

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
MINNEAPOLIS DIVISION

GREGORY WERSAL,)

Plaintiff,)

v.)

Civil Action No. _____

PATRICK D. SEXTON, in his official)
capacity as Chair of the Minnesota Board of)

Judicial Standards; WILLIAM J. EGAN, in)

his official capacity as a Member of the)
Minnesota Board of Judicial Standards;)

DOUGLAS A. FULLER, in his official)
capacity as a Member of the Minnesota)

Board of Judicial Standards; JON M.)
HOPEMAN, in his official capacity as a)

Member of the Minnesota Board of Judicial)
Standards; CYNTHIA JEPSEN, in her)

official capacity as a Member of the)
of the Minnesota Board of Judicial)

Standards; E. ANN MCKINSEY, in her)
official capacity as a Member of the)

Minnesota Board of Judicial Standards;)
GARY PAGLIACCETTI, in his official)

capacity as a Member of the Minnesota)
Board of Judicial Standards; JAMES)

DEHN, in his official capacity as a)
Member of the Minnesota Board of)

Judicial Standards; KENT A.)
GERNARDER, in his official capacity as)

Chair of the Minnesota Lawyers)
Professional Responsibility Board;)

VINCENT A. THOMAS, in his official)
capacity as Vice-Chair of the Minnesota)

Lawyers Professional Responsibility Board;)
KATHLEEN CLARKE ANDERSON, in her)

official capacity as Member of the)
Minnesota Lawyers Professional)

) VERIFIED COMPLAINT FOR
) INJUNCTIVE AND DECLARATORY
) RELIEF

Responsibility Board; MARK R. ANWAY,)
in his official capacity as Member of the)
Minnesota Lawyers Professional)
Responsibility Board; ROBERT B.)
BAUER, in his official capacity as Member)
of the Minnesota Lawyers Professional)
Responsibility Board; RICHARD A.)
BEENS, in his official capacity as Member)
of the Minnesota Lawyers Professional)
Responsibility Board; JOSEPH V.)
FERGUSON, III, in his official capacity)
as Member of the Minnesota Lawyers)
Professional Responsibility Board;)
WOOD R. FOSTER, JR., in his official)
capacity as Member of the Minnesota)
Lawyers Professional Responsibility Board;)
SUSAN C. GOLDSTEIN, in her official)
capacity as Member of the Minnesota)
Lawyers Professional Responsibility Board;)
SHERRI D. HAWLEY, in her official)
capacity as Member of the Minnesota)
Lawyers Professional Responsibility Board;)
LYNN J. HUMMEL, in her official capacity)
as Member of the Minnesota Lawyers)
Professional Responsibility Board; GERI L.)
KRUEGER, in her official capacity as)
Member of the Minnesota Lawyers)
Professional Responsibility Board; ANN E.)
MAAS, in her official capacity as Member of)
the Minnesota Lawyers Professional)
Responsibility Board; KATIE MCWATT,)
in her official capacity as Member of the)
Minnesota Lawyers Professional)
Responsibility Board; MARY L. MEDVED,)
in her official capacity as Member of the)
Minnesota Lawyers Professional)
Responsibility Board; WALLACE NEAL, in)
his official capacity as Member of the)
Minnesota Lawyers Professional)
Responsibility Board; DAVID A.)

PLAINTIFF'S
VERIFIED COMPLAINT

SASSEVILLE, in his official capacity as)
Member of the Minnesota Lawyers)
Professional Responsibility Board; CINDY)
K. TELSTAD, in her official capacity as)
Member of the Minnesota Lawyers)
Professional Responsibility Board; DEBBIE)
TOBERMAN, in her official capacity as)
Member of the Minnesota Lawyers)
Professional Responsibility Board; DIANNE)
A. WARD, in her official capacity as)
Member of the Minnesota Lawyers)
Professional Responsibility Board;)
KENNETH R. WHITE, in his official)
capacity as Member of the Minnesota)
Lawyers Professional Responsibility Board;)
STUART T. WILLIAMS, in his official)
capacity as Member of the Minnesota)
Lawyers Professional Responsibility Board;)
JAN M. ZENDER, in her official capacity)
as Member of the Minnesota Lawyers)
Professional Responsibility Board;)
Defendants.)

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

COMES NOW Plaintiff Gregory Wersal, and, for his Complaint against the Defendants, states the following:

Introduction

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It concerns the constitutionality of portions of Canons 5A(1)(b) and (d), and Canon 5B(2).

2. Plaintiff challenges the “endorsement clause” of Canon 5A(1)(b), which provides that a judge or judicial candidate may not “publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office.”

3. The endorsement clause of Canon 5A(1)(b), on its face and as applied to Gregory Wersal, violates the constitutionally protected rights of freedom of speech and association in that it prohibits judicial candidates from endorsing candidates of their choosing. The endorsement clause is not narrowly tailored to further a compelling government interest, but is instead overbroad, preventing judicial candidates from exercising their free speech rights.

4. Plaintiff also challenges the “solicitation clauses” of Canons 5A(1)(d) and 5B(2). Canon 5A(1)(d) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization” Canon 5D provides that “[f]or purposes of Canon 5 the term ‘political organization’ denotes an association of individuals under whose name a candidate files for partisan office.” Canon 5B(2) provides, in relevant part, that “a candidate shall not personally solicit or accept campaign contributions” The Canon goes on to provide that a “candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”

5. The solicitation clauses of both Canons 5A(1)(d) and 5B(2), on their face and as applied to Gregory Wersal, violate the constitutionally protected rights of freedom of speech

and association in that they each prohibit judicial candidates from personally soliciting campaign contributions from those who wish to support them. The solicitation clauses are not narrowly tailored to further a compelling government interest, but are instead overbroad, preventing judicial candidates from exercising their free speech rights.

Jurisdiction and Venue

6. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

7. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

8. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b).

Parties

9. Plaintiff, Gregory Wersal, is an individual and resident of Minnesota. He lives in the City of Golden Valley in Hennepin County, Minnesota.

10. The Defendants are the members of the Minnesota Board of Judicial Standards (“BJS”), sued in their official capacities: James Dehn, William J. Egan, Douglas A. Fuller, Jon M. Hopeman, Cynthia Jepman, E. Ann McKinsey, Gary Pagliaccetti, and Patrick D. Sexton. The BJS was created in 1971 by the Minnesota Legislature to assist the Minnesota Supreme Court in fulfilling its mandate under the Minnesota constitution to “provide for the retirement,

removal, or other discipline of any judge who is disabled, incompetent, or guilty of conduct prejudicial to the administration of justice.” Minn. Constitution. Art. 6, Section 9; Minn. Statutes 490A.01, 490A.02 (2006). The BJS investigates and prosecutes violations of the Code by judges and judicial candidates.

11. Also sued as Defendants are the members of the Minnesota Lawyers Professional Responsibility Board (“LPRB”), sued in their official capacities: Kent A. Gernarder, Vincent A. Thomas, Kathleen Clarke Anderson, Mark R. Anway, Robert B. Bauer, Richard A. Beens, Joseph V. Ferguson, III, Wood R. Foster, Jr., Susan C. Goldstein, Sherri D. Hawley, Lynn J. Hummel, Geri L. Krueger, Ann E. Maas, Katie McWatt, Mary L. Medved, Wallace Neal, David A. Sasseville, Cindy K. Telstad, Debbie Toberman, Dianne A. Ward, Kenneth R. White, Stuart T. Williams, and Jan M. Zender. The LPRB is responsible for investigating and prosecuting violations of the Minnesota Rules of Professional Conduct. Rule 8.2(b) of the Minnesota Rules of Professional Conduct provides that “a lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.” Canon 5G of the Minnesota Code of Judicial Conduct also provides that “an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.”

Facts

12. State court judges in Minnesota are selected through a process of judicial elections. *See* Minn. Const. art. 6 § 7. Conduct of judicial candidates during these election campaigns is governed by Canon 5 of the Minnesota Code of Judicial Conduct.

13. Plaintiff, Gregory Wersal, is an individual and resident of Minnesota. In 1996, Wersal ran for a seat on the Minnesota Supreme Court. During the campaign Wersal publically identified himself as a Republican, attended and spoke at numerous political party conventions and his campaign committee actively sought a political party endorsement. During the campaign, ethical complaints were filed against Wersal alleging that he had stated his views on disputed legal and political issues and that he had sought the endorsement of a political party, which conduct was at that time prohibited by the Minnesota Code of Judicial Conduct. Because of these complaints, Wersal withdrew from the race. The complaints were ultimately resolved in Wersal's favor.

14. In early 1997, Wersal again announced his candidacy for Justice of the Minnesota Supreme Court in the 1998 elections. As part of this campaign, Wersal began speaking at political conventions, and his campaign committee began actively seeking the endorsement of a political party.

15. On January 1, 1998, the Minnesota Supreme Court adopted new provisions of the Minnesota Code of Judicial Conduct which prohibited judicial candidates from attending or speaking at a political convention and the candidate's campaign committee from seeking a

political party endorsement. In addition the new rules prohibited judicial candidates from stating that they were current or past members of a political party. In addition the amended Canons prohibited judicial candidates from personally soliciting campaign contributions.

16. Soon thereafter, Wersal brought suit in federal court challenging the provisions under the First and Fourteenth Amendments to the United States Constitution. In 2002, the Supreme Court found that a provision in the Minnesota Code of Judicial Conduct prohibiting judicial candidates from stating their views on legal and political issues was unconstitutional under the First Amendment. *See Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

17. On October 20, 2004, the Eighth Circuit declared several provisions of Canon 5 unconstitutional. *See Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005). The Court held that the provisions in question, which prohibited judicial candidates from stating their political affiliation, from making speeches to political organizations, from receiving endorsements, and from personally soliciting campaign contributions, violated the First Amendment.

18. On March 29, 2006, the Minnesota Supreme Court amended Canon 5 by deleting the provisions struck down in *White*. The Minnesota Supreme Court left unchanged Canon 5A(1)(b), which provides that a judge or judicial candidate may not “publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office,” and Canon 5A(1)(d), which provides that a judge or candidate shall not “solicit funds for . . . a political organization” The Minnesota Supreme Court also revised Canon 5B(2), which

had been deemed unconstitutional by the Eighth Circuit in *White*. The revised Canon 5B(2) continued to ban personally solicitations by candidates generally, but added an exception allowing candidates to “ (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”

19. On January 23, 2007, Gregory Wersal sent a letter to the Minnesota Office of Lawyers Professional Responsibility. *See* Wersal Letter, attached as Exhibit 1. In this letter, Wersal noted the potential constitutional problems with Canon 5B(2), and asked for the Office’s enforcement position with regard to that provision. By letter dated February 12, 2007, Martin Cole, Director of the Minnesota Office of Lawyers Professional Responsibility, responded to Wersal’s request for information. *See* Office Letter, attached as Exhibit 2. This letter stated in relevant part that “Our enforcement position – that is, our decision whether to seek discipline for a violation of Canon 5B(2) – would depend on the circumstances. We have no present intention, however, to take a general position of not enforcing Canon 5B(2) as currently in effect.” *See* Exhibit B, at 2.

20. Plaintiff, Gregory Wersal, is a candidate for Justice of the Minnesota Supreme Court in the 2008 judicial election – thus, he is a “judicial candidate” as defined by Canon 5F of the Minnesota Code of Judicial Conduct, – and he intends to run in future judicial elections thereafter. In the 2008 election and in elections thereafter, he would both like to endorse

Minnesota state candidates for public office other than his own and to personally solicit funds but will not do so because he fears discipline under the Minnesota Canons.

21. Gregory Wersal wishes to publicly endorse and publicly oppose certain political candidates for public office who are not candidates running for his judicial office. Campaigning for an elected public office “necessarily entails . . . endorsements.” *Weaver v Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (citation omitted). Crucially, the endorsement clause “depends wholly upon the subject matter of the speech for its invocation” and, moreover, the clause prohibits speech that is of the highest order – political speech. *Republican Party of Minnesota v. White*, 416 F.3d 738, 763-64 (8th Cir. 2005). “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.” *Id.* at 764 (*quoting Buckley v. Valeo*, 424 U.S. 1, 15) (1976) (other quotation omitted) (alteration in original). As Canon 5A(1)(b) forbids Gregory Wersal from publicly endorsing or opposing candidates of any kind running for any public office other than his own, the canon violates his freedom of speech and association rights both on its face and as applied to Gregory Wersal.

22. Gregory Wersal would also like to personally solicit funds by going door-to-door, and by making personal phone calls. Gregory Wersal does not wish to solicit funds from those he knows to be attorneys, but only wishes to exercise his constitutional rights to free speech and association as a judicial candidate. However, Canons 5A(1)(d) and 5B(2), both on their faces

and as applied to Gregory Wersal as a judicial candidate, prohibit him from doing so, and as a result, his freedom of speech and association rights are violated.

23. Immediate and irreparable injury, loss, and damage has occurred and will continue to occur as a result of the endorsement clause of Canon 5A(1)(b), and the solicitation clauses of Canon 5B(2) and Canon 5A(1)(d), thus chilling Plaintiff's free speech and free association rights.

24. Plaintiff has exhausted all extra-judicial means at his disposal to resolve this matter before proceeding to file this Complaint.

25. Plaintiff has no adequate remedy at law.

COUNT I

The Endorsement Clause of Canon 5A(1)(b) On its Face Unconstitutionally Prohibits Judicial Candidates' Protected Political Speech.

26. Plaintiff realleges the preceding paragraphs.

27. The endorsement clause of Canon 5A(1)(b) provides that a judge or judicial candidate may not "publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office."

28. An overbroad law is to be facially invalidated if the burden it places on protected speech is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Jordan v. Pugh*, 425 F.3d at 820, 828 (10th Cir. 2005) (citing *Broadrick v.*

Oklahoma, 413 U.S. 601, 615 (1973)); see *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1038 (D. N.D. 2005).

29. Canons 5A(1)(b) sweeps constitutionally protected speech within its scope, and is not narrowly tailored but is an overbroad, unconstitutional regulation of protected political speech under the First and Fourteenth Amendments. *White*, 416 F.3d at 766; *Weaver*, 309 F.3d at 1322.

COUNT II

The Endorsement Clause of Canon 5A(1)(b) As Applied to Gregory Wersal Unconstitutionally Prohibits Judicial Candidates' Protected Political Speech.

30. Plaintiff realleges the preceding paragraphs.

31. The endorsement clause of Canon 5A(1)(b) provides that a judge or judicial candidate may not “publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office.”

32. Gregory Wersal would like to endorse candidates in races other than his own, both in the 2008 election and in future elections.

33. The endorsement clause forbids Gregory Wersal from making endorsements. As a consequence, this clause, as applied to Gregory Wersal, constitutes an unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

COUNT III

The Solicitation Clauses of Canon 5A(1)(d) and Canon 5B(2), Are On Their Face Unconstitutionally Overbroad, Prohibiting and Chilling Plaintiff's Freedom of Speech and Association.

34. Plaintiff realleges the preceding paragraphs.

35. The solicitation clause of Canon 5A(1)(d) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization”

36. The solicitation clause of Canon 5B(2) provides, in relevant part, that “a candidate shall not personally solicit or accept campaign contributions” The Canon goes on to provide that a “candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”

37. An overbroad law is to be facially invalidated if the burden it places on protected speech is “not only . . . real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Jordan*, 425 F.3d at 828 (citing *Broadrick*, 413 U.S. at 615); see *Bader*, 361 F. Supp. 2d at 1038.

38. Canons 5A(1)(d) and 5B(2) sweep constitutionally protected speech within their scope, and are not narrowly tailored but are overbroad, unconstitutional regulations of protected

political speech under the First and Fourteenth Amendments. *White*, 416 F.3d at 766; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

COUNT IV

The Solicitation Clauses of Canon 5A(1)(d) and Canon 5B(2) As Applied to Gregory Wersal Unconstitutionally Prohibit and Chill Plaintiff’s Freedom of Speech and Association.

39. Plaintiff realleges the preceding paragraphs.

40. The solicitation clause of Canon 5A(1)(d) provides, in relevant part, that a judge or candidate shall not “solicit funds for . . . a political organization”

41. The solicitation clause of Canon 5B(2) provides, in relevant part, that “a candidate shall not personally solicit or accept campaign contributions” The Canon goes on to provide that a “candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.”

42. Gregory Wersal would like to solicit funds by going door-to-door, making personal phone calls, and signing letters seeking contributions to his campaign throughout election cycle. He is prohibited from doing so by the solicitation clauses.

43. The solicitation clauses on their face sweep judicial candidates’ protected speech into the sphere of speech prohibited by the Minnesota Code of Judicial Conduct and, thus, are

not narrowly tailored, but constitute an unconstitutionally overbroad application of the rules governing judicial political campaign speech and association, *Weaver*, 309 F.3d at 1320, and are in direct violation of *White*, 536 U.S. at 788.

44. The solicitation clauses forbid Gregory Wersal from personally soliciting contributions as a candidate from non-attorneys by going door-to-door, or making phone calls. As a consequence, these clauses, as applied to Gregory Wersal, constitute unconstitutional regulation of protected political speech and association, in violation of the First and Fourteenth Amendments of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests this Court to:

(1) Declare Minnesota Judicial Canon 5A(1)(b) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;

(2) Declare Minnesota Judicial Canon 5A(1)(b) unconstitutional as applied to Gregory Wersal because it prohibits judicial candidates from making endorsements in violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;

(3) Declare Minnesota Judicial Canon 5A(1)(d) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;

(4) Declare Minnesota Judicial Canon 5A(1)(d) unconstitutional as applied to Gregory Wersal because it prohibits judicial candidates from soliciting contributions in

violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;

(5) Declare Minnesota Judicial Canon 5B(2) unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution;

(6) Declare Minnesota Judicial Canon 5B(2) unconstitutional as applied to Gregory Wersal because it prohibits judicial candidates from soliciting contributions in violation of free speech and freedom of association rights under the First and Fourteenth Amendments of the U.S. Constitution;

(7) Prohibit, by way of permanent injunction, the Defendants, their agents, and successors from enforcing Minnesota Judicial Canons 5A(1)(b), 5A(1)(d), and 5B(2), and from filing or considering complaints based on these Canons against judicial candidates who make endorsements or personally solicit campaign contributions in a non-official capacity and all others similarly situated;

(8) Grant Plaintiff's costs and attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

(9) Grant Plaintiff such other relief as may be just and equitable.

Dated: March 3, 2008

Respectfully submitted,

James Bopp, Jr.*, Ind. #2838-84
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Local Counsel for Plaintiff

VERIFICATION

I SWEAR (OR AFFIRM) UNDER THE PENALTIES FOR PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE FOREGOING STATEMENTS MADE IN THE FOREGOING VERIFIED COMPLAINT CONCERNING ME AND MY ORGANIZATION ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND UNDERSTANDING.

Dated: February 29, 2008

Gregory Wersal