

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

---

Court Review: The Journal of the American  
Judges Association

American Judges Association

---

October 2007

## Court Review: Volume 41, Issue 3-4 - The Resource Page: Focus on Judicial Campaign-Conduct Rules

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>



Part of the [Jurisprudence Commons](#)

---

"Court Review: Volume 41, Issue 3-4 - The Resource Page: Focus on Judicial Campaign-Conduct Rules"  
(2007). *Court Review: The Journal of the American Judges Association*. 61.  
<https://digitalcommons.unl.edu/ajacourtreview/61>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# The Resource Page: Focus on Judicial Campaign-Conduct Rules

*Editor's Note:* There are about 8,500 state general-jurisdiction trial-court judges in the United States; of those, 77% stand for some sort of contestable election and 87% stand for some form of election. There are about 1,250 state appellate judges in the United States; of those, 53% stand for some sort of contestable election and 87% stand for some form of election. (See Court Review, Summer 2004, at 21.) In addition, there are thousands of additional, limited-jurisdiction judges also subject to election. Thus, the rules governing election-campaign conduct by judges are of great significance.

In 2002, in *Republican Party of Minnesota v. White*, the United States Supreme Court held a broadly written provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from “announcing” positions on issues violated the First Amendment. On remand in that same case in August 2005, the United States Court of Appeals for the Eighth Circuit held two more provisions of the Minnesota Code of Judicial Conduct—the partisan-activities and solicitation clauses—unconstitutional.

Whether the United States Supreme Court again takes the case to provide its guidance or not (a request for review is pending), the Eighth Circuit's opinion will have broad impact, at least for the near term. State supreme courts will continue their struggles to rewrite codes of judicial conduct to meet both the state interests perceived to apply and the limits being placed upon those codes by the federal courts. And judicial candidates will continue their efforts both to succeed in contested elections and to comply with the codes of conduct.

Therefore, we reprint here substantial excerpts from the Eighth Circuit's opinion, as well as from the dissenting opinion of three members of that court. We have deleted all of the footnotes and most of the citations. For the few Supreme Court cases cited by the court to which we have retained the reference, they are simply noted by name and year.

## IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**Republican Party of Minnesota, et al.,**

vs.

**Suzanne White, et al.,**

**416 F.3d 738 (Aug. 2, 2005).**

[\*744] **BEAM, Circuit Judge.**

This case is before us en banc upon remand from the United States Supreme Court. We briefly outline what has occurred in

this matter since its inception, believing that it will be helpful in analyzing the issues presented.

The dispute commenced in the United States District Court for the District of Minnesota. At issue were the so called “announce,” “partisan-activities,” and “solicitation” clauses of Canon 5 of the Minnesota Supreme Court's canons of judicial conduct. The district court rejected Appellants' First and Fourteenth Amendment claims, *Republican Party of Minn. v. Kelly* (D. Minn. 1999), and granted summary judgment to Appellees: the Minnesota Board on Judicial Standards, the Minnesota Lawyers Professional Responsibility Board, and the Minnesota Office of Lawyers Professional Responsibility. On appeal, a divided panel of this court affirmed the district court. *Republican Party of Minn. v. Kelly* (8th Cir. 2001). We denied Appellants' en banc suggestion. The Supreme Court granted certiorari and held, *Republican Party of Minn. v. White* (2002), that the announce clause violates the First Amendment, reversing our holding in *Kelly*. The Court remanded the case for further proceedings consistent with its opinion. Upon remand, the same panel, divided as before, again affirmed the district court's ruling on the solicitation clause and remanded for further consideration in light of *White* of the partisan-activities clause. We granted Appellants' request for en banc review, vacating the panel opinion. Today, we find that the partisan-activities and solicitation clauses also violate the First Amendment. Accordingly, we reverse the district court and remand the case with instructions to enter summary judgment in favor of Appellants.

The Supreme Court's remand requires us to consider two issues in light of *White*: the constitutional viability of the partisan-activities and solicitation clauses of Canon [\*745] 5. . . .

### I. BACKGROUND

Canon 5A(1) and 5B(1), the partisan-activities clause, and B(2), the solicitation clause, rein in the political speech and association of judicial candidates in Minnesota. The partisan-activities clause states, in relevant part:

Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) identify themselves as members of a political organization, except as necessary to vote in an election;

. . . .

(d) attend political gatherings; or seek, accept or use endorsements from a political organization.

Section 5B(1)(a) provides that “[a] judge or a candidate for election to judicial office may . . . speak to gatherings, *other than political organization gatherings*, on his or her own behalf.” (emphasis added). The solicitation clause states,

A candidate shall not personally solicit or accept

campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. 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. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

[\*746] The facts of this case demonstrate the extent to which these provisions chill, even kill, political speech and associational rights. In his 1996 bid for a seat as an associate justice of the Minnesota Supreme Court, appellant Gregory Wersal (and others working on his behalf) identified himself as a member of the Republican Party of Minnesota, attended and spoke at the party's gatherings, sought the endorsement of the party, and personally solicited campaign contributions. In response to Wersal's appearance at and speech to a Republican Party gathering, a complaint was filed with the Minnesota Lawyers Professional Responsibility Board, alleging that Wersal's actions violated Canon 5A(1)(d). Although the Minnesota Office of Lawyers Professional Responsibility (OLPR) ultimately dismissed the complaint, the complaint accomplished its chilling effect. Wersal, fearful that other complaints might jeopardize his opportunity to practice law, withdrew from the race.

Wersal made a second bid for a seat on the Minnesota Supreme Court in 1998. In 1997 and 1998, Wersal asked the OLPR for advisory opinions regarding the solicitation and partisan-activities clauses. The OLPR's response was mixed, stating it would not issue an opinion regarding personal solicitation, in light of proposed amendments to the Canon and the fact that there were no judicial elections scheduled that particular year. It also stated that it would enforce the partisan-activities clause. Wersal then initiated this litigation. In the meantime, he was forced to write several letters to individuals who had indicated they would speak on his behalf at Republican Party conventions across the state, asking them not to do so in order to avoid violating Canon 5 and imploring them to "please be patient. I hope for a decision from the Federal Courts soon." He also had his campaign's legal counsel advise the chairman of the Republican Party of Minnesota that Canon 5 would prohibit Wersal from accepting or using any endorsement from the party. There is no question that Wersal sought to work within the confines of Canon 5 even as he

sought to challenge it—confines that in the most direct of ways restricted his political speech and association, compelling him at one point to end a political campaign.

## II. DISCUSSION

### A. Judicial Selection in Minnesota

Minnesota has chosen to elect the judges of its courts. . . . Some thirty-three states employ some form of contested election for their trial courts of general jurisdiction, their appellate courts, or both. As federal judges, we confess some bias in favor of a system for the appointment of judges. Indeed, there is much to be said for appointing judges instead of electing them, perhaps the chief reason being the avoidance of potential conflict between the selection process and core [\*747] constitutional protections. In promoting the newly drafted United States Constitution, Hamilton argued in Federalist No. 78 that if the people were to choose judges through either an election or a process whereby electors chosen by the people would select them, the judges would harbor "too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws." Arguably, concerns about judicial independence and partisan influence, posited by Minnesota as grounds for regulating judicial election speech, are generated, fundamentally, not by the exercise of political speech or association, but by concerns surrounding the uninhibited, robust and wide-open processes often involved in the election of judges in the first place. As Justice O'Connor noted in her *White* concurrence, "the very practice of electing judges undermines [an] interest" in an actual and perceived impartial judiciary.

Yet, there is obvious merit in a state's deciding to elect its judges, especially those judges who serve on its appellate courts. It is a common notion that while the legislative and executive branches under our system of separated powers make and enforce public policy, it is the unique role of the judicial branch to *interpret*, and be quite apart from making that policy.

But the reality is that "the policymaking nature of appellate courts is clear." Courts must often fill gaps created by legislation. And in particular, by virtue of what state appellate courts are called upon to do in the scheme of state government, they find themselves as a matter of course in a position to establish policy for the state and her citizens. "At the [state] appellate level, common-law functions such as the adoption of a comparative fault standard, or the determination of a forced spousal share of intestate property distribution, require a judiciary that is sensitive to the views of state citizens. The courts' policy-making power is, of course, ever subject to the power of the legislature to enact statutes that override such policy. But that in no way diminishes the reality that courts are involved in the policy process to an extent that makes election of judges a reasonable alternative to appointment.

Without question, Minnesota may choose (and has repeatedly chosen) to elect its appellate judges. . . . [\*748] If Minnesota sees fit to elect its judges, which it does, it must do so using a process that passes constitutional muster.

## B. The First Amendment and Political Speech

Within this context, Minnesota has enacted Canon 5 in an effort to regulate judicial elections. In *White*, the Court held the announce clause of Canon 5, which prohibits judicial candidates from stating their views on disputed legal issues, unconstitutional. It falls to us now to determine whether the partisan-activities and solicitation clauses of Canon 5 are acceptable under the First Amendment. . . .

Protection of political speech is the very stuff of the First Amendment. . . . It cannot be disputed that Canon 5's restrictions on party identification, speech to political organizations, and solicitation of campaign funds directly limit judicial candidates' political speech. Its restrictions [\*749] on attending political gatherings and seeking, accepting, or using a political organization's endorsement clearly limit a judicial candidate's right to associate with a group in the electorate that shares common political beliefs and aims.

## C. The Strict Scrutiny Framework

Political speech—speech at the core of the First Amendment—is highly protected. Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it. The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest. Strict scrutiny is an exacting inquiry, such that “it is the rare case in which . . . a law survives strict scrutiny.”

### 1. The Requirement of a Compelling State Interest

Precisely what constitutes a “compelling interest” is not easily defined. . . . [\*750] In general, strict scrutiny is best described as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest. As one commentator has said, “the Court's treatment of governmental interests has become largely intuitive, a kind of ‘know it when I see it’ approach.” . . . A clear indicator of the degree to which an interest is “compelling” is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being “compelling.” . . . [\*751]

### 2. The Need for Narrow Tailoring

Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. As with the compelling interest determination, whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less

infringement of speech (is the least-restrictive alternative). In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible.

## D. Minnesota's Purported Compelling State Interest

In *Kelly*, Minnesota argued that Canon 5's restrictions on judicial candidate speech served a compelling state interest in maintaining the independence, and the impartiality, of the state's judiciary. Minnesota continues to argue that judicial independence, as applied to the issues in this case, springs from the need for impartial judges. Apparently, the idea is that a judge must be independent of and free from outside influences in order to remain impartial and to be so perceived. Thus, in *Kelly*, the panel majority understood the two notions, independence and impartiality, to be interchangeable, as the Supreme Court promptly noted in *White*. [\*753] In *Kelly*, the panel majority analyzed the announce, partisan-activities, and solicitation clauses in light of impartiality as a compelling interest, but failed to define “impartiality.” On appeal, the Supreme Court filled that void by fleshing out its meaning. Justice Scalia reasoned that impartiality in the judicial context has three potential meanings.

One possible meaning of “impartiality” is a “lack of preconception in favor of or against a particular *legal view*.” Quickly discounting this uncommon use of the word, the Court said it could not be a compelling interest for a judge to “lack . . . predisposition regarding the relevant legal issues in a case” because such a requirement “has never been thought a necessary component of equal justice.” The Court reasoned, first, that it is “virtually impossible” to find a judge who lacks any “preconceptions about the law,” and second, that it would not be desirable to have such a judge on the bench. “Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” We follow the Court's direction and likewise dismiss the idea that this meaning of impartiality could be a compelling state interest.

A second possible meaning is a “lack of bias for or against either *party* to [a] proceeding.” Calling this the traditional understanding of “impartiality” and the meaning used by Minnesota and amici in their due process arguments, the Court explained that this notion “guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.” The Court implied, and we find it to be substantially evident, that *this* meaning of impartiality describes a state interest that is compelling. . . . [\*754]

Being convinced that protecting litigants from biased judges is a compelling state interest, we turn to the “narrow tailoring” examination of the partisan-activities clause under this particular meaning of judicial impartiality. Because this meaning directs our attention to parties to the litigation rather than to ideas and issues, we analyze the regulation in this context before turning to other possible definitions of impartiality. We consider whether the partisan-activities clause actually addresses this compelling state

interest and, if so, whether it is the least restrictive means of doing so.

In *White*, the Supreme Court found that the announce clause failed the narrow tailoring aspect of the strict scrutiny test, holding “indeed, the clause is barely tailored to serve that [lack of bias] interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.” Thus, the Court found that clause was not narrowly tailored because it failed to advance a compelling interest. The same is true for the partisan-activities clause.

### **1. Unbiased Judges and the Narrow Tailoring of the Partisan-Activities Clause**

In one sense, the underlying rationale for the partisan-activities clause—that *associating with a particular group* will destroy a judge’s impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one’s self on particular issues* will destroy a judge’s impartiality. Canon 5, in relevant part, forbids a judicial candidate from identifying with a political organization, making speeches to a political organization, or accepting endorsements from or even attending meetings of a political organization, all of which are the quintessence of political associational activity. And beyond its importance in bringing about those rights textually protected by the First Amendment, association, as earlier noted, is itself an important form of speech, particularly in the political arena. . . . Inasmuch, then, as the partisan-activities clause seeks, at least in part, to keep judges from aligning with particular views on issues by keeping them from aligning with a particular political party, the clause is likewise “barely tailored” to affect any interest in impartiality toward parties. Thus, the Supreme Court’s analysis of the announce clause under this meaning of “impartiality,” to wit judicial bias, is squarely applicable to the partisan-activities clause. . . . [\*755]

We recognize that the difference between the direct expression of views under the announce clause and expressing a viewpoint under the partisan-activities clause through association, is that the latter requires the aligning of one’s self with other like-minded individuals—that is, the members of a political party.

Political parties are, of course, potential litigants, as they are in this case. Thus, in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in favor of that litigant. Yet even then, any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party. That is because the associational activities restricted by Canon 5 are, as we have pointed out, part-and-parcel of a candidate’s speech for or against particular *issues* embraced by the political party. And such restrictions, we have also said, do not serve the due process rights of *parties*. . . .

And in those political cases where a judge is more personally involved, such as where [a] redistricting case is a

dispute about how to draw that judge’s district, and even in those cases discussed above that merely involve a political party as a litigant, recusal is the least restrictive means of accomplishing the state’s interest in impartiality articulated as a lack of bias for or against parties to the case. Through recusal, the same concerns of bias or the appearance of bias that Minnesota seeks to alleviate through the partisan-activities clause are thoroughly addressed without “burning the house to roast the pig.” . . .

Therefore, the partisan-activities clause is barely tailored at all to serve any interest [\*756] in unbiased judges, and, at least, is not the least-restrictive means of doing so. Accordingly, it is not narrowly tailored to any such interest and fails under strict scrutiny.

### **2. Impartiality Understood as “Openmindedness,” and the Partisan-Activities Clause**

The third possible meaning of “impartiality” articulated by the Supreme Court in *White*, and the one around which its analysis of the announce clause revolved, was “described as openmindedness.” The Court explained,

This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.

The Court stopped short, however, of determining whether impartiality articulated as “openmindedness” was a compelling state interest because it found that, even if it were, the “woeful[] underinclusiveness” of the clause betrayed any intended purpose of upholding openmindedness.

We conclude that the partisan-activities clause is likewise “woefully underinclusive,” calling into question its validity in at least two ways. First, it leads us to conclude, before even reaching a compelling interest inquiry, that like the announce clause, the partisan-activities clause was not adopted for the purpose of protecting judicial openmindedness. Second, under a compelling interest analysis, the clause’s underinclusiveness causes us to doubt that the interest it purportedly serves is sufficiently compelling to abridge core First Amendment rights. We conclude that the underinclusiveness of the partisan-activities clause causes it to fail strict scrutiny. [\*757]

#### **a. Underinclusiveness Belies Purported Purpose**

Underinclusiveness in a regulation may reveal that motives entirely inconsistent with the stated interest actually lie behind its enactment. . . . The underinclusiveness manifests itself in the inherently brief period of speech regulation during a political campaign relative to the many other instances in which a judicial candidate, especially an incumbent who is a candidate, has an opportunity to speak on disputed issues. The Court

reasoned that if the purpose of the announce clause were truly to assure the openmindedness of judges, Minnesota would not try [\*758] to address it through a regulation that restricted speech only during a campaign since candidates' views on contentious legal issues can be and are aired in the many speeches, class lectures, articles, books, or even court opinions given or authored before, during or after any campaign.

The same is true of the partisan-activities clause. The announce clause bars a judicial candidate from stating his views on disputed issues though "he may say the very same thing . . . up until the very day before he declares himself a candidate." The partisan-activities clause bars a judicial candidate from associative activities with a political party during a campaign, though he may have been a life-long, active member of a political party (even accepting partisan endorsements for non-judicial offices) up until the day he begins his run for a judicial seat. A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness. The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity. And, history indicates it will be rare that a judicial candidate for a seat on the Minnesota Supreme Court will not have had some prior, substantive, political association. In sum, restricting association with a political party only during a judicial campaign, in supposed pursuit of judicial openmindedness, renders the partisan-activities clause "so woefully underinclusive as to render belief in that purpose a challenge to the credulous."

As for the appearance of impartiality, the partisan-activities clause seems even less tailored than the announce clause to an interest in openmindedness. While partisan activity may be an indirect indicator of potential views on issues, an affirmative enunciation of views during an election campaign more directly communicates a candidate's beliefs. If, as the Supreme Court has declared, a candidate may *speak* about her views on disputed issues, what appearance of "impartiality" is protected by keeping a candidate from simply *associating* with a party that espouses the same or similar positions on the subjects about which she has spoken? . . . . Given this "woeful underinclusiveness" of the partisan-activities clause, it is apparent that advancing judicial openmindedness is not the purpose that "lies behind the prohibition at issue here." [\*759]

#### **b. Underinclusiveness Betrays "Compelling" Claim**

While it is not necessary for us to reach the question of whether judicial openmindedness as defined in *White* is sufficiently compelling to abridge core First Amendment rights, we note that the underinclusiveness of Canon 5's partisan activities clause clearly estab-

lishes that the answer would be no. Whether Minnesota asserts a compelling state interest in judicial openmindedness is substantially informed by the fit between the partisan-activities clause and the purported interest at stake. A clear indicator of the compelling nature of an interest is whether the state has bothered to enact a regulation that guards the interest from all significant threats.

We are guided on remand by the law enunciated in *White*, and the Court's words bear repeating: "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." By its own terms, Canon 5's restrictions on association with "political organizations" apply only to "associations of individuals under whose name a candidate files for partisan office"—political parties. Yet, if mere association with an organization whose purpose is to advance political and social goals gives Minnesota sufficient grounds to restrict judicial candidates' activities, it makes little sense for the state to restrict such activity only with political parties. There are numerous other organizations whose purpose is to work at advancing any number of similar goals, often in a more determined way than a political party. Minnesota worries that a judicial candidate's consorting with a political party will damage that individual's impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party's policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the constitutional, legislative, public policy and procedural beliefs of organizations such as the National Rifle Association (NRA), the National Organization for Women (NOW), the Christian Coalition, the NAACP, the AFL-CIO, or any number of other political interest groups. . . . [\*760] Yet Canon 5 is completely devoid of any restriction on a judicial candidate attending or speaking to a gathering of an interest group; identifying herself as a member of an interest group; or seeking, accepting, or using an endorsement from an interest group. As a result, the partisan-activities clause unavoidably leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited, and thus Minnesota's argument that it protects an interest of the highest order fails.

#### **c. Underinclusiveness Not Indicative of a Legitimate Policy Choice**

The panel majority in *Kelly* did not find the underinclusiveness of the partisan-activities clause troublesome. It viewed it as a legitimate policy choice: "when underinclusiveness results from a choice to address a greater threat before a lesser, it does not run afoul of the First Amendment." Association with political parties, goes the argument, is a greater threat to judicial openmindedness than association with interest groups because political parties have more power "to hold a

candidate in thrall.” But to determine [\*761] whether Minnesota has shown that association with political parties poses a greater menace to judicial openmindedness than association with other political interest groups, it is necessary to do at least some analysis of the two supposed threats. While the opinion in *Kelly* purports to examine the “threat” posed by political parties, it contains no discussion of any comparable danger advanced by association with special interest groups, despite ample record evidence that suggests the influence of these special groups is at least as great as any posed by political parties.

Minnesota has simply not met its heavy burden of showing that association with a political party is so much greater a threat than similar association with interest [\*762] groups, at least with evidence sufficient for the drawing of a constitutionally valid line between them. As a result, cases granting some degree of deference to legislatures who seek to attack one form of a problem before addressing another form are not applicable here. . . . [\*763]

### 3. The Solicitation Clause

We now turn to an analysis of portions of the solicitation clause. The solicitation clause bars judicial candidates from personally soliciting individuals or even large gatherings for campaign contributions. “In effect, candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements.” And as the majority conceded in *Kelly*, such restriction depends wholly upon the subject matter of the speech for its invocation. Judicial candidates are not barred from personally requesting funds for any purpose other than when it is “related to a political campaign.” Restricting speech based on its subject matter triggers the same strict scrutiny as does restricting [\*764] core political speech. . . .

Moreover, the very nature of the speech that the solicitation clause affects invokes strict scrutiny. This is because the clause applies to requests for funds to be used in promoting a political message. It bears repeating that “it can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” And promoting a political message requires the expenditure of funds. . . .

Since strict scrutiny is clearly invoked, the solicitation clause must also be narrowly tailored to serve a compelling state interest. Minnesota asserts that keeping judicial candidates from personally soliciting campaign funds serves its interest in an impartial judiciary by preventing any undue influence flowing from financial support. We must determine whether the regulation actually advances an interest in non-biased or openminded judges. Appellants challenge only the fact that they cannot solicit contributions from large groups and cannot, through their campaign committees, transmit solicitation messages above their personal signatures. [\*765] They do not challenge the campaign committee system that Canon 5 pro-

vides under which candidates may establish committees that may solicit campaign funds on behalf of the candidate. “Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.” [Minn.] Canon 5, subd. B(2).

#### a. Unbiased Judges and the Narrow Tailoring of the Solicitation Clause

We first consider whether the solicitation clause serves an interest in impartiality articulated as a lack of bias for or against a party to a case. Keeping candidates, who may be elected judges, from directly soliciting money from individuals who may come before them certainly addresses a compelling state interest in impartiality as to parties to a particular case. It seems unlikely, however, that a judicial candidate, if elected, would be a “judge [who] has a direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a litigant in a case],” based on whether that litigant had contributed to the judge’s campaign. That is because Canon 5 provides specifically that all contributions are to be made to the candidate’s *committee*, and the committee “shall not” disclose to the candidate those who either contributed or rebuffed a solicitation. Thus, just as was true with the announce clause and its fit with an interest in unbiased judges, the contested portions of the solicitation clause are barely tailored at all to serve that end. An actual or mechanical reproduction of a candidate’s signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request. In the same vein, a candidate would be even less able to trace the source of funds contributed in response to a request transmitted to large assemblies of voters. So, the solicitation clause’s proscriptions [\*766] against a candidate personally signing a solicitation letter or making a blanket solicitation to a large group, does not advance any interest in impartiality articulated as a lack of bias for or against a party to a case.

#### b. Openminded Judges and the Narrow Tailoring of the Solicitation Clause

We next consider whether the solicitation clause as applied by Minnesota serves an interest in impartiality articulated as “openmindedness.” Put another way, would allowing a judicial candidate to personally sign outgoing solicitation letters, or to ask a large audience to support particular views through their financial contributions, in some way damage that judge’s “willingness to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case”? We think not. Given that Canon 5 prevents a candidate from knowing the identity of contributors or even non-contributors, to believe so

would be a “challenge to the credulous.” Thus, Minnesota’s solicitation clause seems barely tailored to in any way affect the openmindedness of a judge. Accordingly, the solicitation clause, as applied by Minnesota, cannot pass strict scrutiny when applied to a state interest in impartiality articulated as openmindedness.

### III. CONCLUSION

In *White*, the Supreme Court invalidated the announce clause and remanded the case to this court. Upon further consideration of the partisan-activities and solicitation clauses in light of *White*, we hold that they likewise do not survive strict scrutiny and thus violate the First Amendment. We therefore reverse the district court, and remand with instructions to enter summary judgment for Appellants.

#### **LOKEN, Chief Judge, concurring in part and dissenting in part.**

I concur in Parts I, II.B, II.C, II.D.1, and II.D.2 of the opinion of the court. I concur in Part IV of Judge John R. Gibson’s dissent and therefore dissent from the holding that Appellants are entitled to summary judgment invalidating the solicitation clauses. I otherwise concur in the judgment of the court.

#### **COLLTON, Circuit Judge, with whom GRUENDER and BENTON, Circuit Judges, join, concurring in part and concurring in the judgment.**

I concur in Parts I, II.B, II.C introduction, II.C.2, II.D introductory text, II.D.1, II.D.2.a, II.D.2.c, II.D.3, and III of the opinion of the court, and in the judgment of the court.

#### **JOHN R. GIBSON, Circuit Judge, with whom McMILLIAN and MURPHY, Circuit Judges, join, dissenting.**

The Court today strikes down the partisan activities clauses and the solicitation restriction as a matter of law, by summary judgment, ruling that the interests at stake are not compelling and that the clauses of Canon 5 are either too broad, or not broad enough, to justify their own existence. Preserving the integrity of a state’s courts and those courts’ reputation for integrity is an interest that lies at the very heart of a state’s ability to provide an effective government for its people. The word “compelling” is hardly vivid enough to convey its importance. The questions of whether that interest is threatened by partisan judicial election campaigns and personal solicitation of campaign contributions, and whether the measures Minnesota has adopted were crafted to address only the most virulent threats to that interest, are in part factual questions, which we should not decide on summary judgment. [\*767] Finally, the Court today adopts an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat. For these reasons, I respectfully dissent.

#### I.

The partisan activities clauses and the solicitation restriction each serve an interest that is and has been recognized as compelling—protecting the judicial process from extraneous coercion.

#### A.

In the district court, the Minnesota Boards argued that the state’s compelling interest was in protecting judicial independence and impartiality, concepts that were not further defined, perhaps because the Boards considered their meaning apparent. When the announce clause was before the Supreme Court, the opinion authored by Justice Scalia determined that further definition and analysis were essential in order to determine whether impartiality was a compelling state interest and whether the announce clause was narrowly tailored to serve that interest. Justice Scalia divined three possible meanings for judicial “impartiality.” The last meaning was “open-mindedness.” . . . . Because the announce clause was “woefully underinclusive” to serve any interest in judicial open-mindedness, Justice Scalia concluded that Minnesota had not adopted the announce clause in order to further such an interest; he therefore found it unnecessary to consider whether preserving “judicial open-mindedness” was a compelling state interest. Since *White*, the New York Court of Appeals has held that judicial open-mindedness is a compelling interest because “it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard.”

After *White*, by order of December 9, 2003, the Minnesota Supreme Court created an Advisory Committee to review its Canons 3 and 5 in light of *White*. . . . Following the Committee’s report, the Minnesota Supreme Court held its own hearing and received public comment. In September 2004, the Minnesota Supreme Court amended Canon 5 to add a definition of impartiality that explicitly includes open-mindedness:

“Impartiality” or “impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

Canon 5E (as amended Sept. 14, 2004).

The Court today discusses open-mindedness as if the concern were to protect [\*768] judicial candidates from experiences that would affect their subjective frame of mind. Thus, the Court holds that the state’s interest cannot be served by measures that only limit the candidate’s conduct during a campaign, not before: “The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.”

This answers the easy question but ignores the hard one. The threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election. This is a fundamental distinction between the partisan activities and solicitation clauses, on the one hand, and the announce clause, which was at issue in *White*. A central tenet of Justice Scalia’s opinion in *White* was that the announce clause regulated a candidate’s relation to issues, not people. The partisan activities and solicitation clauses



regulate how certain speech affects a judicial candidate's relations with people, and organizations of people, not the candidate's relations with issues.

Our Court's concern with temporal underinclusiveness is largely a result of its failure to address the threat to open-mindedness from external pressure. The threat to open-mindedness results from allowing the candidates to incur obligations during a campaign that can affect their performance in office. . . . Once the partisan activities clauses are gone, one may expect that party involvement will become the norm, so that recusal [\*769] would be pointless, since all judges would be similarly compromised.

#### B.

"Open-mindedness," in Justice Scalia's terminology, is in reality simply a facet of the anti-corruption interest that was recognized in *Buckley v. Valeo* (1976) and subsequent campaign finance cases. . . . Corruption is a sufficiently serious threat to our institutions that the government may (1) seek to prevent it before it happens and (2) act against it in intermediate forms that are more subtle than bribery and explicit agreements.

Admittedly, the concern with corruption in the campaign finance cases focuses on payment of money. While the solicitation clause also deals with money-raising, the partisan activities clauses do not, which distinguishes them from the campaign finance cases. Nevertheless, the Supreme Court's decision in *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers* (1973) demonstrates that the concern with corruption and undue influence is not limited to obligations resulting from payments of money. *Letter Carriers* recognized the danger partisan allegiances posed to neutral administration of justice. That case upheld restraints imposed by the Hatch Act on executive branch employees' political activities, in part because of the effect partisanship could have on the performance of their duties . . . . The need for "neutrality" identified in *Letter Carriers* is even more important for the judicial branch than the executive. . . . [\*772]

#### C.

Although in *White* Justice Scalia observed that the parties and this Court appeared to make no distinction between the concepts of judicial "independence" and "impartiality," in its September 14, 2004 [\*773] order, the Minnesota Supreme Court explained its decision not to amend the partisan activities clauses partly by relying on the need for separation of powers: . . . . "As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics." The separation of powers interest is a concern for institutional independence that is distinct from concern for impartiality in any of the senses identified by Justice Scalia. . . . Even the narrowest notion of federalism requires us to recognize a state's interest in preserving the separation of powers within its own government as a compelling interest.

#### D.

The extent and severity of the threat to the state's interests are factual questions that must be proven empirically. In the proceedings in the district court, the Boards adduced sufficient evidence of that threat so that summary judgment for the plaintiffs would not have been appropriate. But recent events make it far less appropriate that our Court should enter judgment as a matter of law on questions of fact as to which there is no record before us.

The record below contained the affidavit of a former governor of Minnesota who stated that he had a lifetime of experience in understanding how Minnesota citizens "think and feel" and that partisan judicial campaigns would lessen Minnesotans' confidence "in the independence of the judiciary." A former Chief Justice of the Minnesota Supreme Court stated that partisan judicial campaigns would "put pressure on judges to decide cases in ways that would impress the judge's supporters favorably."

But far more important to our holding today is the fact that the Minnesota Supreme Court has recently reconsidered the provisions of Canon 5 at issue here, held hearings, and received public comment. . . . [\*775]

The Court today errs grievously in issuing a ruling that strikes the provisions based on the 1997 factual record without considering the September 2004 record before the Minnesota Supreme Court. Since the holding is based on a factual record that antedates the most recent version of Canon 5, one must question whether the Court's holding today even applies to the current version of Canon 5, based as it is, on a 2004 factual determination which the Court does not take into account.

#### E.

The Court today holds that Minnesota's interest in judicial open-mindedness is not a compelling interest because the solicitation and partisan activities clauses are "underinclusive," meaning that they do not address all "significant threats" to the state's asserted interest. The Court today says that underinclusiveness of a regulation will establish that the state's purported interest is not compelling . . . . However valid that reasoning may be in cases where the asserted interest is novel or questionable, it is not valid here because the interests at stake in this case have already been recognized as compelling. Compelling interests cannot be negated simply because a particular measure adopted in their name is deemed ineffective. The Court today acknowledges that avoiding judicial bias that denies litigants due process is a compelling interest, whether or not a particular measure furthers it effectively. Likewise, protecting the integrity of the states' courts has long been recognized as compelling, and by the same reasoning, that interest cannot be negated simply because a particular measure may not protect it fully. . . . [\*776] It is a misreading of the Supreme Court's underinclusiveness discussions, and, most significantly, a nonsequitur as well, to say that the interest in judicial integrity could be reduced to insignificance because Canon 5 does not go far enough to protect it.

## F.

Preserving judicial open-mindedness, and the appearance of it, should be recognized as the same compelling state interest in avoiding corruption interest that was identified in *Buckley v. Valeo* and the campaign finance cases. Though it is the same anti-corruption interest, the need to protect that interest is more urgent and vital in the context of the judiciary because in that context outside influences threaten litigants' due process interest in adjudication in accord with the law and the facts of their case. A further state interest in preserving the separation of powers between state branches of government should also be recognized as compelling. The Minnesota Supreme Court has recently re-examined Canon 5 and clarified that the Canon is meant to protect those state interests. Judicial integrity and separation of powers are interests of the highest importance in guaranteeing the proper functioning of state government and we have no warrant to deny their importance.

## II.

### A.

Though the Court today errs in holding that underinclusiveness of a regulation can negate the importance of the state's interest in the integrity of its judiciary, underinclusiveness does indeed point to a different problem—it raises an inference of pretext. Even where an asserted governmental interest is undeniably compelling, a failure to fully address threats to that compelling interest can be evidence of pretext. The governmental actor may have missed the target because it was not aiming at it, but was actually seeking to accomplish some other, impermissible goal . . .

The Supreme Court has twice upheld speech restrictions on strict scrutiny review where the measure was tailored to [\*777] address only the most critical threat to the governmental interest, even where some threat to the asserted interest remained unaddressed. See *Austin v. Michigan State Chamber of Commerce* (1990), and *McConnell v. FEC* (2003). . . . [\*778]

### B.

The question at issue in our consideration of the partisan activities clauses, as in *Austin*, is whether there is a "crucial difference" in the threat posed by some entities that justified regulating them while leaving others unregulated. To rebut the inference of pretext, the government must show that the speech it has burdened poses a different, more serious threat to its asserted interest than the speech it chose not to regulate.

Recently, the Supreme Court has held that the differences between political parties and other interest groups could warrant differential regulation of the two kinds of groups. This distinction between political parties and other interest groups was at issue in *McConnell*, where the Court considered Title I of the Bipartisan Campaign Reform Act, which imposed restrictions on political parties' fund-raising activities that were not imposed on interest groups, such as the National Rifle Association, the American Civil Liberties Union or the Sierra Club. The plaintiffs contended that the

distinction violated Equal Protection. The Court held the distinction was permissible, because

Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group . . . . Congress' efforts at campaign finance regulation may account for these salient differences.

Before the district court, the Boards contended that special restrictions on judicial [\*779] candidates' reliance on political parties were necessary to protect Minnesota's tradition of non-partisan judicial elections, which dates from the enactment in 1912 of the statute making Minnesota judicial elections non-partisan.

The Minnesota Supreme Court greatly amplified that explanation when it decided to reject the Advisory Committee's proposed revisions to the partisan activities clauses in September 2004. The supreme court order stated, "We conclude that the restrictions on partisan political activity contained in our Code of Judicial Conduct are too important to undermine based on the possibility that they may be vulnerable to constitutional attack, particularly as we are convinced that there are sound bases for their constitutional validity." The court then reviewed the history of Minnesota's commitment to non-partisan judicial elections.

The movement towards non-partisan judicial elections was a reform movement meant to insulate judges from the party machines that had captured the state courts during the late nineteenth and early twentieth centuries. Between 1910 and 1958, eighteen states adopted non-partisan judicial elections. Among states that elect their judges, the majority use nonpartisan elections; currently, twenty states have nonpartisan elections for at least some of their judgeships, as opposed to fifteen who have at least some partisan elections. Among the states with non-partisan judicial elections, there [are] a wide variety of measures to enforce the non-partisan character of the election; some states have few such measures, but many have measures similar to those at issue here. Thus, the idea that [\*780] non-partisan campaigns might protect the judiciary from improper external pressures is hardly a novel idea, but must be placed within a broad national reform movement that still has significant sway within the states. . . . [\*781]

The hearing the Minnesota Supreme Court held before the 1997 amendments to Canon 5 included consideration of whether partisan activities restrictions should be limited to political parties as defined in Canon 5 or whether they should apply to other advocacy groups. There was testimony on both sides of that issue. In addition to the testimony of Judge Meyer (which the Court quotes [in a footnote]) and others against the definition adopted, DePaul

Willette testified:

Let's assume that the rule is not in place and two candidates in a race; one is endorsed by the republican party, one is endorsed by the democratic party. What do we have? We have a party race. It's not a nonpartisan contest. We have a party contest which will lead us, in my judgment, to the kind of fund-raising and the problems that Illinois and Texas are facing today with multi-million dollar budgets for people who want to retain or gain judicial positions.

Willette's testimony also refutes the idea that the Minnesota Supreme Court intentionally failed to address the threat from partisan activity by single-issue interest groups. Willette testified that one reason single-issue interest groups were not included in the partisan activities clauses is that single-issue groups would require a commitment that would have been banned under the announce clause at the time. Obviously, the announce clause can no longer play any role in the regulatory scheme; however, the Minnesota Supreme Court's expectation that the announce clause would serve to moderate a candidate's relation with interest groups was reasonable at the time and therefore tends to show that the partisan activities clauses were effective at the time adopted. Moreover, the invalidation of the announce clause has apparently had a profound effect on the pressures on judicial candidates in that it is apparently now common for organizations to send judicial candidates questionnaires asking them to state their positions on an array of disputed legal issues. See, e.g., *North Dakota Family Alliance, Inc. v. Bader* (D.N.D. 2005) (example of "voter's guide" questionnaire submitted to judicial candidates in North Dakota, including items asking candidate to agree or disagree with statements such as: "I believe that the North Dakota Constitution does not recognize a right to homosexual sexual relationships" and "I believe that the North Dakota Constitution does not recognize a right to abortion."). In light of the invalidation of the announce clause, I believe a remand for further evidence on the issue of pretext would be more appropriate than for us to order summary judgment on a record with evidence supporting both sides of the question.

Once again, the most pertinent evidence about the thinking behind the current Canon 5 is evidence that has not yet been presented to the district court. . . . [\*782]

*McConnell* demonstrates that the distinction between political parties and other interest groups could be defended as a valid response to "salient differences" between the kind of threat each sort of organization poses to the state's interests. In addition to its institutional experience with nonpartisan judicial elections since 1912, in 1997 the Minnesota Supreme Court had before it some evidence validating the distinction between political parties and other interest groups, and some challenging that distinction. It resolved that conflict, concluding that political parties posed the greater threat. The conclusion was reaffirmed in 2004 by a committee of lawyers and scholars charged with

the task of scrutinizing Canon 5 for constitutional problems, and later by the Minnesota Supreme Court. Our Court errs in concluding as a matter of law that the distinction between political parties and other interest groups is pretextual. The evidence as to this distinction is best considered by the district court on remand.

### III.

Our Court's underinclusiveness analysis goes astray by failing to recognize a compelling interest and by failing to allow the Boards to rebut the inference of pretext. Sections I & II, *supra*. But the signal failing of the Court's underinclusiveness analysis is that it envisions a kind of strict scrutiny that simply cannot work when [\*783] applied to real cases because it does not take into account the need for limited deference to the state's attempt to solve the problems that besiege it.

"Deference" is not a word we associate with strict scrutiny review, but there is indeed a place for limited deference, as shown in the recent case of *Grutter v. Bollinger* (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). There are three reasons why we should employ some limited deference to the judgment of the state of Minnesota in this case, if after remand, we were satisfied that the judgment was well-supported by cogent evidence and the possibility of pretext had been rebutted.

The Court's primary reason for striking the partisan activities clauses today is that the provisions are underinclusive. The main thrust of the narrow-tailoring requirement is directly to protect speech rights by avoiding an infringement broader than the need to protect the government's interest: "The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished." Exacting, de novo review by the courts to assure that the government has chosen the least restrictive alternative directly protects the individual's speech right. The objection that a measure is underinclusive, on the other hand, cuts in the opposite direction; it being the command of the First Amendment not to abridge the freedom of speech, one is at first surprised to learn that a law can offend the First Amendment because the law does not forbid enough speech. The vice in an underinclusive law is not that the underinclusiveness directly suppresses speech but that it raises a suspicion of pretext—which is just an inference, and which can be rebutted by sufficient evidence. Even in questions subject to strict scrutiny, there simply has to be some room for judgment about how wide to cast the net, and it should be apparent that it is more offensive to the First Amendment for a measure to be too broad than to be too narrow. The problem with applying the same kind of exacting, de novo review to underinclusiveness as we do to overinclusiveness is that the two requirements form a Catch 22 situation, in which a drafter's very effort to avoid overinclusiveness makes the measure vulnerable to attack for underinclusiveness. . . . [\*784]

A second reason for some limited deference is that this is a case of competing constitutional interests, so that what-

ever protection is afforded First Amendment interests comes at the expense of due process and separation of powers interests. . . .

Finally, this is a case in which the parameters of the evil addressed cannot be outlined with a high degree of precision. The difficulty is that the threat to the governmental interest is not from unambiguously evil conduct, but from behavior that forms part of a continuum with desired behavior—attempts of the citizenry to make their voices heard in their government. The critical and difficult question posed by this case is that the danger to judicial neutrality comes from that sometimes salutary behavior, at the point at which participation in the democratic process becomes undue influence over judicial decisionmaking, preventing a judge from acting as the law's representative, rather than as the representative of a political patron or donor. That point will vary from candidate to candidate, according to whether he or she is stubborn or persuadable, experienced or naive, young or old, poor or independently wealthy, ambitious or modest. No law can account for all these imponderables without restricting some candidate who would not have been swayed by temptation or leaving some candidate at liberty to compromise himself. . . . [\*785]

. . . . When Congress grapples with such a protean concept as “undue influence on an officeholder,” the Supreme Court applies strict scrutiny in such a way as to acknowledge that Congress' task requires exercise of some judgment. In contrast to the Supreme Court's approach, our Court today takes a bludgeon to a state's attempt to solve a delicate problem.

#### IV.

The futility of requiring unattainable precision is illustrated by our Court's treatment of the solicitation clause. The basic scheme of the solicitation clause is to erect the campaign committees as a barrier between the candidate and contributor. As recently as 2002, all but four of the states that had judicial elections prohibited candidates from personally soliciting campaign contributions. The Court today [\*786] seems to implicitly approve the concept of the campaign committee as a barrier between contributors and the judge or would-be judge. Yet, in effectuating the concept, there are necessarily details which could be moved an inch one way or another. It is clear that for the candidate to sign letters himself is one way to hack at the wall between the candidate and contributor—presumably, that is why Wersal wants to do it. It is perhaps true that the entire wall would not fall down, but it would be somewhat less effective in achieving the goal of removing personal obligation from the candidate-contributor relation. If each detail of the scheme must be proved as critical, rather than as forming a part of a scheme that works, then each detail, and therefore the scheme as a whole, is foredoomed.

Moreover, while the Court's ruling today seems to attack only one small aspect of the solicitation-restriction scheme, the ruling contains the seeds to strike the whole scheme. Today Wersal asks only to sign solicitation letters himself and to personally ask for money from large groups.

However, the Court states that any candidate can flank the campaign committee's confidentiality obligation simply by looking up public records showing who contributed to whom. In light of the Court's underinclusiveness analysis, this reasoning will likely require us to condemn the entire scheme as soon as the next plaintiff asks us to.

In sum, though strict scrutiny must, of course, be strict, it must, at least in some instances, be applied with limited deference to the decisionmaker's exercise of judgment. If we pretend that it is otherwise, we adopt a model for strict scrutiny under which no state's attempt to deal with certain problems can survive, and so very real and dangerous problems must be left unaddressed. Every place where the line is drawn is arguably either overinclusive, because too much activism is restricted, or underinclusive, because too much threat to judicial open-mindedness is tolerated. The courts then occupy the enviable position of not being required to say in advance what line would be permissible, but of being privileged to veto every possible legislative attempt to draw the line because it would have been possible to draw the line somewhere else. If strict scrutiny is simply a way to strike down laws, in which any law is doomed as soon as we invoke strict scrutiny, it is a charade. That is not how the Supreme Court has applied strict scrutiny, nor should we adopt this flawed methodology in our Circuit. Instead, where the states or other branches draw the line in a place which the governmental actor can defend, with convincing evidence, as the place where the threat to its interest becomes the most acute, the measure should pass strict scrutiny, though it might have been possible for another hypothetical decisionmaker to have moved the line an inch in one direction or another.

#### V.

There can be no question that the interests at stake here are compelling. There are questions of fact—first, as to whether the threat to those interests posed by partisan involvement in judicial elections and personal solicitation of contributions are [\*787] severe enough to warrant the measures taken by the Minnesota Supreme Court and second, as to whether the particular remedy chosen was truly selected for the asserted reason. I would remand to the district court for trial of these factual questions in light of new evidence of the Minnesota Supreme Court's most recent deliberations on the subject. If the defendants prove by convincing evidence that the threat was as they assert and that the clauses were adopted to remedy that threat, I believe the clauses should be upheld as constitutional. Today's ruling invalidates Minnesota's current attempts to preserve its courts' integrity and public repute without any evidence having been heard on the most recent rule amendments. At the same time, our ruling in effect dooms any future attempt as well by adopting a form of strict scrutiny that no measure will pass. I therefore respectfully dissent.