No. 00-14137-D

IN THE

United States Court of Appeals

FOR THE

Eleventh Circuit

ROBERT BUTLER, *et al.*,

Plaintiffs-Appellees.

v.

THE ALABAMA JUDICIAL INQUIRY COMMISSION, *et al.*,

Defendants-Appellants,

On Appeal from the United States District Court
for the Middle District of Alabama, Northern Division

BRIEF OF *AMICI CURIAE* THE CENTER FOR INDIVIDUAL FREEDOM, RONALD D. ROTUNDA, AND JOHN C. EASTMAN, IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of persons or entities that have or may have an interest in the outcome of this case:

Alabama Judicial Inquiry Commission, defendant

Alabama State Bar, amicus

James C. Barton, attorney for defendants

William J. Baxley, attorney for plaintiffs

Robert Butler, plaintiff

Center for Individual Freedom, amicus

Larry B. Childs, attorney for plaintiffs

Randall L. Cole, defendant

Ira DeMent, District Court Judge

John C. Eastman, amicus

W. Thomas Gaither, plaintiff

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Erik S. Jaffe, attorney for amici CIF, *et al*.

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Samuel A. Rumore, Jr., president Alabama State Bar Ass'n

David Scott, defendant

Harold F. See, Jr., plaintiff

Greg Sullivan, defendant

Norman E. Waldrop, Jr., defendant

James M. White, defendant

J. Mark White, defendant

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INTEREST OF *AMICI*

The Center for Individual Freedom (CIF) is a nonprofit corporation with the mission to investigate, explore and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to CIF are constitutional protections for the freedom of speech, most especially in the context of election campaigns.

Ronald D. Rotunda is the Albert E. Jenner, Jr., Professor of Law at the University of Illinois College of Law and a Visiting Senior Fellow in Constitutional Studies at the Cato Institute.[1] Professor Rotunda is also the author of Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (West 2000), and has both an academic and professional interest in both legal ethics and freedom of speech.

John C. Eastman, Ph.D., is an associate professor of law at Chapman University School of Law, where he teaches primarily Constitutional Law and an advanced seminar on the First Amendment. Dr. Eastman also serves as the Director of the Claremont Institute Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute, a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life."[2] In the latter capacity, Dr. Eastman engages in litigation challenging restrictions on campaign speech. A recent article by Dr. Eastman entitled "Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)," which addresses several of the First

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[1] Affiliations for identification purposes only. The views herein are those of Professor Rotunda and the other *amici*, and do not necessarily represent the views of these other organizations, which are not themselves parties to this brief.

[2] Affiliations for identification purposes only. The views herein are those of Dr. Eastman and the other *amici*, and do not necessarily represent the views of these other organizations, which are not themselves parties to this brief.

Amendment rights at issue in this case, will be published this fall in the annual election law symposium issue of the Catholic University Law Review.

Amici submit this brief pursuant to motion under Fed. R. App. P. 29(b).

STATEMENT

Contrary to the appointment of the federal judiciary, Alabama elects and re-elects its jurists in periodic partisan elections. In the context of such elections, the Alabama Canons of Judicial Ethics restrict core political speech by regulating the content of that speech and forbidding campaign statements that are true but alleged to be misleading and campaign statements that are alleged to be false. Canon 7B(2). The partisan Judicial Inquiry Commission ("JIC") may bring charges under the Canons on the mere assertion of "any *possible* violation" of that speech restriction. Brief of Appellants ("JIC Br.") at 5 (emphasis added). A judge charged with such a "possible" violation of the campaign speech restriction is immediately and automatically disqualified from office – without a hearing – until the charges are resolved. Amendment No. 328, § 6.19, to the Alabama Const. ("Section 6.19").

The particular facts giving rise to this case are a textbook example of why the First Amendment abhors restrictions on political speech. While campaigning for the Republican nomination for the position of Chief Justice of the Alabama Supreme Court, sitting Alabama Supreme Court Justice Harold F. See, Jr. ran a 30-second advertisement discussing his record on crime. In a single sentence com-

paring his record to that of his opponent, Judge Roy Moore, the advertisement stated that "Moore let convicted drug dealers off with reduced sentences or probation – at least 40 times," and displayed the case numbers to which that statement referred. [R1-1-13.] Simultaneously with the first broadcast of this advertisement, Justice See provided the press with extensive documentation on the cases that formed the basis of this single sentence. [R1-15.] Following the broadcast of this advertisement, there was ample debate between the candidates regarding Judge Moore's record and the claim made in the advertisement. When the issue was brought before the bipartisan Alabama Judicial Campaign Oversight Committee, that entity *declined* to find fault with the advertisement. [R1-1-4.]

Despite that open and robust campaign debate regarding judicial performance, and despite the unprecedented detail with which Justice See supported his statement, the partisan JIC decided to bring charges against Justice See under Canon 7B(2). Those charges are especially remarkable in that they are aimed at a single sentence in a 30-second spot that is alleged to be true but claimed to be "misleading" in some respects, and further alleged to be false under a contrived construction of that sentence by the JIC. *See generally* Appellees' Br., Statement of Facts.

Rather than applauding the detailed factual information that Justice See himself had provided to the press and the public to explain, support, and provide con-

text for his statement, or applauding the effectiveness of the First Amendment in generating debate over the disputed statement, the partisan JIC instead sought and still seeks to arrogate to itself the right to judge and punish the supposed truth or falsity of political speech. But that is not the function of government under our constitutional regime.

Indeed, the judicial campaign speech restrictions established in Alabama are an abomination under the First Amendment. No interest that has been alleged by the JIC can support them, and no means are available to prevent the near certainty of their abuse for partisan purposes. In the end, the restrictions are patently unconstitutional, and the district court thus was correct in entering a preliminary injunction and was correct in declining to abstain.

SUMMARY OF ARGUMENT

The campaign speech restrictions at issue in this case violate the First Amendment. Even as applied to allegedly false speech, government-initiated punishment of campaign speech has no place under our constitutional system. Especially pernicious is Section 6.19's automatic pre-trial disqualification of jurists charged with speech violations. The ease with which charges may be filed creates an incentive for and likelihood of abuse by partisan government enforcers.

The JIC's alleged interest in judicial integrity is stated at too high a level of generality and, where analyzed in the context of Alabama's pre-existing choice to

have partisan election of judges, is not advanced by the restrictions. Any narrower interests supposedly served by the speech restrictions are not compelling. The severe burden on First Amendment rights imposed by the establishment of a partisan government Truth Commission to regulate campaign speech calls for a *per se* rejection of such restrictions on free speech regardless of whether a restriction nominally might be limited to allegedly false speech. The district court thus was correct in entering its preliminary injunction and should be affirmed.

The district court also was correct in declining to abstain under *Younger* v. *Harris*, 401 U.S. 37 (1971). *Younger* abstention does not apply at all to the injunction against Section 6.19 given that such injunction does not restrain any pending state proceeding. And even as to the remainder of the injunction barring enforcement under the speech restrictions, the civil non-jury context of this case raises lesser comity concerns than some other proceedings triggering *Younger* abstention, and what concerns remain are mitigated by other factors and outweighed by the unusual circumstances surrounding this partisan attack on a sitting state Supreme Court Justice. Finally, *Younger* abstention plainly does not apply to plaintiffs Butler and Gaither, who are not parties to any pending proceeding, and hence this case must be remanded in any event.

ARGUMENT

I. CAMPAIGN SPEECH RESTRICTIONS ON JUDICIAL CANDIDATES VIOLATE THE FIRST AMENDMENT.

As both the district court and appellees correctly detail, the First Amendment provides its highest protection for direct political speech in the context of an election campaign, and its most unforgiving scrutiny for restrictions on such speech. *See Butler* v. *Alabama Judicial Inquiry Comm'n*, 2000 WL 1336615, at *7-*8 (M.D. Ala. July 28, 2000) (citing, *inter alia*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Brown* v. *Hartlage*, 456 U.S. 45 (1982)); Appellees' Br. at 18 (citing *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)); *see also Meyer* v. *Grant*, 486 U.S. 414, 425 (1988) (First Amendment protection of core election speech is "'at its zenith'" and the burden to justify restrictions on such speech is "well-nigh insurmountable.") (citation omitted); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971) ("the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"). If there are *any* state interests that may overcome First Amendment protection of campaign speech, such interests must be of the absolute first order, consistently and rigorously defended by the state, and clearly and presently threatened in a demonstrable manner.

No such interests exist in this case. In fact, the alleged state interests in this case are substantially at odds with Alabama's chosen method of judicial selection – partisan political campaigns – rendering those interests less than compelling. Furthermore, Alabama's methods of supposedly advancing its interests are so ill-suited for the purpose and so prone to partisan manipulation, that they cannot survive First Amendment scrutiny.

A. Judicial Disqualification on The Mere Accusation of Improper Campaign Speech Violates The First Amendment.

Amici believe that it is constitutionally improper for the government to sit as a truth board and to punish candidates running for *any* office for their campaign speech. The arbiter of truth during election campaigns is the citizenry, not the state. "[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945).

But before addressing the validity of the underlying speech restrictions, *amici* note that the initial and automatic disqualification requirement of Section 6.19 patently violates the First Amendment by imposing an irreparable pre-adjudication penalty on candidates for their political speech. Such penalty is assessed regardless of the eventual determination of truth or falsity of the challenged statement, regardless of the scienter involved in making the statement, and regard-

less of the materiality of, or the plausible punishment for, the challenged statement. And even where the jurist charged is eventually vindicated, there is absolutely no remedy for the harm done.

The ease of filing charges that will generate automatic pre-adjudication penalties highlights the likely misuse of such charges to harass and punish political enemies. The facts of this case provide unfortunate corroboration of such fears.

This case is the very first instance where the JIC has brought charges under Canon 7B(2). The charges were brought against a controversial Republican jurist whom the long-dominant Democratic establishment opposed, it was brought by a JIC composed overwhelmingly of Democratic political appointees, and it was brought after a bipartisan Commission failed to find fault with the challenged advertisement.[3] When all of this is viewed in the context of Alabama's partisan judiciary, the threat of abusive suppression of speech and punishment for political views is both apparent and, we submit, seems to have been actualized in this case. *Cf*. *McIntyre*, 514 U.S. at 357 (purpose of First Amendment is "to protect unpopu-

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[3] *See also* George Lardner, Jr., *Speech Rights and Ethics Disputed in Judicial Races*, Washington Post, Oct. 8, 2000, at A13 ("The crackdown in Alabama and elsewhere is surprising because it comes after decades of inaction.").

lar individuals from retaliation – and their ideas from suppression – at the hand of an intolerant majority"). [4]

Such pre-adjudication punishment based on the mere possibility of having made false or misleading political statements severely burdens the First Amendment rights of candidates against whom charges are brought and substantially chills the speech of many other candidates. Regardless of whether candidates believe they can successfully defend their behavior, the threat of politically motivated charges and automatic disqualification necessarily constrains their speech. That threat will chill all speech that could "possibl[y]" be considered by a politically hostile JIC to violate the Canons, even though the vast majority of such speech would not in fact violate anything and would be protected even under the JIC's cramped view of the First Amendment.

In light of the tremendous burden on First Amendment rights, it is difficult to imagine any state interest that could justify Section 6.19. The JIC does not even attempt to defend the constitutionality of Section 6.19. The closest it comes is in its discussion of abstention, where it merely asserts that disqualification "is not intended as punishment but as a step to preserve the public's confidence in the

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[4] It is interesting to note that Judge Moore – the ostensible victim of the challenged campaign speech – apparently did not file a complaint with the JIC. And the JIC apparently refuses to comment on the source of the complaint, fueling concerns that it is obscuring the political basis for bringing the charges.

courts." JIC Br. at 30. While the abstract interest in protecting public confidence might carry greater weight in connection with charges of wrongdoing in performing *judicial functions* – for example, taking a bribe to decide a case a certain way – the supposed interest in public confidence as it is tangentially affected by non-judicial conduct in the protected campaign speech context simply is not compelling for First Amendment purposes.[5]

Furthermore, Section 6.19 is a poor fit with the alleged interest in public confidence. Because the JIC can file charges on the mere *possibility* of a violation, without considering whether a violation is likely to be found or would result in substantial discipline, the pre-adjudication penalty will likely be more severe than anything imposed following final adjudication even where a violation is found. In this case, for example, it is wholly implausible that even a finding of a violation could result in more than a letter of censure, and there is no allegation that removal is likely or even would be sought. If anything, therefore, the substantial pre-adjudication penalties are more likely to undermine public confidence by exagger-

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[5] In this case particularly, there is no connection between Justice See's current position and his campaign speech seeking to secure a nomination for an office *that he did not get*. Unlike the situation of an alleged impropriety that contributed to a candidate gaining office in the first place – where a temporary delay in taking office might conceivably relate to the inquiry into the validity of the election – the challenged campaign speech here could not possibly have impacted Justice See's *previous* election to his current position.

ating the likelihood and severity of alleged violations well out of proportion to the frequency or severity of actual violations.

B. THE JIC'S ALLEGED INTERESTS ARE NOT CONSTITUTIONALLY COMPELLING UNDER THE CIRCUMSTANCES.

Turning to the underlying charges themselves, the state interests alleged to support the campaign speech restrictions are not "compelling" under the First Amendment when viewed at the proper level of specificity and are not compelling when viewed in the context of Alabama's choices of how to select its judiciary.

The JIC claims to find in this case a compelling state interest in the general "integrity of the judiciary." JIC Br. at 40. But this claimed interest is asserted at far too high a level of generality and, when broken down, has little to do with this case. Thus one could agree on the importance to judicial integrity of rules against bribery or requiring recusal in cases where a jurist has a personal connection, and still be no closer to finding the interest at stake in regulating campaign speech. Likewise, one could recognize the vital importance of insulating judges from political pressures to decide cases according to the popular mood rather than the law, and still find nothing therein to support the restrictions here. These aspects of judicial integrity affect the substantive decisions made in particular cases, go to issues of bias and impartiality, and lie at the heart of any notion of judicial integrity.

But the interests supposedly served by Canon 7B(2) and by Canon 2A as applied in this case turn more on manipulating public *perceptions* by restricting the content of political speech in the midst of a partisan political campaign and are wholly unrelated to any direct threat to the faithful performance of *judicial* duties. Alabama is not regulating what a judge says in court or even what a judge says out of court about cases before him. Regulating what a candidate says in a political campaign does not address the integrity of the business of judging, and an alleged state interest in managing the content of political speech is neither compelling nor valid.

In addition to the mismatch between the broadly stated interest in integrity and the Canons at issue here, whatever interest that Alabama has is undercut by Alabama's inconsistent pursuit of that interest. As the U.S. Supreme Court recently observed, when an asserted interest is only partially and inconsistently promoted by the government, it will not be deemed compelling for constitutional purposes. *See Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 186-87 (1999) (questioning whether federal interests in discouraging gambling were even "substantial" where federal policy was "decidedly equivocal" and where Congress was unwilling "to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General"). In this case,

there are several aspects of Alabama law that call into question the weight of the claimed state interest.

The most obvious area of tension comes from the fact that Alabama chooses to select its judges by partisan judicial elections. Alabama purposefully and repeatedly imposes partisan political campaigns on its judges. The partisan pressure of an election, rather than being a threat to judicial integrity as it might be in the federal system, is instead the chosen measure of judges in Alabama. This essential difference not only places questions of integrity in a very different context, it also reflects upon the means by which judicial integrity is maintained under the Alabama system. While life-tenured federal jurists have self-regulation or the threat of impeachment as the main checks against misbehavior, Alabama jurists have the additional (and primary) check of the election process and the risk of being cast out of office to deter behavior that the electorate deems inappropriate. With responsibility and authority for selecting judges vested in the electorate, partisan efforts to unseat judges because of the content of their political advertisements usurp and undermine the election process as the primary check on judicial integrity and fitness for office.

These fundamental differences between the federal and Alabama judicial systems mean that the Alabama judiciary has less in common in this regard with

the federal judiciary than it does with the state legislature. Indeed, the Alabama judiciary is elected and re-elected for limited terms, populated by self-declared partisan officeholders, regulated through partisan means, and endowed with substantial "legislative" authority over the common law. Notions of integrity thus must take into account the more legislative character of the Alabama judiciary. Likewise, First Amendment interests are substantially greater in such a system, and reach their apex as concerns the campaign speech of candidates for office.

Finally, insofar as the interest asserted is one of public perceptions of neutrality and impartiality that are in fact contrary to the reality of a partisan judiciary, the interest is not compelling at all, but rather is illegitimate. Deceiving the public into a *misperception* of the nature of Alabama's judiciary by restricting speech should be considered a *per se* First Amendment violation, and could never constitute a compelling state interest. *Cf. 44 Liquormart Inc.* v. *Rhode Island,* 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (an asserted interest in keeping citizens "ignorant in order to manipulate their choices in the marketplace … is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech").

C. TARGETING ALLEGEDLY FALSE SPEECH DOES NOT SAVE THE SPEECH RESTRICTION IN THIS CASE.

Appellants focus their constitutional arguments on attempting to save a blue-pencilled version of Canon 7B(2) that would apply exclusively to false statements made with scienter of recklessness or greater.[6] But even a restriction limited to such allegedly false speech violates the First Amendment when applied by the government in the context of campaign speech. Indeed, in such a context *amici* contend that there should be a *per se* rule barring government-initiated truth tests. The only checks on supposed falsehoods in political campaigns should be the counterbalance of more speech and the possibility of individually initiated defamation suits with the many inherent and constitutionally imposed limits therein.

Forbidding government-initiated sanctions against even allegedly knowing or reckless falsehoods serves a variety of free-speech values. First, regardless of whether the speech itself is valuable, prohibiting restrictions aimed at such speech serves to provide the necessary "breathing space" for speech that *is* valuable. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The JIC's claimed authority to remove a judge from his judicial duties by merely *alleging* a falsehood with scienter does not provide such breathing space.

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[6] Appellants make only a half-hearted defense of Canon 7B(2) as applied to true statements and of Canon 2A as applied to the subsequent criticism of Judge Moore. The invalidity of those restrictions is fully addressed by Appellees' Brief.

The charges brought against Justice See amply illustrate this point. The basis for the JIC claiming the advertisement was false seems to be disagreement over whether Judge Moore "let convicted drug dealers off with reduced sentences or parole" as compared to what he was *authorized* to do under the law or as compared to what third parties *recommended* he do. The difference between these two interpretations is not especially material to the basic point of the criticism that Judge Moore exercised his discretion more leniently toward certain criminals than he might have, yet these alternative interpretations now form the crux of the charge against Justice See. It is precisely to avoid even the attempt at punishment in such ambiguous circumstances that the First Amendment provides extensive breathing space even where such space would also insulate some supposedly false speech.

Second, prohibiting government-initiated suits against allegedly false speech serves to limit a pernicious form of government power that is particularly prone to abuse. A claim of falsity may be raised with relative facility in the context of political campaigns where disagreements and conflicting interpretations are rife. The *New York Times* requirement of proof of a high degree of scienter may or may not be effective in limiting an erroneous outcome from such a claim, but it is of very little benefit in preventing the government from bringing the claim in the first place. And in this case, much of the partisan advantage from a politically motivated charge of falsehood can be gained from the charge itself and the ensuing

automatic disqualification, regardless of the eventual outcome of the case. In order to deprive the government of such an easily abused power, the First Amendment will indeed protect even falsehoods, recognizing that such is the cost of protecting against the even greater threat from the government regulating the content of political speech: That such speech regulation will inevitably result in government abuse in the form of a political Star Chamber. *Cf. McIntyre*, 514 U.S. at 357 ("political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse").

Third, U.S. Supreme Court cases approving damages remedies against intentional falsehoods in the defamation context are substantially different than the case at bar. A defamation remedy has not only the constitutionally imposed "actual malice" limitation, but also has inherent limits in its effective materiality requirement through which a plaintiff must show that he was adversely affected by the alleged falsehood. Here, there is no such requirement and there is no allegation that the advertisement had a materially adverse impact on Judge Moore, who won the primary. Other fundamental differences between defamation law and the speech restrictions here are that only the person injured is entitled to bring a defamation suit whereas a partisan government entity has control over whether to bring charges against judicial candidates; defamation defendants have the safeguards of a

jury trial, whereas charged judicial candidates do not; and the remedy in defamation cases is generally actual damages after proof of injury, whereas challenged campaign speech results in immediate disqualification and potential loss of office regardless of any proof of harm and regardless whether the election or the pre-existing judicial position was in any way impacted by the challenged speech.

The partisan enforcement mechanism used with Canon 7B(2) and the lack of numerous safeguards inherent to private defamation suits thus make it especially inappropriate to extend the *New York Times* standard to allow direct, content-based government restrictions on core electoral speech. Instead, the First Amendment is best served by application of a *per se* rule forbidding such speech restrictions.

II. *YOUNGER* ABSTENTION IS EITHER INAPPLICABLE OR INAPPROPRIATE IN THIS CASE.

As the district court correctly noted, it is a "fundamental principle that 'federal courts have a "virtually unflagging" obligation to exercise their jurisdiction' when appropriate. …. To act otherwise would do treason to the constitution of this great country and would ignore the duties and obligations that federal courts were established to carry out. …. [W]here the interest 'in comity collides with the paramount institutional interests protected by the First Amendment, comity must yield.'" *Butler* v. *Alabama Judicial Inquiry Comm'n*, 2000 WL 1336618, at *2 (M.D. Ala. Aug. 3, 2000) (quoting, respectively, *Deakins* v. *Monaghan*, 484 U.S.

193, 203 (1988) (quoting *Colorado River Water Conserv. Distr.* v. *United States*, 424 U.S. 800, 813, 817 (1976)); *Machesky* v. *Bizzell*, 414 F.2d 283, 291 (5th Cir. 1969)). While policy concerns over state sovereignty may occasionally overcome a federal court's solemn duty to exercise its jurisdiction when called upon to do so, this case has numerous material distinctions from *Younger* and its progeny that make abstention especially inappropriate.

A. *YOUNGER* DOES NOT APPLY TO COUNT V OF THE COMPLAINT AND THE INJUNCTION AGAINST DISQUALIFICATION.

While *Younger* abstention imposes certain limits on federal injunctions against pending state proceedings, it has no application to injunctions against other state conduct. In this case, Count V of the Complaint challenges the automatic disqualification provision of Section 6.19. The district court in Part 4 of its Order separately enjoined defendants and others "from hindering or preventing Justice See from continuing to carry out his duties as an Associate Justice of the Supreme Court of Alabama." 2000 WL 1336615, at *16 (July 28, 2000 Mem. Op. and Order). That independent injunction does not restrain any pending state proceeding, and hence is not subject to *Younger* abstention. Indeed, it is essentially indistinguishable from injunctions approved in the context of pre-trial detention or employee discharges, to which *Younger* likewise does not apply. *See Gerstein* v. *Pugh*, 420 U.S. 103, 108 n. 9 (1975) (*Younger* abstention does not apply to action

to enjoin pretrial detention); *Younger* v. *Harris*, 401 U.S. at 47 n. 4 (federal injunction against unconstitutional state action in firing employees "raises no special problem" under basic principles governing abstention).

B. The Proceeding in This Case Raises Lesser Comity Concerns Than Do Cases at The Heart of *Younger* Abstention.

Younger and its progeny recognize that not all state proceedings are equal for purposes of abstention. The equitable weight accorded comity concerns varies with the particulars of each case in which abstention is invoked. For example, the applicability of *Younger* abstention to non-criminal proceedings turns on the involvement of "important" or "vital state interests." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *id*. at 433 n. 12 ("the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state"). In *Younger* itself, for example, comity concerns were particularly acute given the criminal nature of the proceeding and the fact that an injunction would have interfered with the role of the jury. *See* 401 U.S. at 44 (fundamental purpose of abstention important "in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted"). That case also involved a state effort to address perceived inducements to the violent overthrow of government. *Id*. at 38 & n. 1. But where such factors are absent, the

comity interest, while not eliminated, is certainly diminished. The point here is not that *Younger* abstention does not apply in a civil non-jury context – it plainly does apply – but rather that as the comity interest diminishes, so too diminishes the degree of federal interest or special circumstance that will overcome abstention.

The proceeding in this case does not implicate comity to the same degree as *Younger* and many of its progeny, and consequently the equitable pressure to abstain weighs considerably less, and the duty to exercise admitted jurisdiction in protection of federal rights is considerably greater. First, unlike in *Younger*, the allegations against Justice See arise in a civil proceeding that does not involve a jury. The core of Alabama's traditional police power and the balance between judge and jury thus are not implicated.

Second, unlike in *Middlesex*, the allegations against Justice See do not involve his "professional" or judicial conduct. 457 U.S. at 434. Rather, they involve the political conduct of *candidate* See, and hence have a considerably attenuated relationship to the professional regulation concerns relating to a specific trial that were at issue in *Middlesex*. Indeed, because the alleged state interest in this proceeding relates to the campaign speech of a candidate rather than to the performance of judicial functions, that interest is of limited comity value for the same reasons that the interest is not compelling for First Amendment purposes.

Third, the partisan political nature of Alabama's judicial system weakens notions of judicial federalism and the deference that would otherwise be accorded equivalent proceedings under separate sovereigns. The state proceedings at issue in this case are not validly equated with federal court proceedings and in fact bear great resemblance to legislative proceedings.[7] While a state is surely free to experiment with the nature of its judiciary, as the state system deviates further from the built-in procedural and structural protections of the federal judiciary, the importance of addressing federal rights in a federal forum waxes and the value of judicial comity wanes. And although a federal court should not *presume* that a state court would not enforce federal rights, it surely can recognize the diminished safeguards for federal rights as a result of specific state choices regarding its judiciary.

Fourth, changes in the relationship between federal and state courts have diminished the equitable weight that should be given to comity in civil cases. Deference to state proceedings is in large measure predicated upon an enforceable obligation for state courts to follow federal law, and the availability of eventual Supreme Court review. Thus, *Younger* and even *Middlesex* took place when there was still direct appellate review of the decisions of state courts on federal issues. Since 1988, however, appellate review of state decisions has been replaced by no-

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[7] This is especially true insofar as the Supreme Court of Alabama may be constru-

toriously limited *certiorari* review, 28 U.S.C. § 1257, and thus in the civil context there is no security of a final federal determination of federal rights for any particular litigant.[8] Abstention here thus does not create a *balance* of federal and state roles, but rather represents a complete abdication of *any* federal review in the overwhelming majority of cases.

Because the comity values at stake in this case are of less weight than in cases at the heart of the *Younger* doctrine, the equitable balance leans against abstention and in favor of exercising federal jurisdiction to protect federal rights.

C. THIS CASE IS SUFFICIENTLY UNUSUAL TO SATISFY THE WELL-ESTABLISHED EXCEPTION TO *YOUNGER* ABSTENTION.

It is undisputed that even aside from bad faith or harassment, "other unusual circumstances" may call for federal equitable relief against pending state proceedings. *Younger*, 401 U.S. at 55. There are many aspects of this case that render it highly unusual and sufficiently suspect that federal rights and interests would be best served in a federal forum. First, not only is this the first time Canon 7B(2) seems ever to have been the basis of a charge by the JIC, it is being used against a

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ing Judicial Canons that it adopted in its essentially legislative capacity.

[8] In the criminal context there still remains the availability of federal habeas review, thus supporting greater deference to initial state criminal proceedings. In this case, however, there is no mechanism for an effective collateral challenge to

sitting state Supreme Court Justice, was brought by a partisan-appointed JIC of the opposite political party, and is based upon statements that at best involve disagreements in interpretation and demonstrably had no impact on the outcome of any election given that Justice See lost in the primary for Chief Justice. Those facts alone are sufficiently unusual and suspect so as to give a federal court great pause. Combined with the limited state interest and comity concerns, abstention here is inappropriate.

Second, in addition to the suspicious context of this case, the injury to Justice See is plainly irreparable insofar as his preliminary disqualification is concerned. There is no opportunity for him to challenge that disqualification itself, and hence it will only end upon conclusion of the underlying case. But if the state proceeding goes forward, each day of continuing injury will be irreparable.[9]

Third, as detailed in Appellees' Brief, the opportunity for review of Justice See's federal claims is inadequate. And in the end, if the Alabama Supreme Court is the final arbiter, then it faces an inherent conflict of interest in acting as judge of

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adverse determinations of federal rights; only the extremely limited prospect of discretionary Supreme Court review.

[9] This injury is not the equivalent of the normal burdens "'incidental to'" defending a suit by the state. *Younger*, 401 U.S. at 47 (citation omitted). Justice See certainly faces those typical burdens as well, but his further disqualification from

its own handiwork. Because the Alabama Supreme Court was acting in its legislative capacity in passing the Canons to begin with, its eventual review of those same Canons adds nothing to the initial decision to adopt or maintain them.[10] Federal abstention in favor of such review is tantamount to abstaining so that a legislature can revisit the constitutionality of its own law, and perhaps repeal it on further consideration. Comity does not extend that far, and neither does *Younger* abstention.

D. *YOUNGER* DOES NOT APPLY TO THE CLAIMS BY CO-PLAINTIFFS AND REMAND WOULD THUS BE REQUIRED IN ANY EVENT.

Assuming *arguendo* that the Court were to apply *Younger* abstention to Justice See, as a party to the pending proceeding, the other two plaintiffs are not a

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service is a unique and wholly irreparable injury. Indeed, Alabama appears to be the only state to employ such a scheme of prior punishment.

[10] Furthermore, because the Alabama Supreme Court in passing the Canons was under an ongoing duty to observe and respect the federal Constitution in precisely the same way that legislators are, subsequent review in this case puts the state Supreme Court in a bind. If it previously considered the constitutional issue and determined that the Canon was valid, the court has not only made up its mind on the issue, but it has necessarily taken an extra-judicial public position on a matter that will now come before it, in seeming violation of Canon 2A itself and possibly presenting a due-process issue. *Cf. United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (disqualification of an agency decision maker could be had if she had "an unalterably closed mind on matters critical to the disposition of the proceeding"), *cert. denied sub nom. Lead Indus. Ass'n Inc.* v. *Donovan*, 453 U.S. 913 (1981). Alternatively, if the state Supreme Court *failed* previously fully to resolve the constitutional issue (despite Justice See himself having raised the point and voted against the Canon), they were in default of their duties and hence have proven themselves an inadequate tribunal to consider federal rights. Finally, if the

party to that proceeding or any other pending action, and hence *Younger* does not foreclose *their* right to proceed with this action. *Cf. Middlesex*, 457 U.S. at 437 n. 17 (declining to address abstention "as to respondent organizations who are not parties to the state disciplinary proceedings"), *on remand*, 687 F.2d 801, 802-03 (3d Cir. 1982) (noting that "abstention is improper with respect to" plaintiffs "who were not party to the state disciplinary proceedings" and remanding to the district court to consider the standing of such plaintiffs). While each of the other two plaintiffs is immediately harmed by the relevant Canons, they cannot raise their claims in the pending proceedings against Justice See and are fully entitled to a federal forum for their federal claims. *Amici* recognize that defendants in the district court raised an objection to the standing of these additional plaintiffs, but the district court did not reach that issue, dismissing the motion by the other plaintiffs as moot upon ruling in favor of Justice See. 2000 WL 1336615, at *5 (July 28, 2000 Mem. Op. and Order). If this Court were to direct abstention as to Justice See, that earlier motion by the other plaintiffs would cease to be moot and, as in *Middlesex*, the district court would have to address the standing of those plaintiffs in the first instance. A remand for further proceedings thus is required in any event.

Court previously thought the Canon unconstitutional, but adopted it anyway, it was more seriously in violation of its duties and is not a proper arbiter of federal rights.

CONCLUSION

For the foregoing reasons, this Court should affirm the entry of a preliminary injunction and remand to the district court for full consideration of this case on the merits.

Respectfully Submitted,

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October 13, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of October, 2000, I caused two copies of the foregoing Brief of *Amici Curiae* to be served by Federal Express overnight delivery, postage pre-paid, on:

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I hereby certify that the foregoing Brief of *Amici Curiae* complies with the 7,000 word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains _____ words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word 97. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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