility to Decide) discourages frequent disqualification (recusal) out of concern for public disfavor and the resulting burden on judicial colleagues. Honoring this imperative becomes all the more difficult for a judge who has a history of flagging his or her positions on political issues of the day.

Rule 2.11 requires that a judge "not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," or make "pledges or promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."

Rule 2.12 (Disqualification) requires that a judge disqualify him- or herself when the judge "has made a public statement . . . that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Rule 2.12(4). This Rule obviously puts the

politicized judge in the position of having to frequently recuse—in contravention of Rule 2.7.

Rule 4.1(A) sets forth an extensive list of proscribed political and campaign activities, including holding office in a political organization; publicly identifying him- or herself as a candidate of a political organization; and making statements, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the judicial office. Rule 4.1(A)(10) proscribes "knowingly, or with reckless disregard for the truth, mak[ing] any false or misleading statement." Perhaps as a harbinger of challenges to come, the Eleventh Circuit struck down a similar *false or misleading statements* provision in the Georgia Code of Judicial Conduct, holding that restrictions on candidate political speech during judicial campaigns must be subject to an actual malice standard. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

Although Mr. French has challenged only the Rule 4.1(A)(7) prohibition on seeking or accepting endorsements from political organizations, Amici are concerned that, if his challenge is successful, the other Rule 4.1(A) provisions designed to distinguish judicial campaigns from other campaigns may no longer be viable. With judicial campaigns being politicized and with the door open to knowingly false or misleading statements, Montana's permissible choice to have a

nonpartisan judiciary will be defeated and it will have lost the battle to maintain public confidence in the judiciary.

Although the U.S. Supreme Court in *White* left open the question of whether the First Amendment "requires campaigns for judicial office to sound the same as those for legislative office," *White*, 536 U.S. at 783, Amici submit that if Mr. French's challenge to Rule 4.1(A) is upheld, the answer will unfortunately be "yes"—campaigns for judicial office must be the same as those for legislative office.

CONCLUSION

Notwithstanding its invalidation of § 13-35-231, MCA, in *Sanders*, the Ninth Circuit Court has recognized Montana's compelling interest in maintaining a fair and independent judiciary and in maintaining the public's confidence in the judiciary. We urge this Court to acknowledge that regardless of what a political organization is allowed to do, a candidate for judicial office may and should be held to a standard commensurate with the dignity, gravity, and optimal function of judicial office. We therefore respectfully request that this Court deny French's request to declare Rule 4.1(A)(7) of the Montana Code of Judicial Conduct unconstitutional.

Dated this 9th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Amicus Brief of Amici was sent by the U.S. mail to:

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